SUBCONTRACTING DISPUTES IN LABOR ARBITRATION: PRODUCTIVE EFFICIENCY VERSUS JOB SECURITY

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SUBCONTRACTING DISPUTES IN LABOR ARBITRATION: PRODUCTIVE EFFICIENCY VERSUS JOB SECURITY*

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In this Article, Professors Abrams and Nolan discuss the principles which should be used by labor arbitrators in resolving subcontracting grievances under collective bargaining agreements. These disputes involve the fundamental and conflicting interests of labor and management in job security and productive efficiency. The authors conclude that the arbitrator’s primary responsibility is to carry out the intent of the parties as evidenced in the provisions of their agreement.

I. Introduction

In pursuit of productive efficiency, an employer may decide to subcontract a certain function or operation. Compared with using the company’s workforce, the subcontractor may be able to accomplish the task at a lower cost or with greater speed or higher quality. The subcontracting employer may not have available the machinery or the employees to perform the task. If bargaining unit employees had normally performed work similar to that subcontracted, or if those employees could perform the work either during regular work hours or on an overtime basis, they may view the company’s action as a threat to their job security and level of compensation.1

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Subcontracting issues generate as much insecurity within a work force as any other single issue. Frequently, the feeling is intense and comes out in the form: if they get away with this everybody's job will be next and the Union will be left holding a meaningless contract.3

Thus, to protect the work and jobs of its members, unions commonly gripe management decisions to contract out work, and labor arbitrators frequently are asked to resolve these disputes. Both management and labor have much at stake in the subcontracting case:

The basic problem in subcontracting disputes is to strike the proper balance between the employer's legitimate interest in efficient operation and effectuating economies and the union's legitimate interest in protecting job security of its members and the stability of the bargaining unit.4

That "proper balance" between productive efficiency and job security is set by the parties through collective negotiations. The arbitrator's responsibility is to read the product of their negotiations—the collective bargaining agreement—and determine how the parties to the dispute have accommodated their conflicting interests. Their "deal" must control.

The terms "subcontracting" or "contracting out" cover a broad range of possible management actions with varying impact on employees.4 At one end of the subcontracting spectrum, management may contract out a few hours of unit work collateral to the primary objective of the enterprise. At the other end of the spectrum, subcontracting may involve the permanent loss of a significant portion of the employees' regular work and result in the layoff of many, or all, of the employees.5 Between these two extremes lie an almost in-finite number of subcontracting techniques employed by management in pursuit of productive efficiency.

This article will examine the complex and comprehensive body of principles developed and applied by labor arbitrators in the resolution of subcontracting disputes.6 Section II reviews the standards used by arbitrators to interpret contract clauses expressly limiting or prohibiting subcontracting by management will be undertaken.7 Section III and IV examine those principles employed when a collective agreement is silent on the issue of subcontracting.8 After a brief look in Section V at the impact of federal labor law on the resolution of subcontracting disputes,9 the article concludes in Section VI with a discussion of the appropriate remedies in subcontracting cases.10

II. CONTRACT LIMITATIONS ON SUBCONTRACTING

Many collective bargaining agreements address the issue of subcontracting.11 One common contract formulation requires management to give the union advance notice of its intention to subcontract. Such a notice clause may also include a requirement that the company discuss the matter with the union prior to implementing the subcontract. Other contract clauses expressly prohibit contracting out particular kinds of work, while reserving to management the prerogative to subcontract other types of work. Often, contractual limitations on subcontracting are accomplished by express exceptions to the ban, for example, allowing contracting out when employees are not "available" to perform the work. Parties rarely include provisions prohibiting all subcontracting of bargaining unit

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4. In a frequently cited opinion, Arbitrator James McBrearty defined subcontracting as "making an agreement to have another person (human or corporate) do construction, perform services, or manufacture or assemble products that could be performed by payroll, unit employees." Fruehauf Corp., 62 LA 37, 40 (1974).
5. Arbitrator Irving Sabghir grouped subcontracting decisions into two basic types in Pettibone Corporation, 67 LA 871, 873 (1976): "First, those involving fundamental make/buy decisions ... This type ... involves a permanent or a long-term discontinuance of a company's use of its own employees to perform certain tasks ... Secondly, there is the contracting-out of a short-term, specific job which may or may not have been performed in the past by unit employees." See also, Mead Corp., 62 LA 1000, 1005 (Bothwell, 1973).
7. See, infra p. 9.
8. See, infra p. 15.
10. See, infra p. 31.
11. In its survey of major collective bargaining agreements, the Bureau of National Affairs reported in 1983 that 50% of its sample contained subcontracting provisions. 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) 65:2 (1983).
work.\textsuperscript{12}

