

#1462

OPINION AND AWARD

**IN THE MATTER OF THE ARBITRATION BETWEEN
Ohio Department of Health Services**

**-AND-
Service Employees International Union District 1199**

APPEARANCES

For the Department of Health Services

Michael Duco, Manager, Dispute Resolution, Office of Collective Bargaining

For S.E.I.U District 1199

Harry Proctor, International Representative, S.E.I.U District 1199

Case-Specific Data

Hearing Held

September 20, 2000

Grievance No.

14-00-981030-247-02-11

Case Decided

November 10, 2000

Arbitrator: Robert Brookins, J.D., Ph.D.

Subject: Job Classification/Procedural and Substantive Arbitrability

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I. Preliminary Statement

The Ohio Department of Health Services (the Employer) and the Service Employees International Union, District 1199 (the Union)¹ selected the Undersigned to hear the dispute described below. Accordingly, on September 20, 2000, a hearing was held before the Undersigned at SEIU District 1199's home office, in Columbus, Ohio. All parties relevant to the resolution of this dispute were present at that hearing, which commenced at approximately 9:00 a.m. Because there was an issue of substantive arbitrability, the Undersigned obtained the Parties' specific consent to address that issue. During the hearing both parties had a full and fair opportunity to present any admissible evidence and arguments supporting their positions. Specifically, they were permitted to make opening statements and to introduce admissible documentary and testimonial evidence, all of which was available for relevant objections and for cross-examination. Finally, the parties had a full opportunity either to offer closing arguments or to submit post-hearing briefs and opted for the former.

II. The Facts

The relevant facts in this matter are not in dispute. On October 23, 1997, Arbitrator Keenan awarded Mr. Seth Young (the Grievant), a Health Service Policy Specialist, a promotion from a pay range 12, step 7 to a pay range 14, step 7. Because the Grievant had been promoted, he had to complete a 120-day probationary period. On June 26, 1997, during the Grievant's probationary period, the Employer demoted him to a pay range 12, step 4. The Union filed Grievance No. 14-00-97067-02-11, challenging the decision to drop the Grievant to a step 4 instead of to a step 7 where he was before his October 23 promotion. On April 29, 1998, the Employer and the Union (the Parties) were arbitrating Grievance No. 14-00-97067-02-11 before Arbitrator X.² During that arbitral hearing, the parties settled Grievance No. 14-00-97067-02-11 through a Settlement Agreement.³ On June 19, the Grievant received

¹ Collectively referenced as the Parties.

² The record does not clearly state whether Arbitrator Keenan also heard Grievance No. 14-00-981030-247-02-11.

³ Joint Exhibit No. 2.

a paycheck for less than the anticipated amount and discovered that he was still classified in pay range 12, step 4 rather than step 7.

The Union sought unsuccessfully to use informal or noncontractual channels in its initial efforts to resolve Grievance No. 14-00-981030-247-02-11. Specifically, the Union first sought the assistance of the Ohio Office of Collective Bargaining (OCB) in negotiating a resolution to the agreement. Also, the Union sought OCB's opinion as to whether Arbitrator Keenan had authority to resolve the dispute by interpreting the Settlement Agreement. Speaking for OCB, Mr. Pat Mogan concluded that Arbitrator Keenan lacked such authority or jurisdiction and advised the Union to consult the arbitrator. On or about October 21, 1998, Arbitrator Keenan concluded that he lacked authority to interpret the Settlement Agreement and advised the Union to file a formal grievance under the Collective-Bargaining Agreement.

The Union agreed and filed a formal grievance (No. 14-00-981030-247-02-11), on October 30, 1998, alleging that the Employer violated the Settlement Agreement.

Finally, the parties selected the undersigned to decide whether the Employer had indeed violated the Settlement Agreement. Consequently, the Union filed Grievance No. 14-00-981030-247-02-11, claiming that the Employer had violated the Settlement Agreement.

