CHAPTER V

SHOULD THE SCOPE OF ARBITRATION BE RESTRICTED?

I. THE LABOR ARBITRATOR: JUDGE OR LEGISLATOR

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The title of the session to which this paper is addressed is "Should the Scope of Arbitration Be Restricted?" and I am assigned the affirmative of that proposition. The proposition itself reflects a growing concern in some quarters that grievance arbitration is being extended to and used for purposes beyond what was *mutually* envisioned by the parties at the time when the agreement providing for such arbitration was entered into. It also reflects a companion concern over an emerging tendency to narrow the scope of arbitration and to limit and restrict the authority of the arbitrator.

Whether and to what extent arbitration can or should be restricted is, of course, the business of the parties themselves. Being the creature of their mutual agreement, it can and should be as broad or as narrow as the parties themselves mutually agree that it should be. If the parties actually agree that any and every dispute between them shall be subject to arbitration, they should be permitted to have it that way. But the operative words are "if the parties agree." If the parties have not *mutually agreed* to broad arbitration, it should not be imposed upon them. That, however, is what is happening every day in the decisions of arbitrators. That is the underlying fallacy of the decisions of the Supreme

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Court respecting the scope of labor arbitration; and that is the problem to which this paper is addressed.

Briefly summarized, the fault with much of our labor arbitration today is this: That the line between "rights" and "interests" arbitration is being increasingly blurred, with grievance (that is, "rights") arbitration regularly being used to supply contract terms, which is, of course, the function of *"interests"* arbitration. There can be no quarrel with interests arbitration as such—when it is properly labeled and mutually agreed to—but interests arbitration too often masquerades these days as rights arbitration, and thus we find the arbitration of grievances being used as a vehicle for importing terms into the contract, notwithstanding the fact that such use of the grievance process was never agreed upon or even contemplated by the parties.

How did arbitration get this way? How did an essentially judicial or quasi-judicial process for the *interpretation* of contract terms become distorted into an instrument for the *creation* of contract terms? How did arbitrators come to regard their role, as they so often do, as that of legislator or mediator, rather than judge?

My own researches trace this departure to a remark made by Dr. George W. Taylor, of the University of Pennsylvania, at the Second Annual Meeting of this Academy in Washington, D. C., on January 14, 1949. As reported in *Labor Arbitration Reports*,[1] Dr. Taylor observed that arbitration is to be considered as merely "an extension of the collective bargaining process." Now that dictum would be perfectly valid, if all that was meant is that the *interpretation of the terms* of a labor agreement may be regarded as a logical part of the collective bargaining process which produced those terms and that agreement. But this is *not* all that Dr. Taylor meant. As the report of his remarks makes clear, he was actually asserting that grievance arbitration is a legitimate means of *adding* terms to the agreement which the parties failed or neglected to put there. He was urging arbitrators to employ their role of judge in grievance arbitration to supply whatever they determined that the agreement *ought to have contained,* in order to bring about a solution of the dispute before them.

[1] "Arbitration as Part of Bargaining Process," 11 LA 1220 (1949).

This confusion of the role of grievance arbitration with that of interests arbitration would be astonishing in a man of Dr. Taylor's long experience in labor-management affairs were it not for one thing: Dr. Taylor is, by experience and inclination, primarily a *mediator,* and it is a mediator's view which he expresses in his famous dictum. It is a view which puts uppermost the resolution of any and all problems between the parties—regardless of their source—regardless of whether or not they actually arise out of the terms of the agreement. Thus it is apparent that it is not so much that Dr. Taylor doesn't *know* the distinction between rights arbitration and interests arbitration, but that, in his role of mediator, he simply doesn't *care.* Dr. Taylor's lifelong dedication to the cause of labor-management peace is well known and widely admired, though some may question whether it partakes too much of the philosophy of peace-at-any-price—as dangerous a policy in labor-management affairs as it is in foreign affairs. At any rate, he places so high a value on the achievement of that end that the means of achievement seem at times to become unimportant—even when they threaten the integrity of the arbitration process itself.

For, in my opinion, the Taylor dictum has done lasting damage to the arbitration process. It has beguiled arbitrators away from their role as judges into the more god-like role of mediator. It has even contributed (with some assistance from Professor Archibald Cox, as hereinafter noted) to leading astray the United States Supreme Court. And thus to it and to those arbitrators who have espoused this free-wheeling view of grievance arbitration can be laid a great deal of the responsibility for the current reaction against arbitration and the determination of many either to correct the distortion—to restore arbitration to its proper role—or to abandon it altogether.

The Taylor theory found a ready and effective disciple in Professor Cox of the Harvard Law School. Taking his cue from Doctor Taylor, Professor Cox developed his "interstices theory,"[2] which was readily embraced by Mr. Justice Douglas (who preferred the more forthright and Anglo-Saxon word "gaps").[3] This

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2 Cox, "Reflections Upon Labor Arbitration," 72 *Harv. L. Rev.* 1482 (1959).
3 "Gaps may be left to be filled in [in arbitration] by reference to the practices of the particular industry and of the various shops covered by the agreement." *Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 580 (1960), 46 LRRM 2416.

brings us to our first bit of arbitration folklore: The hoary myth that the collective bargaining agreement is merely a skeletal document—inept and incomplete, and therefore requiring an arbitrator to correct it and supplement it—in short, to "fill in the interstices."

It can be admitted that this view of the collective bargaining agreement once had validity. It might even be admitted that it may still have validity in some cases today. But to apply it *generally,* as an excuse or a justification for reading something more into the average complex and voluminous labor agreement than is there, is today simply nonsensical. Some of you serve as consultants in collective bargaining negotiations, and all of you are intimately acquainted with a great many people who do that for a living. Do you think that the agreements *you* draft are inept or incomplete? On the contrary, the average collective bargaining agreement, particularly in those companies and industries which have a long history of union relations, is rather a "carefully and laboriously prepared document," as one court described a Ford agreement. In that case[4] the union argued for an implied restriction on management's right to relocate portions of the operations covered by the contract. The court refused to find any such implied restriction, saying:

> A reading of all the terms and conditions of this agreement leaves one with the unshakable impression that its framers fully intended to state clearly therein every point of importance in the minds of the contracting parties, yet the plaintiffs [the union] wish us to believe that there was a major area of understanding on a specific point, easily includible in the written contract, but not so included. No claim of oversight or inadvertence is made. The claim is simply that there is a part of this agreement that is not contained in the writing evidencing said agreement. * * * Can the plantiffs be heard to say that there is a vital basis for the agreement that is not contained therein? * * * The plaintiffs offer no explanation for the omission of said condition from the written contract. It is difficult to conceive of parties to a contract, who were as diligent in its preparation as these parites, purposely omitting a vital condition. The only possible conclusion that can be drawn is that such condition did not in fact exist.[5]

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[4] *Local Union No. 600, etc.* v. *Ford Motor Co.,* 113 F. Supp. 834 (E.D. Mich. 1953), 32 LRRM 2344.
[5] *Id.* at 842-43.

I submit that the court was absolutely correct and that any arbitrator could *and should* reach the same conclusion when confronted with an argument that he must supply by implication a significant term omitted from what is obviously a thorough and complete and carefully prepared collective bargaining agreement. The ultimate question, here as elsewhere, is one of *intent,* and if there is one presumption that is *not* warranted in today's labor-management context, it is that management, when it staggers bloodily away from the bargaining table, really *intended* to give up *more* of its management prerogative than it left there. It is to indulge in a baseless fiction for an arbitrator to engage in a process of determining the employer's "intent" when that "intent" turns out to be that he meant to cede more management ground than the plain words of his contract give up—that he meant to bar himself from making the "make or buy" decision, or that he intended to freeze himself for the term of the contract into a mold of getting his job done in just this way with precisely these employees in these identical classifications. As a matter of fact, quite often there is ample evidence that the true intent of the employer in the negotiations was precisely the opposite of what the arbitrator would impute to him by "implication"—that is, that he was determined *not* to concede the limitations sought by the union and specifically rejected a language proposal made by the union for that very purpose.

As a final word on the matter of filling in by implication the "interstices" (and it is to be borne in mind that we are not talking of *true interpretation*—that is, the interpretation of language already there—but of the practice, under the guise of interpretation, of *importing* or *implying* additional language, additional limitations, into the contract), I suggest this for your consideration: If the parties really intended to have an arbitrator supply terms, why would they insert that common clause which provides that the arbitrator shall not have power to add to, subtract from, or otherwise modify the agreement? I submit that such a clause is fairly conclusive evidence, from the parties themselves, that they have not left major substantive terms (such as a restriction on contracting out) to be supplied by an arbitrator.

