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## IMPLIED RESTRICTIONS ON WORK MOVEMENTS — THE PERNICIOUS CROW OF LABOR CONTRACT CONSTRUCTION

Owen Fairweather\*

Unless the competitive ability of manufacturers in the United States is made more effective, this country will continue to lose its position in world markets to competitive adversaries within the Common Market, the Free Trade Association, and Japan. Moreover, a rapid increase of exports is needed, not only to regain lost markets, but to make more favorable the commercial balance of trade and thereby reduce the outflow of gold. Currency devaluation is the specter over the horizon unless a stable and favorable balance of international payments can be reestablished.<sup>1</sup> Therefore, the government is now attempting to aid manufacturing concerns to sharpen their competitive claws.

This aid is manifest in the tax credits now granted to companies who purchase labor-cost-reducing equipment<sup>2</sup> and in revised depreciation allowances.<sup>3</sup> Both of these provisions are designed to lower the cost of equipment which reduces labor costs, and hence, to encourage its purchase. The government, therefore, is aiding the race toward more automation because the labor cost per unit of manufactured products must go down if total exports are to be expanded.

Another part of the government effort to encourage exports was the enactment of the Trade Expansion Act last fall.<sup>4</sup> This Act granted the President the authority to trade tariff reductions with the managers of the Common Market in the hope that from such trading our exports would grow more than our imports and the net commercial trade balance in terms of dollars would be improved.

However, as this national policy of encouraging exports is being formulated, there is at work a countervailing development dulling competitive potential and raising costs. Some arbitrators and judges, when asked to construe collective bargaining agreements between labor unions and manufacturing companies, are constructing by implication restrictions on the subcontracting of work. Such prohibitions upon purchases from subcontractors block a competitive process which is often referred to as the "make or buy" decision. The decision to "make or buy" a product or provide a service is normally predicated upon a cost analysis, and the purchase from the outsider only occurs when costs can be reduced thereby.

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1 Vanek, *Overvaluation of the Dollar, Causes, Effects, and Remedies*, in JOINT ECONOMIC COMMITTEE, 87TH CONG., 2D SESS., FACTORS AFFECTING THE UNITED STATES BALANCE OF PAYMENTS 267 (Comm. Print 1962); Houthakker, *Exchange Rate Adjustment*, in JOINT ECONOMIC COMMITTEE, 87TH CONG., 2D SESS., FACTORS AFFECTING THE UNITED STATES BALANCE OF PAYMENTS 287 (Comm. Print 1962). [hereinafter cited as *Factors*].

2 INT. REV. CODE OF 1954, §§ 46-48.

3 2 CCH 1963 STAND. FED. TAX REP. ¶ 1763.

Robert V. Roosa, Under Secretary of the Treasury for Monetary Affairs explained that the tax credit for investment and the revised depreciation guidelines were designed to aid the private economy to penetrate export markets so as to retard the balance of payments drain. *Factors* 334.

4 76 Stat. 872 (1962) (codified in scattered sections of 19 U.S.C.).

Paradoxically, such blocking of "make or buy" decisions has been occurring in this country by arbitration and judicial decision during a period when the European competitors have been obtaining rapid cost decreases by purchasing goods and services from subcontractors. Specialists are springing up in the enlarged common market trading area<sup>5</sup> because European business managers have discovered the principle, identified by Adam Smith in 1776, that one of the major advantages in an expansion in an industrial market is the reduction in cost obtainable from specialization.<sup>6</sup> These European managers are actively exploiting this principle,<sup>7</sup> while many in this country are being restrained.

In addition to blocking purchases from subcontractors, thereby restricting trade and holding up costs, the same group of arbitrators and judges are imposing another trade restriction when they follow a parallel course. They are construing labor agreements with unions to block the movement of work from one plant to another operated by the same company where the same or similar product can be produced at a lower and more competitive cost.

The following cases illustrate these imposed "work movement" restrictions. In *Vulcan Rivet & Bolt Corp.*,<sup>8</sup> a company violated its labor agreement when it contracted to purchase T-head bolts at a lower cost from a supplier. It was directed to reassign the T-head bolt production at a higher cost to its own employees. In *Pet Milk Co.*,<sup>9</sup> a company violated its labor agreement when it contracted with a trucking company to ship ice cream mix, previously shipped by railroad. The company was directed to employ its own drivers and ship the mix in company-owned trucks. In *Bridgeport Brass Co.*<sup>10</sup> a company violated its labor agreement when it sold its railroad locomotive after it discovered that the servicing railroad would switch cars in its rail yard at no cost. The company was directed to rehire the locomotive crew and have it stand by even though there was no locomotive to operate. Finally, in *International Harvester Co.*,<sup>11</sup> a company violated its labor agreement when it moved work from one of its plants to another. It was directed to return the work to the former plant.

If these examples of restrictions upon the use of the services of others and the movement of work to different plants were isolated cases, the trade restriction effect could be dismissed as *de minimis*. However, there are many such arbitration awards. If such awards are sound, they will multiply and rigidity in our free economy will mushroom.

There are, of course, decisions which reject the reasoning behind these

5 Markham, *Competition in the European Common Market*, in *Factors* 135; Kravis, *Common Market—Lesson in Trade Expansion*, 40 HARV. BUS. REV. No. 2, Mar.-Apr. pp. 6, 12 (1962).

6 Adam Smith wrote that "The division of labor is limited by the extent of the market." SMITH, *WEALTH OF NATIONS*, BOOK I., Chap. III (1776).

7 For the theoretical argument behind the conclusion that specialization by independent suppliers of goods and services reduces costs and therefore prices, see STIGLER, *THE THEORY OF PRICE* 145-147 (1952).

8 36 Lab. Arb. 871 (R. R. Williams, 1961). See also, A. D. Julliard Co., Inc., 21 Lab. Arb. 713 (J. A. Hogan, 1953) where the subcontracting of certain work which would have reduced cost \$450,500 a year was not permitted.

9 33 Lab. Arb. 278 (W. P. McCoy, 1959).

10 25 Lab. Arb. 151 (J. F. Donnelly, S. F. Curry; W. L. Mottram dissenting, 1955).

11 24 Lab. Arb. 332 (D. L. Cole, 1955).

cases. In sharp contrast to the group of contract interpreters who imply restrictions on work movements, there is a substantial group who flatly refuse to do so.<sup>12</sup>

Between these two groups fall others. They do not subscribe to either view — apparently because they conclude the opposed views represent extremes. They approve of work movements to subcontractors or to other plants if the managerial action was taken in “good faith.”<sup>13</sup> However, what they individually mean by “good faith” varies considerably. The diversity of their views suggests that it may be the personal opinions of the arbitrators rather than sound contract construction principles that are the actual standards.

This diversity of views creates a condition which is unsound. What limitations do or do not exist under the terms of a labor agreement upon the movement of work to subcontractors or to other manufacturing locations should be predictable by a rational process of language construction. It should not depend upon the chance involved in the selection of the arbitrator who reviews the grievance.<sup>14</sup>

Competent analytical studies of work movement decisions have been published.<sup>15</sup> Various arbitrators have made exhaustive catalogues of the actions of other arbitrators.<sup>16</sup> However, these studies generally consist of an analysis of what arbitrators have, in fact, done, rather than an analysis of the logic of their actions. For example, D. A. Crawford, in his well-known paper presented to the National Academy of Arbitrators, admitted he attempted to rationalize the various awards into a pattern when he said:<sup>17</sup>

To return to the awards, if they are analyzed in terms of the factual decisions made rather than the doctrine articulated the fog of Omar Khayyam dispels, revealing a loaf of bread but no jug of wine. *A pattern of consistent decision making — however inconsistently articulated — emerges.*

This process of cataloguing results and then seeking a consistent rationale justifying these results is backward rationalization. It would seem more appropriate to analyze critically the “articulations” which arbitrators use to support a conclusion that the movement of work to a subcontractor or to another plant violated or did not violate the applicable labor agreement.

It is hoped that this analysis of “articulations” will permit some light to

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12 Cases cited notes 76-78 *infra*. The presence of opposed views was noted by Arbitrator R. Smith in Allis-Chalmers Mfg. Co., 39 Lab. Arb. 1213, 1217 (1962):

Both parties . . . make extensive reference to the decisions of other arbitrators in the area of subcontracting. . . . [I]t is literally possible to cite prior decisions which range throughout the entire spectrum of possibilities. Some, at the one extreme, hold that, absent a specific contractual restriction, the employer retains complete freedom in the matter. Others, at the other extreme, hold that the employer is prohibited from contracting out any work normally performed by unit employees.

13 See cases cited note 107 *infra*.

14 Arbitrator Elmer E. Hilpert noted that the cleavage between “schools of arbitrators” on implied restrictions on work movements is so sharp that one might conclude that the decision in such a case would depend on the “school” to which the arbitrator belonged. Allis-Chalmers Co., Cases No. 13-14, '59-'62 (1963).

15 See generally Crawford, *The Arbitration of Disputes over Subcontracting*, in CHALLENGES TO ARBITRATION, PROCEEDINGS OF THE 13TH ANNUAL MEETING OF NATIONAL ACADEMY OF ARBITRATORS 51 (1960).

16 Arbitrator Allen Dash made a well-publicized review of the cases in Celanese Corp. of America, 33 Lab. Arb. 925 (1959).

17 Crawford, *op. cit. supra* note 15, at 67.

pierce the clouds of confusion surrounding arbitration decisions in this area. The first part of this analysis will consider the construction theories which arbitrators have applied; the second part will consider the possible conflicts which may exist between a finding by an arbitrator that a labor contract prevents one employer from doing business with another and some fundamental legal and economic doctrines.

## I

### THE RATIONALE OF ARBITRATORS AND JUDGES IN "WORK MOVEMENT" DECISIONS

Although the contract construction theories used in the work movement cases run through the entire spectrum of possibilities, these theories can be grouped for analysis. The first group to be considered are the construction theories supporting an implied restriction on "work movements." Then, theories of those who refuse to imply restrictions will be analyzed. Finally, the theories of those who would permit work movements made in good faith will be explored.

#### *A. Theories Supporting Implied Restrictions*

Where labor agreements contain no explicit contractual language to bar work from flowing to subcontractors or lower cost plants,<sup>18</sup> those arbitrators and judges, who imply restrictions, have turned to one, or a combination of several standard labor contract clauses to find the implied contractual intention to limit subcontracting or work transfer.<sup>19</sup> The standard provisions of labor agreements most often used, singly or in combination, as the "source" of the restriction are: (1) The recognition clause; (2) The seniority clause; (3) The list of job classifications; (4) The union shop clause.

Recognition and seniority clauses and job classification lists are found in all labor agreements. Union shop clauses are standard clauses in the labor agreements in many industries.

If it follows that these standard clauses, singly or in combination, can prevent companies (1) from subcontracting work to specialists to reduce costs,

<sup>18</sup> Explicit contractual limitations on subcontracting are rare. A recent study by the Bureau of Labor Statistics reported that only four out of the 1,687 collective bargaining agreements examined contained provisions expressly forbidding subcontracting. U. S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, BULLETIN No. 1304, *Subcontracting Clauses in Major Collective Bargaining Agreements* 4 (1961). Where express prohibitions on work movement have been incorporated, their legality might well be questioned under Section 8(e) of the National Labor Relations Act and the antitrust laws. See the text accompanying notes 121-67. See Philadelphia Dress Joint Board v. Sidele Fashions, Inc., 187 F. Supp. 97 (E.D. Pa. 1960); Selb. Mfg. Co., 37 Lab. Arb. 834 (J. M. Klamon, 1961); but see Carey v. General Electric Co., 50 L.R.R.M. 2119 (S.D.N.Y. 1962).

<sup>19</sup> Sometimes, a restriction is found without identification of its contractual source. E.g., Vulcan Rivet & Bolt Corp., 36 Lab. Arb. 871 (R. R. Williams, 1961). In this case the arbitrator's finding that subcontracting work was improper was based on the following erroneous conclusion as to the meaning of the U.S. Supreme Court decision in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960):

Where the agreement contains no specific reference to contracting out of work, it has been held by the United States Supreme Court that, since the agreement does not allow contracting out, the employer may not unilaterally contract out the work within the job classification covered by the agreement. 36 Lab. Arb. at 872.

No contractual language was relied on by Arbitrator J. Fred Holly when he implied a limitation on subcontracting, stating it was the current popular view in *Warrior & Gulf Navigation Co.* 36 Lab. Arb. 695 (1961). This award was rendered after the company lost the nonarbitrability issue before the Supreme Court. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

or (2) from transferring work to more efficient plants to reduce costs, the resulting restriction on industrial efficiency will rapidly spread throughout unionized industry. The barriers on trade that would be created would be similar to tariff walls surrounding each unionized plant preventing external competition from attacking the high costs within. Before concluding that unionized plants should be considered immunized from such competition, the rationale underlying the implied restrictions based on each standard labor agreement clause relied upon as the foundation for the restriction should be critically examined.

