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Jay E. Grenig
Marquette University Law School, jay.grenig@marquette.edu

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THE REMOVAL OF WORK FROM BARGAINING UNIT EMPLOYEES: THE SUPREME COURT, THE BOARD, AND ARBITRATORS

JAY E. GRENIG*

I. INTRODUCTION

For a variety of reasons, including lower labor costs, employers occasionally seek to transfer work from employees in one location to employees in another location or to contract with independent contractors for performance of the work by the contractor's employees. While this transfer of work may result in a more economical or more efficient operation, the transfer also may result in the loss of work and jobs for employees who had previously performed the work.

The United States Supreme Court, the National Labor Relations Board (Board), and labor arbitrators frequently are called upon to determine whether an employer may take work away from bargaining unit[1] employees. The Supreme Court and the Board are concerned primarily with determining whether the employer's action violated the National Labor Relations Act (Act).[2] Arbitrators, on the other hand, generally are concerned with determining whether the employer's action violated the collective bargaining agreement covering its employees.

This Article examines how the Supreme Court and the Board have interpreted and applied the Act. In addition, this Article analyzes how labor arbitrators have interpreted and applied collective bargaining agreements in deciding whether an employer may take work away from employees in a bargaining unit represented by a

* Professor of Law and Associate Dean for Academic Affairs, Marquette University Law School; member, California Bar and Wisconsin Bar. B.A. 1966, Willamette University; J.D. 1971, Hastings College of the Law, University of California. The author thanks Brendan J. McGrath and Antonio L. Roig, students at Marquette University Law School, for their research assistance.

1. A "bargaining unit" is a group of employees "which, on the basis of related skills or common interests in working conditions, is an appropriate unit for collective bargaining." CCH LABOR LAW COURSE 301 (25th ed. 1983). *See also* H. ROBERTS, ROBERTS' DICTIONARY OF INDUSTRIAL RELATIONS 46 (rev. ed. 1971).

2. 29 U.S.C. §§ 141-169 (1988).

union.[3] While the Supreme Court and arbitrators generally have attempted to balance the interests of employers and employees, the Article shows the Board's recent tendencies to concentrate on the employers' interests in recent years. Furthermore, this Article identifies how the Supreme Court and arbitrators, unlike the Board, have maintained faith in the success of collective negotiations to achieve peaceful accommodation of conflicting interests.

II. THE SUPREME COURT

The Supreme Court's review of Board decisions involving the removal of bargaining unit work without bargaining over the decision has arisen in one of two contexts: (1) subcontracting or contracting out[4] of bargaining unit work; and (2) the closing of all or a portion of a business with the resultant loss of bargaining unit work. Because these cases involved judicial review of the Board's interpretation of the Act, the Court generally has given the Board's interpretation a great degree of deference.[5]

In *Fibreboard Paper Products Corp. v. NLRB,*[6] the Supreme Court held that a decision to subcontract bargaining unit work may constitute a mandatory subject for bargaining even in the absence of anti-union motivation.[7] In *Fibreboard*, an employer unilaterally decided to subcontract plant maintenance work that traditionally

3. In addition to the National Labor Relations Act (Act), state and federal statutes, such as the Worker Adjustment and Retraining Notification Act (WARN), also give workers certain rights with respect to loss of bargaining unit work. 29 U.S.C. §§ 2101-2109 (1988). WARN requires that employers planning a plant closing or mass layoff give affected employees at least sixty days' notice of the action. 29 U.S.C. § 2102(a) (1988). *See, e.g.*, Finnan v. L.F. Rothschild & Co., 726 F. Supp. 460 (S.D.N.Y. 1989); *see also* Weg, *Introduction to Federal Regulation of Plant Closings and Mass Layoffs*, 94 COM. L.J. 123 (1989); Note, *The Worker Adjustment & Retraining Notification Act of 1988: Advance Notice Required?*, 38 CATH. U.L. REV. 675 (1989).

4. "Subcontracting" is a "[p]rocedure followed by many companies to sublet certain parts of the operation to subcontractors rather than have the company's employees perform the work. . . ." H. ROBERTS, *supra* note 1, at 517. The terms "subcontracting" and "contracting out" are used interchangeably. H. ROBERTS, *supra* note 1, at 90. *See also* CCH LABOR LAW COURSE, *supra* note 1, at 307.

5. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500 (1978) (judicial review of questions of interpretation of the Act must be limited for it "is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy"); *see also* NLRB v. City Disposal Sys., Inc., 465 U.S. 822 (1984) (Board's construction of the Act is entitled to deference if its construction is reasonable).

6. 379 U.S. 203 (1964).

7. *Id.* at 208-09.

had been performed by bargaining unit employees.[8] The Court limited its holding to situations where employees are replaced with those of an independent contractor, explaining:

> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case — the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment — is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.[9]

Reasoning that the employer's basic operation had not changed as a result of the maintenance contract, the Court held that the employer was obligated to negotiate its decision to subcontract.[10]

The Court's decision was based on the conviction that collective negotiation has been highly successful in achieving peaceful accommodation of conflicting interests.[11] The Court observed that, "although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation."[12] While acknowledging that collective negotiations may not always be successful, the Court recognized that the national labor policy encourages resolution of labor disputes through collective negotiations.[13]

In a concurring opinion joined by Justices Douglas and Harlan, Justice Stewart wrote that "those management decisions which are fundamental to the basic direction of a corporate enter-

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8. *Id.* at 206-07.

9. *Id.* at 215. *See* 29 U.S.C. 2158(d) (1988).

10. 379 U.S. at 213.

11. *Id.* at 213-14.

12. *Id.* at 214. *See also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), in which the court stated:

> The act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine". . . The theory of the Act is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel agreement.

301 U.S. at 45.

13. 379 U.S. at 214.

prise or which impinge only indirectly upon employment security should be excluded from [the duty to bargain]."[14] This concurring opinion provided the basis for the Supreme Court's next decision on the removal of work from a bargaining unit without bargaining over the decision.

Seventeen years after *Fibreboard*, the Supreme Court was asked to determine whether an employer must bargain about a partial closing motivated by economic reasons where discharged employees were not replaced or the operation moved elsewhere.[15] Guided by Justice Stewart's concurring opinion in *Fibreboard*,[16] the Court held that those management decisions which are fundamental to the basic direction of a corporate enterprise, such as closing an unprofitable portion of a business, or which impinge only indirectly upon employment security are not mandatory subjects of bargaining.[17]

In view of what it saw as an employer's need for unencumbered decisionmaking, the Court reasoned that "bargaining over management decisions [having] a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of business."[18] The Court stated that, while the *decision* to close was not negotiable, the *effects* of the decision to close were.[19] The Court excluded from its ruling the question of whether other types of management decisions, such as plant relocations, sales, various kinds of subcontracting, and automation are excluded from mandatory bargaining.[20]

The Supreme Court has attempted to balance management's right to manage with the right of employees to bargain collectively over the conditions of employment. According to these decisions, a

14. *Id.* at 223 (Stewart, J., concurring).

15. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (Brennan, Marshall, JJ., dissenting). In 1965, the Supreme Court held that an employer may close its entire business for any reason it chooses, including anti-union motivation. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965). However, the Court held that a partial closing of a business, if motivated by a purpose to chill unionism in remaining plants, may be a violation of section 8(a)(3) of the Act. *Id.* at 275. *See* 29 U.S.C. 2158(a)(3) (1988).

16. *See supra* note 14 and accompanying text.

17. *First Nat'l Maintenance,* 452 U.S. at 676-80.

18. *Id.* at 679.

19. *Id.* at 677-78 n.15.

20. *Id.* at 686 n.22.

determination that there is a duty to bargain over a decision to remove bargaining unit work requires a finding that the benefit for labor-management relations and the collective bargaining process outweighs the burden placed on the conduct of business. Because this balancing test must be done on a case-by-case basis, there will probably be inconsistency and uncertainty in the application of the test. Nonetheless, the Court's decisions emphasize the importance of collective bargaining as a method for the resolution of employment disputes involving the removal of bargaining unit work.