There is no way to know how many disputes are actually avoided by defining rights and obligations in contract clauses. It is clear, however, that even when parties address the subcontracting issue in their agreement, disputes concerning the interpretation and application of the provisions remain for resolution in arbitration. The terms themselves may be vague, and broadly worded contract restrictions on subcontracting are often followed by ambiguous exceptions that may "narrow the prohibitions down to very limited circumstances."\textsuperscript{13} The arbitrator must determine what the parties intended and how they mutually understood the terms they employed. The parties' contract must control the resolution of the dispute, but subcontracting provisions are not self-applying.\textsuperscript{14}

A. Applicability of the Subcontracting Limitation

Arbitrators frequently must address the threshold issue of whether the parties' express clause limiting subcontracting is applicable to the contested management action. In \textit{Iowa Manufacturing Co.}, the parties had agreed to a contract clause prohibiting subcontracting "of any work normally performed by employees."\textsuperscript{15} The union grieved when the company purchased pulleys from an outside manufacturer because these were parts that laid-off employees of the company had fabricated in the past. The "real question," according to Arbitrator John Sembower, was "whether or not work was involved or was there a purchase in the market of a standard item which the Company discovered that it could use."\textsuperscript{16} Sembower characterized the dispute as involving the "age-old battlefield" between "work, labor and materials" (as the union claimed) and "goods, wares and merchandise" (as management contended).\textsuperscript{17} Arbitrator Sembower ruled that the transaction was a "sale" and not a subcontract covered by the contract clause.\textsuperscript{18}

Should management be held to have subcontracted when it accepts free services? Arbitrator William Daniel addressed this issue in \textit{Lenawee County Road Commission}.\textsuperscript{19} The collective bargaining agreement between the county employer and the union barred all subcontracting and the employer accepted an offer from the Army Corps of Engineers to plow roads during a blizzard. The Arbitrator ruled that the transaction was not covered by the contract prohibition:

I am inclined to think that it does not [constitute subcontracting] in that the relationship of the parties is nothing more than that created by the acceptance of an offer of help from the federal government. In a normal sense of the term subcontracting implies an actual contractual relationship between the parties that does not exist here, and the payment by one party to the other for the performance of services, which again is absent. Certainly the parties never intended that the employer should be required to turn down offers of such assistance regularly and traditionally offered in cases of disaster and emergency simply because such could potentially deprive employees of an earning opportunity.\textsuperscript{20}

Employing a variation of the non-applicability argument, management may claim that an exception to the contractual no-subcontracting pledge should be implied in an "emergency" situation. Finding the evidence of a genuine emergency compelling, Arbitrator Wayne Estes in \textit{Chevron U.S.A., Inc.}, implied such an exception to a broad subcontracting prohibition:\textsuperscript{21} "Swift, decisive action was indicated on the part of management in meeting its obligation of directing the operation. The maintenance needs were critical, requiring immediate attention because of the emergency nature of the multiple problems."\textsuperscript{22} Estes' approach can be criticized. The implication of an emergency exception nullifies the contract prohibition on subcontracting negotiated by the parties. Management certainly

\textsuperscript{12} Considering the frequency and foreseeability of disputes, it may appear curious that the subcontracting issue is not addressed in all collective agreements. The fundamental and sensitive nature of the issue, however, may prompt parties to postpone direct negotiations over subcontracting provisions until an actual case arises. By then it may be too late and too difficult to resolve the issue through the bilateral grievance procedure; the assistance of a neutral arbitrator is required. See, Abrams, \textit{Negotiating in Anticipation of Arbitration: Some Guideposts for the Initiated}, 29 C.W.R.U. L. Rev. 428 (1979).

