Case Western Reserve Law Review

Volume 17 | Issue 5

1966

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The practice of subcontracting certain types of work is often a source of serious disagreement between an employer and his employees. The already-complex problems in this area are magnified by the existence of dual forums for the settlement of subcontracting disputes — judicial or quasi-judicial resolution in those cases involving provisions of the National Labor Relations Act and arbitration in situations arising under contractual agreements. Professor Smith discusses the ramifications of "contracting out" in both of these contexts. Utilizing surveys of arbitration cases to support his findings, he concludes that those factors which are often determinative of statutory subcontracting issues are frequently relied upon by arbitrators to interpret contracts which either have express subcontracting provisions or are silent on the subject.

THE TERM "subcontracting" in the industrial relations vernacular has a special meaning. It has reference not to subcontracting in a technical, legal sense, but rather to any arrangement made by an employer to have performed or supplied by an independent contractor some service or product which the employer has previously provided or produced as a part of his business operation either wholly or partially through the use of his own union-represented employees. A more accurate term would be "contracting out." An example of a service subcontract would be an arrangement calling for the performance of janitorial work inside the employer's plant by the outside contractor. An example of a product subcontract would be a contract to purchase a component part or a machine tool to be used in a manufacturing process. As seen by the employees of the employer who has entered into the subcontract, the significant labor relations aspect, common to each, is the withdrawal from employees of the work involved in performing the service or producing the component or tool.

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A business fact to be kept in mind, of course, is that what is contracting out to one employer is contracting in to another, and the same employer is frequently involved both in contracting out and contracting in. This is likely to be the case especially in the purchase and sale of product components. Here is involved the very common business problem of "make or buy." It may be that, in the

long run, the particular employer's employees, and employees generally, gain more employment and earnings opportunities than they lose by free subcontracting of this kind. However, the contracting out of an in-plant service is less easily rationalized in terms of employee interests.

By the same token what is a loss of jobs and earnings opportunities, and a shrinkage pro tanto of one bargaining unit because of a particular instance of subcontracting by the employer-subcontractor, represents a corresponding gain to the bargaining unit of another subcontractor, if the latter is organized. So it is not by any means clear that the interests of unionism as a whole are prejudiced in any fundamental sense by freedom of restriction on the right to subcontract.

I. THE LAW OF THE STATUTE: THE DUTY TO BARGAIN

Subcontracting nevertheless may have actual or potential adverse effects on employees and the union representing them in particular instances. This obviously is the basis for the conclusion that the subject is encompassed by the phrase "terms and conditions of employment" as used in section 8(d) of the National Labor Relations Act (NLRA)[1] and therefore is a statutory subject of collective bargaining, classifiable within the "mandatory" area as that term has been defined in the administration of the act.[2] This is easy to see when the bargaining proposal relates to the contracting out of kinds of services which have been performed by bargaining unit employees as in the celebrated case of *Fibreboard Paper Prods. Corp. v. NLRB.*[3] The result is less plausible, although perhaps analyti-

[1] As amended, 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

[2] The leading case establishing the "mandatory-permissive" dichotomy is NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958). See generally FLEMING, PUBLIC POLICY AND COLLECTIVE BARGAINING 67-70 (Shister, Aaron & Summers ed. 1962); Cox, *Labor Decisions of the Supreme Court at the October Term*, 1957, 44 VA. L. REV. 1057, 1074-86 (1958); Note, *Subcontracting, Mandatory Collective Bargaining, and the 1965 NLRB Decisions*, 18 STAN. L. REV. 256 (1965). See also Gasko, *Subcontracting: The Labor Management Relations Act and the Warrior Doctrine: A Lateral Analysis*, 41 U. DET. L.J. 1 (1963); Note, *Employer Subcontracting and the LMRA*, 13 RUTGERS L. REV. 702 (1959).

[3] 379 U.S. 203 (1964). In this case the employer had for some years had collective bargaining relations with a Local of the United Steelworkers for a bargaining unit of the company's maintenance employees. After the union had initiated collective bargaining on the agreement to supplant, upon its terminal date, the parties' then current agreement, the company notified the union it had decided to contract out all maintenance work, so that "negotiation of a new contract would be pointless." There was evidence that cost savings was the prime motivating factor underlying the decision. After some preliminary discussions with the union, which were concluded

cally indistinguishable, when the proposal encompasses a managerial decision to purchase rather than manufacture a product component or a machine tool. As the Supreme Court in deciding *Fibreboard* carefully noted: "Our decision need not and does not encompass other forms of 'contracting out' or 'sub-contracting' which arise daily in our complex economy."[4] An important question, therefore, is how far the NLRB and the courts will extend the holding in *Fibreboard.*

Whatever may be the scope of the duty to bargain concerning subcontracting when the labor agreement is open for bargaining, there is the further question of the existence and extent of the obligation during the term of an agreement which is "silent" on the subject of subcontracting. The principles laid down in *NLRB v. Jacobs Mfg. Co.*[5] and related cases[6] presumably determine whether either party is under a duty to bargain for an addition to the contract of some provision dealing specifically with the subject. But whether the employer, insofar as section 8(a)(5) is concerned, is free of any obligation to bargain with the union, upon demand, before engaging in a particular act of subcontracting may be

with the understanding the parties would meet again on a set date to consider the matter, the company entered into the contemplated subcontracting arrangement.

The union filed unfair labor practice charges against the company, alleging violations of §§ 8(a)(1), 8(a)(3), and 8(a)(5). The Trial Examiner, after a hearing, filed an Intermediate Report recommending dismissal of the complaint. The NLRB accepted this recommendation. 130 N.L.R.B. 1558 (1961). Petitions for reconsideration were filed by the General Counsel and the union, which were granted. Upon reconsideration, the Board accepted the Trial Examiner's finding that the company's motivation in subcontracting was economic rather than anti-union, but held nevertheless that there had been a failure to negotiate, hence a § 8(a)(5) violation. 138 N.L.R.B. 550 (1962). Enforcement of the Board's order was granted by the Court of Appeals 322 F.2d 411 (D.C. Cir. 1963). A second petition for certiorari was granted, 375 U.S. 963 (1964).

[4] Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 215 (1964).

[5] 196 F.2d 680 (2d Cir. 1952), *enforcing*, 94 N.L.R.B. 1214 (1951).

[6] Some important and to some extent unresolved problems have emerged concerning, among other things, the materiality of the fact or lack of discussions of the subject in the course of negotiating the last contract, and the effect of a so-called "waiver" or "wrap-up" provision included in the collective bargaining agreement. This kind of provision, which is quite common, purports to constitute a bilateral waiver of the right of either party to demand bargaining, during the contract term, on any subject whether or not discussed during contract negotiations. See Westinghouse Elec. Corp., 150 N.L.R.B. No. 136 (Feb. 5, 1965); Press Co., 121 N.L.R.B. 976 (1958); Beacon Piece Dyeing & Furnishing Co., 121 N.L.R.B. 953 (1958); Speidel Corp., 120 N.L.R.B. 733 (1958). See generally Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097 (1950); Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248 (1964); Seagle, *The Duty of an Employer to Bargain in Post Contract Negotiations*, 51 CORNELL L.Q. 523 (1966); Wollett, *The Duty to Bargain Over the "Unwritten" Terms and Conditions of Employment*, 36 TEXAS L. REV. 863 (1958).

viewed as a different kind of problem both conceptually and in practical significance. Is the employer now proposing or undertaking an act which, by virtue of its impact, so alters the factual framework within which the contract was negotiated that he has, in legal effect, waived a right, otherwise established, to refuse to bargain during the contract term? Does the answer here require a determination of whether the agreement, properly interpreted in the light of such matters as past practice, collective bargaining history, and the inclusion of a "management rights" clause in the contract, affirms the right of the employer to contract out, at least within certain limits? If so, is this process of interpretation a matter for the NLRB, a court, or, if arbitration is provided for in the contract, an arbitrator?

Decisions of the NLRB rendered since *Fibreboard* seem on the whole to indicate a withdrawal from anything like a rigid position on the statutory issue, especially where the question is raised in the context of an existing collective bargaining agreement and the protest is against unilateral subcontracting without bargaining during the term of the agreement.[7] Nor does there emerge from the decisions a clear analytical or conceptual framework of decision. Rather, the decisions seem to have been made on an *ad hoc* basis, with emphasis upon the circumstances surrounding the managerial decision, including "past practice." There appears, indeed, to be some resemblance in methodology, if not in concept, between this process of statutory application and that employed by arbitrators in probing union challenges to subcontracting on the basis of the existence of implicit contractual restrictions.[8]

[7] For applications of *Firbeboard*, however, as reappraised, see Standard Handkerchief Co., 151 N.L.R.B. No. 2 (Feb. 15, 1965); Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965), *denying enforcement of* 148 N.L.R.B. No. 59 (Aug. 27, 1964).

[8] It is interesting to note that even before the Supreme Court had decided *Fibreboard*, the NLRB had already started to reappraise its position. In a series of 1964 cases the Board refused to find § 8(a)(5) violations where there was a showing that the subcontracting did not result in "significant detriment" to employment, job tenure and/or security of unit employees, there was an established practice of subcontracting without notice to or negotiation with the union, and the parties' collective bargaining history indicated unsuccessful union attempts to obtain specific contractual limitations on subcontracting. Kennecott Copper Corp., 148 N.L.R.B. No. 169 (Oct. 13, 1964); General Motors Corp., 149 N.L.R.B. No. 40 (Oct. 30, 1964); Shell Oil Co., 149 N.L.R.B. No. 26 (Oct. 29, 1964).