III. The Issues

1. Whether Grievance No. 14-00-981030-247-02-11 was untimely filed and is thus nonarbitrable.
2. Whether the parties agreed to use the grievance machinery under their Collective-Bargaining Agreement to arbitrate alleged violation of the Settlement Agreement.
3. Whether the Arbitrator has authority under the Collective-Bargaining Agreement to interpret the Settlement Agreement.
4. Whether the Employer violated the Settlement Agreement.

IV. Contractual and Other Relevant Provisions

Article 7.02A

"Grievance as used in this Agreement refers to an alleged violation, misinterpretation, or misrepresentation of a *specific article(s) or section(s) of the Agreement*."⁴

Article 7.07E-1

"Only disputes involving the interpretation, application or alleged violation of a *provision of this agreement* shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from, or

⁴ (Emphasis added).

modify any of the terms of this agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the express language of this agreement.⁵

Article 7.06, Step 1—Immediate Supervisor or Agency Designee

In the event the complaint is not resolved at the Preliminary Step of this procedure, or if it is the employee's decision not to discuss the complaint at the Preliminary Step, the grievance shall be reduced to writing and presented to the immediate supervisor or agency designee within *fifteen (15) days* of the date on which the grievant *knew or reasonably should have had knowledge* of the event. . . . Grievances submitted beyond the *fifteen (15) day* limit will not be honored. . . .⁶

Article 7.10

"By mutual consent the Employer and the Union may alter any of the procedures set forth in this Article. The grievant or the Union representative and representatives of the Employer may mutually agree at any point in the procedure to a time extension."

Settlement Agreement

2. The union and the grievant agree that this is a full and final settlement of the above-referenced grievance; and that it *shall not be pursued to arbitration; and that there shall be no further claim arising from this grievance under the collective bargaining agreement.*

3. The parties to this Agreement agree that it shall not be precedent setting and that it shall not be used in *any future arbitration except to enforce the terms of this Agreement.*

V. Summaries of the Parties' Arguments

A. Union's Arguments

Procedural Arguments

Procedural Arbitrability

Grievance No. 14-00-981030-247-02-11 is arbitrable because it alleges a continuing violation. Even though Grievance No. 14-00-981030-247-02-11 is tardy under Article 7.06, Step 1, it is nonetheless arbitrable because despite due diligence the Union could not have filed Grievance No. 14-00-981030-247-02-11 within the 15-day limitation of Article 7.06, Step 1. The Union sought to resolve the dispute under Article 7 of the Collective-Bargaining Agreement.

Substantive Arbitrability

Article 43 of the Collective-Bargaining Agreement permits the Union to use contractual machinery to grieve violations of the Settlement Agreement

Arguments on the Merits

The Settlement Agreement required the Employer place the Grievant back in the pay range and step level that he occupied before he was promoted pursuant to Arbitrator Keenan's decision.

A. Employer's Arguments

Procedural Arguments

Procedural Arbitrability

Because Grievance No. 14-00-981030-247-02-11 was untimely filed under Article 7.06, Step 1, it is nonarbitrable under the Collective-Bargaining Agreement.

Grievance No. 14-00-981030-247-02-11 lacks substantive arbitrability under the Collective-Bargaining Agreement because Article 7.02A does not contemplate grievances that

⁵ (Emphasis added).

⁶ (Emphasis added).

allege violations of Settlement Agreements.

Arguments on the Merits

Because the Grievant was promoted pursuant to Arbitrator Keenan's decision, the Union's contentions are largely irrelevant.

The Settlement Agreement contains no language regarding the pay range and step to which the Grievant may be placed.

II. Discussion

A. Procedural Arbitrability

At the outset of the arbitral hearing, the Employer raised the procedural objections of procedural and substantive arbitrability, which are discussed in turn. Regarding procedural arbitrability, the Employer alleges that Grievance No. 14-00-981030-247-02-11 was untimely filed under article 7.06, Step 1 of the Collective-Bargaining Agreement. Furthermore, the Employer contends that the Grievant knew or should have known about the alleged violation of the Settlement Agreement when he received his first paycheck, on June 19, 1998. According to the Employer, the Grievant, therefore, should have filed Grievance No. 14-00-981030-247-02-11 no later than July 4, 1998, fifteen days later. In further support of its argument, the Employer claims that from the outset of the dispute, it has denied that it violated the Settlement Agreement.

