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United States Court of Appeals
Tenth Circuit

June 13, 2023

Christopher M. Wolpert
Clerk of Court

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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NATIONAL NURSES ORGANIZING COMMITTEE, Missouri & Kansas/National Nurses United,

Plaintiff - Appellant,

v.

MIDWEST DIVISION MMC, LLC, d/b/a Menorah Medical Center,

Defendant - Appellee.

No. 21-3146

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**Appeal from the United States District Court**
**for the District of Kansas**
**(D.C. No. 2:20-CV-02571-JAR-JPO)**

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Micah L. Berul, National Nurses Organizing Committee/National Nurses United (Jason R. McClitis and Quinlan B. Moll, Blake & Uhlig, P.A, Kansas City, Kansas, with him on the brief), Oakland, California, for Plaintiff-Appellant National Nurses Organizing Committee-Missouri & Kansas/National Nurses United.

Corey L. Franklin, FordHarrison, LLP, Clayton Missouri, for Defendant-Appellee Midwest Division MMC, LLC, d/b/a Menorah Medical Center.

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Before **TYMKOVICH**, **CARSON**, and **ROSSMAN**, Circuit Judges.

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**CARSON**, Circuit Judge.

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The Supreme Court regularly reminds us of the federal policy favoring arbitration. Although this policy results in a presumption of arbitrability, a party may rebut that presumption. We cannot require a party to arbitrate a dispute that it has not agreed to arbitrate. Today we face such a situation. Plaintiff National Nurses Organizing Committee, Missouri & Kansas/National Nurses United filed a grievance and sought arbitration under the grievance procedure set forth in the parties' collective bargaining agreement ("CBA"). Defendant Midwest Division MMC, LLC refused to arbitrate. Although Plaintiff and Defendant agreed to arbitrate disputes under many provisions of their CBA, we can say with positive assurance that they did not intend to arbitrate disagreements related to staffing plans. And, at its core, the dispute between Plaintiff and Defendant is about a staffing plan. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

Plaintiff, a union, represents a bargaining unit of registered nurses Defendant employs. Defendant implemented new staffing grids that Plaintiff alleges displaced bargaining-unit nurses with supervisory nurses in the performance of bargaining-unit work. While implementing the new staffing grids, Plaintiff and Defendant operated under a CBA. The arbitration provision of the CBA—Article 3—allows Plaintiff to advance grievances not resolved under the Article 14 grievance procedure to final and binding arbitration. Article 3 also provides "[t]he arbitrator shall have no power to: (A) Add or subtract from, or modify any of the terms of this Agreement; (B) Hear or decide any dispute as to the exercise of the Hospital's management rights as set

out in Article 19 (Management Rights) of this Agreement." Article 14 defines a grievance as an "alleged breach of the terms and provisions of this Agreement."

Plaintiff filed a grievance, asserting that Defendant violated Article 4 of the CBA by implementing the new staffing grids. Article 4—"Bargaining Unit Work"—states:

> It is not the intent of the Hospital to displace bargaining unit employees with supervisory employees in the performance of bargaining unit work. It is understood, however, that nothing in this Agreement shall preclude members of management from performing bargaining unit work when such work occurs during the course of training, in the event of an emergency, due to scheduled or unscheduled employee absences, due to an increase in patient census or workload, consistent with past practice and/or when such work or assistance is otherwise necessary for the timely provision of quality patient care.

Plaintiff requested Defendant "cease + desist from utilizing these staffing grids [it] proposed [and] then implemented on 6/28/2020[;] [h]old staffing committee per the CBA [and] amend the proposed grids to conform [with] the CBA[;] [and] [r]eturn the RNs you have removed." Defendant told Plaintiff that it would not process the grievance because the grievance failed to allege a violation of the CBA and the allegations challenged the Hospital's implementation of staffing plans, which is not arbitrable under the CBA.

In refusing to process the grievance, Defendant relied on two articles of the CBA—Articles 34 and 19. Article 34—"Staffing Committee"—states that the "Hospital shall have a staffing system based on the assessment of patient needs," and that the hospital's staffing plan "provides the basis for acuity based staffing decisions within the Hospital by providing guidance on nurse-to-patient staffing levels for staffing coverage in patient care units." Article 34 also states that:

> [d]isagreements among the Committee members or between the Hospital and the Union regarding issues covered by this Article, including disagreements related to staffing plans and the methods to monitor compliance with the plans, that cannot be resolved mutually by the parties shall not be subject to the grievance and arbitration procedures of this Agreement, any dispute resolution process other than mediation, as set forth in Paragraph G below, or administrative or other legal challenge.

Article 19—management rights—states:

> Except as specifically and clearly abridged by an express provision of this Agreement, nothing in this Agreement shall be interpreted as interfering in any way with the Hospital's right to determine and direct the policies, modes and methods of performing the work or providing patient care, including but not limited to: . . . (F) To determine the number, location, and types of facilities, if any, it will maintain to decide the staffing levels and/or ratios, the types of patients, and the classifications and qualifications of employees that may be assigned to any unit shift, procedure, group of patients, or job[.]

Article 19, Section 2, also specifically states that Defendant's:

> exercise of its reserved [management] rights described in [Article 19] Section 1 above shall not be subject to the grievance and arbitration provisions of this Agreement. Further, there shall be no duty to bargain over the Hospital's decision to exercise, or the effects of the exercise of, the management rights described in Section 1 above.

Plaintiff requested a panel of arbitrators, but Defendant continued to refuse to process the grievance. Thus, Plaintiff filed a complaint in the district court to compel Defendant to arbitrate the grievance under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The district court denied Plaintiff's motion for summary judgment to compel arbitration, granted Defendant's cross-motion for

summary judgment, and held Plaintiff's grievance was not arbitrable under the CBA.[1] Plaintiff appeals.

II.

A.