In a series of 1965 decisions the following factor or factors, singly or in combination, were considered as sufficient to reject the claim of a § 8(a)(5) violation: (1) lack of "significant impairment" of employment, job tenure, or security of unit employees; (2) established past practice of subcontracting without notice to or negotiation with the union; (3) no difference in kind or degree between the protested subcontracting and past subcontracting; (4) unsuccessful attempts by the union to ob-

Arbitrators have tended on the whole, as will be noted, to find in the "silent" labor agreement some kind of implied limitation on managerial freedom to subcontract. If an analysis of the cases discloses that arbitrators inquire into the same kinds of fact questions which concern the NLRB when the union elects to proceed under section 8(a)(5), there would seem to be presented another of the several problems of alternative forums which arise in the administration of the "law" of the statute and the "law" of the contract.[9] One of the relevant questions, then, would be whether primacy as a matter of federal law or policy should attach to one or the other forum.[10]

Regardless of the manner in which this matter should be resolved, it seems to be clear at least that the NLRB, although presumably knowledgeable about the developing arbitral jurisprudence

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tain contractual restrictions indicated by the parties' collective bargaining history; and (5) silence of the agreement on subcontracting and/or presence of a broad "management rights" or "waiver" provision. Westinghouse Elec. Corp., 153 N.L.R.B. No. 33 (June 24, 1965) (factors 1, 2, and 4, including a disinclination to regard as persuasive the damage to employee recall rights because of their speculative nature); American Oil Co., 152 N.L.R.B. No. 7 (April 22, 1965) (factors 1 and 2); Central Soya Co., 151 N.L.R.B. No. 161 (April 14, 1965) (factors 1 and 2, plus noting that the amount of work involved was "minimal"); General Tube Co., 151 N.L.R.B. No. 89 (March 19, 1965) (factor 1); International Shoe Co., 151 N.L.R.B. No. 78 (March, 15, 1965) (factor 5); Allied Chem. Corp., 151 N.L.R.B. No. 76 (March 16, 1965) (factor 1, 2, 3, and 4); American Oil Co., 151 N.L.R.B. No. 45 (March 3, 1965) (factors 1, 2, and 4); Fafnir Bearing Co., 151 N.L.R.B. No. 40 (March 1, 1965) (factors 1, 2, 4, and 5); Superior Coach Co., 151 N.L.R.B. No. 24 (Feb. 19, 1965) (factors 1, 2, and 4); Ador Corp., 150 N.L.R.B. No. 161 (Feb. 10, 1965) (factor 5); Westinghouse Elec. Corp., 150 N.L.R.B. No. 136 (Feb. 5, 1965) (factors 1, 2, and 4) in which the Board opinion stated that "it is wrong to assume that, in the absence of an existing contractual waiver, it is a *per se* unfair labor practice in all situations for an employer to let unit work without consulting with the unit bargaining representative." *Id.* at 1258.

In this analysis the author was assisted by the outline notes prepared by William S. Zeman, Esq., of Hartford, Connecticut, for his discussion of April 20, 1966, at the Nineteenth Annual Conference on Labor, New York University.

[9] See generally Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751, 768-71, 795-97 (1965). Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964), *reversing* 11 N.Y.2d 452, 230 N.Y.S.2d 703, 184 N.E.2d 298 (1962), seems to have gone far in the direction of upholding arbitral jurisdiction (of a contract issue) despite the possible or actual existence of statutory jurisdiction (in the NLRB) over a statutory issue arising out of the same set of facts. But the Court has yet to rule on the question of primacy, and the NLRB and lower courts have not come up with any clear answer.

[10] See generally LABOR RELATIONS AND THE LAW 839-46 (3d ed. 1965); McCULLOCH, *Arbitration and/or NLRB* in LABOR ARBITRATION AND INDUSTRIAL CHANGE, PROCEEDINGS 16TH ANN. MEETING, NAT'L ACADEMY OF ARBITRATORS 175-91 (1963); Christensen, *Arbitration, Section 301, and the National Labor Relations Act*, 37 N.Y.U.L. REV. 411 (1962); Dunau, *Contractual Prohibition of Unfair Labor Practice: Jurisdictional Problems*, 57 COLUM. L. REV. 52 (1957); Wollett, *The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction*, 10 LAB. L.J. 477 (1959); Note, *Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice*, 69 HARV. L. REV. 725 (1956).

on the subject of implied contractual limitations on subcontracting, has not elected to fit this substantive development logically into its own jurisprudence on the in-contract term statutory bargaining obligation. If there is a contractual implied limitation on management, one might suppose, applying *Jacobs*, there could be no in-term section 8(a)(5) problem at all, but only a problem of contract administration. If the implied restriction were deemed to be relatively unqualified and absolute, as was judicially determined in *UAW v. Webster Elec. Co.*,[11] it would be absurd to regard the subject of subcontracting as still open for bargaining during the contract term. Since, however, the implied restriction is generally considered to be simply to refrain from acting in bad faith, the limitation upon management is presumably no more than would be true with respect to the exercise of other reserved managerial rights and the Board could consider as unrealistic the view that the subject of subcontracting has been negotiated in the absence of an actual history of specific negotiations.

In closing this brief discussion of the statutory ramifications of subcontracting, it is of interest to note that the mere fact of union entitlement to recognition as statutory bargaining agent of employees in a defined unit does not give rise to an implicit absolute statutory prohibition on employer acts, including subcontracting, which in effect reduce the size or scope of the bargaining unit. Neither the duty to *bargain*, nor the other obligations resting on the employer under section 8(a) create a statutory duty applicable under all circumstances to keep intact the full dimensions of the unit as originally defined.

II. The Silent Agreement: The Problem of Implied Limitations

Unions have repeatedly sought to establish the proposition that there arises out of the typical collective bargaining agreement, which is silent on the subject, an implied restriction on subcontracting. The argument is that the implication derives principally from the "recognition" provision, and additionally from the provisions concerning a union shop, seniority, wages, and practically all others which establish working conditions in the shop for bargaining unit employees. Typically, it has been argued that these provisions of the agreement import what amounts to a guarantee by the employer that the work encompassed by the defined bargaining unit will be

[11] 299 F.2d 195 (7th Cir. 1962).

performed for the employer, if at all, by unit personnel. The rationale has sometimes been expressed as a simple application of the interpretative process of inferring contractual intent by drawing necessary implications from express provisions. At times the proponents have referred generally to the "fruits of the bargain" or "good faith" principle which is well established in contract law.[12]

This attempt has been vigorously resisted by employers. They have contended, of course, that the silent labor agreement may not properly be construed to give rise to any kind of implied restriction on subcontracting except, perhaps, the obligation to act in good faith. However, employers assess the good faith concept quite differently than do the unions.[13] Thus, they argue that the silent agreement leaves the matter of subcontracting, like other business decisions unrestricted by any specific provision in the agreement, within the area of managerial discretion so long as the exercise of this discretion is not motivated by anti-union considerations. Employers maintain that the union analysis is basically faulty, particularly in its reliance on the recognition clause of the agreement which, at most, simply imports into the contract the statutory concept of recognition, which does not at all involve work jurisdiction or an implied restriction on the power to make the decision.

Some courts and arbitrators have sustained the union analysis. At the other extreme, some have rejected this approach and have held that under the typical labor agreement, management is totally or substantially unrestricted in its right to subcontract. The great weight of decisional authority, however, and certainly the trend in recent years, adheres to a position somewhere between these two extremes.[14] Management is said to be subject to implied restrictions

[12] "Williston tells us that there is also in every contract 'an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing." Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 17 (1958), citing, 5 WILLISTON, CONTRACTS § 670, at 159 (Jaeger ed. 1961). See Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1012 (1955).

[13] For an interesting evaluation of the applicability of this concept as a basis for deriving implied limitations upon management, see KELLER, THE MANAGEMENT FUNCTION: A POSITIVE APPROACH TO LABOR RELATIONS 61-66 (1963).

[14] See generally ELKOURI & ELKOURI, HOW ARBITRATION WORKS (1960); Greenbaum, *The Arbitration of Subcontracting Disputes: An Addendum*, 16 IND. & LAB. REL. REV. 221 (1963); Seagle, *supra* note 6; Note, *Arbitration of Subcontracting Disputes: Management Discretion vs. Job Security*, 37 N.Y.U.L. REV. 523 (1962); Note, *Management Prerogatives No Longer Include Right to Make Unilateral Decision to Subcontract*, 38 NOTRE DAME LAW. 288 (1963); 60 MICH. L. REV. 1173 (1962). See also CORNELL UNIVERSITY, CONFERENCE ON: THE ARBITRATION OF

which, however, are not absolute and leave to management a considerable amount of discretion. The major problem emerging from the cases so holding, particularly from the arbitration decisions, concerns the very great difficulty of attempting to discern from them anything resembling a consensus with respect either to conceptual analysis or to the kinds of fact situations which will provide a basis for confident or reliable prediction that a grievance protesting subcontracting will be sustained or denied.

Arbitrators from time to time have given their own testimony to this effect. Arbitrator G. Allan Dash in his much cited "arbitrability" decision in *Celanese Corp. of America*[15] stated:

> I conclude from my analysis of the 64 published arbitration awards . . . that the majority of arbitrators who have been called upon to rule on a contracting-out grievance arising under an agreement in which there is no express language prohibiting contracting-out have construed the language of the agreement before them as a whole and have attempted, with confinement of their attention to the specific case, to make certain that the Company's action of contracting-out particular work at a specific time has not had the effect of violating other recorded agreements provisions as interpreted and applied by the parties themselves through their past practice.[16]

TWO "MANAGEMENT RIGHTS" ISSUES: WORK ASSIGNMENT AND CONTRACTING OUT (1960).

[15] 33 Lab. Arb. 925 (1959) (Dash, Arbitrator).

[16] Celanese Corp. of America, 33 Lab. Arb. 925, 944-45 (1959) (Dash, Arbitrator). Another example occurred in the 1958 case of Bethlehem Steel Co., 30 Lab. Arb. 678 (1958) where Arbitrator Ralph Seward stated:

> Because of the importance which they attach to the issue, both parties have cited certain decisions of other arbitrators in support of their position, and the Umpire has supplemented these citations by his own research into the reported cases. Beyond revealing that other companies and unions have faced this same question of implied obligations — have presented similar agreements, and voiced similar fears — the cases show little uniformity of either theoretical agreement or ultimate decision. . . . Within each group of decisions, moreover, there are conflicts of principle and approach. The Umpire has returned from his exploration of the cases a sadder — if not a wiser — man, echoing the plaint of Omar Khayyam: "Myself when young did eagerly frequent Doctor and Saint and heard great argument about it and about: but evermore came out by that same door where in I went." *Id.* at 682.

