CHAPTER 9

EXAMINING CONTRACTING OUT CLAUSES

I. ARBITRATION OF CONTRACTING OUT DISPUTES IN THE STEEL INDUSTRY

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Introduction

The provisions on contracting out in the current basic steel Labor Agreements are, to say the least, voluminous. In the Bethlehem Steel Agreement, for example, they constitute some 50 paragraphs of text spread over 10 printed pages. They cover a wide range of substantive matters and establish an elaborate procedural system in which all manner of contracting out issues are to be dealt with by the parties up to and including arbitration.

It was not always so. Indeed, until the early 1960s there were no express provisions on contracting out in the basic steel Agreements. Subcontracting disputes did arise, however, and were submitted to arbitration. Management took the position that it retained the right to contract out work unless that right was limited by specific contractual provisions, subject only to its legal obligation not to discriminate against the union. The union, citing the seniority and job description/classification provisions of the Agreement, argued that the company could not contract out work previously performed by its members without the union's agreement. Steel industry arbitrators rejected these extreme positions.

Sylvester Garrett, then Chairman of the U.S. Steel-Steelworkers Board of Arbitration, addressed this issue in 1951 in Case N-159, a seminal decision in the steel industry.[1] That decision held that management's right to contract out work was subject not only to its obligation not to discriminate against the union, but also to an implied obligation under the recognition clause of the agreement

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[1] *National Tube Co.*, Case No. N-159, II Steel Arb. 777 (Garrett, 1951).

to "refrain from arbitrarily or unreasonably reducing the scope of the bargaining unit." Two passages from that decision are especially significant in terms of understanding the subsequent evolution of the contracting out provisions in the basic steel Agreements. In what undoubtedly is the most often quoted paragraph from N-159, Garrett stated:

> What is arbitrary or unreasonable in this regard is a practical question which cannot be determined in a vacuum. The group of jobs which constitute a bargaining unit is not static and cannot be. Certain expansions, contractions, and modifications of the total number of jobs within the defined bargaining unit are normal, expectable and essential to proper conduct of the enterprise. Recognition of the Union for purposes of bargaining does not imply of itself any deviation from this generally recognized principle. The question in this case, then, is simply whether the Company's action . . . [in contracting out work] can be justified on the basis of all relevant evidence as a normal and reasonable Management action in arranging for the conduct of work at the Plant.[2]

The other paragraph, which foreshadows subsequent distinctions the parties were to make, points out:

> Certainly there are various ways in which work may be let out on contract, each of which would appear to give rise to its own peculiar problems. It is one thing to contract for an extraordinary maintenance job, for construction of new facilities, or for the manufacture of semi-finished products, parts, or sub-assemblies in a different plant, and quite another thing to contract with an independent contractor for the performance over the indefinite future of a continuing operation or function within the plant location covered by the collective bargaining agreement.[3]

Contracting out disputes continued to be decided on a case-by-case basis under the principles set forth in N-159, as well as parallel decisions by arbitrators at other steel companies, until 1963, when the parties adopted the first set of provisions expressly addressing contracting out (the so-called "Experimental Agreement"). Those provisions dealt only with work performed by contractors within a plant, but in a preface the parties agreed that they had "existing rights and obligations with respect to various types of contracting out." Those implied rights and obligations remained the arbitral touchstone for contracting out disputes over work performed outside the plant and other contracting out issues not specifically covered in the Agreement.

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[2] *Id.* at 779.
[3] *Id.* at 778.

Although certain modifications and additions were made between 1963 and 1986, the contracting out provisions in the basic steel Agreements remained essentially the same during that period. They included a notice requirement for work to be performed by a contractor in the plant, which later was extended to the performance of repair and maintenance work off the property. Work within the plant was grouped into three basic categories. (1) Performance of production, service, and day-to-day maintenance and repair work was to follow past practice, including "mixed" practices where the work was done under some circumstances by plant forces and under others by contractors. (2) New construction, including major installation, replacement, and reconstruction of equipment and facilities, could be contracted out subject to "any rights and obligations of the parties" applicable at the plant as of August 1, 1963. (3) Nonroutine maintenance and repair work, as well as nonmajor installation, replacement, and reconstruction work, could not be contracted out:

> . . . unless contracting out under the circumstances existing as of the time the decision to contract out was made can be demonstrated by the Company to have been the more reasonable course than doing the work with bargaining unit Employees taking into consideration the significant factors which are relevant. . . .[4]

An arbitrator applying these provisions in many cases had to exercise judgment in determining, for example, whether the repair of a particular piece of equipment was or was not "day-to-day" repair work, and most notably in making determinations as to what was the "more reasonable course" of action. Notably, the parties did not list or indicate what were the "significant factors" to be considered in making that determination. Their Agreement left the arbitrator with considerable latitude to apply the new provisions in a practical and efficacious manner.

The 1986 Agreement

By 1986, conditions in the steel industry had changed dramatically from 1963. Foreign competition, reduced demand for steel, technological change, and other factors had resulted in substantial cutbacks in total production, financial losses, partial and entire

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[4]Experimental Agreement dated June 29, 1963, between Bethlehem Steel Company and the United Steelworkers of America, section A(2). This provision also specified: "Whether the decision was made at the particular time to avoid the obligations of this paragraph may be a relevant factor for consideration."

plant shutdowns, and massive layoffs. Companies also had expanded their use of contractors both within and outside the plant, with the stated goals of reducing costs and increasing efficiency. The union viewed this as a substantial threat to its members, and in the 1986 negotiations it was successful in obtaining major changes in and additions to the contracting out provisions in the basic steel Agreements.[5]

After bargaining—which in the case of U.S. Steel involved an unprecedented six-month work stoppage—the parties agreed to the provisions that, for the most part, constitute their current Agreement on contracting out matters. The changes were substantial. Several of the new provisions addressed issues that had arisen in earlier arbitration cases decided on the basis of the parties' implied rights and obligations.

Most notably, the following "Basic Prohibition" was established:

> In determining whether work should be contracted out or accomplished by the bargaining unit, the guiding principle is that work capable of being performed by bargaining unit Employees shall be performed by such Employees. Accordingly, the Company will not contract out any work for performance inside or outside the Plant unless it demonstrates that such work meets one of the following exceptions.

All work in the plant except for "major new construction" was made subject to an exception that permitted contracting out only if the "consistent practice has been to have such work performed by . . . contractors," *and* if "it is more reasonable . . . for the Company to contract out such work than to use its own employees."[6] Where previously the Agreement had left it to the arbitrator to determine "the significant factors which are relevant" in judging reasonableness in any particular case, under the 1986 provisions, reasonableness is to be judged by reference to 11 separate factors spelled out

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[5]For a discussion of the bargaining context in which the 1986 basic steel Agreements (1987 in the case of U.S. Steel) were negotiated, *see* Carl Frankel's paper published in this volume at p. 247.

[6]There are some variations in the different basic steel Agreements. The U.S. Steel Agreement, for instance, permits contracting out of work under this exception on the basis of a consistent practice established prior to March 1, 1983, without further regard to reasonableness.

The separate exception for "major new construction" generally permits work to be contracted out on the same basis as under the previous Agreements. The parties in 1986 did agree, however, that certain peripheral work was to be assigned to plant forces when it is more reasonable to do so. In 1993, this provision was modified to require that such peripheral work be assigned to the bargaining unit unless it is more reasonable to contract out the work. I have not addressed issues that arose in arbitration relating to the exception for "major new construction." That exception is extensively discussed in the papers presented by Carl Frankel at p. 247 and by Richard Thomas at p. 265 of this volume.

in the Agreement, which "shall be considered" in making that determination.[7]

The 1986 Agreement also for the first time set forth express provisions regarding contracting out of maintenance or repair work to be performed outside the plant or "work associated with the fabricating of goods, materials or equipment purchased or leased from a vendor or supplier." Using the reasonableness standards contained in the Agreement, the company is required to demonstrate that it is more reasonable for it to contract for such work than to use its own employees to perform the work or to fabricate the item. The company is permitted, however, to purchase "shelf items," as defined in the Agreement. These items are to be listed on a shelf item list submitted to the union, and the union can appeal to arbitration a dispute as to whether any such item properly is included on the list. There also is a provision addressing the limited circumstances under which production work may be performed outside the plant.

The 1986 contracting out provisions not only addressed the seemingly full gamut of substantive matters, but also included a new expedited procedure designed to permit most contracting out disputes to be resolved through arbitration, if need be, prior to the work being performed. They also established an annual review

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[7]The factors set forth in the Agreement are:

(1) Whether the bargaining unit will be adversely impacted.

(2) The necessity for hiring new Employees shall not be deemed a negative factor except for work of a temporary nature.

(3) Desirability of recalling Employees on layoff.

(4) Availability of qualified Employees (whether active or on layoff) for a duration long enough to complete the work.

(5) Availability of adequate qualified supervision.

(6) Availability of required equipment either on hand or by lease or purchase, provided that either the capital outlay for the purchase of such equipment, or the expense of leasing such equipment, is not an unreasonable expenditure in all the circumstances at the time the proposed decision is made.

(7) The expected duration of the work and the time constraints associated with the work.