1. *The Recognition Clause As a Basis For An Implied Restriction on Work Movements.*—The “recognition clause” is the statement in a labor agreement that the employer recognizes a particular union as the exclusive bargaining agent of employees in the appropriate unit represented by the union. Arbitrators have said that this clause implies an agreement that the employer will not, by managerial decision, remove work from the employees in the appropriate unit by subcontracting it to others.<sup>20</sup> They have said that unless there is this implied agreement not to remove work there could be “a violation of the spirit, intent and purpose of such collective agreement”;<sup>21</sup> the unit could be emasculated<sup>22</sup> or shrunk;<sup>23</sup> the entire agreement could be nullified.<sup>24</sup>

Arbitrator C. R. Schedler in *U. S. Potash Co.*<sup>25</sup> articulated this theory, saying:

[T]here is no express language either prohibiting or *authorizing* contracting out. What is more significant is that the contract contains a clause recognizing the Union. . . . The infraction here is in the unavoidable effect on these rights. To me it is clear that the work belonged to the unit, which contained employees fully capable of executing it. . . . [T]he contracting out had the inevitable impact of derogating the Union's status as recognized exclusive representative.<sup>26</sup>

20 Recognition clause as a basis for the restriction: *U. S. Potash Co.*, 37 Lab. Arb. 442 (C. R. Schedler, 1961); *Mead Paper Corp.*, 37 Lab. Arb. 342 (L. T. Hawley, 1961); *Container Corp. of America*, 37 Lab. Arb. 252 (H. T. Dworet, 1961); *Vulcan Rivet & Bolt Corp.*, 36 Lab. Arb. 871 (R. R. Williams, 1961); *Socony Mobil Oil Co.*, 36 Lab. Arb. 631 (R. G. McIntosh, 1960); *Gulf Oil Corp.*, 33 Lab. Arb. 852 (D. A. Crawford, 1959); *Continental Can Co.* 7 Basic Steel Arb. 4975 (M. H. Schmidt, 1959); *Pet Milk Co.*, 33 Lab. Arb. 278 (W. P. McCoy, 1959); *Electric Auto-Lite Co.*, 30 Lab. Arb. 449 (A. R. Marshall, 1958); *Arkansas-Best Freight System, Inc.*, 30 Lab. Arb. 26 (H. W. Hoel, 1957) (dictum); *Continental Can Co.*, 29 Lab. Arb. 67 (J. F. Sembower, 1956); *Thompson Grinder Co.*, 27 Lab. Arb. 671 (W. P. McCoy, 1956); *Temco Aircraft Corp.*, 27 Lab. Arb. 233 (L. V. Larson, 1956); *Bridgeport Brass Co.*, 25 Lab. Arb. 151 (J. F. Donnelly and S. F. Curry; W. L. Mottram dissenting, 1955); *General Metals Corp.*, 25 Lab. Arb. 118 (M. Lennard, 1955); *Weber Aircraft Co.*, 24 Lab. Arb. 821 (E. A. Jones, 1955); *Devoe & Reynolds*, 22 Lab. Arb. 608 (A. R. Porter, 1954); *Koppers Co., Inc.*, 22 Lab. Arb. 124 (B. M. Reid, 1954); *Journal Publishing Co.*, 22 Lab. Arb. 108 (H. Seering, Chmn., S. L. Wycoff, J. B. Abramson; W. W. Knight and W. D. Rodbury dissenting, 1954); *A. D. Julliard*, 21 Lab. Arb. 713 (J. A. Hogan, 1953); *Stockholders Publishing Co., Inc.*, 16 Lab. Arb. 644 (B. Aaron, 1951); *Parke Davis & Co.*, 15 Lab. Arb. 111 (I. B. Scheiber, 1950); *Celanese Corp. of America*, 14 Lab. Arb. 31 (S. Wolff, 1950).

21 *Parke Davis & Co.*, 15 Lab. Arb. 111, 115 (I. B. Scheiber, 1950).

22 *Gulf Oil Corp.*, 33 Lab. Arb. 852, 855 (D. A. Crawford, 1959).

23 *Electric Auto-Lite Co.*, 30 Lab. Arb. 449, 454 (A. R. Marshall, 1958).

24 *Thompson Grinder Co., Inc.*, 27 Lab. Arb. 671, 674 (W. P. McCoy, 1956).

25 37 Lab. Arb. 442 (1961).

26 *Id.* at 448.

Likewise, Arbitrator W. P. McCoy in *Pet Milk Co.*<sup>27</sup> espoused the same view that the act of recognition and bargaining with a union denies to the employer the right to subcontract work:

A company and union do not bargain for wages, hours, overtime, etc., in a vacuum. They bargain for the performance of certain work, and set the terms for such performance. If, having set those terms, the company can avoid compliance by the simple device of contracting, the entire contract could become a nullity . . .<sup>28</sup>

Of the several contractual provisions adopted as a basis for a finding of an implied limitation preventing the movement of work by subcontracting or transfer, the recognition clause should be the least susceptible to that interpretation. The recognition clause is only a reflection of the obligation imposed upon the employer by the National Labor Relations Act. By that Act, an employer must recognize a union which represents a majority of his employees in an appropriate unit.<sup>29</sup> Certification by the National Labor Relations Board makes the incorporation of a recognition clause into the labor agreement an absolute obligation. A refusal to do so would then be bad faith bargaining.<sup>30</sup>

It is therefore grossly unrealistic to assume that the employer intended to create a limitation preventing his dealing with subcontractors or moving work to another plant when a recognition clause, which is merely a reflection of a legal requirement, is included in the labor agreement. This clause is the *only* clause in a labor agreement that is completely nonvolitional.

The view that the legally-required recognition clause is merely descriptive of the group of employees represented by the union, and, hence, cannot be considered a clause creating rights is confirmed by the decisions of the National Labor Relations Board. In *Plumbing Contractors Association*,<sup>31</sup> the Board said:

As the Board has heretofore held, and as we here reiterate, a Board certification in a representation proceeding is not a jurisdictional award; it is merely a determination that a majority of the employees in an appropriate unit have selected a particular labor organization as their representative for purposes of collective bargaining. . . . [T]his determination by the Board does not freeze the duties or work tasks of the employees in the unit found appropriate.<sup>32</sup> (Footnotes omitted.)

This same reasoning is followed in unfair labor practice proceedings. In *United Steelworkers*,<sup>33</sup> the union picketed and filed a charge because work was contracted out. The Board found no legal restriction against "contracting out" despite the fact that the agreement contained a standard "recognition clause."

Courts have reacted similarly to the assertion that a recognition clause

27 33 Lab. Arb. 278 (1959).

28 *Id.* at 279.

29 NLRB v. Taitel, 261 F.2d 1 (7th Cir. 1958), cert. denied, 359 U.S. 944 (1959).

30 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).

31 93 N.L.R.B. 1081 (1951).

32 *Id.* at 1087. *Accord*, Heating, Piping & Air Conditioning Contractors, Cincinnati Association, 110 N.L.R.B. 261 (1954); General Aniline & Film Corp., 89 N.L.R.B. 467 (1950).

33 127 N.L.R.B. 823 (1960), *enfd.*, 294 F.2d 256 (2d Cir. 1961).

supports a restriction on contracting out work. Judge Aldrich said in *Local 1509, Amalgamated Ass'n of Street Electric Ry. Workers v. Eastern Massachusetts Street Ry.*<sup>34</sup>

I hold that the union recognition clause and the classification clause do not even raise an arbitrable question as to the defendant's obligation not to contract out fare box work.

In one of the earliest reported arbitration cases concerning subcontracting Emanuel Stein rejected the claim that the recognition clause prevented the employer from abolishing the jobs of its guards and employing an outside property protection service.<sup>35</sup> He brushed aside as irrelevant the claim that the employer's action was vulnerable because it would "shrink or alter the bargaining unit." Many arbitrators since then have done the same.<sup>36</sup>

The purpose of a recognition clause was well explained by Arbitrator M. Beatty in *American Sugar Refining Co.*<sup>37</sup> He said that clause did not create a guarantee that work once performed by employees in an appropriate unit would always be done by them:

The purpose of this clause is to assure fulfillment of the Company's legal obligation to bargain with this Union and assures that this particular Union may represent all hourly paid employees in this plant. It is stretching the point, I believe, to argue that it also means that the Union has jurisdiction over all work which this employer has or which is customarily done by these employees, or that all such work will remain with these employees. The contract does not provide jurisdiction over work or detract substantially from management's customary right to direct the working force, or to determine what work will be done and how.<sup>38</sup>

Another complete answer to those who seek to base a restriction on work movements on the recognition clause is found in an award by Arbitrator Herman A. Gray in *Hearst Consolidated Publications, Inc.*<sup>39</sup>

It is the Guild's contention that the recognition clause constitutes an agreement on the part of the Company that all work coming within the designated occupations will remain in the hands of employees for whom the Guild speaks and who will, therefore, continue to enjoy the coverage and the benefits of the Guild's collective agreement. The Guild cites a number of decisions by arbitrators

34 162 F. Supp. 942, 944 (D. Mass. 1958). See also *Amalgamated Assn. of Street Electric Ry. Workers v. Greyhound Corp.*, 231 F.2d 585 (5th Cir. 1956).

35 *Cords, Ltd., Inc.*, 7 Lab. Arb. 748 (E. Stein, 1947).

36 The recognition clause was specifically rejected as a basis for restricting work movement in the following cases: *Allis-Chalmers Co.*, Cases No. 13, 14, '59-'62 (E. Hilpert, 1963); *Olin Mathieson Chemical Co.*, 36 Lab. Arb. 1147 (T. J. McDermott, 1961); *American Sugar Refining Co.*, 36 Lab. Arb. 409 (D. A. Crawford, 1960); *Columbus Bolt & Forging Co.*, 35 Lab. Arb. 397 (V. L. Stouffer, 1960); *Black-Clawson Co.*, 34 Lab. Arb. 215 (E. R. Teple, 1960); *Minneapolis-Moline Co.*, 33 Lab. Arb. 893 (P. M. Kelliher, 1960); *Lukens Steel Co.*, 33 Lab. Arb. 228 (D. A. Crawford, 1959); *Reynolds Metals Co.*, 32 Lab. Arb. 815 (C. W. Anrod, 1959); *Cooperative Farm Chemicals Ass'n*, 31 Lab. Arb. 482 (A. L. Coffey, 1958); *Richmond Baking Co.*, 30 Lab. Arb. 493 (C. A. Warns, 1957); *Dairy Workers v. Detroit Creamery Co.*, 26 Lab. Arb. 677 (Mich. Cir. Ct., Wayne Co., 1956); *Jones & Laughlin Steel Co.*, 26 Lab. Arb. 568 (S. L. Cahn, 1956); *Carbide and Carbon Chemicals Co.*, 24 Lab. Arb. 158 (P. M. Kelliher, 1955); *Vickers, Inc.*, 24 Lab. Arb. 121 (R. W. Haughton, 1955); *Dalmo Victor Co.*, 24 Lab. Arb. 33 (S. Kagel, 1954); *National Sugar Refining Co.*, 13 Lab. Arb. 991 (I. R. Feinberg, 1949).

37 37 Lab. Arb. 334 (1961).

38 *Id.* at 336.

39 26 Lab. Arb. 723, 725 (1956).



who, in like cases coming before them, have decided on the basis of reasoning very like that advanced by the Guild, that the recognition clause operates to bar an employer from shifting any of the work coming within the purview of the agreement to a subcontractor whose own employees then proceed to perform the work, but not under the terms of the agreement since they are not the employees of the contracting employer.

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

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

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

And it is most significant that Arbitrator Saul Wallen, who has been referred to as the person who probably set off the implied limitation controversy,<sup>40</sup> now rejects the view that a recognition clause supports such a limitation. In *Hershey Chocolate Corp.*,<sup>41</sup> Wallen said:

The contracting out work, . . . does not violate the recognition clause. That clause binds the employer to recognize the Union as the bargaining agent for those employees whom he employs to produce the goods or services in which he deals. It does not bind him to continue unchanged his mode of doing business nor does it automatically bar him, regardless of circumstances, from purchasing services formerly supplied by his own employees.<sup>42</sup>

The recognition clause, derived as it is from the employer's obligation under the National Labor Relations Act to recognize a union as the representative of certain people describes a group of *people* and not *work*. These

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40 See *Olin Mathieson Chemical Co.*, 36 Lab. Arb. 1147 (T. J. McDermott, 1961).

41 28 Lab. Arb. 491 (1957).

42 *Id.* at 493.

clauses appeared universally in collective bargaining agreements soon after the enactment of the Wagner Act, and "contracting out" was then widespread in industry. As Arbitrator Elmer Hilpert pointed out, "it is asking too much to ask one to assume that in one swell [sic] swoop," nearly 30 years after the law required the clause that it really was an agreement by the management of a unionized plant to surrender the right to subcontract work or move work to lower cost plants, which rights had traditionally been "an all important and widely used managerial power."<sup>43</sup>

2. *The Seniority Clause As The Basis For An Implied Restriction on Work Movements.*—The seniority clause in a labor agreement establishes a preference for longer service employees over shorter service employees to the work made available by the employer at a particular location. This clause provides that the latter (shorter service employees) will be laid off before the former when a reduction in work occurs. Thus, the typical seniority clause recognizes that the volume of work available at a particular location may diminish.

In 1947, in *New Britain Machine Co.*,<sup>44</sup> Arbitrator S. Wallen, indulging in a flight of rhetoric, found that subcontracting violated the seniority clause, saying, "If wages is the heart of the labor agreement, job security may be considered its soul."<sup>45</sup> It may have been these words that initiated the use of the seniority clause as a basis for an implied restriction on subcontracting work.<sup>46</sup> In any event, it appears that these words have risen to haunt Arbitrator Wallen, for ten years later he has qualified, if not reversed, his earlier view. In *Hershey Chocolate Corp.*,<sup>47</sup> he said:

[T]he seniority provisions guarantee, not a constant employment opportunity for each category of employees covered by the contract, but a set of rules for the parcelling out of employment opportunities, the availability of which can be affected by diminution of work volume due to changes in the market, due to changes in technology, or due to changes in the realm of good faith managerial decision-making.<sup>48</sup>

That seniority clauses only establish relative rights to available work and are not in any sense creators of contractual claims to work was explained by Arbitrator M. Beatty in *American Sugar Refining Co.*<sup>49</sup> where he noted:

The seniority provisions of a working agreement are for the purpose of determining relative status of employees, which status entitles senior employees to certain preferences for purposes of pro-

43 Allis-Chalmers Mfg. Co., Cases No. 13-14, '59-'62 (Elmer E. Hilpert, 1963).

44 8 Lab. Arb. 720 (1947).

45 *Id.* at 722.

46 Seniority Clause as basis for the restriction: *Zdanok v. Glidden Co.*, 288 F.2d 99 (2d Cir. 1961), *cert. denied*, 368 U.S. 814 (1961); *Selb Mfg. Co.*, 37 Lab. Arb. 834 (J. M. Klamon, B. A. Barken, C. Bingamon, 1961); *U. S. Potash Co.*, 37 Lab. Arb. 442 (C. R. Schedler, 1961); *Mead Paper Corp.*, 37 Lab. Arb. 342 (L. T. Hawley, 1961); *Metropolitan Brick Co.*, 34 Lab. Arb. 394 (E. R. Teple, 1960) (displaced employee cannot be paid lower rate because of specific provisions); *A. D. Julliard Co., Inc.*, 21 Lab. Arb. 713 (J. A. Hogan, 1953); *New Britain Machine Co.*, 8 Lab. Arb. 720 (S. Wallen, W. Knauss, and H. Kosinski, 1947).

47 28 Lab. Arb. 491 (1957).

48 *Id.* at 493.