Similarly, the present writer in a 1962 decision stated:

> Both parties in their briefs make extensive references to the decisions of other arbitrators in the area of subcontracting. Such citation is understandable, since it is literally possible to cite prior decisions which range throughout the entire spectrum of possibilities. . . . The Referee has examined (more than once) the reported cases, as have others. His distinct impression is that in most instances, at least in recent years, the result in the particular case was to uphold the employer's right to take the protested action, while the opinion indicated the view that there are limitations based on factors not presented by the facts of the particular case. . . . Sometimes a detailed cata-

Arbitrator Donald A. Crawford has stated: "Having decided that the issue is arbitrable, we arbitrators then proceed to fog the issue up."[17] If there is so much difficulty among arbitrators in identifying controlling considerations, and even greater difficulty on the part of non-arbitrators in trying to ferret out from arbitration decisions meaningful rationales or bases for prediction, it is tempting to speculate that the reason must lie in a failure to achieve an adequate conceptual analysis of the problem. On the other hand, the fact may simply be that arbitrators, unwilling to accept the extreme positions of either side, are attempting with more or less sensitivity to react sensibly to all the facts presented. In a very recent case Arbitrator Samuel S. Kates stated:

> In my opinion, in line with the trend of arbitrational decisions, each case should be decided upon its own facts in the light of the applicable labor agreement, rather than entirely or mainly upon the mere presence or absence in the labor agreement of an express reference to the contracting out of work.[18]

In this "groping" process a suitable and helpful conceptual analysis may ultimately evolve.

A. Recent Surveys of Arbitration Decisions on Subcontracting

There have been published two extensive and elaborate statistical and analytical dissections of arbitration decisions on subcontracting. The first was undertaken by Arbitrator Dash in the *Celanese* case,[19] in which the issue presented to him was whether a grievance protesting subcontracting under a silent agreement was arbitrable.[20] His survey, covering the period from approximately mid-1947 to mid-1959, was commented upon by Arbitrator Crawford before the

log of such prohibited types or circumstances of subcontracting was set forth, by way of dicta; the more usual pattern has been to express the limitation in terms of such broad criteria as a necessity of "good faith," or "fair dealing," or the requisite of "sound business judgment," or the absence of evidence that the action "arbitrarily reduced the scope of the bargaining unit." In most instances, the arbitrator stressed the importance of looking closely at "the facts and circumstances" of the case, and these, of course, have been almost infinitely varied. Allis-Chalmers Mfg. Co., 39 Lab. Arb. 1213, 1217-18 (1962) (Smith, Arbitrator).

[17] CRAWFORD, *The Arbitration of Disputes Over Subcontracting*, in CHALLENGES TO ARBITRATION 55 (1961).

[18] W. S. Dickey Clay Mfg. Co., 46 Lab. Arb. 444, 447 (1966) (Kates, Arbitrator).

[19] 33 Lab. Arb. 925 (1959) (Dash, Arbitrator).

[20] *Ibid.* See also his later analysis, Dash, *The Arbitration of Subcontracting Disputes*, 16 IND. & LAB. REL. REV. 208 (1963).

National Academy of Arbitrators.[21] Marcia Greenbaum in 1963 published an extension of the kind of study made by Dash but covering the period from approximately mid-1959 to mid-1962.[22] These interesting analyses seemed to be of sufficient merit to warrant bringing them up to date with respect to published and certain unpublished decisions covering the period September 1962 to approximately mid-April 1966. The results of these surveys are contained in Tables I-II.[23]

The Dash and Greenbaum studies also included a review of judicial decisions in subcontracting cases involving silent labor agreement. In the vast majority of cases the issue presented to the court concerned the arbitrability of the grievance protesting the subcontracting, rather than the merits. Dash stated:

> My study of the court cases cited by the Company, plus numerous others I have been able to locate, convinces me that the large majority of courts that have ruled on the issue of arbitrability of contracting-out issues in connection with agreements containing no express language prohibiting such action have, and will, rule such issues to be nonarbitrable.[24]

Similarly, Greenbaum stated:

> The courts up until the Supreme Court decision in the *Warrior & Gulf* case seem to have wavered back and forth deciding for and against arbitrability. Since this decision, with the exception of one case, they have joined the arbitrators in ruling in favor of arbitrability.[25]

This writer's review of court cases decided since mid-1962 confirms the trend noted by Greenbaum. The Supreme Court's decisions in the "1960 Trilogy"[26] have generally been held to be conclusive on the issue of arbitrability so far as the courts are concerned.[27]

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[21] CRAWFORD, *op. cit. supra* note 17.

[22] Greenbaum, *supra* note 14.

[23] This work was undertaken for the author by a research assistant, Sidney Frank, a member of the senior class at the Michigan Law School. I wish to express my indebtedness to him for his valuable assistance in the preparation of the Tables and the classification of the cases therein.

[24] Celanese Corp. of America, 33 Lab. Arb. 925, 944 (1959) (Dash, Arbitrator).

[25] Greenbaum, *supra* note 14, at 222.

[26] United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960), *reversing* 264 F.2d 624 (6th Cir. 1959); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960), *reversing* 269 F.2d 633 (5th Cir. 1959); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), *reversing in part* 269 F.2d 327 (4th Cir. 1959).

[27] Se Smith & Jones, *supra* note 9, at 784-88; Smith & Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties*, 52 VA. L. REV. 831 (1966).

B. An Analysis of the Surveys

Arbitrators, of course, frequently are confronted with the issue of arbitrability as a threshold question. Dash's study indicates that of the 64 decisions reported, there were 10 in which the arbitrator had to rule on this question, and that in each instance the claim of non-arbitrability was rejected. Of the 50 cases reviewed by Greenbaum, there were again 10 in which the question of arbitrability had to be determined, and again the ruling was in support of arbitrability in all 10. Of the 78 decisions covered in the present survey, it is interesting to note that the question of arbitrability had to be ruled upon in only 5 cases or slightly over 5 per cent, as contrasted with 20 per cent in the Greenbaum survey cases and 15 percent in the Dash survey cases. In only 1 of the 5 cases of the present study did the arbitrator find the grievance non-arbitrable.[28]

It seems fairly clear, therefore, that if the cases surveyed are a fair sample of the total of unpublished as well as published decisions, the arbitrability issue has noticeably declined in importance. One may fairly infer that this has been due at least in part to the impact of the Supreme Court's 1960 Trilogy cases[29] in which the Court, in defining the role of the court vis-a-vis that of the arbitrator with respect to labor agreements containing broad arbitration provisions, rejected categorically the proposition that a claim of non-arbitrability should be entertained where, to decide the matter, it would be necessary, in effect, to decide the underlying merits.[30] While this was a rule laid down for courts, not arbitrators, one may also infer that one result has been to reduce the number of claims of non-arbitrability made to arbitrators in subcontracting cases, and that another result has been to influence arbitrators to reject such claims when presented.[31]

Certain other gross statistical comparisons are interesting. The three surveys show the following results in terms of numbers of cases in which the grievance protesting subcontracting was sustained: Dash survey, 19 of 62 cases, or 30 per cent; Greenbaum survey, 11 of 50 cases, or 22 per cent; the author's survey, 12 of 77 cases, or about 16 per cent. These data seem to indicate that

[28] Rockwell-Standard Corp., unpublished, (D. P. Miller, Arbitrator).

[29] United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[30] See Smith & Jones, *supra* note 27; Smith & Jones *supra* note 9.

[31] *Ibid.*

TABLE I

RIGHT TO CONTRACT OUT RETAINED WITH OR WITHOUT LIMITED QUALIFICATIONS

Company Name	*Citation*	*Arbitrator*	*Qualifications Added Support*
Armour and Co.	Unpubl.	J. S. Williams	2, 4
Continental Can Co.	Unpubl.	D. W. Whiting	2, 4
Franklin Ass'n	45 Lab. Arb. 829 (1965)	J. D. Larkin	1, 2, 13
Rohm & Haas Co.	43 Lab. Arb. 333 (1964)	J. Brundschain	1, 2, 4, 5
Sheller Mfg. Co.	42 Lab. Arb. 854 (1963)	F. R. Uible	2, 3, 4
Latrobe Steel Co.	42 Lab. Arb. 921 (1964)	D. E. Whiting	2, 4, 5, 12,
Remington Rand	39 Lab. Arb. 552 (1962)	I. B. Scheiber	1, 2, 3, 5, 1
Remington Rand	39 Lab. Arb. 552 (1962)	I. B. Scheiber	1, 2, 3, 12,
E. J. Laving & Co.	46 Lab. Arb. 98 (1966)	W. Boles	1, 2, 5
Singer Co.	45 Lab. Arb. 840 (1965)	S. Cahn	3, 12
Sandvik Steel Co.	45 Lab. Arb. 1061 (1966)	I. Kerrison	1, 5
*Mobil Oil Co.	Unpubl.	G. G. Somers	1, 2, 3, 5, 1
*General Aniline and Film Corp.	Unpubl.	D. E. Whiting	12, 13
*Con-Gas Service Corp.	43 Lab. Arb. 91 (1964)	M. E. Nichols	3, 5, 13
*Linde Co.	43 Lab. Arb. 554 (1964)	J. W. Murphy	1, 2
*Printing Indus., Inc.	42 Lab. Arb. 586 (1964)	R. Feinberg	1, 2, 3, 4, 1
*American Oil Co.	41 Lab. Arb. 342 (1963)	P. M. Kelliher	1, 4, 5, 13
*Allis-Chalmers Mfg. Co.	39 Lab. Arb. 1213 (1962)	R. Smith	1, 2, 4, 5, 12
*Alan Wood Steel Co.	44 Lab. Arb. 722 (1965)	R. Valtin	1, 2

* Cases may possibly belong in Table II.
† Grievance denied on merits.