III. THE NATIONAL LABOR RELATIONS BOARD

In determining whether a decision to relocate or to take away bargaining unit work is an unfair labor practice, the Board usually is asked to decide whether the employer has discriminated by encouraging or discouraging membership in any labor organization[21] in violation of section 8(a)(3)[22] or whether the employer has failed to bargain in good faith in violation of section 8(a)(5).[23] This Article considers only those situations involving alleged violations of section 8(a)(5) for failure to bargain.

In recent years, the Board has shown less concern with balancing the right of employees to bargain collectively under the Act with the right of management to manage. The Board appears to be permitting employers unilaterally to remove bargaining unit work so long as there is some "business justification" for the removal.

A. The Duty to Bargain Over Subcontracting or Relocation Decisions

In 1961 the Board took the position that a decision to subcontract bargaining unit work is not a mandatory subject of bargaining.[24] The Board reasoned that a decision to subcontract work was a basic management decision over which Congress did not intend

21. *See* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965); *see also supra* note 15.

22. 29 U.S.C. § 158(a)(3) (1988). "It shall be an unfair labor practice for an employer — . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." *Id.*

23. 29 U.S.C. § 158(a)(5) (1988). "It shall be an unfair labor practice for an employer — . . . (5) to refuse to bargain collectively with the representatives of his employees. . . ." *Id.*

24. Fibreboard Paper Prods. Corp., 130 N.L.R.B. 1558 (1961).

to compel bargaining.[25] However, the next year the Board changed its position, holding in *Town & Country Manufacturing Co.*[26] that an employer violates section 8(a)(5) if it fails to bargain over a decision to subcontract work, even if that decision is based solely on economic considerations.[27]

The Board provided a comprehensive examination of the Supreme Court's *Fibreboard* decision in *Westinghouse Electric Corp.*[28] The Board declared that bargaining over a decision to subcontract bargaining unit work generally would not be required if: (1) the subcontracting is motivated solely by economic reasons; (2) it has been customary for the employer to contract various kinds of work; (3) no substantial variance is shown in kind or degree from the established past practice of the employer; (4) no significant detriment results to employees in the unit; and (5) the union has had an opportunity to bargain about changes in existing subcontract practices at general negotiating meetings.[29]

Nearly twenty years later, the Board retreated from the *Westinghouse* criteria and adopted a "business justification" rule. In *Otis Elevator Co.*,[30] the Board ruled that, in determining whether an employer had a duty to bargain over a decision to transfer bargaining unit work, it would consider whether the employer's decision "turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees nor a union's ability to offer alternatives."[31] The Board concluded that the employer had not violated its duty to bargain in good faith when it unilaterally decided to consolidate and transfer research and development functions from one facility to another.[32] In *Otis*, the Board abandoned its earlier position that the Board should consider whether there was any significant detriment to employees in the unit and whether the union has had an opportunity to bargain

25. *Id.* at 1561.

26. 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

27. *Id.* at 1027-28. Following *Town & Country*, the Board reconsidered its original *Fibreboard* decision and concluded that Fibreboard's failure to bargain over its decision to subcontract maintenance work previously performed by bargaining unit employees violated section 8(a)(5). Fibreboard Paper Prods. Corp., 138 N.L.R.B. 550, 551 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964). For a discussion of the Supreme Court's decision in *Fibreboard*, see *supra* text accompanying notes 6-14.

28. 150 N.L.R.B. 1574 (1965).

29. *Id.* at 1576-77.

30. 269 N.L.R.B. 891 (1984), *supplementing* 255 N.L.R.B. 235 (1981).

31. *Id.* at 892.

