CHAPTER 6

REVISITING AN OLD BATTLE GROUND: THE SUBCONTRACTING DISPUTE

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I. Introduction

It has been nearly 20 years since the late Donald Crawford delivered his landmark paper on subcontracting to the National Academy of Arbitrators.[1] That presentation by Scotty Crawford —as he was affectionately referred to by his friends and colleagues—was then considered to be one of the truly outstanding contributions to the profession. And while his thoughts have endured the test of time over these nearly 20 years and are still considered a major contribution, it cannot be assumed, given the dynamic nature of our field, that no changes have taken place since 1960. The purpose of this paper, then, is to trace the development of these changes and to determine to what extent, if any, they have eroded the findings and suggestions that Crawford brought to the attention of the arbitration community. Indeed, an old battle ground is being revisited.

Perhaps it is best to offer a brief summary of Crawford's general findings before embarking on an analysis of the events of the past two decades. This author knows full well the perils of attempting to summarize another's work and that the best source is the original writing itself. Nevertheless, a proper perspective and setting are required for the audience to gain an appreciation of where this writer is coming from. Thus, with this admonition in mind, a brief summary of Crawford's paper is offered.

Crawford began his paper by categorizing explicit subcon-

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[1]Crawford, *The Arbitration of Disputes Over Subcontracting,* in Challenges to Arbitration, Proceedings of the 13th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1960), 51–72.

tracting clauses. The four categories he listed are as follows:

1. The weakest limitation on contracting out is the "discussion before contracting out" type of clause. The company shall inform the union of any construction or repair work, or bargaining-unit work, to be contracted out prior to the writing of the contract, and discuss it with the union.

2. The strongest prohibition against contracting out is found in this type of clause: "There shall be no regular work performed by any employee not covered by the contract except in emergencies or when work must be performed for which regular employees are not qualified." Here the probability of layoff or demotion as a consequence of the subcontracting is not required.

3. More common is the limitation of reasonableness: "The Company will make every reasonable effort to use its available working force and equipment in order to avoid having its work performed by outside contractors" or "The Company will use its own employees whenever possible."

4. Finally, the most common clause is the prohibition against contracting out unit work when the firm's own employees are on layoff or when the layoff or demotion of unit employees would result.[2]

It should be noted that Crawford's categories do not include one where there is an outright ban on subcontracting. Saul Wallen suggested that an outright ban on subcontracting is usually lacking in negotiated agreements because "[t]he realities of industrial life apparently shape the results [particularly] when the subject is submitted to the hammer and anvil of the bargaining process."[3] In addition, the most prevalent types of clauses that were and are present in agreements seem to be those which would fall in categories 1, 3, and 4 (perhaps in that order). Consequently, the typical problems with the above type of contract provisions confronting arbitrators are such questions as: (a) What is "normal or regular bargaining unit work"? To be determined under the definition of work normally performed by the unit employees is whether or not work was performed by outside contractors before the contract was signed and whether or not work involving the construction of new facilities is pro-

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[2]*Id.*, at 52.

[3]Wallen, *How Issues of Subcontracting and Plant Removal Are Handled by Arbitrators*, 19 Ind. & Lab. Rel. Rev. 265, 268 (1966).

duction and maintenance work. (b) What is "reasonable effort"? What is "possible"? (c) When the unit employees are working overtime, is the employer prohibited from contracting out? (d) Has the contracting out actually caused the reduction or layoff of a unit employee?[4]

Thus Crawford suggests that while arbitrators faced with the above situations are required to deal with matters of contract interpretation, that framework is often troublesome because of the ambiguities found in the words and clauses.

According to Crawford, the more perplexing problems confronting arbitrators are those instances where the contract is silent on the subcontracting issue. When he first addressed this threshold question, he found that while arbitrators found these matters to be arbitrable, they often found the grievance to be unfounded on its merits. He based this conclusion mainly on a study conducted by G. Allan Dash, Jr.[5] It should not go unnoticed, however, that Dash's study and Crawford's conclusions preceded the *Steelworkers Trilogy*[6] and *Fibreboard.*[7] (More will be discussed on these cases later.)

Crawford felt that the arbitrability question was a fairly straightforward matter for arbitrators, but a considerably more knotty problem for them came about when they dealt with the *merits* of the subcontracting question in the face of the contract being silent on the issue. In this regard, Crawford traced the positions advanced by labor and management as well as the responses by arbitrators.

The unions initially relied upon contract items such as the recognition and seniority clauses as prohibitions on allowing management to farm out the work. The argument here was that the union was the duly authorized and exclusive bargaining agent; and any management actions that subverted those earned bargaining rights were to be considered violations of those broad contractual grants described in the very basic provisions, such as the recognition and seniority clauses. Initially there was some very limited arbitral siding with the union position, but as

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[4]Crawford, *supra* note 1, at 53.

[5]*Id.*, at 53. For a complete analysis of the Dash study, *see Celanese Corp. of America and District 50,* 33 LA 925 (Dash, 1960).

[6]*United Steelworkers* v. *American Manufacturing Co.,* 363 U.S. 564, 46 LRRM 2414 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 46 LRRM 2416 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 46 LRRM 2423 (1960).

[7]*Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203, 57 LRRM 2609 (1964).

time passed, arbitrators generally rejected these arguments on the grounds that those clauses were specific protections that did not extend to matters other than those for which they were explicitly designed and negotiated.[8]

Management, on the other hand, argued that silence in the agreement should be considered as a union consent to allowing the contracting out of work. In effect, the management position was that it retained all rights not specifically ceded or shared in the labor agreement and therefore a company could not be prohibited from the contracting out of work unless it was specifically stated in the agreement. Arbitrators did not accede to this position either, since a decision supporting such an unbridled right could effectively destroy the union's very basic representational status and make the labor agreement a relatively useless document.

Crawford concluded that arbitrators, in rejecting both of these extreme positions, premised their decisions on balancing the social and economic needs for companies to be efficient to meet the ever-changing production and competitive demands of the marketplace, against the union's quest for survival by protecting the employment status of its members. In other words, they balanced the good against the harm accruing to each party. Thus, it could be said that the *residual rights* theory survived, provided that management met its *implied obligations* to act only in necessary situations and in a reasonable manner.

Crawford summarized his findings of arbitral conclusions (based upon Dash's data) as follows:

1. The implied limitation is invoked with considerable caution. Or, to turn it around, most contracting out is not a present threat to the scope of the bargaining unit.

2. Recognition and contract signing *do not* establish a bargain that all of the jobs then performed, or all of the available production and maintenance work, should be performed by members of the bargaining unit. The opinion to the contrary is, as yet, a minority opinion, and the issue, therefore, is not limited largely to the definition of what constitutes production and maintenance work.

3. The company cannot avoid the contract—cannot undermine (even unwittingly) the union by placing the union in the

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[8]Wallen, *supra* note 3, at 265.

impossible situation of having to agree to cut contract wage rates in order to prevent the company from contracting the work out. The great preponderance of awards sustaining the union were in situations where the only apparent or stated economy of operations possible to the subcontractor were lower wage rates—the janitor, commission house, and overtime type cases.

4. The company cannot "contract out" bargaining unit work to its nonunit employees.

5. The arbitrators will take a long look at contracting out regular, permanent work since union jurisdiction and employee status are involved.

6. If the work is temporary or irregular, the awards seem to say that the company *can* contract it out—that there is no *impact* on the status of the exclusive agent or the employees.[9]

Crawford concluded that he felt if arbitrators' decisions at that time "were measured against the underlying factual situations [they] seem quite consistent and quite logical."[10]

At the time that Crawford delivered his paper, there was a genuine concern among arbitrators about their own feeling of inconsistency with regard to subcontracting decisions. Crawford addressed those concerns by emphasizing that full currency must be given to the "underlying factual situations" that are unique to each case when assessing the pattern of arbitration decisions in this area. Interestingly, those same concerns remain in the present. Nor, of course, is the question of consistency of awards restricted solely to the subcontracting area. But this burning question goes to the very heart of the arbitration process itself. The desire for consistency, on the one hand, and the respect for flexibility and adaptability of the process based upon varying facts, on the other, have been the subject of continuing dialogue since arbitration has become an important influence in labor relations matters.

This age-old question is not being considered in this paper. Rather, the paper focuses on the degree to which there have been discernible patterns developing in the area of subcontracting, particularly with regard to contract language, and to what extent there have been changes over time.

In assessing those developments since 1960, a review of court decisions and NLRB rulings, as well as arbitration awards, is

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[9]Crawford, *supra* note 1, at 68–69.
[10]*Id.*, at 72.

required. Court decisions are significant because of their effect on the arbitration institution, particularly since arbitrators and the parties themselves are keenly concerned with the effect external law and judicial review have on the process. With respect to the National Labor Relations Board, the deferral doctrine with respect to subcontracting also needs attention because of the close relationship established between the Board and arbitration by *Collyer.*[11] Finally, the behavior of arbitrators since 1960 is a major concern and focus of this paper, since it is important to determine if a discernible pattern has been evolving.

II. The Courts and Subcontracting—Arbitrability: Implications for Arbitration

Prior to *Warrior & Gulf,* the courts did not act consistently with regard to the determination of whether subcontracting matters were arbitrable.[12] However, it is now widely accepted that the courts will order arbitration when subcontracting questions arise between the parties. A brief review of the post-*Warrior & Gulf* situation may be instructive in this regard.

It would appear that under *Warrior & Gulf,* an action under Section 301, it was established that where a contract contains a broad arbitration clause, the court would order arbitration of subcontracting disputes even where there is no subcontracting clause in the agreement. However, it should not be overlooked that in this case the arbitration clause was unusually broad in that it covered, as arbitrable grievances, "local troubles" as well as "matters of interpretation of the contract." Thus, while the court would compel arbitration where the arbitration clause was broad, the question still remained as to what result would occur if an agreement did not contain a subcontracting clause and also did not contain a broad arbitration clause.

The early post-*Warrior & Gulf* cases left some doubt as to whether the courts would order arbitration if the conditions varied from that landmark case. In 1963, a federal district court found that no arbitration order should issue.[13] The essential

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[11] *Collyer Insulated Wire,* 192 NLRB No. 837, 77 LRRM 1931 (1971).

