

CHAPTER IV

THE ARBITRATION OF DISPUTES
OVER SUBCONTRACTING

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Definition and Scope of Term

Contracting out, in the broadest sense, means arranging with another firm to make goods or perform services which could be performed by bargaining unit employees with the company's facilities. But if a company transfers work from the bargaining unit to its supervisory or other non-unit employees, or if the company transfers work to another plant of the same company, is this also contracting out as the term is used in arbitration?

A firm cannot contract out to itself so the transfer of bargaining unit work to its other employees cannot be subcontracting. Yet the decisions so often treat the reassignment of work from unit employees to other employees of the company so much like contracting out that this type of case has been included.¹ Moreover, when the issue involves the transfer of work to other plants of the company, several awards have decided such removal of work to be subcontracting.

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¹ Thus Arbitrator Saul Wallen, in one of the first published awards on this subject [*New Britain Machine Co.*, 8 LA 720 (1947)], in ruling that the Company could not transfer four watchman jobs from the bargaining unit to its own guard force, said:

"If one of the purposes of the contract as a whole, and of the seniority provisions in particular, is to assure the bargaining unit employees a measure of job security, then such security would be meaningless if the company's view were in this case to prevail. For it would mean that without regard to prior custom or practice as to the assignment of work, the Company could continuously narrow the area of available job opportunities in which the seniority clause functions by transferring duties performed by bargaining unit employees to employees not covered by the agreement. Not only the seniority clause but the entire agreement could thus be vitiated."

For a listing of several such cases involving the transfer of bargaining unit work to other employees of the same company see footnote 39 following.

Arbitrator Sidney Sugerman, for example, ruled that the transfer of work from one plant of ALCO to another was "subcontracting."²

With this brief glimpse of the breadth with which the concept of "contracting out" may be used in arbitration, we may with equal brevity dismiss contracts expressly defining the Company's authority to contract out.

Types of Express Provisions

For convenience, clauses defining the management authority to contract out can be placed in four main categories:

(1) The weakest limitation on contracting out is the "discussion before contracting out" type clause. The Company shall inform the Union of any construction or repair work, or bargaining unit work, to be contracted out prior to the writing of the contract, and discuss it with the Union.

(2) The strongest prohibition against contracting out is found in this type of clause. "There shall be no regular work performed by any employee not covered by the contract except in emergencies or when work must be performed for which regular employees are not qualified." Here the probability of a lay-off or demotion as a consequence of the subcontracting is not required. Nor is there any provision for differences in the managerial problem or managerial know-how.

(3) More common is the limitation of reasonableness. "The Company will make every reasonable effort to use its available working force and equipment in order to avoid having its work performed by outside contractors"; or "The Company will use its own employees whenever possible."

(4) Finally, the most common clause is the prohibition against contracting out unit work when the firm's own employees are on layoff, or when the layoff or demotion of unit employees would result. "The company will not contract work which would require employees in the bargaining unit to be laid off or reduced in rate of pay, or

² *United Steelworkers of America and ALCO Products, Incorporated*, March 18, 1959 (A.A.A.—L-23209). Mr. Sugerman said (p. 5): Subcontracting "... has tended to take on the general meaning in the context of Labor Relations ... of any removal of otherwise available work belonging and normally assigned to a defined bargaining unit and ... the transfer ... of it to ... outsiders or any others than those deprived of it in the bargaining unit."

See also *Bethlehem Steel and the United Steelworkers*, Alan Dash, (15 I.U.D. 107); *Bethlehem Pacific Coast Steel Corp. and United Steelworkers*, Wyckoff, 31 LA 623 (1958).

would prevent re-employment of employees laid-off not longer than one year."

Typical problems of application that arise are the determination of:

(a) What is "normal or regular bargaining unit work." Whether or not work was performed by outside contractors before the contract was signed is included under the definition of work normally performed by the unit employees. Whether or not work involving the construction of new facilities is or is not production and maintenance work.

(b) What is "reasonable effort." What is "possible."

(c) Whether or not, when the unit employees are working overtime, the employer is prohibited from contracting out.

(d) Whether the contracting out actually caused the reduction or lay-off of a unit employee.

A Basic Issue

George Taylor a year ago said, "I have never seen an organization chart of a business which included a block with 'union' on it. But, once a union acquires status, the flow of authority and decision-making power represented by the organization chart is modified."³

Research studies of contracting out show that union inroads on this area of management authority are limited, and that it is an area that management strongly desires to exclude from the scope of collective bargaining.⁴ For joint decision making as to contracting out work is the sharing of a managerial function included in what

³ George W. Taylor, "Decision-Making in a Laboristic Economy," 1959 Client Seminar Workshop, Edward N. Hay & Associates, Philadelphia 7, Pennsylvania.

⁴ Chandler, Margaret K. and Sayles, Leonard R., *Contracting-Out: A Study of Management Decision Making*, Graduate School of Business, Columbia University (1959).

Milton Derber, W. Ellison Chalmers, and Ross Stagner, *Collective Bargaining and Management Functions: An Empirical Study*, University of Illinois Bulletin, Vol. 55, No. 84 (July 1958).

Mark Kahn, "Jurisdictional Developments in Organized Labor" in *New Dimensions in Collective Bargaining* (New York: Harper & Bros., 1959).

The Columbia Graduate School of Business Study found that "inroads into this area are limited." Strong union voice was found in only 19% of the companies surveyed. 22% had moderate, and 27%, weak voice. In 32% of the firms the union had no voice. According to the Illinois study "The items most frequently mentioned" (which the unions want to bargain about in spite of the Management claim to exclusive authority) "were, in order of frequency, the number of employees on a job or machine, scheduling of operations, *contracting work out*, level of work performance, selection of new employees, and promotion to supervisory positions."

Bradford B. Smith, Economist of U.S. Steel, has described as Union insistence on the perpetuation of inefficiency in the steel industry. And undoubtedly the interpretation of Section 2-B of typical Basic Steel agreements to include local working conditions limiting contracting out entered significantly into management's recent ill-fated drive for a change in "local working conditions."⁵

Thus, when we arbitrate the issue of contracting out under those agreements which are silent—apparently the substantial majority—we are squarely in the middle of the battleground over the scope of collective bargaining. *For contracting out is a rank and file demand for more job security, and to secure it, joint sharing of a management function is required.*

The Silent Contract—Arbitrability

As to the issue of arbitrability, where the contract is *silent as to contracting out*, we may dispose of it quickly. In a recent case involving the Celanese Corporation, Arbitrator G. Allan Dash, Jr., conclusively demonstrates that arbitrators hold the issue of contracting out to be arbitrable even though the contract is silent. He found that less than one-third of the 64 published awards adopted the reserved rights theory, and even “. . . in these decisions, . . . the arbitrators denied the *merits* of the grievance in every case.” (Emphasis added.)⁶

But there is a great cleavage between arbitrators and judges in their philosophies toward the interpretation of labor agreements.