32. *Id.*

about the changes when determining whether there was a duty to bargain over management decisions affecting the scope or nature of the business.[33]

In *Otis*, the Board expanded the Supreme Court's decision in *First National Maintenance*,[34] holding it applicable to management decisions, other than partial closings, which change the nature of the enterprise.[35] According to the Board, the employer's decisions to discontinue research and development operations at two locations and to consolidate them in another location were made to improve the employer's research and development and, hopefully, the marketability of its product.[36] The Board found that the decision was made because the employer believed that its technology was dated, its product was not competitive, its research and development operation at the closed locations duplicated other operations, and a newer and larger research and development center was available at the new location.[37] The Board concluded that the employer's decision did not turn on labor costs, even though that factor may have been one of the circumstances which had stimulated the relocation decision.[38] The Board emphasized that the application of the decision to *Fibreboard* subcontracting decisions is not important, explaining that this was because a *Fibreboard* subcontracting decision turns upon a reduction of labor costs.[39]

While *Otis Elevator* is arguably distinguishable from *Fibreboard,* the Board was faced with a situation nearly identical to *Fibreboard* in *Garwood-Detroit Truck Equipment, Inc.*[40] In *Garwood,* the employer subcontracted tire mounting and service work. The administrative law judge (ALJ) ruled that the case was controlled by *Fibreboard* because it involved replacement of employees in the existing bargaining unit with employees of an independent contractor who did the same work under similar circumstances.[41] Rejecting the ALJ's decision, the Board held that the employer had not committed an unfair labor practice, notwithstanding the contention that the employer's decision constituted modification of the

33. *Id.* at 893.
34. 452 U.S. 666 (1981). *See supra* note 15 and accompanying text.
35. 269 N.L.R.B. at 893.
36. *Id.* at 892.
37. *Id.*
38. *Id.*
39. *Id.* at 893.
40. 274 N.L.R.B. 113 (1985).
41. *Id.* at 114.

collective bargaining agreement.[42] Relying on *Milwaukee Spring II*,[43] the Board found that the record did not reveal any term in the collective bargaining agreement restricting the employer's right to subcontract.[44]

The Board also relied on *Otis Elevator*,[45] holding that the subcontracting decision turned not on labor costs, but on a significant change in the nature and direction of its business.[46] The Board explained that the employer continued to provide the same services as before, but that some of the services were provided to the employer's customers through a subcontractor using the employer's facilities.[47] The Board found that the employer's essential purpose was to reduce its overhead costs across the board so as to be able to remain in business.[48] The Board concluded that the contracting out of the service work contemplated a major shift in the nature and direction of its business (from service and parts to parts only) and did not turn on labor costs.[49] Board member Dennis disagreed, pointing out that the subcontractor performed the same service work on the customers' trucks that the employees had previously performed, using the same tools and equipment in the same work area.[50]

Ignoring the fact that it had not been customary for the employer to subcontract various kinds of work,[51] that the subcontracting represented a substantial variance in kind or degree from established past practice,[52] that there had been significant detrimental results to employees in the unit, and that the union had not had an opportunity to bargain about changes in existing subcontract

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42. *Id.*

43. 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*) (Board reconsidered earlier decision in *Milwaukee Spring I* and held that before it could conclude employer violated section 8(a)(5), it must first identify term in contract which employer's decision has modified), *aff'd sub nom.* Int'l Union United Auto., Aerospace & AG v. NLRB, 765 F.2d 175 (D.C. Cir. 1985). *See* discussion *infra* note 61 and accompanying text.

44. 274 N.L.R.B. at 114.

45. 269 N.L.R.B. 891 (1984) (Board held that critical factor in determining whether management decision is subject to mandatory bargaining depends not upon its effect on employees, but rather fact that decision changes nature and direction of business). *See also supra* note 30 and accompanying text.

46. 274 N.L.R.B. at 114-15.

47. *Id.* at 115.

48. *Id.*

49. *Id.*

50. *Id.* at 117 (Dennis, Member, dissenting).

51. *Id.* at 121-22.

52. *Id.* at 121.

practices,[53] the Board found no violation of the employer's duty to bargain because, in effect, it was good business to subcontract the work.[54] The Board gave no consideration to the effect of the decision on the bargaining unit employees or on the collective bargaining relationship. The Board's decision implicitly rejected the Supreme Court's determination that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests.[55]

Applying its "business justification" test in *Dubuque Packing Co.*,[56] the Board held that an employer had lawfully laid off its employees when it relocated its plant.[57] The Board found that "business exigencies" necessitated the relocation of the plant because the employer was suffering from heavy annual losses and financial difficulties.[58] According to the Board, the relocation turned on a fundamental change in the nature and scope of the business, with labor costs being but one factor.[59] The Board found that the employer was suffering from heavy annual losses and financial difficulties and had a good-faith "business justification" for the relocation.[60]