[12] *In re Crivelli,* 20 Misc.2d 292, 195 N.Y.Supp.2d 393, 33 LA 352 (1959); *Petroleum Workers* v. *Standard Oil Co.,* 275 F.2d 706, 45 LRRM 2843 (7th Cir. 1960); *U.S. Potash* v. *Local 1912, IAM,* 270 F.2d 496, 33 LA 127 (10th Cir. 1959); *In re A&P Co.,* 23 Misc.2d 560, 201 N.Y.S.2d 80, 34 LA 233 (1960).

[13] *Salaried Employees* v. *Westinghouse,* 217 F.Supp. 622, 53 LRRM 2204 (W.D. Pa. 1963).

facts of this case that differ from *Warrior & Gulf* are that during negotiations the union attempted to secure a subcontracting clause in the agreement, but it was rebuffed and the parties were in agreement during those negotiations that subcontracting was not an arbitral matter. Along with the above facts, the court considered the following items: (1) there was no history (past practice) of subcontracting; (2) the arbitration provision was limited to the application and interpretation of the agreement; and (3) there was no clause preventing the union from striking in a subcontracting dispute. Based upon these facts, the court found that the subcontracting dispute was not arbitrable.

Another early post-*Warrior & Gulf* court decision also rejected arbitrability. In that situation, the following facts were operable: (1) the arbitration clause was limited to interpretation and application of the agreement; (2) there was a specific clause prohibiting arbitration of "additions to the contract terms"; and (3) there was a history of unsuccessful union attempts to secure subcontracting limits on the company.[14]

But there are other later decisions with similar fact-patterns that found arbitration to be proper.[15] For example, in *IUE* v. *GE,*[16] the union had been unsuccessful in obtaining a subcontracting clause involving the employers' ability to carry on such action. Moreover, the agreement contained a provision—a zipper clause—to the effect that the agreement "intended to be a complete settlement of the bargainable issues." The Second Circuit nevertheless ruled that subcontracting was indeed arbitrable since it viewed *Warrior & Gulf* as establishing a policy regarding arbitrability that can only be overcome by a clear and express contractual provision that excludes the subject from arbitration. The court reasoned that the history of bargaining could not be used to defeat arbitration, although it stated that the arbitrator might find the bargaining history to be useful in deciding the merits of the issue or deciding what is arbitrable.

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[14]*Operating Engineers* v. *Standard Oil of Indiana,* 186 F.Supp. 895, 46 LRRM 2997 (D.C.N.D. 1960). *See also Petroleum Workers* v. *American Oil Co.,* 324 F.2d 903, 54 LRRM 2598 (7th Cir. 1963) which held that a clause over "non-covered" matters that resulted in a refusal to arbitrate eliminated the obligation to arbitrate subcontracting.

[15]*Columbia Broadcasting System,* 26 Misc.2d 972, 205 N.Y.S.2d 85, 34 LA 552 (1960); *Volunteer Electric Cooperative* v. *Gann,* 46 LRRM 3048 (1960); *P&G Ind. Union* v. *Procter & Gamble Mfg. Co.,* 195 F.Supp. 134, 48 LRRM 2446 (1961), *aff'd,* 298 F.2d 644, 49 LRRM 2555 (2d Cir. 1962); *International Telephone & Telegraph Corp.* v. *IUE,* 286 F.2d 329, 35 LA 703 (1960).

[16]332 F.2d 485, 56 LRRM 2289 (2d Cir. 1964), *cert. denied,* 379 U.S. 928 (1964).

Thus, while there were some early challenges to the Trilogy, and more specifically to *Warrior & Gulf,* it appears that the courts ultimately have taken the view that subcontracting issues are arbitrable or are for arbitrators to deal with even where there is no subcontracting clause in the agreement, provided the arbitration clause is sufficiently broad so as to give the arbitrator jurisdiction over both the procedural and substantive questions that may arise, and provided there is no express provision in the agreement barring arbitration on a subcontracting issue.

With respect to the courts' treatment of substantive subcontracting issues, the three following areas are of interest:

1. *Situations where there are subcontracting clauses in the agreement and where those clauses suggest or imply a management right to do so.* Some collective bargaining agreements mention subcontracting in a manner that suggests there is a management right to subcontract without union interference or influence. Under such agreements, assuming the language is considered to be unambiguous, arbitration may be barred. For example, in *Boilermakers* v. *Shell Oil,* [17] the union struck after it attempted to negotiate and failed to secure the employer's agreement on restrictions on subcontracting. Thereafter the employer did no more than give the union a letter promising "to give appropriate consideration to employment opportunities to employees with seniority." Moreover, the arbitration clause was limited to interpretation and application of the agreement. The Seventh Circuit found that the contract clause was evidence enough that the employer had an unlimited right to subcontract, and it denied arbitration on those grounds. The letter was deemed to be beyond the arbitration clause (see also *Petroleum Workers, supra*).

2. *Situations where there are clauses in the agreement restricting subcontracting.* In these situations, it appears that the courts treat the arbitrator's power to decide whether a particular employer is in violation of the subcontracting clause to be almost without limitation.[18] It also appears that disputes over the interpretation and

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[17] 369 F.2d 527, 63 LRRM 2173 (7th Cir. 1966).

[18] *UAW Local 157* v. *Bahr Machine Co.*, 87 LRRM 2412 (E.D. Mich. 1974), *aff'd,* 516 F.2d 901, 90 LRRM 2891 (6th Cir. 1975), construing "lack of skills or equipment"; *IUE* v. *GE,* 429 F.2d 412, 74 LRRM 2645 (1st Cir. 1970), construing "limitations or transfer of work during discussions"; *Lever Bros.* v. *Chemical Workers,* 554 F.2d 115 (4th Cir. 1976), deciding whether transfer of work to another unit was "subcontracting" requiring prior discussions "under a meet and discuss requirement"; *Local 135, Rubber Workers* v. *Dunlop Tire & Rubber,* 391 F.2d 897, 67 LRRM 2887 (2d Cir. 1968), ability of employees to perform.

application of the clause are generally considered to be an arbitrable matter and that the merits of the situation are within the arbitrator's jurisdiction and discretion.

3. *Situations where the enforcement of an arbitration award favorable to one party could result in an illegal act.* In this kind of situation, the concern of the court is whether it should order arbitration where an arbitration award could possibly result in causing one of the parties to commit an illegal act.

In one case where a hospital's laundry operations were discontinued because they were in violation of health regulations, the laundry work was subcontracted by the employer, despite the fact that there was a clause in the agreement prohibiting the subcontracting of such work.[19] The union sought to arbitrate the matter, and the employer sought court action because it claimed the continuance of the work by unit employees was illegal. The court held the issue to be arbitrable on the grounds that the arbitration award might not cause an illegal condition since improvements in the facilities could be made. Further, the court indicated that the arbitrator can consider the law in fashioning his award.

However, in another case a court refused to permit arbitration of a grievance under a contract provision allowing subcontracting "consistent with the interest which both parties have in harmonious work relationships."[20] At issue in this grievance was a prohibition on subcontracting to firms paying substandard wages. The court ruled that such an interpretation would establish conditions that would allow a violation of Section 8(e) of the Labor Management Relations Act. It also held that the question was a wage problem that was not arbitrable because of a clause in the agreement which prohibited wage arbitration matters.

On the whole, however, a pattern seems to emerge which suggests that the courts have taken the position that most subcontracting matters are arbitrable, particularly where there is a broad arbitration clause in the agreement. Even when there is no contract provision on subcontracting, the support for the arbitrator to consider the merits of the case or for the arbitrator to determine arbitrability seems to be favored. Where subcontracting clauses are in evidence in agreements, the courts also tend to favor having arbitrators decide the merits of the

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[19] *Hospital for Joint Diseases* v. *Davis*, 442 F.Supp. 1030, 97 LRRM 2330 (D.C.N.Y. 1977).
[20] *Pipefitters* v. *Kimberly Clark*, 93 LRRM 2702 (N.D. Ala. 1976).

matter unless a contract provision clearly prohibits that action.

The impact of these court decisions on arbitrators' behavior with respect to the arbitrability of subcontracting disputes is not clear. Two well-known arbitrators reported that their findings indicated that arbitrators have decided the arbitrability questions with the same consistency before and after the Trilogy.[21] Another writer suggested that the evidence shows that the Trilogy set the tone for a change in arbitrator determinations of arbitrability.[22]

It is immaterial whether the findings of one group or another are accepted, at least with respect to the position of arbitrators today. With little exception, the situation today is that arbitrators have taken the view that matters of subcontracting, whether explicitly spelled out in the agreement or not, are questions that the arbitrator may rule upon, even if the consideration is limited to the question of whether the dispute is an arbitrable matter.

III. Court Decisions and NLRB Policy Concerning the Duty to Bargain in Subcontracting Disputes: Implications for Arbitration

The bellwether case controlling the policy in this area is *Fibreboard.*[23] In *Fibreboard,* the court found that an employer had an obligation to bargain prior to subcontracting, despite the fact that the subcontracting was for economic reasons rather than because of any anti-union bias. The decision also required that bargaining be carried to impasse. This case is indeed significant, but it must be emphasized that it was restricted to its own facts, which included the following conditions: (1) The subcontracting did not alter the basic operation of the business. (2) The subcontracting occurred in the plant under situations which were similar to those that prevailed prior to the subcontracting. (3) Employee jobs were eliminated and were taken over by the

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[21]Dash, *Arbitration of Subcontracting Disputes,* 16 Ind. & Lab. Rel. Rev. 210 (1963); Greenbaum, *Arbitration of Subcontracting Disputes,* 16 Ind. & Lab. Rel. Rev. 223 (1963).

[22]McEachem, *The Arbitration of Subcontracting Disputes,* 19 Me. L. Rev. 62 (1967). McEachem found that in the five years before 1960, arbitrators decided in only seven instances out of 19 that subcontracting disputes, where the contract was silent, were arbitrable. He found that in the six years after 1960, arbitrators ruled the same kind of disputes to be arbitrable in 19 out of 26 instances. In addition, the arbitrators cited the Trilogy in 14 of the 19 cases as authority for so deciding. The inference to be drawn was that the Trilogy altered arbitrators' thinking with regard to the arbitrability question.