(8) Whether the decision to contract out the work is made to avoid any obligation under the collective bargaining agreement or benefits agreements associated therewith.

(9) Whether the work is covered by a warranty necessary to protect the Company's investment. For purposes of this subparagraph, warranties are intended to include work performed for the limited time necessary to make effective the following seller guarantees:

a. Manufacturer guarantees that new or rehabilitated equipment or systems are free of errors in quality, workmanship or design.

b. Manufacturer guarantees that new or rehabilitated equipment or systems will perform at stated levels of performance and/or efficiency subsequent to installation.

Warranties are commitments associated with a particular product or service in order to assure that seller representations will be honored at no additional cost to the

procedure to be followed by the parties in a cooperative effort to reduce contracting out disputes at the plant level.

Unsurprisingly, in the period following adoption of the new contracting out provisions in 1986 there was considerable arbitration activity at many plants. It was evident that the union was determined to aggressively challenge any management action that it believed ran afoul of the Agreement. It took time for the local parties to fully comprehend and adjust to the new provisions and to put in place the requisite new procedures. Interpretive issues arose that, in many instances, had to be resolved in arbitration.

Under the new expedited procedure, arbitrators were called upon on short notice to quickly hear and decide cases. Some contracts required a decision within 48 hours of the hearing. Although those contracts stated that the decisions were not to be cited as precedent in any future contracting out disputes, the parties, of course, looked to them for guidance on what to expect in future arbitrations. Ironically, some very important contractual issues had to be decided under the expedited procedure, which limited the parties' preparation time and the time the arbitrator had to reflect on those issues and to draft a decision.

Early decisions under the 1986 Agreement established that the reference in the Basic Prohibition to "work capable of being performed by bargaining unit employees" requires a determination as to whether employees have the capability or skill to do the work. In a number of cases, management had sought to justify contracting out work within the plant on the basis of lack of capability because the needed employees were not available to perform the work as they were all fully employed on other work and even working some overtime. Availability of qualified employees is among the enumerated factors to be considered in applying the reasonableness standard in cases where the company attempts to establish that the work falls within an exception to the Basic Prohibition. Arbitrators held, however, that for purposes of apply-

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Company. Long term service contracts are not warranties for the purposes of this subparagraph.

(10) In the case of work associated with leased equipment, whether such equipment is available without a commitment to use the employees of outside contractors or lessors for its operation and maintenance.

(11) Whether, in connection with the subject work or generally, the Local Union is willing to waive or has waived restrictive working conditions, practices or jurisdictional rules (all within the meaning of "local working conditions" and the authority provided by this Agreement).

ing the Basic Prohibition, the availability of plant forces did not bear on their capability to do the work.[8]

These were key rulings because the prior contracting out provisions had recognized mixed practices with respect to work within the plant, and the practice often had been to use contractors to supplement plant forces when they were fully employed on other work. Under the new language, however, if the work was capable of being performed by plant forces, the company would prevail only if it first could establish a consistent practice of contracting out "such work." In rulings involving that exception to the Basic Prohibition, arbitrators similarly held that in defining "such work" the focus had to be on the nature or kind of work involved, and not on surrounding circumstances such as the relative availability of employees to do the work.[9] The phrase "such work" also led to definitional or characterization disputes of a different sort. For example, if a company proposed to engage a contractor to clean boilers using high-pressure water equipment, and had done so before, but also had used its employees to clean boilers with hand tools, was "such work" the cleaning of boilers or the cleaning of boilers with high-pressure water equipment?

Management was more successful in cases interpreting the provision permitting the company to purchase "shelf items." Arbitrators concluded that the contract permitted such purchases whether or not bargaining unit employees were capable of fabricating the item to be purchased and even if they regularly had done so in the past.[10] Thus, the scope of the shelf item exception is a significant matter. The Agreement states:

> ... the Company may purchase standard components or parts or supply items, mass produced for sale generally ("shelf items"). No item shall be deemed a standard component or part or supply item if its fabrication requires the use of prints, sketches or manufacturing instructions supplied by the Company or at its behest or it is otherwise made according to Company specifications.

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[8] *See, e.g., U.S. Steel Corp.*, Case Nos. USS-23,220 et al., XXV Steel Arb. 19,089 (Beilstein/Dybeck 1987); and *Granite City Division, National Steel Corp.*, Grievance No. 278-88-7, XXV Steel Arb. 19,328 (Mittenthal 1988).

[9] *See, e.g., Inland Steel Co.*, Award No. 770, XXV Steel Arb. 18,861 (McDermott 1987); and *Granite City Division, National Steel Corp.*, Grievance No. 278-88-7, XXV Steel Arb. 19,328 (Mittenthal 1988). Remedy issues came to the fore in the wake of these decisions. Generally, arbitrators provided back pay for lost work opportunities, including substantial overtime within the limit of overtime hours that reasonably could be worked. *See, e.g., U.S. Steel Corp.*, Case No. USS-23,431 et al., XXV Steel Arb. 19,249 (Dybeck 1988).

[10] *See, e.g., U.S. Steel Corp.*, Case No. USS-26,364 (Dybeck 1990); and *Patapsco & Back Rivers Railroad Co.*, XXVII Steel Arb 20,244 (Das 1992).

Disputes under this provision frequently arose in connection with the purchase of rebuilt or remanufactured components or equipment, such as motors, pumps, and valves, that the bargaining unit had repaired and reconditioned in the past. Often, these purchases are accompanied by core exchanges or trade-ins, for which the company receives a certain amount of credit toward the purchase. Prior to 1986, these transactions were subject to arbitral scrutiny under the parties' implied rights and obligations, since they did not involve contractors performing work in the plant. In a few notable cases, arbitrators had found that the company's action unreasonably reduced the scope of the bargaining unit.[11] Under the 1986 language, however, arbitrators have upheld the company's right to make such purchases under the shelf item exception, at least where the evidence shows that the transaction does not amount to a contract for the repair of the old unit that is traded in.[12]

Shelf items, as defined in the Agreement, need not literally fit on a shelf. One case from a steel plant railroad involved the purchase of rebuilt locomotive trucks. The Steelworkers Union, which represented maintenance workers at this railroad, grieved because in the past its members had rebuilt trucks in the company's shop. The decision upheld the company's right to purchase the trucks under the shelf item exception, stating:

> Shelf items are not limited to what a retail customer can buy at a general hardware store. The Labor Agreement specifically defines them as "standard components or parts or supply items, mass produced for sale generally." In the railroad business, locomotive trucks fit within this definition. They are available from a large number of vendors. The purchaser need only specify the standard type of locomotive and standard type of bearing required. These trucks are not made according to the [Company's] particular specifications, and their fabrication does not require the use of prints, sketches or manufacturing instructions supplied by the [Company] or at its behest. . . .
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> The fact that the locomotive trucks which the Company intends to purchase may be remanufactured or rebuilt trucks, rather than totally brand new equipment, does not take them out of the category of shelf items. Reconditioned trucks are routinely produced for sale generally in the railroad business, and, as noted above, their purchase in this case

[11] *See, e.g., Jones & Laughlin Steel Corp.*, Docket Nos. 102-C-77, 103-C-77, XXI Steel Arb. 15,873 (Mittenthal 1979); and *U.S. Steel Corp., Minnesota Iron Ore Operations*, Case No. IOI-1693 (Garrett 1985).

[12] *See supra* note 10.

is not tied in any way to the repair or rebuilding of equipment already belonging to the [Company].[13]

As noted previously, for purposes of determining whether it is more reasonable for the company to contract out work to be performed inside or out of the plant, or for it to purchase an item that does not meet the shelf item criteria, the 1986 Agreement for the first time set out 11 factors that "shall be considered in making that determination." For the most part, these reflect many of the factors that arbitrators repeatedly had cited in ruling on reasonableness in cases under the earlier contract language. Without getting into the specifics of any of the enumerated factors—some of which raised interpretive problems of their own—two more general questions arise with respect to their application in a particular case. How are the different factors to be weighed? And, is the arbitrator restricted to consideration of only the 11 listed factors?

As to the first question, Arbitrator "Mick" McDermott, in an Inland Steel decision, colorfully explained the approach adopted by steel industry arbitrators:

> There is no suggestion . . . [in the agreement language] that all eleven factors are of equal weight nor, on the other hand, is it said that some should be considered more or less significant than others. No such weighting is given in the abstract, nor is it stated that the eleven factors are to be seen as if they were times at bat, so that a batting average would be drawn up and, if the Company had hit better than .500, the grievance automatically would be denied as a matter of mathematics. Indeed, it may be in a given set of circumstances that a few factors would bear so strongly against the decision to contract out that, although found to be in the minority column, they would override a majority of clearly weaker, negative factors. Moreover, every case does not present all eleven factors. Some simply are not applicable to a given fact setting, . . . and they thus remain inert as to the contracting out in dispute. It is reasonably clear, therefore, that this "more reasonable" determination is to be made more as a matter of art than of accounting. Simply pitting a count of some factors against others in a bare and mechanical sense would not always be faithful to the clear demands of . . . [the Agreement language]. It is necessary to probe, prod, knead, jog and nudge the entire record in light of all relevant factors in order to come to an overall judgment on balance as to whether Management has proved contracting out to be the more reasonable course, all things considered.[14]

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[13] *Patapsco & Back Rivers Railroad Co.*, XXVII Steel Arb. 20,224 (Das 1992) at 20,247.
[14] *Inland Steel Co.*, Award No. 772, XXV Steel Arb. 18,880 (McDermott 1987) at 18,887.