49 37 Lab. Arb. 334 (1961).

motion, layoff, recall, etc. Seniority carries no guarantee that jobs will always be provided even for the most senior employees. . . . It is likely that neither party, the Company nor the Union, contemplated seniority as having any relevancy to contracting-out at the time they wrote the contract. In my opinion the seniority provisions are not relevant to this issue.<sup>50</sup>

A seniority clause explains which employees will be laid off when work is reduced. It is not an agreement not to reduce work. Thus, the rejection of this basis for an implied restriction on subcontracting by many arbitrators appears to be based on a realistic analysis of the intention of the parties when they incorporated the seniority clause into the agreement.<sup>51</sup>

The most recent resurgence of the view that an employee obtains a right—in the nature of a property right—in the work itself from a seniority clause occurred when Judge Madden, sitting temporarily in the Second [Circuit] Court of Appeals, released the opinion in *Zdanok v. Glidden Co.*<sup>52</sup> The Company closed down a plant in Long Island, New York where its “Durkees Dressing” had been manufactured and commenced manufacturing the same product at a plant in Pennsylvania.

The language Judge Madden used caused a stir. He indicated that “rights” to work are earned, that they arise by implication from the total agreement as well as from the seniority clause and that they continue to exist even after the collective bargaining agreement expires. In a dissenting opinion, Chief Judge Lumbard pointed out how this view departed from established doctrine.<sup>53</sup>

The federal cases hold that seniority is not inherent in the employment relationship but arises out of the contract. . . . If rights are to persist beyond the term of the collective-bargaining agreement, the agreement must so provide or be susceptible of such construction.

Some clarification is now piercing the confusion. The theory of Judge Madden is being rejected, distinguished and explained away. The first federal court rejection of the *Glidden* theory was by a District Court in New Jersey.

<sup>50</sup> *Id.* at 336.

<sup>51</sup> The view that a typical seniority clause supports an implied restriction on subcontracting was specifically rejected in *Tungsten Mining Corp.*, 19 Lab. Arb. 503 (D. B. Maggs, 1952); *Phillips Pipe Line Co.*, 20 Lab. Arb. 432 (A. L. Coffey, 1953); *Carbide and Carbon Chemicals Co.*, 24 Lab. Arb. 158 (P. M. Kelliher, 1955); *American Sugar Refining Co.*, 36 Lab. Arb. 409 (D. A. Crawford, 1960); *Reactive Metals, Inc.*, 62-2 ARB ¶8495 (T. G. Begley, 1962); *Allis-Chalmers Mfg. Co.*, Cases No. 13-14; '59-'62 (E. E. Hilpert, 1962).

<sup>52</sup> 288 F.2d 99 (2d Cir. 1961), *cert. denied* 368 U.S. 814 (1961). The *Glidden* case is returning to the Second Circuit, having been certified back on the question of whether federal law rather than state law should have been applied in view of the Supreme Court's holding in *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

<sup>53</sup> *Id.* at 105. The pre-*Glidden* law referred to by Judge Lumbard had been enunciated in the Fifth, Sixth and Seventh Circuits. In *System Federation No. 59 v. Louisiana & Ark. Ry.*, 119 F.2d 509, 515 (5th Cir. 1941), the Fifth Circuit said that “collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract, beyond its life. . . .” The Sixth Circuit said in *Elder v. New York Central RR.*, 152 F.2d 361 (6th Cir. 1945), that seniority rights were only created by the express language of the agreement and did not survive the termination of the agreement which had created them. The Seventh Circuit said in *International Association of Machinists v. Servel, Inc.*, 268 F.2d 692 (7th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959), that seniority rights are limited to those clearly expressed and do not survive termination. See also *UAW v. Federal Pacific Electric Co.*, 36 L.R.R.M. 2357 (D. Conn. 1955).

In *Giordano v. Mack Trucks, Inc.*,<sup>54</sup> the employer moved work from a plant in New Jersey to one in Maryland. A group of employees dissatisfied with a negotiated separation agreement, sued for damages, claiming that they had vested rights in the work and that these rights under the *Glidden* theory survived the expired collective agreement. The court in its opinion rejected the theory of "vested rights" citing the settled law prior to *Glidden*.

The Sixth Circuit in *Oddie v. Ross Gear & Tool Co.*<sup>55</sup> reversed a District Court that had blindly followed Judge Madden's view. That court, considering whether employees' contractual rights had been violated when a company moved work from a plant it closed in Michigan to one in Tennessee, said:

Accordingly, we do not have the question of whether plaintiffs' "vested" rights can be validly terminated by relocation of the plant in Tennessee. Rather, it is the question of what rights, if any, the plaintiffs have under the express provisions of the bargaining agreement upon the relocation of the plant in Tennessee. If no rights were acquired under the bargaining agreement as employees at the Tennessee plant, it necessarily follows that no rights have been cut off.<sup>56</sup>

Although certiorari was denied in the *Ross Gear* case,<sup>57</sup> little significance can be given to this denial because certiorari also was denied on the merits of the *Glidden* decision.<sup>58</sup> In view of the two denials one could conclude that the Supreme Court considers *Glidden* and *Ross Gear* to be only interpretations of contract language and does not feel it is the Court's function to review contract construction cases.

The beginning of a future disregard of the *Glidden* doctrine by the Second Circuit itself is clearly indicated in *Procter and Gamble Independent Union v. Procter and Gamble Mfg. Co.*<sup>59</sup> Judge Paul Hays said the *Glidden* holding did not create implied vested rights in work, but was merely an interpretation of unique contract language.

Since we hold that *Zdanok* is inapplicable to the case at bar, we have no occasion to reexamine the principle on which that decision was based. We believe, however, that we should say that *Zdanok* cannot properly be read to govern situations which are not strictly within the facts there presented. . . . [T]he case cannot be made to stand in any general way for the survival of contractual obligations during any period beyond the period with which they were expressly undertaken.<sup>60</sup>

Quite uniformly arbitrators have been unimpressed by the *Glidden* case.

<sup>54</sup> 49 L.R.R.M. 3082 (D.N.J. 1962).

<sup>55</sup> 305 F.2d 143 (6th Cir. 1962). On the basis of this decision the Federal District Court for Northern Ohio dismissed an employee suit for damages in *Slenezka v. Hoover Ball and Bearing Company*, 215 F. Supp. 761 (1963). The Sixth Circuit's refusal to follow the *Glidden* doctrine in *Ross Gear* caused at least the Williams County Circuit Court in Illinois to reverse a *Glidden* type decision on its own motion. *Bradley v. Sangamo Electric Co.*, 129 Daily Labor Report: D-1, June 15, 1962.

<sup>56</sup> *Oddie v. Ross Gear & Tool Co.*, 305 F.2d 143, 149 (1962).

<sup>57</sup> 371 U.S. 941 (1962).

<sup>58</sup> 368 U.S. 814 (1961).

<sup>59</sup> 312 F.2d 181 (2d Cir. 1962).

<sup>60</sup> *Id.* at 186.

Arbitrator R. G. Howlett in *Sivyer Steel Casting Co.*,<sup>61</sup> siding with the Sixth Circuit, said:

I think Judge Miller in *Ross Gear & Tool* and Judge Lumbard in *Glidden* [dissenting] delivered opinions more consistent with recognized relationships between employers and employees and the unions representing the latter than Judge Madden did. . . .<sup>62</sup>

Arbitrator Peter M. Kelliher added his rejection in *United Packers, Inc.*<sup>63</sup> and Arbitrator Clair V. Duff his in *H. H. Robertson Co.*<sup>64</sup> In the latter case the employees claimed the right to follow transferred work from one division to another of the same employer. Duff held that the seniority clause established only relative employment rights at the particular division and rejected the claim saying no "vested rights" in the transferred work had been created. He attempted to distinguish the *Glidden* decision on the basis that it involved a complete discontinuance of manufacturing at one location, whereas in his case only a 10% discontinuance took place, and then said:

To expand and extend the legal reasoning set forth in the recent plant removal cases, to the fact situation here present, would require different contractual provisions than are here present. An Arbitrator is not empowered to modify the Contract under the guise of construction. If such changes in the Contract are desired they must be sought at the bargaining table.<sup>65</sup>

Therefore, it is submitted that an analysis of the purpose and language of the typical seniority clause plus the current court and arbitration authority permits the conclusion that a seniority clause does not support an implied restriction on work movements to subcontractors or to other plants of the same employer.

3. *The List of Job Classifications As the Basis for an Implied Limitation on Work Movement.*—The "job classification list" is the list of the job classifications and their wage rates. Typically it is attached to the labor agreement as an appendix. This list of rates establishes the hourly rates of pay for employees who perform the work covered by each job classification if there is work in that classification to perform. However, arbitrators have said that where such classifications of work are listed, there is the "assumption that . . . work in these categories . . . would be performed by those . . . covered by the agreement,"<sup>66</sup> and thus, there is an implied agreement not to move work to subcontractors or other plants.

The award by Arbitrator John F. Sembower in *Continental Can Co.*<sup>67</sup>

61 39 Lab. Arb. 449 (1962).

62 *Id.* at 455.

63 38 Lab. Arb. 619 (1962).

64 37 Lab. Arb. 928 (1962).

65 *Id.* at 933.

66 Parke, Davis & Co., 15 Lab. Arb. 111, 115 (I. B. Scheiber, 1950).

67 29 Lab. Arb. 67 (1956). Other cases basing the restriction on the list of job classifications are: Container Corp. of America, 37 Lab. Arb. 252 (H. T. Dworet, 1961); Mead Paper Corp., 37 Lab. Arb. 342 (L. T. Hawley, 1961); U. S. Potash Co., 37 Lab. Arb. 442 (C. R. Schedler, 1961); Krey Packing Co., 32 Lab. Arb. 68 (J. M. Klamon, 1959); Thompson Grinder Co., 27 Lab. Arb. 671 (W. P. McCoy, 1956); East Texas Salt Water Disposal Co., 22 Lab. Arb. 484 (C. Emery, 1953).

is an example of the use of the "job classification list" as the basis for implying a limitation on contracting out work.

The agreement is not silent on the matter of subcontracting. If it does not speak out on it, it at least whispers when it spells out in appendix A that janitors are included in the bargaining unit. . . . *When the Company specified job classifications in the recognition of the bargaining unit, it in effect gives up its right to subcontract in that field unless something is added in the way of a contract provision giving the right to subcontract. . . .*<sup>68</sup> (Emphasis added)

Arbitrators such as V. L. Stouffer have rejected such a claim. In *Columbus Bolt & Forging Co.*<sup>69</sup> Arbitrator Stouffer said:

[T]he list of job classifications contains nothing to indicate that any particular number of jobs will be maintained or that all work described in any particular classification will be done exclusively by Employees of the Company.<sup>70</sup>

It is submitted that a mere list of job classifications should be construed to be a list of the wage rates paid if certain work is performed, and not an implied commitment that the management will not purchase goods or services from others.

4. *The Union Shop Clause As the Basis For An Implied Limitation on the Right to Move Work.* — In a two-to-one decision, the Seventh Circuit Court of Appeals held in *United Auto Workers v. Webster Electric Company*<sup>71</sup> that a company could not, under its union shop contract with the UAW, contract out the janitorial work previously done by three bargaining unit employees. The majority opinion, noting that the contract contained no express prohibition on contracting out, said:

But for the agreement, defendant [Webster] would have that right, [to subcontract] as an incident of management. However, there is an agreement providing for a union shop. The employees covered by that agreement are described as *all* defendant's employees, with certain irrelevant exceptions. This classification includes the office janitorial employees. Thus they are required to be members of plaintiff union. If they were to be excluded the agreement should have said so. . . . If this small group can be thus replaced, then other groups could meet the same fate, and eventually it would be possible to deplete a major part of the "protected" union shop force. We hold it would be inconsistent with the basic purpose of the agreement to approve the contracting out of the janitorial jobs here involved.<sup>72</sup>

Judge Knoch, entered a strong dissent, stating in part:

The agreement between the union and management was the result of collective bargaining. A long line of cases provided that management had the right to contract out work unless that right

68 *Continental Can Co.*, 29 Lab. Arb. 67, 73 (1956).

69 35 Lab. Arb. 397 (1960). To the same effect see *Square D Co.*, 37 Lab. Arb. 892 (E. R. Teple, 1961); *American Sugar Refining Co.*, 37 Lab. Arb. 334 (M. Beatty, 1961); *Black-Clawson Co.*, 34 Lab. Arb. 215 (E. R. Teple, 1960); *Hertner Electric Co.*, 25 Lab. Arb. 281 (S. S. Kates, 1955).

70 *Columbus Bolt & Forging Co.*, 35 Lab. Arb. 397, 402 (1960).

71 299 F.2d 195 (7th Cir. 1961). See also *Coulin v. Carey Cadillac Renting Co.*, 50 L.R.R.M. 2888 (S.D.N.Y. 1962) (Cashin, J. indicated agreement with *Webster Electric* rationale) and *Continental Can Co.*, 7 Basic Steel Arb. 4975 (M. H. Schmidt, 1959).

72 299 F.2d 195, 197 (7th Cir. 1961).

was expressly limited by the terms of the agreement. The majority hold that these cases have not been reversed by the ruling in *Warrior*. Yet the majority would give the union the benefit of provisions which it may, or may not have sought, but which, in any event, it did not secure.<sup>73</sup>

The question of contract violation came before the court because the labor agreement contained no arbitration clause. It is submitted that the view that an agreement between a company and a union that new employees must join the union also is an agreement between them that the company cannot purchase goods or services from others comes as a complete surprise to company and union negotiators generally.

The view appears to be unique. No arbitration decision has been found wherein a restriction on subcontracting work has been implied on this theory. The opinion in *Ashland Oil & Refining Co.*,<sup>74</sup> an award rendered years prior to the *Webster* case, specifically rejected the argument. Arbitrator V. E. Wardlaw explained in that case that a union shop clause providing "that work performed by employees as defined herein shall be by members of the union . . ." means only that whenever an *employee* performs work covered by the agreement, the *employee* shall belong to the union. Arbitrator R. Smith specifically rejected the Court's reasoning in *Allis-Chalmers*,<sup>75</sup> saying:

Insofar as *UAW v. Webster Electric Company*, 299 F.2d 195, held otherwise, the Referee, with deference, disagrees with the conclusion there reached. The Court in that case predicated its ruling on what it conceived to be the import of the "union shop" provision of the labor agreement which was before it for consideration. In the Referee's opinion, an absolute prohibition on contracting out cannot properly be implied from such a provision.

Again it is submitted that a "union shop clause" cannot properly support a restriction on subcontracting or work transfer between plants.

### B. *The Right to Move Work As A Reserved Managerial Right*

Those arbitrators who refuse to imply restrictions apply basically a simple, straightforward view to the effect that the management has reserved the right to move work out of a bargaining unit, either to other plants or to subcontractors, unless by specific contractual language this right has been limited.<sup>76</sup> They refer to the "management clause" in a labor agreement which typically provides that the management reserves all managerial rights not specifically

73 *Id.* at 198.