Mr. Dash says, “My study . . . convinces me that the large majority of courts that have ruled on the issue of arbitrability of contracting out issues in connection with agreements containing no express language prohibiting such action have, and will, rule such issues to be non-arbitrable. On the other hand, in not a single published arbitration decision that I have been able to discover, has the arbitrator ruled this issue to be non-arbitrable under comparable circumstances.”⁷

⁵ *Bethlehem Steel Co. & United Steelworkers*, Ralph Seward, 30 LA 678 (1958); *Republic Steel Co. & United Steelworkers*, Harry Platt, 32 LA 799 (1959); *Great Lakes Steel Corp. & United Steelworkers*, Gabriel Alexander, 8 SAB 5481 (1959).

⁶ *Celanese Corporation of America and District 50*, Dash, 33 LA 925 at 944 (1960).

⁷ *Ibid.*, p. 944.

The Silent Contract—Pandemonium

Having decided that the issue is arbitrable, we arbitrators then proceed to fog the issue up.

I think of a statement made by the much respected James Phelps (Vice-President Industrial Relations, Great Lakes Steel) in our 9th Academy Meeting: "I believe that, in over 15 years of intensive experience in representing management in grievance arbitration, I have found among arbitrators less consistency in their approach to the question of how the execution of a collective bargaining agreement affects the exercise by management of its customary functions which are not surrendered in the agreement than I have found in the consideration of any other subject."⁸

Similarly Ralph Seward said in a Bethlehem case of May 5, 1958 on the issue of contracting out:

"Because of the importance which they attach to the issue, both parties have cited certain decisions of other arbitrators in support of their position, and the umpire has supplemented these citations by his own research into the reported cases. Beyond revealing that other companies and unions have faced this same question of implied obligations—have presented similar agreements, and voiced similar fears—the cases show little uniformity of either theoretical agreement or ultimate decision. Within each group of decisions, moreover, there are conflicts of principle and approach. The umpire has returned from his exploration of the cases a sadder—if not a wiser—man, echoing the plaint of Omar Khayyam: "Myself when young did eagerly frequent Doctor and Saint and heard great argument about it and about: but evermore came out by that same door wherein I went."⁹

It is interesting to note, however, that Arthur J. Goldberg, General Counsel, Ben Fischer, International Representative, Elliott Bredhoff, Associate General Counsel and Tim L. Bornstein, Counsel, of the United Steelworkers of America, found quite a different result from reading the same cases. They say:

"Although the weight of numbers does not provide an absolute basis for the resolution of a particular case, subcontracting is one area in which there is a large body of arbitral decisions and the

⁸ James C. Phelps, "Management's Reserved Rights: An Industry View," from *Management Rights and the Arbitration Process*, Proceedings, Ninth Annual Meeting National Academy of Arbitrators. (Washington, D. C., BNA Incorporated, 1956) p. 106.

⁹ Bethlehem Steel, *op. cit.*, p. 682.

thinking of arbitrators is *especially well-defined and articulate.*"¹⁰

Perhaps this business of confusion or clarity can be illustrated graphically. Mr. Dash, in his *Celanese* opinion, says of the 64 published decisions he located, "in 19 the arbitrator found that, in the absence of a provision prohibiting contracting out of work, the company retained the right to take such action. . . . The . . . decisions . . . which find that the full right to contract-out is not retained, are much more numerous. There are 45 such decisions. . . ." ¹¹

In the Bethlehem case, Ralph Seward referred to some 23 published awards—four of which Allen Dash did not include. He, too, separated the retained right from the implied limitation cases. Of the 19 cases which they both classified, Mr. Seward has four cases in the full right retained category that Mr. Dash has in the implied limitation category—a 21% difference.¹² Even the purport of the opinions on this issue is hard to classify.

Of the 17 arbitrators listed by Mr. Dash as writing the 19 opinions based on the reserved right concept, seven have written opinions based on the limited right concept. Mr. Seward's classification would add two more arbitrators to yield nine of 17.¹³ Indeed, the extent of management authority when the contract is silent is an area in which it is extremely difficult to achieve conceptual clarity. Perhaps a look at the practice as to contracting out of construction and maintenance work will shed some light on the source of this difficulty.

The Institutional Setting

According to the Columbia Graduate School of Business Study¹⁴ on management decision making as to subcontracting, eight out of

¹⁰ Consolidated Western Steel Division and United Steelworkers of America. Brief for the Union, November 1959.

¹¹ *Celanese* (Dash), *op. cit.*, pp. 943-944.

¹² Compare *Celanese* (Dash), *op. cit.*, p. 942 and *Bethlehem Steel*, *op. cit.*, p. 682 footnote. The cases are *National Sugar Refining*, 13 LA 991; *Washington Post Co.*, 23 LA 728; *Carbide and Carbon Chemicals Co.*, 24 LA 158; and *Park Davis & Co.*, 26 LA 438.

¹³ *Ibid.*

¹⁴ Chandler and Sayres, *op. cit.*, pp. 11, 23-27, 37, is the principal source for this entire section.

Similar data do not appear to be available as to the contracting out of other than construction and maintenance work.

Production work contracted out, of course, is normally performed off the Company premises, and is therefore less apt to be a source of Union grievances. Almost all published arbitration awards on contracting out involve performance on the premises by the contractor.

ten unionized manufacturing firms contract out their major construction work but some companies do perform some of this work themselves. Seventy per cent contract out some portion—but not all—of their modernization work. Seventy-five percent subcontract some of their minor construction—50% contracting out less than 25% of it. Some non-routine maintenance is contracted out by eight out of ten firms, although more than 60% contract out less than 25% of it.

In short, most manufacturers farm out major construction and modernization, but do the minor construction and maintenance work themselves. And even as to the latter work, most subcontract some because of particular circumstances.

In deciding whether or not to contract out construction and maintenance work, cost is considered controlling by 34% of the firms, past practice by 26%, number of men on layoff by 22%, and union pressure is considered controlling by 18%. As to cost, the majority of firms believe contracting out of major construction to be cheaper, but contracting out routine maintenance to be more costly. Cost is not crucial because construction and maintenance work is a peak and valley problem. Considerations of speed, efficiency, and long run corporate structure as to manning, equipment, facilities, and management scope are important.

Although the number of men on layoff greatly concerns management (and workers) in deciding whether to subcontract, it cannot be the controlling factor because almost one-half of the firms cannot interchange craft and production workers. Moreover the contracts and the layoffs do not necessarily coincide in time.

Thus, the evidence indicates that managerial decisions on contracting out are not simple, that they must meet varying requirements amid a diversity of circumstances and considerations, and that the decisions of a company are not all one way.

The Parties' Ambivalent Conduct

Contracting out is an area in which the arbitrators might be said to be reflecting the confusion of the parties. At times—as we have seen—the company will contract out work and at other times the company will have unit employees perform the same work. At times the union will object to contracting out and at other times not. Very often the employer representative will say directly, or imply, that the company is not arguing that management is entitled to sub-contract out all bargaining unit work. And the Union for its part will say directly, or imply by its conduct during

the hearing, that of course it recognizes that the employer can contract out certain types of work.

