under the basic agreement to dissect work contracted by management to be performed outside the plant. Unlike cases arising under the "major" exception, the specific factors to be considered by the arbitrator, in deciding a case involving work to be performed outside the plant, have been spelled out under "Reasonableness." Thus, a case respecting work outside the plant mandates an "all or nothing" decision from the arbitrator. The union has absolutely no contractual support in asserting a claim to "peripheral work" when the work is to be performed outside, and the arbitrator has no authority to award the bargaining unit any component of the work. For example, in the event of a management decision to contract the complete remanufacture of a locomotive outside the plant, there is no basis under the agreement for an arbitrator to decide that some of the project's components, such as painting and engine rebuild, must be performed by plant forces. The only issue is whether, in consideration of the reasonableness factors, the remanufacture may or may not be contracted out.

Conclusion

In closing, let me refer you again to Bernie Kleiman's comments. For those of you who may be designated arbitrator to hear and decide a contracting out dispute in the steel industry, let me wish you abundant wisdom in sorting out the ambiguity and in assisting the parties in the final process of negotiating their agreement. As a management advocate, I shall do my utmost, whenever possible, to influence the direction of your wisdom.

IV. Examining Contracting Out Clauses in the Railroad Industry

Herbert L. Marx, Jr.*

As this is being presented to you, I am currently serving on an Emergency Board appointed by President Clinton, with fellow Academy members Rolf Valtin (as Chairperson) and Gil Vernon.

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The author expresses his appreciation for information and suggestions from Steven V. Powers, Assistant to the President, Brotherhood of Maintenance of Way Employes; Martin Fingerhut, Executive Director of the railroad members of the National Railroad Adjustment Board; and John W. Gohmann, John W. Gohmann and Associates, Inc., and

This Board is to make recommendations concerning a wide-ranging dispute over contract terms between the major railroad carriers and one railroad union, the Transportation Communications International Union (TCIU). One of the issues before the Board is—you guessed it—the contracting out of work, particularly as related to TCIU's Carmen Division. Please understand, therefore, that these comments are entirely unrelated to the proceedings before the Emergency Board and most assuredly are not to be taken as the view of my fellow Board members.

As has been discussed by the previous speakers, steel industry contracting out provisions have the "guiding principle" that "work capable of being performed by bargaining unit Employees shall be performed by such Employees" and that the employer "will not contract out any work" unless it meets certain exceptions, which are specified in minute detail.[1]

This is in sharp contrast to the railroad industry. Railroad contracting (or contracting out) language can be defined to provide, in maintenance of way operations, the right of a carrier (as railroad employers are designated) to arrange with outside companies for work that otherwise might be performed by the carrier's own employees. This is limited only by certain restrictions and the requirement of advance notice and discussion. In railroad labor contracts covering skilled craft employees (known as "shopcraft employees"), contracting out clauses more closely resemble those in the steel industry, although there remains a wide difference.

Without question, most carriers understandably wish to concentrate on the operating side of railroading and have made great efforts to reduce the costs of repair, maintenance, and construction through vastly improved techniques and through contracting to outside firms. At the same time, in the face of precipitous decline in the size of their memberships over the years, railroad organizations (as unions are called), for equally understandable reasons, seek to maximize the number of positions and amount of work for employees they represent. Thus, there has been extensive attention to contracting provisions, with the result that this language

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former member, National Railroad Adjustment Board, who have no responsibility for the opinions and possible errors herein.

[Editor's note: Mr. Marx's remarks were presented by M. David Vaughn, Member, National Academy of Arbitrators, Gaithersburg, Maryland. The two substitute discussants on the panel were Martin W. Fingerhut, Executive Director of the railroad members of the National Railroad Adjustment Board, Washington, D.C.; and Donald F. Griffin, Partner, Highsaw, Mahoney & Clarke, Washington, D.C.]

[1]Agreement between Bethlehem Steel Corporation and United Steelworkers of America (Aug. 1, 1993), 6.

continues to require interpretation through arbitration. It likewise follows that, in many instances, there is enough ambiguity in such language so that the parties fail to agree on what may or may not be contracted and under what conditions.

Here is a reminder of another major difference between railroad agreements and steel agreements and, indeed, agreements in most American industries. Steel agreements are for fixed periods of time, at the end of which the entire agreement is subject to negotiation, with resulting settlement, strike, or rarely, interest arbitration. In contrast, railroads generally follow an older pattern in that their collective bargaining agreements are continuous, subject only to formal notice by either party as to its wish to change particular provisions. (These are known as "Section 6 notices," referring to Railway Labor Act provisions.[2]) Uninterrupted operation is ensured only by agreement on moratoria for specified periods during which the parties agree to withhold Section 6 notices.

