CHAPTER 8

SUBCONTRACTING IN THE 1990s

I. CONTRACTING OUT: TWO SOLITUDES

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It is said that nature abhors a vacuum. So, it turns out, do labour adjudicators. The truth of this becomes evident when one examines the treatment of "contracting out" as a collective bargaining issue—and all the more so when one compares the adjudicative response to this issue on the north and south sides, respectively, of the 49th parallel.

It is not the purpose of this paper to inquire into specific forms of contracting out clauses that parties have negotiated into their collective agreements. Rather, the concern of this paper is to review the way in which labour adjudicators have dealt with the issue of contracting out in the *absence* of a particular clause spelling out the parties' expectations in the matter, and the degree to which the adjudicators have or have not been prepared to infer restraints on management from the *other* provisions of the parties' negotiated agreement.

Canada

First, if I may, a look at the Canadian treatment of the issue of contracting out, beginning with the approach that has come to be adopted in this country among labour arbitrators.[1] There were, early on, indications that arbitrators might find in the negotiated provisions of the collective agreement as a whole—e.g., seniority, the wage and job classification system, and the very recognition clause of the collective agreement itself—a "residual right" on the

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[1]For a review of this subject generally, *see* MacDowell, *Contracting Out at Arbitration: An Arbitrator's Perspective* in Labour Arbitration Yearbook 1994–95 (Butterworths-Lancaster 1992), 325–54.

union side to be protected inferentially against unilateral action by the employer that had the effect, or potential effect, of rendering those negotiated rights meaningless. Thus, in *Sudbury Mine, Mill & Smelterworkers Union, Local 598 and Falconbridge Nickel Mines Ltd.*,[2] then Arbitrator (and later to be Chief Justice) Bora Laskin upheld the union's challenge to a contracting out, finding it implicit that if the work of the plant was still going to be carried out, it would be carried out under the conditions established by the negotiated collective bargaining agreement. In doing so, Arbitrator Laskin adopted the basic finding of an earlier case that "the work to be done in the plant by members of the bargaining unit is fundamental to the existence of the contract."[3]

That is not, however, a position that trade unions have been able to maintain in this country. By the middle of the 1960s, the Laskin approach to the concept of residual rights had been firmly rejected by arbitrators, in favour of the view that traditional management rights not specifically negotiated away in a collective agreement remained the reserve of the employer. On this issue of contracting out in particular, Arbitrator Harry Arthurs, in what has come to be accepted as the leading case establishing the present direction, observed in *Russelsteel*:

> The wide notoriety given to labour's protests against this practice, the almost equally wide notoriety, especially amongst experienced labour and management representatives, of the overwhelming trend of decisions, must mean that there was known to these parties at the time they negotiated the collective agreement the strong probability that an arbitrator would not find any implicit limitation on management's right to contract out. It was one thing to imply such a limitation in the early years of this controversy when one could not speak with any clear certainty about the expectations of the parties; then, one might impose upon them the objective implications of the language of the agreement. It is quite another thing to attribute intentions and undertakings to them today, when they are aware, as a practical matter, of the need to specifically prohibit contracting-out if they are to persuade an arbitrator of their intention to do so.[4]

That continues to be the law today, and against its requirements even typical clauses such as "the company will not permit any person not covered by this agreement to do any tasks or duties covered under this agreement" generally have been found to be

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[2](1958), 8 L.A.C. 276 (Laskin).
[3]*UAW Local 525 and Studebaker-Packard Ltd.* (1957), 7 L.A.C. 310 (Cross).
[4]*USWA and Russelsteel Ltd.* (1966), 17 L.A.C. 253, 256–57.

insufficiently specific to apply to contracting out, being read rather as intending to limit only the employer's right to have bargaining unit work performed by its own non–bargaining unit personnel.[5] Although from time to time there is reference in the cases that the contracting out, to be upheld, must nonetheless have been carried out in "good faith" or for "bona fide business reasons," there has been no attempt by arbitrators here to determine whether a pure cost-saving motivation constitutes anything less than good faith or a bona fide business reason. Rather, the extent of the inquiry simply has been to determine whether the contracting out is "real" (i.e., whether the employer truly has relinquished control of the work to the point that the individuals performing it are indeed employees of an "arm's-length" third party).[6]

Given this very limited involvement by arbitrators on the issue, trade unions in more recent years have tended to appeal to the Labour Board with their complaints that contracting out represents a fundamental undermining of their bargaining rights as well as of the actual work standards achieved for employees through the negotiation of the parties' collective agreement.[7] With very limited specific statutory exceptions (e.g., in the case of "technological change" under some Acts), there is no mid-term duty to bargain under Canadian legislation, even though economic sanctions during a collective agreement are strictly prohibited.[8] All jurisdictions in Canada do, however, at least in varying degrees, have statutory proscriptions against employers interfering by design with their employees' rights to organize, or to enjoy the fruits of collective bargaining, and if even *one* of the employer's motives has been found to fall within that category, the whole employer action will be struck down as "tainted."[9] And a number of the labour

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[5]*See, e.g., Robin Hood Multifoods Ltd.* (1980), 26 L.A.C.2d 371 (Ladner); *Air Canada* (1971), 23 L.A.C. 406 (Bairstow).

[6]*See Don Mills Found. for Senior Citizens* (1984), 14 L.A.C.3d 385 (P.C. Picher); *Riverdale Hosp.* (1974), 7 L.A.C.2d 40 (Schiff); and more recently *Radio Shack* (1995), 41 L.A.C.4th 69 (Beck); *Metropolitan Toronto Zoo* (1995), 41 L.A.C.4th 186 (Knopf); *Drug Trading Co.* (1995) 41 L.A.C.4th 140 (Haefling).

[7]In Canada, legislative jurisdiction over labour relations falls essentially to provincial governments and their labour boards, with only certain defined activities reserved to the domain of the Canada Labour Code and the Canada Labour Relations Board.

[8]As a result, labour relations boards in Canada have tended to place great emphasis on the adequacy of employer disclosure during *bargaining. See, e.g., Consolidated Bathurst Packaging Ltd.* [1983] O.L.R.B. Rep. 141, *aff'd on reconsideration* [1983] O.L.R.B. Rep. 1995, *rev'd* (1985), 85 C.L.L.C. ¶14,031 (Ont. Div. Ct.), *rev'd* (1986), 86 C.L.L.C. ¶14,048 (Ont. C.A.), *aff'd* [1990] 1 S.C.R. 282.

[9]*Upheld* by the courts, for example in *R.V. Bushnell Communications Ltd.* (1973), 1 O.R.2d 442 (H.C.), *aff'd* (1974), 4 O.R.2d 288 (C.A.).

statutes cast a reverse onus on the employer to prove that "anti-union animus" was *not* one of the motivating factors. Notwithstanding all of that, however, labour boards, beginning with the Ontario Board,[10] tended to regard pure cost saving as a full defence to a plea of anti-union animus,[11] and the early successes for trade unions generally came only in cases of conduct designed clearly to do nothing *but* avoid having to deal with a union.[12] Indeed, the spill-over of arbitral thinking in this area, with the residual-rights principle of *Russelsteel* over *Falconbridge*, initially was evident in the labour board responses to contracting out as well. In *Heritage Nursing Home Ltd.*,[13] for example, a complaint that the Home had contracted out its cleaning services was dismissed with the following observations:

> 4. The possibility that an employer might contract out bargaining unit work for legitimate business reasons has become part of the reality of collective bargaining over the last 30 years. There is little jurisprudential support for the notion that a collective agreement is a "no cut" contract of employment given to a union for the period of its term. The fact that clauses limiting the ability of an employer to contract out are expressly included in collective agreements with some frequency is substantial evidence that the general expectation of the labour relations community is to the contrary. If a union wishes to protect itself from the risk of contracting-out, it may attempt to do so at the bargaining table where that issue can be dealt with like any other economic issue. (*See Russelsteel Ltd.*, 17 L.A.C. 253 (Arthurs) and *see generally* Brown & Beatty, *Canadian Labour Arbitration* (Toronto, 1977) at 180–81.) The evidence establishes that in fact in other collective agreements the complainant union has expressly negotiated that protection. In this case it has not. In these circumstances the Board should not lend its remedial authority to fill a contractual gap.[14]

What has prompted a demarcation in the Labour Board's thinking appears to have been more recent tendencies by employers (once again, as it happens, arising particularly in the nursing home sector) to extend contracting out beyond the traditional peripheral activities of the operator and into what the Board has

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[10]Generally considered the leader in the application of provincial labour law, Ontario having been the most populous and commercially developed of the provinces.

[11]*See, e.g., Kennedy Lodge Nursing Home(s)* [1980] O.L.R.B. 1454; *Carressant Care Nursing Home* [1985] O.L.R.B. Rep. 31.

[12]*See Sunnycrest Nursing Home* [1982] O.L.R.B. Rep. 375; *Dr. Hiller's Peppermint Canada Ltd.* [1979] O.L.R.B. Rep. 375; *Plastics Corp. Ltd.* [1982] O.L.R.B. Rep. 726.

[13][1981] O.L.R.B. Rep. 631.