The company always argues at some point as well that: "Silence is consent to contracting out." And the union argues that "The Recognition Clause prohibits farming out bargaining unit work." The union naturally has just finished seeking in vain to secure a specific prohibition against subcontracting in the last contract renewal negotiations. And the union has accepted the contracting out of the particular work for two years, but when a layoff occurred, suddenly discovered that the company had violated an implied obligation not to contract out this work in the first place. At this point a production manager or engineer pops up who at some time has said that the company intends to give *all* its construction and maintenance work to its own employees.

In short, the parties project ambivalent concepts and conduct onto their arbitrators who in turn project them onto paper. And, of course, the basis for all this highly rational but seemingly inconsistent conduct—at least from the arbitrator's viewpoint—stems from different problems and situations which, of necessity, must be dealt with by both parties as they arise. In trying to delineate guideposts for the parties by defining inconsistent conduct surrounding different problems and factual situations, the arbitrators produce the inconsistent data.

Silence—the Reserved Rights Doctrine

The case for ruling that silence reserves the decision on contracting out solely to management was ably stated by James Phelps when he said that the typical labor agreement contains a management clause by which the parties agree that the company retains the exclusive right to manage the business and plants and direct the working forces limited by the provisions of the agreement. In *practice*, therefore, says Mr. Phelps, the parties write the contract as an instrument containing specific and limited restrictions on the functions that management would otherwise be free to exercise. And a different kind of contract should not be imposed by arbitrators."¹⁵

And in his argument to Ralph Seward in the *Bethlehem* case Mr. Phelps said:

"The right to contract work out and to determine in its discretion what work should be done by its own employees and what should be done by independent contractors is necessary to

¹⁵ Phelps, *op. cit.*, pp. 115, 117.

the Company's growth and efficient operation. During the entire period of its relations with the Union, it has freely exercised this right. Depending on such considerations as the nature, magnitude and length of a job, the type of equipment and skill required, the availability of manpower and the volume of other work to be done, it has treated work of the same general character in different ways, sometimes having it performed by its own employees and sometimes by outside contractors. And because of the importance of this right to decide, under the particular circumstances of each case, whether or not independent contractors should be used, the company has never agreed to any of the proposals advanced by the Union during contract negotiations which would have restricted its freedom of choice or would have permitted contracting out only with Union consent." ¹⁶

He also said:

"In general, I believe that arbitrators subscribe to the principle that management continues to have the rights which it customarily possesses and which it did not surrender in the collective bargaining agreement, but many arbitrators are reluctant to follow the principle to its logical conclusion." ¹⁷

Yet the facts are that on the issue of contracting out the arbitrators seem to find that management did surrender in the collective bargaining agreement an *unlimited* right to contract out. Only a minority of arbitrators even recite the reserved rights theory, and very often abandon it on utterance. In the cases which Mr. Dash has grouped under the "reserved rights" concept, every single one in some way limits management on contracting out. Each holds that the contracting out must *be in good faith*, or that the given instance (1) was in conformance with past practice; (2) was dictated by the requirements of the business, or (3) was not unreasonable or arbitrary. And of the 19 cases only 6 of them are limited to just *one* of these four qualifications. ¹⁸

Eleven point out that the sub-contracting was in conformance with past practices not previously objected to by the union. Five hold that the sub-contracting was not unreasonable, arbitrary, discriminatory, nor intended to harm the status of the union. Two of the remaining three say that the sub-contracting was in good faith. Thus 18 of the 19 cases include an estoppel concept (against the union) or impose a limitation of good faith or reasonableness, (upon the com-

¹⁶ Bethlehem Steel, *op. cit.*, p. 680.

¹⁷ Phelps, *op. cit.*, p. 108.

¹⁸ Celanese (Dash), *op. cit.*, p. 942.

pany) which is of itself inconsistent with the reserved rights of management theory.¹⁹

Even the cases cited as specifying the reserved rights doctrine, therefore, embrace the implied limitation conception. Or at least they read that way.

This leads to the conclusion that there is *no true adherence* by arbitrators to the reserved rights of management concept in the field of contracting out.

In fact, there is not much adherence to it by management except for purposes of marshalling arguments. For example, Los Angeles attorneys (Musick, Peeler and Garrett) representing a U.S. Steel division said:

"... in the absence of express contractual restriction an employer is free unilaterally to contract out—at least in the absence of obvious malice toward or discrimination with respect to a labor organization..."²⁰

Even James Phelps implied in the case he presented to Ralph Seward that he recognized limitations on the right to contract out. Management too, then, has trouble following the reserved rights principle to its logical conclusion.²¹ Actually it is not followed in the area of contracting out.

The real issue therefore is to decide what limitation is implied.

The Implied Limitation

One of the first published awards resting on the implied limitation concept is Arbitrator Sidney Wolff's decision prohibiting Celanese Corporation from contracting out the operation of its restaurant. He wrote:

"It is *implied* in every contract that there will be good faith and fair dealing and that neither part to the contract will do anything that has the effect of destroying or injuring the right of the other party to receive the fruits of the contract."²²

¹⁹ *Ibid.*

²⁰ Company Brief Consolidated Western Steel Division, United States Steel Corporation and U.S.A.

²¹ See, for example, *Republic Steel & U.S.A.*, Platt, 32 LA 799 at 800 and 803 (1959); *Lukens Steel & U.S.A.*, Crawford, 33 LA 228 at 228, 229 (1959).

²² *Celanese Corporation of America and Textile Workers Union of America*, Wolff, 14 LA 31 at 34 (1950). Wolff also said (pp. 34 and 36):

"The failure to incorporate . . . an express prohibition . . . is not sufficient to authorize such a contract. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip

He then ruled that contracting out denied the benefits of the contract to the employees, and that if the Company could contract out the cafeteria, it could completely avoid the Agreement.

A more recent statement of similar genesis is that of Arbitrator Milton Schmidt in sustaining the United Steelworkers' protest to contracting out the installation of four automatic testers in the can assembly lines. He said:

"The fundamental objective of a collective bargaining agreement from the Union's standpoint, is not only to fix wage rates, hours, and general conditions of employment, but also to secure for the Union recognition of its rights to exclusive representation of the bargaining unit employees and *to make secure the right of its members to the jobs or the work which the company requires performed—that is to say the kind of work that is reasonably embraced within the jobs covered by the defined unit.* Certainly the unit may be reduced in size by jobs being eliminated . . . or operations contracted. But it is equally apparent that, absent from extenuating circumstances, jobs cannot be taken from the Union members and given to outside contractors, even though it might be more efficient or less costly for the Company to do so." (Emphasis added).²³

These cases express the idea that the labor agreement entitles the employees to the seniority and job security benefits of performing all the company's maintenance and production work—that contracting it out violates the implied covenant of good faith by depriving the employees of their right to receive the fruits of the contract.

was fatal. It takes a broader view today. A promise may be lacking and yet the whole writing may be instinct with an obligation, imperfectly expressed."

"When we consider that . . . the Company sought to remove from the Union's jurisdiction one of the departments expressly covered by the agreement, and to deny its benefits to the employees by way of turning over the operation to another who was to continue the very same operations on the very same premises but allegedly is an independent contractor, it seems clear that the spirit, as well as the terms of this Agreement was violated.