Thus, although the Agreement now spells out 11 specific reasonableness factors that the parties and the arbitrator are to address, the arbitrator retains a fair degree of latitude and must continue to exercise judgment in balancing the different factors to reach a sound decision.

I do not recall seeing a decision directly addressing the question of whether arbitrators are confined to the 11 reasonableness factors set forth in the Agreement or can take into account other factors on a case-by-case basis. I will not venture a contractual analysis here, other than to note that the agreement, while stating that "the following factors shall be considered," does not include the word "only." After reading more than 100 decisions applying this section of the Agreement, I have concluded that arbitrators are reluctant to come right out and say that they can consider other factors that they believe bear significantly on the question of reasonableness. Yet, there are decisions that allude to other factors without specifically stating that they are being weighed in the balance. By analogy to the school of judicial realism, I suggest that an arbitrator who believes strongly that some additional factor is particularly relevant to determining what is the more reasonable course in a given case will take that into account in weighing the enumerated factors, without doing violence to the Agreement.

Although major interpretive issues raised by the 1986 contract language have been resolved, and the number of subcontracting disputes requiring arbitration has noticeably declined at most steel plants, intriguing questions still arise as to the scope of the contracting out provisions of the Agreement. For example, several cases have involved the repair and maintenance, both in the plant and off the plant site, of mobile equipment leased by the company under an arrangement whereby the lessor is responsible for that work. In those cases, the company argued that it had not contracted out repair and maintenance work, but had merely leased equipment—as it is fully entitled to do—under a lease requiring the lessor to repair and maintain its own equipment. (In at least one such case, the lessor evidently insisted on this.) The union stressed that its members are fully capable of performing this work and that they have repaired and maintained such equipment owned by the company, and, sometimes, leased equipment as well. Arbitrators have held that this type of lease arrangement consti-

tutes a form of contracting out that is subject to the provisions of the Agreement.[15]

In another case, the union grieved when the company directed outside delivery services, such as UPS and Federal Express, to deliver packages to individual addressees within the plant, instead of to a central mailroom. The union objected to the loss of work previously performed by bargaining unit mail clerks who received the packages and then made delivery runs within the plant. The arbitrator in that case held that there was no contractual relationship between the company and the outside carriers regarding performance of the work in issue; thus, there was no basis to review its action under the contracting out provisions of the Agreement.[16]

Arbitrators also have been asked to rule on whether those provisions apply to: (1) pay-for-performance contracts;[17] (2) the erection by a contractor of a welfare building for its own employees who work in the plant, to be built on land inside the plant leased to the contractor by the company for a nominal rent;[18] (3) the dismantling of equipment for shipment to a purchaser who has purchased it on a "where is, as is" basis;[19] and (4) a contract whereby an outside firm was to build, operate, and maintain a coal granulation production facility tied directly into the company's blast furnaces, under an arrangement whereby the company was to purchase the granulated coal, which it claimed was a shelf item.[20]

If there is a common thread running through the decisions in these cases, it is that the form of the transaction is not necessarily controlling. Rather, the underlying nature of the transaction must be examined to determine whether the company has entered into a contractual arrangement for the performance of work that is within the scope of the bargaining unit.

Conclusion

I believe it is fair to conclude that in the steel industry, arbitration has played a significant role in the parties' evolving relationship with respect to contracting out issues. In negotiating their con-

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[15] *See, e.g., U.S. Steel Corp.*, Case No. USS-23,731, XXV Steel Arb. 19,158 (McDermott/Dybeck 1987); and *Bethlehem Steel Corp.*, Decision No. 3475, XXVI Steel Arb. 19,907 (Valtin 1990).

[16] *Bethlehem Steel Corp.*, Decision No. 3503 (Doepken/Das 1991).

[17] *Bethlehem Steel Corp.*, Decision No. 3573 (Wallin/Das 1993)—Yes.

[18] *Bethlehem Steel Corp.*, Decision No. 3624 (Das 1995)—No.

[19] *U.S. Steel Corp.*, Decision No. USS-26,225 (Das/Dybeck 1988)—No.

[20] *Bethlehem Steel Corp.*, Decision No. 3557, XXVII Steel Arb. 20,289 (Das 1993)—Yes.

tracts, the parties have responded to and drawn upon arbitration decisions. The present relatively complex and comprehensive set of detailed rules and procedures set forth in the basic steel Agreements may be a far cry from the implied rights and obligations discerned in the early arbitration decisions. But unanticipated questions still arise that arbitrators must decide in light of both the present contract language and the historical context from which it emerged. Moreover, no matter how detailed the provisions, arbitrators still are called on to make significant judgments on such conceptual issues as defining or characterizing the nature of the work in dispute and in determining what is the "more reasonable" course. Within the limits of the contract they continue to strive to attain the goal stated by Syl Garrett in a somewhat different context, namely, to work with the tools at hand to provide as fair and practical an interpretation and application of the Agreement as is objectively possible.

II. THE STEEL CONTRACTING OUT PROVISION: A STRONG CLAUSE NEGOTIATED FROM "WEAKNESS"

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It is not as if the National Academy of Arbitrators has ignored the subject of contracting out in its Annual Proceedings. No doubt, interest in the subject persists because, as headlines at GM earlier this year remind us, the issue stubbornly persists.

In this paper the subject is revisited, albeit with a more specific and less theoretical focus than has been the case in the past. My limited office is to outline the resolution of the contracting out issue as spelled out in the collective bargaining agreements between the United Steelworkers and the major steel producers, and equally important, to explain the 1986–1987 bargaining context that yielded the highly restrictive scheme embodied in those agreements. I will also deal with two problems that continued to plague the process thereafter, one being application of the major new construction exception and the other being the remedy for repeated violations of the advance notice requirement—an issue exacerbated by the conflicting views of the Eleventh Circuit and the USX Board of Arbitration over the Board's remedial authority

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in such situations. Finally, I describe how these two problems were, in turn, resolved in 1993.

Before outlining the provisions, a capsule recitation of the relevant historical background may be helpful. The contractual history begins in 1963 when a clause partially defining the parties' rights with respect to contracting out first became effective in steel industry contracts in the form of a limited, practice-based Experimental Agreement.[1] In each succeeding round of negotiations, the Steelworkers sought and often achieved some enlargement of its rights, but nearly always the improvements were in the procedural rather than the substantive sphere. Two decades of tinkering with the old contract language and an exhaustive well-conceived tripartite study of the problem authored by Rolf Valtin in 1979 did not yield a solution. Finally, spurred by a huge surge in contracting out in the 1980s, the problem ripened into a crisis. The parties thus faced a major struggle over the issue as the 1986 round of negotiations commenced.

What emerged from those negotiations was not a slightly revised version of the old provision but what has been described as a "revolutionary" contracting out regulatory system. It earned that designation because it imposes perhaps the toughest restrictions on contracting out found anywhere in the manufacturing sector; it provides a genuine opportunity for the unit to recapture work that historically has been contracted out; and it fashions a special expedited procedure by which, in many cases, the parties may obtain an arbitrator's award even before the company makes a final decision to contract out the work.[2]

Outline of the Provisions

I turn now to the language itself. The steel contracting out system is founded on the "guiding principle" that "work capable[3] of being

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[1]Well before the parties negotiated contract language specifically dealing with the subject, arbitrators had issued a series of awards, predicated on other provisions, that set basic ground rules with respect to contracting out. The most significant of these awards is *National Tube Co., National Works*, Case #N-159, II Steel Arb. 777 (Garrett 1951); *Bethlehem Steel Co.*, Case #423, VII Steel Arb. 4379 (Seward 1958).

[2]The clause in the current agreement between the Steelworkers and Bethlehem Steel Corporation is reproduced in an addendum to this paper. Less significant passages have been excised to meet space limitations. Language added in 1993 appears in italic type.

[3]Although "capable" is not defined in the contract, arbitrators are unanimous in applying that term in its skill or ability sense. *See, e.g., USS/Kobe Steel Co.*, Grievance No. 1104-91-15-IS (Doepken 1991); *Inland Steel Co.*, Co. Ex. 17, XXVI Steel Arb. 20,026 (Bethel 1990); *Allegheny Ludlum Steel Corp.*, Grievance Nos. 5049, et al. (McDermott 1987); *U.S. Steel Corp.*, USS-23,220, et al., XXV Steel Arb. 19,089 (Beilstein/Dybeck 1987).

performed by bargaining unit employees shall be performed" by them. The contractual corollary to that principle is that the employer is barred from contracting out any work, whether performed on or off the plant site, unless it proves that the work in question falls within one of the delineated exceptions to the general principle.