Having raised this procedural issue, the Employer has the burden of persuasion to establish that Grievance No. 14-00-981030-247-02-11 was in fact tardy as alleged. If the Employer establishes this allegation, the burden of persuasion then shifts to the Union to justify the tardiness of Grievance No. 14-00-981030-247-02-11.

Article 7.06, Step 1 provides in pertinent part: "[T]he grievance shall be reduced to writing and presented to the immediate supervisor or agency designee within *fifteen (15) days* of the date on which the grievant *knew or reasonably should have had knowledge* of the event. . . . Grievances submitted beyond the *fifteen (15) day* limit will not be honored. . . .⁷

The Employer satisfies its burden by showing that Grievance No. 14-00-981030-247-02-11 was

⁷ (Emphasis added).

filed approximately 118 days after the 15-day time limit had tolled under Article 7.06, Step 1. Specifically, the Grievant first learned of his placement in pay range 12, step 4 on June 19, when he received his first paycheck under the Settlement Agreement. Yet, Grievance No. 14-00-981030-247-02-11 was not filed until October 30, 1998. Thus, the burden shifts to the Union to justify the tardiness of Grievance No. 14-00-981030-247-02-11 or to show that it was not in fact tardy.

1. Due Diligence

In response, the Union first asserts the defense of due diligence, arguing in effect that even if Grievance No. 14-00-981030-247-02-11 was untimely, that tardiness is justified under the doctrine of due-diligence. In this respect, the Union points out that the Settlement Agreement presented special problems that required the Grievant to resort to informal avenues to resolve Grievance No. 14-00-981030-247-02-11. Thus, the Union consulted a financial officer, the OCB, and Arbitrator X. In other words, the Union implies that it acted in good faith and with due diligence in attempting to resolve Grievance No. 14-00-981030-247-02-11 and that those efforts caused it to file that grievance beyond the limits of Article 7.06, Step 1. In the Union's view, Grievance No. 14-00-981030-247-02-11 simply could not have been filed sooner, given the Union's good-faith efforts to resolve it.

The Employer asserts that from the time it was initially notified of the alleged violation of the Settlement Agreement, it denied that allegation. In other words, according to the Employer, the Union knew or should have known of the violation when the Grievant received his paycheck, on June 19, 1998, and, therefore, could (and should) have grieved that alleged violation within the 15-day compass of Article 7.06, Step 1. In addition to its continuing-violation argument, the Union offers a due-diligence response to this argument.

The Arbitrator holds that the Union exercised due diligence, under the circumstances of this case.

⁸ Observe, however, that, relative to the "continuing violation" exception, the "due diligence" exception is less effective against explicit contractual provisions of limitation.

The due-diligence doctrine is a generally recognized exception to contractual provisions of limitations.⁸ To establish a claim of due diligence, the Union must first demonstrate that it exercised due diligence by acting in good faith and without undue delay. Then it must show that despite due diligence, circumstances beyond its control significantly hampered its ability to comply with the 15-day limit of Article 7.06, Step 1.

The Union introduces credible, uncontroverted testimony that the nature of the dispute in this case reasonably obliged the Union to pursue unusual (extra-contractual) avenues during its initial attempts to resolve Grievance No. 14-00-981030-247-02-11. What is not demonstrated, however, are even the approximate time limits required for these extra steps. For example, the Union points out that having three parties involved in attempts to resolve this dispute required extra time, as did the Union's efforts to obtain OCB's opinion about the merits of the dispute and the authority of the arbitrator to resolve the dispute. In addition, the Union spent some time apprising the arbitrator of the nature of the dispute and obtaining his opinion. However, a thorough assessment of the "due diligence" argument requires some useful notions as to the amount of time consumed in pursuing these steps. This is especially true where, as here, the grievance was filed approximately 133 days after the Grievant received his first paycheck under the Settlement Agreement.

