FMCS Case No. ----------

In the Matter of Arbitration between: **Grievant: CS**

Union

and **Hearing: August 6, 2020**
Brief exchange: September 12, 2020
Company **Award date: September 14, 2020**

Award on Arbitrability

I. Background

The Company manufactures beverage cans. It operates many plants across North America, including the plant in Megopolis, Ohio where this Grievance arose. The Company and the Union are parties to a Master Collective Bargaining Agreement in effect from February 25, 2017 through February 24, 2022. Hourly employees at the Megopolis facility are members of Union No. ____, and are serviced by Union Staff Representative KF. KF's counterpart at the Company is David DK, Director of Human Resources. All facts below are agreed or are supported by the testimony of both KF and DK, unless otherwise noted.

In August 2019, the Union filed Grievance _____ to contest the discharge of Grievant CS at the Megopolis facility. The Grievance advanced to Step 4 (arbitration), the parties selected me as Arbitrator, and a hearing date was set for March 5, 2020.

On February 20, 2020, DK and KF spoke via telephone and discussed several active grievances, including #_____. The next day, DK called KF and offered to settle the Grievance for $2,500 and no reinstatement. KF called DK back on February 27, stated he was "crunching some numbers", and offered to settle for $10,000. DK asked to confirm whether that meant $10,000 with no reinstatement, and KF agreed. Several hours later that same day, DK called KF and increased his offer to settle to $6,000 with no reinstatement. KF said he would touch base with his side and respond the next day.

On the morning of February 28, KF called DK and counteroffered to settle for $7,500 and no reinstatement. A few minutes later, DK called KF back. DK told him he was calling to double-check and confirm that, if he got authority for the $7,500 and accepted the Union's offer, "do you need to get authority from anyone else or do we have a deal?" KF confirmed that they would have a deal, adding: "Yes. This is between you and me." KF testified that by "[t]his is between you and me", he meant that the local was not a part of settlement negotiations, and that he had authority to settle.

Several hours later, DK called KF and told him the Company was accepting the Union's offer of $7,500 and no reinstatement. DK said he would follow up with an email confirming their agreement, and he would send a formal settlement document shortly. KF agreed. DK testified that at this point, KF said that he [KF] "needed to check with his side of the table."

KF consistently and repeatedly testified that throughout these negotiations, it was always his intention to obtain Grievant CS's approval before finalizing any deal. He testified that it was his standard practice to first negotiate the settlement terms with the Company's representative, and then to bring the terms to the grievant for his or her review. He explained that he views this practice as analogous to the Union's practice of bringing a tentative agreement negotiated by the Union's negotiating committee back to the entire bargaining unit for a contract ratification vote. He testified variously that he "intended", "thought", "considered", and "felt" that there was no deal until CS approved it. However, he admitted that he never communicated any of this to DK. He also testified that at Step 3 of a grievance, he has unilateral authority to decide whether to take the grievance to arbitration, to settle, or to withdraw the grievance, and that he has authority to settle a grievance even over a grievant's objection.

At about 3:00 that afternoon (still February 28), DK wrote KF an email confirming settlement for $7500 and no reinstatement. Ten minutes later, DK emailed the Arbitrator to advise of settlement and cancel the hearing. Roughly ten minutes after that DK emailed KF a settlement document, plugging the dollar amounts and employee information into a template of what DK described as standard settlement language. This settlement document contained a signature line for CS. It also contained what DK characterized at the hearing as "standard boilerplate" language such as that neither party admits wrongdoing and that CS could not bring suit or another charge based on the same facts that the parties were settling. These terms had not been previously discussed by DK and KF in the context of this Grievance, but KF acknowledged at the hearing that such terms are standard in settlement agreements, and that at no point in discussions of this Grievance has the Union ever objected to these terms.

On the afternoon of March 2, KF called DK and told him CS would not sign the settlement agreement. The parties stipulated at the arbitration hearing that "CS was not in agreement with the proposed settlement providing him with a payment of $7,500 and no reinstatement to employment because CS disapproved of the payment amount which he believe[d] to be insufficient." DK immediately offered to redraft the agreement to omit CS's signature line, but KF refused. There was no testimony that CS objected to any of the other terms in the settlement agreement DK had sent to KF.

On March 4, KF emailed the Arbitrator to say the parties had not settled and to request the arbitration hearing be rescheduled. The next day, DK responded by accusing the Union of backing out of the settlement agreement and requesting an arbitration award confirming the terms of settlement. After many emails back-and-forth, the parties emailed the Arbitrator on June 23 to inform me they had agreed:

that you, as our arbitrator, have the authority to determine whether the parties entered into a binding settlement in February 2020 (and therefore whether the case on its merits is arbitrable). We also agreed that the next step would be to have a preliminary hearing before you to present evidence and argument on the arbitrability topic alone….