It is rather widely acknowledged by now that, in discussing the

nature of arbitration in the *Warrior* case,[6] Justice Douglas went to some rather fanciful extremes. There is no need in this paper to review the Court's unrealistic notions concerning the arbitrator's function of reducing tensions and improving morale.[7] I do not believe that many arbitrators take that rhetoric very seriously. And it could be dismissed as the "romantic" notion which Paul Hays labeled it,[8] but for one thing: It illustrates the fundamental and pervasive error of the Steelworkers' Trilogy,[9] the one that is doing continuing harm to the arbitration process, the one that has created the mood, indeed, the *need,* for restrictive language concerning arbitration. That error is the *assumption* that wide-open, free-wheeling arbitration à la Taylor is what both parties want from the arbitrator. That *both* parties want the arbitrator to be father confessor, mediator, judge, and legislator. It is the need to negate this view that makes many in management determined to amend their contracts—to restore rights arbitration to its rightful role, that is, a judicial role rather than a legislative or mediatory one.

As I have already indicated, I do not deny the right of employers and unions who *mutually desire* an arbitrator to be all things to them to have it that way. Such, I understand, was the role of the late Harry Shulman as Permanent Umpire under the Ford-UAW Agreement. But, as Paul Hays also pointed out, that was a special situation—their situation, those parties and their then representatives and Harry Shulman.[10] It is not the typical situation and certainly ought not to be *presumed* to be the desire of *all* employers and unions. And this is particularly true when what they are

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6 *Steelworkers* v. *Warrior & Gulf Navigation Co., supra* note 3.

7 "The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished." *Id.* at 582.

8 Hays, "The Supreme Court and Labor Law October Term, 1959," 60 *Colum. L. Rev.* 901 (1960).

9 *Steelworkers* v. *Warrior & Gulf Navigation Co., supra* note 3; *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564, 46 LRRM 2414; *Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960), 46 LRRM 2423.

10 "Dean Shulman was a great and good man, whose experience with arbitration was almost wholly confined to a situation that was quite unusual, and that, by the use of his own unusual gifts, he was able to shape largely to his own pattern. His remarks on arbitration present a challenging ideal of what that procedure might be, particularly if all arbitrators were as intelligent, wise, and effective as Shulman." Hays, *supra* note 8, at 932.

engaging in is *ad hoc* arbitration, rather than arbitration before a permanent umpire.

I suggest to *ad hoc* arbitrators that they reflect long and carefully on the essential difference between their role and that of a Harry Shulman acting as permanent umpire. However diminishing it may be to the ego, honest reflection will convince them, I feel certain, how much *less* is expected of them and how unfounded was Justice Douglas's confused assumption that *all* parties want more and want it all the time and in every case. Justice Douglas's error is perhaps understandable. It is an error in reasoning. From the fact that *some* choose to, it is erroneously concluded that *all* choose to—and so what is *voluntary* for some is made *mandatory* for all. And so with the Shulman mantle. It does not belong on *all* arbitrators, not because they are not big enough to wear it (although this is unquestionably true of some), but because the parties have not *mutually* invited them to don it.

It is the purpose of this paper to place before this Academy what the author hopes is a reasoned explanation of the respects in which some in management sincerely believe that arbitration and arbitrators have gone astray. It will suggest that certain adages frequently cited and frequently applied by arbitrators cannot soundly be applied at all in the average arbitration case.

This brings us to the matter of so-called "implied undertakings" on the part of the employer-party to the labor contract. There has been such a welter of muddy thinking on this subject that it becomes necessary to begin on a rather elementary level to sweep the dust and misconceptions aside.

No one, so far as I know, has yet gone as far as declaring that the principles of the law of contract have no *application whatsoever* to collective bargaining contracts. Indeed, the discussions of this subject by arbitrators and others are replete with references to Professor Williston and other authorities, and to cases both ancient and modern. Accordingly, we shall begin by restating a few of those principles.

For purposes of our discussion, contracts (and this includes promises or undertakings which are parts of contracts) are either

"express" or "implied," and, if implied, they are either implied in fact or implied in law.[11]

> Contracts may be implied either in law or in fact. Contracts implied in fact are inferred from the facts and circumstances of the case, and are not formally or explicitly stated in words. It is often said that the only difference between an express contract and a contract implied in fact is that in the former the parties arrive at their agreement by words, whether oral or written, while in the latter their agreement is arrived at by a consideration of their acts and conduct, and that in both of these cases there is, in fact, a contract existing between the parties, the only difference being in the character of evidence necessary to establish it.[12]

It will be noted that the *conduct of the parties* is the source of the contract implied in fact. Indeed, "A promise will not be inferred where there are facts wholly inconsistent with the contract to be implied." [13]

Let us now turn to the theory of implied limitations, particularly as it is summed up in the ideas expressed in the phrases "the covenant of fair dealing" and "the fruits of the bargain."

Professor Williston tells us that an implied covenant of good faith and fair dealing permits an implication of an obligation.[14] Professor Cox has derived considerable mileage from this notion in his writings on labor arbitration, notwithstanding the fact that it is entirely alien to the basic nature of the collective bargaining agreement. Williston himself did not apply it to union contracts; his illustrations of the principle are taken entirely from the commercial field—for example, that a licensor of a play impliedly covenants not to sell it also to the movies—and a seller of a business impliedly agrees not to solicit his former customers.[15]

Another one of Williston's illustrations, sometimes cited as supporting the theory of implied limitations,[16] is the well-known opinion of Mr. Justice Cardozo in the case of *Wood* v. *Duff-*

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11 17 Am. Jur. 2d, *Contracts*, Sec. 3 (1964).
12 *Ibid.*
13 *Ibid.*
14 5 Williston, *Contracts*, Sec. 670 (3d ed. 1961).
15 *Id.*, n. 17.
16 See *Bethlehem Steel Co.*, 30 LA 678, 682 n. (1958).

Gordon.[17] Wood, an agent, signed a contract with Lady Duff-Gordon in which she gave him the exclusive right to sell her endorsement of commercial products, and they were to split the profits earned by such endorsements. When Lady Duff-Gordon thereafter undertook independently to sell her own endorsements, pocketing the proceeds, Wood sued. Lady Duff-Gordon's defense was that, since Wood had made no promise to do anything, there was no mutuality and hence no contract. But Judge Cardozo held that Wood's promise to pay her one half of the profits resulting from his efforts clearly implied a promise by him to make reasonable efforts. The contract, said Cardozo, in the phrase which came to be so widely quoted is " 'instinct with an obligation' imperfectly expressed." [18]

Because arbitrators and writers, lacking any other basis for implying an agreement—not to subcontract, for example—have cited the foregoing remark of Justice Cardozo as justifying the implication of such an agreement, it is worth our while to follow the case a little further. The New York Court of Appeals had occasion not long ago to pass on a union's attempt to use the *Duff-Gordon* case in a labor arbitration situation. The case was *In re Otis Elevator Co.*[19] In that case, the union attacked certain subcontracting as violating what it claimed was an implied promise (relying on *Duff-Gordon*) by the employer to keep its operations in Yonkers, New York. The court rejected this argument saying:

> We entertain little doubt that a labor contract such as this does not preclude an employer from discontinuing certain operations essential to his business and letting them out to be performed by independent contractors.[20]

So much for *Duff-Gordon* as applied to labor arbitration.

As a matter of fact, that case strikingly exemplifies the vast gulf between the collective bargaining contract and the commercial contract whose trappings Professor Cox and others have sought

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17 222 N.Y. 88 (1917), 118 N.E. 214.
18 *Id.* at 91.
19 6 N.Y. 2d 358 (1959), 32 LA 986.
20 *Id.* at 361-62.

from time to time to hang upon it.[21] In *Duff-Gordon,* Wood had made an underlying promise from which his implied promise could be inferred. In the average collective bargaining agreement, *there is no such underlying promise.* In a subcontracting situation, for example, in order for the *Duff-Gordon* rule to apply, there would have to be an underlying *promise of continued employment,* in order to support the implication of a promise not to contract out and thus thwart the underlying promise. As hereinafter pointed out, the collective bargaining agreement does not constitute or contain, under ordinary circumstances, a guarantee or undertaking of continued employment.

The point was clearly made in one of the leading cases in this field, *Amalgamated Association* v. *Greyhound Corporation.*[22] That case involved subcontracting. The union claimed, despite the absence of any language limiting the company's right to contract out, that the contract impliedly limited that right. This was perhaps the first appearance of the argument, applied to labor arbitration, that when one signs a contract conferring a right on another, he impliedly covenants not to do anything which will frustrate the exercise of that right. The court rejected that and the other arguments advanced by the union, saying:

> The union argues that the recognition in the contract that there will be reductions in forces means only reductions to a point less than completely eliminating all the jobs in a classification, since to rule otherwise would allow the destruction of part of the very subject matter of the agreement. The union further contends that it is a fundamental principle that if one confers a right on another, he impliedly agrees not to act so as to make impossible the exercise of that right; therefore, it would be unreasonable to assume that the parties would make an agreement carefully setting forth the terms of the porters' and maids' employment if they have no right to employment even as long as the

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21 One would have supposed that the inapplicability of commercial contract principles to the labor agreement was conclusively established, for those of Mr. Cox's school, by the opinion of Mr. Justice Douglas in the *Warrior* case distinguishing labor arbitration from commercial arbitration. It will be recalled that, had he not been able to make such a distinction, Mr. Justice Douglas would have been compelled to apply long-standing precedents in commercial arbitration to the case then before him, and he would have been compelled to deny arbitrability to the union's claim. Instead, he firmly declared that commercial arbitration precedents were *inapplicable* to labor arbitration, because the two types of arbitration have "quite different functions." *Steelworkers* v. *Warrior & Gulf Navigation Co., supra* note 3, at 578.