2. Continuing Violation

The Union argues in the alternative that Grievance No. 14-00-981030-247-02-11 was not untimely in the first instance because the Employer committed a continuing violation by repeatedly paying the grievant at the step 4 (instead of the step 7) level. Specifically, the Union argues that the June 19 discrepancy and subsequent discrepancies in the Grievant's pay constitute a continuing violation of the Settlement Agreement. Therefore, according to the Union, Grievance No. 14-00-981030-247-02-11 is impervious to the 15-day stricture of Article 7.06, Step 1. The Employer offered no specific response

⁸ Observe, however, that, relative to the "continuing violation" exception, the "due diligence" exception is less effective against explicit contractual provisions of limitation.

to this defense.

Generally, the efficacy of time-based challenges to grievances turn either on explicit contractual provision(s) of limitation or on implicit (or reasonable) contractual provisions of limitations. Still there are exceptions common to both. For example, arbitral precedent firmly embraces the doctrine of continuing-violation as an exception to either explicit or implicit contractual time bars. In the arbitral domain, the doctrine of continuing violation essentially extends either explicit or implicit contractual time horizons for filing grievances arising from an employer's repetitive conduct that violates the same provision(s) of a Collective-Bargaining Agreement.

Moreover, repetitive contractual violations may surface as either affirmative or constructive conduct.⁹ A classic example of an affirmative, repetitive violation occurs where an employer repeatedly pays an employee less than his proper salary. A constructive, repetitive violation occurs where an employer leaves an otherwise proper disciplinary action in an employee's personnel file beyond the contractually agreed-upon period. In either case, each repetitive violation is a new violation.

Without additional discussion, the foregoing description signals the persuasiveness of the Union's continuing-violation argument, despite the explicit, 15-day limitation in Article 7.02A, Step 1 of the Collective-Bargaining Agreement.¹⁰ Indeed, the allegation, in Grievance No. 14-00-981030-247-02-11, is a virtual paradigm of a continuing violation. And a new violation arises each time the Employer allegedly underpays the Grievant in light of the Settlement Agreement. More important, perhaps, each new violation creates a new 15-day "window," under Article 7.06, Step 1, in which the Union may grieve that violation.¹¹ Observe, however, that this new "window" closes 16 days

⁹ The most important element in recognizing a new or repetitive violation is refusing to view failures to grieve prior contractual violations as fatal to claims subsequent violations of the same type.

¹⁰ See, e.g., Elkouri & Elkouri, *How Arbitration Works* 281 (5th Ed. 1997) (observing, "[I]t is generally accepted that a continuing violation of a collective bargaining agreement gives rise to a 'continuing grievance' in the sense that the offending act is repeated from day to day, with each day comprising a new occurrence." (Internal quotation marks omitted)).

¹¹ Observe, however, that the Arbitrator so holds without deciding whether the Employer has in fact violated the Settlement Agreement. Such a determination is obviously premature at this procedural stage.

after the Grievant receives his last objectionable paycheck, and another new "window" opens after the next new violation.

Therefore, the issue becomes whether the Union took advantage of the latest "window" to open. In other words, given the continuing nature of the Employer's alleged violation, the critical issue regarding the timeliness of Grievance No. 14-00-981030-247-02-11 is not whether it was filed 15 days after the Grievant received his first pay check, on June 19, 1998, but whether that grievance was filed within 15 days after the Grievant received an allegedly partial paycheck.

The record reveals that Grievance No. 14-00-981030-247-02-11 was timely filed under this standard. On October 23, 1998, a directly deposited paycheck for \$1,677.64 became available to the Grievant.¹² Thus, the Grievant had 15 days within which to grieve that paycheck, and Grievance No. 14-00-981030-247-02-11, which was filed on October 30, 1998, falls squarely within that "window," thereby satisfying Article 7.06, Step 1. Consequently, Grievance No. 14-00-981030-247-02-11 is not untimely.