\textsuperscript{13} \textit{Shenango Valley Water Co.}, 53 LA 741, 745 (McDermott, 1969).

\textsuperscript{14} \textit{Consolidated Foods Corp.}, 45 LA 331, 332 (Gibson, 1965).

\textsuperscript{15} 68 LA 599 (Sembower, 1977).

\textsuperscript{16} \textit{Id.} at 601.

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.} at 601-02; \textit{Roane Electric Furnace Co., Inc.}, 67 LA 88 (Cantor, 1976).

\textsuperscript{19} 72 LA 249 (1979).

\textsuperscript{20} \textit{Id.} at 250; \textit{Tracy School District}, 76 LA 883 (Bogue, 1981) (work performed for school employer by students paid under federal program does not constitute subcontracting).

\textsuperscript{21} 74 LA 269 (1980).

\textsuperscript{22} \textit{Id.} at 272; \textit{see also}, \textit{Dutch Maid Bakery}, 52 LA 588 (King, 1969).
can act in an emergency, but it cannot shift the potential loss to the
contractually protected employees. The company should be held
accountable for lost wages caused by its contract violation.\(^\text{23}\)

B. Interpretation of Particular Contract Clauses

Although subcontracting provisions contain a variety of stipula-
tions, there are a number of commonly employed formulations
which warrant analysis. Frequently, contract clauses prohibit sub-
contracting of a certain class of work, for example, maintenance or
major construction work. The arbitrator must then determine
whether the contested work falls within the contract prohibition.\(^\text{24}\)
When parties expressly restrict subcontracting of specific kinds of
work, arbitrators correctly assume that “no other unexpressed re-
strictions on subcontracting” are intended.\(^\text{25}\) Similarly, when a pro-
vision bars subcontracting of work from a specifically named facility,
work from other facilities is not covered.\(^\text{26}\)

Many clauses prohibit the subcontracting of work “normally per-
formed” by unit employees. In *Mobil Chemical Co.*, Arbitrator Fred
Whitney interpreted such a clause when management contracted out
the task of moving furniture.\(^\text{27}\) Although the contracted work was
not a daily responsibility, when it was done it was performed by unit
employees. The arbitrator ruled that the work was “a ‘normal’ duty
of the classification in the sense that when the task arises it will be
performed by the [unit] employees.”\(^\text{28}\) Whitney reasoned that “if
these employees risk discipline if they refuse to perform the task, it
follows that when furniture is to be moved that they have the right
to the job” under the contract clause.\(^\text{29}\) Although Whitney is correct
when he concludes that “normal work” does not have to be a daily
obligation, his theory is overbroad. The parties intended to protect
the ordinary job functions of employees, not any conceivable assign-

\(^{23}\) Pacific Oil Co., 52 LA 173 (Moran, 1969) (no exception should be implied for
emergencies).


\(^{25}\) Hewitt-Robins, Inc., 70 LA 662, 663 (Collin, 1978); but cf. Reichhold Chemi-
cals, Inc., 78 LA 259 (Merrifield, 1982) (clause only prohibited subcontracting of
certain work).

\(^{26}\) International Paper Co., 72 LA 421 (Howell, 1979); Kroger Co., 52 LA 440
(Doylé, 1968); (a provision prohibiting subcontracting “to an outside company” does
not bar the transfer of work from one division of the company to another).

\(^{27}\) 51 LA 363 (1968).

\(^{28}\) Id. at 372.

\(^{29}\) Id.

ment that an employer might possibly order them to perform. The
term “normal” must be given a reasonable reading by the arbitrator
consistent with the expectations of the parties.

A common exception to a broad contract restriction on subcon-
tracting allows contracting out when qualified employees are not
“available” to perform the work in question. Arbitrator J. Weather-
ill determined the exception did not apply when non-scheduled em-
ployees “can present themselves, ready and willing to perform their
work, within a reasonable time of being called.”\(^\text{30}\) But are employees
“available” when they are working a full regular week and could
perform the work only on an overtime basis? Arbitrators have di-
vided on this question when contracts are silent on subcontracting.\(^\text{31}\)
When contracting out is expressly prohibited by contract, arbitra-
tors generally agree that management must make reasonable use of
overtime prior to subcontracting.\(^\text{32}\) Management must “make a suffi-
ciently diligent effort to avoid subcontracting consistent with the
letter and spirit” of the contract between the parties.\(^\text{33}\) Such “effort”
should include using employees on an overtime basis.