22 231 F.2d 585 (5th Cir. 1956), 37 LRRM 2834.

> company has jobs to offer. * * * *The contention that he who creates a right agrees not to act so as to make impossible the exercise of the right assumes the creation of the right, which is the very point* in issue.[23] (Emphasis supplied.)

A striking example of an arbitrator assuming what the court called "the very point in issue" was given by Arbitrator Nathan P. Feinsinger in a *General Motors* case.[24] The case involved the automation of certain operations, and the grievance claimed that management had no right to assign the task of programming the automated equipment to engineering personnel chosen for the job. That work, the union claimed, "belonged" to the toolmakers who had performed a similar function in the past. Arbitrator Feinsinger did not even pause to *discuss* the application of the recognition clause to this situation. He *assumed* it and went on to hold that the toolmakers were indeed entitled to the new work, because the old work had "belonged" to them. Thus, he overrode a management determination as to how best to get the new job done.

Next let us consider the decision of Arbitrator Sylvester Garrett in a *National Tube Company* case.[25] The company had contracted out the work involved in slag removal and window washing. The union challenged its right to do so, arguing that "Since the Union is the exclusive bargaining representative of all such employees, it urges the company has no right by unilateral action to decrease the scope of the bargaining unit by contracting out work previously done by employees in the unit.[26] Arbitrator Garrett accepted that argument, saying "In view of the fact that the Union has status as exclusive representative of all incumbents of a given group of jobs, it would appear that recognition of the Union plainly obliges the company to refrain from arbitrarily or unreasonably reducing the scope of the bargaining unit." [27]

Here, explicitly stated, is the assertion of an implied limitation based on the recognition clause. That the recognition clause is not susceptible of the interpretation which Arbitrators Feinsinger, Garrett, and others have so often placed upon it, however, will

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[23] *Id.* at 586-87.
[24] 37 LA 192.
[25] 17 LA 790 (1951).
[26] *Id.* at 791.
[27] *Id.* at 793.

shortly be demonstrated. For now, it is enough to remark that, in order to assume that the employer impliedly intends to give rights to the union and its members—a right to the continuation of the job, a right to jurisdiction over its performance, a right not to have the bargaining unit decreased or eliminated—in order, in short, to find that the collective agreement gives some sort of property right in the job, it is necessary to assume that the collective agreement is an undertaking to maintain the *status quo* during the life of the agreement. Among other things, it is necessary to assume that the union contract is an agreement *to employ.* Now the labor agreement is not, and historically never has been, an employment agreement. It is not an agreement to employ any more than it is an agreement by the employees to work for the employer for the duration of the contract. It is simply a framework of terms and conditions which will apply when and so long as the employer chooses to employ anybody and when and so long as anybody chooses to work for him. Its vitality arises from the *fact of employment,* and it ceases to have vitality when the employment ceases.

This aspect of the collective agreement, clearly understood in the early days, is now widely overlooked or ignored. Arbitrator Garrett's decision is only an example of a fairly widespread misunderstanding or disregard of the true nature of the collective agreement. It has no separate, independent status, force, or existence. It regulates working conditions only when and so long as there are workers employed. Arguments for implied limitations based on the cry that otherwise the employer can "decimate" or "destroy" the unit mistake this essentially *contingent* nature of the collective agreement and beg the question. Absent an explicit undertaking by the employer *not* to decrease the size of the unit, the power to do so remains with him. If, in the course of managing the business responsibility, the employer finds it necessary to dispense with some or all of the unit jobs, the collective agreement (to the extent of that elimination) no longer has anything to attach to and regulate, and therefore ceases to have vitality.

Let us now deal explicitly with the recognition clause as a source of implied limitations on management action. In this discussion, we are in the area of implications, not express terms, because the average recognition clause contains no express agreement to con-

tinue the unit or the operation without change—no express grant to the union or its members of jurisdiction over the work.

There has been a great deal of fuzzy reasoning—particularly with respect to the recognition clause—indulged in by arbitrators who are bent on reading into collective bargaining agreements terms which are not there. The report of Arbitrator Donald A. Crawford to the Academy in 1960 indicated this quite clearly.[28] He summed up the decisions on the contracting out issue this way:

> First, is the contracting out apparently based on economies available to the subcontractor of lower wage rates including fringe benefits rather than other economies of operation or special advantage: If so, the contracting out will be found in violation of the limitation implied from the Recognition Clause.[29]

Now, it is submitted, that the "implied limitation" to which Arbitrator Crawford refers either exists, or it does not. It either inheres in the recognition clause, or it does not. The external factor of whether or not the employer is trying to "beat the union prices" [30] (to use Crawford's phrase) cannot change the words, the meaning, or the legal effect of the recognition clause. It is submitted that the fallacy just disclosed is the inevitable result of the tendency of some arbitrators to act as mediators or legislators—to sustain a right which they feel *ought* to exist, to find in the contract what they feel *ought* to be there, and to seek to justify their action legally and contractually by purporting to find warrant for their decision in some term which actually does appear in the contract. Perhaps this is not always done consciously.

On the contrary, it seems likely that quite often it proceeds from a subconscious compulsion on the part of the arbitrator to acknowledge his essentially *judicial* function and therefore to attempt to place a legalistic sanction on a legalistically unwarranted decision. It is suggested, in passing, that the "creeping legalism" [31] which is so much deplored by some commentators is nowhere more strikingly exemplified than in the decision of an arbitrator who painstakingly combs a contract clause for a thread

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28 Crawford, "The Arbitration of Disputes over Subcontracting," in *Challenges to Arbitration* (Washington: BNA Incorporated, 1960).
29 *Id.* at 72.
30 *Ibid.*
31 See generally, "Creeping Legalism in Labor Arbitration: An Editorial," 13 *Arb. J.* 129 (1958).

from which he can spin an interpretive argument in support of a finding that that clause contains a right or a limitation which ordinary interpretation, common sense, and sometimes even the history of negotiations, clearly demonstrate is not there and was never in the minds of the parties who wrote it.

There are other logical flaws in the "implied limitations" theory. Let us assume an employer who is unalterably opposed to any restriction on his right to contract out (not, it will be agreed, a far-fetched hypothesis). Let us assume further that this employer would be willing to suffer a strike, if necessary, in defense of that particular area of his management responsibility. In that context he enters into negotiations with his union. The union does not mention contracting out. If it did, the employer would quickly make his position clear, and a strike might well ensue. Nothing being said and agreement being reached on other issues, the parties sign a contract containing a standard recognition clause. Is it fair or even sound to say that this employer thus undertook impliedly to restrict his right to contract out? Is it fair or sound to say that *he* should have raised the point when the union didn't? Is it not a fact that any such reasoning moves completely over into the still rather radical ideology that the employer has only those rights which he derives from the union contract and which are expressly vouchsafed to him therein? And is that not precisely the ultimate reduction of the reasoning of the "implied limitations" theorists? It is submitted that any result which would "imply" an "agreement," permitting one party deliberately to refrain from making a critical proposal, but nevertheless thereafter to claim the same rights as though such a proposal had been made and accepted, is a frontal assault on law, logic, equity, and common sense.

Yet that very frontal assault is being made by arbitrators almost everyday. In fact, a number of cases demonstrating just that are collected in a footnote to the government's brief in the *Fibreboard* case.[32] Case after case is cited in which arbitrators have found limitations on management's rights. It would serve no useful purpose to go into those cases here. The point to be made is, as the government's brief in that case itself acknowledged, that, day after

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[32] Brief for the National Labor Relations Board, p. 33, n. 27, *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964).

day, arbitrators are reading into contracts by implication precisely the kinds of provisions which the parties themselves put there when they *actually do agree* to such limitations and *express them in writing* in the collective agreement. But the arbitrators are doing it in cases where the parties did not.

Perhaps the ultimate logical flaw in the implied limitations theory is that it proves too much: If there are implied limitations on *reducing* the work made available to the bargaining unit, then, *a fortiori,* there are implied limitations against *eliminating* that work altogether, as by ceasing to do business. Yet even the most dedicated of the implied limitations theorists do not argue that, absent bad faith or unfair labor practices, the employer does not still retain the right to go out of business during the term of the collective agreement; nor could they. That right remains, unless contracted away, and, remaining, that right makes a mockery of the whole idea of implied limitations.

Let us turn now specifically to a consideration of the nature of the recognition clause—unquestionably the most frequently employed source of implied limitations.