". . . if the Company could so avoid its obligations as to the cafeteria department, how simple it would be for the complete avoidance of the Agreement."

²³ *Continental Can Co. & United Steelworkers of America*, Schmidt, 7 BSA 4975 (1958). Schmidt also said:

"As I interpret these provisions (relating to the definition of the unit, and the recognition of the Union, etc.) taken together, and in the context of the collective bargaining relationship, *the purpose and intent is to restrict the work* which is comprehended as the area of work of the employees within the bargaining unit to those employees and to such others as in the future may become employees and members of the Union within the prescribed period." (emphasis added)

The first case expresses the idea also that if some production and maintenance work can be contracted out, all production and maintenance work can be contracted out—that the authority to sin a little, perforce must include the authority to sin a lot.²⁴

Critics of this all or none doctrine hold that the Union should be obliged to demonstrate rather than anticipate its injury before the contracting out is barred.²⁵

The fault of the fruits of the bargain concept is that it *assumes* that the *bargain* includes the right to all available production and maintenance work; that the establishment of a collective agent vests a right to *all available work* where none existed before.

Another line of decisions holds that contracting out is limited by the discharge clause.

Arbitrator Herman A. Gray, in ruling that Hearst Consolidated Publications improperly contracted out the messenger service department, said:

“The company has expressly pledged itself not to terminate employment of any employee without good reason. This pledge . . . creates the right to receive available work. . . . The right to job expectancy is seriously infringed where the company discharges a group of its employees so that the work which they have been doing might be performed by the employees of another.”²⁶

The fault of this concept is that it is based on an irrelevancy—for the prohibition relied upon is against improper discipline and not against contracting out.

A less rigorous limitation states that the company when making decisions about contracting out is obliged to respect *within reasonable limits the jurisdiction and status of the exclusive agent with whom it has contracted*.

Sylvester Garrett, Chairman of the Board of Arbitration, United States Steel Corporation and United Steelworkers of America, wrote

²⁴ See also *Bridgeport Brass & Independent Union*, Donnelly, 25 LA 151 (1955); *New Haven Gas Co.*, Stutz, 24 LA 883 (1955).

²⁵ In a Lukens Steel award, I expressed myself as a believer in a little sin as follows: “And while the Union may understandably fear that a contracting out incident in which the resultant effect of the bargaining unit, if any, was minimal may prepare the way for one in which the effect is substantial, in the absence of a specific prohibition against contracting out the Union must demonstrate rather than anticipate that the Recognition and Seniority provisions have been violated by Company action under the Management Clause.”

Lukens Steel & United Steelworkers of America, 33 LA 228 at 231 (1959).

²⁶ *Hearst Consolidated Publications & Newspaper Guild*, Gray, 26 LA 723 at 726. See also *Parke Davis & Co.*, Scheiber, 15 LA 111; *Celanese* (Wolff), *op. cit.*, p. 36.

an opinion superbly expressing the limitation implied from the Recognition Clause. I quote:

"The inclusion of given individuals in the bargaining unit is determined, not on the basis of *who they are*, but on the basis of the *kind of jobs* which they happen to fill. In view of the fact that the Union has status as exclusive representative of all incumbents of a given group of jobs, it would appear that recognition of the Union plainly obliges the Company to refrain from arbitrarily or unreasonably reducing the scope of the bargaining unit.

"What is arbitrary or unreasonable in this regard is a practical question which cannot be determined in a vacuum. The group of jobs which constitute a bargaining unit is not static and cannot be. Certain expansions, contractions, modifications of the total number of jobs within the defined bargaining unit are normal, expectable and essential to proper conduct of the enterprise. *Recognition of the Union for purposes of bargaining does not imply of itself any deviation from this generally recognized principle.* The question in this case, then, is simply whether the Company's action—either as to window washing or slag shoveling—can be justified on the basis of all relevant evidence *as a normal and reasonable management action in arranging for the conduct of work at the plant.*" (Emphasis added.)²⁷

Ralph Seward in his penetrating and definitive Bethlehem Steel opinion adopts Garrett's formulation of the implied obligations issue in disputes over contracting-out work.²⁸ He then proceeds to apply

²⁷ *National Tube Co. & U.S.A.*, Garrett, 17 LA 790 at 793 (1951).

²⁸ Seward's own postulation of the implied obligation doctrine is as follows (*op. cit.*, p. 681):

"The (Union) claim rests essentially on the contention that an agreement granting benefits to employees who are performing certain types of work necessarily carries with it—if it is to be meaningful—some obligation to have such work performed by employees. The Union fears that unless some such obligation is held to exist, the Company could defeat the purpose of the Agreement and render its benefits illusory simply by farming out its work to contractors. The Company fears, on the contrary, that if *any* such obligation is held to exist, its normal right to contract with other companies for the furnishing of necessary goods and services will be jeopardized or destroyed. Broadly posed, the issue thus touches both parties in a supremely sensitive spot; the Union in its concern for the representational rights and job security of its members; and the Company in its concern for the preservation of its ability to run its enterprise efficiently and according to the dictates of sound business judgment.

"At the outset, therefore, the extreme fears of each party should be set at rest. There is no question . . . but that the Company has—and has always had—a broad general right to contract with other companies for the furnishing of

the concept—to weigh the facts of efficient operation against the degree of job security at stake. Seward says:

“Garrett’s language, in its essentials, might well be adopted as a statement of the implied obligations issue in the present case. And if the grievance were to be decided on the basis of this issue, a holding for the Company might well be indicated. Though scrap reclamation is a continuing operation which feeds directly into the Company’s steelmaking processes, its most efficient performance seems clearly to call for specialized skills and equipment which the Company has not developed within its own organization. Scrap reclamation is frequently contracted out in the steel industry . . . and it could hardly be argued that in their bargaining the parties have assumed that this type of work would always—or even normally—be performed by bargaining unit employees. Management anticipated from the Heckett process benefits which are real and important—a 50 per cent increase in the amount of usable scrap. . . . By contrast, only a small number of its employees would be affected by the change—some 45 or 50 out of a bargaining unit covering many thousands. Weighing all the circumstances, the claim that management had here abused its right to contract out or had frustrated in any substantial manner the purposes or performance of the agreement would seem to have little substance.”²⁹

In this short paragraph, Mr. Seward has applied all the yardsticks. And in particular he has pointed to one facet of contracting out often unseen. It is the problem of management know-how that so substantially enters into a decision as to whether or not to contract out. The company may have the equipment, *the available skilled men*, but not the available *managerial or technical* know-how.