When the employees are fully occupied, however, management
need not hire new employees before subcontracting.\(^\text{34}\) Consider a sit-
uation where management has a short-term project to complete.
Were the employer required to hire additional employees in lieu of
subcontracting when the present employees are not available, man-
agement would be saddled with an expanded workforce when the
project was over. It is difficult to conclude that by prohibiting sub-
contracting conditioned by an availability exception, the parties
agreed that the employer would have to expand the scope of his op-
eration when no employees on the payroll were available to perform
the task. It is more likely that when the parties prohibited subcon-
tracting unless employees were not available, they intended to pro-
tect the job rights of unit employees within the context of the ex-
isting scope of the operation.

In general, an arbitrator should review with care a management
claim that an express contractual exception to a subcontracting pro-


\(^{31}\) Compare Hugo Neu-Proler Co., 50 LA 1270 (Bailer, 1968) (obligation to use
overtime) with the Richardson Co., 45 LA 451 (Lanna, 1965) (no obligation to use
overtime).

\(^{32}\) Goodyear Atomic Corp., 66 LA 598 (Voit, 1976); U.S. Steel Corp., 54 LA 1207
(Duff, 1970); Lehigh Portland Cement Co., 49 LA 967 (Crawford, 1987).


\(^{34}\) Braniff Airways, Inc., 34 LA 665 (Shister, 1960).
hibition is applicable. Assertions without proof are not sufficient. For example, a bald claim that employees could not perform a contracted task, 36 or could not perform the task well, 37 should not excuse otherwise prohibited subcontracting. Where the evidence presented does establish the excusing circumstances—such as proof of a backlog of work which made employees unavailable to perform tasks in a timely fashion—38 the arbitrator should uphold management's decision to subcontract.

In resolving disputes involving the interpretation of subcontracting clauses, arbitrators may find helpful evidence of the "custom and usage" in a particular plant. 39 The manner in which a clause has operated over a period of time is a useful indicator of what the parties intended by their provision. Prior arbitration awards between the parties on subcontracting questions may also be employed in resolving later arising disputes. 39

C. Notice and Discussion Obligations

The most common contract reference to subcontracting stipulates that the employer must give the union advanced notice of its decision to subcontract and/or discuss the matter with the union prior to contracting-out. An advance notice stipulation "is a definite restriction on the right . . . to subcontract work. Unless this condition precedent shall have been fulfilled, there is no contractual right to subcontract work." 40 Arbitrators have required management to give "reasonable" advance notice to the union in a form and at a time which allows the union the opportunity to evaluate the propriety of management's action from its own perspective. 41 Notice provisions afford unions the opportunity to suggest alternatives to management and convince the company to reverse its decision. 42 If the clause mandates discussion with the union, "[t]he consultation is to be a meaningful one." 43

On the other hand, an advanced discussion provision does not require management to obtain the union's consent to contract-out work, unless the clause so provides. 44 The union does not have veto power over management's action. 45 Moreover, the union may be held to have waived its contractual discussion rights by failing to request negotiations after receiving timely notice of the employer's intention to subcontract. 46

Arbitrator Wilber Bothwell implied an exception to a prior notice requirement in an emergency situation. 47 The ammonia compressor at the company's plant broke down and immediate action was warranted. 48 Care must be taken by the arbitrator in such situations to verify the existence of a genuine emergency. The fact that it was not "convenient" to the company to give the contractually required notice should not be considered a sufficient excuse.