We review a grant of summary judgment de novo, applying the legal standard the district court employed. BNSF Ry. Co. v. Hiett, 22 F.4th 1190, 1193 (10th Cir. 2022) (citing US Airways, Inc. v. O'Donnell, 627 F.3d 1318, 1324 (10th Cir. 2010)). We also review de novo whether a particular grievance is arbitrable under a collective bargaining agreement. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union & Its Local 13-857 v. Phillips 66 Co., 839 F.3d 1198, 1203 (10th Cir. 2016) (citing Local 5-857 Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Conoco, Inc., 320 F.3d 1123, 1125 (10th

[1] The dissent asserts the majority does not meaningfully contend with the presumption that we must resolve any ambiguity in favor of the Union—claiming the district court had "self-professed doubts" about arbitrability. The district court had no such doubts. Quoting one sentence with no context misrepresents the district court's opinion. The district court said that the *language of the grievance* appeared to reference both something that is arbitrable (the displacement of bargaining unit nurses in Article 4) and something that may be excluded from arbitration (staffing issues in Article 34 and/or management decisions in Article 19). In holding the grievance is not arbitrable, the district court's analysis could not be clearer: the court must read the CBA as a whole, Articles 19 and 34 do not read Article 4 completely out of the CBA, and the express provisions in the CBA exclude staffing issues from arbitration. The district court's opinion—relying on the text of the CBA—makes plain that the agreement contains no ambiguity. The dissent's claim that we do not grapple with the district court's *finding* of "something arbitrable" and "something that may be excluded from arbitration" is unfounded. The district court made no such finding. It examined the text of the CBA, the language of the grievance, and determined that the dispute was not arbitrable. And we affirm that decision.

Cir. 2003)). A court—not an arbitrator—typically determines whether the parties intended to arbitrate a particular dispute. Id. at 1204 (citing Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 296 (2010)). Arbitration is "strictly a matter of consent." Id. (citing Granite Rock Co., 561 U.S. at 299). Axiomatically, for a court to order arbitration, the parties must have consented to arbitrate the dispute at issue. Id. At the same time, however, we acknowledge the federal policy favoring arbitration of labor disputes. Id. (citing Granite Rock Co., 561 U.S. at 301).

We recognize that these are competing principles. But we strike a balance between them "by applying a presumption that a dispute is arbitrable unless we may say 'with positive assurance' that the parties intended otherwise." Id. We thus apply the presumption of arbitrability "only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand." Id. (citing Granite Rock Co., 561 U.S. at 301). And we adhere to the presumption and order arbitration only when the party opposing arbitration does not rebut the presumption. Id. To rebut the presumption, "the party opposing arbitration must provide 'forceful evidence' that the parties intended to exclude the dispute from arbitration." Id. (citing United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584–85 (1960)). Indeed, with no express provision excluding a particular grievance from arbitration, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where . . . the arbitration clause [is] quite broad." Id. (quoting United Steelworkers, 363 U.S. at 584–85).

B.

Plaintiff contends on appeal that the CBA covers the dispute because Plaintiff's grievance asserts a displacement of bargaining-unit work in violation of Article 4. Article 3, the arbitration clause, provides that Plaintiff may advance unresolved grievances to arbitration. Article 4 addresses supervisory employees performing bargaining-unit work. Remember that Plaintiff's grievance, an alleged violation of Article 4 of the CBA, involves Defendant displacing bargaining-unit nurses: "currently and ongoing, the Hospital intends to displace bargaining unit RNs in the performance of bargaining unit work as expressed in the hospital staffing grids . . . implemented on 6/28/2020 in which they removed the Registered Nurses in the bargaining unit." And Article 4 provides that "[i]t is not the intent of the Hospital to displace bargaining unit employees with supervisory employees in the performance of bargaining unit work."

Defendant points us to Article 34 and Article 19, contending that the grievance challenges its implementation of a staffing plan, and Article 34 excludes staffing-plan disputes from arbitration and provides that the sole remedy for such disputes is mediation. Defendant contends that Article 34's plain language excludes from arbitration a broad range of disputes because Article 34 encompasses many issues and its plain language excludes all disputes even "related to" staffing plans.

Plaintiff disputes this interpretation of Article 34. Plaintiff argues its Article 4 grievance does not trigger Article 34's provision excluding staffing disputes from arbitration because that provision is confined to disagreements between Plaintiff and

Defendant about "issues covered by this Article [34], including disagreements related to staffing plans." Article 34, Plaintiff explains, concerns only acuity-based nurse-to-patient staffing levels, and its grievance focuses solely on the displacement of bargaining-unit work under Article 4. Article 34 § 1(G)'s reference to Defendant's management rights under Article 19, when "the parties agree, consistent with Article 19 . . . that the Hospital maintains the ultimate financial, operational and legal responsibility of providing appropriate staffing," does not change the analysis, Plaintiff contends, because its grievance does not concern inappropriate staffing levels but *who* is performing the work—supervisory or bargaining-unit nurses. And for that same reason, Article 3's provision excluding from arbitration disputes related to the Hospital's exercise of its management rights also does not apply. Moreover, Article 19 provides that "[e]xcept as specifically and clearly abridged by an express provision of this Agreement, nothing in this Agreement shall be interpreted as interfering in any way with the Hospital's" exercise of management rights. Article 4, Plaintiff asserts, specifically abridges those management rights by setting forth specific circumstances under which the Hospital may replace bargaining-unit nurses with supervisory nurses. Plaintiff argues that the district court's Article 34 construction, which excludes all disputes "that could be revealed through a staffing plan," makes Article 4's commitment to preserving bargaining-unit work surplusage. Plaintiff also argues that the presumption in favor of arbitration supports its position because we cannot say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

We begin our analysis with the CBA's text, which leads us to conclude that the CBA excludes Plaintiff's grievance from arbitration. Article 19 explicitly states, "[i]t is understood that nothing in this Agreement shall preclude persons employed in supervisory, managerial or other non-bargaining unit positions from performing bargaining unit work" and "nothing in this Agreement shall be interpreted as interfering in any way with the Hospital's right to . . . decide the staffing levels and/or ratios . . . and the classifications and qualifications of employees that may be assigned to any unit, shift, procedure, group of patients, or job." Article 19 § 2 provides, "The Hospital's exercise of its reserved rights in Section 1 above shall not be subject to the grievance and arbitration provisions of this Agreement." And, as stated, Article 3 excludes from arbitration disputes "as to the exercise of the Hospital's management rights as set out in Article 19."[2]