[14]*Id.* at 631.

referred to as the "core" functions of its enterprise. Thus, in *Kennedy Lodge, Inc.*,[15] the Board wrote:

> 60. . . . The evidence supports the conclusion that the arrangement with Medox was entered into for no other reason than to allow Kennedy to replace its unionized employees with non-union employees and thereby to extricate itself from its collective bargaining obligations in respect of its aides and to thereby avoid having to pay the wages and benefits under the collective agreement. . . .
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> 61. This leads us to a discussion of subcontracting; an arrangement under which an employer contracts for certain services that he is already or could otherwise perform himself. Given the effect upon the employer's complement of employees, it is not difficult to understand why decisions to subcontract often generate a vigorous response from trade unions. However, it has long been accepted in the arbitral jurisprudence in this jurisdiction that, absent an express prohibition in the collective agreement, an employer is free to contract out. (*See Kennedy Lodge Nursing Home* (1982), 28 L.A.C.2d 380 (Brunner) for the most recent review of the cases.) In this connection we have been careful to point out that in order to fit within this presumption and to be a proper exercise of management rights under a collective agreement the contracting-out must be real, in the sense that the work in question is moved within the subcontractor's organization where it is performed by the subcontractor's employees. If the work is performed by the subcontractor's employees there will be no breach of a collective agreement which does not expressly prohibit contracting-out. The essence of the argument put forward by the applicant/complainant in this matter is that, apart altogether from the collective agreement, a decision to subcontract, if undertaken for no other reason than to avoid the wage rates in the collective agreement, breaches the unfair labour practice provisions of the Labour Relations Act. If this is so an employer who contracts for security, janitorial, cafeteria or any number of other functions that are peripheral to the core activities of his business, because he can have these services performed less expensively by a subcontractor other than under the collective agreement, would be in breach of the Act. This type of subcontracting arrangement, usually undertaken to reduce costs, has become quite common and it would surely come as a surprise to the community if we were to find that it was in breach of the Act. *However, it would be no less of a surprise to the community if we were to find that a decision taken to use a subcontractor, in place of bargaining unit employees, to perform a part or all of the employer's core activity on the employer's premises utilizing the employer's equipment and under the employer's control, as in this case, was not in breach of the unfair labour practice provisions of the Act.*[16]

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[15][1984] O.L.R.B. Rep. 931.
[16]*Id.* at 931 (emphasis added).

It should be noted that Canadian labour statutes generally have provisions extending bargaining rights (and collective agreements) both to a "related" employer and to an arm's-length employer who nonetheless is on the receiving end of a "sale of a business." Labour boards have been loathe to find that the latter applies in the case of a typical contracting out to a preexisting, genuine third-party contractor.[17] On the other hand, boards have shown an increasing willingness to take hold of the "true employer" issue (otherwise appropriate for grievance arbitration) by application of the "related-employer" provision in the legislation. Under the Ontario Labour Relations Act, the provision reads:

> 1. . . . (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.[18]

Once again the Board, in applying its statutory discretion, has shown heightened sensitivity on the question of contracting in. And, as the Board said in a leading case, *Brantwood Nursing Homes Ltd.*:

> 112. . . . Brantwood's sole and acknowledged purpose in contracting-out the work in question was to avoid the wage rates it was obliged to pay under its agreement with CUPE. We accept that this was for "financial reasons." It is unnecessary for us to assess the relative extent to which Brantwood's cash flow problems were the result of misfortune and mismanagement, or whether they were unavoidable, or whether reduction of labour costs was the only solution possible. We do not consider Brantwood's financial situation a relevant consideration in the exercise of our discretion under subsection 1(4), for reasons set out by the majority in *Kennedy Lodge Inc., supra*, at paragraph 57 (reproduced at paragraph 99 of this decision).[19]

At least in such cases of contracting in, or in other situations of a corporate relationship looking the least bit incestuous, I think it is fair to say that the experience of the Labour Relations Board in dealing with the related-employer kind of issue, together with the

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[17] *See, e.g., Charming Hostess* [1982] O.L.R.B. Rep. 536; *Metropolitan Parking* [1979] O.L.R.B. Rep. 1193.

[18] S.O. 1995, ch. 1.

[19] [1986] O.L.R.B. Rep. 9; *upheld on judicial review* [1986] O.J. No. 475.

Board's apparently increasing activism in the area, have tended to make it the union's current forum of choice.[20]

United States

All of that, it seems to me, stands in significant contrast to the development of the law as it has taken place in the United States. To begin with, one might expect to see an even more dominant role played by the National Labor Relations Board (NLRB), as will be discussed from its statutory mandate, as well as by the courts. In the latter regard, one of the differences between Canada and the United States is the fact that the courts in the latter have been assigned a true appellate role with respect to decisions of the NLRB, whereas in Canada the involvement of the court is solely by way of "judicial review" (and the deference that that implies). As for the primary jurisdiction assigned to the NLRB, the National Labor Relations Act (NLRA),[21] as is the law in Canada, makes it an unfair labour practice to violate employees' rights to organize and to bargain collectively, or to discriminate in hiring practices on the basis of employees exercising those rights. In terms of the bargaining duty itself, section 9(a) of the Act makes the trade union the exclusive bargaining agent "in respect to rates of pay, wages, hours of employment, or other conditions of employment," and section 8(a)(v) expressly deems it an unfair labour practice to refuse to bargain over those items. Of note here, section 8(d) goes on to provide that "where there is in effect a collective bargaining contract . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contracts." That latter provision might well be viewed as an invitation to the NLRB to step in on an issue like contracting out and assume the role of grievance arbitrators: Did the conduct of the employer represent a deviation from the terms of the parties' collective bargaining agreement? I believe it is fair to say that the Board has not done so, however. Rather, the NLRB has applied its normal policies regarding deferral to arbitration,[22] and as one learned arbitrator has expressed it:

> The arbitrator's function is to interpret the collective agreement, while that of the NLRB is to enforce the National Labor Relations Act.

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[20] *See Don Mills Bindery, Inc.* [1983] O.L.R.B. Rep. 2008; *Cronkwright Transport Ltd.* [1990] O.L.R.B. Rep. 768; *Groupe Schneider S.A.* [1994] O.L.R.B. Rep. 142.

[21] 29 U.S.C.

[22] *See, e.g.*, Hardin, ed., The Developing Labor Law, 3d ed. (BNA Books 1995), ch. 18.

> Accordingly, where the issue is primarily one of contract interpretation, the board will normally defer to the arbitrator if the hearing is fair and the decision is not at odds with the statute. Where there is no applicable collective agreement, the NLRB will decide solely based on the terms of the statute.[23]

Thus, the distinction in the role of the NLRB versus grievance arbitration boards ought to be clearly defined (and in most cases I understand that it is), according to whether there is or is not a collective agreement in effect.

Nonetheless, the background to this particular issue of contracting out, at least from an implicit policy point of view, has been the deliberations of the NLRB, and even more consequentially the courts, regarding whether a contracting out initiative by an employer constitutes a "mandatory" or merely "permissive" subject of bargaining. If it is the former, the employer has the duty to raise it with the union in advance, to allow it to be bargained on, and any implementation of the initiative *without* that having taken place will be ruled unlawful and rolled back. In contrast to Canada, this obligation (assuming no waiver or "zipper" clause[24]) exists on mandatory bargaining subjects even during the term of a collective agreement as well (at least where the parties have not already addressed it in a clause). With respect to the issue of "subcontracting" in particular, the law on permissive-versus-mandatory is generally taken to flow out of the Supreme Court's decision in *Fibreboard Paper Products Corp. v. NLRB.*[25] On the dispute there involving the contracting out of plant maintenance work, the Court came to the conclusion that the matter did involve a "mandatory" subject of bargaining, on the basis that:

(a) The subcontracting did not alter the employer's basic operation because maintenance work still had to be performed at the plant;

(b) No capital investment was involved in the subcontracting decision; and

(c) The employer "merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment."[26]

Having made that determination, however, the Court was quick to observe:

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[23]Bernhardt, *Subcontracting During the Term of a Contract*, 37 Arb. J. 1 (Mar. 1982), at 47.

[24]*See, e.g.*, Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 Ohio St. L.J. 23, 24 (1985).

[25]379 U.S. 203 (1964).

[26]*Id.* at 213.

> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting-out" involved in this case . . . is a statutory subject of collective bargaining . . . our decision need not and does not encompass other forms of "contracting-out" or "subcontracting" which arise daily in our complex economy.[27]

Indeed, in a separate concurring opinion, Justice Stewart sounded a note of conservatism that would prove to be referred to in the future by both the NLRB (under most Administrations) and the Court far more than the initial judgment:

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding . . . managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of §8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.[28]

The present state of the thinking of the NLRB itself on the subject is generally exemplified in its 1984 decision in *Milwaukee Spring Div. of Illinois Coil Spring Co.*[29] *(Milwaukee Spring II).* Before arriving at a consideration of that decision, however, it is noteworthy to review the decision of the Board (as earlier constituted) in *Milwaukee Spring Div. of Illinois Coil Spring Co.*[30] *(Milwaukee Spring I)*. As Chairman Van de Water set it out:

> The issue presented for decision in this matter is whether an employer, after engaging in decision bargaining and while offering to engage in further effects bargaining, may, without union consent, relocate bargaining unit work during the term of an existing collective-bargaining agreement from its unionized facility to its non-unionized facility, and lay off employees, solely because of comparatively higher labor costs in the collective-bargaining agreement at the unionized facility which the union declined to modify.[31]

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[27] *Id.* at 216.

[28] *Id.* at 223. In general terms, the mandatory obligation to bargain on major decisions of this type has come to attach to those where the motivating factors are such as would fairly be "amenable to resolution through the bargaining process" (e.g., issues of cost). *See First Nat'l Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981); *Otis Elevator Co. (II),* 269 NLRB 891 (1984); and more recently *Oklahoma Fixture Co.,* 314 NLRB 159 (1994).

[29] 268 NLRB No. 87 (1984); 1983 NLRB Dec. (CCH) ¶16,029.

[30] 265 NLRB No. 28 (1982); 1982–83 NLRB Dec. (CCH) ¶15,317.

[31] *Id.* at 26,032.