[23]*Supra* note 7.

subcontractor's employees. (4) The reasons for the subcontracting were related to the costs of labor, which might have been adjusted by negotiation with the union, thereby avoiding the need to subcontract. (5) The employer was still in the same business-risk situation under the subcontracting because the subcontracting was done on a cost-plus basis.

After *Fibreboard,* the question remained whether the holding in that case would be applicable to other situations where some of the *Fibreboard* facts were not present. In *NLRB* v. *Adams Dairy,*[24] the Eighth Circuit ruled that while subcontracting involved a major change in operations, the employer was not obliged to bargain prior to its decision to subcontract. In this case the employee milk distributors, who worked on a commission basis, were replaced by subcontractors who bought milk at the dairy and sold it as individual contractors. While it may appear that the decision in this case differs significantly from *Fibreboard,* it should be noted that although there was no obligation to bargain on the subcontracting itself, there still may be an obligation to bargain the effects the subcontracting might have on unit employees. The courts seemed unwilling to overlook the detrimental effect the subcontracting may inflict on the bargaining unit. In this connection, it must be observed that *Standard Handkerchief*[25] is an example. It was ruled in this case that the employer was required to bargain regarding the effects that the transfer of work from one bargaining unit to another had on employees in the original unit.

Two important decisions indicate that an employer's intent to subcontract requires the employer to notify the union of that intent.[26] In addition, it has been found that such notice should be given prior to the actual implementation of the subcontracting decision.[27] Finally, it appears that the courts require that the notice normally should be given prior to the finalization of the decision to subcontract.[28] Closely allied to the above area is the

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[24]350 F.2d 108, 50 LRRM 2084 (8th Cir. 1965), *cert. denied,* 382 U.S. 1011, 61 LRRM 2192 (1966).

[25]*Standard Handkerchief Co.* v. *Ladies Neckwear Workers, Local 142,* 151 NLRB No. 15, 58 LRRM 1339 (1965).

[26]*Transmarine Navigation,* 152 NLRB No. 107, 59 LRRM 1232 (1965); *Weltronic Co.* v. *NLRB,* 419 F.2d 1120, 73 LRRM 2014 (6th Cir. 1969), *cert. denied,* 398 U.S. 938, 74 LRRM 2268 (1970).

[27]*See Swack Iron & Steel,* 146 NLRB No. 1068, 56 LRRM 1024 (1964).

[28]*NLRB* v. *Johnson* (Carmichael Floor Covering), 155 NLRB No. 54, 60 LRRM 1394 (1965), *aff'd,* 368 F.2d 549, 63 LRRM 2331 (9th Cir. 1966); *Transmarine Navigation, supra* note 26.

question of whether the employer is required to respond to a reasonable union request for information. The courts have answered affirmatively, although the determination of what is a reasonable request is still in doubt. Along this same line, there is authority which suggests that where the union has become aware of the employer's subcontracting, despite the employer's failure to notify the union of such subcontracting, the employer may not be considered to have refused to bargain.[29]

For the employer's subcontracting decision to require bargaining, the key appears to be that it is necessary to show that the subcontracting has caused a "significant detriment" to the unit employees. And what constitutes a "significant detriment" has produced the largest body of litigation. Thus, while *Fibreboard* settled the question (that there was a significant detriment) when there has been an abolition of jobs of a whole class of unit employees, it did not decide whether the loss of overtime, denial of new jobs, or restriction on wages or bonus could constitute such detriment.[30] The following section deals with a review of cases dealing with these kinds of questions.

In *Kennecott Copper Corporation,*[31] the NLRB ruled that the mere possibility that greater overtime would have been available but for subcontracting does not establish that there is a significant detriment. In *Kennecott,* a machine had to be rebuilt once a year. In prior years, the in-house maintenance crews had done the work. The Board ruled that since no employees were laid off due to the subcontracting, since it was a rare and short-term project, and since the need for overtime that would have been required on the project was undefined, no prior bargaining was required. The same kind of reasoning was applied to *District 50 UMW* v. *NLRB.*[32] In addition, it was found in *General Tube Company*[33] that a small loss of overtime, even if proven, does not constitute a significant detriment so as to require bargaining.

However, where a union can prove that the subcontracting

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[29]*NLRB* v. *Spun Jee Corp.*, 385 F.2d 379, 66 LRRM 2485 (2d Cir. 1967).

[30]*Puerto Rico Telephone Co.*, 149 NLRB No. 184, 57 LRRM 1397 (1964), *enforcement denied in part,* 359 F.2d 983, 62 LRRM 2069 (1st Cir. 1966); *District 50, UMW* v. *NLRB,* 358 F.2d 234, 61 LRRM 2632 (4th Cir. 1966); *Cities Service Oil,* 158 NLRB No. 120, 62 LRRM 1175 (1966); *NLRB* v. *King Radio Corp.*, 416 F.2d 569, 72 LRRM 2245 (10th Cir. 1969).

[31]*Kennecott Copper Corp.* v. *IAM,* 148 NLRB No. 169, 157 LRRM 1217 (1964).

[32]*Supra* note 30.

[33]151 NLRB No. 850, 58 LRRM 1496 (1965).

has resulted in a significant loss of overtime pay, the Board has required prior bargaining. In *Cities Service Oil,*[34] the work of employee truckers was subcontracted to independent distributors, and such a transfer of work cost a group of employees an average of about $400 in overtime pay.

In this same vein, both the Board and the courts have found that there is a significant detriment when there is a loss of unit jobs. For example, in *NLRB* v. *C.H. Sprague & Sons,*[35] an oil distributor had a history of hiring winter truckers. When it changed to hiring primarily independent contractors, the Board found that the company had a duty to bargain. The District of Columbia circuit court went even further than the Board. In *NLRB* v. *UAW* (General Motors Corp.),[36] the court ruled that a change in the procedure of shipping cars resulting in the loss of only six jobs was indeed a significant detriment.

It can thus be seen from the above actions that both the courts and the NLRB used as a test in requiring bargaining the concept of "significant detriment" to unit employees. The test criterion that appears to have been the most influential in the Board's reasoning is the degree to which (how significantly) the subcontracting has adversely affected the employees. In addition to this test, other factors considered by the courts and the Board are: "departure from past practice, in kind or degree; a change in conditions of employment, or significant impairment to job tenure, employment security, or reasonably anticipated work opportunities. . . ."[37]

The importance of this section on the arbitration process cannot be minimized. Although the focus is on the duty to bargain, the reasoning and effects of the court and NLRB decisions are important for arbitrators and the parties to consider. For although there is no uniform labor policy that is readily transferable from the public jurisdictions of the court and the Board, arbitration is unlikely to operate without regard to the thread of reasoning that prevails in these forums. This consideration becomes more significant when the deferral policy of the NLRB is considered.

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[34]*Supra* note 30.
[35]428 F.2d 938, 74 LRRM 2641 (2d Cir. 1970).
[36]381 F.2d 265, 65 LRRM 2489, *cert. denied,* 389 U.S. 857 (1967).
[37]Feldesman, *How Issues of Subcontracting and Plant Removal Are Handled by the National Labor Relations Board,* 19 Ind. & Lab. Rel. Rev. 260 (1966).

IV. Deferral of Subcontracting Disputes to Arbitration

It was not until *Collyer*[38] that the NLRB would defer subcontracting disputes to arbitration. In cases prior to *Collyer,* there is a strong indication that the Board was reluctant to defer these kinds of disputes to arbitration.[39] Apparently the Board felt at that time that if there was some doubt as to whether the question was an arbitrable matter, it would use its discretionary powers to retain jurisdiction. For example, in *Puerto Rico Telephone,* the Board stated:

> ". . . the Board frequently has declined to exercise jurisdiction where a dispute had been or could have been submitted to arbitration, but the Board's declaration in these cases was purely discretionary. In this case withdrawal of jurisdiction was not warranted in the face of the company's resistance to arbitration and in view of the existence of a dispute as to whether a certain grievance step unilaterally could be invoked by a party to a contract."[40]

After *Collyer* set the stage for deferral on subcontracting questions (among others), uncertainty remained as to how the Board would handle such questions in situations where there was no subcontracting clause in the agreement or where there was such a provision present in the contract. In *Bethlehem Steel,* the Board firmly established a policy to defer on subcontracting disputes.[41] In *Titus Ford Sales,* the issue involved work transfer, and there was a weak clause in the agreement with regard to the limitations on subcontracting; again the Board deferred to arbitration.[42] Also, in *Western Electric,*[43] the Board deferred to arbitration since it felt that the arbitration clause was sufficiently broad to handle the dispute in that forum.

It should be noted that the *Roy Robinson, Inc.*[44] limitation on the Board deferral doctrine does not at this juncture affect the subcontracting area since that case involved Sections 8(a)(1) and 8(a)(3) issues dealing with individual rights (discipline and discharge matters), whereas subcontracting matters are usually

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[38]*Collyer Insulated Wire, supra* note 11.
[39]*Puerto Rico Telephone Co., supra* note 30; *Adelsons Inc.* (Food Fair), 163 NLRB No. 365, 64 LRRM 1364 (1967).
[40]*Puerto Rico Telephone Co.,* supra note. 30.
[41]*Bethlehem Steel Corp.,* 197 NLRB No. 121, 80 LRRM 1417 (1972).
[42]*Titus Will Ford Sales,* 197 NLRB No. 4, 80 LRRM 1289 (1972).
[43]*Western Electric, Inc.,* 199 NLRB No. 49, 81 LRRM 1615 (1972).
[44]228 NLRB No. 103, 94 LRRM 147 (1977).

viewed as Section 8(a)(5) kinds of issues that are indeed still within the deferral policy.

It is fair to say that the view of the Board since *Bethlehem Steel* is that, if a contractual arbitration provision is sufficiently broad for federal and state courts to order arbitration, acting under Section 301 of the Taft-Hartley Act, the Board will also defer to the arbitral forum. And as the earlier analysis of Section 301 situations shows, it is likely that, absent an express contractual authority to management to subcontract, or absent the express recognition in the agreement that the employer has such a right, the Board will more than likely defer to arbitration.