[2] The dissent implies our textual reading is really a balancing inquiry in which we are crediting certain provisions and not others. We do no such thing. We read the CBA as a whole and consider each provision in looking at the document in its entirety. The dissent's suggestion that "our version of a textual approach" does not weigh all provisions equally simply does not hold up to the CBA's language. The dissent, rather, reads some and ignores other provisions of the CBA—in its words "*sua sponte* elevating some provisions over others." The dissent asserts that the Union's grievance states a violation of CBA Article 4 and is therefore arbitrable, thus reading Article 4 in a vacuum. Sure, without the rest of the CBA, Article 4 would allow arbitration in this case. But the parties did not bargain for that. Subsequent provisions of a CBA may limit earlier provisions. The dissent claims that the CBA "nowhere" says that Article 4 disputes are not arbitrable and that Article 4 cabins Article 19. True, Article 19 says that it can be "specifically and clearly abridged by an express provision of this Agreement." But Article 4 fails to do that. It says,

> "nothing in this Agreement shall preclude members of management from performing bargaining unit work when such work occurs during the course of training, in the event of an emergency, due to scheduled or unscheduled

No matter how Plaintiff casts the grievance, we must consider the substance of the claims.[3] Commc'n Workers of Am. v. Avaya, Inc., 693 F.3d 1295, 1301 (10th Cir. 2012) (directing that no matter how artfully Plaintiff labels the grievance, "facts are more important than legal labels in determining whether a claim is arbitrable" (citation omitted)). Plaintiff disputes Defendant's staffing plan but recasts it as an arbitrable grievance. To be sure, Plaintiff's grievance challenges hospital staffing

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> employee absences, due to an increase in patient census or workload, consistent with past practice and/or when such work or assistance is otherwise necessary for the timely provision of quality patient care."

Under the CBA, Article 19 cabins Article 4. Article 19 provides *nothing* in the CBA interferes with the Hospital's right to decide staffing levels and the classifications of employees that may be assigned to any shift or job and *nothing* in the CBA prevents non-bargaining unit positions from performing bargaining unit work. Thus "nothing" in the CBA—which would include Article 4—makes a staffing dispute like the one at issue here arbitrable.

The dissent "wonders" what disputes would not be rendered un-arbitrable under this reading of the CBA. We will not opine on disputes not properly before us, but to address the dissent's alarm, we refer it to the clear and unambiguous language of Articles 19 and 34, which provides that the CBA does not interfere with the hospital's right to decide staffing plans or staffing grids.

[3] The dissent claims to "understand the Union's grievance to allege what it says." It says that the grievance does not use the words "staffing plan" or *directly* reference the hospital's "staffing grids" and states that the grievance's reference to staffing grids is simply a statement of how Plaintiff discovered the alleged Article 4 violation. Thus, to the dissent, Article 34 doesn't matter because the language Plaintiff used does not expressly allege a disagreement related to staffing plans. We note, though, that the grievance requested that Defendant "cease and desist from utilizing these *staffing grids*" (emphasis added). Whether Plaintiff mentioned the staffing grids matters not. Our law provides that facts are more important than labels in determining whether a claim is arbitrable. And whether Plaintiff chose not to say it was challenging "staffing grids" or a "staffing plan" doesn't negate the fact that Plaintiff filed a grievance about the impact resulting from the hospital's staffing plan.

plans, as shown by the remedy it seeks, requiring Defendant to "cease and desist . . . utilizing these staffing grids" and to hold a staffing committee meeting to "amend the proposed grids."

Plaintiff suggests that any interpretation other than its own renders Article 4 meaningless. Not so. Article 4 states that it is not the Hospital's *intent* to "displace bargaining unit employees with supervisory employees in the performance of bargaining unit work."[4] It then says that "nothing in this Agreement shall preclude members of management from performing bargaining unit work when such work occurs during the course of training, in the event of an emergency, due to scheduled or unscheduled employee absences, due to an increase in patient census or workload, consistent with past practice and/or when such work or assistance is otherwise necessary for the timely provision of quality patient care." In contrast to Article 19's mandatory language, Article 4 uses aspirational language—it is Defendant's "intent" not to displace bargaining-unit employees, but the circumstances under which it may do that are fairly broad—especially when "otherwise necessary for the timely provision of quality patient care."[5]

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[4] Our textual reading of the CBA—specifically giving meaning to the parties' use of the word "intent"—comports with our charge to interpret the terms of the CBA agreed upon by the parties, not to re-write it to suit our view of the general principles of labor law.

[5] The dissent argues that because Defendant did not argue that Article 4 was a statement of intent until oral argument, we cannot consider it. But we will not disregard the CBA's express language. Generally, we do not consider new legal theories on appeal. But we can consider this argument as Defendant "argued the contract should be interpreted as a whole and claimed the language in the operative

Moreover, Plaintiff's contention that Article 34 covers only acuity-based staffing issues finds no support in the CBA's text. Article 34 excludes from arbitration all disagreements "regarding issues covered by . . . Article [34], including disagreements related to staffing plans." This broad language—"disagreements related to staffing plans"—encompasses more than disputes directly concerning staffing plans. Thus, Article 34, read along with the provisions in Article 19 describing the Hospital's management rights and excluding from arbitration disputes over those rights in Articles 19 and 3, expressly provides that disputes like Plaintiff's, concerning the hospital's implementation of a new staffing grid are not arbitrable.