No. *Qualifications or Added Support*

1. Act was in good faith, or not in bad faith.
2. Act was dictated by requirements of the business, for efficiency, for economy, or for expeditious performance.
3. Act was in conformance with past practices, not previously objected to by the union.
4. Act was not unreasonable, arbitrary, discriminatory, nor intended to harm status of union.
5. Act did not cause substantial number of employees to be deprived of work.

**12. History of bargaining relationship and negotiations indicate that union recognizes that employer has right to subcontract and has failed to limit this right.

***13. Union claims in stating its position that employer violated recognition, seniority, wage, etc. provision of the agreement.

Factors 6-11 (as denominated in Table II) were not relied upon in the cases in Table I.

** This factor was not used in the Dash analysis. It was added because some arbitrators thought it just as important as any other and, in some cases, controlling.

*** This factor was not used in the Dash analysis. It was simply an attempt to indicate cases in which the union sought to rely on a pure implied limitations theory.

TABLE II

FULL RIGHT TO CONTRACT OUT NOT RETAINED

Company Name	*Citation*	*Arbitrator*	E
Borg-Warner Corp.	Unpubl.	J. F. Sullivan	5, 6
Mohawk Rubber Co.	Unpubl.	J. G. Stashower	1, 2
Narragansett Brewing Co.	Unpubl.	J. J. Healy	2, 3
North Am. Aviation, Inc.	Unpubl.	A. M. Ross	1, 3
‡Rockwell-Standard Corp.	Unpubl.	D. P. Miller	5, 6
‡Rockwell-Standard Corp.	Unpubl.	D. P. Miller	5
Palmer-Bee Co.	Unpubl.	D. P. Miller	(av c
Rollway Bearing Co.	Unpubl.	R. E. Kharas	1, 2
Bearings Co.	Unpubl.	R. W. Putt	4, 5
Richardson Co.	45 Lab. Arb. 451 (1965)	A. Lanna	1, 2
Purex Corp.	45 Lab Arb. 174 (1965)	L. Guild	2, 3
‡Bridgeport Brass Co.	45 Lab. Arb. 90 (1965)	Conn. State Bd. of Med. & Arb.	(ca w
‡Bridgeport Brass Co.	45 Lab. Arb. 90 (1965)	Conn. State Bd. of Med. & Arb.	10,
Millprint, Inc.	44 Lab. Arb. 678 (1965)	A. Anderson	2, 5
Wright Mach. Co.	44 Lab. Arb. 641 (1965)	F. Flannagan	1, 2
Phillips Chem. Corp.	44 Lab. Arb. 102 (1965)	A. Sartain	12
Kaiser Steel Corp.	44 Lab. Arb. 25 (1965)	I. Bernstein	2, 4
Elizabeth Arden Sales Corp.	39 Lab. Arb. 1048 (1962)	J. Altieri	1, 2
‡United States Steel Corp.	39 Lab. Arb. 1089 (1963)	S. Garrett	1, 2
‡United States Steel Corp.	39 Lab. Arb. 1089 (1963)	S. Garrett	1, 2
Pacific Laundry & Dry Cleaning Co.	39 Lab. Arb. 676 (1962)	T. Tsukiyama	1, 4
Trans World Airlines	39 Lab. Arb. 643 (1962)	J. Gilden	6, 1
Collins Radio Co.	39 Lab. Arb. 180 (1962)	R. Ray	3, 5
Crompton & Knowles Corp.	40 Lab. Arb. 1332 (1963)	F. Sander	5, 1
Union Carbide Metals Co.	40 Lab. Arb. 1193 (1963)	C. Duff	1, 3
Griffin Pipe Prods. Co.	40 Lab. Arb. 946 (1963)	J. Larkin	1, 3
KVP Sutherland Paper Co.	40 Lab. Arb. 737 (1963)	S. Kadish	1, 2
Dow Metal Prods. Co.	40 Lab. Arb. 827 (1963)	J. Sembower	12
Station KQED	40 Lab. Arb. 638 (1963)	A. Koven	2, 3
Celotex Corp.	40 Lab. Arb. 554 (1963)	P. Kelliher	1, 2
Electric Autolite Co.	40 Lab. Arb. 429 (1963)	H. Gole	3, 1
Weatherhead Co.	41 Lab. Arb. 1333 (1963)	E. J. Forsythe	3, 5
Anaconda Am. Brass Co.	41 Lab. Arb. 1236 (1964)	B. Turkus	1, 2
Bendix Corp.	41 Lab. Arb. 905 (1963)	C. A. Warns	
National Airlines, Inc.	41 Lab. Arb. 765 (1963)	J. C. Vadakin	3, 4
United States Steel Corp.	41 Lab. Arb. 777 (1963)	P. Florey appr. by S. Garrett	1, 2
Waterman-Bic Pen Corp.	41 Lab. Arb. 577 (1963)	Conn. St. Bd. of Med. & Arb.	1, 2
Simplex Wire & Cable Co.	41 Lab. Arb. 237 (1962)	S. Wallen	1, 5
Convey-All Corp.	41 Lab. Arb. 169 (1963)	S. Kates	1, 2
Safeway Stores, Inc.	42 Lab. Arb. 353 (1964)	A. M. Ross	1, 2
Twin City Milk Producers Ass'n	42 Lab. Arb. 1121 (1964)	N. Gundermann	6
Columbus Auto Parts Co.	42 Lab. Arb. 755 (1964)	W. G. Seinsheimer	1, 2
‡Pittsburgh Steel Co.	42 Lab. Arb. 750 (1964)	T. J. McDermott	2, 3
‡Pittsburgh Steel Co.	42 Lab. Arb. 750 (1964)	T. J. McDermott	4, 5
Crompton & Knowles Corp.	42 Lab. Arb. 594 (1963)	A. H. Stockman	1, 2
‡Diebold, Inc.	42 Lab. Arb. 537 (1964)	J. A. Klein	1, 2
‡Diebold, Inc.	42 Lab. Arb. 537 (1964)	J. A. Klein	3
Pittsburgh Steel Co.	42 Lab. Arb. 507 (1964)	T. J. McDermott	1, 2
Ford Motor Co.	42 Lab. Arb. 220 (1964)	H. H. Platt	1, 2

No.	*Emphasis*
1.	Act must be in good faith, or not an effort to suppress terms of the agreement.
2.	Act must be dictated by requirements of the business, for efficiency, for economy, or for expeditious perfomance.
3.	Act must be in conformance with past practice not previously objected to by union, must not be instituted by company as a new practice.
4.	Act must not be unreasonable, arbitrary, discriminatory, not intended to harm, prejudice, or undermine union.
5.	Act must not be intended to, nor actually deprive substantial number of employees covered by the agreement of work in categories covered by agreement.
6.	Act is barred by recognition provision (11) or would be barred if it had such effect (5).
7	Act is barred by job security rights of employees including seniority.
8.	Act is barred by wage provisions of the agreement.
9.	Act is barred as a deprivation of overtime benefits.
10.	Act is barred as a denial of rights of promotion, transfer or avoidance of layoff, or results in improper discharge.
11.	Act would be barred if it represents an attempt to evade substantial provisions of the agreement, would make a nullity of agreement, or would be in violation of the "spirit, intent, or purpose" of the agreement.
**12.	History of bargaining relationship and negotiations indicate that the union recognizes that the employer has right to subcontract and has failed to limit this right.
***13.	Union claims in stating its position that the employer violated recognition, seniority, wage, etc. provision of the agreement.
****14.	Claim that the obligation to bargain imposed by virtue of the *Fibreboard* decision has been violated.

** This factor was not used in the Dash analysis. It was added because some arbitrators thought it just as important as any other and, in some cases, controlling.

*** This factor was not used in the Dash analysis. It was simply an attempt to indicate cases in which the union sought to rely on a pure implied limitations theory.

**** This factor was not used by Dash. It was used simply to indicate that the Supreme Court's *Fibreboard* decision became involved in the case.

there has been no abatement, and indeed an increasing tendency, on the part of unions to carry grievances protesting subcontracting to arbitration. At the same time the unions faced a diminishing prospect of success.

Speculation as to the reasons for these trends is probably unreliable partly because of a lack of knowledge of some relevant facts. The increase in resort to arbitration could be reflective of an increased incidence of subcontracting disputes, and hence of the practice of subcontracting, or only (or at least in part) of the increasing tendency on the part of unions to attempt to obtain through arbitration what they were unable or did not seek to obtain through contract negotiations. The data on the won-loss record suggests the possibility that arbitrators are tending to be less receptive to union protests against subcontracting. But another possibility is that management has tended increasingly to avoid subcontracting in situations where, insofar as it can judge from the arbitration precedent, there exists a serious risk of losing a case.

The Dash analysis of the decisions sought to classify them according to whether the arbitrator seemed to accept the view that, absent an express contract limitation, the right to subcontract was either "retained" or "not retained" (Tables I and II, respectively) Apparently this dichotomy was based in part on the premise that there may be a basic difference in approach taken by arbitrators on the relevance and applicability, in relation to the subcontracting issue, of the "reserved rights" or "management functions" theory of the collective bargaining agreement. It may be that this is an untenable basis of classification, having more regard for certain statements concerning management's reserved rights, or the absence of them, in the arbitrator's opinion than may be justified. As Dash himself recognized in a subsequent review of his own earlier work:

> Table I shows nineteen published decisions in which the arbitrators seemed to sustain the reserved rights theory in deciding the merits of the cases before them. They at least mention the theory in some fashion. But to differentiate between these nineteen decisions and the forty-five decisions in Table 2, in which the arbitrators found that the full right to subcontract work is not retained is quite a difficult task. This is so because after many of the arbitrators in the nineteen cases had expressed the reserved rights theory in some form they proceeded to abandon it in their written opinions. The way in which they limited the applications of this theory is recorded in the footnotes to Table 1 that are tied to the heading of "Qualifications or Added Support." In other words these arbitrators made use of the reserved rights theory but also found the reasons recorded in these footnotes as additional support

> for their findings or as added criteria which the company had to meet.[32]

Crawford, analyzing the cases surveyed by Dash, concluded that "only a minority of arbitrators even recite the reserved rights theory, and very often abandon it on utterance."[33] Despairing of finding meaningful articulations of doctrine in the decisions, he turned to "the factual decisions made," and, through this approach, found that "the fog" was somewhat dissipated and that "a pattern of consistent decision-making — however inconsistently articulated — emerged."[34] Greenbaum also noted the difficulty of attempting to differentiate between the two categories of cases, stating:

> Although the arbitrators in Table 1 cases [referring to her survey] *mentioned* management's reserved rights they did not adhere to a strict interpretation of that theory but instead added or "implied" some limitations.[35]

The most significant point, perhaps, is that in *every* instance involving a case classified in any of the three studies in Table I, it was deemed necessary to note that the opinion of the arbitrator, although professing to embrace the reserved rights theory in general, proceeded beyond that point. Each arbitrator additionally listed one or more conclusions of fact in relation to the circumstances surrounding the act of subcontracting which fact apparently, in the arbitrator's view, constituted at least make-weight support of the conclusion on the merits; in every instance this conclusion was to deny the grievance.