Work in the Plant

The contract divides exceptions into two categories depending on whether the work is to be performed in or outside the plant. In terms of in-plant work, one rule governs all production, service, maintenance, or repair work, and nonmajor new construction, installation, replacement, and reconstruction of equipment and production facilities. That rule forbids contracting out unless the employer meets both requirements of a two-prong test. First, the employer must show a consistent practice of contractors performing the work. But that is not enough. Then, the employer must show that it is "more reasonable" to contract out the work than to use bargaining unit employees. "Reasonableness" is determined by application of an 11-factor contractual test. Of those factors, the awards place most emphasis on adverse impact on the bargaining unit, availability of qualified unit employees (and supervisors) for a long enough period to complete the work, availability of equipment either on hand or by lease or purchase, and time constraints associated with the work. Most telling is a consideration that is entirely absent: the comparative cost of doing the work with bargaining unit employees versus outside contractors is not one of the reasonableness factors and does not enter into the contractual analysis.

Another exception governs major new construction, major installation, and major replacement as distinguished from new construction, installation, and replacement that is not major. The employer is free to contract out such major work subject only to rights or obligations ("practices") that existed at that plant as of a specified historic period tied to the plant's inception. As we shall see, the difficult task in applying the major new construction exception is determining what constitutes "major."

The parties carved away from the major new construction exception a category of work they called "peripheral." The term is not defined except to say that it may not concern the main body of the project, and it may include such project-related work as

demolition, site preparation, road building, pipelines, and various utility hook-ups. Peripheral work, regardless of the prior practice, must be assigned to the bargaining unit unless contracting out is the more reasonable course, applying the same 11-factor test to which I have alluded.

Work Outside the Plant

Maintenance, repair, or fabrication work that the company would send outside the plant for performance is another category subject to the contractual reasonableness test. Unless the employer demonstrates that it is more reasonable to contract out such work than to perform it in-house, it must be assigned to the bargaining unit. There is, however, no restriction on the company's right to purchase shelf items, defined as standard components or parts or supply items mass produced for sale generally, unless fabrication of the item requires the use of employer-supplied prints, instructions, or specifications.

The final work category exception deals with production work to be performed outside the plant. In this instance, the bar to contracting out is lifted only when the employer can prove "that it is unable because of a lack of capital to invest in necessary equipment or facilities" and that its decision is not a step in exiting the steelmaking business. Where capital resources are scarce, the company is entitled to make reasonable judgments in the allocation of those resources as among plants represented by the Steelworkers.

Notice Requirements

The drafters of the original Experimental Agreement in the 1960s realized that notice was at the heart of any system. Accordingly, they detailed information the employer was obligated to furnish before deciding to contract out on site. By the end of the 1986 round, the notice requirement had expanded into one that demanded that the employer not only provide a written description of the work including location, type, occupations involved, estimated duration, and the anticipated use of bargaining unit forces during the period, but to do so (1) whether the work was to be performed on or off site, (2) with sufficient particularity to enable the union to determine the reasons for the proposed contracting out, (3) with full disclosure of all information in its

possession relating to the 11 reasonableness factors (including the proposed contract itself), and (4) in sufficient time, save for emergencies, for the union to invoke the special expedited procedure described below.

When it came to notice violations, the parties gave the arbitrator authority to "fashion a remedy, at his discretion, that he deems appropriate," and that remedy could include back pay and benefits if the grievants who would have performed the work could be identified. As explained in a later section of this paper, a dispute over the precise reach of these remedial powers in notice cases led to express authority for the arbitrator to impose a penalty for willful or repeated violations or breach of a previous cease and desist order.

Dispute Resolution

A joint contracting out committee administers the system. The committee may, of course, resolve any matter by agreeing that the work in question may or may not be contracted out. Although that resolution is final and binding, it is so only with respect to the work under consideration, and it cannot affect future determinations.

Unresolved matters may take one of two tracks, namely, the regular grievance procedure or, at the request of either party, the special contracting out expedited procedure. In all cases except day-to-day maintenance and repair service, the expedited procedure must be implemented prior to the employer's letting of a binding contract. The entire process from initiation to completion of the hearing takes several weeks (unless time restraints are waived). The award must issue within 48 hours of the close of the hearing. In some contracts, awards in expedited cases carry no precedential value while in others they do. In practice, however, both parties cite prior expedited awards even if they are contractually nonprecedential.

Finally, in the hope of minimizing the number of disputes, the parties created an annual procedure in which they review, as of a specified date, all work that the company anticipates contracting out in the following 12 months. The mechanism contemplates a study by the local parties, potential agreement, identification of disputes, and a report on these matters to the top levels of their respective organizations.

The Bargaining Context

In the years 1982 to 1985, disaster struck the U.S. steel industry. Interrelated forces in the form of surging imports, declining prices, and an overvalued dollar drove the industry into a state of crisis. Losses were measured in billions, and significant producers such as Wheeling Pittsburgh Steel Corporation and McLouth Steel Corporation filed for bankruptcy protection. Several larger producers stood on the brink. Over roughly the same period, workers in the industry suffered the staggering loss of 250,000 jobs. Employment sank to half its level of the 1970s, and steel towns became depression zones. This was the economic framework as the parties approached the 1986 round of negotiations.

At the same time, the bargaining framework changed significantly. From 1956 to 1985, the major steel producers negotiated with the Steelworkers through a voluntary multiemployer structure known as the Coordinating Committee Steel Companies (CCSC). By 1985, mainly as a result of mergers and withdrawals, the CCSC consisted of six major steel employers, USX, Bethlehem, LTV, Inland, National Steel, and Armco. For reasons of their own, the six companies decided to dissolve their multiemployer bargaining structure in 1985 and negotiate instead on a company-by-company basis in the upcoming round.

Faced with a severe economic climate beyond anything we had known, the union was forced to adopt a survival-based bargaining strategy for 1986. One aspect of this strategy was a "Bargaining Program for Dire Situations." This program contemplated wage and other concessions ("adjustments where the consequences of not doing so will be harmful to the interests of our members") but under only carefully defined conditions, including union access to books and records, some form of restoration or recoupment, and equal sacrifice from management. But by far the most important quid pro quo for concessions was job security, more particularly, elimination of the longstanding contracting out problem. The theme that came to dominate each set of company negotiations was that if the union was going to help save the company, the union would do so to save jobs for steelworkers, not outside contractors.

The union's January 16, 1986, Policy Statement[4] made employment security "one of the overriding issues" and, with respect to contracting out, specifically declared:

> We should begin with an outright ban on the contracting out of any production, service, maintenance, repair, rehabilitation or new construction, or office and technical functions that our members possess the skill to perform or can be trained to do. Special emphasis also should be placed on the need to correct conditions used as excuses for contracting out, such as lack of trained manpower and specialized equipment.... Effective ways must be found to return to the bargaining unit work which is already contracted out.

The steel agreements were not due to expire until August 1. Nevertheless, immediately upon the adoption of the January 16 Statement of Policy, the union sent a letter to the six major steel producers enclosing a copy of the Statement and informing each of them that, in light of the economic circumstances in the industry and their individual financial condition, it was prepared to bargain early on the basis of the equation outlined in the document (wage concessions or forbearance in exchange for job security goals). The first to accept the invitation was LTV, which had initially approached the union in the fall of 1985. Full negotiations did not commence immediately, however. To test the waters, the parties entered into an Interim Progress Agreement, pursuant to which scheduled wage and cost-of-living increases were held in abeyance pending the outcome of a plant-by-plant contracting out study. The object of the study was to determine what work, if any, could be retrieved from contractors and how many jobs that retrieval would mean for bargaining unit employees. It turned out that sufficient work was reclaimed from contractors to recall approximately 200 laid-off steelworkers. It was only then that the parties entered into full negotiations. Ultimately, an agreement was reached on April 1, 1986. On the economic side, the agreement reduced labor costs by approximately $3.60 per hour. On the job security side, the union won the contracting out system that is the basis for this paper. LTV did not avoid bankruptcy, however, and on July 17, 1986, it filed for Chapter 11 protection.

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[4]Bargaining policy takes the form of a Statement adopted by the Basic Steel Industry Conference, which comprises the presidents of steel industry local unions.

In the meantime, the union negotiated with the five remaining major steel producers. In exchange for wage restraint or concessions varying in amount,[5] four of the five agreed to the new contracting out clause without forcing a confrontation. USX, however, stubbornly resisted, and contracting out was a key issue in the ensuing six-month work stoppage. In the end and upon the recommendations of Mediator Sylvester Garrett, the parties reached an agreement that included a contracting out section very much like those of the other major producers.[6]

Ordinarily, unions do not achieve major bargaining breakthroughs in dismal economic circumstances. In the context of the 1986–1987 steel negotiations, however, circumstances normally indicative of weakness were, with respect to contracting out, a source of strength instead. The employers were desperate for wage concessions (or forbearance) and therefore "willing" to pay the price. At the same time, our members, facing wage concessions, were more determined than they would have been in "good times" to fight for contracting out protection as the quid pro quo.