That clause is, after all, plainly and simply a creature of the National Labor Relations Act. The Act requires of the employer what he says in the recognition clause that he is doing, namely, to recognize the union as the exclusive representative of all the employees in the bargaining unit for purposes of collective bargaining.

Nothing in the Act expressly requires such a clause, and its presence in the contract is not essential, but rather simply historical and habitual. Its significance dates back to a time in the 1930's when many a union would gladly have settled for a writing, signed by the employer, doing no more than extending recognition to the union. Bitter battles were waged over that simple issue. But now the fact of recognition is compulsory under the Act, and that very element of compulsion, which takes the recognition clause out of the area of items to which the employer is free to agree or not to agree, points up the utter fallacy of attempting to base any "implied agreement" on the recognition clause.

In a very real sense, the recognition clause is unique in the labor agreement, in that it is the only term the inclusion of which is

completely nonvolitional, in so far as the employer is concerned.[33] The National Labor Relations Act, as the Supreme Court early said,[34] and as the Act itself has provided since 1947, does not compel the making of agreements. All the other terms of the collective agreement are terms to which the employer could refuse to agree, subject to the economic consequences of that refusal. But the recognition clause is different. The employer *cannot* withhold recognition;[35] he cannot refuse to "agree" to recognize. Nor, having "agreed," can he refuse to put the fact of that agreement in writing and sign it.[36] It follows, therefore, that, whatever may be properly "implied" from other *volitional* clauses in the agreement, no element of volition or implied agreement can be ascribed to or derived from the recognition clause. Once this nonvolitional aspect of the recognition clause is clearly understood, it is readily seen how unfair and illogical it is to impute to it an implied undertaking—the "fruits of the bargain" idea—the very essence of which is a *volitional* undertaking (as in the *Duff-Gordon* case) which permits the assumption that the party making that volitional undertaking intended also to do whatever was necessary to give effect to the underlying promise, and, particularly, not to frustrate its performance.

There are other reasons why the recognition clause does not and cannot have the scope which some arbitrators would attribute to it. To hold, as some arbitrators do, that the ordinary recognition clause prevents any change in the composition of the bargaining unit or the work assignments of its members is to ascribe to it all of the force and effect of what is elsewhere called a scope clause or a work jurisdiction clause. But those who are familiar with such clauses (as in the entertainment industry and the building

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33 This conclusion with respect to the nature of the recognition clause was also reached in Fairweather, "Implied Restrictions on Work Movements—The Pernicious Crow of Labor Contract Construction," 38 *Notre Dame Law.* 518, 523 (1963).

34 "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine'." *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45, 1 LRRM 703 (1937).

35 McManemin, "Subject Matter of Collective Bargaining," 13 *Lab. L.J.* 985, 1002 (1962).

36 *H. J. Heinz Co.* v. *NLRB,* 311 U.S. 514, 7 LRRM 291 (1941); Labor Management Relations Act (Taft-Hartley Act) Sec. 8 (d), 61 Stat. 136, 140 (1947), 29 U.S.C. Sec. 141, 158 (d) 1958.

trades [37]) are very well aware of how substantially those clauses differ from the ordinary recognition clause—how extremely detailed such clauses are in describing the work they cover.[38] To assert that the broad general language of the average recognition clause has the same effect—lacking, as it does, the essential element of detail—is to call the alphabet a dictionary.

While a review of National Labor Relations Board decisions respecting the effect of Board certifications would be in point, because the recognition clause is, of course, related to and in many cases derived from the certification, it would unduly extend this paper to do so. It suffices to note that the decisions of the Board clearly demonstrate that a Board certification covers *people* and not *work*. In *Plumbing Contractors Association*,[39] the Board said:

> As the Board has heretofore held, and as we here reiterate, a Board certification in a representation proceeding is not a jurisdictional award; it is merely a determination that a majority of the employees in an appropriate unit have selected a particular labor organization as their representative for purposes of collective bargaining. It is true that * * * in making such determination the Board considers the general nature of the duties and work tasks of such employees. However, unlike a jurisdictional award, this determination by the Board does not freeze the duties or work tasks of the employees in the unit found appropriate. Thus, the Board's unit finding does not *per se* preclude the employer from adding to, or subtracting from, the employees' work assignments.[40]

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[37] For example, the following is a typical work jurisdiction clause which, as shown in the record before the National Labor Relations Board, appeared in the labor agreement which was the subject of *Local 169, United Brotherhood of Carpenters and Joiners (W.H. Condo)*, 119 NLRB 726, 41 LRRM 1174 (1957):

> "This Union has jurisdiction in the following and over such other work as it shall hereafter acquire: tending to bricklayers and masons, mixing of mortar by hand or any other process, the handling of brick, stone and all material used by bricklayers and masons, whether by highlift, conveyor, etc., building and wrecking of all scaffolds—patent, tubular, putlock, hanging, swinging, lookout buck, arm, etc., used by them except the building of pole scaffolds used by masons of whatever kind are to be decked and dismantled by hod carriers. The stock pile shall be on the ground, fifteen (15) feet from the building line. When material once has been stock piled and is required to be moved to another location on job, such work shall be done by the hod carriers at the hod carriers' rate."

[38] The gulf between a scope clause and a recognition clause is exemplified in *Pan American Airways, Inc.*, 13 LA 189 (1949).

[39] 93 NLRB 1081, 27 LRRM 1514 (1951).

[40] Id., 27 LRRM 1514 at 1518. Accord, *General Aniline & Film Corp.*, 89 NLRB 467, 25 LRRM 1585 (1950); *Heating, Piping & Air Conditioning Contractors*, 110 NLRB 261, 34 LRRM 1634 (1954); *Gas Service Co.*, 140 NLRB 445, 52 LRRM 1037 (1963).

This basic tenet of Board law and its bearing on the recognition clause argument has been recognized by a number of arbitrators.[41]

And the Board has gone further in helping us to evaluate the force of the ordinary recognition clause. Those who have followed the history of Section 10 (k),[42] under which the Board is charged with making decisions in jurisdictional disputes cases, will be aware that never in the entire history of that Section—and, more to the point, at no time since the Supreme Court said that the Board must make affirmative awards one way or the other in these cases[43]—has the Board ever found that an ordinary recognition clause, standing alone, gave the claiming union jurisdiction over the work. Nevertheless, many arbitrators persist in finding in the recognition clause those very elements which the Board does not.

In fairness it should be noted that not all arbitrators do so. One of the most eminent of their number had one of the earliest reported cases in which the recognition clause was urged as the source of implied union rights. This was Doctor Emanuel Stein, of New York University, in *Cords, Ltd., Inc.*[44] The issue there was as to the employer's right to abolish its guard department and to replace it by an outside agency. Doctor Stein said:

> The Union denies the Employer's right to make such a change; it argues that, since the bargaining unit includes guards, the effect of the Employer's action will be unilaterally to shrink or alter the bargaining unit.
>
> Granted that such will be the effect of the change, I can see no justification for the Union's position. Inclusion of a department in a bargaining unit has never before been thought adequate, in the absence of specific agreement by an employer, to prevent its elimination as long as there was no showing of bad faith. Absent bad faith, we cannot lightly read into an agreement a limitation on customary managerial discretion to add to or subtract from the number of departments.[45]

Arbitrator Whitley P. McCoy, writing in 1949,[46] found the published decisions "unanimously to the effect that the company has

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41 See, e.g., the decisions of Arbitrators Leonard, Coffey and Boles cited and discussed *infra*.
42 See statute cited note 36, *supra*.
43 *NLRB* v. *Radio Engineers Union*, 364 U.S. 573, 47 LRRM 2332 (1961).
44 7 LA 748 (1947).
45 *Id.*, at 749-50.
46 *International Harvester Co.*, 12 LA 707 (1949).

the right to subcontract work unless the contract specifically restricts that right," [47] and he rejected union arguments based on the recognition clause and the list of job descriptions which were a part of the contract. The recognition clause argument was also urged upon Arbitrator I. Robert Feinberg in 1949 in *National Sugar Refining Co.*[48] Considering the reams of tortured argument that have since been spun out about the potent hidden content of the recognition clause, Arbitrator Feinberg's dismissal of the argument is refreshing:

> In order for him [the arbitrator] to sustain the Union's position, there must be something in the contract which may be said to support that position. Paragraphs First and Second of the contract do not fulfill that function. Paragraph First is *merely the usual recognition clause,* and Paragraph Second defines the bargaining unit. Under these clauses the Company has recognized the Union as the representative of its employees, and the term employees is defined. Nothing in these clauses requires the Company to use only its regular employees, or hire new employees, to perform work on refinery facilities. As a matter of fact, these clauses operate only after an employee has been hired, and the relation of employer-employee has been created, and indicate to which of the employees so hired the provisions of the contract shall apply. They do not require the Company to make any particular individuals its employees. Nor does it follow from the fact that stevedores are expressly excluded from the unit, although not employees of the Company, that all other workers on the premises must be Union members.[49] (Emphasis added.)