The case, it can be seen, did not in strict terms involve a contracting out, and all of the ensuing analysis is done on the basis of a reassignment of work. The company had advised the union that it had just lost a major contract, and asked to sit down with the union to negotiate concessions that would keep the operation at the unionized location. The union denied any concessions, and the operation was moved to the nonunionized location, resulting in the termination of 99 employees at the unionized plant. Interestingly, part of the agreed stipulation by the union was that "The relocation decision is economically motivated and is not the result of union animus."[32] One might have thought that the union would have held back the right to argue that a decision that was purely economically motivated *was* the product of union animus (i.e., plain contract avoidance), but the union obviously chose to test the argument at its most direct, being that such action as here was so "inherently destructive of employee interests" as to be unlawful per se.[33] The Board effectively accepted that argument, concluding:

> We find that Respondent's decision to transfer its assembly operations and to lay off unit employees as a consequence during the term of the collective-bargaining agreement constitutes a midterm modification within the meaning of Section 8(d). Respondent may not take such action without the consent of the Union (which Respondent did not obtain) or a waiver of the Union's statutory right to object to such action.[34]

As that case was making its way to the appeals court, however, the composition of the NLRB was changing under President Reagan, and the court granted the Board's own motion that the case "be remanded to the Board for further evaluation." That ultimately produced the decision of the Board referred to as *Milwaukee Spring II*.[35] The Board wrote:

> Sections 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." Generally, an employer may not unilaterally institute changes regarding these mandatory subjects before reaching a good-faith impasse in bargaining. Section 8(d) imposes an additional requirement when a collective bargaining agreement is in effect and an employer seeks to "modif[y] . . . the terms and conditions contained in" the contract: the employer must obtain the

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[32] *Id.* at 26,0333.
[33] *Compare Great Dane Trailers*, 388 U.S. 26 (1967).
[34] *Supra* note 30, n.24 at 26,073.
[35] *Supra* note 29.

> union's consent before implementing the change. If the employment conditions the employer seeks to change are not "contained in" the contract, however, the employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change.[36]

There was, once again, no provision whatever in that contract dealing with contracting out or the transfer of work, and those introductory words of the Board directly focused the issue on the Board's own view of "residual rights": Where the parties have not bargained specific language into the contract, do the rights remain as unfettered management rights in this fundamental area, or is management precluded from acting without obtaining the further agreement of the union? For the "new" Board, that was an easy one:

> Applying these principles to the instant case, before the Board may hold that Respondent violated Section 8(d), the Board first must identify a specific term "contained in" the contract that the Company's decision to relocate modified. In *Milwaukee Spring I,* the Board never specified the contract term that was modified by Respondent's decision to relocate the assembly operations. The Board's failure to do so is not surprising, for we have searched the contract in vain for a provision requiring bargaining unit work to remain in Milwaukee.[37]

On the "wages and benefits" argument (and bearing in mind that the issue under the NLRA was whether the employer was "modifying" the collective agreement), the Board wrote:

> ... Respondent, in accord with Section 8(d), abandoned the proposals to modify the contract's wage and benefits provisions. Instead, Respondent decided to transfer the assembly operations to a different plant where the different workers (who were not subject to the contract) would perform the work. In short, Respondent did not disturb the wages and benefits at its Milwaukee facility, and consequently did not violate Section 8(d) by modifying, without the Union's consent, the wage and benefits provisions contained in the contract.[38]

The Board in *Milwaukee Spring I* had followed a line of reasoning enunciated in earlier Board decisions like *Boeing Co.*[39] and *University of Chicago,*[40] notwithstanding that those cases were rejected on enforcement by the courts. The Board noted in *Milwaukee Spring II* that "we agree with the appellate courts, and not the Board, in

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[36] *Id.* at 27,331–332.
[37] *Id.* at 27,332.
[38] *Id.*
[39] 230 NLRB No. 94 (1977); 1977–78 NLRB Dec. (CCH) ¶18,461.
[40] 210 NLRB No. 19 (1974); 1974 NLRB Dec. (CCH) ¶26,442.

the *University of Chicago* and *Boeing* cases,"[41] and, in language that calls to mind the more recent Canadian arbitral jurisprudence, wrote:

> Language recognizing the Union as the bargaining agent "for all production and maintenance employees in the Company's plant at Milwaukee, Wisconsin," does not state that the functions that the unit performs must remain in Milwaukee. No doubt parties could draft such a clause; indeed, work-preservation clauses are commonplace. It is not for the Board, however, to create an implied work-preservation clause in every American labor agreement based on wage and benefits or recognition provisions, and we expressly decline to do so.[42]

So what have *American* labour arbitrators done about all that? In some of the earlier cases one finds at least a hint of similar conservatism. In *National Sugar*,[43] for example, Arbitrator Feinberg observed:

> It is true, of course, that job security, and an opportunity to perform available work, is of concern to a union and that the letting of work to outsiders by an employer may in some instances be said to be a derogation of the basic purposes of their collective bargaining agreement. Nevertheless, it is also true that where the subject has assumed importance in the relations between the parties a provision is generally inserted in the agreement defining their respective rights. It has almost been universally recognized that in the absence of such a provision an employer may, under his customary right to conduct his business efficiently, let work to outside contractors . . . .[44]

Even then, however, arbitrators were qualifying that position, indeed, flagging a "good faith" test that would come to dominate the cases of the future. As Arbitrator Feinberg concluded the above statement, ". . . if such letting is done in good faith and without deliberate intent to injure his employees."[45]

True, "good faith" in *that* context sounds little different from the narrowest of labour board tests having to do with employer "bloody-mindedness." And that, it might be recalled again, is about where *Canadian* arbitrators have left it. But for American arbitrators, the seeds had been sown; and "good faith" came to mean something

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[41] *Supra* note 29, at 27,342.
[42] *Supra* note 29, at 27,332.
[43] 13 LA 991.
[44] *Id.*
[45] *Id.* at 1001.

very different, in terms of the impact on the bargaining unit. As Arbitrator Hogan in *A.D. Juilliard*,[46] opined:

> After a thoughtful consideration of this question the Arbitrator concludes that the Recognition Clause when considered together with the Wage Clause, the Seniority Clauses, and other clauses establishing standards for covered jobs and employees limits the Company's right to subcontract during the term of the Contract. The Contract sets forth standards of wages and working conditions applicable to those employees and those jobs covered by the Recognition Clause. When the contract was signed the employees in the mending room were on the covered jobs, and the Contract contemplated that work normally performed by them would continue to be so performed as long as the work was available. To allow the Company, after signing an agreement covering standards of wages and conditions for mending room jobs and employees, to lay off the employees and transfer the work to employees not covered by the agreed standards would subvert the Contract and destroy the meaning of the collective bargaining relation.[47]

Indeed, as one arbitrator was to put it: "The power to subcontract is the power to destroy."[48] And in another case, dealing with the pure "economic" issue:

> If a company were permitted to contract out bargaining unit work on the basis of comparative wage rate advantages elsewhere, it would constitute a privilege to engage in a course of conduct that would nullify its collective bargaining contract. Followed to its extreme but logical conclusion, all bargaining unit work could be contracted out to cheaper labor. Simply beating the union prices set forth in the contract would be comparable to a unilateral reduction in a negotiated wage which a company has no right to make—and a company cannot accomplish by indirection what it would not be permitted to do directly under the terms of a contract.[49]

Stopping there would leave the impression that the arbitral law has swung entirely in one direction; that is not the case. Arbitrators are, of course, the considered experts at understanding and recognizing the concerns of both sides, and I think it is fair to say that the way that these competing strains of the case law have come to be synthesized in general is represented in the oft-quoted case of *Shenango Valley*:

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[46]21 LA 713.
[47]*Id.* at 724.
[48]*American Sugar Ref. Co.*, 36 LA 409, 414 (Crawford 1960). *See also The Advertisor Co.*, 87-1 Lab. Arb. Awards (CCH) ¶8,224 (Baroni 1987).
[49]*Mead Corp.*, 75 LA 665, 667 (Gross 1980).

> In the absence of contractual language relating to contracting out of work, the general arbitration rule is that management has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it. This general right to contract out may be expanded or restricted by specific contractual language.[50]

The overriding key is the phrase "good faith," a term that American arbitrators have used to encompass a broad variety of factors, including the ones noted in *Shenango Valley* above. And clearly, as I read the cases, at the arbitral level the issue has come down to one of *balancing* the affected interests.[51] Thus, in *The Advertisor Co.*,[52] the layoff of almost half the bargaining unit (three employees out of eight) through subcontracting shortly after the collective agreement was signed was found to establish "bad faith." On the other hand, where the change in mode of operation resulted in the loss of only overtime opportunities, the "business justification" was held to be paramount.[53]

Now one would have thought that the strong reassertion of management's rights by the Board in *Milwaukee Spring II* (and as affirmed by the court line) might have dampened the willingness of arbitrators to imply broad qualifications of "good faith" into collective agreements otherwise silent on contracting out. That indeed is the point of an article by Kenneth Kirsner, *Arbitral Treatment of Subcontracting after Milwaukee Spring II: Much Ado About Nothing?*[54] Kirsner finds, however, that arbitrators have continued, post *Milwaukee Spring*, undeterred. Indeed, in a more recent case, *Crosset Co.*,[55] the collective agreement *expressly* reserved to the employer the right to "subcontract or transfer work, services, jobs, products or components thereof." In denying the grievance the arbitrator *still* wrote:

> When sanctioning subcontracting/transferring of work, arbitrators will want to be certain that the change was dictated by economic

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[50]53 LA 741, 744–45 (McDermott 1969). For a considered review of various types of subcontracting clauses, *see* Abrams & Nolan, *Subcontracting Disputes in Labour Arbitration: Productive Efficiency Versus Job Security*, 15 U. Tol. L. Rev. 7 (1983). All of this is also subject to the established practice of a particular industry, and even more so, of the particular parties.