Two Views on the Determination of "Major"

In the 1986–1987 clause, the parties lifted, nearly intact, language from the previous agreement dealing with "new construction, including major installation, major replacement, major reconstruction. . . ." The one textual change inserted the word "major" before the words "new construction." Although the new construction language itself was largely the same as before, it now appeared in a completely different clause and in a much different context. Unlike its place in the prior agreement, it had now become an exception—thus to be narrowly construed, say the usual rules—to the governing proposition that work capable of being performed by bargaining unit employees shall be performed by them. In any event, "major" had to be construed in keeping with the overall thrust and sweep of the new clause.[7]

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[5]One objective of the union in the 1986 round was, as much as possible, to maintain a level playing field in labor costs.

[6]There are minor language variations in the clause among the contracts in the six companies.

[7]In the course of rejecting an employer argument on another issue, Arbitrator McDermott observed, "that cannot be embraced because it would ignore the revolutionary nature of the new contracting-out language and would continue to use old tests for judging contracting out, which tests the new language abandons." *Allegheny Ludlum Steel Corp.*, Nos. 5049, et al., at 17 (McDermott 1987).

In fact, however, there developed two divergent lines of authority with respect to the determination of "major." The USX arbitrators, for example, focused on such factors as cost of the project and total man hours, almost in an absolute sense, but in any event, without consideration of how the project at issue compared with projects the bargaining unit had performed historically or even in the recent past. At USX, such comparisons were deemed irrelevant to the determination of "major." As one award declares, "if the subject work is determined to fall within [the new construction section], the fact that bargaining unit employees had performed jobs of similar magnitude does not negate the Company's entitlement under said provision to contract out the work."[8] The issue proved a vexing one to the union, spawning significant cases at USX, particulary at the iron-ore facility where bargaining unit forces had traditionally performed construction work similar in magnitude to what the company was contracting out with the blessing of the new clause, as interpreted.

At Inland Steel, on the other hand, the arbitrators applied a different standard to the determination of "major." Although weighing factors similar to those considered by their USX counterparts, the Inland arbitrators did so in a relative sense, that is, by comparison with other projects conducted at the plant. Thus, Arbitrator McDermott concluded:

> Accordingly, size of the project as affected by physical, geographical, personnel, and cost considerations are relevant. But they cannot be taken in an absolute sense. Determination of whether a given project is major requires comparison with other projects conducted at the plant in order to assess, in a relative sense, whether this one appears larger and grander in light of the factors stated above.[9]

In a subsequent award, Arbitrator Bethel expanded on this theme as follows:

> . . . the structure of the contract itself leads inescapably to the conclusion that the meaning of "major" is relative.
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> Rather, [the drafters] recognized that internal forces could do many of the same *types* of projects as contractors. The distinguishing factor is the size of the project. "Major" projects, which arbitrator McDermott

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[8] *U.S. Steel Corp. (Minnesota Ore Operations)*, USS-25,534, at 6 (Neyland/Dybeck 1988). *See also U.S. Steel Corp.*, USS-23,735 (Neyland/Dybeck 1988); *USS, a Division of USX Corp.*, USS-31,020 (Beilstein/Dybeck 1991).

[9] *Inland Steel Co.*, Co. Ex. 13 at 6, XXV Steel Arb. 19,279 at 19,281 (McDermott 1988).

has identified as those of a large or grand scale, are the type that one would not normally or ordinarily expect internal forces to do.[10]

The gulf separating the Inland and USX interpretations was eliminated by amendment of the contract language in 1993. That resolution is explained in the concluding section.

Remedy for Repeated Notice Violations

Notice infractions became another source of recurring disputes. At the USX plant in Fairfield, Alabama, a series of such violations led to repeated warnings[11] and a prospective affirmative award: "The Company is ordered to hereafter provide notice of contracting out as required by Section 2-C."[12] When, notwithstanding these progressive remedial measures, employer misconduct persisted, the union brought suit to enforce the arbitrator's injunctive award. The ultimate outcome of that litigation is the stuff of Dickensian satire.

The U.S. District Court in Birmingham, Alabama, issued a preliminary injunction requiring USX to abide by the arbitrator's order and provide advance notice of contracting out as the collective bargaining agreement dictated. The injunction worked. On appeal, however, the U.S. Court of Appeals for the Eleventh Circuit set aside the district court's injunctive order because (1) it enforced an arbitration award that, assuming it did contemplate judicially imposed injunctive relief, was on that score "illegal" and (2) the union had an adequate remedy at law.[13]

The larger question posed by this case is where to draw the appropriate balance between the respective roles of judge and arbitrator where an award contains a prospective affirmative order and the employer commits a subsequent violation of that order.[14] However interesting and complex that question may be, it is beyond the scope of this paper. My task here is to focus on the court's reading of the arbitrator's contractual power to fashion a remedy in notice cases. The court's reading is the predicate for its decision, and it highlights the union's dilemma in this circumstance: how to achieve compliance with the contract.

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[10] *Inland Steel Co.*, Co. Ex. 19 at 25, 33 (Bethel 1992).

[11] *See, e.g., U.S. Steel Corp.*, USS-27,782 (Petersen/Dybeck 1989); *U.S. Steel Corp.*, USS-27,744, XXVI Steel Arb. 19,630 (Petersen/Dybeck 1989).

[12] *U.S. Steel Corp.*, USS-26,733, et al. at 7 (Dybeck 1988).

[13] *United Steelworkers of Am. v. USX Corp.*, 966 F.2d 1394, 1405 (11th Cir. 1992).

[14] *See, e.g., Oil, Chemical & Atomic Workers Int'l Union v. Ethyl Corp.*, 644 F.2d 1044 (5th Cir. 1981), a decision that the Eleventh Circuit swept away in a footnote.

The USX agreement, said the court, authorizes the arbitrator in notice violation situations "to fashion any remedy 'appropriate to the circumstances of the particular case . . . includ[ing the award of] earnings and benefits to the grievants who would have performed the work.'"[15] From these words, the court concluded that if USX breached its duty to notify, it might have to pay the union's expenses in prosecuting the grievances. What's more, the quoted prescription gives the arbitrator discretionary authority to impose additional sanctions "appropriate to the circumstances of the particular case."[16] Although at this juncture the court declined to identify just what those additional sanctions might be, later in the opinion it declared that the language in question clearly empowered the arbitrator, if he thinks it appropriate, to "require the Company to reimburse the union for [its attorneys' fees]."[17]

The union was astonished. No one, least of all USX, had ever suggested in briefs, oral argument, or elsewhere that the Board of Arbitration possessed the remedial powers ascribed to it by the Eleventh Circuit. Indeed, no steel arbitrator has ever awarded attorneys' fees or expenses, let alone more severe sanctions for notice violations. To do so would be to "penalize" the company, contrary to the agreement and 40 years of arbitration precedent. Clearly, the court seized on a construct entirely of its own making to brace its conclusion that arbitration offered a more appropriate forum for the union's relief quest than did the courts.[18]

Although the union lost the injunction and wondered at the correctness of the court's contractual reading, we were nevertheless now armed with a definitive ruling from a U.S. Court of Appeals that the notice remedy language in the USX agreement clearly vested the arbitrator with the power, in appropriate circumstances, to award the union its grievance expenses and any attorneys' fees it might incur. So armed, the union appeared at the next arbitration case involving a notice infraction at the Fairfield Works just two weeks after the Eleventh Circuit's opinion issued. Citing the employer's recidivist history at this facility and the broad remedial powers articulated by the court, the presenter asked the arbitrator

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[15] *Supra* note 13 at 1396.
[16] *Id.* at 1396.
[17] *Id.* at 1401.
[18] The specific purpose of the exercise was to demonstrate that, compared with the awesome cudgels wielded by the arbitrator, the court had no real power to deal with a recidivist employer.

to direct the company to pay the union's grievance costs. The arbitrator's full response is as follows:

> In any event, the Board considers the Union's request for the extraordinary remedy of the payment of the Union's costs in preparing and presenting this grievance to be beyond the Board's authority to issue remedial awards for violations of the Agreement.[19]

A "catch-22" comes to mind. After repeated notice infractions by the employer at a particular plant, the arbitrator issues an award, in effect, prospectively prohibiting breaches. When the union seeks enforcement of that award in the form of an injunction, judicial relief is ultimately denied because, we are told, the collective bargaining agreement gives the arbitrator the power to issue tough sanctions, including grievance costs and attorneys' fees to punish or deter such misconduct while the court itself lacks meaningful remedial weapons. But when the matter next arises before the arbitrator, he concludes, notwithstanding what the U.S. Court of Appeals said on the subject, that the Agreement, as he reads it, does not in fact give him the authority to award the union its grievance costs, let alone to impose tougher sanctions.

The remedial merry-go-round described in this saga, apart from its capacity to delight cynics, infuriated union representatives whose task it became to explain the unexplainable to the Fairfield membership. Moreover, it did little to enhance the appreciation steelworkers might hold either for the legal system or the arbitration process. Fortunately, the problem could be cured in the collective bargaining process.

Contractual Solutions

As indicated, both the determination of "major" and the notice remedy issues were ultimately resolved in the 1993 round of steel negotiations. We discuss each resolution in turn.