B. Substantive Arbitrability

The Employer also raises an issue of substantive arbitrability and, thus, assumes the burden persuasion on that issue. Specifically, the Employer argues that the Undersigned lacks jurisdiction to hear Grievance No. 14-00-981030-247-02-11 because it arises from an alleged violation of the Settlement Agreement, which falls without the scope of a "grievance" as defined by Article 7.02A of the Collective-Bargaining Agreement. In other words, the Employer insists that violations of the Settlement Agreement do not violate any provision of the Collective-Bargaining Agreement, and the parties agreed to arbitrate only those grievances based on alleged violations of provisions specifically set forth in the Collective-Bargaining Agreement.

The issue of substantive arbitrability, in this dispute, comprises two sub-issues. First, whether

¹² Union Exhibit No. 1 at 3.

the Undersigned as an arbitrator has authority or jurisdiction even to address the substantive issue in the first instance. Second, assuming that jurisdiction exists, whether the Collective-Bargaining Agreement manifests an intent to arbitrate alleged violations of the Settlement Agreement. These issues are discussed in turn below.

1. Scope of the Undersigned's Jurisdiction

As early as 1960, the United Supreme Court declared that: "[T]he threshold question, *the meaning of the arbitration clause itself, is for the judge unless the parties clearly state to the contrary.*"¹³ This pronouncement is the touchstone for distinguishing arbitral from judicial jurisdiction regarding procedural issues in grievance arbitration. Absent specific and clear consent from the parties, grievance arbitrators must steer clear of issues of substantive arbitrability. Given the foregoing rule, the Undersigned obtained specific consent from the Employer, the Union, and OCB to address the issue of substantive arbitrability in this case. With that consent in hand, the Undersigned now determines whether the parties agreed to arbitrate Grievance No. 14-00-981030-247-02-11.

2. Scope of the Parties' Arbitration Clause

The key to determining the substantive arbitrability of Grievance No. 14-00-981030-247-02-11 is to assess the scope of the parties' grievance and arbitration clauses. The first step in that task is simply reading the language. If that reading reveals that on their faces the clauses either do or do not contemplate grievances that allege violations of contract-based settlement agreements, then the interpretative inquiry stops there. If, on the other hand, a simple reading reveals facial ambiguity as to whether such grievances are contemplated, then further interpretative inquiry is necessary, bearing in mind the Court's admonition that doubts are resolved in favor of coverage. Having encountered facial ambiguity, one then looks elsewhere within the Collective-Bargaining Agreement for the parties' intent. Finally, if that search is unavailing, then resort to parol evidence is indicated.

¹³ Steelworkers v. Enterprise Wheel & Car Corp., 80 S. Ct.1358 (1960) (Brennan, J., joined by Harlan, J., concurring).

Article 7.02A of the Collective-Bargaining Agreement defines "grievance" and, thereby fixes the scope of the arbitration clause—Article 7.07E-1. Article 7.02A provides: "Grievance as used in this Agreement refers to an alleged violation, misinterpretation, or misrepresentation of a *specific article(s) or section(s) of the Agreement*." Then Article 7.07E-1 states:

Only disputes involving the interpretation, application or alleged violation of a *provision of this agreement* shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the express language of this agreement.¹⁴

Although Article 7.07E-1 does not explicitly limit its coverage to "specific" contractual provisions, reason suggests that grievances must first survive the "screening" of Article 7.02A before qualifying under Article 7.07E-1. In short, qualification under Article 7.02A is a precondition for coverage under Article 7.07E-1. Consequently, when read together, Articles 7.02A and 7.07E-1 establish an intent to arbitrate only those grievances that involve an "alleged violation, misinterpretation, or misrepresentation of a *specific article(s) or section(s) of the Agreement*."¹⁵

Ultimately, that specificity proves fatal to the substantive arbitrability of Grievance No. 14-00-981030-247-02-11. The lines of reasoning that support this holding are set forth below.

3. Derivative Nature of Grievance No. 14-00-981030-247-02-11

Looking back through time, one observes that Grievance No. 14-00-981030-247-02-11 is indirectly or derivatively linked to Grievance No. 14-00-97067-02-11. First, Grievance No. 14-00-97067-02-11 presumptively alleges a violation of a specific contractual provision, thereby obtaining coverage under Article 7.02A and substantive arbitrability under Article 7.07E-1. Second, Grievance No. 14-00-97067-02-11 is the sole subject of the Settlement Agreement. On the other hand,

¹⁴ (Emphasis added).