74 8 Lab. Arb. 465 (1947).

75 *Allis-Chalmers Mfg. Co.*, 39 Lab. Arb. 1213, 1217 (1962).

76 *ACF Industries*, 38 Lab. Arb. 14 (J. S. Williams, 1962); *Allis-Chalmers Mfg. Co.*, 37 Lab. Arb. 944 (D. J. White, 1961); *Harnishfeger Corp.*, 37 Lab. Arb. 685 (G. H. Young, 1961); *Los Angeles Standard Rubber Co.*, 37 Lab. Arb. 784 (H. LeBaron, 1961); *Beaunit Mills, Inc.*, 37 Lab. Arb. 366 (H. T. Dworet, 1961); *American Sugar Refining Co.*, 37 Lab. Arb. 334 (M. Beatty, 1961); *Rockwell-Standard Corp.*, 36 Lab. Arb. 1447 (G. S. Bradley, 1961); *Edward Balf Co.*, 36 Lab. Arb. 1396 (J. F. Donnelly, 1961); *Reynolds Metals Co.*, 36 Lab. Arb. 1341 (H. Wycoff, 1961); *Allegheny Ludlum Steel Corp.*, 36 Lab. Arb. 912 (M. S. Ryder, 1961); *Volunteer Electric Cooperative*, 36 Lab. Arb. 787 (L. D. Redden, 1961); *Snyder Mining Co.*, 36 Lab. Arb. 861 (M. O. Graff, 1961); *West Virginia Pulp & Paper Co.*, 36 Lab. Arb. 137 (B. C. Roberts, 1960); *Columbus Bolt & Forging Co.*, 35 Lab. Arb. 397 (V. L. Stouffer, 1960); *Richmond Baking Co.*, 30 Lab. Arb. 493 (C. A. Warns, Jr., 1957); *American Airlines, Inc.*, 29 Lab. Arb. 594 (S. A. Wolf, 1957); *Waller Bros. Stone Co.*, 27 Lab. Arb. 704 (H. J. Dworkin, 1956); *Mallinckrodt Chemical Works*, 27 Lab. Arb. 530 (J. M. Klamon, 1956); *American Airlines, Inc.*, 27 Lab. Arb. 174 (S. A. Wolf, 1956);

limited (or bargained away) by some other provision of the agreement.<sup>77</sup> Even where no "management clause" is included, the view that the management retains all rights to manage not specifically limited by a provision of the labor agreement is still a controlling construction theory.<sup>78</sup>

Those who so construe a labor agreement feel strongly that their brother arbitrators are straying when they limit this normal managerial activity. Arbitrator M. Beatty, also a District Judge of Shawnee County, Kansas, expressed his conviction that those arbitrators who imply restrictions on work movement clauses are "in outer space and reading the stars instead of the contract."<sup>79</sup> In a more serious, but equally unsympathetic vein, Arbitrator P. M. Kelliher, in *Carbide and Carbon Chemicals Co.*,<sup>80</sup> noted:

It is a fundamental principle in the construction of Collective Bargaining Agreements that Management continues to retain those rights that it had prior to entrance into an effective Collective Bargaining Contract. A careful analysis of the current Collective Bargaining Agreement fails to disclose any language that can be reasonably interpreted as indicating an intention of the Parties that this Management thereby surrendered or limited its right to contract out maintenance work. . . . This Arbitration Board simply lacks the authority to, in effect, add an amendment to this Agreement placing such a restriction upon the Company's rights.

Arbitrator Elmer E. Hilpert stated this position forthrightly when he said:<sup>81</sup>

Admittedly, there is no provision in the agreement of these parties (as there are provisions in the agreements of some *other* parties) which *expressly* prohibits the Company from "contracting out" so-called "unit" work; *i.e.*, work which has been, traditionally, historically, or characteristically, done by "unit" employees; and, hence, the Union is compelled to contend that there is such an *implied* prohibition on the Company's "contracting out" for such work.

But it is axiomatic that, before a company enters into a collective bargaining agreement, it possesses, as a mere incident of its ownership of the business enterprise, inherent, plenary "man-

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Stix, Baer & Fuller Co., 27 Lab. Arb. 57 (J. M. Klamon, 1956); Parke, Davis & Co., 26 Lab. Arb. 438 (R. W. Haughton, 1956).

77 The simple "reservation of rights" interpretation of the typical management clause was well explained by Arbitrator P. Davis in *Illinois Bell Telephone Co.*, 15 Lab. Arb. 274, 280 (1950):

In any company-employee relationship situation prior to the appearance of a union and before the existence of a collective bargaining agreement, every authority, power and responsibility in all aspects of management is vested in the company and its authorized officials. The only restrictions upon the company in the area of labor-management relations are those imposed by federal, state or local legislative enactments, or ordinances. Aside from such restrictions, the company is in complete possession of all authority and power over its workers insofar as employment is concerned. When a union is formed and a collective bargaining agreement is signed, the original power and authority of the company is modified only to the degree that it voluntarily and specifically relinquishes facets of its power and authority. This principle is today firmly established in labor-management relations and in arbitration.

To the same effect see *Babcock & Wilcox Co.*, 26 Lab. Arb. 172 (S. S. Kates, 1956); *United Wallpaper, Inc.*, 25 Lab. Arb. 188 (J. F. Sembower, 1955).

78 *Kay Mfg. Co.*, 23 Lab. Arb. 797 (M. Wersing, 1954).

79 *American Sugar Refining Co.*, 37 Lab. Arb. 334, 338 (1961).

80 24 Lab. Arb. 158, 159 (1955).

81 *Allis-Chalmers Mfg. Co.*, Cases No. 13-14, '59-'62 (E. E. Hilpert, 1963).



agerial powers," which include the power so to "contract out," and that, after a company enters into a collective bargaining agreement, it still retains all such of its formerly-existent inherent, plenary managerial powers as were not proscribed, or restricted, in such agreement. When it enters into a collective bargaining agreement, a company, of course, "loses" such of its formerly-existent powers as were expressly proscribed, or restricted, in such agreement; but because it was the possessor of "inherent and plenary" powers, to begin with, a company "loses" additional powers by *implication* only if such implication is a "necessary" — in the sense of being an "inescapable" — one. In sum, although there may be *implied*, as well as *express*, limitations on a company's managerial powers in a collective bargaining agreement, a rule of "strict construction" — in "finding" such *implied* limitations — is to be applied.

No such *implied* limitation on the Company's power to "contract out" may be derived from the "recognition" clause in the parties' agreement \* \* \* on which the Union herein principally relies.

The fundamental invasion of the rights of management that is involved in the creation of restrictions by implication was pointed out by Arbitrator R. R. Williams in *Hercules Powder Co., Ltd.*<sup>82</sup>

Nowhere in the agreement is there to be found either expressly or by implication, any restriction upon the right of the company to have work covered by the job classifications performed by persons who are not its employees. . . . A company's right to make decisions affecting the management of its plant is founded in basic and fully accepted tenets of the common law; while this right may be contracted away or modified by agreement, it is not removed by inference. The federal courts have recognized the law to be that, where the agreement contains no ban upon such action, and where the company's action is not discriminatory, contracting out is a proper practice and right of management. *Timken Roller Bearing Co. v. NLRB*, 161 F.2d 949, 6th Circuit, 1947.

This simple construction has been followed many times by experienced arbitrators and is reported to be the generally accepted view.<sup>83</sup>

When courts have considered this matter they have supported the "reserved rights" view. For example, in *Local Union No. 600, UAW v. Ford Motor Co.*,<sup>84</sup> the Federal District Court of Michigan refused to imply a restriction on work movement, saying:

The Court has before it, as a part of the pleadings, a copy of the labor agreement which is the subject of this controversy. It is obvious that it was a carefully and laboriously prepared document, and that both the UAW-CIO and the Ford Motor Company

82 21 Lab. Arb. 330, 334 (1953).

83 *E.g.*, in *Los Angeles Standard Rubber Co.*, 37 Lab. Arb. 784, 786 (1961), Arbitrator H. LeBaron said:

The undersigned agrees with what appears to be the general holding of arbitrators on this subject and that is that absent a specific prohibition against subcontracting, management retains this right.

And Arbitrator T. G. Begley said in *Reactive Metals, Inc.* 62-2 ARB ¶ 8495 (1962):

The Arbitrator has read the arbitration decisions given to him by the Union and the Company, and he finds that the weight of the decisions as to subcontracting work is in favor of this Company due to the fact that the contract does not contain a specific provision prohibiting the Company from contracting out unit work.

84 113 F. Supp. 834 (E. D. Mich. 1953).

had the benefit of competent counsel and representatives in the negotiations. . . .

A reading of all the terms and conditions of this agreement leaves one with the unshakable impression that its framers fully intended to state clearly therein every point of importance in the minds of the contracting parties, yet the plaintiffs [the union] wish us to believe that there was a major area on a specific point, easily includable in the written contract, but not so included. . . . It is difficult to conceive of parties to a contract, who were as diligent in its preparation as these parties, purposely omitting a vital condition. The only possible conclusion that can be drawn is that such condition did not in fact exist.<sup>85</sup>

Therefore, without a specific limitation on the right to transfer work, a substantial number of contract interpreters hold, without equivocation, that the management has the right to transfer work by subcontract or otherwise. Such right to move work, they say, is one of the reserved rights.

### C. *The "Good Faith" or Middle-of-the-Road Approach*

The theories of those who say work can be subcontracted or moved to a new plant if the action was taken in good faith are the third group of theories. Hidden behind the semantics of "good faith" and "bad faith" are actually many variations in approach that need analysis.

Some arbitrators have held that the movement of work to a subcontractor was in "bad faith" where the "subcontractor" is not *in fact* a separate employer, but the original employer acting through a sham agent. Under established legal concepts, the use of a sham arrangement to avoid statutory obligations has often been stricken down.<sup>86</sup> A sham relationship designed to avoid contractual obligations should suffer the same fate. This principle was applied, in *Continental Can Co. Inc.*,<sup>87</sup> where Arbitrator J. F. Sembower, reacting adversely to such an arrangement, stated:

In scrutinizing subcontracting arrangements, arbitrators have shown an inclination to inquire into whether certain arrangements are, in fact, dealings with independent contractors or merely new employer-employee relationships. It can hardly be gainsaid that to come within the inherent rights of management it must be, in fact, an independent contractual relationship, not employer-employee.<sup>88</sup>

And in *Allis-Chalmers Mfg. Co.*,<sup>89</sup> a major factor in the approach of Arbitrator

85 *Id.* at 841-43.

86 See *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (beef boners who were paid by the hundredweight and called independent contractors, held to be "employees" under FLSA); *United States v. Silk*, 331 U.S. 704 (1947) (coal unloaders who were called independent contractors, held "employees" under Social Security Act).

87 29 Lab. Arb. 67 (1956).

88 *Id.* at 72. Arbitrator W. P. McCoy said he joined those arbitrators who imply restrictions on work movements in *Thompson Grinder Co.*, 27 Lab. Arb. 671 (1956), but the facts of that case showed that the so-called subcontractors were regular employees hired as "independent contractors" over the weekends at lower rates to clean machinery—an obvious sham arrangement. McCoy, however, did join those who restrict work movements by implication in *Pet Milk Co.*, 33 Lab. Arb. 278 (1959). Arbitrator Sidney A. Wolff explained that the maintenance of the same direction of and control over cafeteria workers after the subcontracting was a major consideration in striking down the arrangement in *Celanese Corp. of America*, 14 Lab. Arb. 31 (1950), when he distinguished that decision in *American Airlines, Inc.*, 27 Lab. Arb. 174 (1956).

89 37 Lab. Arb. 944 (1961).

D. J. White was the existence of a bona fide subcontracting relationship:

In any event, there is no question of lack of good faith in this case. On the evidence it is clear that the Company's move was a straight-forward affair; the subcontractor is bonafide, distinct and at arm's length from Allis-Chalmers as a business entity.<sup>90</sup>

Sham subcontracting situations involve an attempt to avoid contractual obligations and can be clearly considered "bad faith." But when one leaves this limited area, the semantics of "good faith" — "bad faith" lose all guidelines. Arbitrators are then in an uncharted sea. The tests used to determine whether a managerial action was in "good faith" or not have varied so greatly that, as Arbitrator Russell Smith observed, "the wide variation in the results of their [the numerous arbitrators'] deliberations of itself casts some doubt on the wisdom of such efforts. . . ."<sup>91</sup>

Arbitrator Smith concluded that in general "'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. . . ."<sup>92</sup> He then identified four instances where a movement of work to a subcontractor should be stricken down as "bad faith."<sup>93</sup>

Without attempting anything like a complete "catalog," the following would appear, at least prima facie, to be instances of bad faith: (1) To negotiate a collective agreement with the Union

90 *Id.* at 950.

91 Allis-Chalmers Mfg. Co., 39 Lab. Arb. 1213, 1219 (1962).

92 *Ibid.*

93 *Ibid.* Arbitrator D. J. White, in Allis-Chalmers Mfg. Co., 37 Lab. Arb. 944 (1961), appears to say that Arbitrator Smith has in an earlier opinion also relied heavily on certain contract construction principles as the test of "good faith." He said:

After reviewing at great length all of the opinions and decisions mentioned by and submitted by the parties here, and after examining carefully Arbitrator Donald A. Crawford's landmark paper, "The Arbitration of Disputes Over Subcontracting" and Arbitrator Mark L. Kahn's perceptive comments thereon delivered at the 13th Annual Meeting of the National Academy of Arbitrators, I am inclined to the view that the most realistic and reasonable position is that which was expressed by Arbitrator Russell A. Smith in Referee Case No. 8-1959-1961, Allis-Chalmers v. UAW, Local 1027, decided March 10, 1961. . . . Like Smith, I think we must first address ourselves here to the evidence on past practice. (Footnotes omitted)

Where there is a language ambiguity in the labor agreement, past practice is often reviewed by the arbitrators as an aid in determining the intention of the contracting parties. See Allis-Chalmers Mfg. Co., 39 Lab. Arb. 1213, 1218 (1962). However, contract rights or limitations are made by "agreement," not by "past practice." In this connection it is significant that the contracting parties in Basic Steel in 1962 recorded in the "Memorandum of Understandings on Miscellaneous Matters" that:

The Company has stated that it is its policy and intention to use its employees as much as practicable for work on the properties involved, and to contract out work only when that course is required by sound business considerations.