[51]*See generally* Elkouri & Elkouri, How Arbitration Works (4th ed. 1985), at 536 ff.; Bernhardt, *Subcontracting During the Term of a Contract*, 37 Arb. J. 1 (Mar. 1982), at 45.

[52]87-1 Lab. Arb. Awards (CCH) ¶8,224 (Baroni 1987).

[53]*Granite City Steel*, 85-1 Lab. Arb. Awards (CCH), ¶8,712 (McDermott 1985).

[54]44 U. Miami L. Rev. 371 (1989).

[55]93-1 Lab. Arb. Awards (CCH) ¶3,167 (Krislov 1993).

necessity and does not severely weaken the bargaining unit or subvert the agreement. Thus it is possible that the company's action may be set aside even though the contract authorizes the subcontracting/transfer of work.[56]

It is clear that contracting out is not an issue that American arbitrators will let go of easily.

II. UNION PERSPECTIVE

GARY S. WITLEN*

Introduction

It is an unfortunate reality that in this 61st year under the National Labor Relations Act (NLRA) some participants in the labor-management community must continue to be reminded that the statute's "manifest objective" was to promote collective bargaining as a means of achieving contracts between employers and labor organizations, thereby promoting industrial peace and stability.[1] Congress recognized that these goals could not be accomplished until employees had the opportunity to equalize the economic power held by their employers. To achieve such parity, the right of employees to associate and to join representative organizations of their choice had to and must be protected. Finally, the benefits derived from collective bargaining agreements could not be attained unless employers were compelled to treat with those representatives in good faith. Thus, the law encourages bargaining, promotes the formation of labor organizations, and counteracts employers' inclination to avoid bargaining with their employees as economic equals.

Unions have no inherent interest in pursuing actions that are destructive of employers, for without employers unions cannot exist. Nonetheless, many employers persist in their belief that collective bargaining impinges upon the exercise of their entrepreneurial prerogatives.[2] Historically and currently, a method

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[56] *Id.* at 3907.

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[1] *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938); *NLRB v. The Sands Mfg. Co.*, 306 U.S. 332, 334 (1939); *National Labor Relations Board v. Jones & Laughlin*, 301 U.S. 1, 45 (1937); *Singer Mfg. Co.*, 24 NLRB 444, 463 (1940), *enforced*, 119 F.2d 131 (7th Cir. 1941). *See* declaration of policy set forth in sections 1 and 101 of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. 141, 151.

[2] *See, e.g., Joy Recovery Technology Corp.*, 320 NLRB No. 45 (1995); *Sumo Container Station, Inc.*, 317 NLRB 383 (1995); *Pollution Control Indus. of Ind.*, 316 NLRB 455 (1995).

of evading the bargaining obligation has been to eliminate the work performed by members of a bargaining unit through the processes of subcontracting, work relocation, and partial plant closure.

That strategy has never been easier to effect or more profitable. The global economy allows products to be manufactured one component at a time in facilities scattered throughout the world, thus replacing the traditional single-location assembly line. Employers have expanded opportunities to disperse their production facilities, making it more difficult for unions to organize as an initial matter, followed by a weakening in the ability of unions to maintain wage parity among workers.[3] Consequently, it is easier for employers to assign work to locations that provide them with greater price competitiveness and profits, frequently at the expense of workers and their terms and conditions of employment.

Although traditional subcontracting may have served limited purposes such as affording employers the flexibility to perform work beyond their normal capacities on a temporary basis, modern subcontracting and related permanent work transfer decisions have the effect of terminating bargaining units and their employees. For those who seek to avoid the bargaining process, the equation is simple. Without employees, there are no unions, and without unions, there is no collective bargaining.

This paper provides a trade union view of employers' legal obligations to discuss work transfer decisions. It also considers the role of the arbitrator in determining contract rights, frequently without specific contract language that reflects the current economic circumstances in which work transfer decisions are implemented. It is the author's view that the arbitrator has an obligation to serve the objectives of the NLRA, to promote collective bargaining and to preserve the right of employees to participate in that process through representatives of their own choosing. Arbitrators should strive to interpret agreements in a manner that maintains the status quo that the parties bargained to establish, until they are both free to utilize the economic power that they can marshal to pursue their collective bargaining objectives at contract renewal.

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[3]Duke, *Regulating the Internal Labor Market: An Information-Forcing Approach to Decision Bargaining over Partial Relocations*, 93 Colum. L. Rev. 932, 936–37 (1993).

The Runaway Shop[4]

From its inception, the National Labor Relations Board (NLRB) was required to counteract efforts by employers to avoid their statutory bargaining obligations by transferring work to subcontractors or relocating their facilities. The Board correctly determined that such procedures were inimical to the very purpose of the Act, destructive not only of the rights of the immediate participants but also of the future efforts by other employees to organize for the purpose of attempting to engage in bargaining.[5]

The statutory restrictions imposed on the parties are minimal. Employers are required to "bargain collectively with the representatives of his employees, subject to the provisions of section 159(a)"; unions, which are statutory representatives, must do no more than "bargain collectively with an employer. . . ."[6] Employers retain their right to manage their businesses and make entrepreneurial decisions.[7] The 1935 Act did not specify the subjects about which employers and employees were obligated to bargain. The early Board defined the bargaining obligation in terms of the overarching objectives of the statute, and it recognized subcontracting decisions as an employer practice "which may vitally affect its employees by progressively undermining their tenure of employment in removing or withdrawing more and more work, and hence more and more jobs, from the unit."[8] Accordingly, the employer was obligated "to sit down and discuss these matters with the Union when requested to do so."[9]

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[4]A "runaway shop" is generally defined as an employer that purposely changes location to avoid dealing with a union. It was cited as a basis for the passage of the NLRA. *See* Hearings on S. 1958, Senate Comm. on Educ. and Labor, 74th Cong., 1st Sess. 105–08 (1935).

[5]*Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 49, 1 LRRM 303 (1935), *aff'd*, 303 U.S. 261 (1938) (eliminating the obligation to bargain by eliminating the employees in the bargaining unit was contrary to the Act's objective because it "created and tends to create a condition of unrest and fear on the part of the employees . . . which impaired and tends to impair their efficiency and consequently, . . . the safety and efficiency of instrumentalities of transportation among the several states"). *See also Diaper Jean Mfg. Co.*, 109 NLRB 1045, 1062, *enforced*, 222 F.2d 719 (1st Cir. 1954).

[6]29 U.S.C. §§ 158(a)(5) & (b)(3). Section 159(a) provides that a union selected by a majority of the bargaining unit shall be the collective bargaining representative "in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."

[7]*Mahoning Mining Co.*, 61 NLRB 792 (1945).

[8]*Timkin Roller Bearing Co.*, 70 NLRB 500, 518, 18 LRRM 1370 (1946), *enforcement denied*, 161 F.2d 949 (6th Cir. 1947).

[9]This is not to suggest, however, that the early Board decisions unanimously mandated bargaining over the decision to subcontract where there was no anti-union animus. *See, e.g., Mahoning Mining Co., supra* note 7, at 803. Many cases were litigated as violations of § 8(3) of the Act, prohibiting employer discrimination in the hiring and tenure of employees, rather than as § 8(5) refusal-to-bargain violations.

The 1947 amendments added section 8(d), making explicit the implicit bargaining obligations in the original Act.[10] Nonetheless, it remained the primary responsibility of the Board to determine which subjects fell within the bargaining obligation on a case-by-case basis.[11] And the distinction between issues found to be "mandatory" subjects of bargaining, as opposed to matters that were merely "permissive," determined whether the parties could maintain their bargaining positions to impasse.[12]

Throughout this period, the decisions that reflect the most consistent Board policy involved application of the statute to the "runaway" shop. Unilateral decisions to transfer work to avoid the bargaining obligation, either through the device of subcontracting to a third party or partial closure of an operation, were found to be statutory violations that threatened the majority status of the union, the exercise of protected rights of employees, or the process of collective bargaining itself.[13] Employers were not permitted to discriminate in their employment decisions, including the location of work, merely because there was also an economic incentive to do so.[14] Even in the absence of bad faith or anti-union animus, the Board frequently required bargaining over the decision to transfer work, where the fundamental benefits of the law were in jeopardy.[15] It was only where the employer's decision was moti-

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[10]Collective bargaining was defined as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." 29 U.S.C. § 158(d).

[11]*Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

[12]*NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

[13]*Kuehn Mfg. Co.*, 7 NLRB 304 (1938); *Gerity Whitaker Co.*, 33 NLRB 393, 407, 8 LRRM 275 (1941), *enforced as modified per curium*, 137 F.2d 198 (6th Cir.), *cert. denied*, 318 U.S. 763 (1943); *Mount Hope Finishing Co.*, 106 NLRB 480, 494 (1953), *enforcement denied*, 211 F.2d 365 (4th Cir. 1954). The Board analogized employer decisions to transfer work and eliminate jobs to lockout situations, finding them destructive of collective bargaining agreements and the bargaining representation process. Terminations as a result of such decisions were treated as violations of § 8(a)(3). *NLRB v. Remington Rand, Inc.*, 94 F.2d 862 (2d Cir. 1938).

[14]*Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). *See also Industrial Fabricating, Inc.*, 119 NLRB 162, 170 (1958), *enforced*, 272 F.2d 184 (6th Cir. 1959). "Although the employees' decision to organize may result in economic expense to their employer, Congress cannot have intended to permit the employer for that reason to take anticipatory action to nip such organization in the bud. To hold otherwise would be to strip all meaning from the Act and nullify the congressional objective of protecting the right of employees to organize for collective bargaining."