¹⁵ (Emphasis added).

Grievance No. 14-00-981030-247-02-11 is based solely on the alleged improper implementation of the Settlement Agreement that, unfortunately, references no specific contractual provision as a basis for the "settlement" contained therein. Consequently, any link between Grievance No. 14-00-981030-247-02-11 and a specific contractual provision is necessarily derived from whatever link Grievance No. 14-00-97067-02-11 has to a specific contractual provision. In other words, Grievance No. 14-00-981030-247-02-11 is at best indirectly or derivatively linked to a specific contractual provision through Grievance No. 14-00-97067-02-11.

Therefore, the issue is whether Grievance No. 14-00-981030-247-02-11 can become substantively arbitrable by alleging a violation in the implementation of a Settlement Agreement that focuses on an earlier arbitrable grievance (No. 14-00-97067-02-11). Again language from the Steelworkers Trilogy creates a proper backdrop for the ensuing discussion. When addressing issues of substantive arbitrability, the Court opined:

"[T]o be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under [section] 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance *should not be denied* unless it may be said with *positive assurance* that the arbitration clause is *not susceptible* of an interpretation that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*¹⁶

These guidelines are as applicable to the Undersigned who is entrusted with this issue of substantive arbitrability as they are to federal judges who are also charged with resolving issues of substantive arbitrability.

Even when doubts are resolved in favor of coverage, the derivative nature of Grievance No. 14-00-981030-247-02-11 is debilitating in this case because it isolates the Settlement Agreement from the Collective-Bargaining Agreement. First, the arbitral record, in the instant case, does not reveal the

¹⁶ United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 583 (1960).

¹⁷ Since the contractual provision that was the subject of Grievance No. 14-00-97067-02-11 remains unknown, one cannot be sure that Grievance No. 14-00-97067-02-11 and Grievance No. 14-00-981030-247-02-11 focus on the same contractual provision. If in fact they do not—and the Arbitrator has no way of knowing

specific contractual provision(s) allegedly violated in Grievance No. 14-00-97067-02-11.¹⁷ Second, and more important, the Settlement Agreement and the arbitral record are silent regarding how, if at all, any specific contractual provision(s), allegedly violated in Grievance No. 14-00-97067-02-11, factored into the resolution of that Grievance in the Settlement Agreement.¹⁸

Thus, on the face of the matter, one can reasonably assume that the Settlement Agreement itself is wholly independent of any contractual provision and of the Contract itself. Indeed, parties to settlement agreements clearly strive to separate those agreements from their Contract. And so it is in the instant case, given the following statement:

The union and the grievant agree that . . . there shall be no further claim arising from this grievance under the collective bargaining agreement. . . . [and] . . . that [this Agreement] it shall not be *precedent setting* and that it shall not be used in any *future arbitration except to enforce the terms of this Agreement*.¹⁹

The foregoing language manifests an explicit intent to separate the Settlement Agreement from the Collective-Bargaining Agreement in order to deny the Settlement Agreement any precedential value under the Collective-Bargaining Agreement.

This is not an unusual goal in labor/management relations. Parties to settlement agreements commonly and customarily strive to separate those agreements from the very contractual provisions that triggered the grievances that are the subject of the settlement agreements. Accordingly, most settlement agreements—including the one in the instant case—are wholly independent of the Collective-Bargaining Agreement. Therefore, holding that Grievance No. 14-00-981030-247-02-11 is substantively arbitrable, under Article 7.02A and Article 7.07E-1 (both of which recognize only grievances that allege violations

this—then Grievance No. 14-00-981030-247-02-11 is not even derivatively linked to the Collective-Bargaining Agreement.

¹⁸ Article 30 is the only specific contractual provision referenced in the Settlement Agreement. There the parties simply agreed that the Settlement Agreement would not be subsequently deemed to have violated Article 30. See Joint Exhibit No. 2, § 6.