Troubled with the question, Where exactly do you draw the line?, Arbitrator Melvin Lennard in his General Metals award deciding a janitor case tried to provide criteria with which to balance

goods and services. There is also no question but that it may not properly abuse that right—that it may not exercise it in such a way as to frustrate the basic purpose of the Agreement or make the Agreement impossible to perform. The ‘implied obligations’ issue, as posed in this case, is not whether the Company may contract out *all* of its work or *none* of its work. It is whether there was any implied contractual bar to the contracting out of *this particular scrap reclamation work, at this particular plant and under the circumstances of this particular case.*”

²⁹ *Ibid.*, p. 683. Seward actually decided the case for the Union on the basis of a local working condition protected under Section 2-B-3.

the company's right to effective operations against the union's right of exclusive agency. Simplified, his criteria are:³⁰

1. Whether such work is to be performed permanently;
2. Whether an emergency is involved;
3. Whether the skills of unit members and managers are sufficient;
4. Whether the necessary equipment is available;
5. Whether the effect on the Union is substantially harmful, including effect on size of the unit, and on unit wage rates;
6. Whether the type of work is frequently subcontracted in the industry, and whether the work is different from that the Company normally performs;
7. Whether the work is unprofitable.

But a troublesome line it is to draw. And even if the easiest to apply doctrine of implied limitation is followed, difficulties in drawing the line remain. For when the arbitrator follows the doctrine that the contract entitles the bargaining unit employees to all the available production and maintenance work, the job descriptions and the kinds of work that unit employees have performed in the past do not always reveal the ability of the employees to do the type of work that the company is insisting on contracting out today. And there still can be questions as to availability of sufficient unit employees and equipment.³¹

A New Approach

Sylvester Garrett, in a United States Steel decision subsequent to that cited earlier, injects an interesting concept into his discussion of the dispute over the Company's contracting out of a multi-million dollar re-build and construction program along with a substantial amount of repair work. Although his opinion weighs many considerations including the fact that the Company had contracted out work of the same general nature for some years; that it was not until the 1957 recession layoff in this case that a grievance was filed; that the program was near substantial completion by then; that many of the projects were for practical reasons beyond the Com-

³⁰ *General Metals Company & I.A.M.*, Lennard, 25 LA 119 at 120. For other opinions discussing criteria for applying the implied limitation, see *Weber Aircraft & I.A.M.*, Jones, 25 LA 821; *Magnolia Petroleum Co. & Indep. Union*, Larson, 21 LA 267; *A. D. Julliard Co. & T.W.U.A.*, Hogan, 21 LA 713; *White Brothers & Teamsters*, Hogan, 32 LA 965 at 968.

³¹ See for instance Schmidt, *op. cit.*

pany's ability to perform;—the opinion does include this interesting statement:

"The situation here differs substantially from that in Case N-159, where the problem arose because of contracts with outside contractors covering performance, over the indefinite future, of continuing operations or functions within the plant location. Here the disputed work is new construction, or one-shot performance of maintenance functions, for the most part. No doubt in recognition of this distinction, the Union here rests its weight primarily on the contention that the disputed work normally and customarily has been performed by bargaining unit employees over the years. On this basis, it urges that the Board embrace the (Section 2-B-3 protected local working condition) approach of Arbitrators Seward and Wyckoff, in the two Bethlehem cases which it cites."³²

In this statement, Mr. Garrett seems to imply that the contracting out of new construction and one-shot (or abnormal) maintenance work would not constitute an "arbitrary or unreasonable reduction of the scope of the bargain unit." Or to put the matter the other way, the implied limitation applies essentially to the contracting out of permanent and continuing work on the premises—including routine maintenance.

In a similar vein International Representative Ben Fischer in presenting the Steelworkers' case against the contracting out of the operation of the Company cafeteria by Consolidated Western Steel Division of United States Steel Corporation said:

"Under the applicable arbitration decisions in the steel industry, interpreting the contract language here involved, the prohibition does not run to all subcontracting *per se*. It is subcontracting which is designed to frustrate the contract and the collective bargaining process which is in issue, *not the right of management to subcontract the extraordinary maintenance jobs, construction work and similar exceptional jobs referred to by Arbitrator Sylvester Garrett*. . . .

"The Company's Exhibit 'B' reveals the kind of subcontracting situations in which management's right is *normally not contested* through the grievance machinery. They are mostly new installations, new construction, special printing projects, and matters which neither replaced regular employees nor subverted the terms and conditions of a collective bargaining contract. And it is especially interesting to note that the heading which the Company chose for these outside contractors was

³² *United States Steel & U.S.A.*, 33 LA 282 at 284 (1959).

'Vendors,' which clearly implies that they were 'ad hoc' subcontractors for special and unusual projects, not permanent managers of the Company's continuing operations.

"Not one of the subcontracts listed in the Company's Exhibit 'B' is even comparable to this situation in which regular employees of the Company have been totally replaced by new employees, who are performing identical work, in the identical way, on the same premises, with the same equipment—except for lower wages and fewer benefits." (Emphasis added.)

But if we may plummet from the lofty peaks of doctrine to the humdrum world of facts, there appears an interesting development.

The Logic of the Awards

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.*

If the 64 awards listed by Allan Dash are taken as representative, they show that 16 cases (or 25%) sustained the union's claim that the contracting out violated the implied limitation. Fifteen of the 16 involved regular, continuing work. Twelve of the 16 presented factual situations wherein the primary advantage of the subcontract lay in wage rates below the unit rates. Eight of the 12 cases involved janitorial and window cleaning work, and one involved messengers—where the real difference is *rates*, not management skill. The tenth involved contracting out manufacturing operations to commission houses to get advantage of lower wage rates. The eleventh and twelfth involved contracting out regular work on Saturday and Sunday to avoid overtime rates.³³

³³ Celanese (Dash), *op. cit.*, pp. 942-943. Three of the 64 cases are excluded. Two (Bethlehem & Republic) were decided on other grounds and one (National Tube) was referred back.

The 16 cases (listed on Table II) are:

8 Janitor-window cleaning cases

Parke Davis & Co. & Allied Trades Council, 15 LA 111, Scheiber.
 Stockholders Publishing Co. & Guild, 16 LA 644, Aaron.
 Weber Aircraft & I.A.M., 24 LA 821, Jones.
 New Haven Gas Co., 24 LA 883, Stutz.
 General Metals Corp. & I.A.M., 25 LA 118, Lennard.
 Continental Can Co. & U.S.A., 29 LA 67, Sembower.
 Electric Auto-Lite Co., 30 LA 449, Marshall.
 Krey Parking Co. & A.M.C. & B.W.A., 32 LA 68, Klamon.

1 Messenger case

Hearst Consolidated Publications, Inc., 26 LA 723, Gray.

Of the remaining four cases, one involved transferring unit work to non-unit employees of the same company,³⁴ and so is not properly a contracting-out case. And finally, three cases of the 16 are strays from the prevalent pattern of awards. One holds that cafeteria operations cannot be contracted out even though the Company was a failure at running the food business.³⁵ Another award held that guard jobs could not be contracted out to the Pinkertons.³⁶ And a third held that a day's installation work of the type regularly done by the maintenance department could not be subcontracted.³⁷

Basically then the awards—as judged by their facts rather than their dicta—seem to stand for these propositions:

1. The implied limitation is invoked with considerable caution. Or to turn it around, most contracting out is not a present threat to the scope of the bargaining unit.

2. Recognition and contract signing *do not* establish a bargain that all of the jobs then performed, or all of the available production and maintenance work, should be performed by members of the bargaining unit.

The opinion to the contrary is, as yet, a minority opinion. And the issue therefore is not limited largely to the definition of what constitutes production and maintenance work.