In attempting to decide which cases fell into the Table I category, it was quickly discovered that arbitrators seldom explicitly indicate the relative importance of the facts or considerations cited in their opinions. This difficulty reached the point that Table I actually includes two sub-groups. Above the line are listed those cases in which the arbitrator seemed to be resting his decision primarily on the management rights theory, any other factors mentioned having been regarded only as of rather incidental interest. In the cases listed below the line it was less clear that the arbitrator relied basically on a reserved rights approach, and the result was to leave the analyst in real doubt as to whether the arbitrator would have held as he did except for the existence of the other factors cited.

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[32] Dash, *supra* note 20, at 211.

[33] CRAWFORD, *op. cit. supra* note 17, at 59.

[34] CRAWFORD, *op. cit. supra* note 17, at 67.

[35] Greenbaum, *supra* note 14, at 226.

In none of the cases included in Table I did the arbitrator state categorically that an employer may subcontract in his complete discretion and without limitation. In most instances the arbitrator noted that the protested act of subcontracting had been made in good faith or that the act was dictated by the requirements of the business or was motivated by a desire to achieve efficiency, economy, or more expeditious performance, or that there was consistency with past practice (which is perhaps simply spelling out the concept of good faith more completely).

It is probably no longer useful to attempt the classification system represented by Tables I and II. The first five factors of "qualifications or added support" listed in Table I are, to all intents and purposes, the same as the first five factors listed as having been emphasized in many of the cases listed in Table II. Considering the cases listed in both tables on a consolidated basis, the specification of the standard of good faith, or the more explicit proposition that the fact of subcontracting must have been (or was) dictated by the requirements of the business, or on grounds of efficiency, economy, or expeditious performance, were the most commonly cited qualifying factors, having been mentioned in 42 and 47, respectively, of the 77 cases. This follows the pattern noted earlier in the Dash and Greenbaum surveys.

Even these criteria, however, are of little assistance as a basis for forecasting results in future cases except where a further examination of the cases is made for the purpose of attempting to discern the particular facts which influenced the decisions. Greenbaum, after examining the original Dash survey, the Crawford explication of Dash, and Greenbaum's own survey, stated the following:

> This writer from the vantage point of both studies concludes that arbitrators will decide an employer may contract out as a management function where there is no express provision in an agreement prohibiting such action provided the employer has made a reasonable business decision in good faith without intent to undermine the union. There is no queston that limitations are recognized by arbitrators. The matter boils down to how arbitrators interpret the phrases "a reasonable business decision," "good faith," and "intent to undermine." . . . The reasoning and logic of the decisions vary with the facts of the case, the clauses in the contract which might be found applicable and their use by the parties and the arbitrators' interpretations of those frequently used but difficult to define phrases.[36]

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[36] Greenbaum, *supra* note 14, at 234.

C. *Criteria Influencing Arbitrators of Subcontracting Disputes*

(1) Cost Considerations. — One of the interesting problems emerging from the cases is the relevance, in terms of the criterion of good faith or its equivalent, of the fact that the employer's decision to subcontract was motivated wholly or substantially by considerations of cost, that is, that it costs less to get the work done by an outside contractor than through one's own employees. The further question arises whether it is pertinent to determine why the outside contractor can do the work at less cost. One obvious reason might be lower wage rates paid by the outside contractor, possibly because his employees are non-union. This kind of case had arisen frequently enough so that Crawford stated, as one of his propositions emerging from an analysis of the facts of the cases rather than their dicta:

> 3. The company cannot avoid the contract — cannot undermine (even unwittingly) the union by placing the union in the impossible situation of having to agree to cut contract wage rates in order to prevent the company from contracting the work out.
>
> For the great preponderance of awards sustaining the union were in situations where the only apparent or stated economy of operations possible to the subcontractor were lower wage rates — the janitor, commission house, and overtime type cases.[37]

On this point Greenbaum's conclusion, based upon her survey, was that the factor appeared in so few cases as to preclude generalization. She found that the point had been mentioned in only four decisions (as compared with twelve in the Dash survey), and that, surprisingly enough, two arbitrators thought the managerial decision was perfectly legitimate while the other two considered that the ground of decision indicated an intent to undermine the union and therefore was evidence of bad faith.[38]

This author's survey does not clarify the confusion. In five cases it was stated or implied that subcontracting cannot be justified solely by cost considerations.[39] In a few cases the saving of costs seemed to be regarded as a make-weight factor in support of the

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[37] CRAWFORD, *op. cit. supra* note 17, at 68.

[38] Greenbaum, *supra* note 14, at 231.

[39] Bendix Corp., 41 Lab. Arb. 905 (1963) (Warns, Arbitrator); Crompton & Knowles Corp., 40 Lab. Arb. 1333 (1963) (Sander, Arbitrator); KVP Sutherland Paper Co., 40 Lab. Arb. 737 (1963) (Kadish, Arbitrator); Elizabeth Arden Sales Corp., 39 Lab. Arb. 1048 (1962) (Altieri, Arbitrator); Simplex Wire & Cable Co., 41 Lab. Arb. 237 (1962) (Wallen, Arbitrator).

managerial decision.[40] There may be an emerging view, although still not widely held, that cost savings are sufficient to justify subcontracting, or at least that this consideration is not alone an index of bad faith. However, in most instances the arbitrator has cited other supporting factors as well in concluding that the managerial decision was made for appropriate business reasons and hence was not violative of the contract.[41]

(2) Good Faith. — The difficulty of evaluating the relevance of cost considerations as a factor is illustrative of the problem encountered in attempting, conceptually and factually, to apply the criterion of good faith. Arbitrators seldom expound at length on any basic rationale or principle in their decisions. Those who are lawyers (and some who are not) sometimes refer to the concept of good faith which is said to be part of basic contract law. Others express this idea more graphically as a "fruits of the bargain" notion. But the applicability of these principles to the labor agreement in relation to subcontracting problems is assumed, not explained. Perhaps this is attributable to the general, although by no means universal, disposition of arbitrators to be pragmatists and to react to facts rather than to indulge in juridical or labor relations expositions. They tend to utilize other kinds of generalizations which, however, are scarcely more precise.[42]

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[40] Kaiser Steel Corp., 44 Lab. Arb. 25 (1965) (Bernstein, Arbitrator); Arketex Ceramic Corp., 43 Lab. Arb. 1188 (1964) (Dworkin, Arbitrator); Safeway Stores, Inc., 42 Lab. Arb. 353 (1964) (Ross, Arbitrator); Anaconda Am. Brass Co., 41 Lab. Arb. 1236 (1964) (Turkus, Arbitrator).

[41] See Alan Wood Steel Co., 44 Lab. Arb. 722 (1965) (Valtin, Arbitrator); Ametek, Inc., 43 Lab. Arb. 106 (1964) (Somers, Arbitrator); Printing Indus., Inc., 42 Lab. Arb. 586 (1964) (Feinberg, Arbitrator); Allis-Chalmers Mfg. Co., 39 Lab. Arb. 1213 (1962) (Smith, Arbitrator).

[42] The following statements of arbitrators are illustrative of these generalizations:

> There is no question in his [the arbitrator's] mind but that the Company has — and has always had — a broad general right to contract with other companies for the furnishing of goods and services. There is also no question but that it may not properly abuse that right — that it may not exercise it in such a way as to frustrate the basic purposes of the Agreement or to make the Agreement impossible to perform. . . . Bethlehem Steel Co., 30 Lab. Arb. 678, 682 (1958) (Seward, Arbitrator).
>
> In view of the fact that the Union has status as exclusive representative of all encumbents of a given group of jobs, it would appear that recognition of the Union plainly obligates the Company to refrain from arbitrarily or unreasonably reducing the scope of the bargaining unit.
>
> 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

In *KVP Sutherland Paper Co.*,[43] Arbitrator Kadish made an interesting and valiant effort to find a suitable approach. After

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not imply of itself any deviation from this generally recognized principle. The question in this case, then, is simply whether the Company's action . . . 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. National Tube Co., (Garrett, Arbitrator), published in II Basic Steel Arbitration Information Bulletins 777, 779.

Consideration of the relevant materials which bear on the issue in these cases permits these generalized answers to some of the questions raised in them:

First, in the exercise of its managerial authority under Article Fifteen, Management has the right to have work done by outside contractors in the conditions which reasonable men recognize as proper grounds for contracting out work. This right has been exercised for years . . . without serious Union challenge. . . .

Second, the Company may not abuse its right to let work to outside contractors. No one can deny that good faith and fair dealing are implied obligations under a labor agreement. If these obligations are to be meaningful, Management, in contracting out work, must act reasonably and with conscious attention not only to its own interests but also to the interest of the employees. More specifically, it may not undermine the status of the Union as sole bargaining agent of the employees by unreasonably narrowing the scope of the bargaining unit. This is an obligation fairly implied in the "recognition clause." Republic Steel Corp., 32 Lab. Arb. 799, 803-04 (1959) (Platt, Arbitrator).