It is important for arbitrators and the parties to be aware of the above position of the Board since it probably will defer such matters to arbitration with the Board retaining jurisdiction pending the results of the arbitrator's award. However, on review, the Board must be satisfied that the arbitrator's award is not repugnant to the Act—nor contrary to what the Board's final disposition of the matter would have been if it had decided the case. Thus, the criteria or tests relied upon by the courts and the Board are indeed significant factors that must be considered by the parties and the arbitrators. Again, it must be emphasized that, although the arbitral forum is a private one—at least in the private sector, public policy implications cannot be avoided. The subcontracting area is no exception.

V. The Development of Arbitration Decisions in Subcontracting Disputes: An Analysis

Development in Situations Where the Contract Is Silent

Situations of this kind have been studied and researched with greater frequency than any other area of subcontracting. Starting with studies by Dash,[45] the area has been analyzed in later time periods by Greenbaum,[46] Wallen,[47] and others.[48] Further,

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[45]Dash's first study was part of his decision in the now famous *Celanese* case, *supra* note 5. He later wrote a paper expanding on the *Celanese* decision. *See* Dash, *supra* note 21, at 208–15.

[46]Greenbaum did a companion study updating the case analysis done by Dash. While Dash's study covered published BNA cases from 1947 to 1959, Greenbaum studied cases from 1959 to 1962. *See* Greenbaum, *supra* note 21, at 221–34.

[47]Wallen, with the aid of Marcia Greenbaum, updated the previous studies by analyzing cases from 1962 to 1965. *See* Wallen, *supra* note 3, at 265–71.

[48]Edwin H. Jacobs, *Subcontracting Arbitration: How the Issues Are Decided,* 21 Cleveland St. L. Rev. 163 (1972) (Jacobs analyzed decisions issued from 1968 to 1971).

several arbitrators in their decisions have traced the reasoning of their colleagues in this area with meticulous care.[49] Thus, there has been a wealth of studies, and therefore it is not surprising that the criteria relied upon by arbitrators in deciding cases in this area are relatively well-defined as well as being relatively numerous.

While the making of a laundry list is always somewhat risky because someone's favorite may be omitted, this writer has found the following considerations to be those that are most frequently considered by arbitrators when they examine the merits of a subcontracting dispute in cases where the labor agreement does not contain a subcontracting clause:

1. The discussion or treatment, if any, of the subject of subcontracting during contract negotiations.
2. The "good faith" of the employer in subcontracting the work. (Was the decision to subcontract motivated by anti-union bias? Was it designed to discriminate against the union?)
3. Any layoffs resulting from subcontracting. (Were regular employees deprived of work?)
4. The effect or impact that subcontracting will have on the union and/or bargaining unit. (Was the required work part of the main operation of the plant?)
5. Possession by the company of the proper equipment, tools, or facilities to perform the required work.
6. Was the required work an experiment into a specialty line?
7. Any compelling business reasons, economic considerations, or unusual circumstances justifying the subcontracting. (Was the work subcontracted out performed at a substantially lower cost?)
8. Any special skills, experience, or techniques required to perform the required work.
9. The similarity of the required work to the work regularly performed by bargaining-unit employees.
10. Past practice in the plant with respect to subcontracting this type of work.
11. The existence of any emergency conditions. (Were properly qualified bargaining-unit employees available to complete the work within the required time limits?)

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[49] *See Diebold Inc.*, 42 LA 536 (1964); *KVP Sutherland Paper Co.*, 40 LA 737 (1963).

12. Was the required work included within the duties specified for a particular job classification?[50]

Despite the reliance on a relatively uniform set of criteria, arbitrators are not entirely predictable in their decisions in this area. If they were, such cases would not have to be advanced to arbitration. The logical question then is: Why, if the criteria are relatively well established and generally known, do decisions vary? The answer is indeed simple and logical. The criteria are simply the guidelines relied upon by the arbitrator, but the facts of each case (or the stuff to be analyzed) within the framework are bound to vary from case to case. Moreover, the criteria are applied in varying combinations from case to case, and the balancing of one set of combinations against another makes it possible for a different result to emerge. Another factor to be appreciated is that different arbitrators will assign different weights to each criterion or each combination of the criteria.

Thus, the arbitrator is balancing criteria and/or combinations of criteria against each other within a given fact pattern that is presented. Saul Wallen called it the balancing of rights and responsibilities.[51] It might be analogous to a discipline or discharge situation where the arbitrator is weighing the equities of the situation within that often-noted framework first developed by Daugherty.[52]

Perhaps the best summary of what has occurred in this area and what may be expected to continue was made by Wallen:

> "In sum, then, the predominant approach to subcontracting by arbitrators in cases where the contract is silent on the subject appears to involve application of the implied-obligations approach. But the obligation is not to refrain from innovation or change if they have a limited impact on jobs. It is to avoid unreasonable reductions in the scope of the unit and to refrain from nullifying the terms of the contract by means of the contracting-out device. Much more often than not, contracting out is upheld."[53]

Before concluding in the area, one interesting possibility needs mention. In *Mead Corp.*,[54] the arbitrator found that the company had violated the recognition clause and the wage provision of the agreement. But more important is the fact that he

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[50]*Diebold Inc., supra* note 49, at 543, and *Harris Sergbold Co.*, 62 LA 421, at 428 (1974).
[51]Wallen, *supra* note 3, at 266.
[52]*Grief Brothers Cooperage Corp.*, 42 LA 555 (1964).
[53]Wallen, *supra* note 3, at 271.
[54]62 LA 1001 (1973).

noted that he felt the case had been "Collyerized." In the original union petition to the NLRB, it was claimed that the company had failed to discuss the proposed subcontracting. Thus, the duty to bargain à la *Fibreboard* was the question at that time. However, it is not clear that the Board ever acted in the case. The company claimed that it did and dismissed the charge; the union contended that it withdrew the claim with Board approval and proceeded to arbitration. The arbitrator felt it was a *Collyer* deferral question, but there is no evidence that the Board acted in such a manner, nor is there evidence that it retained jurisdiction. In this case, the decision was predicated upon what was perceived to be contract violations. However, the case poses some interesting questions. Does a deferral action influence the arbitrator's decision even though he decides the issue as a contract question? In other words, would the arbitrator decide on a violation of a recognition or wage clause any differently if a case were not "Collyerized"? If the answer to that question is affirmative, then it might be to a union's advantage to first seek an NLRB action and then rely on a deferral to arbitration where the arbitrator might be influenced by the specter of the Board looking over his shoulder. The assumption underlying all of this behavior is that the Board criteria are much more favorable to the union—an inference not clearly supported at this time.

In summary, it may be said that there has not been any significant change in this part of the "old battle ground" since 1960 except for, perhaps, the deferral question.

The Development of Subcontracting Clauses in Labor Agreements

Of major concern in this paper is the development of subcontracting clauses in labor agreements and what impact these developments have on the arbitration of such disputes. Studies by the Bureau of Labor Statistics (BLS) and The Bureau of National Affairs, Inc. (BNA), demonstrate that the development of subcontracting clauses limiting the rights of management in agreements has been substantial over the years.

As can be observed from Table 1, the major breakthrough for unions in securing such clauses occurred between 1959 and 1966, and while the penetration continues in the 1970s, the rate has slowed considerably. Many factors may account for the change in the growth rate. The economic conditions may have been better for both parties in the early sixties for such clauses

TABLE 1
Limitations on Subcontracting

	Year			
	1959	1965–66	1974[a]	1975[a]
Total number of agreements surveyed	1,687	1,823	1,550	1,514
Number of workers (in thousands)	7,477.3	7,339.2	7,218.0	7,069.8
Subcontracting Limitations				
Number of agreements	378	801	821	815
Number of workers (in thousands)	2,558.0	4,464.4	4,720.5	4,819.0
Percent of agreements	34	61	65	68
Percent of workers	22.4	44	53	54

[a]Agreements for these years include only those covering 1000 or more workers.
Source: U.S. Department of Labor, Bureau of Labor Statistics, Bull. Nos. 1957 (1977) and 1888 (1975).

to be agreed to. By contrast, managements' desire to curtail costs may have caused them to be more cautious in this area in the seventies. In addition, the marginal concept may be working in recent times; that is, the unions were able to make inroads in the major agreements, and the ability to secure such clauses in other agreements becomes increasingly difficult. Finally, there are some indications that management bargaining posture in recent years has become more aggressive, being called "take-away bargaining" or other such names. If that assumption is correct, then the subcontracting-limitations area would appear a prime target for employers.

The BLS data are indeed helpful in highlighting the changes, and the BNA survey adds some support to those findings as well as providing some further refinements. The BNA study is taken from a sample of 400 contracts.[55] These data reveal that all types of subcontracting clauses found in the agreements within its sample increased from 25 percent in 1965 to 44 percent in 1978. The increase reported by BNA is not as dramatic as that re-

[55]All of the following data are taken from BNA sources: Basic Patterns in Union Contracts, 8th ed. (May 1975); *Basic Patterns: Management and Union Rights,* in Collective Bargaining Negotiations and Contracts, Vol. 879, 65:1–6.

ported by BLS, but nevertheless the increase is significant and reflects the same trend results. It is interesting that the slowdown indicated in the BLS study is also apparent in the BNA study since the number of contracts containing limitations on subcontracting reported by BNA was 35 percent in 1970 and increased to only 40 percent by 1975.

BNA also classifies the type of subcontracting limitations, at least in the latter years. In 1975, 43 percent of the agreements required consultation with the union prior to subcontracting, whereas the figure was 27 percent in 1978. Another kind of subcontracting clause reported is the situation where there is a prohibition if a layoff would result from the action. In 1975 the percentage of surveyed contracts containing such clauses was 26, and in 1978 the percentage had dropped to 22. Necessary skills and equipment is another category in the BNA surveys. In 1975, companies were restricted to subcontracting only if they lacked these factors in 26 percent of the agreements; in 1978 the percentage was down to 22. In 1975, BNA reported that about 20 percent of the agreements contained a clause to the effect that it was company policy to use skilled workers in the bargaining unit for maintenance and construction jobs. Two new categories were reported in 1978: (1) total prohibitions on subcontracting, 2 percent; and (2) contracting out in accordance with past practice, 18 percent.