3. The company cannot avoid the contract—cannot undermine (even unwittingly) the union by placing the union in the impossible situation of having to agree to cut contract wage rates in order to prevent the company from contracting the work out.³⁸

For the great preponderance of awards sustaining the union were in situations where the only apparent or stated economy of

1 Commission House case

A. D. Julliard Co. & T.W.U.A., 21 LA 713, Hogan.

2 Overtime avoidance cases

Magnolia Petroleum Co. & Independent Union, 21 LA 267, Larsen.

Thompson Grinder Co., 21 LA 671, McCoy.

³⁴ New Britain Machine Co. & U.E., 8 LA 720, Wallen.

³⁵ Celanese Corp. of America & T.W.U.A., 14 LA 31, Wolff.

For contrary view see *Linde Div., Union Carbide & O.C.A.W.A.*, Shister, 30 LA 998; *SKF Ind. & U.S.A.*, Crawford, 9 ALAA 71,000; *Armco Steel Corp. & United Steelworkers of America*, 1953 (Simkin); *American Viscose Corp. & T.W.U.A.*, March 30, 1954 (Simkin) esp. p. 9.

³⁶ Lorraine Mfg. Co. & T.W.U.A., 22 LA 390, Horvitz.

³⁷ *St. Regis Paper & Int. Chemical Workers*, 30 LA 379, Hill. Compare denial of other grievance in same award.

³⁸ See *Gulf Oil Corporation & Oil, Chemical & Atomic Workers*, Crawford, 33 LA 852 at 855.

operations possible to the subcontractor were lower wage rates—the janitor, commission house, and overtime type cases.

4. The company cannot “contract out” bargaining unit work to its non-unit employees. There are dozens of decisions upholding this proposition to go along with the one included in the 16 cases Mr. Dash reported.³⁹

5. The arbitrators will take a long look at contracting out regular, permanent work since union jurisdiction and employee status is involved. Fifteen of the 16 cases sustaining the grievances applied to permanent work.

6. If the work is temporary or irregular, the awards seem to say that the company *can* contract it out—that there is no *impact* on the status of the exclusive agent or the employees.

Of the 45 awards upholding the contracting out, a surprisingly large number—almost half—applied to regular work. Against the 15 saying that permanent work could not be contracted out, were 20 awards saying that permanent work could be removed from the unit. Some of the cases involved sub-contracting the work of entire departments (printing, mending, box manufacturing and the like). Six of them involved contracting out trucking operations, sometimes including the selling function. Three cases involved incidental services which came essentially free as part of package sales or lease arrangements. Two included contracting out guard jobs to detective agencies—which is a situation dominated by the Taft-Hartley view as to guards.⁴⁰ Three cases are really not decided on the issue of

³⁹ Owl Drug & I.L.W.U., 10 LA 498 (Pollard)—leader work.
 Union Oil Co. of Calif. & Indep. Union, 11 LA 94 (Cheney)—leader work.
 Bridgeport Brass & Fed. Labor Union, 15 LA 559 (Donnelly)—leader work.
 Adolph Coors & Brewery Workers, 18 LA 156 (King)—leader work.
 Rock Hill Printing & Finishing Co. & T.W.U.A., 19 LA 467 (Jaffee)—leader work.
 Cooperative Mills & I.B.T., 20 LA 603 (Lehoczy)—clerical checker.
 Lear Inc. & U.A.W., 20 LA 681 (Boyce)—inspector work.
 Carborundum & U.G.C. & C.W., 20 LA 832 (Cummins)—inspector work.
 Bethlehem Steel & U.S.A., 16 LA 111 (Killingsworth)—expediting job to supervisors.
 Wheeling Steel & U.S.A., 3 B.S.A. 1523 (Shipman)—unit standardizing to chemists.

⁴⁰ Celanese (Dash), *op. cit.*, p. 942.

The manufacturing operation cases are:

Amos Keog Mills & T.W.U.A., 8 LA 990, Copeloff.
 Parke Davis Co. & O.C.A.W., 26 LA 438, Haughton.
 Hershey Chocolate & Confectionery Workers, 28 LA 491, Wallen.
 Linde Co. & O.C.A.W., 30 LA 998, Shister.
 Dalmo Victor Co. & I.A.M., 24 LA 33, Kagel.

The trucking cases are:

Hercules Power & U.M.W., 21 LA 331, Williams.
 Waller Bros. Stone Co. & U.S. & A.P.W., 27 LA 704, Dworkin.

contracting out.⁴¹

The justification lies in the compelling logic and economies of the particular situation. Obsolete and expensive equipment or processes need not be replaced. Particular functions poorly done can be contracted out to specialists with substantially better know-how, equipment, and resources. Sub-contracts aimed at maintaining the availability of manufacturing and distribution resources additional to the company's capacity are upheld if necessitated by special problems of fluctuating demand. The empty return trip, the cost of modern trucks, and the interstate regulations control the trucking cases. With bakeries and breweries, advantages as to retail or wholesale selling are important to the change in distribution system. Actually three of the trucking cases (Koppers, International Harvester, and Reynolds Metals) involve part-time and irregular hauling so that they might more properly be classified with the following group of cases.

The remaining 25 awards concern what I would call impermanent or surplus work. The contracting out does not directly and immediately affect or displace unit workers:

- 14 involved ordinary maintenance work, painting in 7 cases⁴²
- 3 involved major construction⁴³
- 1 involved installing 10 machine tools to set up a new plant⁴⁴
- 1 involved excess truck deliveries⁴⁵
- 3 involved excess or temporary work contracted out without pro-

Koppers Co. & U.G.C. & C.W., 22 LA 124, Reid
 International Harvester, 25 LA 1, Smith.
 Richmond Baking Co. & Teamsters, 30 LA 493, Warns.
 Reynolds Metals & U.S.A., 32 LA 366, Schedler.

The package deal incidental service cases are:

American Airlines & T.W.U., 27 LA 174, Wolff.
 Bakelite Co. & Glass, Ceramic Workers, 29 LA 556, Updegraff.
 White Bros. & Teamsters, 32 LA 965, Hogan.

The guard cases are:

Cords Ltd. & U.R.C.L.W.A., 7 LA 748, Stein.
 Ohmer Corp. etc. & U.E., 11 LA 197, Kelliher.

A major reorganization justifies contracting out one truck mechanic's job—Appalachian Electric Co. & I.B.E.W., 19 LA 815, Holly.

⁴¹ *The off-beat cases are:*

Reynolds Metals & Guards' Assn., 32 LA 815, Anrod—4 guard jobs were replaced by electric alarms.

Hertner Electric & U.E., 25 LA 281, Kates—specific agreement to contract out janitor work, otherwise could not.