[15]*Brown-McLauren Mfg. Co.*, 34 NLRB 984 (1941); *Warehouse Processing & Distribution Workers' Union, Local 207*, 118 NLRB 342, 347 (1957) (the fact that the employer was motivated by economic considerations and not anti-union animus does not excuse conduct that interferes with the exercise of employees' statutory rights); *Brown Truck & Trailer Co., Inc.*, 106 NLRB 999, 1016 (1953) (bargaining representative is at least entitled to notice of and opportunity to discuss action that has the effect of displacing all or substantially all employees in the bargaining unit even where no animus); *Shamrock Dairy,*

vated entirely by considerations divorced from labor costs or the exercise of employee statutory rights that the Board concluded that bargaining over work transfers was not required.[16]

Fibreboard

Whether by coincidence or, perhaps, illustrative of the inherent nature of the Board, the major policy pronouncements regarding work transfer decisions have followed changes in the political administration of the country. In 1961, the "Eisenhower" Board held that an employer was not required to bargain over its decision to subcontract maintenance operations for economic reasons and consequently terminated a bargaining relationship that had existed since 1937.[17] Holding that Congress did not intend to require employers to bargain over basic management decisions such as whether and to what extent to risk capital and managerial effort, the Board concluded that the decision to subcontract work performed by the members of an existing bargaining unit did not involve "conditions of employment" but rather the question of whether a continued employment relationship would exist.[18]

Upon request for reconsideration, a different panel of the Board reversed its position.[19] The Board emphasized that the obligation to bargain did not preclude the employer from effectuating an economic decision to terminate a phase of its business; it merely required prior discussion with the bargaining representative.

In affirming the Board's decision, the Supreme Court included within the scope of "condition of employment," "termination of employment which . . . necessarily results from the contracting out of work performed by members of the established bargaining unit."[20] Such a definition was deemed necessary to bring subcontracting, a matter the Court considered to be of vital concern, within the collective bargaining process. By its own terms, the

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Inc., 124 NLRB 494 (1959), *enforced*, 280 F.2d 665 (D.C. Cir.), *cert. denied*, 364 U.S. 892 (1960).

[16] *Diaper Jean Mfg. Co., supra* note 5, at 1058, 1062.

[17] *Fibreboard Corp.*, 130 NLRB 1558 (1961).

[18] *Id.* at 1560–61.

[19] *Fibreboard Corp.*, 138 NLRB 550 (1962). In the interim, the Board had determined that bargaining was required over economically motivated subcontracting decisions. *Town & Country Mfg. Co., Inc.*, 136 NLRB 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963). The elimination of unit jobs was found to be a "term and condition of employment," subject to mandatory bargaining under § 8(d). *Id.* at 1027. The Board also determined that its earlier decision was inconsistent with the Supreme Court's ruling in *Railroad Telegraphers v. Chicago & Northwestern Ry. Co.*, 362 U.S. 330 (1960).

[20] 379 U.S. at 210.

majority opinion was limited to situations in which the employer's decision involved the replacement of employees in the existing bargaining unit with those of an independent contractor performing the same work under similar conditions of employment. The company's basic operation did not change, nor was a significant capital expenditure required.[21]

Nonetheless, Justice Stewart issued a concurring opinion expressing his concern that the majority decision was too broad and suggesting that the majority implied "that any issue which may reasonably divide an employer and his employees must be the subject of compulsory collective bargaining."[22] Reaffirming prior Court determinations that the scope of section 8(d) was restrictive, rather than expansive,[23] he defined the bargaining obligation as attaching to the physical conditions in which employees worked, not to managerial decisions concerning the commitment of investment capital and the basic scope of the enterprise, and possibly attaching to an intermediate category of managerial decisions in which the impact of a particular managerial decision on job security is indirect and uncertain.[24]

The immediate impact of Stewart's opinion is apparent from the Board's decision in *Westinghouse Electric Corp.*[25] There, the company historically had subcontracted work that could have been performed by employees in its various departments, without discussing the individual subcontracts with the union. The Board held that such bargaining was not required by its decision in *Fibreboard Corp. II*, which, it explained, did not "lay down a hard and fast new rule to be mechanically applied regardless of the situation involved." Rather, the Board relied upon the flexibility that it considered to be implicit in the Supreme Court's decision and concluded that there could be circumstances in which unilateral employer action regarding a mandatory subject of bargaining could be justified.[26] The Board held that the determination of whether a unilateral subcontracting decision was subject to manda-

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[21] *Id.* at 213–15.

[22] *Id.* at 221.

[23] *NLRB v. American Ins. Co.*, 343 U.S. 395 (1952); *NLRB v. Wooster Div. of Borg-Warner Corp.*, *supra* note 12, at 722.

[24] *Supra* note 20, at 222–23.

[25] 150 NLRB 1574 (1965).

[26] *Id.* at 1576. The Board's citation of *NLRB v. Katz*, 369 U.S. 736, 747 (1962), to support this proposition strains the acceptable limits of advocacy. There, the Supreme Court stated that:

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotia-

tory bargaining depended upon whether (1) the employer was motivated solely by economic considerations; (2) the subcontracting was consistent with prior business operations; (3) the current subcontracting varied significantly from established practice; (4) the subcontracting adversely impacted on the employees in the unit; and (5) the union had the opportunity to bargain over existing subcontracting practices in general negotiating meetings.[27]

In *Westinghouse,* the company had subcontracted on a routine basis for years, the union had negotiated unsuccessfully over the employer's practices in general contract negotiations, and, perhaps most significantly, the subcontracting had not resulted in the displacement of any bargaining unit employees.[28] In short, the new test was promulgated in a factual context distinguishable from the *Fibreboard* subcontracting, which involved the substitution of bargaining unit members with employees of another company performing the same work under the control of the initial employer.

Application of the *Westinghouse* test shattered the singular approach to subcontracting seemingly mandated by the majority opinion in *Fibreboard,* leaving a trail of complaints dismissed because the union could not prove that the decision had a "significant detriment" to the employees in the bargaining unit.[29] The exception created by *Westinghouse,* based upon the Board's reading (or misreading) of *Katz,* threatened to swallow the *Fibreboard* rule.

Concurrent with these subcontracting developments, cases were litigated involving the bargaining obligation that applied to decisions to partially close or permanently relocate work. In the absence of evidence of anti-union animus, the Board generally attempted to evaluate whether the factual situations were similar to those addressed by the majority decision in *Fibreboard.* The courts adopted a more conservative approach, applying the criteria enun-

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tion, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of Section 8(a)(5), without also finding the employer guilty of overall bad faith. *While we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, no such case is presented here.* (emphasis added)

[27] *Supra* note 25, at 1577. The balancing test established in *Westinghouse* was generally accepted by the courts of appeal. *NLRB v. Royal Plating and Polishing Co.*, 350 F.2d 191 (3d Cir. 1965); *Brockway Motor Trucks v. NLRB*, 582 F.2d 720 (3d Cir. 1978); *Equitable Gas Co. v. NLRB*, 637 F.2d 980 (3d Cir. 1981).

[28] *Supra* note 25, at 1582–83.

[29] *Kennecott Copper Corp. (Chino Mines Div.)*, 148 NLRB 1653 (1964); *American Oil Co.*, 151 NLRB 421 (1965); *American Oil Co.*, 155 NLRB 639 (1965); *Central Soya Co., Inc.*, 151 NLRB 1691 (1965); *Superior Coach Corp.*, 151 NLRB 188 (1965).

ciated in the Stewart concurring opinion and the Board's *Westinghouse* ruling.[30] The overlap in terminology obscured the focus of both the Board and courts, transforming what should have been consideration of the impact of the employer's decision on collective bargaining and employee rights into disputes over the category in which the employer's decision fell.

Adams Dairy, Inc.[31] is illustrative, a case in which the company unilaterally decided to modify its distribution system by eliminating its company drivers in favor of a system exclusively dependent upon outside contract drivers. The Board found a violation of section 8(a)(5), viewing the matter as subcontracting. The court of appeals reversed, finding that no unfair labor practice had been committed in the absence of evidence that the employer's decision had been motivated by anti-union animus or a desire to discourage union membership.[32] After remand for reconsideration in light of the Supreme Court's *Fibreboard*[33] decision, the court of appeals again found that the employer's decision was beyond the scope of mandatory bargaining because it was a partial liquidation that changed its fundamental operating procedure. While the Board focused on *Fibreboard*, the appellate court took its guidance from the intervening Supreme Court decision in *Textile Workers Union of America v. Darlington Mfg. Co.*[34]

The definitional confrontations provided little guidance to either labor or management as to their rights and obligations.[35]

First National Maintenance

In 1979, the Supreme Court paid homage to the Board's expertise and granted it "considerable deference" in determining whether the price of food in the cafeteria and vending machines was a

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[30] *See* George, *To Bargain or Not To Bargain: A New Chapter in Work Relocation Decisions*, 69 Minn. L. Rev. 667, 676 n.45 & n.46, 680 & n.72, 684 & n.85 (1985) [hereinafter "George"].

[31] 137 NLRB 815 (1962).

[32] *NLRB v. Adams Dairy, Inc.*, 322 F.2d 553, 557 (8th Cir. 1963), *vacated*, 379 U.S. 644 (1965). The court held that there was no obligation to bargain despite the fact that termination of employees was a natural consequence of the decision to subcontract the entire delivery operation. In contrast, the Board considered economic decisions that resulted in the termination of employment to invoke the obligation to bargain, at least where the employer remained in business. *Ozark Trailers, Inc.*, 161 NLRB 561, 565 (1966).