Mr. Feinberg went on to point out that, where contracting out "has assumed importance in the relations between the parties," then "a provision is generally inserted in the agreement defining their respective rights." He then concludes:

> 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 if such letting is done in good faith and without deliberate intent to injure his employees.[50]

It is worth noting that Arbitrator Feinberg did not find it necessary (as so many arbitrators wrongly do) to twist and torture

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47 *Id.,* at 709.
48 13 LA 991 (1949).
49 *Id.,* at 1001.
50 *Ibid.*

the recognition clause into some kind of a restriction—merely in order to give effect to the essential requirement of good faith. He treats the two as separate considerations, as indeed they are.

A few years later, the position was summed up by Arbitrator Peter Kelliher as follows, in a case in which the union once again placed its reliance on the recognition clause: [51]

> It is a fundamental principle in the construction of Collective Bargaining Agreements that Management continues to retain those rights that it had prior to entrance into an effective Collective Bargaining Contract. A careful analysis of the current Collective Bargaining Agreement fails to disclose any language that can be reasonably interpreted as indicating an intention of the Parties that this Management thereby surrendered or limited its right to contract out maintenance work. The fact that this Company did recognize the Union as the Collective Bargaining Agent for employees in the Painter Classification cannot by inference result in a restriction of Management's right to contract out maintenance work. This Arbitration Board simply lacks the authority to, in effect, add an amendment to this Agreement placing such a restriction upon the Company's rights. The Parties were fully aware that this type of work was being contracted out over a period of many years and under successive Contracts and yet took no action to in any way modify the contractual language. The Board cannot do so now upon the request of one of the Parties.
>
> Arguments with reference to the contracting out of work being a violation of the Recognition and Seniority clauses have been made in numerous cases under substantially similar factual situations. Arbitrators, including the Impartial Member of this Board, the National Labor Relations Board, and the Courts of Law have held almost uniformly that in the absence of a specific contractual restriction, Management has the right to contract out work.[52]

The idea expressed by Arbitrators Feinberg and Kelliher, and by the court in the *Ford Motor Co.* case, *supra,* that the parties must write subcontracting restrictions into their agreement, if there are to be any, is repeated again and again in the cases. Thus, Arbitrator Arvid Anderson in *Wisconsin Natural Gas Co.*[53] said:

> The Arbitrator believes that the placing of limitations on the right to subcontract is of such importance that it should be the

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51 *Carbide & Carbon Chemicals Co.,* 24 LA 158 (1955).
52 *Id.,* at 159-60.
53 31 LA 880 (1958).

> subject of collective bargaining and not be incorporated into the labor agreement by an arbitrator's decision based on the theory that such limitation is implied or inferred by the recognition clause, seniority clause, or other terms of the labor agreement.[54]

And Arbitrator Kelliher in *Minneapolis-Moline Co.*,[55] spoke to the same effect as follows:

> In summary, however, the Arbitrator must find that a clear understanding exists in the field of Labor-Management Relations that where the Parties intend to prevent subcontracting such a specific provision is incorporated in contracts to limit management's right in this matter.[56]

The early cases uniformly dismissed the argument that the recognition clause constituted an implied limitation on the employer's right to contract out, and sound arbitrators are still doing so. Others, however, allowed themselves to be seduced into "finding" a contractual basis for precluding contracting out—usually when they felt that somewhere the transaction lacked essential good faith. As we have already noted, it was not necessary to engage in that sophistry.

Perhaps the most complete answer to those who sought erroneously to find an implied agreement or limitation in the recognition clause was given by Professor Herman A. Gray, of New York University, who met the issue head on in *Hearst Consolidated Publications, Inc.*[57] Professor Gray's summary of the union's arguments and his decision in that respect follow:

> It is the Guild's contention that the recognition clause constitutes an agreement on the part of the Company that all work coming within the designated occupations will remain in the hands of employees for whom the Guild speaks and who will, therefore, continue to enjoy the coverage and the benefits of the Guild's collective agreement. The Guild cites a number of decisions by arbitrators who, in like cases coming before them, have decided, on the basis of reasoning very like that advanced by the Guild, that the recognition clause operates to bar an employer from shifting any of the work coming within the purview of the agreement to a subcontractor whose own employees then proceed to perform the

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54 *Id.*, at 885.
55 33 LA 893 (1960).
56 *Id.*, at 895.
57 26 LA 723 (1956).

work, but not under the terms of the agreement since they are not the employees of the contracting employer.

I have read and carefully weighed each of these decisions. I confess myself unable to accept the reasoning whereby the arbitrators' conclusions were reached. *I think it gives to the recognition clause of the collective agreement a scope and effect which it is not designed to have and should not have.*

In my view the purpose of the recognition clause is no more than to enunciate the legal status of the bargaining union. It describes the unit of the employees for whom the union treats and thus delineates the operative scope of the agreement itself. It serves no substantive function. That is, it does not deal with and has no bearing upon the terms and conditions governing the employment itself. These constitute the subject matter of the body of the agreement which follows the introductory words of the preamble. *To read substantive provisions into the recognition clause through arbitration decisions is, in my judgment, to use arbitration as a means for expanding the agreement which the parties have made rather than just interpreting and applying its provisions in specific situations.*

I am, therefore, constrained to hold that the recognition clause contained in the preamble does not by itself prevent the Company from turning over to an independent contractor any of the work covered by the collective agreement, thereafter to be performed by the employees of such independent contractor rather than by employees of the Company. And, if the recognition clause does not prevent subcontracting, then there is nothing else in the agreement before this Board which does. The right to sub-contract is one of the powers possessed by management. If the collective agreement places no express limitation on the exercise of this power, as this one does not, then it must be held that it remains intact.[58] (Emphasis added.)

In *Hershey Chocolate Corp.*,[59] Arbitrator Saul Wallen, in rejecting a union argument based on the recognition clause, gave voice to a point which we have already noted, namely, that the collective agreement simply prescribes the terms under which the covered employees will work *when work is available to them.* It is not a guarantee. As Arbitrator Wallen put it:

The contracting out work, if done pursuant to a good faith business decision (in the absence of specific language of limitation

[58] *Id.*, at 725.
[59] 28 LA 491 (1957).

> or prohibition) does not violate the recognition clause. That clause binds the employer to recognize the Union as the bargaining agent for those employees whom he employs to produce the goods or services in which he deals. It does not bind him to continue unchanged his mode of doing business nor does it automatically bar him, regardless of circumstances, from purchasing services formerly supplied by his own employees.[60]

The same point with respect to the nature of the collective agreement was made, as already noted, by Arbitrator Feinberg in the *National Sugar Refining Co.* case, *supra.* See also the quotation from the opinion of Arbitrator Sidney A. Wolff in *American Airlines, Inc., infra.* To the same effect was the opinion of Arbitrator Charles W. Anrod in *Reynolds Metals Co.*[61] As that arbitrator put it:

> Any discussion of management's right to subcontract (not subject to contractual regulation) must start with the recognition that a collective bargaining agreement, in the absence of provisions indicating a contrary intent, contains no guaranty on the part of the employer to furnish employment to any individual or to continue operations.[62]

The mere fact that an agreement with respect to wages, hours, and other conditions has been entered into, said Arbitrator Anrod, "does not deprive [the employer] of the right to contract out work covered by the agreement even though such subcontracting may result in terminations or layoffs." [63]

In *Columbus Bolt & Forging Co.*,[64] Arbitrator Vernon L. Stouffer dealt with the subcontracting of janitorial work. There, following the combining of certain offices in a single building, the employer entered into a contract with an outside firm for the performance of janitorial services in the new combined office building. The employees who had theretofore performed janitorial work were members of the bargaining unit, and the union made the familiar arguments that the agreement restricted the company's

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60 *Id.*, at 493.
61 32 LA 815 (1959).
62 *Id.*, at 820.
63 *Ibid.*
64 35 LA 397 (1960).

right to subcontract and that sustaining the company's action could result in reducing the agreement to a "nullity." [65]

Arbitrator Stouffer rejected the union's arguments in the following language:

> The Arbitrator is not impressed with the view that a broad or absolute limitation on subcontracting may be read into the language of the ordinary recognition clause or the list of classifications contained in the Agreement.
>
> The recognition clause in this case merely recognizes the Employees have selected the Union to act as their bargaining representative. There is nothing in the langauge of ARTICLE II, Section 1, upon which to predicate a limitation upon the Company's right to manage its business or to retain whatever working force will best accomplish its purpose.
>
> Any limitation which the Union deems necessary, dealing with the subject of sub-contracting, should be written into the Agreement in clear language to that effect. This is a subject for negotiation.[66]

In one case, *American Airlines, Inc.*,[67] even though the recognition clause actually described the work to be performed by members of the bargaining unit (thus resembling the "work jurisdiction" clauses [68] in the building and theatrical crafts), Arbitrator Sidney A. Wolff refused to find a prohibition on subcontracting. With reference to the union's argument that the recognition and "scope" clauses obligated the company to use only its employees in the performance of the work described, Arbitrator Wolff said:

> I do not so construe this clause. In my opinion, it merely delineates the work to be performed by the various classifications of employees covered by the Agreement when work is performed by the Company. *It does not constitute a binding commitment* bestowing absolute ownership of the work listed upon the several classifications of employees described. Nor does it constitute a bar against subcontracting. In this connection, the Union's unsuccess-

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[65] It is, perhaps, unnecessary to comment in passing on the invalidity of the "nullity" argument. As we said of the argument for implied limitation, the "nullity" argument proves too much, for, if it were valid, it too would prevent the employer with a union contract from going out of business entirely or discontinuing that portion of his business which is represented by the union.