The CBA grants Defendant discretion to make staffing and managerial decisions. Plaintiff's reliance on Article 4 does not hold up to the limiting language in Articles 3, 19, and 34. In sum, the parties did not consent to arbitrate the kind of dispute Plaintiff's grievance asserts.[6]

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clauses . . . should control." Edwards v. Doe, 331 F. App'x 563, 573 (10th Cir. 2009) (unpublished). Defendant's arguments that the court must read Article 4 together with Article 19 and Article 34 put Plaintiff on notice as to the substance of the issue. See Nelson v. Adams, USA, Inc., 529 U.S. 460, 469 (2000) ("It is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts. But this principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue.").

[6] Plaintiff submitted a Rule 28(j) letter notifying us that the Eighth Circuit determined that a similar dispute fell under the CBA's arbitration provision. Nat'l Nurses Org. Comm.-Missouri & Kansas/Nat'l Nurses United v. Midwest Div.-RMC, LLC, 25 F.4th 1073, 1076 (8th Cir. 2022). The Eighth Circuit concluded that the provision excluding staffing-plan disputes, "Article 38[,] addresses nurse-to-patient

AFFIRMED.

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staffing levels and establishes the means to monitor and resolve disputes regarding those staffing levels. It does not address the subject matter of this dispute, *i.e.*, which nurses perform the work or the displacement of bargaining unit nurses." Id. It also concluded, "Article 38(1)(F)'s reference to 'disagreements related to staffing plans' relates only to staffing-plan disputes that fall under 'issues covered by' Article 38." Id. It held that "[b]ecause the grievance alleges displacement of bargaining unit nurses, which is covered by Article 3, and not issues related to nurse-to-patient staffing levels, which are covered by Article 38, Article 38(1)(F)'s arbitration exemption does not apply." Id. And it noted, "Article 19 does not alter this analysis." Id. It also "decline[d] to consider [the hospital's] argument that Article 38 covers the issue of which nurses perform the work, which it raised for the first time in its reply brief." Id. at 1077 (citation omitted). The Eighth Circuit's opinion does not specifically reference management rights.

The record does not contain the CBA the Eighth Circuit reviewed. We know from the numbering of the sections, however, that the two CBAs are not identical. The Eighth Circuit's opinion does not reference any language from Article 19 that specifically says that "[t]he Hospital's exercise of its reserved [management] rights described in Section 1 above shall not be subject to the grievance and arbitration provisions of this Agreement." The district court ultimately concluded that although the two cases involved CBAs with similar language, they are not identical, and the one in our case appeared to further limit and exclude certain disputes from arbitration. The Eighth Circuit noted as much when discussing the District of Kansas's opinion. See id. at 1076 n.2 ("We do not find persuasive RMC's cited case that raised a similar grievance. . . The court determined that, compared to the CBA before us, the collective bargaining agreement before it 'appear[ed] to further limit and exclude certain disputes from arbitration.'" (quoting Nat'l Nurses Org. Comm.-Mo. & Kan. V. Midwest Div.-MMC, LLC, No. 2:20-CV-2571, 2021 WL 3022313 (D. Kan. July 16, 2021))).

Despite this, the dissent posits that the Eighth Circuit's opinion somehow supports reversal. In the dissent's view, because the language of the union grievance is identical, and because the CBA in the Eighth Circuit contains the same language as Article 4 in this case, we must reverse—even though we don't know the entirety of the CBA's language in the Eighth Circuit. What we do know is that the Eighth Circuit distinguished the Kansas district court opinion because the CBA at issue in this case "further limit[ed] and exclude[ed] certain disputes from arbitration."

***National Nurses Organizing* v. *Midwest Division MMC*, No. 21-3146**

**ROSSMAN, J., dissenting**

This case concerns a labor dispute between a union of nurses, Appellant National Nurses Organizing Committee – Missouri & Kansas/National Nurses United (the "Union") and their employer, Appellee Menorah Medical Center (the "Hospital"). The parties entered a collective bargaining agreement ("CBA") that ran from October 21, 2018 through May 31, 2021. There is no question the CBA was validly formed, is enforceable, and has an arbitration provision.

The disagreement underlying this appeal arose in the summer of 2020, when the Union discovered the Hospital was displacing its bargaining unit nurses with supervisory nurses to perform bargaining unit work. The issue before us has nothing to do with the merits of this disagreement. *See AT & T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims."). Rather, we are called to decide only whether the district court correctly determined the dispute is "excluded from arbitration." Aplt. App. vol. 2 at 405.

My colleagues in the majority discern no error and affirm the grant of summary judgment to the Hospital. I would reverse, for three main reasons.

First, the majority's conclusion that the dispute is excluded from arbitration relies on a misreading of the Union's grievance. According to the majority, "at its core, the dispute between Plaintiff and Defendant is about a staffing plan." Maj. Op. at 2. Having so construed the grievance, my colleagues then "can say with positive assurance that [the parties] did not intend to arbitrate disagreements related to staffing plans." *Id.* But the dispute alleged by the Union is about the displacement of bargaining unit work, a discrete subject of the parties' agreement covered by Article 4 of the CBA. The Hospital concedes Article 4 can be breached, and the district court assumed Article 4 was arbitrable. Nothing in the CBA says otherwise. That should be the end of the matter.

Second, convinced the dispute is about a staffing plan, the majority ignores the ambiguity identified by the district court. According to the district court, the "plain language of the [Union's] grievance . . . reference[s] both something that is arbitrable (the displacement of bargaining unit RNs in Article 4) and something that may be excluded from arbitration (staffing issues in Article 34 and/or management decisions in Article 19)." Aplt. App. vol. 2 at 402. While I would find the Union's grievance clearly states an arbitrable Article 4 dispute, even if we assume some ambiguity, as did the district court, how can we say with "positive assurance" the dispute falls outside the scope of

the CBA? Applying the well-settled presumption of arbitrability governing this case, we can't. The majority does not grapple with this component of the district court's ruling, let alone explain how affirmance is permissible in light of it.