[33] 350 F.2d 108, 112–13 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

[34] 380 U.S. 263 (1965).

[35] Conflicts among the circuits and the inconsistent decision making of the Board are noted in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 672–74 ns.7–10 (1981). *Compare, e.g.*, decision of Member Jenkins in *Summit Tooling, Inc.*, 195 NLRB 479, 480, 79 LRRM 1396 (1972), *enforced*, 83 LRRM 2044 (7th Cir. 1973) with his dissent in *Kingwood Mining Co.*, 210 NLRB 844, 86 LRRM 1203 (1974), *aff'd*, 515 F.2d 1018 (1975).

mandatory or permissive subject of bargaining.[36] Two years later, a majority of the Court ignored that expertise and reversed the Board's conclusion that bargaining was required over an employer's decision to close part of its business for economic reasons separate and apart from labor costs.

The Court's decision in *First National Maintenance Corp. v. NLRB*[37] adopted Justice Stewart's classification of managerial decisions enunciated in his concurrence in *Fibreboard*. First National Maintenance (FNM) serviced commercial customers on a contract basis and did not transfer employees among them. Following a dispute with one customer, Greenpark Care Center, FNM terminated the contract for economic reasons and also terminated its employees who had been assigned to service Greenpark. Those employees had recently voted for union representation, and the newly certified bargaining agent's request for bargaining was refused. The Board found a violation of the Act.

In reversing, the Supreme Court agreed that the company's decision had an impact on the employees, but one that was made wholly apart from the employment relationship.[38] The Court equated the company's decision to terminate its contract with Greenpark with a decision whether to be in business at all, a fundamental entrepreneurial determination that did not require bargaining, instead of with a decision as to whether to substitute one set of employees for another.[39] The Court promulgated a balancing test to evaluate whether the statutory objectives of collective bargaining outweighed the "burden" bargaining might place on the employer's conduct of its business.[40] That evaluation required a determination of whether the factor that prompted the employer's decision was amenable to the bargaining process. In *First National Maintenance*, the Court found that the statutory objectives could not be advanced by bargaining because the real dispute was between FNM and Greenpark, not between FNM and its employees.[41]

The Court engaged in lengthy speculation on the burdens that bargaining would impose upon employers in similar circumstances.

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[36] *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495–98 (1979).
[37] 452 U.S. 666 (1981).
[38] *Id.* at 677.
[39] *Id.*
[40] *Id.* at 679.
[41] *Id.* at 678, 688. To the extent the majority distinguished *Fibreboard*, it was on the basis that the employer decision there had been directly related to labor costs, a matter amenable to resolution through the collective bargaining process. *Id.* at 687–88.

The Court cited management's "need for unencumbered decision making," its purported need to "be free from the constraints of the bargaining process to the extent essential for the running of a profitable business,"[42] and its alleged need to make decisions with "speed, flexibility, and secrecy in meeting business opportunities and exigencies," although none of these factors appeared to have influenced the company's decision not to bargain in the instant case.[43] In contrast to these expressions of concerns for the "rights" of the employer, the Court asserted that a union's interests could be protected by bargaining over the effects of a managerial decision or pursuing remedies available where union animus could be proven to be a motivating factor.[44]

The Court's decision further blurred the distinctions between the bargaining obligations that attached to subcontracting, plant relocation, and partial closure decisions.[45] It did not end the definitional warfare, but rather provided guidance as to which terminology would be most likely to invoke the preferred response. Employers construed their decisions as involving entrepreneurial changes in their businesses; unions cloaked unfair labor practice charges in the rubric of subcontracting;[46] and the Board issued a series of tortured and politicized decisions that attempted to accommodate the Supreme Court's decisions and the competing analyses of the appellate courts.

In *Otis Elevator I*,[47] the Board found unlawful the company's failure to bargain over its decision to relocate work during the process of consolidating its operations following an acquisition. The same Board held in *Milwaukee Spring I*[48] that the transfer of a portion of an operation from a unionized to a nonunion facility to

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[42] *Id.* at 678–79.

[43] *Id.* at 683. Indeed, the record reflected that FNM had first given notice of its intention to cancel its contract with Greenpark in March 1977, but did not effectuate the cancellation until August 1, after the union had organized the employees assigned to Greenpark. *Id.* at 669–70.

[44] *Id.* at 682–83.

[45] For discussion of early Board and General Counsel reaction to the *First National Maintenance* decision, *see* George, *supra* note 30, at 684–85; and DiLorenzo & Jones, *Mid-Term Bargaining Over Unit Work Transfers*, 45 Lab. L.J. 433 (1994).

[46] *E.g.*, *Whitehead Brothers Co.*, 263 NLRB 895 (1982) (discontinuance of in-house trucking operations and use of subcontractor did not involve a fundamental change of the employer's business of transporting customers' products); *Bob's Big Boy*, 264 NLRB 1369 (1982) (discontinuation of shrimp processing facility was not a partial closure and did not alter primary focus of employer's business of supplying processed food for its restaurants).

[47] 255 NLRB 235, 236, 106 LRRM 1343 (1981). Despite recognizing the substantial investment in the new facility, the Board concluded that it did not alter the character of the enterprise or the nature and direction of its activities.

[48] 265 NLRB 206, 111 LRRM 1486 (1982).

decrease labor costs violated the Act. However, on remand to consider the impact of the *First National Maintenance* decision, new panels that included three Board members appointed by President Reagan reversed both of these opinions.[49]

In *Otis II*,[50] three separate opinions were issued, with the Board members able to reach consensus only on their determination that the *First National Maintenance* balancing test applied to relocation decisions. The rule that emerged from *Otis II* was that the bargaining obligation did not attach if the employer's decision had been based on anything other than labor costs, and even where labor costs were a factor no bargaining was required if the decision reflected a change in the scope and direction of the enterprise. The impact of the decision on the employees and the union's ability to offer alternatives that might influence the decision were not factors to be considered.

Dubuque Packing

In the seven years following *Otis II*, no Board panel was capable of enunciating a single view as to the appropriate factors to be utilized in determining the bargaining obligation. It was not until the Board's 1991 decision in *Dubuque Packing Co.*[51] that a majority was able to render an opinion encompassing the balancing tests contemplated by *First National Maintenance* and the recognition of the benefits of collective bargaining as expressed in *Fibreboard*.

The dispute in *Dubuque* began in 1977 with the employer's determination that it was losing money at one of its hog-killing plants and could maintain its operations only were the union to grant significant concessions. After two separate bargaining sessions that resulted in two separate sets of union concessions, the

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[49] *Milwaukee Spring II*, 268 NLRB 601, 115 LRRM 1065 (1984), *aff'd*, 765 F.2d 175 (D.C. Cir. 1985); *Otis II*, 269 NLRB 891, 115 LRRM 1281 (1984). For extended analyses of these decisions, *see* George, *supra* note 30 at 685–94, and Kirsner, *Comment: Arbitral Treatment of Subcontracting Disputes After Milwaukee Spring II: Much Ado About Nothing?*, 44 U. Miami L. Rev. 371, 383–85 (1989).

[50] 269 NLRB at 892.

[51] 269 NLRB 891 (1984), *remanded*, 880 F.2d 1422 (D.C. Cir. 1989). This was yet another case in which an initial determination was reversed by a reconstituted Board panel. In its first decision, the panel applied the prevailing *Otis II* analysis and dismissed the union's complaint. On reconsideration, a new panel reversed, promulgated a new test, and, in so doing, reversed *Otis II* in its crucial elements. *Dubuque II*, 303 NLRB 386 (1991), *enforced*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted*, 114 S. Ct. 1395, *cert. dismissed*, 114 S. Ct. 2157 (1994). While the matter was pending before the Supreme Court, the company and union entered into a settlement of the back pay claims, essentially terminating the litigation. *See* Schmall & Cappell, *The Impact of Dubuque Packing Co. Upon the Collective Bargaining Practices of Attorneys and Their Clients*, 24 Stetson L. Rev. 111, 113 (1994).

company closed the plant and relocated the work, with a loss of 530 jobs. Eventually, a second location was closed as well.

The Board first determined that a decision to relocate work was more closely analogous to the subcontracting decision subject to mandatory bargaining in *Fibreboard* than to the partial closing situation found to require only permissive bargaining in *First National Maintenance.*[52] However, mindful of the Stewart legacy and its own *Westinghouse* pronouncement, the Board cautioned that "the circumstances surrounding decisions to relocate vary significantly" and that "it is not feasible to categorize all decisions to relocate as mandatory subjects of bargaining."[53]

The resulting test requires the General Counsel to demonstrate that the employer's decision does not involve a change in the core entrepreneurial direction of the corporation. If the General Counsel meets that burden, the decision to relocate is presumed to be a mandatory subject of bargaining. However, the employer may rebut the presumption by establishing that (1) the work at the new site varies significantly from that performed at the old location; (2) work at the old site was discontinued entirely; (3) the decision involves a change in the scope of the enterprise; or (4) labor costs were not a factor in the decision or, if labor costs were a factor, that the union could not have offered concessions that could have changed the decision.[54]

Since *Dubuque,* the Board has demonstrated a greater willingness to pierce the standard corporate denial that a decision to relocate work without bargaining was related to labor costs. Thus, in *Owens-Brockway Plastics Products,*[55] the Board rejected the employer's contention that its decision to close its one unionized plant and transfer its work to the remaining nonunion facilities, following a merger with another corporation, was merely part of an overall corporate restructuring, not a reaction to the disparity in labor costs. The Board observed that a decision to close the one unionized plant out of 26 in operation raised a presumption that labor costs were a factor, an issue that was amenable to collective

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[52]*Dubuque II,* 303 NLRB at 391.

[53]*Id.* at 390.