This statement would rebut any inference that the labor contract prevents subcontracting and puts in doubt those awards construing the controversial Rule 2(B) as the source of such contractual limitation. Bethlehem Steel Co., 30 Lab. Arb. 678 (R. Seward, 1958); Republic Steel Corp., 32 Lab. Arb. 799 (H. Platt, 1959); Great Lakes Steel Corp., 8 Basic Steel Arb. 5481 (G. Alexander, 1959). In 1963 the 1962 statement on subcontracting was replaced by a statement contained in the "Experimental Agreement" which essentially limited subcontracting on work performed within the plant to the types which had been previously subcontracted. This agreement called forth a strong protest from the craft union leaders who believed it constituted an attempt by the United Steelworkers to "monopolize" work which should be performed by their members. Vol. XIII, No. 203 Wall Street Journal, August 1, 1963.

representative covering classifications of work while withholding from the Union the fact that the employer contemplates, in the immediate future, a major change in operations which will eliminate such work; (2) entering into a "subcontracting" arrangement which is a subterfuge, in the sense that the "employees" of the ostensible "subcontractor" become in substance the employees of the employer; (3) the commingling of employees of a subcontractor, working under a different set of wages or other working conditions, regularly and continuously with employees of the employer performing the same kinds of work; (4) contracting out work for the specific purpose of undermining or weakening the Union or depriving employees of employment opportunities.

His first test is related to the National Labor Relations Board's newly defined obligation of an employer to notify the union of his intentions to contract out work before taking action, first enunciated last year in the *Town & Country* decision.<sup>94</sup> The second and third tests are related to the sound legal doctrine that an employer cannot avoid his contractual obligations by a "sham" subcontract.<sup>95</sup> The fourth test is related to the "good faith" tests used by the Board in runaway shop cases<sup>96</sup> and quite recently in a case involving the move-

94 *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962). The Board said that the subcontracting of work without advance notice to the union to provide it with an opportunity to negotiate with the employer was evidence, when evaluated as part of a pattern of conduct, of a refusal to bargain in good faith required by Section 8(a)(5) of the Act. To the extent that the work movement was an economic reprisal against employees exercising protected rights, the Board's conclusion would be consistent with prior decisions and it was on this basis that the Fifth Circuit affirmed the Board. However, there was a statement in the nature of dictum in this case that the single act of failing to notify the union of subcontracting before the decision is finalized will support a violation of Section 8(a)(5). The same principle was first rejected by the Board in *Fibreboard Paper Products Corp.*, 130 NLRB 1558 (1961), and then, in a highly unusual reconsideration, 138 NLRB No. 68, 51 LRRM 1101 (1962), the Board reversed its decision and adopted the *Town & Country* doctrine and this new decision was affirmed. *Fibreboard Paper Products Corp. v. NLRB*, — F.2d —, 53 LRRM 2666 (D.C. Cir. 1963). Where a plant shut down without advance notice to the union, the ruling was the same. *Darlington Mfg. Co.*, 139 N.L.R.B. No. 23 (1962). In *N.L.R.B. v. New England Web, Inc.*, 309 F.2d 696 (1st Cir. 1962), the court set aside a similar Board order, even where the shutdown occurred only shortly after a union had become the representative of the employees, because economic reasons existed for the shutdown. In *N.L.R.B. v. Rapid Bindery Co.*, 293 F.2d 170 (2d Cir. 1961), the court approved a finding requiring notification to the union after a decision to move the plant had been made to allow bargaining on the effect of such decision. In *NLRB v. Hawaii Meat Co., Ltd.*, — F.2d —, 53 LRRM 2872 (2d Cir. 1963), the court reversed the Board, holding that subcontracting without notice to the union during a strike was an action similar to replacing an economic striker.

The new General Counsel of the Board, Arnold Ordman, invaded the labor contract interpretation field when he wrote, as a Trial Examiner, an opinion finding an independent 8(a)(5) violation based on the provisions of Section 8(d). *Adams Dairy* 137 NLRB 815 (1962). This latter section includes the requirement that ". . . no party to [a] contract shall terminate or modify such contract, unless the party desiring such termination or modification" serves the requisite written notices and continues in full force and effect, without resorting to strike or lockout, "the existing contract for a period of 60 days after such notice is given or until the expiration date of such contract, whichever occurs later. . . ." Mr. Ordman found that:

By thus eliminating both the work which was the subject-matter of the collective bargaining contract and the employees who performed that work, Respondent in the most real sense terminated that contract since there was no area left in which it could be operative. Without more, therefore, it appears that Respondent's failure to follow the procedure prescribed by Section 8(d) as a precondition to such termination constitutes a violation of Section 8(a)(5). I so find.

95 See note 86, *supra* and accompanying text.

96 *N.L.R.B. v. U. S. Air Conditioning Corp.*, 302 F.2d 824 (1st Cir. 1962); *N.L.R.B. v. Brown-Dunkin Co., Inc.*, 287 F.2d 17 (10th Cir. 1961); *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962); *Sidele Fashions, Inc.*, 133 N.L.R.B. 547 (1961).

ment of work from one plant of an employer that was organized to another that was not.<sup>97</sup>

It is submitted that Arbitrator Smith's second and third tests are sound, but that the "good" or "bad" faith intentions of an employer in tests (1) and (4) are established essentially by finding a violation of Section 8(a)(5) of the National Labor Relations Act and hence should be matters solely within the jurisdiction of the National Labor Relations Board. Arbitration should not be the tribunal wherein one obtains remedies for violations of the National Labor Relations Act. This view was expressed by the Federal District Court in *UAW v. Federal Pacific Co.*:<sup>98</sup>

Since the contracts created no duty to continue operations, damage to the employees and union from their termination was not the result of illegal or tortuous conduct by defendant, and no right of action exists founded either in tort or contract for the consequences of the closing.

The only possible basis for relief to the employees or union would appear to be on a showing that the closing was without economic cause or justification or other cause except a purpose to break the union, in some way prohibited as an unfair labor practice under the Taft-Hartley Act. If the Act has created such rights in plaintiffs, however, their vindication can be only through the exclusive machinery set up by the Act, and not in the first instance in this Court.

That the *good faith* and *past practice* tests applied by arbitrators in the subcontracting cases are leading arbitrators astray is the view of Arbitrator Elmer Hilpert. He said:<sup>99</sup>

One may question whether doctrines of (1) "bad faith" and of (2) "past practice" are not associated with the presence or absence of an interim "unfair labor practice," over which arbitrators have no jurisdiction, rather than with the contractual scope of a company's *residual* "managerial powers," to which their jurisdiction is confined. . . .

Furthermore, a decision of an arbitrator concerning a matter covered by the Act does not prevent the Board from rendering a contrary decision.<sup>100</sup>

Undoubtedly, the introduction of the "good faith" qualification by arbitrators on the right of the employer to move work historically resulted from a loose application of concepts developed by the National Labor Relations Board. In one of the early "good faith" awards<sup>101</sup> Arbitrator H. J. Dworkin cited as his source an "American Law Report" as follows:

As a matter of law, the right of the company to subcontract is clear. In recent years many courts have had occasion to pass upon the question of the right of companies to subcontract work, where a collective bargaining agreement exists. The decisions of these courts are cited in an annotation on this subject appearing in 57 A.L.R. 2d 1399 (1958). On the basis of court decisions on

97 *Darlington Mfg. Co.*, 139 N.L.R.B. No. 23 (1962).

98 36 L.R.R.M. 2357, 2358 (D. Neb. 1955).

99 *Allis-Chalmers Co.*, Cases No. 13-14, '59-'62 (1963).

100 *N.L.R.B. v. Wagner Iron Works*, 220 F.2d 126 (7th Cir. 1955), *cert. denied*, 350 U.S. 981 (1956); *N.L.R.B. v. Auto Workers*, 194 F.2d 698 (7th Cir. 1952); *Raytheon Co.*, 140 N.L.R.B. No. 84 (1963).

101 *Holub Iron & Steel Co.*, 36 Lab. Arb. 106 (1961).

this subject, the general rule is stated in that annotation, at page 1400, as follows:

"It has been generally held, that, at least *in the absence of bad faith* on the part of the employer, a collective labor contract *which contains no express prohibition* against an employer's hiring an independent contractor for the performance of work formerly done by employees covered by the contract does not preclude the employer from hiring an independent contractor to do such work."<sup>102</sup> [Emphasis added]

The ALR editors were discussing the "good faith" limitation on the right to subcontract arising from the National Labor Relations Act rather than from a labor agreement. These editors were correctly stating that when work is removed by an employer in an effort to interfere with the employees' rights to organize protected by the Act, the action violates an *express* prohibition contained in the National Labor Relations Act.<sup>103</sup>

In enforcing the Taft-Hartley Act, the Board has followed the policy that when business reasons for a transfer of work can be established by the employer, the transfer of work cannot be found to be an act of interference.<sup>104</sup> It makes no difference whether the employer's business reasons were, in fact, sound or foolish. In *E-Z Mills, Inc.*,<sup>105</sup> the company closed a plant in Vermont and moved the operations to Georgia. The union claimed the purpose of the move was to avoid dealing with it. The Board said:

The Respondent's contention that economic reasons motivated the closing is supported by the testimony of its officials. . . . Whether the Respondent's conclusions were correct, *or were improvident folly*, is immaterial if they were nondiscriminatory.<sup>106</sup> (Emphasis added.)

The Board and the Courts have clearly held that it is not their function to substitute their judgment for that of an employer on such matters.<sup>107</sup>

However, the major group of arbitrators using the words "good faith" as a test to be applied to the employer's motivation in moving work have other things in mind than do the Board or the Courts when they find a work movement to be in "bad faith."<sup>108</sup> Some consider movement of work to a sub-

<sup>102</sup> *Id.* at 111.

<sup>103</sup> See note 94 *supra*.

<sup>104</sup> Currently there are contrary winds blowing at the Board. Arnold Ordman, the new General Counsel, found interference with employee rights under 8(a)(3) of the Act arising from work movements which were clearly motivated by sound business reasons in his trial examiner opinion in *Adams Dairy*, 137 NLRB 815 (1962). He said (p. 826)

' . . . specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a)(3).<sup>3</sup> Such proof . . . is necessary 'where employer conduct inherently encourages or discourages membership.'

<sup>105</sup> 106 N.L.R.B. 1039 (1953).

<sup>106</sup> *Id.* at 1043. See also N.L.R.B. v. Lassing, 284 F.2d 781 (6th Cir. 1960); N.L.R.B. v. R. C. Mahon Co., 269 F.2d 44 (6th Cir. 1959); N.L.R.B. v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955); Mount Hope Finishing Co., 211 F.2d 365 (4th Cir. 1954); Diaper Jean Mfg. Co., 109 N.L.R.B. 1045 (1954); Brown Truck and Trailer Mfg. Co., 106 N.L.R.B. 999 (1953).

<sup>107</sup> N.L.R.B. v. Houston Chronicle Publishing Co., 211 F.2d 848 (5th Cir. 1954). See N.L.R.B. v. E. S. Kingsford, 313 F.2d 826 (6th Cir. 1963).

<sup>108</sup> Approved Management Action as "Good Faith": Pure Oil Co., 38 Lab. Arb. 1042 (J. D. Larkin, 1962); Reynolds Metals Co., 37 Lab. Arb. 599 (J. F. Caraway, 1961); Weyerhaeuser Co., 37 Lab. Arb. 308 (J. F. Sembower, 1961); Central Soya, 36 Lab. Arb. 1173 (J. F. Sembower, 1961); Allegheny Ludlum Steel Corp., 36 Lab. Arb. 912 (M. S. Ryder, 1961); American Sugar Refining Co., 36 Lab. Arb. 409 (D. A. Crawford, 1960) (" . . . must

contractor who pays his employees a lower wage or provides them less favorable conditions a *per se* "bad faith" work movement.<sup>109</sup> This definition, undoubtedly, springs from a desire to protect employees paid union wage scales from the competition of others paid lower wage scales. Others consider work movements may be approved as "good faith" only if no employee is on layoff at the time it occurs or is not laid off as a result thereof.<sup>110</sup> These arbitrators are concerned with the protection of work opportunities.

A substantial group of arbitrators have made efforts to catalogue the definitions of "good" and "bad" faith. The lists become very extensive. For example, Arbitrator J. F. Sembower, in *Central Soya Co.*,<sup>111</sup> listed as the various tests:

Many awards by outstanding arbitrators are grouped into categories which suggest to those authors that the question of "reasonableness" and "good faith" is determined in the light of "past practice," "justification," "effect upon the union," "effect upon unit employees," "type of work involved, i.e., whether it is work

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demonstrate the existence of compelling logic or economies of operation and the consideration of Union status and integrity of the bargaining unit." *Id.* at 414.); Holub Iron & Steel Co., 36 Lab. Arb. 106 (H. Dworkin, 1961); International Paper Co., 35 Lab. Arb. 403 (A. R. Marshall, H. L. Haynes, H. W. Wissner, 1960); Black-Clawson Co., 34 Lab. Arb. 215 (E. R. Teple, 1960); United States Steel Co., 33 Lab. Arb. 282 (S. Garret, 1959); Reynolds Metals Co., 32 Lab. Arb. 815 (C. W. Anrod, 1959); Republic Steel Corp., 32 Lab. Arb. 799 (H. H. Platt, 1959); Haven Busch Co., 32 Lab. Arb. 781 (J. H. Piercey, 1959); White Brothers, 32 Lab. Arb. 965 (J. A. Hogan, 1958); Weatherhead Co., 30 Lab. Arb. 1066 (H. Dworkin, 1958); Bendix Aviation Corp., 30 Lab. Arb. 827 (M. H. Schmidt, 1958); Texas Gas Transmission Corp., 27 Lab. Arb. 413 (P. M. Hebert, 1956); Tempco Aircraft Corp., 27 Lab. Arb. 233 (L. V. Larson, 1956); Cannon Electric Co., 26 Lab. Arb. 870 (B. Aaron, 1956); International Harvester Co., 25 Lab. Arb. 1 (R. Smith, 1955); Devoe & Reynolds, 22 Lab. Arb. 608 (A. R. Porter, 1954); Koppers Co., Inc., 22 Lab. Arb. 124 (M. Reid, 1954). Disapproved Management Action: Gulf Oil Corp., 33 Lab. Arb. 852 (D. A. Crawford, 1959); General Metals Corp., 25 Lab. Arb. 118 (M. Lennard, 1955); Niagara Veldments, Inc., 63-1 ARB ¶ 8062 (J. Shister, 1962). In *Allis-Chalmers Mfg. Co.*, 39 Lab. Arb. 1213 (R. A. Smith, 1962), Arbitrator Smith said:

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. For example, an examination of all the subcontracting cases reported in volumes 35, 36, and 37 of Labor Arbitration Reports (the last three such volumes) revealed 22 decisions denying the specific grievance against subcontracting and only six upholding the specific grievances. 39 Lab. Arb. at 12.