B. Midterm Contract Modifications

When an employer seeks to modify the terms of a collective bargaining agreement, the employee cannot unilaterally change the terms, but first must obtain the union's agreement.[61] However, if an employer seeks to change conditions not contained in the collective bargaining agreement, the Board held in *Milwaukee Spring II* that the employer's obligation is a general one of bargaining in good faith to impasse over the subject before instituting the proposed changes.[62] According to the Board, the employer is not re-

53. *Id.*
54. *Id.* at 115.
55. *See supra* text accompanying note 11.
56. 287 N.L.R.B. 499 (1987).
57. *Id.* at 537-38.
58. *Id.*
59. *Id.*
60. *Id.*
61. Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601, 602 (1984), *aff'd*, 765 F.2d 175 (D.C. Cir. 1985) (*Milwaukee Spring II*), *supplementing* 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*).
62. 268 N.L.R.B. at 602. *See also* DeSoto, Inc., 278 N.L.R.B. 788 (1986) (Dennis, Member, dissenting in part) (no violation of Act when employer closed plant and transferred work to its other facilities, because these actions did not modify any term of collective bargaining agreement).

quired to obtain the union's consent on a matter not contained in the body of the collective bargaining agreement even if it is a mandatory subject of bargaining.[63] The Board explained that the section 8(d) prohibition against midterm modifications applies only to terms contained in the bargaining agreement.[64] The Board explicitly ruled that recognition clauses should not be construed as work preservation clauses.[65]

Once the decision is bargained to impasse, the Board said that the relocation of work will violate the Act's ban on unilateral modification of collective bargaining agreements only if a specific term in the contract was modified by the employer's decision to relocate work.[66] After bargaining to impasse, the Board said that the employer may transfer the work covered by the collective bargaining agreement to a non-union plant where labor costs would be lower.[67] In reaching its decision, the Board overruled earlier decisions holding that the unilateral transfer of work from one location to another, whether or not specifically prohibited by the collective bargaining agreement, violated section 8(a)(5).[68]

C. *Conclusion*

The Board's decisions suggest that virtually any economic reason will be considered as "business justification" for removal of the work without bargaining over the decision, so long as the reason is not based solely on labor costs. No longer does the Board consider the effect of the employer's decision on employees or a union's ability to offer alternatives. The Board now appears to have less faith in collective bargaining as a method of dispute resolution than does the Supreme Court.

IV. ARBITRATORS

While the Supreme Court and the Board apply statutory law,

63. 268 N.L.R.B. at 603.

64. *Id.* at 602-03.

65. *Id.* at 602. A recognition clause describes the employees to which the collective bargaining agreement is applicable. *See* CCH LABOR LAW COURSE, *supra* note 2, ¶ 2402, at 1851.

66. 268 N.L.R.B. at 602.

67. *Id.* at 604.

68. *Id.* The decisions overruled include: Boeing Co., 230 N.L.R.B. 696 (1977), *enf. denied,* 581 F.2d 793 (9th Cir. 1978); University of Chicago, 210 N.L.R.B. 190 (1974), *enf. denied,* 514 F.2d 942 (7th Cir. 1975); and the applicable portion of Los Angeles Marine Hardware Co., 235 N.L.R.B. 720 (1978), *enforced,* 602 F.2d 1302 (9th Cir. 1979).

arbitrators derive their authority from the collective bargaining agreement. If there is a conflict between the collective bargaining agreement and public law, for the arbitrator the agreement governs.[69] As the Supreme Court stated in *United Steelworkers of America v. Enterprise Wheel & Car Corp.:*[70]

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.[71]

Provisions relating to the removal of bargaining unit work exist in numerous collective bargaining agreements and the removal of bargaining unit work is the basis of many grievances.[72] Two basic types of disputes involving the removal of bargaining unit work are submitted to arbitration: cases in which the collective bargaining agreement is silent on the subject and cases in which the agreement contains specific provisions on the subject.[73] With respect to the first category, some arbitrators have embraced the position that a prohibition against subcontracting, even if not verbalized in the agreement, can be inferred from other terms in the agreement, such as the recognition clause, wage clauses, and seniority clauses.[74] Other arbitrators have held that management has a right to assign work to employees outside the bargaining unit in the absence of a specific restriction in the contract.[75] Arbitrators also have evaluated the right of an employer to assign bargaining unit work to employees outside the bargaining unit, using an analysis similar to that used by the Board in *Westinghouse Electric Corp.*[76]

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69. Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974) (arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties").