[66] 35 LA 397 at 402.

[67] 27 LA 174 (1956).

[68] See note 37, *supra*.

> ful efforts in collective bargaining to obtain a clause against subcontracting must not be overlooked. Basic is the principle that what a party has not been able to obtain in collective bargaining may not be granted in a proceeding of this kind.[69]

See also the decisions of Arbitrator Sam Kagel in *Dalmo Victor Co.*[70] and Arbitrator Edwin R. Teple in *Black-Clawson Co.*[71] As Arbitrator Teple phrased it, he was "not impressed with the view that a broad or absolute limitation on subcontracting may be read into the language of the ordinary recognition clause or the list of job classifications contained in the agreement." [72] He then goes on to point out:

> * * * there is nothing in the language of this clause upon which to predicate a limitation upon the Company's right to manage its business or to retain whatever working force will best accomplish its purpose. Likewise, the list of job classifications attached to, and made a part of, this Agreement contains nothing to indicate that any particular number of jobs in each classification will be maintained or that all of the work described in any particular classification will be done exclusively by employees of the Company.[73]

Applying a good faith test, the arbitrator sustained the employer on the basis of its arguments of efficiency and cost. To the same effect were the decisions of Arbitrator Ronald W. Haughton in *Vickers, Inc.*[74] and Arbitrator Peter M. Kelliher in *Carbide and Carbon Chemicals Co.*[75] In *American Sugar Refining Co.*,[76] Arbitrator Marion Beatty had this to say about the union's assertion of the implied provisions of the recognition clause as a basis for jurisdiction over work:

> The recognition clause, the seniority provisions, and the listing of job classifications with rates of pay in the back of the working agreement, all of which are relied upon by the Union, make for hardly more than a slight inference, and a most debatable one, that all work customarily done by employees in those classifications will remain with these employees, and that management may not

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69 27 LA 174, at 178-79.
70 24 LA 33 (1954).
71 34 LA 215 (1960).
72 *Id.*, at 220.
73 *Ibid.*
74 24 LA 121 (1955).
75 24 LA 158 (1955).
76 37 LA 334 (1961).

make changes in its methods which would eliminate this work from the plant or from the bargaining unit.[77]

As to the recognition clause specifically,[78] he stated:

> The purpose of this clause is to assure fulfillment of the Company's legal obligation to bargain with this Union and assures that this particular Union may represent all hourly paid employees in this plant. It is stretching the point, I believe, to argue that it also means that the Union has jurisdiction over all work which this employer has or which is customarily done by these employees, or that all such work will remain with these employees. The contract does not provide jurisdiction over work or detract substantially from management's customary right to direct the working force, or to determine what work will be done and how.[79]

In *Kennametal, Inc.*,[80] the union, taking a blunderbuss approach, argued that the company's subcontracting of certain maintenance painting work at the plant violated the "Intent and Purpose," "Recognition," "Management," "Wages," and "Seniority" clauses of the contract. Arbitrator Myron L. Joseph dismissed all such claims, saying:

> I can find no implication here that all production or maintenance work must be done by the employees. These provisions mean exactly what they say, that the Contract sets forth the terms of employment for the production and maintenance employees of the Company. They do not state how many employees there are or should be, what work they may or must do.[81]

Arbitrator John Day Larkin rebuffed the recognition clause argument in a *Sinclair Refining Co.*[82] case, in this language:

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[77] *Id.*, at 336.

[78] It will have been noted that in several of the cases which we have been considering, including the instant one, the union based its argument for implied limitations on, among other things, the list of job classifications and rates of pay which quite frequently is appended to the union contract. The argument is that this listing of jobs operates to "freeze" their existence and content. Such listings, of course, do no such thing. They are in the agreement solely as a vehicle for indicating rates of pay, and they no more constitute an acknowledgment of union jurisdiction over the jobs or the work than the recognition clause does, as the arbitrators properly found in the several cited cases in which the point was raised. See also *Kennametal, Inc., infra,* respecting the assertion of other standard contract clauses as a basis for implied restrictions.

[79] 37 LA 334, at 336.

[80] 38 LA 615 (1962).

[81] *Id.*, at 617.

[82] 38 LA 718 (1962).

> With respect to Article I of the Agreement now before us, it simply provides that the Company recognizes this Union as the exclusive bargaining agent, as required by an NLRB order for
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> "All truck drivers and warehousemen-loaders employed by the Employer at its Rockford, Illinois, Tap Terminal * * *"
>
> and excluding all other personnel at this Terminal. Nothing in this or any other language of the Agreement limits the Company's right to reassign duties to improve the efficiency of the operation of the Terminal. Job duties are not frozen. There is no guarantee that the work assigned to either loaders or truck drivers will remain the same. Therefore, we find no violation of Article I, in the Company's change to driver-assisted truck loading.[83]

In another case [84] involving the assignment of work to employees outside the bargaining unit, Arbitrator John W. Leonard answered the union's argument thus:

> It is appropriate initially to consider whether the Company assignment of work violated Article 1 (a), the recognition clause of the Agreement. In essence, the Union views the combined weight of this clause and the NLRB certification of an I.A.M. unit including the McGill welders as precluding the Company from unilaterally assigning outside the limits of the I.A.M. unit welding repair of whatever nature on any crusher equipment. The reasoning implicitly underlying such a conclusion is simple and logical, if one can accept the basic premise that an NLRB certification, of itself, prescribes which employees shall perform what work. Such a premise necessarily is totally unacceptable to the Arbitrator. An NLRB certification confers upon the bargaining representative chosen by the employees only the right to bargain for those employees. The extent to which the Union has a voice in the assignment of work is determined by the agreement between the Union and the Company, not by the NLRB certification.[85]

The fact that the recognition clause, derived as it is from the employer's obligation under the National Labor Relations Act, does not accomplish a grant of jurisdiction over *work* any more than a Board certification does was also recognized by Arbitrator A. Langley Coffey in *Phillips Pipe Line Co.*[86] As Arbitrator Coffey put it:

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83 *Id.*, at 721-22.
84 *Kennecott Copper Corp.*, 64-2 ARB para. 8820, p. 5834 (CCH 1964).
85 *Id.*, at 5837.
86 20 LA 432 (1953).

> Neither is there any basis for holding that the certification of a bargaining agent, or for that matter the recognition of one by management, in itself, is tantamount to giving the Union a voice in who shall do the work. A National Labor Relations Board certification does nothing more than confer bargaining rights upon the employees' chosen representative. From that point on the employer and employee representative deal at arms length and each strikes the best bargain possible. It is the contract and not the relationship of the parties which governs the right to the work and determines to whom it shall be assigned.[87]

As the decisions which we have been discussing make clear, the current of respectable authority is to the effect that an understanding so critical as one ceding to the union a property right in the work performed must be *expressly* written into the agreement. We have already noted how unfair and illogical it is to imply into an agreement a term which an employer would have adamantly resisted (had it been proposed) and which a union (deliberately or otherwise) failed to seek in negotiations. The unfairness becomes sharpened to the point of absurdity when the term is one which the union *did* propose in negotiations, but failed to achieve. Many arbitrators feel that the doctrine of "implied agreement" becomes a laughing stock when it is used to import into the agreement terms which one party proposed, the other rejected, and both parties thus put aside when they signed the final agreement without the limitation. Similarly, where in negotiations the company specifically claimed the right to subcontract janitorial work and the contract is thereafter signed without any limitation, it cannot be said—with a straight face at least—that the company relinquished its right to subcontract the work in question, and Arbitrator S. S. Kates in *Hertner Electric Co.*[88] so held.

The need for limitations to be negotiated has been well expressed by Arbitrator Thomas J. McDermott.[89] Following a scholarly treatment of the argument respecting the implications said to be contained in a recognition clause, Arbitrator McDermott rejected the suggestion that that clause prevented the subcontracting of janitorial work, and he then declared:

> It is the Union that must decide how much effect the Company's

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87 *Id.*, at 433.
88 25 LA 281 (1955).
89 *Olin Mathieson Chemical Corp.*, 36 LA 1147 (1961).