Finally, the majority is too-quick to dismiss the Eighth Circuit's contrary 2022 decision in a case involving related parties: *Nat'l Nurses Org. Comm.-Mo. & Kan./Nat'l Nurses United* v. *Midwest Div.-RMC, LLC*, 25 F.4th 1073. That case involved the same dispute over bargaining unit work, the same bargaining unit work provision, and similar reservations of the Hospital's management rights. *Id.* at 1074-75. Unlike my colleagues, I am persuaded by the Eighth Circuit's holding and reasoning, which counsels for reversal here.

Reviewing the district court's grant of summary judgment *de novo* and considering the evidence in the light most favorable to the Union, *BNSF Ry. Co.* v. *Hiett*, 22 F.4th 1190, 1193 (10th Cir. 2022), I would find the Union's grievance arbitrable and reverse. Accordingly, I respectfully dissent.

## I.

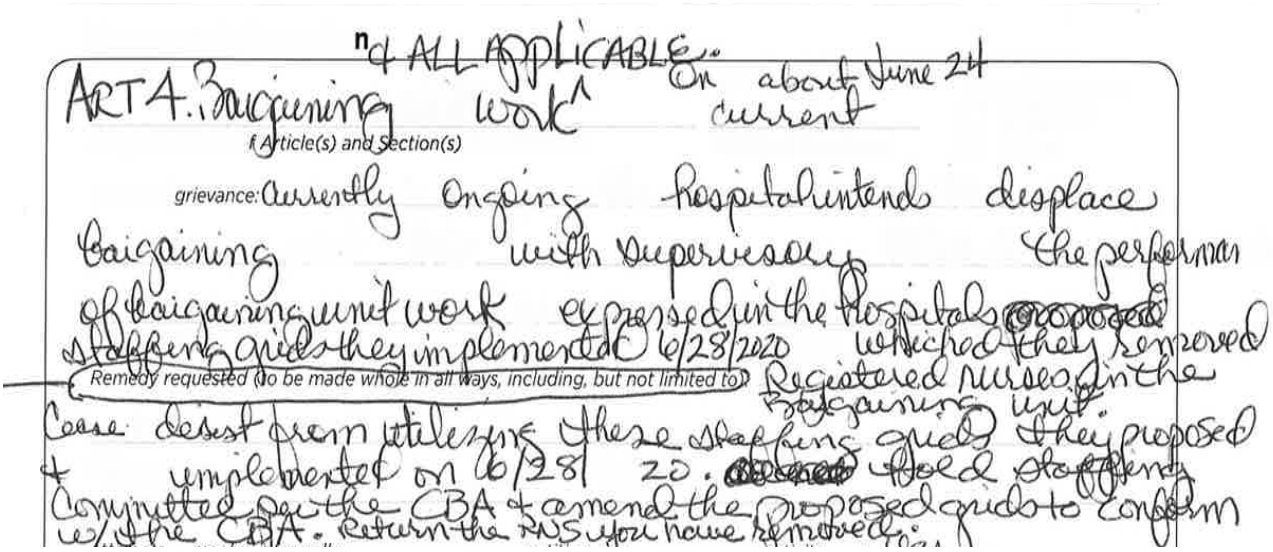
## The Union's Grievance Plainly States A Violation Of Article 4; This Is An Arbitrable Dispute.

### A. The Disagreement Is Over Bargaining Unit Work, Not Staffing Plans.

"When a collective-bargaining agreement contains an arbitration provision and a dispute arises between the parties to the agreement, a court should send the dispute to arbitration *unless* it can say with positive assurance that the arbitration provision is not susceptible to an interpretation that covers the dispute." *Int'l Bhd. of Elec. Workers, Loc. #111* v. *Pub. Serv. Co. of Colo.*, 773 F.3d 1100, 1107 (10th Cir. 2014) (emphasis added). Here, we have an arbitration provision and a dispute between the parties to the agreement. Our first order of business is clear. We must "examine the grievance[] here and determine whether [it] fall[s] within the scope of the arbitration agreement." *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union & Its Loc. 13-857* v. *Phillips 66 Co.*, 839 F.3d 1198, 1205 (10th Cir. 2016). "Unless we can say with positive assurance that [it] do[es] not," *id.*, we "should send the dispute to arbitration," *Loc. #111*, 773 F.3d at 1107. "Positive assurance" requires the party opposing arbitration to show "an express provision of the CBA excludes the grievances from arbitration" or to "adduce[] forceful evidence showing the parties did not intend to arbitrate

them." *Phillips 66*, 839 F.3d at 1206 (citing *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960)).

Article 14 of the CBA defines "Grievance" as "An alleged breach of the terms and provisions of this Agreement." Aplt. App. vol. 1 at 45. The Union's grievance is readily understood.




Where the grievance asks for the alleged violations of the CBA, the Union explicitly alleges the Hospital violated Article 4 and all applicable Articles. About the "[n]ature of the grievance," the Union wrote: "Currently [and] ongoing the [H]ospital intends to *displace bargaining unit RNs with supervisory RNs* in the performance of bargaining unit work as expressed in the [Hospital's] staffing grids they implemented . . . *in which* they removed registered nurses in the bargaining unit." *Id.* at 112 (emphases added).

The asserted dispute falls squarely within Article 4, which provides:

**ARTICLE 4**
**BARGAINING UNIT WORK**

It is not the intent of the Hospital to displace bargaining unit employees with supervisory employees in the performance of bargaining unit work. It is understood, however, that nothing in this Agreement shall preclude members of management from performing bargaining unit work when such work occurs during the course of training, in the event of an emergency, due to scheduled or unscheduled employee absences, due to an increase in patient census or workload, consistent with past practice and/or when such work or assistance is otherwise necessary for the

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timely provision of quality patient care.

The Hospital agrees not to and expressly waives any right it may have to withdraw recognition, to petition for unit clarification concerning, or in any other way to challenge the inclusion in the bargaining unit of any Registered Nurses or classifications or job titles who or which are currently included in the unit on the grounds that they are or may be supervisory.