The present Referee, while rejecting the Union's view that there exists an absolute (implied) prohibition on the contracting out of work of kinds regularly and normally performed by bargaining unit employees, likewise rejects the Company's view that it has complete freedom in this respect. In the Springfield case he indicated that "a standard of 'good faith' may be applicable, difficult of definition as this may be." Upon further reflection, he is prepared now to say that he thinks this standard is implicit in the union-management relationship represented by the parties' Agreement, in view of the quite legitimate interests and expectations which the employees and the Union have in protecting the fruits of their negotiations with the Company. . . .

Real difficulty arises, however, in attempting to lay down a set of specific criteria to be used in determining whether, in a subcontracting situation, an employer has acted in bad faith. Many arbitrators have sought to do this, and the wide variation in the results of their deliberations of itself casts some doubt upon the wisdom of such efforts and suggests that detailed specification may best be left to the collective bargaining process. In general, it seems to the Referee that "good faith" is present when the managerial decision to contract out work is made on the basis of a rational consideration of factors related to the conduct of an efficient, economical operation, and with some regard for the interests and expectations of the employees affected by the decision, and that "bad faith" is present when the decision is arbitrary (i.e., lacks any rational basis) or fails to take into account at all the interests and expectations of employees affected. . . . Allis-Chalmers Mfg. Co., 39 Lab. Arb. 1213, 1218-19 (1962) (Smith, Arbitrator).

If there is no special evidence of intent one way or the other, the arbitrator must ask himself whether constructive intent should be assigned to the parties. Constructive intent is concededly a legal fiction but is sometimes an essential element of statutory as well as contractual interpretation. The arbitrator must consider whether an implied obligation should be extracted from the various articles of the agreement which have been negotiated for the benefit of the employees and the protection of the union. Such an im-

reviewing and rejecting the extreme positions on the issue of implied contractual limitations on subcontracting, he then proceeded to note "that there are vital concerns underlying each of these extreme viewpoints."[44] These were identified as being, on the union side, the "stake . . . in maintaining its representational integrity and employee job security"[45] and, on the employer side, the "stake . . . in its power to manage an efficient business."[46] His analysis then proceeded as follows:

> Ultimately the question in this case as in any case entails weighing the Company's affirmative case for the particular decision to subcontract against the impact that decision has upon the subject matter of the bargain. The integrity of the bargain protected by the very execution of the contract, the recognition, wage and related clauses, may be said to have been violated where the balance favors the Union; otherwise not.[47]

He then concluded that in the case before him "the balance appears . . . quite clearly to favor the Company." He noted among other things the "episodic and temporary" nature of the particular subcontracting, the "extremely small" impact upon the bargaining unit, and the company's "wholly plausible business reasons to farm out the work complained of which do not remotely suggest either taking advantage of a contractor's lesser wage scale ('beating the union prices', . . .) or a motive to reduce the status of the Union."[48]

One of the problems in the attempt to extract from the decisions the meaning and import of the good faith criterion, where it is determined that this is the test to be applied, is that it is not clear to what extent a different criterion mentioned in the arbitrator's opinion (and therefore listed as a separate factor in the

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plied obligation is often called the "covenant of good faith and fair dealing." It is implied in every contract that neither party will take any action which improperly impairs or destroys the right of the other party to receive the fruits of the bargain. In deciding whether the covenant of good faith and fair dealing has been violated, one must examine the employer's motive in taking action which adversely affects the employees. Objective effects as well as subjective purposes must be scrutinized, in order to ascertain whether the economic interests of the employees were so disproportionately impaired as to destroy the substance of the agreement for all practical purposes. Another test is whether the employer's action was in accordance with conventional and customary business practice. Safeway Stores, Inc., 42 Lab. Arb. 353, 357 (1964) (Ross, Arbitrator).

[43] 40 Lab. Arb. 737 (1963) (Kadish, O'Bea, and Southon, Arbitrators).

[44] *Id.* at 740.

[45] *Ibid.*

[46] *Ibid.*

[47] *Ibid.*

[48] *Id.* at 741.

survey tabulations) is simply overlapping or is regarded as independently significant. Might an arbitrator take the position in a given case that while the employer acted in good faith, a protested act of subcontracting nevertheless was violative of the contract on the ground, for example, that it was inconsistent with past practice or had a substantial, adverse impact on the scope of the bargaining unit or detrimentally affected employment opportunities of bargaining unit employees? The difficulty here arises in part out of the conceptual problem involved in attempting to establish the rationale for deriving from the labor agreement an implicit limitation on the right to contract out. For example, the view that good faith requires the employer to refrain from any act which will deprive the union and the represented employees of the benefits of the agreement would lead naturally to a rather rigorous and pervasive kind of implied limitation. If, on the other hand, this fruits of the bargain concept is rejected in favor of a concept of good faith which relates more to subjective intent than to objective effects, the implied limitation on management becomes less severe. Those qualifications or criteria identified as Items 1 through 5 in Tables I and II are related to this kind of analysis.

(3) Deprivation of Work from Bargaining Unit Employees.— One factor noted in each of the survey analyses as having been mentioned with considerable frequency is whether the particular act of subcontracting actually deprived any substantial number of bargaining unit employees of work. It is perhaps significant that in most of the cases in which this factor was mentioned, and in which the grievance was denied, the arbitrator also mentioned good faith as a factor, which may mean that the absence of a direct, adverse impact on employment opportunities is taken to be one of the indications of good faith. In a fair number of the relatively few cases in which the grievance was sustained, the arbitrator noted that there had been a direct, adverse impact upon employment.

(4) Past Practice. — In the current survey, thirty arbitrators mentioned past practice as a factor considered. The apparent importance of this factor, at least as indicated by the frequency with which it was noted in the opinion, appeared also in the Dash and Greenbaum surveys. In each of the three surveys this factor was noted in a substantial number of cases in which the grievance was denied, and in a few cases in which the grievance was sustained. The relevance of an established past practice, particu-

larly if it has extended over a period of years during which there have been successive contract negotiations, seems fairly clear however the basic contractual issue is framed. Obviously, consistency or inconsistency with such practice has some relation to the matter of good faith and some bearing on the determination of an issue expressed in terms of the parties' mutual agreement or understanding concerning the existence and scope of any implied restriction.

(5) Collective Bargaining History.—Related, of course, is factor twelve which was listed separately in the author's survey, namely, "collective bargaining history" on the subject of subcontracting. This factor has been cited either alone or along with past practice in a substantial number of cases in which the grievance has been denied. It seems fairly obvious that an established past practice of subcontracting in circumstances not substantially different from those in the particular case under protest, together with a history of unsuccessful union efforts to obtain contractual restrictions, presents an intrinsically weaker case for the union than if the facts show the presence of one factor but not the other. It is probable, moreover, that arbitrators would be more likely to be persuaded by past practice than by collective bargaining history. This kind of reaction seems quite justified. An attempt, or even a series of attempts, on either side to write restrictions or rights into a collective bargaining agreement ought not to be regarded, standing alone, as evidence of a mutual understanding that, unless the specific provision were inserted, the labor agreement would have to be interpreted, as to the matter in question, adversely to the position taken by the proponent of the amendment. This would not be true, of course, if the agreement contained an express provision which the proposed amendment was designed to modify. Certainly it is perfectly sound and healthy collective bargaining practice in dealing with the area of reserved rights or implied limitations for one side or the other to attempt to buttress its view of a basic contractual position by writing in an explicit provision.

(6) Miscellaneous Factors.—There is no reason to discuss in any detail factors six through eleven of the Dash-Greenbaum analyses. Items six through ten simply identify various of the standard provisions of the labor agreement which, arguably, either singly or in combination give rise to some sort of implied limitation on the right to contract out bargaining unit work. Unless one were to accept the notion that one or more of these provisions necessarily implies an absolute prohibition on subcontracting, as

the Seventh Circuit held in *UAW v. Webster Elec. Co.*,[49] their citation, or any particular reference to them in an arbitrator's opinion, adds nothing to the analysis. Factor eleven — whether the protested act constituted an attempt to evade some substantive provision of the agreement or would be in violation of its spirit, intent, or purpose — was a formulation appearing with some frequency in the Dash analysis, with considerably less frequency in the Greenbaum analysis, and almost not at all in the author's survey. It scarcely needs to be articulated as a separate, identifiable consideration if, as now seems generally to be agreed, the matter of good faith is the basic point to be investigated.

Factor thirteen extends to cases in which the union posited its claim of implied limitation by specifically citing the recognition, seniority, wage, and similar provisions of the particular agreement. It was included in the survey only to show that it is this kind of argument, as distinguished from some other articulated theory such as that of good faith, which is generally the contractual basis of the claim of implied limitation. In addition, the factor demonstrates the point, already obvious from the tabulations, that it normally does not suffice merely to persuade the arbitrator of the merits of the grievance. Therefore, arbitration experience suggests that the union's chances of success will be more directly related to the extent to which it can make solid factual arguments related to one or more of the first five factors listed in the surveys.

D. Results of the Silent Agreement Decisions

It has already been noted that the union "batting average" in the cases covered by the several surveys has not been impressive. In only twelve instances in the current survey did the union succeed in persuading the arbitrator to sustain the grievance on the merits. An examination of these cases further indicates that the record is even less impressive than might at first appear. In two of the cases back pay was not awarded despite the finding of violation of an implied limitation, because, as the arbitrator viewed the matter, the employer had thought he was acting in good faith and had made immediate effort to correct the situation. In three other cases, in which the arbitrator heard *multiple* grievances protesting subcontracting, the ratio of union success was, respectively, one in

[49] 299 F.2d 195 (7th Cir. 1962). The court relied primarily upon the "union shop" provision in the labor agreement.

ten, one in three, and one in two. In each of the instances in which the grievance was sustained, the case, as compared with the others in which the grievance was denied, involved the least amount of work subcontracted in terms of employees, time, and money. In two of the twelve cases the sole basis of the decision was the conclusion that the recognition provision of the agreement precluded any subcontracting, a point of view which certainly is without general support. In one case the arbitrator seemed to base his conclusion on a finding of anti-union bias.