109 *Gulf Oil Corp.*, 33 Lab. Arb. 852 (D. A. Crawford, 1959); *White Bros.*, 32 Lab. Arb. 965 (J. A. Hogan, 1958). In the *White Bros.* case, Arbitrator Hogan said:

The distinction between lower-cost subcontracting where the lower costs are based on greater efficiency and subcontracting where the lower costs are based on lower wage rates, few fringe benefits or less favorable working conditions, is of prime importance because it helps resolve the fundamental problem. The fundamental problem in subcontracting cases is how to secure a fair accommodation between Management's right to run its business efficiently and the Union's right to protect its bargained standards. *Id.* at 969.

See also *Thriftmart Inc.*, 84 Daily Labor Report: D-1 (1963) (F. Meyers).

110 *Reynolds Metals Corp.*, 37 Lab. Arb. 599 (J. F. Caraway, 1961); *Tempco Aircraft Corp.*, 27 Lab. Arb. 233 (L. V. Lennard, 1956).

111 36 Lab. Arb. 1173, 1176 (1961). In *General Metals Corp.*, 25 Lab. Arb. 118 (1955) Arbitrator M. Lennard sets forth eleven tests to be used to determine whether the management moved the work in "good faith" or not. In Crawford, *The Arbitration of Disputes Over Subcontracting* in CHALLENGES TO ARBITRATION, PROCEEDINGS OF THE 13TH ANNUAL MEETING OF NATIONAL ACADEMY OF ARBITRATORS 51 (1960), the author attempted to catalogue various tests. Harry Shulman encouraged the "good faith" approach in his *Oliver Wendell Holmes Lecture*, Feb. 9, 1955, Harvard Law School published in National Academy

which normally is done by unit employees," "availability of properly qualified employees," "availability of equipment and facilities," "regularity of subcontracting," "duration of subcontracted work," "unusual circumstances involved," and "history of negotiations on the right to subcontract."

There is another group of arbitrators who, although using the words "good faith," apparently believe that they should not block a normal management action. They approve any work movement if they find it an act motivated by a desire to lower costs and increase efficiency. For example, in *International Paper Company*,<sup>112</sup> Arbitrator A. R. Marshall said "there is persuasive evidence that the Company has acted in good faith" because it "contracted out work in an attempt to operate the mill in an efficient manner."<sup>113</sup> In *Bethlehem Steel Co.*,<sup>114</sup> Arbitrator R. Seward cited with approval the principle that the question of whether the action is in good faith is whether the company's action can be justified as "a normal and reasonable management action."<sup>115</sup> In *National Tube Co.*,<sup>116</sup> Arbitrator S. Garrett said the test was whether the employer's action "can be justified . . . as a normal and reasonable management action. . . ."

Most arbitrators who evaluate work movements in terms of "good faith" are probing the motivation of management. Arbitrator H. W. Wissner, in *Ideal Cement Co.*,<sup>117</sup> said subcontracting disputes "ultimately are reduced to a crucial point of Company judgment." That some arbitrators quite frankly recognize that the "good faith" test in work movement cases has led them into a review of the wisdom of a managerial decision and that they are in fact substituting their judgment for that of the management is interesting. Arbitrator M. Lennard in *General Metals Corp.*<sup>118</sup> said:

If this appears to be a substitution of my judgment for that of the management, the risk of such a substitution is inherent in a dispute like this one where the arbitrator is required to weigh the legitimate objective of the management (to run a cleaner, better, more efficient business) against the legitimate objective of the union (to protect the job security of its members). This is markedly true where the contract of the parties as in this case, defines only in the most general terms the permissible methods of achieving both objectives.<sup>119</sup>

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of Arbitrators Proceedings BNA 1956. M. Beatty made this pointed criticism of this approach in *American Sugar Refining Co.*, 37 Lab. Arb. 334 (1961):

When an arbitrator finds that the parties have not dealt with the subject of contracting-out in their working agreement, but that the employer is nevertheless prohibited from contracting-out (a) unless he acts in good faith; (b) unless he acts in conformance with past practice; (c) unless he acts reasonably; (d) unless his act does not deprive a substantial number of employees of employment; (e) unless his acts were dictated by the requirements of the business; (f) if his act is barred by the recognition clause; (g) if his act is barred by the seniority provisions of the working agreement; or (h) if his act violates the spirit of the agreement, the arbitrator may be in outer space and reading the stars instead of the contract. (Footnotes omitted.) 37 Lab. Arb. at 337.

112 35 Lab. Arb. 403 (1960).

113 *Id.* at 408.

114 30 Lab. Arb. 678 (1958).

115 *Id.* at 683.

116 17 Lab. Arb. 790, 794 (1951).

117 39 Lab. Arb. 349, 351 (1962).

118 25 Lab. Arb. 118 (1955).

119 *Id.* at 122.



As soon as "motives," "reasonableness" and "necessity" become the criteria, the arbitrator ceases to be an interpreter of an agreement, and becomes a judge of the merits of a business decision. It was early recognized that management decisions were properly the affair of managements, not arbitrators, in this apt statement from *Wright Aeronautical Corp.*:<sup>120</sup>

[I]t is management which is responsible for results. This being so, the management should be free to manage. To permit compulsory arbitration in matters affecting the business policies . . . would, in effect, force upon management judgments of persons chosen as arbitrators who may know little or nothing about the business and plant problems involved and who bear no personal responsibility for the consequences of their awards. The operation of a great industrial plant like the Wright plant . . . is a task which can be performed only by men familiar with its organization and skilled in the work that is done. Tampering with the machine by unskilled hands would be a dangerous procedure and is not to be encouraged. (Emphasis added.)

That the "good faith" — "bad faith" approach requires the arbitrator to substitute his judgment for that of the management rather than an interpretation of the agreement was pungently pointed up by Arbitrator M. Beatty:<sup>121</sup>

Arbitrators are not soothsayers and "wise men" employed to dispense equity and good will according to their own notions of what is best for the parties, nor are they kings like Solomon with unlimited wisdom or courts of unlimited jurisdiction. Arbitrators are employed to interpret the working agreement as the parties themselves wrote it.

## II

### THE POSSIBLE CONFLICTS BETWEEN IMPLIED RESTRICTIONS ON WORK MOVEMENTS AND OTHER LEGAL AND ECONOMIC DOCTRINES

#### A. *The Illegality of Limitations On Freedom to Subcontract Under Section 8(e) of the National Labor Relations Act*

In 1959, Section 8(e) was added to the National Labor Relations Act. It reads as follows:<sup>122</sup>

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, *express or implied*, whereby such employer ceases or refrains or agrees to *cease or refrain from* handling, using, selling, transporting

120 13 L.R.R.M. 2580, 2582 (1943) (arbitrator not indicated). See also *United Dairy Workers v. Detroit Creamery Co.*, 38 L.R.R.M. 2303 (Mich. Cir. Ct., Wayne Co., 1956).

121 *American Sugar Refining Co.*, 61-3 ARB ¶ 8773 (1961). Arbitrator W. P. McCoy was critical of the "good faith" test for an opposite reason. He said, in *Pet Milk Co.*, 33 Lab. Arb. 278 (1959), it created a way by which subcontracting could be approved:

Later decisions disclose that employers, . . . have contracted out work that the parties did have in mind when they negotiated their collective bargaining contracts. In many such cases arbitrators have denied a company's right to so "fracture the bargaining unit." The real basis of these decisions is not "bad faith," as so often asserted, but the nature of the work. A company and union do not bargain for wages, hours, overtime, etc., in a vacuum. They bargain for the performance of certain work, and set the terms for such performance. If, having set those terms, the Company can avoid compliance by the simple device of contracting, the entire contract could become a nullity. . . . 33 Lab. Arb. at 279.

122 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. IV, 1958).

or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . . (Emphasis added)

Since this language makes it an unfair practice to enter into an express or implied agreement preventing the employer from doing business with other employers, one would think it would make the actions of arbitrators and courts which imply such restrictions illegal.

In this connection it should be noted that Section 8(e) also contains provisos expressly permitting agreements restricting employers in their dealings with subcontractors in the construction and clothing industries.<sup>123</sup> These express exceptions, of course, make the conclusion that in those industries not covered by the exceptions, a restriction on a movement of work to a subcontractor would be outlawed.

However, some have argued that its broad language *prohibiting* agreements which obligate an employer to cease doing business with any other person does not make unlawful express or implied provisions in labor contracts that restrict or limit a management's right to "contract" and "do business" with another employer or use the products produced or services rendered by that other employer *unless such restriction is in the nature of a secondary boycott*. This means that to violate Section 8(e), the express or implied restriction on subcontracting must have been borne in an attempt to harm the subcontractor because he does not pay union wages, [he does not] have a contract with the union, or for some other reason.<sup>124</sup> But a reading of the legislative history of the section establishes that its leading proponents and opponents interpreted Section

<sup>123</sup> Locals 234 and 243, *International Ladies Garment Workers v. Beauty Bilt Lingerie*, 48 L.R.R.M. 2995 (S.D.N.Y. 1961). The arguments that the apparel and construction industry exceptions made the 8(e) limitation on subcontracting unconstitutional as an irrational classification and violative of due process clause of Fifth Amendment were rejected in *Employing Lithographers v. N.L.R.B.*, 301 F.2d 20 (5th Cir. 1962).

<sup>124</sup> Previant, *The Hot Cargo and Secondary Boycott Sections: A Critical Analysis*, 48 GEO. L. J. 346 (1959). See also Cox, *The Landrum-Griffin Amendments to the N.L.R.A.*, 44 MINN. L. REV. 257 (1959) at page 273:

Although the language leaves doubt, the underlying rationale should also exclude from section 8(e) conventional restrictions upon subcontracting such as the promise that

"all work that is usually performed in the plants of the Company shall continue to be performed in such plants unless a change is mutually agreed upon by both parties."

In a literal sense this clause is an agreement between an employer and a union by which the employer undertakes not to do business with any other person, but it has a different function from the contracts which were the targets of section 8(e). A restriction upon subcontracting which seeks to protect the wages and job opportunities of the employees covered by the contract, by forbidding the employer from having certain kinds of business done outside his own shop, is quite different in purpose and effect from blacklisting specified employers or groups of employers because their products or labor policies are objectionable to the union. The fact that Congress rejected the attacks upon the secondary boycott provisions of the Landrum-Griffin bill which alleged that the bill unwisely threw doubt upon the validity of bona fide restrictions upon subcontracting, may be attributed to disbelief in the allegation just as easily as to congressional opposition to contractual restrictions upon managerial freedom to subcontract, although there were undoubtedly individuals who hoped to resolve the subcontracting issue in favor of management. Whatever the merits of the latter issue, it is distinct from the only explicit subject of legislative concern.

8(e) as a provision which would *prohibit* agreements, express or *implied*, prohibiting "contracting out" of work where the motivation behind the restriction was merely keeping the work in the "home" plant rather than to injure the outsider.<sup>125</sup>

For example, during the journey of the Landrum-Griffin Act from the House floor into Congressional conference and then to eventual passage, and as part of an unsuccessful effort to change the language of Section 8(e), Senator Kennedy and Congressman Thompson of New Jersey prepared a joint critique<sup>126</sup> which said:

Companies and unions in manufacturing industries *often agree upon restrictions upon subcontracting in order to protect the employees against the loss of jobs. . . .* It would not be unusual for a power company to agree not to contract out any of its line construction while its own regular employees worked less than 40 hours a week. These clauses are frequently negotiated in all kinds of industry. They have nothing to do with hot cargo agreements or secondary boycotts. *Yet they appear to be outlawed by the House bill.*

The language of the House bill should be revised to avoid this interference with normal collective bargaining. (Emphasis added)

These remarks by Senator Kennedy and Representative Thompson are significant. Both believed that the language of Section 8(e) would effectively outlaw clauses in labor agreements preventing an employer from subcontracting regardless of the motivation behind the restriction. Except for the garment and construction industry provisos, Section 8(e), as finally passed, is identical to the provision Kennedy and Thompson were discussing.<sup>127</sup>

Senator Morse similarly interpreted Section 8(e). He also explained that this provision would prohibit an employer from agreeing not to subcontract work:<sup>128</sup>

The House bill, and now the conference report, have made it an unfair labor practice for any employer and a union to include in their agreement a provision which imposes any condition upon doing business with another employer. . . .

The far-reaching effect of this proposal is something on which there are no hearings. The conferees, and certainly no member of this body, have any idea how many labor agreements contain such provisions. Examples that come to my mind which would be banned by these provisions are as follows:

First. *It would prevent a union from protecting the bargaining*

125 Senators Kennedy, Morse, McNamara and Randolph, and Representative Thompson, made unsuccessful efforts to change the language so as to avoid this result. I LEGISLATIVE HISTORY OF LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 944; II *Id.* 1383, 1700, 1708.

126 105 CONG. REC. 16590 (1959). See also the following quotation from the Kennedy and Thompson critique to the same import:

Section 707 of the Senate bill sought to correct this by outlawing hot cargo clauses and making existing clauses unenforceable. The bill also makes it an unfair labor practice for a union to request such a clause in collective bargaining.

The House bill extends these prohibitions to all employers and labor unions. The objection to extending the "hot cargo" limitation into a general prohibition such as the House bill contains is that the general prohibition would also outlaw legitimate forms of collective agreement. *Ibid.*

127 Compare H.R. 8400, 84th Cong., 1st Sess. § 705(b)(1) with § 704(b) of the Landrum-Griffin Act, *i.e.*, §8(e) of the N.L.R.A.

128 See 105 Cong. Rec. 17884 (1959).

*unit it represents by obtaining an agreement not to subcontract work normally performed by employees in the unit. (Emphasis added)*

The addition of the garment and construction industry provisos to Section 8(e) after the unsuccessful attempts by Senators Kennedy, McNamara, Randolph and Morse and Representative Thompson to change the language, lends additional support to the view that this section makes an agreement not to subcontract an unfair labor practice. The garment industry proviso states that "The term 'any employer' . . . shall not include persons in the relation of a . . . subcontractor . . . in the apparel and clothing industry."<sup>129</sup> Thus, Congress took pains to provide specifically that Section 8(e) did not prohibit an agreement between an employer and a union that the employer would cease doing business with a "subcontractor" in the garment industry. Therefore, it can certainly be argued that Congress intended Section 8(e) to outlaw all agreements, express or implied, preventing subcontracting by the employer, unless protected by such a proviso. In other words, there would be no need to exempt garment industry employers and subcontractors from protection from such restrictive clauses unless the language, without the exemption, would have made restrictions on the movement of work to such subcontractors illegal.