The BNA surveys also dealt with industry patterns. The 1975 survey indicated that manufacturing agreements contained some kind of limitation in the area of subcontracting 38 percent of the time, and in 1978 it was 39 percent of the time. In nonmanufacturing, the figures for those same years were 45 and 52 percent, respectively. The percentage of language limitations for construction agreements rose from 83 to 93 percent during that time period, and in the apparel area it decreased from 89 to 67 percent.

Some summary conclusions are merited from the above data. While contract clauses limiting management's right to subcontract have increased over the years, their rate of increase has slowed considerably in the recent past. The "meet and discuss" types of clauses are the most prevalent, and they, too, are decreasing in number, while the outright-restriction-type clauses are almost nonexistent. Next in importance are restrictions where layoff would occur if there were a subcontracting action. They, too, are tapering off in number. Finally, subcontracting

restrictions are far more prevalent in the construction trades and are least prevalent in manufacturing. Perhaps it is important to note than an exception to these patterns is the steel industry which has long had a history of elaborate restricting language.

These data show that while arbitrators must certainly deal with contract interpretation questions in this area as well as with the vagaries of language ambiguities, the bulk of the subcontracting cases that probably will still be of major concern are those involving cases where the agreement contains no provision on subcontracting. Despite the continued predominance of the silent-agreement cases, some consideration of arbitral behavior in the area of contract clauses is appropriate.

Arbitration Decisions in Situations Where There Is a Contract Provision

Meet-and-Discuss Type of Limitation. In *Kaiser Foundation Hospitals,*[56] the arbitrator was confronted with a situation where the contract required that the employer give the union a 30-day notice of its intention to subcontract. On eight separate occasions, the hospital failed to do so. The arbitrator was asked to decide whether the employer's failure to notify the union was a violation of the agreement. He found that it indeed was, but the remaining question was what the remedy might be. Essentially, the arbitrator reasoned that the notice was a condition precedent to subcontracting, and if that condition were met, then the balancing factors with regard to the subcontracting decision itself would determine whether a remedy was in order and what such a remedy would be. Alternatively, if the condition precedent were not met (the 30-day notice), then again the remedy would depend on the balancing of management responsibilities against union rights. His words on this question were as follows:

> "In effect, this is a definite restriction on the right of the Hospital to subcontract work. Unless this condition precedent shall have been fulfilled, there is no contractual right to subcontract work. If the required thirty day notification is given, and because there are no other restrictions against the subcontracting of work in the contract, then the criteria and standards generally applicable to the various aspects of subcontracting become applicable to any work subcon-

[56] 61 LA 1008 (1973).

> tracted by the Hospital. If, on the other hand, this condition precedent is not fulfilled the subcontracting of work by the Hospital constitutes a breach of the contract."[57]

In this case, the arbitrator found management's rights to be prevailing on one occasion and the union's rights to be violated on another.

In *Indian Head Inc.*,[58] there was a similar clause in the agreement requiring management to meet and confer with the union prior to subcontracting. The company in this case conceded that it did not meet and discuss the subcontracting matter with the union prior to resorting to subcontracting. Given those events, the arbitrator focused on what he considered the sole question —remedy. He reasoned that if the discussions would have proved futile, then there would not have been any restriction on management's decision to subcontract. But the dicta offered by the arbitrator indicate that he may not be so willing to accept that thesis. He ultimately went on to rule for the union and awarded pay to the aggrieved unit employees because of the company's breach of the meet-and-discuss provision.

In another case, *Grain Processing Corp.*,[59] the arbitrator reasoned that there should not be a remedy for the union where an employer did not notify the union before subcontracting because the contract did not authorize the arbitrator to penalize the employer for such a required-notice breach. In *Kimberly Clark*,[60] another factor came into play in this area of meet-and-confer. Although this was not the focal point of the decision, the union argued that it did not receive from the company the data regarding the subcontracting decision and that such information was essential for the union to make an informed judgment on whether to contest the action. The arbitrator ruled that there was no such requirement, although he predicated that answer on the fact that he requested the data to be turned over to him and, after examining the information, concluded that it would not alter the decision.

Indeed, some interesting questions arise in this area. Is the "meet and discuss" provision merely a condition precedent to the actual subcontracting? If so, is management still required

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[57] *Id.*, at 1012.
[58] 65 LA 703 (1975).
[59] 65 LA 431 (1975).
[60] 69-2 ARB 4966 (1969).

under an implied-obligation theory to justify its subcontracting decision? Alternatively, has the union waived its right to challenge the management subcontracting decision by agreeing to a "meet and discuss" provision? If arbitrators are to take the former view, management may argue that the "meet and discuss" provision is a further limitation than the implied obligation, and for a company to agree to such a clause *in addition to* the implied-obligation concept is a penalty to which it would not agree if it knew beforehand that the other constraints were to remain. The unions, on the other hand, could argue that if the "meet and discuss" clause cancels out the implied obligation, it is a meaningless clause since all management would be required to do is discuss the matter until it reaches a stage of futility.

There is support for both positions. For example, it might be argued that the primary purpose of the "meet and confer" clause is to allow the union an opportunity to persuade management to accede to the union's arguments. Proponents of the continued effect of the implied-obligation concept argue that, after the condition precedent of the meeting and discussing is met, the arbitrator might limit management's action only if it causes a "serious detriment" to the unit.

It would appear that the predominant view is that the "meet and discuss" clause absolves management of any further obligation, but there is a hint of evidence to the contrary.

The Significance of the Recognition Clause When There Is Also a Subcontracting Clause. Two recent cases are examples of contracts with weak subcontracting clauses, which added up to an affirmation by the companies in question that they would make every effort not to subcontract work that was normally performed by the regular employees. In the earlier case, *Sealtest Foods,*[61] the arbitrator indicated that the subcontracting clause required "good faith" efforts by the company. He did not specifically repudiate the recognition clause, but he chose to treat the issue as if the contract were "silent" on the subcontracting question, thus basing his decision on the residual-rights–implied-obligation concept. In *Ethyl Visqueen,*[62] the arbitrator specifically stated that the controlling clause was the subcontracting provision, and all other provisions relied upon by the union were not germane to the issue.

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[61]48 LA 797 (1966).
[62]73-2 ARB 4266 (1973).

From these cases, which reflect the view in this area, it seems clear that the reliance on recognition, seniority, and other such clauses is not persuasive to arbitrators where there is a weak subcontracting clause in the agreement. In all probability, the arbitrator will go with the implied-obligation–residual-rights balancing arguments to determine the issue.

Clause Restricting Subcontracting Where Parts and Products Are Customarily Made by Unit Employees. Generally speaking, arbitrators confronted with a clause restricting management from subcontracting for work involving the production of parts and equipment normally made by unit employees will hold for the union if there is a significant detriment to the unit. A case that perhaps typifies this position is *Consolidated Aluminum Co.*[63] However, in this case the arbitrator went further; he not only determined that the subcontracting was a significant detriment in that it was a clear and present danger to the unit, but that it *potentially* could affect the future of the unit. The last aspect of his decision presents some fascinating questions that will be considered shortly. However, it is interesting to note that in another case, *Iowa Manufacturing Co.*,[64] the arbitrator determined that the purchase of stock parts from a supplier was not a subcontracting violation. He so held despite the fact that the contract prohibited subcontracting where employees were on layoff and the work subcontracted was work they normally performed. The arbitrator reasoned that such purchases were not subcontracting since they were ready-made stock parts in a catalogue, and thus there was no deprivation of work.

Although the cases analyzed are but two, they are of recent vintage and thus may yield some interesting insights. While most arbitrators would seem to apply the balancing test that has so often been referred to in this paper, in *Consolidated* the arbitrator took the opportunity to speculate on the possible future effects on the unit. That might be stretching the point, although the possibility of "creeping changes" (small incremental increases in subcontracting occurring over a protracted period of time) should not be ignored. It seems that, even in the face of the "creeping change" problem, the question of detriment to the unit cannot be answered until the actual fact is clearly a present danger as opposed to a future possibility. The other

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[63]66 LA 1172 (1976).
[64]68 LA 603 (1977).

case offers some interesting thoughts in that it treated the purchase of parts that were standard and premade as "nonwork."

These two mutations from what one would generally expect in this area serve notice that there is always the possibility of surprise in arbitration and the results are not entirely predictable.

Clause Restricting Subcontracting Except Where the Company Lacks the Equipment and Facilities. The consensus seems to be that companies are restricted under such clauses to subcontracting only in instances where they lack the equipment or facilities to do the work. A challenging idea was offered by the arbitrator in *Ashland Chemicals Co.*[65] In this case the arbitrator concluded that the company was prohibited from subcontracting even if it were required to rent part of the equipment and to train the affected employees in the operation of such equipment. In two other cases, the arbitrators ruled that if there were a gross uneconomic effect on the company, it could subcontract, notwithstanding a clause limiting subcontracting, unless there was a lack of equipment and facilities. In *Weyerhaeuser Co.*,[66] the arbitrator allowed the company to subcontract the dismantling and removal of equipment it sold to the subcontractor because, in his judgment, this was not a serious detriment to the unit. In this case no employees were laid off as a result of the subcontracting, past practice supported the company action, and the economic savings were substantial. The arbitrator concluded that all of these factors made the company action reasonable. But it should be kept in mind that the subcontracting clause was not a strong limiting factor. Perhaps the words of that clause would be helpful:

> "It is not the policy of the Company to subcontract work which is normally performed by employees in each bargaining unit covered by this Agreement so long as there is appropriate equipment, skills, necessary time and qualified employees to perform such work. If the Company determines that such work will be sub-contracted, the appropriate Union committee will be notified in writing as soon in advance as practical of the nature of the work and the reasons for subcontracting."[67]

In *Lehigh Portland Cement Co.*,[68] Crawford made the point that commercial impracticability as opposed to simple savings could mitigate against limiting the company's right to subcontract.

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[65] 64 LA 1245 (1975).
[66] 68 LA 7 (1976).
[67] *Id.*, at 9.
[68] 49 LA 973 (1967).