[54]The appellate court summarized the test as: (1) exempting from bargaining employer decisions to relocate that are objectively viewed as entrepreneurial in nature; (2) exempting decisions that were motivated by something other than labor costs; (3) exempting employers from negotiations when doing so would be futile or impossible; and (4) requiring mandatory bargaining over decisions that leave the firm in the same entrepreneurial position as previously, that were taken because of labor costs, and that offer a realistic hope for a negotiated resolution. 1 F.3d at 31–32.

[55]311 NLRB 519 (1993).

bargaining.[56] Similarly, the Board required an employer to bargain over its decision to transfer work from its one union location (at which the members of the bargaining unit had rejected requested concessions) to two other union facilities where employees had accepted the wage reduction proposal.[57] However, the Board has also continued to recognize the prevailing Supreme Court precedent where labor costs were not a factor in the employer's subcontracting decision.[58]

Beyond Dubuque?

The recent cases appear to reflect the current Board's apparent desire to simplify the analysis by returning to the *Fibreboard* mandatory bargaining requirement where the facts reveal that the employer has merely substituted one group of employees for another, performing similar work under the control of the initial employer. In a series of decisions beginning with *Torrington Industries*,[59] the Board has attempted to resurrect the long-ignored distinctions between subcontracting and work relocations and eschewed submitting all work transfer issues to the *First National Maintenance* balancing test incorporated in *Dubuque*.[60]

Although unions would argue that the Board's approach is entirely consistent with the objectives of the Act in that it promotes collective bargaining and preserves the integrity of the bargaining unit, the new approach has been rejected by the only appellate

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[56] *Id.* at 522.

[57] *Seminole Intermodal Transport*, 312 NLRB 236, 145 LRRM 1343 (1993), *enforced*, 50 F.3d 10 (6th Cir. 1995). *But see B.C. Indus.*, 307 NLRB 1275, 140 LRRM 1326 (1992) (no bargaining obligation where employer transfers work from one unionized facility to another, offers to relocate employees, negotiates new contract with union, and subsequent layoffs were a result of loss of customers).

[58] *E.g., Oklahoma Fixture Co.*, 314 NLRB 958 (1994), *enforcement denied on other grounds*, 79 F.3d 1030 (10th Cir. 1996) (decision to subcontract to avoid product liability did not require bargaining).

[59] 307 NLRB 809, 140 LRRM 1137 (1992). *See also "Automatic" Sprinkler Corp.*, 319 NLRB 57, 1995 NLRB Lexis 1035 (1995) (mandatory bargaining required over company decision to remain in sprinkler fitting installation and maintenance business but subcontract work previously performed by its employees where objective was reduction of labor costs); *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021 (1994) (*Dubuque* balancing not necessary where employer has transferred unit work, but not facilities, to achieve lower labor costs; decision not involve complex reallocation of capital); *Power, Inc.*, 311 NLRB 599, 145 LRRM 1198 (1993), *enforcement denied*, 40 F.3d 409 (D.C. Cir. 1994); *Rock-Tenn Co.*, 319 NLRB 136 (1995); *Compu-Net Communications*, 315 NLRB 216 (1994) (obligation to bargain mandated by *Fibreboard* where employer's subcontracting essentially converts many of its old employees into employees of subcontractor, despite economic pressures unrelated to collective bargaining contract).

[60] 307 NLRB at 810. *See also Geiger Ready-Mix Co. of Kansas City*, 315 NLRB at 1023 n.16 (1995).

court to have considered it thus far.[61] Unions would also herald the Board's new inclination to adapt the criteria utilized to evaluate subcontracting and relocation decisions and apply them to decisions that "downsize" bargaining units. In *Holmes & Narver/Morrison-Knudson*,[62] the Board required the employer to bargain over a decision to reassign bargaining unit work and lay off bargaining unit employees in an effort to become more competitive.[63] The majority held that the *Dubuque* balancing analysis need not be undertaken if the employer's decision did not involve complicated capital allocation questions, a factor also relied upon in *Torrington*. The Board's application of these principles in this area of job assignments has not been accepted by the appellate courts.[64]

Finally, the Board has most clearly returned to its pre-*Fibreboard* roots by prohibiting a company from utilizing the threat of permanent subcontracting in the midst of an economic strike to pressure the union and members of the bargaining unit to submit to its demands.[65] The termination of the members of the bargaining unit that resulted from the decision was addressed as a violation of section 8(a)(3) and found to be inherently destructive of the employees' right to engage in section 7 activities, specifically, the right to resist employer bargaining demands. But even under traditional section 8(a)(5) considerations, the Board rejected the employer's attempt to justify its decision as a necessary cost reduction or as a fundamental change in its business operation that, as an entrepreneur, it was entitled to make without bargaining.[66]

It remains to be seen whether the Board's approach will be sustained. But although it may be characterized as radical and new, it has ample historic support and is entirely consistent with its statutory obligation to protect and ensure the survival of the parties necessary to accommodate bargaining—the employees themselves and their designated bargaining representatives.

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[61] *Furniture Renters of Am., Inc.*, 311 NLRB 749 (1993), *enforcement denied*, 36 F.3d 1240 (3d Cir. 1994), *on remand*, 150 LRRM 1272 (1995) (appellate court holds decision to subcontract delivery operation because of concerns about employee theft not subject to bargaining).

[62] 309 NLRB 146 (1992).

[63] *See also Sheraton Hotel Waterbury*, 312 NLRB 304, 144 LRRM 1182 (1993), *enforced in part*, 31 F.3d 79 (2d Cir. 1994).

[64] *St. Anthony Hosp. Sys.*, 319 NLRB 9, 150 LRRM 1142 (1995), *enforcement denied sub nom. Gratiot Community Hosp. v. NLRB*, 51 F.3d 1255 (6th Cir. 1995) (employer not obligated to bargain over staffing decision that effectively staffed bargaining unit positions at the "zero level").

[65] *International Paper Co.*, 319 NLRB 150, 151 LRRM 1033 (1995).

[66] *Id.* at 1055.

Role of the Arbitrator

Although cases presented to the Board seek enforcement of statutory rights that require bargaining over employer work transfer decisions and prevent discrimination in employment based on union affiliation, the issues submitted to arbitrators involve enforcement of rights incorporated, explicitly or implicitly, in collective bargaining agreements. The relief available to employees from the Board includes requiring an employer to bargain before subcontracting or restoring the status quo that existed when a work transfer decision was improperly implemented. Relief sought from arbitrators may prevent the employer from implementing a work transfer decision during the term of the contract. In terms of preserving bargaining unit jobs, preventing future employer transfers of work during the life of a contract, and promoting meaningful bargaining, the arbitrator rather than the Board has the potential greater impact. A decision that a contract does not permit the transfer of work that eliminates the bargaining unit requires the employer to address the issue during bargaining at the termination of the agreement when the union will be free to exercise its right to strike.[67] It was in such circumstances that Congress envisioned the collective bargaining process to be most effective.

In the absence of contract provisions defining the rights of the parties, arbitrators confronted with subcontracting disputes apply criteria similar to those discussed above, with no greater degree of unanimity than displayed by the Board or courts.[68] The generally accepted principle was enunciated more than 25 years ago in *Shenango Valley Water Co.*,[69] as "management has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in a subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it."[70] Arbitrators who have applied these criteria in a balancing test

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[67]Many work transfer disputes arise mid-contract term, when the employer holds the economic advantage because the union is usually contractually precluded from striking in support of its bargaining position.

[68]Crawford, *The Arbitration of Disputes Over Subcontracting* in Challenges to Arbitration, Proceedings of the 13th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1960); Sinicropi, *Revisiting an Old Battleground: The Subcontracting Dispute* in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1979).

[69] 53 LA 741 (McDermott 1969).

[70]*Id.* at 744–45.

have often characterized the concerns of the respective parties as management's "need to remain competitive in an ever changing economy" versus labor's desire "to preserve for its members that which it has bargained for in good faith."[71]

It is universally acknowledged that both parties enter into a collective agreement with a measure of "good faith" that the other will comply with its terms.[72] Thus, it requires no leap of reasoning to also recognize that no union enters into a contract without the expectation that the bargaining unit, and the contract, will still exist at the expiration of the contract term. In interpreting the individual clauses in a contract, that ultimate truth must be the guiding principle. In the absence of specific clauses that permit a party to destroy all or a part of the bargaining unit, it should be presumed that the parties intended the contract to evidence their mutual commitment to preserve their bargaining relationship. In this context, subcontracting clauses adopted years ago, which were intended to cover emergency situations in which an employer required extra workers or specialized skills or equipment, should not be interpreted as permitting the modern subcontracting decisions that permanently remove bargaining unit work, practices that were not within the contemplation of the parties when the clauses were initially negotiated, and that directly undermine the bargaining relationship.

In determining "good faith" in the absence of contract language, the arbitrator should follow the Board's lead and be most protective of the employees when the effect of the employer's decision is to eliminate the entire bargaining unit.[73] This may require a reprioritization of the factors that have been traditionally evaluated. Such work transfer decisions cannot be excused because they are based upon the entrepreneur's desire to maximize its financial returns, lest every contract be subject to termination upon the discovery of a cheaper labor supply. Arbitrators cannot bestow the "good faith" mantle on "reasonable business decisions" where the

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[71] *Angelus Block Co.*, 100 LA 1129, 1134 (Prayzich 1993).

[72] *Allis-Chalmers Mfg. Co.*, 39 LA 1213, 1218 (Smith 1962). The most common criteria for determining "good faith" include past practices of the parties, justification of subcontracting decision, effect on union or bargaining unit, effect on employees, type of work involved, availability of qualified employees and equipment, regularity of subcontracting, duration of subcontracted work, unusual circumstances involved, and history of negotiations on right to subcontract. Elkouri & Elkouri, *How Arbitration Works*, 4th ed. (BNA Books 1985), 540–43.