In *District No. 9, IAM*,<sup>130</sup> the Board held that a contract clause prohibiting subcontracting except to shops or subcontractors approved by the union violated Section 8(e). The clause read:<sup>131</sup>

Whenever the employer finds it feasible to send work out that comes under the jurisdiction of the union and this contract, preference must be given to shop or subcontractors approved or having contracts with District No. 9, International Association of Machinists. (Article XXIX)

The Board stated:<sup>132</sup>

The very language of Section 8(e) which proscribes the "entering into" of contracts or agreements, express or implied, is broad and sweeping in scope. The term "enter into" at law means "to join with another or with others" or "to become bound or obligated by a . . . contract." Even though Article XXIX was void and a nullity in the eyes of the law, the parties agreed that "Article XXIX was binding on all members of the car dealers' association." The parties maintained, reaffirmed and gave effect to Article XXIX thereby becoming bound by it. Accordingly, we find, in agreement with the General Counsel, that the respondent and the car dealers' association did "enter into" an agreement on November 2, 1960, which incorporated Article XXIX and by so doing violated Section 8(e) of the Act. (Footnotes omitted.)

In *Local 618, IBT*,<sup>133</sup> the Board held that a similar clause violated Section 8(e).

Most recently the Board held in the *Pure Milk Association* case<sup>134</sup> that a union's attempt to enforce an agreement with the employer whereby the

129 73 Stat. 544 (1959), 29 U.S.C. § 158(e) (Supp. IV, 1958).

130 134 N.L.R.B. 1354 (1961). See also *Minnesota Milk Co.*, 133 N.L.R.B. 1314 (1961).

131 *District No. 9, IAM*, 134 N.L.R.B. 1354, 1356 (1961).

132 *Id.* at 1359.

133 134 N.L.R.B. 1363 (1961). See also *Alpert v. Local 559 Teamsters*, 49 L.R.R.M. 2802 (D. Conn. 1962).

134 *Pure Milk Ass'n*, 141 N.L.R.B. No. 103 (1963).

employer agreed not to do business with any other employer who did not hire union drivers violated Section 8(e). In connection with shipments of milk from its dairy, the Sidney Wanzer Company had changed from a contractor who hired union drivers to a contractor who did not. The union struck. Its action was enjoined by a federal court pending the decision by the Board that the attempted enforcement of the clause restricting subcontracting violated Section 8(e).

One commentator, Emanuel Dannett<sup>135</sup> recognized the scope of the language of 8(e) and its unique legislative history:

The language of Section 8(e), if read literally, bars all collective bargaining agreements in which an employer agrees to *cease* "doing business with any other person." It would thus condemn all of the no-subcontracting provisions, whether or not a neutral party would be affected by the provision.<sup>136</sup>

Significantly he pointed out that some of the legislators who urged the broad language finally adopted in 8(e) were cognizant of the public policy against restraints on trade:

[T]here is a substantial body of opinion to the effect that clauses [in labor agreements] barring the use of prefabricated products are against public policy because they frequently operate to prevent the use of technological improvements, to encourage make-work arrangements, or to compel the employer to continue uneconomic practices. Congressman Rhodes was of the opinion that such clauses would be held to be "flagrant restraints of trade," were it not for the exemption given to labor unions under the anti-trust acts. The public policy considerations opposing prefabrication clauses would apply with equal force to conventional no-subcontracting clauses.<sup>137</sup> (Emphasis added)

The impact of Section 8(e) on union claims that contracting out is restricted by the labor agreement has rarely been discussed by arbitrators.<sup>138</sup> This may result from the fact that management advocates appearing before

135 Dannett, *The Legality of Subcontracting Provisions Under Section 8(e)*, in SYMPOSIUM ON LMRDA, LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 905 (1961). See to the same effect Farmer, *The Status and Application of Secondary Boycott and Hot Cargo Provisions*, 48 GEO. L. J. 327, 335-40 (1959); Fairweather, *An Evaluation of the Changes in Taft-Hartley*, 54 NW. U. L. REV., 711, 726-733 (1960); cf. Rothman, *Problems Raised by New Secondary Boycott Provisions*, 45 L.R.R.M. 78 (1959).

136 Dannett, *supra* note 134, at 905.

137 *Id.* at 910.

138 Arbitrator J. M. Klamon in *Selb Mfg. Co.*, 37 Lab. Arb. 834 (1961), enforced what appears to be an illegal clause. It stated:

The Companies will not, so long as equipment and personnel are available, subcontract work which is customarily performed by employees in the bargaining unit to any other company. When necessary to subcontract work, every effort shall be made to give the work to a contractor who employs members of the International Association of Machinists. 37 Lab. Arb. at 837.

Arbitrator Klamon answered the Company's argument as to the legality of the clause: Since both parties have incorporated this Article into agreements between them for some years, we certainly have no authority either to assume that anyone acted in bad faith, nor do we have the authority to usurp the function of the courts in this matter. In the absence of a clear holding that such an Article is illegal by our highest courts, we must as Arbitrators interpret and apply the meaning and intent of the agreement and not presume to guess relative to legality. . . .

This case was enforced by the U. S. District Court, *IAM v. Selb Mfg. Co.*, 49 L.R.R.M. 2366 (E.D.Mo. 1961). Interestingly, the Court did not rest its affirmance on a violation of this contract clause but found by implication a violation of the seniority clause. Another

them have not pointed out its language and clear legislative history. However, where a contract clause is illegal it becomes null and void and should not be enforced by an arbitrator.<sup>139</sup> Section 8(e) should certainly not be ignored. Arbitrators should exercise great care to avoid incorporating by implication an illegal restriction upon dealing with subcontractors into a labor agreement.

B. *Are Union-Employer Agreements Restricting "Work Movements" Illegal Under the Antitrust Acts?*

As has been noted, work movements to an outside contractor occur because he is a specialist and costs can thereby be reduced. Similarly, work movements to other plants of the same company result from cost dictates (transportation, efficiency of method, lower wage costs, etc.). Competition is the regulating force that causes the "make or buy" analysis to be made and governs the transfer of work to obtain cost reductions. This regulatory rule of competition is recognized by the law. "The heart of our national economic policy long has been faith in the value of competition"<sup>140</sup> because a "free economy best promotes the public weal. . . ."<sup>141</sup> The Sherman Act implemented this national economic policy and the Supreme Court said it proscribed "all combinations and conspiracies which restrain the free and *natural flow* of trade in the channels of interstate commerce."<sup>142</sup> (Emphasis added)

Quite obviously an agreement (either express or implied) between an employer and a labor union that the employer will not subcontract work to others is an agreement to restrict the flow of work to a lower cost producer of certain goods or supplier of certain services. The effect of such an agreement is to hold the work at the higher cost location against the economic forces of price competition. Since such an agreement results in higher costs

example of an apparent disregard of Section 8(e) is Arbitrator James J. Healy's decision in *Narragansett Brewing Co. and Brewery Workers Local 114*, 61-2 ARB ¶ 8495. The union contract provided:

Only union-made malt shall be used if the same is obtainable. All other union-made material and supplies shall be given preference provided price, quality, and general conditions are equal.

To meet competition the company had changed beer carton sizes and a rush order was sent to an outside supplier. Upon discovery that the cartons were not union made, the union filed a grievance alleging violation of the contract. Without considering the legality of the clause, Arbitrator Healy directed the company to make reasonable investigation in the future to insure that goods purchased were union made. See also *ILGWU v. Beauty Bilt Lingerie*, 48 L.R.R.M. 2995 (S.D. N.Y. 1961).

139 To refuse to enforce an illegal clause is not an action that is subject to the criticism that the arbitrator is enforcing specific provisions of the National Labor Relations Act. In other situations arbitrators have refused to uphold illegal contracts. See *United Tavern*, 16 Lab. Arb. 210 (M. Slavney, 1951) (union shop clause violated state law); *Hillside Transit Co.*, 22 Lab. Arb. 470 (A. Anderson, 1954) where the arbitrator said:

I am persuaded that I do not have authority to knowingly make a decision which is in direct conflict with statutes and court decisions dealing with the same subject. . . . In my opinion, the seniority provision of the agreement in question is in conflict with the Labor Management Relations Act as interpreted by the two highest authorities on that law and, therefore, invalid. . . . 22 Lab. Arb. at 473.

See also *Mode O'Day Corp.*, 1 Lab. Arb. 490 (G. Cheney, 1946) (states that any conflict between Selective Service Act and contract must be resolved in favor of Act).

140 *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951).

141 *Times Picayune Pub. Co. v. United States*, 345 U.S. 594, 605 (1953); see also *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

142 *Eastern States Retail Lumber Dealers Assn. v. United States*, 234 U.S. 600, 609 (1914).

it will hold prices up and the consumer will be injured. On this analysis, agreements, either express or implied, prohibiting subcontracting should be stricken down as violative of the national policy enunciated in the Sherman Act.

However, alongside the national policy designed to preserve competition, there sits another. This is a policy to preserve for labor unions certain powers which, when exercised, may restrain trade. In theory, unions will use these powers to better the conditions of their members and it is believed that the benefits derived by the members justify the restraints on trade.

To determine how these two policies should be reconciled when they come into conflict, Congress enacted Section 20 of the Clayton Act.<sup>143</sup> This licensed unions to exercise their power "lawfully" in carrying out "legitimate objects." This legislative pronouncement did not resolve the conflict in these opposing policies. The questions of what was a "lawful" exercise of the union's power to restrain commerce and what was a "legitimate object" to be obtained by the exercise of such power became the subjects of much litigation. It was not until the Norris-LaGuardia Act<sup>144</sup> denied the federal courts the use of injunctive remedies where a restraint of trade arose out of a labor dispute<sup>145</sup> and the Congressional intent was re-evaluated by the court<sup>146</sup> that labor union actions which restrained trade gained real immunity from the proscriptions of the antitrust laws. This shield that protected unions from liability for restraints of trade was based on an interpolation of the Clayton Act and the Norris-LaGuardia Act. Justice Frankfurter in *U. S. v. Hutcheson*<sup>147</sup> explained:

[W]hether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.

For the Norris-LaGuardia Act portion of this "Clayton-Norris-LaGuardia-Hutcheson shield" to apply, the restraint of trade had to occur in connection with a labor dispute. This was made clear in the Report of the Attorney General's National Committee to Study the Antitrust Laws,<sup>148</sup> where it stated that a commercial restraint created by a labor union is vulnerable under the Sherman Act unless the restraint occurs "in the course of a labor dispute as defined in

143 The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the *legitimate objects* thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. (Emphasis added) Clayton Act § 6, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958).

144 47 Stat. 70 (1932) (codified in scattered sections of 29 U.S.C.).

145 Norris-LaGuardia Act § 13(c), 47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1958) provides:

The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

146 *United States v. Hutcheson*, 312 U.S. 219 (1941).

147 *Id.* at 231.

148 REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS, 299-330 (1955)

the Norris-LaGuardia Act.” This means that before this portion of the “shield” will protect a contractual restraint upon an employer doing business with a subcontractor the restraint must be a *secondary boycott* attack upon the subcontractor. Otherwise it becomes a restraint that does not grow out of a dispute between the union and the subcontractor.

Now any restraint on dealing with a subcontractor *which is in the nature of a secondary boycott* — for example, an attack upon the subcontractor because he is unorganized or fails to pay union scale — is *clearly illegal* under Section 8(e) of the National Labor Relations Act. Therefore, if the restraint has a secondary boycott objective, *i.e.*, an attack against the subcontractor, it cannot any longer be a restraint for a “legitimate objective” and the Clayton Act part of the shield falls.<sup>149</sup>

Conversely, if the restraint is not a secondary boycott attack upon the subcontractor, then it is not a restraint growing out of a labor dispute, but is simply an agreement between a union and an employer to impose a commercial restraint upon the purchasing of products or services. As such, it is not protected under the portion of the shield which is built upon the Norris-LaGuardia Act.<sup>150</sup>

The relationship between a prohibition in a labor contract against an employer dealing with another employer and the policy against restrictions on trade underlying the Sherman Act was recognized by Solicitor General Archibald Cox:<sup>151</sup>

Apart from the participation of the labor union, [hot cargo] agreements would violate the Sherman Act. [Fashion Originators Guild v. FTC, 312 U.S. 457 (1941)] This was the theory upon which the Senate voted to outlaw “hot cargo” contracts in the trucking industry. In the House the prohibition was expanded to all agreements by which an employer agrees with a labor organization not to handle or use the goods of another person. . . .

In addition, the Attorney General’s report states that where a “union combines with a nonlabor group to effect some direct commercial restraint” the anti-trust laws remain applicable and impose liability upon the union and the conspiring nonlabor group.<sup>152</sup> A contractual restraint on subcontracting is, of course, pursuant to an agreement between a union and a nonunion employer. Hence, under this view, which reflects the actions of the federal courts, such a restraint would clearly appear to violate the antitrust laws.

The leading decision of the Supreme Court to the effect that a union

<sup>149</sup> In *United States v. Fish Smokers Trade Council, Inc.*, 183 F. Supp. 227, 236 (S.D.N.Y. 1960), it was stated:

The Clayton and Norris-LaGuardia Acts, raised as a shield by defendants for their otherwise unlawful activities, cannot avail them here. By their very language, these Acts are limited to the pursuit of *legitimate objects* of labor and labor disputes affecting the employer-employee relationship for the purpose of mutual help, which language encompasses neither disputes over the sales of commodities nor employer help in controlling market and price. (Emphasis added)

<sup>150</sup> A restraint suppressing commercial competition is not protected activity. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 501 (1940) (Dictum).

<sup>151</sup> Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 272 (1959).

<sup>152</sup> REPORT OF THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS, 299-330 (1955).



cannot establish a commercial restraint on trade by agreement with a nonunion group is *Allen Bradley Co. v. Local Union No. 3*.<sup>153</sup> In that case a labor union had aided a group of employers to create a monopoly to control the marketing of goods and services. It was held to be a violation of the Sherman Act, notwithstanding the fact that the union's actions were intended to further its members' interests as wage earners. Very recently the Supreme Court restated the holding of the *Allen Bradley*<sup>154</sup> case saying:

It is also beyond question that nothing in the anti-injunction provisions of the Norris-LaGuardia Act, nor in the labor exemption provisions of the Clayton Act, insulate a combination in illegal restraint of trade between businessmen and a labor union from the sanctions of the anti-trust laws.