Aplt. App. vol. 1 at 36. The Union's interpretation of Article 4 is straightforward. The Hospital cannot displace bargaining unit nurses with supervisory nurses in the performance of bargaining unit work, unless one of the exceptions stated in the Article applies.[1]

The majority, though, reads Article 4 as a toothless expression of "aspirational" "intent." Maj. Op. at 11. That understanding is inconsistent both with the Hospital's litigation position and the district court's findings. The Hospital never made this argument in its appellate briefing. To the contrary,

[1] The applicability of these exceptions—e.g., whether the bargaining unit work occurred "in the event of an emergency"—would be a merits issue in arbitration.

the Hospital, like the Union, understood Article 4 was a provision the Hospital could violate. *See* Aplee. Br. at 23 ("Moreover, because the grievance does not allege *an violation* [sic] of Article 4 (Bargaining Unit Work), the Hospital is not contractually required to arbitrate the dispute under the clear and unambiguous terms of Articles 14 (Grievance Procedure) and 3 (Arbitration)." (capitalization omitted) (emphasis added)).[2] And the district court never suggested Article 4 was simply an unenforceable statement of intent. It described the displacement of bargaining unit nurses, a breach of Article 4, as "something that is arbitrable." Aplt. App. vol. 2 at 402.

[2] In response to questioning at oral argument, the Hospital suggested Article 4 *was* simply a "statement of intent," Oral Arg. at 18:08, one which could not "create a substantive right," Oral Arg. at 22:04. I would not credit a legal contention raised for the first time at oral argument. *See Save the Colo.* v. *Spellmon*, 50 F.4th 954, 967 n.7 (10th Cir. 2022) ("We typically decline to address arguments initiated at oral argument. . . . We adhere to that practice here, for we lack briefing on the issue . . . ."); *Corder* v. *Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1235 n.8 (10th Cir. 2009) ("An argument made for the first time at oral argument . . . will not be considered.").

The majority readily adopts this new argument, claiming the Hospital "argued the contract should be interpreted as a whole." Maj. Op. at 11-12 n.5 (quoting *Edwards* v. *Doe*, 331 F. App'x 563, 573 (10th Cir. 2009)). Because there is a substantive difference between arguing generally for holistic construction and contending a specific contractual provision has no legal effect at all, I remain unpersuaded.

While I understand the Union's grievance to allege what it says,[3] the majority concludes it alleges a dispute about a staffing plan violating Article 34. Article 34 of the CBA expressly requires the parties to mediate, not arbitrate, "disagreements related to staffing plans and the methods to monitor compliance with the plans." Aplt. App. vol. 1 at 69.

I agree with the majority that we must examine the *substance* of the grievance. This means we "focus on the factual allegations in the" grievance. *Commc'n Workers of Am.* v. *Avaya, Inc.*, 693 F.3d 1295, 1301 (10th Cir. 2012) (quoting *P&P Indus., Inc.* v. *Sutter Corp.*, 179 F.3d 861, 871 (10th Cir. 1999)). The grievance does not use the words "staffing plan." The grievance does directly reference the Hospital's "staffing grids" implemented on June 28, 2020. But, examining the factual allegations in the grievance, the dispute is not *about* staffing but about what the staffing grids implemented in violation of the parties' agreement: "remov[ing] registered nurses in the bargaining unit." Aplt. App. vol. I at 112. The Union explains it "learned that [the Hospital] was displacing bargaining unit nurses with supervisory nurses in the performance of bargaining unit work on or about June 28, 2020, when the Hospital

[3] *Compare* Article 4, Aplt. App. vol. 1 at 36 ("It is not the intent of the Hospital to displace bargaining unit employees with supervisory employees in the performance of bargaining unit work.") *with* the grievance, *id.* at 112 ("Currently [and] ongoing the [H]ospital intends to displace bargaining unit RNs with supervisory RNs in the performance of bargaining unit work.").

implemented new staffing grids that revealed such displacement." Aplt. Br. at 10. As the Union persuasively argues, "The Grievance's reference to staffing grids is simply a statement of how the violation of Article 4 was discovered." Rep. Br. at 10. That is an arbitrable dispute covered by Article 4, not something excluded by Article 34. But having misread the Union's grievance, the majority unsurprisingly finds dispositive an inapposite section of the CBA.

### B. Article 4 Is Not Excluded From Arbitration.

The CBA nowhere says Article 4 disputes are not arbitrable. Nothing in Article 4 exempts a disagreement about the displacement of bargaining unit nurses from the CBA's arbitration provision. Neither does any other provision in the CBA. Article 3, the arbitration clause, on its face excludes from arbitration only disputes about Article 19. To the extent the Hospital argues Article 19 permits it to allocate bargaining unit work to supervisory nurses, Article 4 cabins this permission. Indeed, Article 4 serves a clear purpose, and limits only one of the Hospital's management rights.[4] And although the

[4] Federal labor law requires "employer[s] to bargain 'in good faith with respect to wages, hours, and other terms and conditions of employment.'" *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 198 (1991) (quoting 29 U.S.C. §§ 158(a)(5), (d)). To effectuate that negotiation, Congress established and protects bargaining units as "the exclusive representatives" for purposes of "bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a).

Hospital contends Article 34 evinces the parties' intent to exclude a broad array of disputes from arbitration, it elsewhere appears to argue Article 34 concerns only "the right to develop, implement, change, and amend the staffing plans, which dictate the nurse-to-patient [staffing] levels," and that this right "extends to determining the appropriate level of staff that best meets the needs of the patient population." Aplee. Br. at 14, 21.

Though nothing in the CBA excludes the Article 4 grievance from arbitration, the absence of an express provision is not the end of the road for the Hospital. To show the parties did not agree to arbitrate disputes about the displacement of bargaining unit nurses, the Hospital could also provide "forceful evidence of [the parties'] purpose . . .." *AT & T Techs.*, 475 U.S. at 650

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The Union has been certified as the bargaining unit representative for the employees involved in this case for over two decades, pursuant to the National Labor Relations Act's vesting of that authority in the National Labor Relations Board. *See* 29 U.S.C. § 159(b). The bargaining unit—through the Union—and the Hospital negotiated and agreed to an allocation of work and certain specific exceptions to that allocation.