Clause Restricting Subcontracting Where the Work Is Normally Performed by Unit Employees. Several questions arise in this area. Does work "normally performed by unit employees" include work of a similar nature but of a far greater magnitude than that which was previously performed? In *Merck, Sharp and Dohme,*[69] the arbitrator ruled that it does not. He reasoned that the phrase referred to all of the significant aspects of past work and was not to be applied in terms of abilities and skills of the employees.

Full-employment and overtime questions also arise in these situations. In *Ideal Electric & Mfg. Co.,*[70] the contract provided that subcontracting could not occur if the employees were not fully employed. The arbitrator decided that the contract did not intend that full employment include overtime. In his view, the effect of the subcontracting on the employees' ability to work their customary work load was all that was required and that the offering of overtime prior to subcontracting was not required.

In another case, *Buhr Machine Tool Corp.,*[71] it was decided that the company did violate the agreement by subcontracting where the employees were available for further overtime. While there were also attritions in the unit, the arbitrator reasoned that the employees on the job could have worked additional overtime, and he ordered that they be compensated for the overtime they would have worked. Perhaps it is unfair to premise the analysis here only on the overtime question since the arbitrator based a great deal of his decision on the fact that the unit was devastated by subcontracting, and he ordered a host of employees reinstated to return the unit to its original size. Nevertheless, the overtime question was addressed in a straightforward manner, and the company was found to have an obligation in this area. In *Goodyear Atomic Corp.,*[72] the arbitrator also found a company violation when it did not provide overtime to unit employees where the contract provided that the employer was to "fully utilize" all of its employees prior to subcontracting.

Other awards appear to rule differently from those mentioned above, although they do not specifically so state.[73]

The question of overtime also arises in situations where time

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[69]44 LA 262 (1965).
[70]67 LA 227 (1976).
[71]61 LA 333 (1963).
[72]66 LA 598 (1976).
[73]*Weyerhaeuser Corp., supra* note 66; *Ideal Electric, supra* note 70; *Mobil Oil Co.,* 72-2 ARB 8483 (1972).

pressure prohibits doing the job in-house. The salient question in such cases is whether the employer may subcontract the entire job or only that portion that can be accomplished by working the employees on overtime. *Consolidated Aluminum, supra,* indicates that only the excess may be subcontracted. However, the *Alpha Portland Cement*[74] decision appears to support the opposite view. In that case, however, the employer was faced with a time constraint in that he had to produce safety guards for equipment as a result of a government-imposed requirement; and, moreover, the employees were already on an overtime basis. A final factor influencing the arbitrator was the past practice.

Clause Restricting the Subcontracting Where the Subcontractor May Do the Work More Efficiently. In *Keene Corp.*,[75] the arbitrator ruled that the company could subcontract work to an outside guard rather than giving it to a unit employee because the outside guard could do the job more efficiently; the unit employee was transferred to another job in the production unit. The arbitrator reasoned that there was no intent to destroy the unit. The controlling contract language was as follows: "The purpose of this article is to insure that members of the nonbargaining unit do not perform work normally done by bargaining unit employees and thus eliminate the need for the services of such employees." To put it mildly, this writer finds that decision to be contrary to what might normally be expected.

Summary

From the brief analysis of the above awards, which admittedly are but a sampling of what may have been determined, it can be seen that there is no uniform treatment of the subcontracting question where the contract contains language dealing with subcontracting. Perhaps the real factor contributing to the apparent disparity is the fact that the contract language, for the most part, falls into categories (1), (3), and (4) cited by Crawford.[76] It must be recalled that these voice rather weak subcontracting limitation clauses that contain value-laden words and phrases. Because of the uncertainties over the meaning of these words and phrases, it might be said that subcontracting clauses of these

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[74]63 LA 1143 (1974).
[75]63 LA 798 (1974).
[76]*Supra* note 1.

types are mere extensions of the implied-obligations theory. Arbitrator Roumell made this point in *The City of Detroit.*[77] Perhaps the parties themselves have negotiated these types of clauses because they are more comfortable knowing that any problems arising in such situations will be decided by arbitrators who will apply the balancing criteria of the implied-obligations theory to the particular facts—and with fairness and integrity.

VI. The Public Sector

An analysis of the public sector indeed warrants more space and time than it is afforded here. Nevertheless, any treatment of the subcontracting subject requires some attention to the public sector. It is well known that the similarities between public- and private-sector grievance handling are great, but it is also widely accepted that there are differences that cannot go unnoticed. Because of a variety of state laws that are not uniform, the public sector creates some noticeable distinctions; and the fact that the arbitral forum in the public sector is not necessarily private creates some real discrepancies.

One of the most interesting current developments in the public sector stems from *Westchester County CSEA* v. *Cimino,* which was decided in July 1978.[78] A thorough analysis of the case was reported in the December 1978 issue of the *Labor Law Journal.*[79] In that situation the county provided watchman services using both its own employees and those of a private contractor; the county's employees were unionized and were covered by the Taylor Act. The county abolished the jobs of its employees for budgetary reasons and authorized competitive bidding from outside contractors for the work in question. The union did not negotiate, nor did it contest the employer's actions. Two charges were brought against the county. First, it was alleged that the subcontracting was nothing but a facade, and thus the employees of the private contractor should be considered employees of the public employer. Second was the allegation that the state constitution prohibited a private contractor's employees from providing governmental services. The court rejected both arguments in

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[77] *City of Detroit & Teamsters, Local 214,* Industrial Relations Service Bureau, Inc. (1976).
[78] 44 N.Y.2d 985, 58 A.D.2d 869 (1978).
[79] John H. Galligan and Irving H. Sabghir, *Subcontracting and Obligation to Bargain under New York's Taylor Act,* 29 Lab. Law J. 771-78 (1978).

sustaining the county. However, a significant aspect of this case is that there was no argument made under, nor any consideration given to, the Taylor Law. That act provides that the employer is required to bargain in good faith over the terms and conditions of employment. Thus, it is not unreasonable to conclude that the subcontracting in question could fall under that statutory requirement. But the issue—the duty to bargain the subcontracting under the Taylor Law—was not raised and therefore was not considered by the court.

It might be argued that this case has altered the subcontracting question in the public sector. That might very well be the case if the question is resolved outside the labor relations framework. However, if it is considered within the labor relations framework, the result should not be any different than before this case was considered. Yet the uncertainties with respect to subcontracting in the public sector, even within the labor relations framework, are indeed great.

Let us take the case of a state jurisdiction where the subcontracting is a bargainable matter; yet it is a permissive rather than a mandatory subject of bargaining. In such a case, a union would be hard pressed to be able to secure the public employer's agreement even to negotiate the matter, and if such agreement were achieved and the matter was referred to an interest arbitrator as an impasse issue, it is highly unlikely that the neutral would grant the union's request to limit the employer's rights in this area.

If one were to take the matter one step further, the impact is even more problematical. Suppose a grievance under the agreement which was negotiated under the above circumstances were advanced to arbitration by the union. In all probability, the grievance arbitrator would not be sympathetic to the union. Factors influencing the result include the following: (1) there is another (or other) state statute[s] granting the public employer the right to subcontract; (2) the subject is a permissible bargaining item that does not oblige the employer even to discuss the matter; (3) there was a bargaining attempt by the union to secure a limitation on the employer's right and it was unsuccessful; and (4) an interest arbitrator rejected the union's position. Despite all these factors, one might pose the question, what if the subcontracting seriously impacts on the bargaining unit's integrity? Should it not be subjected to the same tests of reasonableness utilized in grievance arbitration matters where there is an

obligation to bargain such subjects? Not to allow such a consideration makes the question of bargaining-unit survival a futile exercise. However, if the arbitrator were to apply such tests of reasonableness, has he or she not exceeded the limits of his or her authority? These questions emphasize the unique uncertainties that are thus far reserved to the public sector.

With respect to the scope of bargaining, some additional considerations arise where the subcontracting matter is a mandatory bargaining item. If a subcontracting issue is bargained to impasse and is put before an interest arbitrator, he or she is indeed confronted with a Hobson's choice that is even more challenging than that of the grievance arbitrator in subcontracting cases. The interest arbitrator in such a situation must consider what impact a subcontracting-limitation clause will have on the parties in the future. Such a decision is very tenuous when one considers that it must be made in the face of changing economic conditions that may cause abrupt alterations in taxing and budgetary decisions by the public employer. In addition, the subcontracting impasse item may be part of a final-offer arbitration. If this last aspect is present, the arbitrator, although not predisposed toward ruling for such an item, may be influenced to accept it because of the other items in the final-offer positions of the parties.

It is this writer's belief that, all other things being equal, interest arbitrators are not likely to grant subcontracting clauses since they would have to deal with the impact that such a clause *might have* in the future. Grievance arbitrators, on the other hand, would be in a better position to deal with such matters since they benefit from being able to decide each issue on the basis of an impact that has *already occurred.*

Another problem area that arises in the public sector but is not present in the private sector is that of categorical budgets. Often the laws and regulations governing budgetary aspects of public management prohibit funds from being transferred from one category to another. Consequently, it sometimes happens that general operating funds allocated for a payroll are cut, necessitating a layoff or an hours' reduction for the affected employees. Concurrently, another budget category may experience no cut or even be increased; such funds cannot be transferred to accommodate the salaries of affected employees, but they may be extended for private contracted service. When such

factors are present, the union may not have the grievance-arbitration avenue of appeal. Indeed, the employer's defense of substantive nonarbitrability is a reality that is often advanced in such circumstances, and it cannot be regarded lightly by arbitrators.

The political nature of public-sector bargaining provides yet another basis for highlighting a difference from the private sector in the area of subcontracting. While political considerations enter into the decision framework in almost all walks of life, the very nature and structure of the public sector make political considerations more significant there. When subcontracting decisions are made for political reasons, the arbitrator is not necessarily confronted with a more imposing problem, but the hidden agenda of the real basis for the decision often confuses the issue.

It should be emphasized that the above brief treatments are examples of the anomalies found in the public sector. For the most part, labor relations matters as they relate to the arbitration of subcontracting issues are handled similarly in private- and public-sector cases.

Federal Government

The Civil Service Reform Act[80] is in some respects drastically altering labor relations in the federal government, most noticeably in grievance arbitration. In the area of subcontracting, federal management has retained the exclusive right under the law to contract out work. Section 7106 of Title VII of the law lists as a management right the following: ". . . nothing in this chapter shall affect the authority of any management official— . . . (2) in accordance with applicable laws—. . . (B) to assign work, to make determinations with respect to contracting out. . . ."