The parties subsequently agreed that the hearing on arbitrability would be conducted on Zoom. That hearing was held on August 6, and briefs were submitted on September 11.

II. Issue

Whether the parties entered into an enforceable oral settlement agreement on Grievance _____?

III. Relevant CBA Provisions

ARTICLE 3
Union Recognition

Section 1. The Company recognizes the Union as the sole and exclusive collective bargaining agency for all employees working on jobs in the bargaining units [covered by the Agreement].

ARTICLE 15
Adjustment of Grievances

Section 1. Every dispute of any kind or character which may arise between the Company and the Union or the employees shall be deemed to be a grievance and shall be handled in accordance with the procedures set forth in this agreement.

Section 6. Should grievances arise between the Company and the Union or the employees, they shall be processed in the following manner:

> Step 1. The grievance shall be presented orally by the employee or employees involved, together with the Steward or, in his absence, a Grievance Committee member, to the Departmental Supervisor or Plant Manager (or his designee), who shall provide the employee an opportunity to present his grievance....
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> Step 2. The Step 2 meeting will be held between the members of the Grievance Committee and the Plant Manager or his designee and the Plant Human Resources Manager….
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> Step 3. The Step 3 meeting shall be held between the members of the Grievance Committee, Representatives of the International Union or a designee, and the Human

Resources Manager, Labor and Compliance or his designee. Management's response shall be sent, in writing, to the International Union Representative and shall be postmarked or emailed not later than midnight of the eighth (8th) work day following such meeting, with a copy to the Local Union Grievance Committee. If the answer is not satisfactory, arbitration may be requested by the Union through the International Union Representative. Such request shall be made by mail or email and shall be postmarked not later than midnight of the eighth (8th) work day following the date of receipt of the answer. Such request will be sent to the Federal Mediation and Conciliation Service with a copy to the Human Resources Manager, Labor and Compliance.

Step 4. The arbitrator shall not have authority to alter, modify, add to or subtract from any of the terms or provisions of this Agreement.

IV. Analysis

A. The Principle of Exclusive Representation

the Union argues that throughout the process of negotiating a resolution to Grievance _____, both the Union and The Company intended for Grievant CS to be a necessary party to any final agreement, and that CS's rejection of the settlement dollar amount precluded the formation of a binding settlement agreement. I find this argument incorrect as a matter of law and inconsistent with the parties' CBA.

A founding principle of American labor law is the principle of exclusive representation. Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159, provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect….

"Exclusive representation" means that the union – and only the union -- has the right to bargain for, and control the grievances of, members of a bargaining unit. The rationale behind exclusive representation is that workers need to speak in a unified voice – through their Union – to counterbalance the otherwise overwhelming bargaining power of employers. Exclusive representation (1) strengthens union bargaining power vis-à-vis an employer, (2) discourages strategic behavior by subsets of employees at the expense of overall cooperation, and (3)

forbids an employer from using a divide-and-conquer strategy by dealing directly with bargaining unit members.

The second part of Section 9(a) of the NLRA provides that "individual . . . employees have the right . . . to present grievances to their employer without the intervention of the bargaining representative as long as . . . not inconsistent with the terms of a collective-bargaining agreement then in effect . . .". However, if a collective bargaining agreement specifies that the union may institute a grievance on behalf of the employees, an individual employee is prohibited from addressing that grievance himself, and the employee is bound by the result reached by the union. Vaca v. Sipes, 386 U.S. 171 (1967) (unions – not individual grievants – have unilateral control over the processing of grievances); Julius G. Getman, Bertrand B. Pogrebin, & David L. Gregory, Labor Management Relations and the Law, 119 (2d ed. 1999).

Thus, as a matter of law, Grievant CS was not a party to settlement negotiations over Grievance _____ and had no right to veto any agreement reached between The Company and the Union. Had the Company treated CS as a party and attempted to negotiate with him directly, it would have committed an unfair labor practice by undermining the Union's right of exclusive representation.

Even putting aside the principal of exclusive representation, I find that the parties' CBA unequivocally provides that the Union is the exclusive representative of the bargaining unit for purposes of grievance processing and settlement.

Grievance procedures are created by contract. An individual employee's right to pursue her or his grievances therefore are limited by the terms of that contract. The typical collective bargaining agreement – and the CBA governing this Grievance – provides that the power to press grievances rests solely with the Union.