Taking the twelve cases as a whole, and disregarding those in which the arbitrator derived an absolute prohibition from the recognition clause, three considerations seem to have been regarded as the most important. In six cases the arbitrator seemed to be influenced by the fact that regular bargaining unit work was involved. In four cases the existence of available unit personnel, together with equipment and other facilities, was deemed significant. In four cases the adverse effect on the employees was cited as important. On the other hand, all three analyses show that these same considerations have been present in a number of cases in which the grievances have been denied on their merits. One can only conclude that the "fog" which Arbitrator Crawford detected as blanketing the area of decision-making has not been noticeably pierced in recent years by any kind of arbitral radar.

III. Survey of Recent Arbitration Decisions Concerning Subcontracting Under Agreements Which Are Not Silent

Neither the Dash nor the Greenbaum surveys attempted to cover arbitration decisions presenting problems of interpretation or application of contractual provisions explicitly restricting subcontracting — the non-silent contract. Crawford likewise dealt only briefly with this area, but he did categorize types of contract provisions into four groups as follows:

> (1) The weakest limitation on contracting out is the "discussion before contracting out" type clause. "The Company shall inform the Union of any construction or repair work or bargaining unit work, to be contracted out prior to the writing of the contract, and discuss it with the Union."
>
> (2) The strongest prohibition against contracting out is found in this type of clause. "There shall be no regular work performed by any employee not covered by the contract except in emergencies

> or when work must be performed for which regular employees are not qualified." Here the probability of a lay-off or demotion as a consequence of the subcontracting is not required. Nor is there any provision for differences in the managerial problem or managerial know-how.
>
> (3) More common is the limitation of reasonableness. "The Company will make every reasonable effort to use its available working force and equipment in order to avoid having its work performed by outside contractors"; or "The Company will use its own employees whenever possible."
>
> (4) Finally, the most common clause is the prohibition against contracting out unit work when the firm's own employees are on layoff, or when the layoff or demotion of unit employees would result. "The company will not contract work which would require employees in the bargaining unit to be laid off or reduced in rate of pay, or would prevent re-employment of employees laid-off not longer than one year."[50]

It was decided that the author's survey of the more recent arbitration decisions should include cases in which problems of interpretation and application of specific contractual restrictions on subcontracting have been presented.[51] It would seem to be of some interest to determine to what extent Crawford's categorization continues to be appropriate, in so far as can be judged from the sampling of contract provisions reflected in the reported decisions. In addition, it might be useful to compare restrictive criteria agreed upon in collective bargaining negotiations with those which have emerged in the arbitral process in cases involving silent contracts. A total of 47 cases have been examined including a few that have not been published. The results are shown in Tables III and IV.

The analysis indicates that the Crawford categorization of contract provisions continues to be generally accurate except that a fifth category should be added in which the contract prohibits the subcontracting of work "normally," "customarily," or "regularly" performed by unit employees; or limits subcontracting to "major" maintenance or repairs or to "new" construction, operations, facilities or work; or specifies certain "standards" or "criteria" to be met as prerequisites, such as that it must be justifiable on grounds of practicality, economy, efficiency, or business considerations; or limits subcontracting to particular types of work or to instances

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[50] CRAWFORD, *op. cit. supra* note 17, at 52.

[51] The collection of cases was made by Research Assistant Sydney Frank. The classification of them in the tabulations which follow was done by Research Assistant Renato L. Cayetano. To each of these the author wishes to express his indebtedness.

TABLE III

CASES GROUPED BY CATEGORIES

Category (1) "Discussion Before Contracting Out" Type

Company Name	*Citation*	*Arbitrator*	*Added Factors Or Support*
Kaiser Aluminum & Chem. Co.	43 Lab. Arb. 307 (1964)	P. M. Hebert	1, 3, 4, 5
*Detroit Edison Co.	43 Lab. Arb. 193 (1964)	R. A. Smith	1, 2, 4
International Paper Co.	39 Lab. Arb. 747 (1962)	L. Hawley	3
*O. Hommel Co.	45 Lab. Arb. 999 (1965)	B. N. Reid	None**
*Huron Portland Cement Co.	Unpubl.	R. W. Haughton	None

Category (2) "Strongest Prohibition" Type

*Hofmann Indus.	Unpubl.	L. M. Gill	None
Givaudan Corp.	Unpubl.	I. B. Scheiber	4, 6
*Reynolds Metals Co.	42 Lab. Arb. 333 (1963)	A. L. Coffey	None
Theo Hamm Brewing Co.	42 Lab. Arb. 83 (1963)	J. S. Williams	None
*Joseph T. Ryerson & Son, Inc.	42 Lab. Arb. 1196 (1964)	M. Rubin	None
Jos. Schlitz Brewing Co.	42 Lab. Arb. 931 (1964)	I. Bernstein	None
*Mason & Hanger-Silas Mason Co.	42 Lab. Arb. 1247 (1964)	G. S. King	8
*Meshberger Stone Corp.	41 Lab. Arb. 137 (1963)	J. J. Willingham	None
*Monsanto Chem. Co.	40 Lab. Arb. 177 (1963)	M. M. Rohman	None
Lee Rubber & Tire Co.	Unpubl.	S. Wallen	None

Category (3) "Reasonableness" Type

*Crane Co., Chapman Div.	42 Lab. Arb. 781 (1963)	J. V. Altieri	None
*Celetex Corp.	41 Lab. Arb. 464 (1963)	J. W. Sweeney	2, 7
*Tenneco Oil Co.	40 Lab. Arb. 240 (1963)	J. W. Sweeney	9
*Tenneco Oil Co.	39 Lab. Arb. 282 (1962)	H. Wissner	1, 6
*Tenneco Oil Co.	44 Lab. Arb. 1121 (1965)	M. Merrill	None
Niagra Weldments, Inc.	39 Lab. Arb. 937 (1962)	J. Shister	None
*Owens-Corning Fiberglass Corp.	44 Lab. Arb. 473 (1965)	F. Uible	7
*Whirlpool Corp.	44 Lab. Arb. 876 (1965)	H. Cole	None

Category (4) "No Impairment of Employment" Type

*R. D. Warner Co.	Unpubl.	C. V. Duff	None
*Kyova Fiber Pipe Co.	Unpubl.	S. L. Chalfie	None
*Ohio Valley Gas Co.	44 Lab. Arb. 786 (1964)	S. S. Kates	1, 2
*Thriftimart, Inc.	40 Lab. Arb. 449 (1963)	F. Meyers	None
Ed Friedrich, Inc.	39 Lab. Arb. 399 (1962)	J. S. Williams	9

Category (5) "Criteria" Type

*Mitchell Specialty Div., Novo Indus. Corp.	Unpubl.	L. M. Gill	None
*National Gypsum Co.	43 Lab. Arb. 843 (1964)	L. Autrey	3, 5, 8
Wilshire Oil Co.	42 Lab. Arb. 315 (1964)	T. T. Roberts	1, 2
Meadow Gold Prods. Corp.	42 Lab. Arb. 466 (1964)	S. L. Cahn	None
Publicker Indus., Inc.	42 Lab. Arb. 598 (1964)	D. A. Crawford	None
Phillips Chem. Co.	41 Lab. Arb. 145 (1963)	C. R. Schedler	3, 4
Columbus & So. Ohio Elec. Co.	41 Lab. Arb. 1225 (1963)	V. L. Stouffer	None
Ideal Cement Co.	39 Lab. Arb. 349 (1962)	H. Wissner	1
Ostrow Enterprises Co.	44 Lab. Arb. 242 (1965)	P. Prascow	7
Merck Sharp & Dohme	44 Lab. Arb. 262 (1965)	W. Loucks	None
Merck Sharp & Dohme	44 Lab. Arb. 793 (1965)	D. Crawford	8
United States Steel Corp.	44 Lab. Arb. 321 (1965)	C. McDermott	5, 6, 8
United States Steel Corp.	44 Lab. Arb. 317 (1965)	S. Garrett	4, 5, 6
Lynch Corp.	44 Lab. Arb. 762 (1964)	H. Dworkin	None
Consolidated Foods Corp.	45 Lab. Arb. 331 (1965)	R. Gibson	6, 7

* Denotes that clause might possibly belong also in another category or categories.

** "None" denotes that the arbitrator, in denying or sustaining the grievance, has relied exclusively and primarily on the language of the contract (as applied or interpreted by him).

† Denotes that the grievance was denied on the merits.

†† Denotes that the grievance was sustained on the merits.

††† Denotes that the grievance was in part sustained and in part denied on the merits.

Legend: "Added Factors or Support" refers to factors, support, or considerations used by the arbitrator aside from, or in addition to, those clearly flowing from the express contractual provision on subcontracting.

Number	*Added Factors or Support*	*Number sion*
1.	Established past practices of subcontracting out without prior notice to, or negotiation with, the union; also subcontracting not different in kind or degree from past practices.	
2.	History of bargaining negotiations indicates that the union had unsuccessfully attempted to limit or prohibit the company from unilateral subcontracting (either broad or specific limitations).	
3.	No "significant impairment" on the employment, job tenure, security rights or	

TABLE IV

CASES IN WHICH CONTRACT PROVISION APPLIED WITHO
RELIANCE ON OTHER "SUPPORT" FACTORS

Company Name	*Citation*	*Contractual Criteria Applied/Interpreted*
O. Hommel Co.	45 Lab. Arb. 999 (1965)	1
Huron Portland Cement Co.	Unpubl.	1, 2
Hofmann Indus., Inc.	Unpubl.	1, 6
Reynolds Metals Co.	42 Lab. Arb. 333 (1963)	6
Theo Hamm Brewing Co.	42 Lab. Arb. 83 (1963)	4
Jos. Schlitz Brewing Co.	42 Lab. Arb. 931 (1964)	4
Joseph T. Ryerson & Son, Inc.	42 Lab. Arb. 1196 (1964)	4, 2
Meshberger Stone Corp.	41 Lab. Arb. 137 (1963)	4, 5
Monsanto Chem. Co.	40 Lab. Arb. 177 (1963)	4, 6
Lee Rubber & Tire Co.	Unpubl.	4, 6
Crane Co., Chapman Div.	42 Lab. Arb. 781 (1963)	3, 7
Tenneco Oil Co.	44 Lab. Arb. 1121 (1965)	6, 7
Niagra Weldments, Inc.	39 Lab. Arb. 937 (1962)	6
Whirlpool Corp.	44 Lab. Arb. 786 (1965)	2
R. D. Warner Co.	Unpubl.	2, 7
Kyova Fiber Pipe Co.	Unpubl.	2, 7
Thriftimart, Inc.	40 Lab. Arb. 449 (1963)	2, 5, 7
Novo Indus. Corp.	Unpubl.	7, 8
Meadow Gold Prods. Corp.	42 Lab. Arb. 466 (1964)	2, 8
Publicker Indus., Inc.	42 Lab. Arb. 598 (1964)	1
Columbus & So. Ohio Elec. Co.	41 Lab. Arb. 1225 (1963)	7
Merck Sharp & Dohme	44 Lab. Arb. 262 (1965)	2
Lynch Corp.	44 Lab. Arb. 762 (1964)	9

Legend: "Contractual Criteria Applied or Interpreted" means the fulfillment or nonfulfillment a contractual "standard" or "requirement", or the existence of a fact, event, or occasion i posed by the contract as a condition on subcontracting.