In general, most railroads join together to engage in "national bargaining" with each of their many organizations or with coalitions of such organizations. This results in national agreements that then become part of the particular agreements of each participating carrier and organization. Having said this, however, it must be emphasized that there are instances when a carrier stands alone to bargain on issues separately from national bargaining or when a carrier and its organizations have devised unique contracting language.

This explanation is necessary to demonstrate how agreements come about on any particular topic—and contracting is only one example. Contracting out of work by carriers goes back many years, varying from railroad to railroad. Throughout, employees and their organizations have sought to retain as much work as possible, while the carriers have lowered their costs by making use of complex new equipment that they have not bought or do not wish to buy and by constantly improving their operational methods. Where carriers have reduced their forces, the tendency is to take care of emergency or seasonal work and one-time-only projects by contracting out to avoid the recall or hiring of additional forces.

This has meant that contracting out of work has been a significant topic in almost all railroad bargaining. Because of the understandably strong feelings of both parties, the contracting language

[2]Railway Labor Act, U.S. Code, Title 45, Chapter 8.

that does exist continues to be tested, particularly where one party or the other believes that the current instance should be the basis of some different reading of the contract. As a result, contracting out disputes that lead to arbitration in the railroad industry—perhaps in sharp contrast to the steel industry among others—proceed at an unabated pace.

With this background, we can examine the two major types of railroad union-management contracting arrangements. The language covering maintenance and construction of track, buildings, bridges, and so forth, involves, in almost all cases, the Brotherhood of Maintenance of Way Employes (BMWE). Rather than restate ancient history, we can begin at a recent point (recent, that is, in the more-than-century-old history of railroad bargaining). The starting point is the May 17, 1968, National Agreement between most (but not all) carriers and the BMWE.[3] Article IV's opening phrase, "In the event a carrier plans to contract out work . . .", implies an assumption that the carrier maintains the unilateral right to contract out, provided timely notice is given to the organization and, more significantly, provided that Article IV does not "affect the existing rights of either party in connection with contracting out." As to this exception, it can readily be seen that there can be and is interminable argument as to the nature, extent, and currency of "existing rights." Further, organizations were given the right to retain "existing rules . . . in their entirety" in place of the new Article IV, and many have done so.

Article IV also provides that, where timely notice is given to the organization and discussion ensues, "the carrier may nevertheless proceed with said contracting," subject to the organization initiating a claim (as grievances are termed) leading to arbitration. It requires the parties to "make a good faith attempt to reach an understanding," but no parameters are provided for such "good faith" efforts. As a result of this, most disputes are arbitrated many months or even years after the contracting is completed, with no possibility of undoing the work even where an organization's claim is sustained in arbitration.

It is an understatement to say that the 1968 National Agreement was not a solution satisfactory to all for determining when contracting out is or is not permissible. In 1981, some 13 years later, the then Chairman of the National Carriers' Conference Committee,

[3]National Agreement dated May 17, 1968, between carriers represented by Carriers' Conference Committees and Brotherhood of Maintenance of Way Employes, Article IV.

Charles I. Hopkins, Jr., wrote a side letter to the BMWE President, O.M. Berge, to help assuage this situation.[4] The letter noted the opposing positions of the parties and included a sentence that continues to be quoted by organizations as an argument in arbitration: "The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees."

In addition, the letter called for the establishment of a labor-management committee "to continue discussions on these subjects for the purpose of developing mutually acceptable recommendations that would provide greater work opportunities for maintenance of way employees as well as improve the carriers' productivity by providing more flexibility in the utilization of such employees." Such a committee was duly appointed, but it did not make any substantial progress in resolving the differences between the parties, and it is not currently operative.

The positive effect of the 1981 side letter is difficult to quantify. Today, however, reference continues to be made to the letter by the organizations as to their measure of the carriers' good faith and their efforts to "increase the use of their maintenance of way forces to the extent practicable." Certain procedural changes were adopted in the 1986 bargaining between the BMWE and the carriers, but this did not materially change the situation.[5]

The final development in the BMWE contracting provision occurred as a result of the findings of Presidential Emergency Board 219 (PEB 219) in 1991,[6] at this time the latest completed round of national railroad bargaining. After mandating a review of these findings, Congress imposed the Report on the parties, with clarifications and modifications, to constitute the agreements among the involved carriers and organizations. The 1991 Imposed Agreement[7] provided for a form of expedited arbitration through

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[4]Side letter by Charles I. Hopkins, Jr., to O. M. Berge (Dec. 11, 1981), regarding National Agreement between carriers represented by National Carriers' Conference Committee and Brotherhood of Maintenance of Way Employes.

[5]Agreement dated October 17, 1986, between railroads represented by the National Carriers' Conference Committee and employees of such railroads represented by the Brotherhood of Maintenance of Way Employes, Article VIII.