Article 15 of the parties' CBA contains the parties' grievance procedures. Article 15 Section 1 provides that "**[e]very** dispute of any kind or character which may arise between the Company and the Union **or the employees** shall be deemed to be a grievance and shall be handled in accordance with the procedures set forth in this agreement." (Emphasis added.) Circling back to the NLRA Section 9(a), the CBA thus provides that *all* labor disputes between the Union and The Company will be resolved through Article 15, and that neither individual employees nor The Company may attempt to undercut the Union's role by negotiating grievances independent of the Union.

Consistent with this, though Step 1 of the grievance procedure calls for an aggrieved employee to present her or his grievance orally to the Departmental Supervisor or Plant Manager, Steps 2-4 all demonstrate exclusive the Union control over bargaining unit members' grievances. Individual grievants are not even mentioned in Steps 2-4. Instead, all references are to the Union (or its representatives), the Company (or its representatives), or the "parties" – i.e., the Company and Union which are the sole parties to the CBA.

The Union argues that DK's draft settlement agreement containing a signature line for CS indicates that the Company considered CS a necessary party to the settlement agreement. I disagree. If that had been the purpose or effect it almost certainly would have been an unfair labor practice because it would have undercut the Union's exclusive representation of CS and would have constituted unlawful direct bargaining. DK's immediate offer to redraft the settlement agreement to remove CS's signature line indicates DK did not consider CS a necessary party. And the most obvious explanation for including a grievant's signature on a grievance settlement agreement is not that the employer and the union believe the grievant is a necessary party, but to ensure (1) that the grievant understands the terms of the settlement agreement – e.g., that s/he can't later sue on the same dispute, and (2) to protect both the company and the union from a potential duty-of-fair-representation suit by demonstrating the grievant agreed with the terms of the settlement. This was precisely the explanation proffered by DK, and is consistent with KF's repeated testimony that although he had full authority to settle Step-3 grievances, he considered it best practice to do so only after obtaining a grievant's consent.

Finally, the Union's argument that CS was a necessary party to the settlement agreement is undercut by KF's consistent and repeated testimony that although it was his practice to get a grievant's consent before finalizing a grievance settlement, at Step 3 of a grievance he has unilateral authority to decide whether to take the grievance to arbitration, to settle, or to withdraw the grievance, and that he has authority to settle a grievance even over a grievant's objection.

B. Contract Formation

The Company and the Union agree on the broad contours of what it takes to create an enforceable agreement, but disagree over whether an agreement was reached in this case. Under general principles of contract law – and under Ohio contract law, which the parties both appear to agree applies here – an enforceable contract is formed if there is (1) an offer, (2) acceptance, (3) consideration, and (4) agreement on essential terms.

The Company argues all four elements are met here. Company Brief at 14. According to the Company, the "offer" element is met by KF's counteroffer to settle for $7,500 with no reinstatement. The "acceptance" element is met by DK informing KF on the telephone that the the Company would accept those terms. The "consideration" element is met by the $7,500 to be paid in exchange for the Union dismissing the grievance. The "essential terms" element is met because the parties reached agreement on the amount the Company would pay CS and on CS's not being reinstated.

1. Offer

The Union argues the "offer" element is not met for three reasons. All three reasons assume that KF's counteroffer of $7500 and no reinstatement, in return for the Union dropping the Grievance, was contingent on CS's agreement to the $7500 figure.

The Union's first argument that it gave only a contingent offer is that the parties intended for CS to be a necessary party to the grievance settlement agreement, and that CS's rejection of the settlement dollar amount nullified the offer. However, as described above, this argument is incorrect as a matter of law and is inconsistent with the parties' CBA.

Second, the Union argues that KF intended for the final agreement to be contingent on CS's agreement to the $7500 figure, and that because one party never intended to form an enforceable contract, none was formed. This would have been a winning argument had KF communicated this to DK before DK accepted KF's counteroffer of $7,500 with no reinstatement. However, although KF testified variously that he "intended", "thought", "considered", and "felt" that there was no deal until CS approved it, he admitted that he never communicated any of this to DK.

Instead, throughout the negotiations between DK and KF, DK had every reason to believe that a final agreement was *not* conditioned on CS's acceptance. As described above, both the background labor law and Article 15 of the CBA give the Union the exclusive power to settle grievances on behalf of bargaining unit members. KF acknowledged in his testimony that he has unilateral authority to settle Step-3 grievances, and never told DK otherwise. When KF called DK and counteroffered to settle for $7,500 and no reinstatement, KF never conditioned his counteroffer on CS's acceptance of the $7500 figure. When DK called KF to confirm that had authority to settle for $7,500, KF confirmed they would have a deal and again failed to condition his counteroffer on CS's acceptance of the $7500 figure. Acceptance turns on objective manifestations of assent, not on the subjective thoughts inside the mind of one party but never communicated to the other.