From the union's standpoint, the comparative approach adopted by the Inland Steel arbitrators offered the most reasonable answer to the determination of "major." As fortune would have it, Inland Steel was the first to enter into negotiations with the union in the 1993 round. For that company, the solution required no more than the contractual codification of existing arbitration awards. Accordingly, there was little employer resistance and the contract was amended simply by lifting concepts from the two key Inland

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[19] *USS, a Division of USX Corp.*, USS-31,792 at 17 (Sharnoff/Dybeck 1992).

decisions and recasting them into a definition of "major."[20] The Inland settlement became the pattern-setter, and the five remaining major producers, including USX, which was last in line, followed suit by adopting the Inland language.

The second issue also posed no insuperable negotiating difficulty. To resolve the conflicting views over the scope of remedial power in notice cases, the union and each of the major steel producers agreed to a new section specifically authorizing the arbitrator to fashion a suitable remedy or *penalty* where it is found that the employer committed willful breaches of the notice requirement, engaged in a pattern of violative conduct, or violated a previous cease and desist order issued in connection with notice violations. Now, the arbitrator does have the power attributed to him by the Court of Appeals.

Addendum

Section 4. Contracting Out

(a) Basic Prohibition
In determining whether work should be contracted out or accomplished by the bargaining unit, the guiding principle is that work capable of being performed by bargaining unit Employees shall be performed by such Employees. Accordingly, the Company will not contract out any work for performance inside or outside the Plant unless it demonstrates that such work meets one of the following exceptions.

(b) Exceptions
(1) Work in the Plant
a. Production, service, all maintenance and repair work, all installation, replacement and reconstruction of equipment and productive facilities, other than that listed in subparagraph (b)(1)b. below, all within a Plant, may be contracted out if (i) the consistent practice has been to have such work performed by employees of contractors and (ii) it is more reasonable (within the meaning of paragraph (c) below) for

[20]The new language reads as follows:
A project shall be deemed major so as to fall within the scope of this exception if it is shown by the Company that the project is of a grander or larger scale when compared to other projects bargaining unit forces at the Plant are normally expected to do. Such comparison should be made in light of all relevant factors.

the Company to contract out such work than to use its own Employees.

b. Major new construction including major installation, major replacement and major reconstruction of equipment and productive facilities, at any Plant may be contracted out subject to any rights and obligations of the parties which as of the beginning of the period commencing August 1, 1963, are applicable at that Plant *in the case of any Plant which was in operation on or before August 1, 1958. With respect to any other plant, the period commencing date shall be the date five years after the date on which the Plant started operations.*

A project shall be deemed major so as to fall within the scope of this exception if it is shown by the Company that the project is of a grander or larger scale when compared to other projects bargaining unit forces at the Plant are normally expected to do. Such comparison should be made in light of all relevant factors.

. . .[W]ork that is of a peripheral nature to major new construction . . . and which does not concern the main body of work shall be assigned to Employees within the bargaining unit *unless it is more reasonable to contract out such work,* taking into consideration the factors set forth in paragraph (c). . . . *For purposes of this provision, the term "work of a peripheral nature" may in certain instances include, but not be limited to demolition, site preparation, road building, utility hook-ups, pipe lines and any work which is not integral to the main body.*

(2) Work Outside the Plant

a. Should the Company contend that maintenance or repair work to be performed outside the Plant or work associated with the fabricating of goods, materials or equipment purchased or leased from a vendor or supplier should be excepted from the prohibitions of this Section, the Company must demonstrate that it is more reasonable (within the meaning of paragraph (c) below) for the Company to contract for such work . . . than to use its own Employees. . . .

Notwithstanding the above, the Company may purchase standard components or parts or supply items, mass produced for sale generally ("shelf items"). No item shall be deemed a standard component or part

or supply item if its fabrication requires the use of prints, sketches or manufacturing instructions supplied by the Company or at its behest or it is otherwise made according to Company specifications.

b. Production work may be performed outside the Plant only where the Company demonstrates that it is unable because of lack of capital to invest in necessary equipment or facilities, and that it has a continuing commitment to the steelmaking business. In determining whether there is capital to invest in particular equipment or facilities, the Company is entitled to make reasonable judgments about the allocation of scarce capital resources among its Plants represented by the Union and their supporting facilities.

. . .

(c) Reasonableness

In determining whether it is more reasonable for the Company to contract out work than use its own Employees, the following factors shall be considered:

(1) Whether the bargaining unit will be adversely impacted.
(2) The necessity for hiring new Employees shall not be deemed a negative factor except for work of a temporary nature.
(3) Desirability of recalling Employees on layoff.
(4) Availability of qualified Employees (whether active or on layoff) for a duration long enough to complete the work.
(5) Availability of adequate qualified supervision.
(6) Availability of required equipment either on hand or by lease or purchase, provided that either the capital outlay for the purchase of such equipment, or the expense of leasing such equipment, is not an unreasonable expenditure in all the circumstances at the time the proposed decision is made.
(7) The expected duration of the work and the time constraints associated with the work.
(8) Whether the decision to contract out the work is made to avoid any obligation under the collective bargaining agreement or benefits agreements associated therewith.
(9) Whether the work is covered by a warranty necessary to protect the Company's investment. For purposes of this subparagraph, warranties are intended to include work

performed for the limited time necessary to make effective the following seller guarantees:

a. Manufacturer guarantees that new or rehabilitated equipment or systems are free of errors in quality, workmanship or design.

b. Manufacturer guarantees that new or rehabilitated equipment or systems will perform at stated levels of performance and/or efficiency subsequent to installation. . . .

(10) In the case of work associated with leased equipment, whether such equipment is available without a commitment to use the employees of outside contractors or lessors for its operation and maintenance.

(11) Whether, in connection with the subject work or generally, the Local Union is willing to waive or has waived restrictive working conditions, practices or jurisdictional rules. . . .

(d) Contracting Out Committee

(1) At each Plant a regularly constituted committee consisting of not more than four persons . . . half of whom shall be members of the bargaining unit and designated by the Union . . . and the other half designated . . . by the Management, shall attempt to resolve problems in connection with the operation, application and administration of the foregoing provisions.

. . .

(e) Notice and Information

Before the Company finally decides to contract out an item of work as to which it claims the right to contract out, the Union committee members will be notified. . . . [S]uch notice will be given in sufficient time to permit the Union to invoke the Expedited Procedure described in paragraph (h) below, unless emergency situations prevent it. Such notice shall be in writing and shall be sufficient to advise the Union members of the committee of the location, type, scope, duration and timetable of the work to be performed so that the Union members of the committee can adequately form an opinion as to the reasons for such contracting out. . . .

. . . Either the Union members of the committee or the Company members of the committee may convene a prompt meeting of the committee. . . . At such meeting, the parties

should review in detail the plans for the work to be performed and the reasons for contracting out such work. Upon their request, the Union members of the committee will be provided any and all relevant information in the Company's possession relating to the reasonableness factors set forth in paragraph (c) above. Included . . . shall be the opportunity to review copies of any relevant proposed contracts with the outside contractor. . . . Except in emergency situations, such discussions, if requested, shall take place before any final decision is made as to whether or not such work will be contracted out.

. . . Should it be found in the arbitration of a grievance alleging a failure of the Company to provide the notice or information required under this paragraph (e) that such notice or information was not provided, that the failure was not due to an emergency requirement, and that such failure deprived the Union of a reasonable opportunity to suggest and discuss practicable alternatives to contracting out, the Impartial Umpire shall have the authority to fashion a remedy, at his discretion, that he deems appropriate to the circumstances of the particular case. Such remedy, if afforded, may include earnings and benefits to grievants who would have performed the work, if they can be reasonably identified.

(f) *Remedy for Repeated Notice Violations*
Notwithstanding any other provision of this Agreement, where, at a particular Plant, it is found that the Company (i) committed violations of paragraph (e) that demonstrate willful conduct in violation of the notice provision or constitutes a pattern of conduct of repeated violations or (ii) violated a cease and desist order previously issued by the Impartial Umpire in connection with a violation of paragraph (e), the Impartial Umpire may, as circumstances warrant, fashion a suitable remedy or penalty.

(g) Mutual Agreement and Disputes
The committee may resolve the matter by mutually agreeing that the work in question either shall or shall not be contracted out. Any such resolution shall be final and binding only as to the matter under consideration and shall not affect future determinations under this Section.

If the matter is not resolved, or if no discussion is held, the dispute may be processed further (i) by filing a grievance relating to such matter under the complaint and grievance

procedure . . .; or (ii) by submitting the matter to the Expedited Procedure set out in paragraph (h) below.

(*h*) Expedited Procedure

In the event that either the Union or Company members of the committee request an expedited resolution of any dispute arising under the Section . . ., it shall be submitted to the Expedited Procedure in accordance with the following:

(1) In all cases except those involving day-to-day maintenance and repair work and service, the Expedited Procedure shall be implemented prior to letting a binding contract.

(2) Within three (3) days (excluding Saturdays, Sundays and holidays) after either the Union or Company members of the committee determine that the committee cannot resolve the dispute, either party . . . may advise the other in writing that it is invoking this Expedited Procedure.

(3) An expedited arbitration must be scheduled within three (3) days (excluding Saturdays, Sundays, and holidays) of such notice and heard at a hearing commencing within five (5) days (excluding Saturdays, Sundays and holidays) thereafter. . . .