70. 363 U.S. 593 (1960).

71. *Id.* at 597. *See also Gardner-Denver Co.*, 415 U.S. 36.

72. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584 (1960).

73. A. ORDMAN, 2 LABOR AND EMPLOYMENT ARBITRATION § 41.05 (Bornstein & Gosline, eds. 1990).

74. *Id. See also* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 538-39 (4th ed. 1985).

75. *See, e.g.,* Stewart-Warner Corp., 22 Lab. Arb. (BNA) 547, 550-51 (1954) (Burns, Arb.).

76. 150 N.L.R.B. 1574 (1965) (discussed *supra* note 28 and accompanying text). *See, e.g.,* Superior Dairy, Inc., 69 Lab. Arb. (BNA) 594, 598-99 (1977) (Abrams, Arb.); *see also* ELKOURI & ELKOURI, *supra* note 74, at 549-51.

Arbitrators have imposed requirements of good faith and reasonableness in order to justify the removal of bargaining unit work in the absence of an express prohibition.[77] For example, where it was not feasible to do the work with bargaining unit employees because of lack of appropriate direction, skills, or equipment, arbitrators have upheld the decision to subcontract the work.[78] If bargaining unit employees are fully employed, an employer is not required to assign overtime that would have been necessary to complete the work performed by a subcontractor.[79]

A. Specific Contract Provisions

Arbitrators are sometimes asked to determine whether an employer's action violated specific provisions in the collective bargaining agreement relating to work preservation. For example, in *Safeway Stores, Inc.*,[80] the agreement provided that "all products presently handled in the Meat section of the Company's stores shall continue to be handled by Meat Department Employees who are covered by this Agreement."[81] The union grieved the employer's offering prepackaged chicken for sale in its store to stimulate sales and to increase productivity.[82] The arbitrator refused to read the contract clause as restricting the employer's right to determine the method for packaging and selling chickens as long as the chickens were processed by employees for distribution to customers.[83]

The arbitrator reasoned that the contract clause emphasized "products" or types of articles sold rather than the "nature of the work" or "procedures" used in "handling products."[84] He found that bargaining unit personnel had not been injured as a result of the introduction of prepackaged chicken, as the overall employee hours had increased since prepackaging.[85] In addition, recognizing that the union had attempted unsuccessfully to negotiate a work preservation clause prohibiting prepackaging, the arbitrator con-

77. Federal Mogul Corp., 82 Lab. Arb. (BNA) 441, 445 (1984) (Roberts, Arb.). *See also* cases cited in ELKOURI & ELKOURI, *supra* note 74, at 539 n.420.

78. *See, e.g.*, Freeman-United Coal Co., 90 Lab. Arb. (BNA) 649 (1987) (Feldman, Arb.); Amax Coal Co., 83 Lab. Arb. (BNA) 942 (1984) (Kilroy, Arb.).

79. *See, e.g.*, Samsonite Corp., 90 Lab. Arb. (BNA) 1286 (1988) (Dworkin, Arb.).

80. 81 Lab. Arb. (BNA) 474 (1983) (Allen, Arb.).

81. *Id.*

82. *Id.*

83. *Id.* at 476.