III. IMPLIED LIMITATIONS ON SUBCONTRACTING

In the absence of a provision restricting subcontracting, a company retains broad—but not unlimited—discretion to contract out. 49

[T]he general arbitration rule is that management has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in a subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it. 50

A. Implications Drawn from Other Contract Clauses

Arbitrators generally have recognized an implied limit on management's right to subcontract, based on other provisions of a collective bargaining agreement with the union. The parties' contract con-

37. Pacific Tel. and Tel. Co., 78 LA 68 (Koven, 1982).
39. Wisconsin Public Service Co., 73 LA 1169 (Edes, 1979) (five prior awards between the parties).
42. J. T. Baker Chemical Co., 76 LA 1146 (Mussmann, 1981); Indian Head, Inc., 65 LA 706 (Foster, 1975).
43. FMC Corp., 75 LA 485, 492 (Le Winter, 1980).
44. Id.
47. Schlitz Brewing Co., 51 LA 41 (1968).
48. Id. at 46.
49. Arbitrator Rankin Gibson has referred to management's "common law right to subcontract." Chemed Corp., 73 LA 734, 735 (1979). See also, Ilsco Corp., 74 LA 659 (Ipevec, 1980); Transit Auth. of River City, 74 LA 616 (Chapman, 1980).
tains wage, seniority and recognition clauses. Management action which would fundamentally undermine the integrity of the parties' relationship as evidenced by the provisions of their agreement is inconsistent with their express undertakings. Professor Archibald Cox talked in terms of "an implied covenant of good faith and fair dealing." Arbitrator Donald Crawford reasoned that the potential impact of subcontracting on job rights necessitated some limitation by implication:

The power to subcontract is the power to destroy. Obviously the Company cannot recognize the Union as exclusive agent for its unit employees, agree upon terms of employment, and then proceed arbitrarily to reduce the scope of the unit or to undercut the terms of the Agreement.

In addition to wage, seniority and recognition clauses, collective agreements also normally contain management rights provisions, reserving to the company broad prerogatives to make decisions in furtherance of legitimate business objectives. Subcontracting is one of the tools customarily used by management to achieve productive efficiency. Restricting management's contracting-out diminishes its reserved power under the agreement.

The arbitrator must interpret the parties' agreement as a whole to give effect to their mutual intention. Therefore, the rights preserved by the management rights provision must be weighed together with the interests protected by the wage, seniority and recognition clauses in order to formulate the appropriate standard for review of a subcontracting action in the absence of an express clause. No implied flat prohibition on subcontracting is warranted when the contract is silent on the issue. If the parties had intended that the interest in job security were to prevail over the interest in productive efficiency in all instances, they would have so indicated. However, the generalized language of a typical management rights clause in the absence of an express reservation of the right to subcontract, should not be read to constitute an unrestricted grant of power to nullify job rights protected by other contract clauses.

B. A Standard of Reasonableness

In drawing the line between permissible and impermissible subcontracting, arbitrators have employed various verbal formulations. "Reasonable" and "good faith" subcontracting is said to be allowed; contracting-out done in bad faith or with discriminatory motive is prohibited. While these formulations do indicate that management's right to subcontract is not unlimited, they do not help resolve concrete disputes in any mechanical way. "[T]here is no certainty in this area, no absolute truth."

Although widely employed by arbitrators, the term "good faith" subcontracting as descriptive of what is permissible should be avoided. "Good faith" is a term of art in labor law used by Congress to describe the mutual duties of labor and management in the bargaining process. Confusion may arise as to whether "good faith subcontracting" would always require an employer to negotiate with the union prior to implementing its decision. Similarly, the phrase may trap the unwary into thinking that only maliciously motivated subcontracting is censurable. "Bad faith" as characterizing a decision taken with "deliberate intention to harm or undermine" the union is not the sine qua non of a valid grievance. The alternative term "reasonable" is preferable when applied as the standard for review of subcontracting decisions in the absence of an express contract stipulation on the issue. The "reasonableness" standard recognizes a broad range of permissible management actions; it contrasts with arbitrary or capricious management actions, and with

52. Mead Corp., 75 LA 665 (Gross, 1980); KVP Sutherland Paper Co., 40 LA 737 (Kadish, 1963); Parke, Davis & Co., 15 LA 111, 115 (Scheiber, 1950).
60. Hartley and Hartley, Inc., 74 LA 196, 199 (Daniel, 1980).
62. Sections 8(a)(5), 8(b)(3) and 8(d) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5), 158(b)(3) and 158(d).
64. Kenworth Truck Co., 73 LA 947, 949 (Doyle, 1979) (the prevailing "rule of reasonableness.").
subcontracting which undermines the integrity of the unit or is motivated by censurable reasons.