(4) The arbitrator must render a decision within forty-eight (48) hours (excluding Saturdays, Sundays and holidays) of the conclusion of the hearing. Such decision shall not be cited as a precedent by either party in any future contracting-out disputes.

. . .

(*j*) Shelf Item Procedure

(1) *No later than June 1, 1994, and,* . . . annually thereafter, the Company shall provide the Union members of the committee with a list and description of anticipated ongoing purchases of each item which the Company claims to be a shelf item within the meaning of paragraph (b)(2)a. above. . . .

(2) The committee may resolve the matter by mutually agreeing that the item in question either is or is not a shelf item. . . .

(3) If the matter is not resolved, any dispute may be processed further by filing, within thirty (30) days of the date of the last discussion, a grievance in Step 3 of the

complaint and grievance procedure described in Article XI. . . .

. . .

(i) Annual Review
Commencing on or before *January 2* of each year the Company committee members shall meet with the Union committee members for the purpose of (i) reviewing all work whether inside or outside the Plant which the Company anticipates may be performed by outside contractors or vendors at some time during the following *twelve (12) months*, (ii) determining such work which should be performed by bargaining unit Employees and (iii) identifying situations where the elimination of restrictive practices would promote the performance of any such work by bargaining unit Employees. . . .

By no later than *February* 1 of each year the Local Union and Company committee members shall jointly submit a written report to the International President and the Chief Executive Officer of the Company or their designees describing the results of this review. . . .

III. SOME MANAGEMENT VIEWS ABOUT "MAJOR NEW CONSTRUCTION" IN THE STEEL INDUSTRY

RICHARD I. THOMAS*

Introduction

Even prior to the collapse of the domestic steel market in the early 1980s, a significant amount of work had been routinely contracted out and had provoked confrontations between employers and organized labor in a number of bargaining negotiations.[1] Prior to the early 1960s, since no contract provision squarely dealt with the matter of contracting out in the steel industry, disputes by and large were disposed of on the basis of arguments derived from

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[1]A joint study by a union-management committee in 1979 estimated that from 1971 to 1978 an average of 15,000 contractor employees worked full-time each year in the steel industry, representing approximately 15 percent of the companies' own craft forces. Hoerr, And the Wolf Finally Came—The Decline of the American Steel Industry (University of Pittsburgh Press 1988), 431.

various sections of the basic agreement, including recognition, local working conditions, seniority, and management rights. This changed, however, in 1963 with the Experimental Agreement. It was from this Agreement, which acknowledged the "existing rights and obligations" of the parties primarily on the basis of prior arbitration decisions, that modern day contracting out language had its origin. But, it was not until the mid-1980s that detailed contracting out restrictions became a "red hot," priority issue in bargaining.

Despite finger pointing by both the employers and the union, the plain fact of the 1980s was that, as a result of years of investment neglect, basic technological lag, and high labor costs, American steel producers had a significant unit cost disadvantage in domestic and international markets. Thus, as layoffs escalated throughout that decade, management decisions to contract out work became increasingly widespread as basic steel producers attempted to withstand the financial challenges presented by their lack of sophisticated technology; aggressive foreign competition; new, state-of-the-art mini-mills; and the lower labor costs of nonunion manufacturers.[2]

It was in these circumstances that the contracting out battle lines were drawn in the mid-1980s. For management, the need to contract out work was a matter of economic survival. The union, conversely, viewed contracting out as management's method of eroding the bargaining unit and thus job security, particularly with respect to craft employees where contracting could be accomplished with the greatest ease. Thus, in 1986 the issue finally erupted as a priority at the bargaining table. The result of the negotiations was the beginning of significant prohibitions against contracting out in the steel industry with further restrictions produced in two successor agreements. The present discussion of contracting out is particularly timely in view of the Steelworkers'

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[2]McCammon & Cotton, *Arbitration Decisions in Subcontracting Disputes*, 29 Indus. Rel. 1 (Winter 1990), 135.

Disputes over contracting out in the 1980s also included a trend in American industries toward adopting a Japanese technique of creating two tiers of workers:

> The higher tier, or "core" group, consisted of the company's most skilled workers, who held the primary production jobs. A secondary group consisted of temporary and part-time workers and contractor employees who performed ancillary or seasonal work at much lower wages. The Japanese steel industry employed one hundred fifty thousand such workers. This practice became increasingly popular in U.S. manufacturing industries, . . .

Hoerr, *supra* note 1, at 434.

announcement that this subject will again be a priority during 1996 bargaining.[3]

Today, a majority of American steel manufacturers are governed by collective bargaining agreement provisions that place serious limitations on management's ability to contract out most types of production or maintenance work, and the bargaining table spells the possibility of even further restrictions.

Current provisions of the basic steel agreement have realigned earlier recognized presumptions and burdens of proof in arbitration cases regarding the contracting of work. It is safe to suggest, as a general proposition, that prior to the mid-1980s, it was the union's burden to prove that certain contracting out violated specific terms of the basic agreement; thereafter, it has been management's burden to point to specific provisions that authorize the disputed contracting out. Indeed, today most parties subscribe to a notion known as the "guiding principle" or "basic prohibition," which provides that "work capable of being performed by bargaining unit employees shall be performed by bargaining unit employees," absent agreement to the contrary or unless contracted out pursuant to limited exceptions defined under the collective bargaining agreement. One of these exceptions, which I shall refer to from time to time as the "major" exception, deals with the matter of "major new construction" where management still retains the right, in most situations, to contract out. Today, I shall limit my remarks and explore but a small sampling of the issues presented by major new construction in the steel industry, at least from a management perspective.

The Role of the Arbitrator

Hearing respectful comments made a month or so ago during a memorial for Arbitrator Sylvester Garrett, the patriarch of steel arbitrators, I was reminded of the reason why the basic steel

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[3]The Statement of the Basic Steel Industry Conference of the United Steelworkers of America, adopted at Pittsburgh, Pennsylvania, on February 2, 1996, provides, in part, as follows:

Contracting Out Prohibitions

The Union is not about to help the steel companies survive and prosper only to see our jobs performed by outside contractors. Updated contracting out clauses are absent from many steel contracts, and must be made a priority issue in future negotiations.

The 1993–94 improvements build upon the landmark contracting out clause negotiated in 1986 to prohibit the contracting out of work our members are capable of

industry bargaining table seems to produce so much ambiguity. This includes, for certain, the nebulous language the parties have chosen to express their understanding regarding such a critical matter as contracting out. I believe it was the Steelworkers' General Counsel, Bernard Kleiman, who explained at Sylvester's memorial that, if the basic steel agreement were to await clear and unmistakable language hammered out jointly by the parties on certain matters, there would be no agreement at all. Consequently, to facilitate overall agreement, the parties over the years, with calculation, drafted ambiguous language, which they could swallow for the moment, in the expectation that interpretative direction and construction would be added later on a case-by-case basis through the arbitration process. This observation pays respect to the arbitrator's profession and points out the arbitrator's significance, not only in dispute resolution but in the bargaining process itself.

Thus, given the arbitrator's important role in the broad scheme of things, I urge the exercise of some particular caution. In dealing with "major" exception disputes and other contracting out matters, arbitrators will be called upon to interpret such ambiguous terms and clauses as "major," "work," "grander or larger scale," "all relevant factors," "work of a peripheral nature," and "work which is not integral to the main body." I submit, the interpretation of such language should not be undertaken in isolation. Rather, I urge arbitrators to exercise their responsibility to interpret such language in a context of the entire agreement and in recognition of the overall purpose and intent of the parties.

The Major Construction Exception Maximizes an Opportunity for Employment Security

While some variation exists, present day contracting out provisions in the steel industry are usually prefaced with a section entitled "Basic Prohibition." The basic prohibition section makes it "clear that the parties' negotiated method for dealing with contracting-out cases establishes a general, but a very definite, disposition against contracting out."[4] That is, the first sentence of

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performing or work they can be trained to perform, especially with respect to "major" new construction. . . .

The shelf-item and major construction and rehabilitation loopholes that remain in our existing contracting out clauses must be closed.

1996 Lab. Rep. (BNA) (Feb. 6), No. 24: E-3.

[4]For specific contracting out language, see the agreement between Bethlehem Steel Corporation and the United Steelworkers of America, section 4 ¶ 02.04.04 (Aug. 1,

the prohibition establishes the "guiding principle" that work capable of being performed by bargaining unit employees shall be performed by them.

Most arbitration cases do not turn on the basic prohibition. Indeed, arbitrators have not been hesitant to hold that there is precious little work, in, about, or concerning a steel producing facility that is not capable of being performed by the bargaining unit—somehow, somewhere.[5] Consequently, it is under the exceptions that follow the basic prohibition that most cases develop. Generally, aside from mutual agreement of the parties, these exceptions distinguish work to be performed within the plant from that to be performed outside.