The Union's third argument for finding no acceptance is that KF said he needed to "check[…] with his side of the table." Again, this would have been a winning argument had KF communicated this to DK *before* DK accepted KF's counteroffer of $7500 and no reinstatement. However, KF did not make this statement to DK when KF made his counteroffer, or when DK asked if KF had authority to settle for $7500. Instead, KF made this statement *after* DK called and told KF that the Company was accepting the counteroffer – i.e., after the oral contract was formed. Once an enforceable contract is formed, it's too late to add conditions absent agreement by both parties.

2. Essential Terms

The Union makes two arguments that KF and DK never agreed on the essential terms of the grievance settlement agreement. First, the Union points out that the draft written agreement proffered by DK contained terms the parties had not previously discussed, such as that neither party admits wrongdoing and that CS could not bring suit or another charge based on the same facts that the parties were settling. The Union argues these are essential terms that the parties never agreed upon.

However, there is no evidence in the record either that these terms were essential or that they were not agreed upon. DK testified and KF acknowledged at the hearing that these terms are standard in settlement agreements. Nothing in the record indicates that at any point in discussions of this Grievance has the Union ever objected to any of these terms. The only term objected to was the settlement amount. This was objected to by CS, who was not a proper party to settlement negotiations, and only *after* DK had accepted KF's settlement offer.

The Union's second argument on essential terms is that if parties intend to reduce an oral agreement to writing, the oral agreement is necessarily tentative and therefore unenforceable. The Union cites two labor arbitration awards for this proposition: SuperValu, Ohio Valley Division, 2000 BNA LA Supp. 108294 (2000) and Williams Furnace Co., 107 BNA LA 215. The Company counters with several Ohio contract cases holding that an underlying oral contract remains enforceable even if a later writing is created to memorialize the oral agreement.

Relatedly, both parties seem to agree that the two cases most closely on point are Williams Furnace Co., 107 BNA LA 215, and Health Care and Retirement Corp., 99 LA 916, though the parties disagree on which of these cases should control. The Union's preferred case is *Williams Furnace*, where an arbitrator found that although the parties had reached a verbal agreement over certain terms, the written agreement drafted by the company included important terms that were never discussed during the parties' settlement discussions, thus making the oral "agreement" merely tentative and therefore unenforceable. The Company's preferred case is *Health Care*, where an arbitrator found that an oral settlement agreement reached between the company and the union was enforceable, rendering the grievance not arbitrable, even though the individual grievant never signed off on its terms.

Neither case is perfectly on point. In *Williams Furnace*, the arbitrator found that even though the parties had agreed on a payment amount, there were still "radical differences in each party's position" when the parties attempted to reduce their oral "agreement" to writing. Here, the only term the Union has objected to is the payment amount, and the Union did not object even to this until after the Company had accepted the Union's counterproposal that included that very term. Likewise, the *Health Care* case did not involve an oral grievance settlement that the parties all along intended to reduce to writing.

I believe the best way to reconcile these cases and awards is by finding that an oral settlement agreement the parties later intend to reduce to writing is enforceable only if the parties have agreed to all essential terms. Here, as described above, I find that the Company and the Union orally agreed on all essential terms to settle Grievance _____. The only terms they did not discuss were that neither party admitted wrongdoing and that CS could not bring suit or another charge based on the same facts that the parties were settling. These terms were neither essential nor objected to. The only essential term that was objected to was the payment amount, and this was objected to by Grievant (who was not a proper party to the agreement) and the Union only *after* both parties had agreed to all essential terms including the payment amount. For these reasons, I find that that the parties entered into an enforceable oral settlement agreement on Grievance _____ when, on February 28, 2020, DK accepted KF's counteroffer for the Company to pay Grievant $7,500 with no reinstatement in return for the Union's agreement to drop the Grievance.

V. Disposition

For the reasons described above, I find that the parties have agreed to settle Grievance _____ on the following terms: (1) The Company will pay CS $7,500, (2) CS will not be reinstated, and (3) the Union will withdraw Grievance _____. This settlement moots the Grievance, making it non-arbitrable. The appropriate remedy is for both parties to comply with the settlement agreement. I retain jurisdiction for the limited purpose of resolving any disputes the parties may have about applying or interpreting this Award.

_____ September 14, 2020

Richard A. Bales, Arbitrator Date