[73] *See Angelus Block Co., supra* note 71, at 1136; *Builders Plumbing Supply*, 95 LA 344 (Briggs 1990); *Campbell Truck Co.*, 73 LA 1036, 1040 (Ross 1979); *American Sugar Ref. Co.*, 36 LA 409, 414 (Crawford 1960).

effect of those decisions is the subrogation of the employees' expectation that if the company continues to perform work, they will perform it under the terms and conditions as established by the contract.[74]

Thus, economic advantages gained by the employer's decision to transfer work from a unionized workforce to a less expensive, nonunion workforce should never be considered the exercise of reasonable business judgment; they should be per se indications of bad faith. The employer's implementation of such a decision without first bargaining with the representative of its employees should be considered confirmation of the employer's anti-union intent. Additionally, bad faith should be presumed where the new subcontracting is qualitatively or quantitatively different from prior practice, regardless of whether the change has an immediate adverse impact on the current members of the bargaining unit in terms of lost employment.[75] Gradual erosion of the unit, or of the terms of the collective bargaining agreement, is as destructive to the bargaining process as is immediate termination of employees because it undercuts employees' faith in the value of the bargaining process as well as in the utility of their bargaining representative.[76]

Further, arbitrators should not interpret contracts based upon the notion that a group of employees performs tasks that are peripheral to the "core" entrepreneurial functions of the company.[77] All parts of a bargaining unit are "important parts." The contract benefits and statutory rights enjoyed by members of a janitorial bargaining unit are as precious to those employees as are the comparable rights and benefits enjoyed by the most skilled production worker. Rights should not be expendable because the employees who exercise them may be easily replaced.

In short, the criteria developed by arbitrators over the years to determine bad faith need to be applied with a view to preserving the overall rights of the parties to engage in collective bargaining. The new work transfer decisions must be recognized as a threat to the essential components of the bargaining process, the members of the bargaining unit, and their designated representative labor organization. An employer should never be permitted to violate

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[74]*See Armco Steel Co.*, 102 LA 1109 (Strongin 1994); *Mead Corp.*, 75 LA 665 (Gross 1980).
[75]*See Simonds Indus., Inc.*, 104 LA 41 (Rybolt 1994).
[76]*See ABB Combustion Eng'g*, 101 LA 258 (Cohen 1993).
[77]*Armco Steel Co.*, 102 LA 396 (Strongin 1994); *Hillbro Newspaper Printing Co.*, 46 LA 310 (Darragh 1965).

the commitment it expressed to its employees by signing a collective bargaining agreement in furtherance of its economic self-interest. If the effect of a work transfer decision is to substitute a cheaper, less troublesome workforce for the members of the bargaining unit working under a contract, the arbitrator has an obligation to remember that the statutory bargaining requirements are implicit in every collective bargaining agreement and to interpret the contract in a manner that preserves its existence and the protections it affords.

III. MANAGEMENT PERSPECTIVE

ROBERT MACPHERSON*

I think I'm going to remain seated, if that is all right, thank you. It is actually kind of nice being last here to speak because I have not nearly as much time left as my colleagues, but that is okay because I think I can say it very briefly from a management perspective. And I will enjoy the opportunity to respond to Gary's last few points.

Fortunately, from a management perspective in Canada, the law in this area has been very clear for a long time, certainly since the *Russellsteel* decision in the late 1960s. I was in high school then and for as long as I have been practicing law it has been pretty clear law despite the intervention of the labour board addressing various issues such as related employers and successor employers and unfair labour practice complaints in the context of contracting out.

Fundamentally, contracting out has been perceived in Canada as a management right and a right that unions should expect management may wish to exercise in appropriate circumstances. And in recognizing this, unions have been presumed to have understood that should they wish to restrict this right they must do so in collective bargaining, obviously subject to the duty to bargain in good faith.

I prefer to look on the whole issue as based on a bargaining model really. Because I think that although there are a great deal of differences in the jurisprudence between our two countries, fundamentally, if we go back to first principles we must ask the

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*Partner, McCarthy Tetrault, Toronto, Canada. [Editor's Note: The remarks of Mr. Macpherson are based on the transcript of his taped remarks and do not represent a written presentation.]

question, you as labour arbitrators must ask the question, what is a union granted when it is granted bargaining rights or when it negotiates a collective agreement with a recognition clause. Fundamentally, I think what a union is granted is the right to bargain terms and conditions of employment for a defined group of employees of a particular employer. I submit that a union is not granted, or the bargaining unit is not granted, ownership over any particular work and that an employer and the employer's management, always retain the right to have work performed in a variety of different ways.

Subcontracting is only one example of the choices that management may exercise to have work performed. It is suggested (by Gary Witlen) that management must be fundamentally motivated by anti-union animus if it is going to have bargaining unit work performed other than by its own employees in circumstances that could lead to layoff of a large number of employees in the bargaining unit. I submit that this is something that may have to be a matter of an inquiry such as an unfair labour practice inquiry or an inquiry of an arbitrator. But it is not something that, needless to say, should be presumed in assessing or applying standards of good faith.

Looking at a bargaining model and looking at the world economy—the oft-used phrase that was well described by Gary in describing how a 747 gets manufactured these days—it is obvious that employers on either side of the border in manufacturing operations—and this is even more significant with free trade and with NAFTA—must be able to survive. And thus for the employees' jobs to survive, employers must be able to have the work performed in the most cost effective and efficient way. And I agree that the union should be able to address this in collective bargaining. Unions should be able to seek information for the purpose of bargaining that allows them to persuade employers that it makes sense to have the work to be continued to be performed by the members of the bargaining unit that it represents. And unions should be able to go to the bargaining table and should be able to seek and obtain information that allows them to meaningfully negotiate over those issues. But where unions are not successful in so negotiating over those issues and where they're unable to obtain express restrictions in the collective agreement around subcontracting—subject, of course, always to being able to pursue remedies for unfair labour practices in the context of employer subterfuge or where there are related employer issues or successor

employer issues—it is not, I submit, unreasonable in negotiating collective agreements for management to attempt to keep any restrictions out of the agreement if it can.

In Canada, of course, under our collective bargaining system, we do not have midterm bargaining during the currency of the collective agreement. And the collective bargaining then occurs on a periodic basis with collective agreements typically being for terms of one, two, or three years—although interestingly I've noted that the average length of collective agreements, at least in Ontario, seems to be increasing based on some recent reports, and parties are negotiating longer agreements. But, nevertheless, the union periodically has an opportunity to negotiate over the issue of subcontracting, and the employer has a duty to bargain in good faith during those negotiations over the issue of subcontracting. Of course, the significant difference in the United States is the opportunity to seek midterm bargaining and, perhaps naively from the point of view of a management lawyer in Canada, I am not sure what the big problem is quite frankly with midterm bargaining, based at least on how Gary has described it to me, more so over coffee this morning than in his speech. He was a little more moderate in describing it when we had coffee. He made it sound pretty attractive to me but maybe I am missing something. But, you know it does not strike me as being a whole lot different, particularly in view of the fact, as I understand it, that sanctions are not available if an impasse is reached. It does not strike me as a whole lot different than what often is negotiated in language in collective agreements in Canada where a union may be successful in obtaining a provision—often in a letter of understanding if not in the body of the agreement itself—that management will agree to notify them in advance of a decision to subcontract where practical and that the parties will engage in meaningful discussions prior to the subcontracting taking place. And for most companies that is not a particularly onerous provision to comply with, though if I am negotiating collective agreements for management I would prefer to keep any restrictions out of the agreement if I can. If the union has the bargaining power to get something in the agreement, that is a fairly palatable restriction to live with, and, in fact, in some cases management can sit down with the union and the union has the opportunity to say, "No, we think you're mistaken. We don't think you're going to save money in doing this. We don't think it's more efficient." Or indeed, "We'll agree to other changes that'll allow you to keep the work with us." I think that is a positive thing and I

do not think that management should be particularly concerned about that, provided, of course, that management ultimately, and in a timely fashion, can continue to manage the enterprise and if necessary pursue the contracting out decision if they determine that it is appropriate.

But as arbitrators, I believe that you have to look at the collective agreement in terms of what the parties have expressly negotiated and be reluctant to impose any implied restrictions on management rights where the union has presumably, because of a lack of bargaining power, been unable to negotiate the kinds of restrictions it would like to impose. If we believe in free collective bargaining and if it is believed that the purpose of free collective bargaining is to allow the parties to use their relative economic strengths to come to a common solution and common terms and conditions of employment that they can live with, we have to accept that where a trade union in a particular industry or particular business does not have the bargaining strength to achieve such restrictions, then maybe that goes hand in hand with the notion that the employer has other economic alternatives for the performance of the work that it should be entitled to pursue if it makes sense. And all of this, of course, must be seen in the context that employers can always be challenged for unfair labour practices or for acting in bad faith. To suggest that subcontracting is inherently destructive and ultimately must be the product of bad motives on the part of the employer, while it may be accurate in an individual situation it is generally speaking a dangerous principle to apply.

Fundamentally, I think that we have to recognize that bargaining unit employees do not have ownership over the work that they are performing, that employers should be entitled to engage in other means of operating the enterprise and not exclusively be tied to the performance of the work by bargaining unit employees, and that the challenge for trade unions is to ensure that they negotiate terms and conditions of employment that will hopefully from their point of view be beneficial to their members, and permit their members to continue to perform the work in a cost effective and an efficient manner so that subcontracting will not be the alternative of choice for that employer.

Thank you.