Since this is a new statute and administrative determinations regarding its operation have not been announced, it is as yet uncertain that such matters are definitely outside the grievance arbitration area. However, the language of the law seems to indicate that they are.

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[80]Pub. L. No. 95-454, 92 Stat. 1111 (1978).

VII. Concluding Comments

When I first began delving into the topic of subcontracting, I was impressed with Ralph Seward's now famous footnote in one of his early decisions in this area. He quoted Omar Khayyam: "Myself when young did eagerly frequent Doctor and Saint and heard great argument against and for: but evermore come out by the same door wherein I went."[81] After considering the material gathered for this paper, Seward's choice of words appears to be more appropriate than ever.

As I read the several awards, I was even more impressed with his statement. Almost all arbitrators were aware of the seriousness of this area and the grave concerns it raised for labor and management. The very heart of management's rights and union security is involved. Thus, the unsettling nature of these concerns is always challenging the arbitrator.

While arbitrators appear to have settled on relatively consistent criteria in balancing rights and obligations in reaching decisions in subcontracting cases, it is clear that they continue to search for other factors and to rely on them if they are present in any particular case. In addition, there seems to be a tendency for arbitrators to resort to dicta to a greater degree in their awards in subcontracting disputes than in other cases, perhaps because they feel more uncertain about their decisions.

For those who are searching for consistency of awards in this area, I am afraid their efforts will be in vain. The apparent inconsistency is not to be construed as failure, however, since each decision must be predicated on the facts of the case at hand. What must be considered is not the outcome of a particular dispute, but whether the arbitrator relied upon the balancing criteria in arriving at the decision. That is the true test of the merits of the award, and, from the analysis of recent published awards and of those of the past, this writer believes that most arbitrators have applied these criteria in a logical manner; this is true of decisions since Crawford as well as before Crawford. In the last analysis, they seem to look at the question by assessing whether there has been a "serious detriment" to the unit. While the definition of "serious detriment" may need to be honed and refined, it is essentially determined by the same

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[81] *Bethlehem Steel Co.*, 30 LA 678, 682 (1958).

general measures relied upon by the courts and the Board. Thus, the three institutions—the courts, the Board, and arbitration—appear to be in general agreement, and while there is no planned or uniform national labor policy with respect to the subcontracting question, it can fairly be said that all three institutions, acting independently, are remarkably consistent.

With respect to the development of contract language in this area, the trend seems to have slowed in recent years. Moreover, the changes that have occurred are in areas where the limitations on management are relatively weak and/or ill defined. Thus, most arbitration decisions dealing with such ambiguous provisions follow the framework that would be used if the agreement were silent on the subcontracting issue.

In revisiting this old battle ground, it appears that the battle lines have shifted, but the turf is still the same and the battle plans have not been altered appreciably. The problems of the past remain, the same questions persist, and while some old uncertainties have been erased, new ones have taken their place.

Perhaps Sanford Kadish's words in a now famous subcontracting case, describing the state of the art at that time, best sum up the present condition: "After examining these studies and many of the [subcontracting] decisions discussed, it is fair to conclude that no one, whatever his initial inclinations or prejudices, will go away from them without finding something he likes. Like the town fair, there is something there for everyone."[82]

Comment—

LEONARD R. PAGE*

At least from a union's perspective, our topic is slightly misleading. When you revisit an old battle ground, you normally expect to see relics of long-finished battles and cemeteries and monuments to the fallen combatants. However, as to subcontracting, we all know that the battle has never ended, nor can we even begin to talk about the "light at the end of the tunnel." In our adversarial labor relations system, subcontracting will probably always be a continuous battle ground. Indeed, my own view

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[82] *KVP Sutherland Paper Products Co., supra* note 49, at 737.

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of the future leads me to believe that the struggle may even intensify.

Subcontracting involves issues that are extremely sensitive to both sides. On management's side, the underlying issue is the company's sacrosanct right to run its business in an efficient manner. On the union side (the ones with the white hats), subcontracting brings forth fervent cries of job security. Both management and union, therefore, tend to view subcontracting disputes as matters of principle going beyond the merits of the particular dispute.

I have heard Dick Mittenthal advise arbitrators-in-training that their task in writing a decision is to persuade the losing party. In the area of subcontracting, this advice cannot be overemphasized. Subcontracting battles often leave bitter scars. I have seen the wounds of subcontracting battles reopened to the point of long strikes or plant closings as the "losing" side tried to salvage a final victory. All parties involved in subcontracting disputes should carefully consider whether "winning" the present subcontracting battle risks losing the ultimate war for labor relations stability.

Professor Sinicropi has done more than just update Scotty Crawford's 1960 masterpiece. He has explored new areas where attention has been long overdue. The Supreme Court decisions in the *Steelworkers Trilogy, Fibreboard,* and the NLRB *Collyer* doctrine, together with public-sector bargaining, are all post-1960 developments.[1] I do have several random observations on his comprehensive presentation.

Arbitrability

I have never really understood the overzealous tendency of management to argue arbitrability. As the cases show, the burden of proving that the issue is *clearly* beyond the scope of arbitration is so heavy that this defense usually fails. I also believe that losing such a procedural round must have a negative impact on subsequent review of the company's case on the merits.

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[1] *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 57 LRRM 2609 (1964); *Collyer Insulated Wire*, 192 NLRB No. 837, 77 LRRM 1931 (1971).

And in those few cases where lack of arbitrability is sustained, the war does not necessarily end. Under Section 301 of the Labor Management Relations Act,[2] either party to a labor agreement may bring an action in the appropriate state or federal court to enforce that agreement. Thus, even where an issue is not subject to arbitration, court jurisdiction is still available.

Finally, by arguing arbitrability, management risks a strike that cannot be subject to immediate injunctive relief. Under the *Boys Market* exception to the Norris-LaGuardia Anti-Injunction Act, a court may only enjoin a strike that is subject to arbitration.[3]

In sum, I believe arguments of arbitrability should be carefully weighed before erected. Such roadblocks can easily be outflanked.

NLRB—The Duty to Bargain

I also underscore Professor Sinicropi's observation that the NLRB will usually issue a complaint for failure to bargain in advance of subcontracting that has a "significant detriment" on the bargaining unit. The Board will usually order that the workers be made whole and the status quo restored. Such a remedy is possible even though an arbitrator might ultimately rule in the company's favor as a matter of contract interpretation.

Arbitrators may resent what they perceive to be NLRB interference or encroachment. However, arbitrators historically have paid scant attention to a company's duty to bargain prior to making any changes in wages, hours, or working conditions. Until such sensitivity is demonstrated, unions will continue to file both unfair labor practice charges and grievances.

Development of Subcontracting Clauses in Labor Agreements

Professor Sinicropi notes that contract clauses limiting management rights on subcontracting have increased, but that the rate of increase has slowed. However, one area of contract development that BNA does not explicitly analyze is the growth in

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[2]29 U.S.C. §185.

[3]*Boys Markets, Inc.* v. *Retail Clerks, Local 770,* 398 U.S. 235, 74 LRRM 2257 (1970). Even though an injunction may not be available, the employer generally retains the right to either discipline workers or seek damages for breach of the no-strike clause.

the number of clauses retaining the right to strike over subcontracting disputes. Approximately 40 percent of the labor agreements surveyed by BNA contained conditional rather than *absolute* no-strike pledges.[4] The UAW-Ford national agreement, for example, has been specifically amended to retain the union's right to strike over subcontracting disputes.[5] I believe that similar contract clauses are becoming more prevalent in contracts involving white-collar workers and industries in the process of geographic or technological change. The reason is simple—unions are dissatisfied with the ability of arbitration to handle the more permanent and insidious type of subcontracting involving unit erosion.

Unit Erosion and the "Creeping Change"

In particular, I refer you to problems of plant relocation and the development of new products, services, or processes. These problems involve situations where the company in effect "subcontracts" bargaining-unit work to its nonunion employees. To unions, the problem is also called "unit erosion," and its dimensions are most disturbing. It involves a fundamental question of survival. The process is often very gradual and sublimated, as the word "erosion" itself implies. Or in a plant closing, the erosion can be very sudden and dramatic.

Typically, a new product, service, or process is developed that incorporates some aspects of bargaining-unit work. The work, not surprisingly, is assigned to nonunion employees in new classifications, departments, or even new plants. Over the course of years, the attrition of the bargaining unit and the increased use of a new product, service, or technology result in the severe contraction of the ratio of union to nonunion employees. The union one day awakes to find its jurisdiction restricted to products or services for which there is little demand, while the new product or service is firmly entrenched elsewhere in nonunion classifications or plants.

If a grievance is arbitrated at any particular stage of this ero-

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[4]The Bureau of National Affairs, Inc., *Basic Patterns: Management and Union Rights*, in Collective Bargaining Negotiations and Contracts, No. 871, 77:2

[5]UAW-Ford National Collective Bargaining Agreement, Article VII, Section 23, subsection e, p. 65 (dated October 5, 1976).

sion process, the employer naturally claims the work in question is *new, new, new,* and can usually show that no bargaining-unit workers have been laid off. The union arguments that the new product, service, or process is replacement work and that the real issue is the future integrity of the bargaining unit are usually viewed as not compelling, absent a showing of present detriment to the bargaining unit. Very few arbitrators have asserted themselves against this evolutionary type of erosion, by which the union work is left to "wither on the vine."

Professor Sinicropi calls this the "creeping change" problem. He probably correctly notes that "in the last analysis [the bulk of the arbitrators] seem to look at the question by assessing whether there has been a 'serious detriment' to the unit."

As a partisan advocate, I suggest to you that many arbitrators have placed undue emphasis on the need to show present serious detriment to the bargaining unit in subcontracting or unit-erosion cases. Change and development in products, services, and processes are not "new," but, to the contrary, are rather natural in a dynamic economy. Unions have a legitimate right to expect that they will grow and evolve as the company itself changes, rather than be frozen in place, representing only the work being performed as of the date of recognition.