> possession of the right to subcontract will have on the security of the bargaining unit. If the Union believes that full possession of this right by the Company constitutes a threat to its security, then the course of action is clear. The question becomes one for collective bargaining consideration.
>
> To sum up, therefore, I do not accept the principle that regardless of the intentions of the Company, the recognition clause denies to management the right to contract out work of a continuing nature which is being performed by members of the bargaining unit.[90]

In a recent case[91] involving the transfer of clerical duties from bargaining unit employees to salaried workers, Arbitrator Joseph M. Klamon held:

> . . . . the recognition clause, contained in Article I, Section 1 of the Company-Union Agreement, does not include or imply any restriction, express or implied, on the right of management to assign work.[92]

As to the company's right to assign the work in question, he stated:

> This is one of the fundamental rights of management, and can only be limited or restricted in direct contract negotiations. Moreover, such a restriction must be stated in the clearest terms and even then extends only as far as is clearly stated.[93]

In another recent case,[94] Arbitrator Walter E. Boles, Jr. held that the Company did not violate Article I (Recognition), Article III (Job Classification and Rates), and Appendix A (Wage Rates) of the agreement by assigning to maintenance employees (members of another bargaining unit) the duty of recording on their time slips certain data (previously performed by time-keeper clerks in the bargaining unit). As to the union's contention that the recognition clause conferred jurisdiction over the work on the timekeeper clerks, Arbitrator Boles stated:

> It is believed, however, that the Company is correct in asserting that an NLRB certification 'is a certification to represent only *people* not work . . .' NLRB decisions support this conclusion, as does a respectable body of arbitrators' awards. * * * It has always seemed quite unlikely to me that contracting *parties intend,*

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90 *Id.*, at 1152-53.
91 *Olin Mathieson Chemical Corp.*, 42 LA 1025 (1964).
92 *Id.*, at 1040.
93 *Ibid.*
94 *Olin Mathieson Chemical Corp.*, 43 LA 258 (1964).

> by virtue of either a recognition clause or a list of job titles and rates, to 'freeze' job duties within this or that classification; these parts of a collective bargaining agreement have other and far less subtle missions to perform.[95]

This review of the decisions of arbitrators who rejected the recognition clause argument can be concluded with a reference to the recent decision[96] of Arbitrator John Day Larkin in a case involving the question of whether the Company's assignment of work to employees outside the bargaining unit violated the recognition clause. Arbitrator Larkin had this to say:

> It is generally recognized by arbitrators that the purpose of the recognition clause is no more than to enunciate the legal status of the bargaining union. It describes the unit of employees and sets forth, in general terms, the operative scope of the agreement. But such recognition does not deal with and has no bearing upon the specific terms of employment itself. Other provisions of the agreement specifically limit management's exercise of authority; but we find no rule in the present contract which limits this Company's right to make the kind of assignment involved in the instant case.[97]

As the foregoing review demonstrates, there is a clear and substantial current of authority which rejects the recognition clause as a source of implied limitations on management.

We turn now to consider some cases in which the logical and legal principles which demand such rejection of the recognition clause have been notably transgressed.

We have already referred to the decision of Arbitrator Feinsinger[98] in which—assuming without discussion that the recognition clause conferred a property right in the work—he overrode management's determination as to the type and calibre of personnel required to man certain automated operations. We have also the case[99] in which Arbitrator Garrett too readily bought the union argument that recognition of the union implied an undertaking not to interfere with the unit. The influence of Arbitrator Garrett in that direction is discernible in the decisions of his colleagues.

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[95] *Id.*, at 260-61.
[96] *Olin Mathieson Chemical Corp.*, 43 LA 1064 (1964).
[97] *Id.*, at 1065-66.
[98] *General Motors Corp., supra* note 24.
[99] *National Tube Co., supra* note 25.

Arbitrator Peter Seitz subscribed to the Garrett reasoning in a *Curtiss-Wright Corp.* case,[100] even though he went on to find that the action of the company in taking work away from the bargaining unit was not a violation of the contract. His reason for so holding is interesting because it injects a new note. Arbitrator Seitz upheld the company because its action was not *unreasonable* in the circumstances of that case.

The criterion of "reasonableness" as a guide to the meaning of language seems also to appeal to Arbitrator Ralph T. Seward. In *Bethlehem Steel Co.*,[101] he quoted with approval Arbitrator Garrett's criterion:

> * * * "Whether the company's action * * * can be *justified* on the basis of all relevant evidence as a *normal* and *reasonable* management action" * * *.[102] (emphasis added)

and then went on to put it even more explicitly in his own case:

> The "implied obligations" issue, as posed in this case, is not whether the company may contract out *all* of its work or *none* of its work. It is whether there was any implied contractual bar to the contracting out of *this particular scrap reclamation work, at this particular plant and under the circumstances of this particular case.*[103]

Arbitrator Seward here seems prepared to join in Arbitrator Crawford's "beating the union prices" rationale [104] which we have previously discussed. Here again, we submit that an implied contract or undertaking, like an express one, is and must be an *absolute.* It either exists or it does not exist. As already suggested, a rationale which holds that a contract means one thing under one set of circumstances and something else under another set of circumstances offends both law and logic. Contracts cannot change —not even labor contracts—according to the accident of external conditions. Why, then, do eminent arbitrators apply these varying standards to them? The answer is to be found in the Taylor dictum, discussed at the outset of this paper. It is to be found in the *mediatory* approach urged upon arbitrators by Dr. Taylor and

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100 43 LA 5 (1964).
101 30 LA 678 (1958).
102 *Id.*, at 683.
103 *Id.*, at 682.
104 Crawford, *supra* note 28, at 72.

too readily adopted by them. It results in arbitrators again and again distorting the question before them into one which asks "*ought* management to exercise this right?"—and answering that unposed question in the light of their own notions of industrial equity—rather than dealing with the question actually raised by the grievance and put before them: "does management have this right?" or "does the contract limit management in the exercise of this right?"

The mediatory (at the expense of the judicial) approach to arbitration is well-illustrated by two recent cases. The first was decided by Arbitrator Gerald G. Somers. In *Ametex, Inc.*,[105] the union alleged that the company violated the recognition, seniority, wage, union security, and other conditions of the bargaining agreement by contracting out plant janitorial services for a new office building. Examining the positions of the parties in terms of their furthest extension, Arbitrator Somers concluded:

> Since the two extreme positions discussed above are both logically untenable, it becomes necessary to analyze each dispute of subcontracting on its own merits. And it is in this sense that 'a rule of reason' must be applied. * * * Since there is no specific prohibition against subcontracting or endorsement of subcontracting in the Agreement, it is necessary to discuss the validity of subcontracting in terms of motivations and consequences.[106]

The second case was decided by Arbitrator Maurice E. Nichols. Arbitrator Nichols's case[107] concerned the union's protest over the installation of new fluorescent bulbs in light fixtures by employees of an outside cleaning company who had been hired to clean and wash all light fixtures and reflectors in the office area. After an analysis of the arguments, Arbitrator Nichols noted:

> In the absence of any language in the Agreement which is directly pertinent to the specific issue here involved it is proper that we examine the basic equity in the positions taken by the parties.[108]

Note that in both cases, although the arbitrators expressly noted the absence of pertinent language, they then announced that this

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105 43 LA 106 (1964).
106 *Id.*, at 110.
107 *Con-Gas Service Corp.*, 43 LA 91 (1964).
108 *Id.*, at 96.

lack called upon them not to dismiss the grievance (the logical move, but one peculiarly abhorrent to all too many arbitrators), but on the contrary to exercise "a rule of reason" (Somers) or "basic equity" (Nichols).

We must pause here to consider the dilemma in which this places management draftsmen. If management is determined not to share its decision-making function with the union and the arbitrator, what should it do? It would seem that, if the *absence* of language gives rise to the extraneous mediatory considerations observed in the Somers and Nichols decisions, then the solution ought to lie in including in the contract language which expressly circumscribes the rights accorded by the agreement. Unhappily, the influence of the Taylor dictum is so strong and pervasive that this solution, even when it can be managed in negotiations, is frequently frustrated. This unhappy fact is nowhere better illustrated than in an unreported decision by Arbitrator Gabriel N. Alexander involving *Consumer's Power Company*. That decision is referred to and quoted from by Arbitrator Russell A. Smith in *Detroit Edison Co.*[109] In that case, as quoted by Arbitrator Smith, a clause covering contracting out provided that the company would not employ outside contractors "for the purpose of laying off employees who ordinarily and customarily do such work."

Although the report does not make it clear, it seems altogether likely that this clause represented a compromise between a union demand for a ban on contracting out and management resistance to any such restriction. A case thereafter arose in which contracting took place, but it appears that the union could not prove that its *purpose* was to lay off bargaining unit employees. Arbitrator Alexander's treatment of this problem is illuminating (and discouraging):

> The Company emphasizes (in my opinion it overemphasizes) the necessity * * * for proving a cause and effect relationship between the use of an outside contractor and the laying off of employees. Carried to the extreme contended for by the Company the meaning of the quoted phrase would be so confined that it would only prohibit the Company from embarking on a conscious plan

[109] 43 LA 193 (1964).