"The overarching policy of the National Labor Relations Act is . . . 'to encourag[e] the practice and procedure of collective bargaining,' and to 'protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." *Am. Steel Constr., Inc.*, 372 NLRB No. 23 at *3 (Dec. 14, 2022) (quoting 29 U.S.C. § 151). That policy is advanced only when we give effect to each provision of the CBA to which the parties agreed, even the ones, like Article 4, the Hospital now wants to disclaim. To hold employers and employees to their bargain is not to "re-write" the CBA, Maj. Op. at 11 n.4; it is to abide by the delicate balance of interests and negotiating processes codified by Congress.

(quoting *Warrior & Gulf*, 363 U.S. at 584-85). That evidence might rely on the interaction of different provisions within the CBA. Or it may draw from facts beyond the agreement itself. Here, failing to carry its burden, the Hospital has shown neither.

Absent an express provision (as here), we have examined whether the collective bargaining agreement itself demonstrates the parties' intent to exclude the alleged dispute from arbitration. In *Loc. 5-857 Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union* v. *Conoco, Inc.*, for example, this court considered (and rejected) Conoco's contention that language in other provisions "show[ed] that Conoco specifically bargained for flexibility to fill certain . . . job vacancies." 320 F.3d 1123, 1127 (10th Cir. 2003). Forceful evidence may also be gathered from beyond the four corners of an agreement. We have found the terms of an employee medical plan offered by the party opposing arbitration to be potential "forceful evidence" of the intent not to arbitrate a union's dispute. *Phillips 66*, 839 F.3d at 1207. We have also found the parties' "bargaining history" to be "forceful evidence" of an intent to exclude a dispute from a collective bargaining agreement's arbitration clause. *Loc. 7 United Food & Com. Workers Int'l Union* v. *Albertson's Inc.*, 963 F.2d 382 at *2 (10th Cir. 1992).

I see neither an express provision in the CBA nor forceful evidence offered by the Hospital which would permit this court to reasonably reach a conclusion other than the grievance says what it says and is arbitrable. The majority's contrary view does not withstand scrutiny. According to the majority, Articles 34 and 19 "expressly provide[] that disputes," like that in the grievance, "are not arbitrable." Maj. Op. at 12. "Plaintiff's reliance on Article 4 does not hold up to the limiting language in Articles 3, 19, and 34," the majority concludes. *Id.*

As explained, the majority misreads the plain language of the Union's grievance to be about a staffing dispute, when it alleges a breach of Article 4. True, Article 34 of the CBA expressly requires the parties to mediate, not arbitrate, "disagreements related to staffing plans and the methods to monitor compliance with the plans." Aplt. App. vol. 1 at 69. But the Union's grievance alleges no such disagreement, so Article 34 is beside the point. So, too, is Article 19.[5] Reviewing the text of that provision, we see it begins by limiting its reach

[5] In relevant part, Article 19 provides: "Except as specifically and clearly abridged by an express provision of this Agreement, nothing in this Agreement shall be interpreted as interfering in any way with the Hospital's right to determine and direct the policies, modes and methods of performing the work or providing patient care[.]" Aplt. App. vol. 1 at 52. Article 4 fits neatly alongside Article 19, *generally precluding* the displacement of "bargaining unit employees with supervisory employees in the performance of bargaining unit work," but clearly identifying several specific conditions under which "members of management" *may permissibly* "perform[] bargaining unit

to subjects and disputes *not* covered by another provision. Article 4 is a provision "specifically and clearly abridg[ing]" the generally reserved management rights treated by Article 19, so Article 19's reservation of rights is inapposite. Aplt. App. vol. 1 at 52.[6] And because this is an Article 4 dispute, not an Article 19 one, Article 3, § 3, limiting the arbitrator's authority to "[h]ear or decide any dispute at to the exercise of the Hospital's management rights as set out in Article 19," is irrelevant. *Id.* at 36.

The majority claims Articles 34 and 19 "expressly provide[]" the grievance is "not arbitrable." Maj. Op. at 12. That my colleagues can reach this decision only after repurposing Article 4 as aspirational and *sua sponte* elevating some provisions over others is evidence enough these articles "expressly provide" no such thing.

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work"—during training, in the event of an emergency, as a result of employee absences, due to increased patient census or workload, when such work is consistent with past practice, or when displacement of bargaining unit nurses is "necessary for the timely provision of quality patient care."

While Article 4 and 19 appear on their face to establish compatible presumptions and exceptions, the majority instead announces "Article 19 cabins Article 4." Maj. Op. at 9-10 n.2. Curiously, though, the majority never identifies which specific Article 4 condition the Hospital is relying on to permissibly exercise its general Article 19 management rights.

[6] By adopting the majority's expansive interpretation of "reserved" and "management rights," one wonders what disputes would *not* be rendered un-arbitrable.

The majority's analysis also relies on a flawed understanding of what the law requires. I am unaware of any authority directing judges to perform a balancing inquiry to determine which "limiting language" a court will credit in assessing whether a party's dispute is arbitrable. Under the majority's version of a textual approach, one finds all provisions are equal, yet some provisions are more equal than others. The majority seems to place a novel burden on the party requesting—not opposing—arbitration, inconsistent with uniform and long-standing caselaw requiring the contrary.

Properly read according to its own terms, the grievance here plainly alleges an arbitrable violation of Article 4. The Hospital has shown nothing to disturb that conclusion. Under these circumstances, our law is clear: the dispute should be sent to arbitration.

## II.

## Even Assuming Some Ambiguity, Our Law Compels Reversal.

Our law is equally clear that any doubts—any ambiguity, any questions as to scope—must be resolved in favor of the Union.[7] The "presumption favoring arbitration in the labor context," *Loc. #111*, 773 F.3d at 1108, must be applied "where a validly formed and enforceable arbitration agreement is

[7] This principle is supported here by both the presumption favoring arbitration and the summary judgment standard.

ambiguous about whether it covers the dispute at hand." *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 301 (2010). By refusing to contend with the district court's self-professed doubts about arbitrability, the majority does not meaningfully deal with this well-settled doctrinal presumption.[8]

Here, the district court believed the arbitration clause susceptible to one interpretation that covers the Union's asserted dispute. That conclusion triggered the district court's obligation to invoke the presumption of arbitrability and adhere to it, unless rebutted by the Hospital. But there is nothing indicating the district court did so, and the record does not permit us to conclude the Hospital could have rebutted it.