Moreover, the "present detriment" principle rests on the apparent assumption that as long as the present work force is not on layoff, there is no injury to the union. But bargaining-unit work is held in trust by a union on behalf of future generations of union workers. No individual worker "owns" or has title to his or her job. Thus, even where an employer may be able to avoid present layoffs (artificially or otherwise), the potential impact on future generations of union workers of such "creeping change" cannot be denied and must be taken into account. A union's ability to represent effectively future generations of workers is obviously undermined by unchecked erosion.

Until we see more decisions such as *Consolidated Aluminum Co.* and *Buhr Machine Tool Corp.,*[6] where unit erosion and future impact is at least considered, I predict that unions will continue to insulate themselves from "creeping change" or unit erosion problems by retaining the right to strike over such disputes.

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[6]*Consolidated Aluminum,* 66 LA 1172 (Boals, 1976); *Buhr Machine Tool Co.,* 61 LA 333 (Sembower, 1973).

Comment—

RICHARD C. HOTVEDT*

One can really have nothing but praise for scholars like Professor Sinicropi who accurately tell us where we have been, how we got there, and, by close analysis, where we probably will be going. So it is with Professor Sinicropi and his fine paper. My own gloss will be brief. Of course, I am an advocate for employers, as will be obvious. What continually surprises me is the frequency with which I find myself saying that, on the whole, the rules of decision in this area of subcontracting have developed sensibly. Let me make just a few observations.

In the first place, I instinctively rebel against new doctrines such as when arbitrators imply a subcontracting restraint in the absence of explicit language. I rebelled when arbitrators started ordering the return of runaway work even though the contract was silent. And I am rebelling against the Supreme Court's ruling in *Nolde,*[1] which says that postexpiration arbitrability will be presumed unless negated. Those are presumption-shifting changes I would not have made. They smack too much of the law of status rather than the law of consent to suit me. But once they are made, we can live with them by bargaining for adjustments, if the subsequent decisions are sensible.

What do I mean by "sensible"? More than "I win," to be sure. For example, the professor talks about meet-and-confer type of restraints on subcontracting. His paper lends support to the view that even after discussing but deadlocking a subcontracting proposal, the employer must face implied restraints gauged by the usual 12 factors. Supposedly, that resurrection of arbitral restraint over the subcontracting prevents sterile, futile discussions (especially in the union's view). But that, in my view, is *not* sensible. Where the negotiators have gone only so far as to prescribe "meet and confer," and such notice and discussion did take place, it is simply not honest to go farther. While arbitration may answer the limited fact questions as to notice, discussion, or the exchange of truly relevant information, it is a distortion of the system to use those devices more broadly and to second-

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[1] *Bakery and Confectionary Workers Local 358* v. *Nolde Bros. Inc.*, 430 U.S. 243, 94 LRRM 2753 (1977).

guess the subcontracting decision. How easy it would be to expand one's own scope of decision under the guise of evaluating the employer's good faith or the merits of its economic rationale. But such expansion should be resisted.

Second, the professor reviews the works of Crawford and Wallen and his own experience to demonstrate that the law, rather than developing consistently, has developed flexibly to meet different facts. He is obviously right, and it is a good thing, too. The development of broad principles through case-by-case, multifactored balancing of relative interests is something I heartily endorse. I believe we are wise not to insist on code-like predictability for these disputes. Competent labor relations planners *are* able to foretell likely arbitral reactions by reference to precedents and the professor's 12 points as applied to their own contract and facts. Besides, each bargain offers the parties the chance for more specificity if they really want it. The development of the multifactor test in cases where a restraint is implied, once management gets the hang of it, is not really fatal to efficiency. Moreover, the free choice of arbitrators by parties operates to curb extremism. That is a truism—but a valuable fact. As in our choice of clergymen, we suffer a zealot in the pulpit, but we insist on common sense in the confessional where it really counts. Arbitrators giving flexible application of Sinicropi's 12 points are more preferable to absolutes or absolute consistency.

Third, on the whole, I would rather be in the contract forum than at the Board when litigating subcontracting or the adequacy of bargaining information. I think that arbitrators discern what is necessary from what is tactical somewhat better than does the Board. By contrast, the Board simply presumes relevance on all information demands and is too far from the process to judge well. Management will try to persuade the Board to apply the new-found flexibility of the *Detroit Edison*[2] case to future information requests, but I think it is going to be tough going, given the Board's predilections. Naturally, I am pleased that deferral has survived a new NLRB majority, even if in truncated form, confined to Section 8(a)(5) or contract issues.

Before leaving this point, let me digress so far as to say that the Board should have preserved deferral in Section 8(a)(3) cases as well. At base, I am an old fan of *Union News,*[3] *Black-*

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[2]*NLRB* v. *Detroit Edison Co.*, 560 F.2d 722, 95 LRRM 3341 (6th Cir. 1977).
[3]*Union News* v. *Hildreth,* 295 F.2d 658, 48 LRRM 3084 (6th Cir. 1961).

Clawson,[4] and the Goldberg concurrence in *Humphrey* v. *Moore.*[5] I always thought that the Blumrosen notion of severing personal issues from unit issues was wrong, but it is symptomatic of this administration that it would have its NLRB adopt such a heresy. The second-guessing of discipline cases bespeaks a fundamental distrust of bargaining and of bargaining institutions. I find that both ironic and wasteful. To say that the statute compels it is an oversimplification. But back to subcontracting and our friend from Iowa.

My fourth observation concerns the professor's questioning whether the NLRB's new mood in deferral cases causes the arbitrator to act differently, knowing that he may be reviewed. In this practitioner's opinion, I do not think it bothers the neutral one bit. If anything, the knowledge that a disgruntled loser may take his theories of discrimination or political favoritism elsewhere should actually free the arbitrator to judge things by the contract. The Board has no purchase over arbitrators and they know it. Professionalism in decision-making is already guarded by marketplace standards far better than any bureaucratic supervision could be. But efficiency strongly compels the management advocate to broaden deferral cases and force all extraneous, allegedly statutory issues to fit, in the hopes of clearing the cases up the first time they are litigated. So the new deferral standards really impact our litigation choices more than they do your attitudes about review.

Fifth, when surveying industries, the professor observed wide variations. He noted the strictness of prohibitions on subcontracting in the traditional construction industry. But isn't it true that the strict prohibitions are the least effective? There is so much pressure for efficiency, so much fluidity for capital and skills, and so much opportunity to go double-breasted that efforts to write and enforce strictly such subcontracting clauses in construction are self-defeating. The dam survives because the water leaked out elsewhere.

It is interesting to observe, by contrast, the trucking industry with its joint-committee system. While nominally prohibiting subcontracting, the entire system of riders and special-commodity divisions, etc., is really a form of subcontracting, grudg-

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[4] *Black-Clawson Co., Inc.* v. *Int'l Ass'n of Machinists, Lodge 355,* 313 F.2d 179 (2nd Cir. 1962).

[5] 375 U.S. 335, 55 LRRM 2031 (1964).

ingly granted. By allowing such a change, both the industry and the union survive. In a real sense, of course, this joint-committee system is a continuing bargain administered by the parties. But while talking about specific industries, let me go back for a moment to my earlier theme of respect for the contract's explicit, if limited, terms on subcontracting.

In construction, traditional *area* contracts may feature sweeping and strict prohibitions, but in the dynamic field of *project agreements,* the parties are likely to be more sophisticated. They are working to specific tolerances in time, cost, and design. Their language is likely to be fresh, backed up with documented negotiating history. All that work has not obviated arbitration; if anything, we see a continual testing of project-agreement boundaries, especially as a substitute for representation cases.

The important thing to remember as a rule of construction in project agreements is that if the parties didn't insert a specific restraint on subcontracting or a specific listing of the work in the scope clause, they probably didn't imply coverage. Moreover, in the fast-paced work of large project agreements, there seems to be a consensus that tardy assertion of subcontracting claims will be viewed unfavorably. Often they are just disguised efforts to organize the subcontractor after straight-ahead methods failed.

Turning to the professor's laundry list of 12 factors that may help resolve one of these cases, we see more examples of government regulation forcing subcontracting to occur directly or indirectly. The Environmental Protection Agency, Occupational Safety and Health Administration, Department of Transportation, or local authorities all can impose sudden changes in method that result in subcontracting or simply doing the work outside the scope of the basic project. As an advocate, I see these as compelling arguments for tolerating more subcontracting, especially if the contract contains only implied restraints. The tricky part comes if the parties expect or force the arbitrator to resolve the validity of the government interference. Some such issues could really go beyond the competence of arbitrators and labor lawyers alike. We think rather a prima facie showing of how the regulation caused the employer to act is the best way to handle it.

Sixth, if the professor wants an opinion on whether overtime opportunities for the unit should weigh against subcontracting, let me quickly give him negative advice. I thought the purpose of premium pay was to discourage the burden of overtime.

Treating it like a guaranteed earning opportunity at wasteful costs ultimately hurts the industry and the public. Absent explicit restrictions in contract language, implying such waste should be discouraged. The professor's report of a coal-field case where the arbitrator said the unit was entitled to overtime every night and all weekend before he would permit subcontracting sounds like a crude form of birth control.

Seventh, turning to the public sector, I agree with the observations that it is similar to the private sector but has its differences. I especially agree that interest arbitrators should avoid creating no-subcontracting rules. Moreover, the problems of politics and budgets, so often beyond the control of either party to a public-sector contract, should cause neutrals to imply fewer subcontracting restrictions than they might in the private sector. It is one thing if the agency has literally pledged work preservation. Then let the arbitrator keep the agency to its word, and if some fancy form of sovereign immunity is going to be argued in court on appeal, the state court system is better equipped to evaluate such political and budgetary issues. But if the contract is silent and you are tempted to reach for your handy list of 12 points to block the subcontracting, there really is a public interest in government flexibility that should override the government employees' desire for security and status quo.

Well, as Henry Hart used to tell us about the criminal justice system, there will always be rubber in it, no matter how strict people want to make it. But, discretion and common sense will out—as it will in labor arbitration—and I am happy for it. While that means conceding discretion to a third party over major cost issues, I much prefer an arbitrator to the government in that role as long as it is clear that we are going to have someone. At least it cannot be said that, as a class, arbitrators are rigid, are distant from the workplace, or are hostile to productivity and change.