> to do employees out of their jobs in the future by resort to subcontracting.[110]

That, of course, is precisely what the clause said and precisely what it meant. The resulting restriction on management action was a narrow one, to be sure, but it clearly represented *the best that the union could get* in negotiations by way of a restriction. Nevertheless, Arbitrator Alexander refused to accept the plain and literal import of the negotiated language:

> I would not so construe it. I think the words [sic] 'purpose' deserves a more realistic interpretation, one that requires the company to pay reasonable heed to the past as well as to the future in deciding whether to use a contractor or its own work force on a project.[111]

Note how the arbitrator, subconsciously perhaps, translated the question into mediator's terms: *Should* the company have contracted out or shouldn't it?—rather than *could* the company do so under the contract?

It is not to be wondered at that, after quoting the foregoing, Arbitrator Smith said, in some perplexity:

> Precisely what Mr. Alexander had in mind in using this language is not made clear.[112]

To a management observer, however, what Arbitrator Alexander had in mind is all too clear! Perceiving that the contract language did not go as far as it needed to go, in order to constitute the limitation which the union obviously had sought (and which it just as clearly failed to get), he substituted his own views as to what the contract *ought* to have said and completely disregarded what it did say. This willingness to sweep aside the work of the draftsmen in favor of a more desirable state of affairs (as viewed by the arbitrator-turned-mediator) is all too frequent. It was strikingly illustrated in a paper delivered to the Academy by Arbitrator Benjamin Aaron some years ago.[113] For purpose of that lecture, Arbitrator Aaron posed a hypothetical case:

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110 *Id.*, at 204.
111 *Ibid.*
112 *Ibid.*
113 Aaron, "The Uses of the Past in Arbitration," in *Arbitration Today* (Washington: BNA Incorporated, 1955).

> The agreement provides as follows:
> Where skill and physical capacity are substantially equal, seniority shall govern in the following situations *only*: promotion, downgrading, layoffs, and transfers.

We are then asked to suppose that the employer has consistently followed a practice of applying seniority also in the assignment of overtime—not one of the four situations named as the sole situations in which seniority shall govern. The grievance arises when the employer departs from that practice, and the question then posed was what to do about the conflict between past practice and what Arbitrator Aaron himself described as "the plain meaning of the pertinent language in the collective agreement."

Arbitrator Aaron chose to give contractual status to the employer's practice, but, in order to do so, he was forced to dispose of his hypothetical contract language, and his manner of doing so is, once again, both illuminating and discouraging. As already noted, the contract provided for the application of seniority "in the following situations only." Arbitrator Aaron sought to surmount this insuperable difficulty by suggesting, first, that the parties were "inexperienced draftsmen" and so had simply overlooked the problem of overtime assignment. Upon that assumption he rested another, namely, that, had they not overlooked overtime assignment, they would have provided regarding it. Building the inferential pyramid still higher, he further assumed that, had the parties provided regarding overtime, they would have provided that seniority would govern in the distribution of it. However, apparently feeling (as well he might) that this structure was a little weak, Arbitrator Aaron suggested another tack: That the troublesome word "only" be *disregarded altogether* on the theory that it simply was added at the last moment *by an "over-zealous draftsman!"* [114]

Similar disregard for contract language was demonstrated in the remark that Arbitrator John Perry Horlacher made not long ago in dismissing an arbitrability argument in a Christmas bonus case: [115] The case for non-arbitrability, Arbitrator Horlacher said briskly, "rests entirely and insecurely upon the language that

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114 *Id.*, at 5.
115 *Keystone Lighting Corp.*, 43 LA 145 (1964).

happened to be used in the arbitration clause and upon a *literal* interpretation of it." [116] (emphasis supplied)

It is submitted that this sort of arrant disregard for contract language—this utter lack of judicial restraint—indeed, this complete abdication of the judge's role in favor of that of mediator—can only breed disrespect for the arbitrator and the arbitration process. Its product will be (and has already been) not only the sort of contractual restrictions on arbitrators and arbitration which the members of this Academy most deplore, but even the abandonment of arbitration altogether as a labor-management tool, in those situations in which contractual reform of the process through negotiation proves not to be possible.

And where reform by contract *is* possible, the resulting restrictions will breed litigation, particularly arbitrability litigation. Arbitrators should be mindful that *Warrior* dealt with a fairly broad arbitration clause and that the Supreme Court invited parties who wished to restrict the scope of arbitration to do so by contract language. A different atmosphere will pervade the Court, we predict, when it has before it a clause in which the parties have frankly and explicitly negated the assumptions of *Warrior* concerning the desired scope of arbitration and have limited arbitration and the arbitrator's authority.

It is germane at this point to make an observation or two concerning the arbitrator and the issue of arbitrability. Last year this Academy took up this subject in a closed session on which Arbitrator Lewis M. Gill reported briefly as follows: [117]

> What to do when one side wants a ruling on arbitrability first before proceeding to hearings on their merits and the other subjects? The comments were generally to the effect that if our best mediatory efforts fail, most of us probably would rule on arbitrability first—if possible off the cuff so as not to delay the proceeding.[118]

One cannot help asking, in some desperation, "Delay *what* proceeding—if the objection to arbitrability was well-taken?"

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116 *Id.*, at 148.
117 17th Annual Meeting of the National Academy of Arbitrators at New York City, January 29-31, 1964.
118 24 *Daily Labor Report* (February 4, 1964), p. AA-3.

Arbitrators are too often impatient with issues of arbitrability. They argue that, if the contract language does not sustain the union, management will win on the merits anyway, and so, they ask, why not get right to the merits?

One answer to that has already been indicated: Fear of those arbitrators who ignore the absence of language—those who ignore its absence even when its absence was *negotiated,* when the union tried and failed to get the limitation it seeks.[119] Management has a right not to be needlessly exposed to the risk of a bad decision on the merits.

There is, however, still another answer: When a claim is without merit because the obligation on which it purports to rest is simply non-existent, the employer has a right to be free of the need to defend against that claim again and again, every time a new occurrence sets the stage for a reassertion of the claim. He has a right to have the union told by the arbitrator: You do not have that right under this contract—and thus to have the question laid to rest until the next negotiation. He has a right to be free of the danger that the *next* arbitrator (as some of the examples we have been discussing plainly threaten) may mediate the missing language into the contract.

And, while reflecting on arbitrability, arbitrators would do well to bear in mind that the strictures of *Warrior* were aimed at the *courts,* not at the arbitrator. So far as the arbitrator is concerned, the Court was profuse in its acknowledgements of their special expertise and insight in the matter of contract interpretation. It follows, we submit, that arbitrators are uniquely qualified to apply the doctrine of *Cutler-Hammer,*[120] to look to the substance of the agreement and to deny arbitrability to those claims which are palpably without foundation in its terms—those claims which would require for their success an interpretation of the agreement which it simply will not support and which does violence to its language, to its intent and to common sense.

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119 Arbitrator G. Allan Dash, Jr., did precisely that in *Celanese Corp. of America,* 33 LA 925 (1959), in which he made his widely publicized review of the state of the art of reading into contracts limitations which are not there.

120 *International Assn. of Machinists* v. *Cutler-Hammer, Inc.,* 271 App. Div. 917, 19 LRRM 2232, aff'd. 297 N.Y. 519, 20 LRRM 2445 (1947).

The trend toward narrowing arbitration springs from well-founded fears by employers that rights and responsibilities the exercise of which are truly untouched by the union contract are nevertheless in peril when they are exposed to an arbitrator—in peril of being clouded, second-guessed, or actually abridged in respects which were not the subject of negotiations, or in which (in the more aggravated cases) the union tried and failed to secure amendment of the contract.

Only arbitrators can dissolve this fear, and they can do it only by exercising self-restraint and by approaching their task with a thorough awareness that their mission is adjudicatory—that (unless the parties have specifically authorized them to be something more) their mission is that of judge, not legislator.

II. WHAT AND WHEN AND HOW TO ARBITRATE

BEN FISCHER*

Frank O'Connell is preoccupied with "rights." He simply assumes management has certain "rights" and collective bargaining is a device whereby unions attempt to wrest these "rights" away from management. Who ordained these rights is not explained; perhaps they were established by law professors.

So here we are again back to the "rights" theory, "divine rights," the master-servant relationship and the whole caboodle of malarky which enable men with good minds and good hearts to waste their time in a sea of speculative nothingness instead of applying themselves to finding solutions to real issues and problems arising from our changing economic and social climate.

If a union had the power to write a contract which said that management has no rights, then what would that prove? And if a company says to a union you have only the right the law gives you, namely the right to bargain (whatever that turns out to be), then what does that prove? Obviously, the only real issue resolved is the relative power of the parties at a given time in a given situation. This is hardly an adequate basis for examining the appropri-

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