[6]Report to the President by Emergency Board No. 219 (Jan. 15, 1991).

[7]Imposed Agreement in Accordance with the Provisions of Public Law 102-29, July 29, 1991, binding on participating carriers represented by the National Carriers' Conference Committee and certain of their employees represented by the Brotherhood of Maintenance of Way Employes.

establishment of an Interpretation Committee, including a neutral to serve with party representatives. Following a specified time period, unresolved disputes would be disposed of by the neutral arbitrator. The point here obviously was to provide for early bilateral dispute resolution and/or a final and binding decision in a much more timely fashion than had previously been the case. A start was made on implementing this procedure, at the initiation of the BMWE. The parties, however, did not or could not agree on going forward with the arbitration phase.

Again, a new procedure was not fully implemented, and to date contracting out disputes continue to reach arbitral review in the same leisurely pace as previously. One of the hang-ups was that PEB 219 directed that arbitration costs be borne by the parties—instead of the National Mediation Board—a proposal echoed in many other subjects of the PEB 219 Report, thus causing it to receive the informal name of the Arbitrators' Full Employment Act.

Careful note should be taken, however, that this series of so-called National Agreements are not universally applicable. In many instances, carriers and the BMWE have agreed to far different language. For example, the Burlington Northern agreement includes the following specific admonitions:

> However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when the work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces.[8]

On the opposite extreme is the following language contained in a side letter:

> It was also agreed that any future work ordinarily considered maintenance of way work on the Detroit, Toledo and Ironton Railroad will be performed by our forces when practicable, and that when it is necessary to contract any such work we will confer with the General Chairman [of the organization] and all such work shall be by mutual agreement between the Chief Engineer and the General Chairman.[9]

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[8]Agreement between Brotherhood of Maintenance of Way Employes and Burlington Northern Railroad Company, Note to Rule 55.

[9]Brotherhood of Maintenance of Way Employes and Grand Truck Western Railroad Company, February 28, 1955, side letter (in part).

The agreement between Amtrak and the BMWE takes a middle ground.[10] In addition to the standard national language, it lists specific types of work for which contracting is forbidden except by "written concurrence" of the General Chairman and other specific instances where no such concurrence is required.

In much briefer fashion, we turn to a review of the contracting out procedures for the shopcraft organizations, that is, electricians, machinists, sheet metal workers, and others who perform work on locomotives and rolling stock. Here, a reasonable starting point is the September 25, 1964, National Agreement[11] that those of us with sufficient "chronological impairment" will remember emerged from the bargaining imposed by President Lyndon Johnson, who locked up the parties in the White House until the deal was done.

The 1964 Agreement provided that "subcontracting of work . . . will be done only when genuinely unavoidable" for one of five conditions, condensed and paraphrased as follows:

1. Managerial skills not available on the property.
2. Skilled manpower not available from active or furloughed (laid off) employees.
3. Essential equipment not available.
4. Required time of completion cannot be met by carrier forces and equipment.
5. "Such work cannot be performed by the carrier except at a significantly greater cost, provided the cost advantage enjoyed by the subcontractor is not based on a standard of wages below that of the prevailing wages paid in the area" and provided no craft employees "will be furloughed as a result of such subcontracting."

Article VI of the 1964 Agreement also provided for what became Special Board of Adjustment 570 (SBA 570). This Board was established to hear and resolve shopcraft contracting disputes (as well as so-called "protection" cases). The Board became well-known for the strong views expressed by the parties not only before the Board but in extensive written dissents and replies. Many

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[10]Agreement between the National Railroad Passenger Corporation (Amtrak), Northeast Corridor, and its employees represented by the Brotherhood of Maintenance of Way Employes, Scope and Work Classifications (May 19, 1976).

[11]Agreement between the National Railway Labor Conference and Eastern, Western, and Southeastern Carriers' Conference Committees and employees of such carriers represented by the organizations comprising the Railway Employees' Department, AFL-CIO, Article II (Sept. 27, 1964).

railroad arbitrators served with the Board until relieved at the displeasure of one or both parties. I claim the distinction of being the only arbitrator whose services were terminated by SBA 570 not once, but twice.

Recently, someone noted that the terms of SBA 570 called for the payment of arbitrators by the parties, rather than the National Mediation Board (NMB). When the NMB enforced this provision in the current cost containment climate, SBA 570 died an unceremonious death, and disputes were instead referred to the National Railroad Adjustment Board or to Public Law Boards, where the Railway Labor Act provides for payment of arbitrators by the NMB.

In 1991, PEB 219 added similar language for "expedited arbitration panels" as previously discussed in relation to the BMWE. This provision also placed limits on wage loss remedies. In addition, it provided for payment of the neutrals by the parties. This expedited arbitration procedure has not yet been effectuated. In the current 1996 bargaining, the contracting issue is again before a Presidential Emergency Board, but, as indicated above, on this I have no comment.