84. *Id.*

85. *Id.*

cluded that "no arbitrator should impose a dramatically more restrictive interpretation on a party than was surrendered by that party at the bargaining table."[86]

The arbitrator's job occasionally is made easier by an unambiguous contract provision limiting subcontracting. For example, in *Aeronca, Inc.*,[87] the employer contracted out installation of duct work at a paint storage area in the plant.[88] The contract expressly provided that the employer would "not place work outside except as schedules, available manpower, facilities, equipment, and costs dictate."[89] The arbitrator held that the contract unambiguously limited subcontracting only with respect to work placed "outside" the plant.[90]

In another case, the contract barred contracting out "repair and maintenance work customarily performed by classified employees at the mine or central shop. . . ."[91] The employer was found to have violated the contract by subcontracting out work which customarily had been performed by members of the bargaining unit and where the employer had the equipment and employees available to perform the work.[92]

In *International Salt Co.*,[93] the contract provided that the employer would give employees the "first opportunity to perform available work, provided they are qualified."[94] The employer argued that contracting out repair work of a front-end loader fell within a contract provision that allowed it to contract out work when "Company employees are fully employed (40 hours of work) and economic considerations clearly indicate that the work must be done right away."[95] Finding that employees were fully employed forty hours per week and that economic considerations required that the work be done right away, the arbitrator held that the employer had not violated the contract.[96]

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86. *Id.*
87. 82 Lab. Arb. (BNA) 144 (1983) (Finan, Arb.).
88. *Id.*
89. *Id.*
90. *Id.* at 146.
91. Drummond Coal Co., 82 Lab. Arb. (BNA) 473 (1984) (Nicholas, Jr., Arb.).
92. *Id.* at 475. *But see* Peabody Coal Co., 89 Lab. Arb. (BNA) 885 (1987) (Volz, Arb.).
93. 86 Lab. Arb. (BNA) 52 (1986) (Williams, Arb.).
94. *Id.* at 53.
95. *Id.*
96. *Id.* at 54.

Some collective bargaining agreements provide that the employer will employ its own employees unless there is a valid reason for contracting out. For example, in *Georgia Kaolin Co.*,[97] the collective bargaining agreement required an employer to use

> its own employees to do all work which is customarily done by them unless in the judgment of the Company such work can be performed more economically or expeditiously by outside contracts. In such cases, however, the contractor shall be required to conform to the wages and overtime provisions of this agreement.[98]

Applying this provision, the arbitrator held that the employer had not violated the contract when it subcontracted the stripping of overburden at its kaolin mines.[99] He noted that the employer would have had to replace heavy equipment if it were to recommence stripping with its own employees.[100]

Even where the contract restricts subcontracting, a well-established past practice of contracting out the work in question may be relied on in determining that subcontracting does not violate the contract. For example, in *Amax Coal Co.*,[101] the arbitrator found that the practice of contracting out repair work on cranes had existed since cranes were first used at the mine and upheld the employer's contracting out of repair work.[102]

B. Recognition Clauses

Although the Board has declined to construe recognition clauses in collective bargaining agreements as limiting subcontracting,[103] arbitrators have not been so reluctant. A leading arbitrator

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97. 86 Lab. Arb. (BNA) 81 (1985) (Clarke, Arb.).

98. *Id.* at 82-83.

99. *Id.* at 88.

100. *Id. See also* Sears, Roebuck & Co., 86 Lab. Arb. (BNA) 859, 860 (1986) (Kahn, Arb.) (contract permitted subcontracting of work that can be "performed more efficiently and economically outside of bargaining unit;" arbitrator held that proposal to subcontract unit work was proper because employer would save cost of about one and one-half bargaining unit jobs, cost of extra moves within warehouse, and cost of sending service technicians to customers' homes).

101. 88 Lab. Arb. (BNA) 1281 (1987) (Kilroy, Arb.), and cases cited at 1284. *See also* Pennwalt Corp., 89 Lab. Arb. (BNA) 24 (1987) (Marlatt, Arb.) (employer had contracted out pouring of concrete on thirteen projects within preceding six years); Honeywell, Inc., 86 Lab. Arb. (BNA) 667 (1986) (Eagle, Arb.) (contracting out of construction work had been practice for more than fifteen years).

102. 88 Lab. Arb. at 1284-85.