Respecting work inside the plant, the parties have agreed that different, less stringent standards should apply to "major new construction" as contrasted with routine repair and maintenance. For illustrative purposes today, I shall reference the major new construction or "major" exception set forth in the 1993 agreement between Bethlehem Steel Corporation and United Steelworkers of America that provides, in part, as follows:

> b. Major new construction, including major installation, major replacement and major reconstruction of equipment and productive facilities, at any Plant may be contracted out subject to any rights and obligations of the parties which as of the beginning of the period commencing August 1, 1963, are applicable at that Plant *in the case of any Plant which was in operation on or before August 1, 1958. With respect to any other Plant, the period commencing date shall be the date five years after the date on which the Plant started operations.*
>
> *A project shall be deemed major so as to fall within the scope of this exception if it is shown by the Company that the project is of a grander or larger scale when compared to other projects bargaining unit forces at the Plant are expected to do. Such comparisons should be made in light of all relevant factors.*
>
> As regards the term "new construction" above, except for work done on equipment or systems pursuant to a manufacturer's warranty, work that is of a peripheral nature to major new construction, including major installation, major replacement and major reconstruction of equipment and production facilities and which does not concern the main

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1993). Further, the basic prohibition at the beginning of the contracting out section of the collective bargaining agreement was written in sweeping language. *Granite City Division, National Steel Corp. (Granite City, Ill.)*, Griev. No. 278-88-7, 25 ¶ 19,328 at 19,332 (Mittenthal 1988). When the basic prohibition refers to "work capable of being performed by bargaining unit employees," it is plainly referring to the work itself and to the abilities of unit employees to perform such work. *Id.* In fact, employees may be "capable" of doing work even though not available to do so. *Id.*

[5] *Inland Steel Co. (Indiana Harbor)*, Award No. 770, 25 ¶ 18,861 at ¶ 18,869 (McDermott 1987).

> body of work shall be assigned to Employees within the bargaining unit *unless it is more reasonable to contract out such work* taking into consideration the factors set forth in paragraph (c) or it is otherwise mutually agreed. *For purposes of this provision, the term "work of a peripheral nature" may in certain instances include, but not be limited to demolition, site preparation, road building, utility hook-ups, pipe lines and any work which is not integral to the main body.*[6]

In carving the "major" exception in the first instance, the parties recognized that there would always be certain projects having plant force requirements that plainly exceeded the employer's reasonable ability to staff without risk to other operating or maintenance requirements. That is, the parties have recognized that it makes no practical or economic sense to maintain plant force at unrealistically high levels solely to staff major projects, or to recall and lay off employees responsive only to major project requirements.

It is reasonable to suggest, therefore, that projects worthy of exception as "major" include those that if done in-house would place an unreasonable demand on the normal complement of plant forces, generally or respecting a specific craft. This demand, of course, is influenced by not only employee-hours required but also the particular period during which the work must be performed. Thus, it may be that a project with relatively few employee-hours, which must be performed within a short period, is more likely subject to the "major" exception than one involving more hours but with no time constraints. I believe, stated simplistically, a project that would occasion a peak in plant force demand, above normal staffing, should constitute a "major" exception. It seems that such a flow of logic is consistent with an objective of maximizing job security and craft stability (i.e., avoiding the unreasonable cost and practical difficulty of frequent layoffs and recalls). Moreover, over-staffing prohibits management from efficiently securing the economic viability of the plant and the job security that goes with it.[7] Indeed, employers are able to reduce labor costs and maximize employment security only by maintaining a streamlined workforce and hiring contractors for work beyond the norm.[8]

It should be emphasized that management has a *right*, not an *obligation*, to contract out a project qualifying under the "major" exception. That is, in anticipation of a period of reduced routine

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[6]Agreement between Bethlehem Steel Corporation and the United Steelworkers of America, section 4 ¶ 02.04.08–02.04.10 (Aug. 1, 1993).
[7]Hoerr, *supra* note 1, at 432.
[8]*Id.* at 431.

repair and maintenance requirements, or for some other reason, management may decide to schedule its own employees to perform a project that would fall under the "major" exception. Such decisions are to be encouraged, and management should not be punished for making them. This observation will gain further significance in the context of applicable benchmarks for purposes of the "grander and larger" language, which I will address in a moment.

I believe management's willingness to agree to various forms of job security and "no-cut" employment provisions has been influenced by the protection against erratic layoffs and recalls afforded by the "major" exception. Management's willingness to expand or continue such forms of employment security would reasonably depend upon a continuation of such protection.

Consequently, in deciding a "major" exception case, it is important that the arbitrator keep in mind the reason why that exception is essential to any overall realistic objective of long-term employment security. In this respect, the arbitrator must carefully consider the newest ambiguity introduced into the "major" exception provisions, in particular the "grander and larger" language:

> A project shall be deemed major so as to fall within the scope of this exception if it is shown by the Company that the project is of a grander or larger scale when compared to other projects bargaining unit forces at the Plant are expected to do. Such comparison should be made in light of all relevant factors.[9]

Confusion with this language, added during 1993 negotiations, begins perhaps with an observation that the comparative terms "grander" and "larger," although used in the alternative, are synonymous according to Webster. Thus, when these two words are given their fair and ordinary meaning, there is only redundancy with nothing to aid the arbitrator in discerning what particular comparative measurement the parties had in mind.

Similarly, the provision that the comparison to "other projects . . . should be made in light of all relevant factors" is of no assistance in identifying the parties' intent. What are the "relevant factors?" Are they total hours, individual craft hours, craft or total hours as a factor of time during which the work must be performed, dollar value, or something else?

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[9]Agreement between Bethlehem Steel Corporation and the United Steelworkers of America, section 4 ¶ 02.04.09 (Aug. 1, 1993).

Significantly, in the past when the parties have reached agreement as to specific factors to be considered in contracting out decisions, they have not been at all reluctant to set them out in their agreement. For example, the parties have identified some 11 separate "reasonableness" factors to be referenced in connection with decisions about "nonmajor" work to be performed in the plant, peripheral work, and work to be performed outside the plant. Suffice to say, the parties apparently reached no specific understanding about factors relevant under the "grander and larger" language and, once again, have entrusted the arbitration process to complete their agreement in this regard.

Accordingly, I suggest that arbitrators so entrusted be aware of the importance of avoiding a "catch-22" with the "grander and larger" language. The comparative reference is to "other projects bargaining unit forces at the plant are expected to do." Does this include a project that at any time or under any circumstance has been performed by the bargaining unit? I think not, and I believe the parties have given some glimpse of their intent by limiting the reference in other basic agreements besides Bethlehem's to projects that plant forces are "normally expected to do." Perhaps, the omission of the word "normally" in the Bethlehem agreement was an oversight.

In any event, as earlier noted, the very reason for the "major" exception is that plant forces should not be expected to perform projects having plant force requirements that plainly exceed the employer's reasonable ability to staff, at normal plant force levels, without risk to other operating or maintenance requirements. Moreover, as previously emphasized, although management has a right to contract out "major" projects, it is not obligated to do so if particular circumstances of the moment permit the work to be assigned in-house. Indeed, such assignments should not be discouraged by management's fear of establishing a new base line.

Consequently, it would be inappropriate to argue that a project, otherwise qualifying under the "major" exception but performed nonetheless by plant forces, should be considered as demonstrative of what plant forces "are expected to do" within the meaning of marginal paragraph 02.04.07. Such a strained construction would not only unrealistically elevate, in leap frog fashion, the base line for "grander or larger" reference, but perhaps foreclose management from assigning any major projects to plant forces. I submit that the bottom line test of a "major" project under the

basic prohibition section is still whether the project, if done in-house, would occasion a demand above normal staffing. The issue must be whether the project is "grander," "larger," "bigger," "not smaller"—call it what you may—however, the comparative reference must be to other projects that bargaining unit forces have been expected to perform under normal operating conditions, excluding those eligible for contracting out under the "major" exception even though assigned to plant forces.

Fragmentation

In the time remaining, allow me to share with you a few thoughts regarding arguments routinely asserted in arbitration urging the fragmentation of a project presented in good faith by management as a "major" exception. According to Webster, the fair and ordinary meaning of the term "project" is "a specific plan or design"; "a planned undertaking." It is a fundamental right of management, without current contractual limitation, to invest in plant and equipment by means of whatever "specific plan or design" it elects. Moreover, there is no present contractual basis for arbitral challenge regarding the composition of a project or the timing of its implementation. The union's only vested contractual interest in a "major" project goes to a claim of peripheral work. Thus, arbitrators have observed that a project is not the sum of its components and subject to dissection for purposes of analysis under contracting out provisions.[10] It is important, therefore, that the arbitrator "view the project in its entirety."[11] Under such analysis, each and every component must be considered an essential and integral part of the project. Consequently, an argument that bargaining unit forces have routinely performed one or more of the component parts of a project has no place in a "major" exception case.

As an aside and perhaps at the risk of exceeding the promised scope of my comments, let me suggest that claims by the union to peripheral work are expressly limited to "major" projects to be performed within the plant (i.e., the "work of a peripheral nature" paragraph of the Bethlehem agreement). For the same reasons mentioned in regard to "major" projects, there is no basis at all

[10] *National Steel Corporation (Granite City Div.)*, Griev. No. 623-92-12, 26 ¶ 20,287 at ¶ 20,888 (Mittenthal 1992).
[11] *Id.*

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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*Member, National Academy of Arbitrators, New York, New York; President, National Association of Railroad Referees.

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