It should come as no surprise that contracting out in the railroad industry is by no means a well-settled concept. Let me note some of the issues that continue to confront railroad neutrals:

1. The basic provisions refer to work "within the scope" of the agreement. Scope rules define (or do not define) the work to be assigned to a particular craft or classification. Thus, the question continues to arise as to whether the contested contracting project is "within the scope."[12]
2. In virtually all agreements, advance notice (usually 15 days) of proposed contracting must be given to the General Chairman, thus providing the organization with an opportunity to request a conference. Here, all kinds of questions arise: Was the notice given in proper form and timely fashion? If not, what kind of monetary remedy applies, if any, when the work itself would have been permissibly contracted? What about notice that comes after the carrier has already engaged an outside contractor? What about an otherwise proper notice

[12]NRAB 3-5848 (Guthrie); NRAB 3-18305 (Dugan). (In this and following footnotes, reference is made to awards of the National Railroad Adjustment Board, Third Division, and of various Public Law Boards that examine the referenced questions. Public Law Boards resolve disputes between a single carrier and a single organization. These awards are simply examples and are not set forth as the only or predominant views on the subject.)

where the subsequent work extends substantially beyond that stated in the notice?[13]

3. Some carriers have argued that employees of a specific craft are required to show that they have performed the work "exclusively" in the past. This is the test for claiming work when there is a dispute between crafts, but it is not generally applicable to contracting where the language refers to work "customarily" performed by the craft employees. But how does one define "customarily"—or "regularly" or "historically"? What if the past record shows a mixed practice, in which substantial portions of the work have been contracted and equal or greater portions performed by craft employees? If a past practice claim is made by either party, to what degree must evidence be provided to prove such an assertion?[14]
4. Sometimes the contracting is allegedly not under the control of the carrier and/or is solely for the benefit of a third party, such as an industry customer, or on the basis of local government requirements. Does this obviate the need for notice to the organization and/or hold the carrier harmless?[15]
5. Most significantly, when a carrier is found to have failed to give timely notice and/or where it is determined that the work was contracted in violation of agreement restrictions, what is the remedy? Should the claimants receive pay even if they were fully employed at the time? Can a monetary claim be sustained on the basis of maintaining the "integrity of the agreement"? Do employees on furlough have a superior claim to remedy than do active employees? In reference to employees otherwise fully occupied, what about the theory of "unrecoverable lost work opportunity" as contrasted with the theory of "undue enrichment?"[16]

One would hope that answers to these and similar questions would have been resolved over 30 years of contracting out agreement provisions. Although certain principles are emerging, there remains the resolution of distinguishable contracting situations, the emergence of new goals and attitudes of individual carriers,

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[13]NRAB 3-24173 (Sirefman); NRAB 3-28337 (Fletcher); NRAB 3-29121 (Fletcher); NRAB 3-29306 (Goldstein); NRAB 3-30754 (Marx).

[14]NRAB 3-13237 (Dorsey); NRAB 3-29802 (Marx); NRAB 3-30218 (Marx); Public Law Board No. 4402-20 (Benn); Public Law Board No. 4768-1 (Marx).

[15]NRAB 3-30216 (Marx); NRAB 3-30683 (Marx).

[16]NRAB 3-13237 (Dorsey); NRAB 3-21609 (Bailer); NRAB 3-23928 (Sickles); NRAB 3-28044 (Goldstein); Public Law Board No. 4768-1 (Marx).

and the turnover of leadership, nationally and locally, within organizations. Thus, arbitration of contracting out disputes continues, with awards frequently laced with such phrases as:

- "As established in a myriad of similar cases . . ."
- "A principle so well understood it requires no support by case citation . . ."
- "This dispute is distinguishable from the cited awards because . . ."

Or, this classic summary by a revered and now deceased Academy member: "In these days of individual confusion, national uncertainty, international insecurity, and cosmic befuddlement, the Board is impelled here to say the hell with it."[17]

In sum, the rules for rights to or limits on contracting out in the railroad industry do not conform to the neater and more precise provisions in other industries. It must be kept in mind, however, that carriers are constantly seeking ways (through not only contracting) to become more cost efficient and thus better prepared to meet the challenges from the competing trucking and airline industries. At the same time, railroad organizations have seen a drastic diminution of their membership through curtailment of routes, crew reductions, and automation; small wonder that they vigorously seek to retain as much work and as many jobs as possible through restrictions on or elimination of contracting out. And despite all this, the system of railroad collective bargaining and dispute resolution works—and has done so for far more years than can be claimed by virtually any other industry.

[17]Public Law Board No. 164-287 (Daugherty).