Washington Post & Guild, 23 LA 728, Healy—supports Company's right to convert from dealer to independent contractor distribution of newspapers, using same individuals and in accord with their desire.

test, but later grieved because of subsequent layoffs due to general business conditions⁴⁶

And 3 were odd balls—that is, irrelevant to our issue.⁴⁷

The reasons given for upholding the contracting out in the 25 awards are:

The unit employees are busy. The work is temporary. The employer need not hire temporary workers. There has been no layoff or loss of earnings. The employer does not have to postpone the work. Nor change his schedules. Nor does he have to cancel the contract because of a subsequent layoff caused by business conditions. Nor does the company have to recall A to make B available. Nor promote painter helpers to painters jobs. The Company is not geared to handling the construction project, and bits of it need not be retained for unit employees to do.

Essentially the arbitrators were just unable to visualize a threat to union status or jobs security in these impermanent situations, and unwilling thus far to adopt the doctrine that all bargaining unit work belongs to unit employees as a matter of implied contract.

⁴⁶ *Excess painting:*

Ashland Oil Refinery & Oil Workers, 8 LA 465, Wardlow.
 Swift & Co. & U.P.W., 10 LA 842, Healy.
 Electro Physical Lab & U.E., 7 LA 474, Kaplow.
 Devoe & Reynolds & U.A.A., 22 LA 608, Porter.
 Carbide & Carbon Chemicals & Oil Workers, 24 LA 158, Kelliher.
 Bendix Aviation & I.A.M., 30 LA 827, Schmidt.
 Weatherhead Co. & U.A.W., 30 LA 1066, Dworkin.

Excess auto & truck repairs:

Ark-Best Freight Systems & I.A.M., 30 LA 27, Hoel.
 Wisconsin Natural Gas & U.M.W., 31 LA 880, Anderson.

Excess welding:

Phillips Pipe Line Co. & Operating Engineers, 20 LA 432, Coffey.
 Texas Gas Transmission & Chemical Workers, 27 LA 413, Hebert.

Excess pipe fitting:

Mallinckrodt Chemical Works, 27 LA 530, Klamon.

Excess general maintenance:

Youngstown Sheet & Tube & U.S.A., 14 LA 645, Blair.
 Cooperative Farm Chemicals & O.C.A.W.A., 31 LA 482, Coffey.

⁴⁸ Corn Products Refining & O.C.A.W.A., 20 LA 690, Klamon.

Tomco Aircraft & U.A.W., 27 LA 233, Larson.

National Sugar Refining & U.P.W., 13 LA 991, Feinberg.

⁴⁹ International Harvester & U.A.W., 12 LA 707, McCoy.

⁴⁵ Haven Busch & Teamsters, 32 LA 781, Piercey.

⁴⁶ American Cynamid & U.M.W., 13 LA 652, Copeloff.

Carborundum & U.G.C. & C.W., 20 LA 60, Cummins.

Vickers & I.U.E., 24 LA 121, Haughton.

⁴⁷ Tungsten Mining, 19 LA 503, Maggs.

Stix, Baer & Fuller & I.B.E.W., 27 LA 57, Klamon.

Carbide & Carbon Chemicals, 26 LA 74, Marshall.

Indeed the logic of the decisions involving construction and maintenance (18 of the 25) reflects the logic of the institutional behavior discussed earlier as to contracting out this type of work.

What the awards viewed in their factual settings consistently convey is that the issue as to contracting out is not decided on the basis of the criteria often discussed in the opinions such as:

- Management's reserved right
- or the union's right to the available work of the production and maintenance or other defined bargaining unit
- or the union's right to the benefits of the bargain
- or authority to contract out is authority to void the Agreement
- or past practice
- or industry practice
- or the number of jobs involved
- or whether the work is integral to the regular business of the company
- or whether an emergency exists.

To put it too boldly and too simply, the decisions measured against the underlying factual situations seem quite consistent and quite logical. Rightly or wrongly, up to now, the published awards convey that the issue as to contracting out is:

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

Second, if not, is permanent continuing work being contracted out?

If not, the work may be contracted out.

If so, is the contracting out of the permanent work based on *compelling* logic or economies of operation that justify such action?

The doctrine seems to be that the company cannot undermine the status of the collective bargaining agent by contracting out work primarily to beat the union prices, nor can the company contract out permanent work without compelling reasons other than a seeming desire to reduce the status of the exclusive agent.

Otherwise and generally, therefore, contracting out is a management decision since the status of the bargaining agent is not involved.

Discussion—

MARK L. KAHN*

Scotty Crawford has documented without mercy the conflict and confusion in our dicta on contracting out. Fortunately, all is not lost. We can at least take comfort from his discovery that our awards—about which I intuitively suspect the parties have more concern than with our dicta—have a remarkable consistency when examined in relation to the facts.

Crawford's paper suggests to me that on this sensitive and vital issue there is taking place a development akin to the one we have all observed in the equally sensitive and vital area of industrial discipline. The typical collective bargaining agreement simply prescribes "just cause" as a necessary condition of discipline or discharge. Similarly, the agreement that is silent with respect to contracting out raises, in a disputed instance, the issue of "just cause" for the action or for the complaint against it. (I imply no burden of proof on either party.) Just as arbitration has made a substantial contribution to the establishment of equitable and practical standards for determining and dealing with employee misconduct,¹ so does it now appear to be making a similar contribution in connection with contracting out.

I can take serious issue with Crawford only on the broad definition of contracting out that he offers at the outset (but largely ignores thereafter). I submit that it is not useful to regard all diversion of work from the bargaining unit as one conceptual kettle of fish, and that Scotty's concluding generalizations on contracting out arbitration awards do not fit the problems associated with the assignment of bargaining unit work to other employees on the premises. Many companies have sought to persuade arbitrators and courts that their right to contract out is unrestricted (under a silent agreement and/or in view of the management rights clause), and have actually persuaded many courts to this effect; but I have yet to hear a company assert an unrestricted right to divert work from the bargaining unit to its own non-unit employees.

Only special circumstances or purposes justify the performance of bargaining unit work by non-unit employees at the same site.

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¹ See the rewarding monograph by Robert H. Skilton, *Industrial Discipline and the Arbitration Process* (Philadelphia: University of Pennsylvania Press, 1952).

Supervisors, usually under an explicit contract provision, may perform unit work for an inherently supervisory purpose (e.g., instruction) or in an emergency. A technician may operate a machine or inspect units of product in order to discover the origin of a recurring defect. Except for such limited objectives or situations, however, the only valid basis for assigning regular bargaining unit work to non-unit employees is that the character of the particular work has so changed as to render it no longer appropriate for the bargaining unit.

In some industries and trades, particularly where long-established craft units are involved, one finds agreements that establish the union's jurisdiction over specified work as well as employees. For example, a current agreement in the newspaper industry involving mailers reads:

Section 4: The jurisdiction of the union is defined as including all handling of incoming and outgoing papers from pressroom through and including platform work, all addressograph work in connection with mailing room operation, and including all work now being performed by the mailing department.

Such a clause, on its face, appears to bar the contracting out of the work so assigned to the union's jurisdiction. The more customary recognition clause, however, which defines the unit only in terms of categories of employees, provides a far more stringent bar to the performance of unit work by non-unit employees than it does to contracting out. As Crawford has shown, arbitrators will generally uphold the contracting out of temporary non-recurring work if no substantial injury is thereby inflicted on the bargaining unit or on any of its members; but this surely does not mean that a management may assign such work to its own non-unit employees rather than contract the work out. Those considerations that may justify the transfer of regular continuing work to a contractor—e.g., his specialized equipment or know-how, his inherent economies of scale, etc.—are not ordinarily applicable in the intra-plant diversion of work from the bargaining unit. I do agree, however, that when regular work is permanently transferred to another plant of the same firm, the pertinent considerations broadly resemble those applicable to the permanent transfer of such work to a different firm.