The district court read the "plain language of the [Union's] grievance . . . to reference both something that is arbitrable (the displacement of bargaining unit RNs in Article 4) and something that may be excluded from arbitration (staffing issues in Article 34 and/or management decisions in Article 19)." Aplt. App. vol. 2 at 402. When the district court found the Union's grievance "reference[d] . . . something that [was] arbitrable," it had to compel arbitration, *see AT & T Techs.*, 475 U.S. at 650 ("Doubts" about a dispute's arbitrability

[8] The majority's solution to the problem of ambiguity is to suggest the district court *actually* thought the issue very clear. Maj. Op. at 5 n.1. I do not see this clarity, and I would assume the district court meant what it said when it pointed out the ambiguity in the "plain language of the grievance." Aplt. App. vol. 2 at 402.

"should be resolved in favor of coverage."). At minimum, the district court had to presume the Union's dispute was arbitrable unless the Hospital rebutted that presumption. *Phillips 66*, 839 F.3d at 1206. There is *nothing* indicating the district court applied any presumption before concluding the Union's dispute was excluded from arbitration.

On appeal, we, like the district court, must presume an asserted dispute is arbitrable when an "arbitration agreement is ambiguous about whether it covers the dispute at hand" and "the presumption [of arbitrability] . . . is not rebutted" by the party opposing arbitration. *Phillips 66*, 839 F.3d at 1204; *see also John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 550 n.4 ("[W]hen a contract is scrutinized for evidence of an intention to arbitrate a particular kind of dispute, national labor policy requires, within reason, that 'an interpretation that covers the asserted dispute' . . . be favored.") (quoting *Warrior & Gulf*, 363 U.S. at 582-83). But the majority grapples with neither the district court's finding of "something arbitrable" and "something that may be excluded from arbitration," nor the presumption implicated here.

The district court erred, both in finding ambiguity, where the grievance is clear, but also in failing to apply the presumption of arbitrability in the face of that ambiguity. Neither error permits affirmance.

## III.

## The Eighth Circuit's Decision In *National Nurses* Supports Reversal.

In *Nat'l Nurses Org. Comm.-Mo. & Kan./Nat'l Nurses United* v. *Midwest Div.-RMC, LLC*, 25 F.4th 1073, 1076 (8th Cir. 2022), the Eighth Circuit confronted a similar dispute under a similar CBA. There, the grievance requested the hospital defendant "cease + desist from utilizing these staffing grids," "[h]old staffing committee per the CBA [and] amend the proposed grids to conform [with] the CBA." 25 F.4th at 1075. That language is identical—verbatim—to the grievance here. *See* Maj. Op. at 3. The alleged violation concerned a CBA article providing, "It is not the intent of the Hospital to displace bargaining unit employees with supervisory employees in the performance of bargaining unit work." 25 F.4th at 1075. Again: identical. *See* Maj. Op. at 3. As here, the hospital defendant relied on a "Staffing Committee" provision and a reservation of management rights "relating to" staffing in refusing to process the grievance. 25 F.4th at 1075-76; Maj. Op. at 3-4. The hospital claimed "the grievance effectively challenges the hospital's staffing plans, which are not subject to arbitration under the terms of the CBA." 25 F.4th at 1075-76. The hospital there even argued, like the Hospital here, "compelling arbitration will nullify" those other articles. *Id.* at 1076; *see* Aplee.

Br. at 22. The Eighth Circuit correctly rejected each of these arguments. Each is mistakenly adopted by the majority today.

As the majority correctly points out, the numbering of the articles in the two CBAs varies slightly. Maj. Op. at 12-13 n.6. And, yes, the "two CBAs are not identical" in every respect. *Id.* But the grievances alleged by the Union and the substance of the applicable provisions involved—whether numbered Article 3 (in the Eighth Circuit case) or Article 4 (here)—are indistinguishable. The core issue before the Eighth Circuit, as before ours, was "whether the grievance alleged a subject matter subject to [the arbitration] provision." 25 F.4th at 1075. In considering the arbitrability of the stated grievance, the panel used the same legal framework applicable here—the review for consent to arbitrate and the presumption of arbitrability. *Id.* It examined the substance of the grievance and the bargaining unit work provision, and it reviewed the interplay of staffing and management rights provisions. *Id.* at 1075-76. It held "[t]hose provisions create an arbitration exemption that is simply narrower than [the hospital] would like" and concluded "adopting [the hospital's] position would render [the bargaining unit provision] of no effect." *Id.* at 1076. Under those circumstances, the Eighth Circuit understood the grievance to mean what it said and held "the grievance alleged an actual breach [of the CBA]." *Id.* at 1077. The same conclusion is warranted here.

According to the majority, the Eighth Circuit did not "reference any language" specifically excluding the hospital's exercise of management rights from arbitration. Maj. Op. at 12-13 n.6. But the Eighth Circuit *did* discuss, and correctly dismissed, the hospital's arguments as to the "sole, exclusive, and unilateral rights" it maintained over staffing issues. 25 F.4th at 1076.

I am left unpersuaded by the majority's efforts to distinguish the Eighth Circuit opinion. At the very least, the Eighth Circuit's contrary holding about the same bargaining unit grievance would suggest the ambiguity of the agreement before us. In these circumstances, the presumption in favor of arbitrability is appropriate, and I would submit this dispute to arbitration.

**IV.**

Whether because the grievance simply says what it says and alleges a plainly arbitrable dispute or because the presumption of arbitrability is triggered and undefeated, I would reverse and remand for the district court to order arbitration.