¹⁹ Joint Exhibit No. 2. (emphasis added).

to specific contractual provisions), implicitly conjoins the Settlement Agreement and the Collective-Bargaining Agreement by according the Settlement Agreement the status of a contractual provision. This interpretation would tend to subvert and confound the Parties' intent under the Settlement Agreement.

Finally, Grievance No. 14-00-981030-247-02-11 cannot overcome this hurdle—bring that Grievance within the ambit of Article 702A—merely by citing specific contractual provisions that the Employer allegedly violated while implementing the Settlement Agreement.

The upshot is that the specificity of Article 7.02A removes reasonable doubts as to whether the Parties intended for grievances alleging violations of Settlement Agreement to be raised under Article 7.02A or Article 7.07E-1. The specificity of Article 7.02A, the derivative nature of Grievance No. 14-00-981030-247-02-11, and the resulting separation of the Settlement Agreement and the Collective-Bargaining Agreement oblige the Arbitrator to hold that Grievance No. 14-00-981030-247-02-11 lacks substantive arbitrability. The Union specifically alleges that the employer improperly implemented the Settlement Agreement. Indeed, had Grievance No. 14-00-981030-247-02-11 alleged a violation of the Collective-Bargaining Agreement, the Union would hardly have spent time pursuing informal avenues to resolve that Grievance. Instead, the Union would have simply filed that Grievance under Article 7.02A and Article 7.07E-1. Finally, the unambiguous language in Article 7.02A and Article 7.07E-1 renders it unnecessary for the Arbitrator either to rummage through other contractual provisions or to consult parol evidence to ascertain the Parties's intent in this dispute.

C. Remaining Options of Enforcement

Consequently, the Union must seek an avenue other than the Collective-Bargaining Agreement through which to resolve this Grievance No. 14-00-981030-247-02-11. Language in the Settlement Agreement clearly establishes that the parties did not foreclose arbitration as a forum for the enforcement of the Settlement Agreement, and enforcement is undoubtedly the gravamen of the instant dispute. Indeed, the Settlement Agreement plainly states in pertinent part: "The parties to this Agreement agree

that it shall not be precedent setting and that it shall not be used in any future arbitration *except to enforce* the terms of this Agreement."²⁰ Also, the following statement is handwritten on the back of the Settlement Agreement: "This Agreement will not be considered a violation of Article 30. The Union *will not file nor process any grievance as a result of this Agreement.*"²¹ At first glance, these two statements appear to be at cross-purposes. That is, the second statement appears to vitiate the right of enforcement that the first statement established. However, the Arbitrator reads the second statement more narrowly to mean that the Union shall not challenge the implementation of the Settlement Agreement under Article 30 of the Collective-Bargaining Agreement.

This interpretation shields the first statement from potential violence by the second, giving both meaning and function in the Settlement Agreement. Ultimately, the first statement manifests the Parties' intent to enforce the Settlement Agreement through arbitration, albeit outside of the Collective-Bargaining Agreement. In the Arbitrator's view, the first statement is every bit as binding on the Parties as any promise to arbitrate contained in the Collective-Bargaining Agreement. Otherwise, one is left with the anomalous situation in which the parties have struck an agreement that cannot be enforced, a position that is manifestly at odds with both custom and commonsense. The viable option is to arbitrate the Settlement Agreement outside of the contract, focusing solely on the language of the Settlement Agreement.

III. The Award

For all the foregoing reasons, Grievance No. 14-00-981030-247-02-11 is **DENIED** as lacking substantive arbitrability under the Collective-Bargaining Agreement.

Notary Certificate

²⁰ (Emphasis added).

²¹ (Emphasis added).

State of Indiana)
)SS:
County of _____

Before me the undersigned, Notary Public for _____ County, State of Indiana, personally appeared _____, who swears under oath and under penalty of perjury that the contents of this document are true and accurate and were prepared solely by Robert Brookins who hereby acknowledges the execution of this instrument this _____ day of _____, 2000.

Signature of Notary Public: _____

Printed Name of Notary Public: _____

My commission expires: _____

County of Residency: _____

Robert Brookins