On the topic of arbitrability, Scotty records the conclusion of G. Allan Dash, Jr., that most courts have, and will, rule that contracting out issues are non-arbitrable unless the agreement contains

express limitations, whereas arbitrators invariably hold otherwise.² This is indeed a troublesome dichotomy, and one that should be squarely faced.

At the risk of belaboring the obvious, let me state that an arbitrable dispute is one that falls within the scope of the authority of the arbitrator to render an award based upon the merits of the case. The arbitrator's authority derives from (and is limited by) the agreement of the parties on their use of arbitration. A non-arbitrable dispute is none of the arbitrator's business and should be returned by him to the parties (if by some chance it has been placed before him) with no appraisal of the merits. A grievance may have merit but be non-arbitrable, or lack merit yet be fully arbitrable.

I believe that the courts have tended to mistake lack of merit for non-arbitrability in many contracting out cases. Thus, in *United Steelworkers v. Warrior & Gulf Navigation Company*³ the trial court made findings of fact involving the merits before concluding that the union's claim was non-arbitrable. On appeal, the majority of the U.S. Fifth Circuit found that the union's allegations of "lockout" and "discrimination" lacked merit. It held:

* * * The contract before us does not deal with the power of the employer to contract with others to perform services previously done by its employees. Since this is a matter as to which an employer may, except as limited by a specific collective bargaining agreement, do without violating either state or federal law, it remains, so far as relates to this agreement, strictly a matter of management. . . .

Dissenting Circuit Court Judge Rives supplied a more reasonable and practical view of the obligation to arbitrate under an existing labor agreement:

. . . the employer is under no obligation to arbitrate a dispute concerning his power to subcontract. But where, as here, the allegation is that this power has been utilized to violate other provisions of the contract, the duty to arbitrate arises.

With reference to certain findings of fact by the District Court, Judge Rives observed:

. . . they are without effect on the course of this litigation.

² *In re Celanese Corporation of America and United Construction Workers, Local 153* (Celco Plant, Narrows, Virginia), American Arbitration Association Case No. L-24473, CHA-L-52-59, September 1959.

³ 168 F. Supp. 702 (43 LRRM 2328); affirmed on appeal, U.S. Court of Appeals, Fifth Circuit, No. 17646, July 30, 1959 (44 LRRM 2567).

They involve a determination of the merits of the union's grievance, and, consequently, constitute an invasion of the province of the arbitrator as defined in the contract between the parties.

The U.S. Supreme Court has fortunately agreed to review this significant case,⁴ and we may hope that its forthcoming decision will reduce the present breach between arbitrators and the courts on this arbitrability issue.

Returning now to the merits, I suggest that arbitrators (and parties) should not consign "past practice" to the limbo of irrelevance proposed by Crawford in relation to contracting out. There is substantial variation among industries and companies and plants with respect to the role played by independent vendors of goods and services.⁵ For example, the subcontracting of production work is central to the organization of resources in such industries as construction and apparel. "Make or buy" decisions on components are standard practice in the manufacture of transportation equipment. In regard to construction and maintenance work in manufacturing—the location of many contracting out disputes—one will find established practices ranging from the regular contracting out of all such work over to the other extreme of a largely self-sufficient program. I do not argue that past practices necessarily govern where the agreement is silent, or that changing circumstances or opportunities may not warrant even a radical change in practice, but I do suggest that the "customary modes of procedure"⁶ are entitled to careful consideration as part of the evidence concerning the intentions and expectations of the parties. Of the 64 decisions on contracting out surveyed by Dash in his *Celanese* opinion,⁷ 35 are listed as making an explicit reference to past practices. I am sure that past practices were an implicit consideration in many more.

The construction and maintenance of industrial plant and equipment is presently a battleground for work opportunities between the "industrial" (inside) and "craft" (outside) unions. Organized labor is trying to establish criteria and procedures (including

⁴ Cert. granted December 7, 1959, 361 U.S. 912.

⁵ For an example of the variation among plants in manufacturing, with respect only to the contracting out of construction and maintenance, see M. K. Chandler and L. R. Sayles, *Contracting-Out* (New York: Graduate School of Business, Columbia University, 1959), especially Chapter II.

⁶ See Douglass V. Brown, "Management Rights and the Collective Agreement," Industrial Relations Research Association, *Proceedings of First Annual Meeting* (December 1948), pp. 145-155.

⁷ See above, note 2.

arbitration) for the peaceful settlement within its own ranks of such work jurisdiction disputes,⁸ although acceptable measures do not come easily.⁹ Such steps as have been taken recognize the existence of a "doubtful" or "gray" area separating the routine maintenance activities, on the one hand, and the new construction work, on the other, and suggest that established past practices must determine the jurisdictional decisions in such cases. If organized labor succeeds in these efforts at self-determination—and right now its prospects are not bright—acute problems may arise when managerial preferences conflict with labor's internal jurisdictional decisions.

I wish, before closing, to pose a question and to tell a story. Carl Schedler, in a lucid essay on contracting out,¹⁰ urged the parties to face up to this problem in their negotiations and then spell out their agreed policy in their contract. I have some reservations concerning the general feasibility of Schedler's recommendation—just as I doubt the wisdom of spelling out disciplinary penalties for specific types of misconduct and believe that most parties find the "just cause" approach to industrial discipline preferable—and I would appreciate your views on this. On the whole, it seems clear that the pattern of arbitrators' decisions on contracting out, in cases where the agreement is silent, has been broadly consistent with management's needs for flexibility and efficiency and (while not actually labeling the agreement a living document) has respected management's right to make legitimate adjustments to a changing environment. Contracting out has been restricted by arbitrators only when viewed as in conflict, in the particular instance, with the bona fide commitments of the employer under the agreement.

Viewing this issue as a whole, it is important to consider how the question should be put. Since our President-Elect is Father Brown, I must tell you about the experience of a young monk who asked the abbot of his monastery, "Father, may I smoke while I pray?" and received a strong negative award. Our young monk returned to his cell, contemplated deeply, and then returned to the abbot with a new approach that won his case: "Father, may I pray while I smoke?" Perhaps our debate about implied obligations versus inherent rights will give way to a more fruitful posing of the contracting out issues in functional and practical terms. We owe thanks to Scotty Crawford for the insights he has furnished to us.

⁸ Mark L. Kahn, "Jurisdictional Developments in Organized Labor," in *New Dimensions in Collective Bargaining* (New York: Harper & Brothers, 1959).

⁹ "Unsolidarity Forever," *Fortune* (November 1959), pp. 273-274.

¹⁰ "Sub-Contracting under the Labor-Management Agreement," *Arbitration Journal*, Vol. 10 (1957), pp. 131-137.