Number *Contractual Criteria Applied/Interpreted*

1. Subcontracting permitted with respect to "new" work, services, or the like; or "major" repairs, construction, installations, work, or services.
2. Subcontracting prohibited with regard to work or services "customarily," "regu larly," or "normally" performed by the company on its premises by its ow unit employees.
3. Subcontracting permitted in cases where "economical," "practical," or during "u usual" or "emergency" circumstances (with or without provision for advan notice or discussion).
4. Subcontracting specifically prohibited with respect to certain types of work services as expressly noted in the agreement.
5. Subcontracting prohibited unless contractor or successor-employer agrees to ob serve the terms and conditions of the agreement; or agrees to pay equal higher wages.
6. Subcontracting prohibited unless qualified and skilled employees and/or adequa plant equipment are not available.
7. Subcontracting prohibited when there are unit employees on layoff status; or whe subcontracting would result in layoff or displacement or unit employees; when subcontracting would result in reduction of work week, hours of wor or wages.
8. Subcontracting prohibited when "competition is reasonably equal"; or when wor is not "customarily" performed "outside" the plant.
9. Subcontracting prohibited unless "schedules cannot be met after utilization of qual

where there is a "lack of available equipment or skilled employees."[52]

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[52] In examining the cases some of the contract provisions involved, which seem to fall into some one of the five categories, were selected for illustration.

Category (1) ("Discussion before contracting" type)

"When consideration is being given to contracting work out thorough discussion will take place with the appropriate union representatives." Kaiser Aluminum and Chem. Corp., 43 Lab. Arb. 307 (1964) (Herbert, Arbitrator).

"Outside Contractors. (a) If management proposes to contract out work which is regularly and customarily done by the employees in a bargaining unit, and such contracting appears to threaten their security of employment, the chairman or chief steward of the division will be given prior notice thereof." Detroit Edison Co., 43 Lab. Arb. 193 (1964) (Smith, Arbitrator).

"New works and major repairs to building including painting may be contracted out. The Company agrees to discuss this with the Union." O. Hommel Co., 45 Lab. Arb. 999 (1965) (Reid, Arbitrator). (This provision could also be included in categories (3) and (5)).

Category (2) ("Strongest prohibition" type)

"All work coming within the jurisdiction of the IAM and so recognized shall be performed by employees covered by this contract; such as . . . ." The Hamm Brewing Co., 42 Lab. Arb. (1963) (Williams, Arbitrator).

"Non-bargaining unit employees shall not be permitted to perform work customarily performed by the production and maintenance employees covered by services or for training purposes or in cases of emergency." Joseph T. Ryerson & Son, Inc., 42 Lab. Arb. 1196 (1964) (Rubin, Arbitrator). (Also suitable for category (5)).

"The Company agrees that types of work, assigned to Mason-and-Hanger-Silas Mason Company, at Clarksville Facility, which are normally performed by the Bargaining Unit is recognized as coming within the jurisdiction of the I.A.M. and is covered by this Agreement, and will be performed by the employees covered by this Agreement." Mason & Hanger-Silas Mason Co., 42 Lab. Arb. 1247 (1964) (King, Arbitrator). (Also suitable for category (5)).

Category (3) ("Reasonableness" type)

"Article 10(2). Except in cases where delivery dates may be placed in jeopardy, the Company will use every effort to avoid subcontracting of work so long as any employee is on layoff, or the employees in the unit are on a reduced work week schedule." Crane Co., 42 Lab. Arb. 781 (1963) (Altieri, Arbitrator). (Also suitable for category (4)).

"The Corporation will make every reasonable effort to use its available working forces and equipment in order to avoid having its work performed by outside contractors. The Corporation will not contract work which would require employees in the Bargaining Unit to be laid off, reduced in rate of pay, or prevent qualified employees from being upgraded, or prevent laid-off employees from being recalled." Tenneco Oil Co., 40 Lab. Arb. 240 (1963) (Sweeney, Arbitrator). (This provision could appropriately also be included in category (4)). See also other cases involving this provision, Tenneco Oil Co., 39 Lab. Arb. 282 (1962) (Wissner, Arbitrator; Tenneco Oil Co., 44 Lab. Arb. 1121 (1965) (Merrill, Arbitrator).

"Work shall not be contracted for which the Company concludes that it has qualified employees and adequate equipment." Niagra Weldments, Inc., 39 Lab. Arb. 937 (1962) (Shister, Arbitrator).

Category (4) ("No impairment of employment" type)

"The Company agrees that it will not contract any work which is ordinarily and customarily done by its regular employees if as a result thereof, it would become necessary to lay off any such employees, or any such employees are

It is obvious that the inclusion of a contract provision on subcontracting did not, in the cases examined, resolve all problems; otherwise, recourse to arbitration would have been unnecessary. Quite obviously, the contractual standard was unclear, at least to the parties, in its application to the fact situations presented. The distinct impression was gained, upon examining the opinions in the cases, that in many instances the arbitrator seemed to introduce considerations in support of his conclusion not necessarily involved in a strict interpretation of the particular contract restriction on subcontracting.

The analysis represented by the foregoing tabulations yields some rather interesting information. Twenty decisions of the 43 examined, constituting approximately 45 per cent of the total, were cases in which the analyst concluded that the arbitrator relied upon, or at least mentioned in support of his conclusion, factors or considerations not strictly called for by the particular contract provision. Understandably, this occurred least frequently in the case

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laid off because of lack of work." Ohio Valley Gas. Co., 42 Lab. Arb. 786 (1964) (Kates, Arbitrator). (Also suitable for category (5)).

"The Company will not contract out work which would require employees in the bargaining unit to be laid off or reduced in rate of pay or to prevent re-employment of employees laid off or to keep from paying overtime to the employees who would normally perform the work." Ed Friedrich, Inc., 39 Lab. Arb. 399 (1962) (Williams, Arbitrator).

"It is the intent of the parties to this agreement that the wages, hours, working conditions and fringe benefits embodied herein, which have been arrived at through the years of collective bargaining shall be preserved and maintained. It is also the intent of the parties that work presently being performed by employees covered by this agreement will not be contracted out in order to displace present employees. In this regard, industry practices 'shall not be changed'." Thriftimart, Inc., 40 Lab. Arb. 449 (1963) (Meyers, Arbitrator).

Category (5) ("Criteria" type)

"The Company agrees not to contract out work customarily performed by its employees. However, nothing herein contained shall prevent the Company from continuing to have work performed outside the Company which prior to April 30, 1962, it customarily has had performed outside the Company." Meadow Gold Prods. Corp., 42 Lab. Arb. 466 (1964) (Cahn, Arbitrator).

"All new construction, new machinery installations, new equipment installations and work pertinent thereto, and major repair works may be given to outside contractors to perform." Publicker Indus., Inc., 42 Lab. Arb. 598 (1964) (Crawford, Arbitrator). "It is agreed that work shall be performed as much as practicable by Union labor in the Employer's own shop. In the event that all work cannot be rendered in the Shop of the Employer, the Employer may contract his work to union shops only." Ostrow Enterprises, Inc., 44 Lab. Arb. 242 (1965) (Prascow, Arbitrator).

"The Company recognizes the employees . . . shall perform all mechanical or other work incident to the maintenance of plant that is done on plant premises provided the necessary plant equipment is available and skills of present employees can be utilized." National Gypsum Co., 43 Lab. Arb. 842 (1964) (Autrey, Arbitrator).

of the contract provisions in the second category ("strongest prohibition" type). The supportive factors cited bear a marked resemblance to those often mentioned by arbitrators in deciding subcontracting issues presented under the silent contract. Moreover, the won-loss figures for the cases involving non-silent contracts suggest, if the sample is at all representative, that the union prospects of success are not substantial, although they are (again understandably) somewhat better than if the agreement is silent on subcontracting. As could have been anticipated, the chances of a favorable decision appear to vary directly with the specificity of the contract provision in establishing a restriction on the managerial right to subcontract.

IV. CONCLUSION

Subcontracting of bargaining unit work has presented a complex of problems both under the law of the NLRA and the law of the collective bargaining agreement. Included are the problems of overlapping jurisdiction between the forum for enforcing the law and the forums for enforcing the agreement, particularly, as to the latter, the arbitration process. Despite the basic differences between the statutory issues involved before the NLRB and the contractual issues presented in arbitration, the decisions seem to take account, increasingly, of the same kinds of factors when the problem raised is in the context of the silent labor agreement. As to each branch of the decision-making process there is difficulty in the prediction of the result and of conceptualization.

Unions have not, on the whole, fared well in attempting to obtain restrictions on subcontracting through the arbitration process where the agreement has been silent on the subject. Nor have they come off distinctly better when the agreement has contained an express contractual provision except where the provision has been explicit rather than cast in terms of general criteria.