103. *See, supra* notes 62 & 65 and accompanying text.

has concluded that the trend of recent cases has been to read the recognition clause together with wage and seniority clauses to provide limited prohibition from subcontracting where subcontracting would tend to undermine the bargaining unit and the collective bargaining agreement.[104]

If the subcontracting results in the discharge of bargaining unit employees and, in effect, undermines the bargaining unit, the employer's economic justification has to be substantial and more in the nature of extreme financial exigency to outweigh the employees' right to preserve their job.[105] In *Ormet,* the arbitrator found that the employer's subcontracting of its boat work at a river terminal involved precisely the work which normally was done by bargaining unit employees.[106] Finding that the subcontracting eroded the strength of the bargaining unit and undermined its integrity as well as that of the contract, the arbitrator held that the subcontracting violated the contract provisions on recognition, wages, and seniority.[107]

The contract in *M.S. Ginn & Co.*[108] did not address the question of what work was reserved for employees in the bargaining unit. The employer, a furniture dealer, had manufacturers ship directly to customers pursuant to past practice.[109] Declaring that the employer had an obligation to refrain from actions which would unreasonably reduce the scope of the bargaining unit, the arbitrator held that there was no contract violation.[110] He explained that the contracting out did not adversely affect the size of the bargaining unit.[111] In addition, the arbitrator found that the contracting out was not arbitrary or unreasonable in view of the sporadic incidence of furniture installations and the unpredictably wide fluctuations in the amount of work.[112]

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104. *See* Federal Mogul Corp., 82 Lab. Arb. (BNA) 441 (1984) (Roberts, Arb.); *see also supra* note 77 and accompanying text.

105. Ormet Corp., 86 Lab. Arb. (BNA) 705, 709 (1986) (Baroni, Arb.).

106. *Id.* at 710.

107. *Id.*

108. 82 Lab. Arb. (BNA) 98 (1983) (Harkless, Arb.).

109. *Id.* at 99.

110. *Id.* at 105.

111. *Id.*

112. *Id. See also* National Steel Group, 84 Lab. Arb. (BNA) 683 (1985) (McDermott, Arb.) (where there was no reduction in overall hours worked by bargaining unit employees, employer's action did not cause any arbitrary or unreasonable reduction in scope of bargaining unit); Ohio Valley Fed. Credit Union, 82 Lab. Arb. (BNA) 805 (1984)

Arvin Industries, Inc.[113] also involved a case in which no contract provision expressly governed subcontracting. The arbitrator held that the employer had properly contracted certain repair work, finding that the work was temporary in nature, that doing the work with bargaining unit employees would have been much more costly, that no layoffs resulted from the contracting out, that there was a practice of contracting out, and that the employer lacked essential equipment and the employees lacked the necessary capability.[114]

Arbitrators have attempted to balance management's right to manage and direct its enterprise efficiently and economically with the employees' right to bargain over the terms. In the absence of specific contractual work preservation language, arbitrators continue to rely on the recognition clause and seniority and wage provisions in order to prevent the removal of bargaining work which would tend to undermine the bargaining unit and the collective bargaining agreement. Arbitrators generally recognize that allowing an employer who has signed an agreement covering wages and conditions of employment to lay off the employees and transfer the work to employees not covered by those standards would subvert the contract and destroy the bargaining relationship.

V. CONCLUSION

Although excluding management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security from the duty to bargain, the Supreme Court has recognized that collective bargaining has been successful in achieving peaceful accommodation of the conflicting interests of employers and employees.

Conversely, recent decisions of the Board suggest that it is more concerned with management's economic interests than with the effect the decision to remove work from a bargaining unit has on the employees in that bargaining unit. Unlike the Board, arbitrators have attempted to balance employee interests and management interests when determining whether an employer may unilaterally remove bargaining unit work. Arbitrators continue to

(Duda, Arb.) (employer did not violate recognition clauses where temporary subcontract did not undermine union or result in layoffs).

113. 88 Lab. Arb. (BNA) 1188 (1987) (Volz, Arb.).

114. *Id.* at 1191-92.

exhibit a concern with the effect of a removal decision on the integrity of the bargaining unit and the collective bargaining relationship. Thus, the decisions of the Supreme Court and the decisions of arbitrators have attempted to balance the interests of employees and employers and to encourage the use of collective bargaining to resolve employment disputes.