The District Court in Minnesota in *United States v. Milk Drivers Union*,<sup>155</sup> found that a union had violated the antitrust acts when it entered into an agreement with certain dairies which contained a provision that "gave the Union the right to discontinue delivery to stores that sold milk at 'unfair' prices—that is consumer prices which were substantially below the prices charged by the dairies for home deliveries." Although this was not an agreement between a company and a union wherein the company agrees not to deal with the outsider, the net effect of this company-union agreement was the same.

The Court explained the union's claim for exemption from the Antitrust Act as follows:<sup>156</sup>

The Union claims that it is immune from the issuance of an injunction because its conduct in this case in attempting to equalize or minimize the differential between the prices at which milk was sold at stores and at the home, was for the welfare of its members, and was a labor dispute.

We need not decide here whether the Union, acting alone, in what it did was in a "labor dispute" within the immunization clause of the Norris-LaGuardia Act because complaint is made against, and relief is sought from, the Union's acting, not alone, but in combination with milk producers, stores and others in a conspiracy to fix the price of milk. So the legal question is whether such conduct, if proved, is enjoined. The answer is yes and the authority is contained in the United States Supreme Court's holding in *Allen Bradley Co. v. Local Union No. 3*, *International Brotherhood of Electrical Workers*, 1945, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939.

That case enunciated the principle that a union operates outside the scope of its statutory immunity when it combines with a non-labor group to impose commercial restrictions such as price-fixing on interstate trade and commerce, even though it be prompted by a desire to further its own interests and that of its wage-earner members.

It was thought by some that the majority of the Court in the *Allen Bradley* case had only outlawed restrictive agreements between a union and a *group* of employers and that restrictive agreements made by a union and a *single*

<sup>153</sup> 325 U.S. 797 (1945).

<sup>154</sup> *Los Angeles Meat and Provision Drivers Union v. United States*, 371 U.S. 94 (1962).

<sup>155</sup> 153 F. Supp. 803 (D.Minn. 1957).

<sup>156</sup> *Id.* at 808.

employer were exempted by the "shield."<sup>157</sup> However, the Federal District Court for the Southern District of New York in three cases was not bothered by the fact that only one employer was involved. It held that agreements between a single employer and a union restricting the employer to business dealings with certain subcontractors violated the Sherman Act. The effect of these agreements is very similar to the limitation on the subcontracting of work implied by arbitrators.

In *Loews, Inc. v. Basson*,<sup>158</sup> a union of projectionists, deliverers and cutters sought to compel a movie producer-distributor to license only exhibitors who employed union projectionists. Even though the producer-distributor objected, the court held that its entry into the proposed contract constituted an illegal combination between a union and a nonlabor group. It was also held that the restraint did not arise from a labor dispute and for this additional reason was not protected by the Norris-LaGuardia Act.

In *Westlab, Inc. v. Freedomland, Inc.*,<sup>159</sup> the defendant, Freedomland, had entered into a contract with the plaintiff, Westlab, providing that Westlab would design, engineer and supply all sound equipment for a recreation park. Subsequent to the consummation of this contract, defendant union, Local 3, International Brotherhood of Electrical Workers, informed Freedomland that its members would not perform any work at the park if Westlab, the subcontractor, was permitted to supply material for the project, because Westlab did not employ members of Local 3. Thereafter Freedomland entered into a subcontract with Sound Systems, Inc., a competitor of Westlab which did employ members of Local 3. The court held that these facts were sufficient to state a claim by Westlab against Freedomland, Local 3 and Sound Systems under the Sherman Act. It overruled the motion to dismiss.

In *U.S. v. Fish Smokers Trade Council, Inc.*,<sup>160</sup> the following clause, incorporated in the labor agreement between a single employer and a union, was held to be in restraint of trade under the Sherman Act:

In the event that an Employer uses any means for the distribution of its products other than through its own employees, such as agent-distributors, etc., then such agent-distributors, etc., must be members of the union, subject to its rules and regulations.

As an additional reason why the Sherman Act was violated, the court explained that the independent contractors against whom this clause was leveled were not subject to organization by the union, so secondary boycott activity against them could only be a conspiracy to restrain trade and hence was not protected from the antitrust acts as a restraint "arising out of a labor dispute" and for a "legitimate objective." The rationale of the court's decision is found in this quotation:

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157 Justice Roberts in his dissent stated:

The course of decision in this Court has now created a situation in which, by concerted action, unions may set up a wall around a municipality of millions of inhabitants against importation of any goods if the union is careful to make separate contracts with each employer, . . . notwithstanding the fact that the purpose and inevitable result is the stifling of competition in interstate trade and the creation of a monopoly. 325 U.S. at 819 (1945).

158 46 F. Supp. 66 (S.D.N.Y. 1942).

159 F. Supp. 701 (S.D.N.Y. 1961).

160 183 F. Supp. 227 (S.D.N.Y. 1960).

There is one principal issue raised by the pleadings and that is whether the jobbers are independent businessmen as plaintiff maintains and therefore not a proper subject of unionization; if they are, then it follows that the defendants' alleged activities in forcing them into the Union and into agreements to allocate their customers is an act in restraint of trade within the stricture of the antitrust laws. . . .

The identification of the affected subcontractors as jobbers and hence as independent businessmen, not subject to unionization, as one of the reasons why the activity was not protected by the "Clayton-Norris-LaGuardia-Hutcheson shield" is significant to the current analysis of implied restrictions on work movements.

The same rationale was used recently by the Supreme Court in *United States v. Los Angeles Meat Provision Drivers Union*.<sup>161</sup> There it was held that grease jobbers, who were the malfeasors, were independent businessmen not subject to unionization and the restraints on trade were therefore not "protected" from the antitrust acts. In addition, in this recent decision, the Supreme Court explained that its decision in the *Columbia River Packers Ass'n v. Hinton*,<sup>162</sup> involved a private antitrust suit brought by a fish buyer to enjoin regulation of selling prices by a combination of fishermen, joined together as the Pacific Coast Fishermen's Union. The defendants' claim "that an injunction against them violated the Norris-LaGuardia Act," was rejected because the restraint did not arise out of a "labor dispute" within the meaning of the Norris-LaGuardia Act. The court pointed out that that statute "was not intended to have application to disputes over the sale of commodities."<sup>163</sup>

From these various decisions there can be extracted series of reasons why an arbitrator who implies a restriction on the subcontracting of work from the general provisions of a labor agreement, would be creating a restraint of trade violative of the Sherman Act.

(1) He would be creating a restraint of trade by an agreement between a businessman and a labor union. In its *Allen Bradley*<sup>164</sup> decision the Supreme Court said that such a restraint of trade is not shielded from the Sherman Act.

(2) He would be creating a "commercial restraint" on the sale of goods and services. Such a restraint is not shielded from the Sherman Act, said the court in *Columbia River Packers Assn. v. Hinton*.<sup>165</sup>

(3) He would be making no effort to determine whether the restraint affects subcontractors who are independent businessmen, not subject to unionization. Such restraints are not protected, said the court in the *Los Angeles Meat Provision Drivers case*.<sup>166</sup>

(4) Finally, the arbitrator would face a dilemma caused by the interaction of the antitrust acts and the National Labor Relations Act from which there is no escape.

(a) If the motivation behind the restraint on subcontracting is an economic

161 371 U.S. 94 (1962).

162 315 U.S. 143 (1942).

163 *Id.* at 145.

164 325 U.S. 797 (1945).

165 315 U.S. 143 (1942).

166 371 U.S. 94 (1962).

attack upon the subcontractor for not paying union scale, etc., the arbitrator would be creating a secondary boycott restraint clearly violative of Section 8(e) of the National Labor Relations Act.<sup>167</sup> The "legitimate objectives" standard in the Clayton Act portion of labor's shield from the antitrust act cannot then apply.

(b) If the restraint on the subcontracting is not part of an economic attack against the subcontractor, it cannot be said to be an action taken as part of a labor dispute and then the Norris-LaGuardia portion of the shield which requires that the restraint be part of a labor dispute does not apply.<sup>168</sup>

Unions and employers are treading on treacherous ground under the antitrust acts whenever express limitations upon subcontracting are written into the agreement. Such a restraint can no longer be considered a protected restraint growing out of a labor dispute between the union and the subcontractor because if it is an economic attack on the outsider, it clearly violates Section 8(e). Arbitrators who carry no financial responsibility for what they do certainly should not impose restrictions by implication which could cause the taint of illegality to touch the labor contract and the parties.

### *C. Creating Restrictions on "Work Movements" Removes An Economic Regulator*

Mobility of capital and mobility of labor are necessary in an expanding economy. The fate of "depressed areas" depends in part upon their ability to attract new plants and industries, some of which are going to be lured away from more crowded areas because of lower wage rates. If, then, we assume that a lawful movement of work made solely for business reasons can violate by implication a labor contract, the mobility of capital as well as labor is restricted. Such a restriction would prevent an important economic regulator from operating which, if free to operate, causes plants to be initiated in areas where the manpower resources are available and costs are lower.

It is also naive to believe that managements can always keep their wage costs within the competitive "ball park" by not conceding to excessive demands and "weathering" a strike. The more realistic view is that a management, when faced with an unreasonable wage cost demand implemented by a threat of strike, will often agree to raise wage costs and then set about to avoid the higher cost by (a) automating to eliminate employees; (b) subcontracting part of the production or services to others who can produce the needed part or supply the service for less (including the purchase of the needed part from a subcontractor in Europe or Japan); or (c) moving the production to some other plant of the company where, because the wage rates and fringe costs are lower, the production costs are less. The alternative to avoidance of the excessive cost by one of these means is usually the loss of the business to a competitor.

Management, of course, subcontracts work with reluctance. When it subcontracts work to others who can produce for less, the management loses the return payable for the managerial services that the management renders.

<sup>167</sup> See note 144 *supra* and accompanying text.

<sup>168</sup> See notes 140 and 145 *supra* and accompanying text.

If the subcontracting is complete, there is no longer a need for the members of the production management. Therefore, a management is under a strong economic compulsion not to subcontract work and will only do so when compelled by economic consideration of sufficient magnitude to offset the loss of the managerial return and the dilution in the scope of their managerial jobs.

To build restrictions against "work movements" by implication or by express language is tantamount to building "tariff walls" around plants to protect the high costs within from outside competition. Once unions are protected by such "tariff walls" they will, of course, be encouraged to make excessive demands, for then the employer has lost one protective alternative — moving the work to a lower cost producer.

The possible movement of work is a natural restraint on union abuse in the collective bargaining process. Absence of natural restraints results in more governmental intervention. Therefore, arbitrators who imply restrictions on work movements are removing a natural economic restraint and setting the stage for more governmental intervention to the ultimate injury of our free economy.

In addition, some economic analysts believe that other economic "regulators" in addition to "free competition" are functioning within our economy. An exponent of such a view is John Galbraith, the Harvard economist and ex-Ambassador to India. In his book, *American Capitalism*,<sup>169</sup> Galbraith explained the check and balance role of opposing power concentrations. He maintains that against many power concentrations, a natural "countervailing power" will build up and it will quite effectively prevent the first power concentration from being abusive in its dealings. Galbraith explains:<sup>170</sup>

In fact, new restraints on private power did appear. . . . [T]hey appeared not on the same side of the market but on the opposite side, not with competitors, but with customers or suppliers. . . . [P]rivate economic power is held in check by the countervailing power of those who are subject to it.

Galbraith illustrates his view by pointing out that the big food marketing chains, as powerful buyers, have been able to use their ability, not only to switch purchases, but also to threaten direct competitive production in the bargaining with big millers, canners and meat packers for lower prices. Galbraith believes that by use of these threats these big food distribution chains have prevented more price abuse to the food-buying consumer than threats of governmental antitrust prosecution ever prevented.

This same, more pragmatic, view is applicable here. If unions know that if they abuse their power and force "too good a deal," an outward "work movement" may occur to the detriment of their members, they will be more moderate. Therefore, this outward "work movement" consequence of "too good a deal" should be permitted to operate as a natural check on abuse of union power and as a better alternative than governmental regulation.

Some arbitrators have candidly said that if they detect as the motivation for the movement of the work an effort to "beat the union's price," the manage-

169 J. K. Galbraith, *American Capitalism*, Houghton Mifflin Co., 1946.

170 *Id.* at 111.

ment action is in "bad faith" and must be stricken down.<sup>171</sup> There is nothing inherently vicious in "beating the union's price," however unfavorable the semantics of that phrase, because unions, in a free economy, should have as much right as anyone else to price themselves out of the market. The freedom to make a bargain includes the freedom to make one that is too good as well as one that is not good enough.

### III

## CONCLUSION

There is little doubt that those arbitrators who, by implication, restrict the basis upon which an employer can do business with a third party, are inflicting harm upon our economy. Such restrictions prevent the most economic utilization of productive capabilities. Because of the increasing invasion of our markets, both at home and abroad, by foreign competitors, wage earners, managements, and the general public cannot now afford the luxury of restrictions on competition to protect high cost operations, whether they be implied from the general terms of a labor agreement or set forth in express terms.

And an agreement between a union and the employer that that employer will not deal with another employer should be considered contrary to Section 8(e) of the National Labor Relations Act whether such restriction has secondary boycott undertones or not, and whether implied or express. Since such restraints are commercial restraints between a union and a businessman, they should not be considered protected from the liabilities under the anti-trust acts. A secondary boycott can no longer be a "legitimate objective" under the Clayton Act and, if the restraint is not in the nature of a secondary boycott, it is not a restraint growing out of a labor dispute under the Norris-LaGuardia Act.

Furthermore, it is submitted that arbitrators who imply restrictions on "work movements" are doing the institution of arbitration irreparable harm. Such restrictions come as a surprise to the management negotiators and diminish management's ability to hold down costs. Managements, who are under pressure from all persons interested in the enterprise to operate plants effectively, will reject arbitration as the process to be relied upon to resolve disputes over contract interpretation if such surprise results become characteristic. Only if the simple and straightforward view, that managements retain all rights to manage unless they have agreed to limit these rights, is adopted generally, can thoughtful managements support this important institution.

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171 Gulf Oil Corp., 33 Lab. Arb. 852 (D. A. Crawford, 1959):

Such a broad interpretation of the company's right to manage runs counter to the Recognition Clause. . . . For if the Company can subcontract a bargaining unit job whenever it can get it done at less than union rates, the union is faced with the impossible alternative of having the work concerning which it has bargained with the Company removed from the bargaining unit or agreeing to the performance of the job by its members at less than the agreed upon contract rates.