In employing the standard of reasonable subcontracting, the arbitrator must not substitute his personal view of what would have been a good business decision for that of management. If a company makes a business decision that falls within the range of reasonableness, the arbitrator should uphold the action and deny the grievance. "The arbitrator must bear in mind that the employer must have the necessary managerial discretion to operate the business with reasonable chances of success ..." 66 On the other hand, under the standard of reasonable subcontracting, a management decision to subcontract proven by the union to have been "quixotically made," will be overturned in arbitration. 66

Whether subcontracting in any given case is reasonable depends upon the consideration of a variety of factors. 67 Arbitrators will (1) review management's asserted business justification for the particular subcontract, (2) review evidence of prior practice in contracting out and bargaining history as to the issue, (3) assess the impact of management's action on unit employees and the union, and (4) note any special circumstances which support or censure management's decision. 68

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65. Fruehauf Corp., 62 LA 37, 44 (McBrearty, 1974).
68. In Fruehauf Corp., 62 LA 37, 42 (1974), Arbitrator James McBrearty analyzed two decades of arbitration awards and constructed the following list of factors most frequently considered by arbitrators in assessing the reasonableness of subcontracting decisions:
1. Past practice. Whether the company has subcontracted work in the past.
2. Justification. Whether subcontracting is done for reasons such as economy, maintenance of secondary sources for production and manpower aid, augmenting the regular work force, plant security measures, or other sound business reasons.
3. Effect on the union or bargaining unit. Whether subcontracting is being used as a method of discriminating against the union and/or whether it substantially prejudices the status and integrity of the bargaining unit.
4. Effect on unit employees. Whether members of the bargaining unit are discriminated against, displaced, deprived of jobs previously available to them, or are laid off by reason of the subcontract. Subcontracting may be justified by other considerations even where layoffs will result. Moreover, arbitrators have considered whether layoffs could be anticipated, saying that subcontracting is to be judged by foresight rather than hindsight. . . .
5. Type of work involved. Whether it is work which is normally done by unit employees, or work which is frequently the subject of subcontracting in the particular industry or work which is of a "marginal" or "incidental nature."
6. Availability of properly qualified employees. Whether the skills possessed by available members of the bargaining unit are sufficient to perform the work.
7. Availability of equipment and facilities. Whether necessary equipment and facilities are presently available or can be economically purchased.
8. Regularity of subcontracting. Whether the particular work is frequently or only intermittently subcontracted. . . .
9. Duration of subcontracted work. Whether the work is subcontracted for a temporary or limited period, or for a permanent or indefinite period. Even where it is permanent, however, the harm may be outweighed by the justification for the subcontracting.
10. Unusual circumstances involved. Whether the action is necessitated by an emergency, some urgent need, or a time limit for getting the work done. Also, the subcontracting may be justified because a "special job" is involved, or because it is necessitated by a strike or other such situation.
11. History of negotiations on the right to subcontract. Whether management's right to subcontract has been the subject of contract negotiations. Arbitrators have pointed to the union's unsuccessful attempt to negotiate a restriction on subcontracting. However, it has been emphasized that while this factor may support a claim to considerable latitude in subcontracting, it cannot imply that there is no restriction at all, for parties may try to solidify or expand existing rights through bargaining.
12. Performance of the work on the Company's premises. Whether the work which is subcontracted is performed on the Company's premises. If the contractor is brought on to the Company's premises, the right to contract-out becomes more questionable.

70. 59 LA 1221, 1225 (1972).
Arbitrator Jaffee is correct. There is no simple answer to the subcontracting case. The parties' interests in productive efficiency and job security are fundamental and countervailing. As noted above, the arbitrator may not impose his own views as to what the parties should do in a subcontracting situation. The essential focus must be on what the parties have done.

As participants in a collective relationship, labor and management have reached express understandings as to some of the rules which will guide their work relationship. In addition, in most instances they have lived under the terms of a collective bargaining agreement for some period of time. Their conduct in prior subcontracting situations may indicate that the parties have reached an implicit understanding as to subcontracting. Their bargaining history may show that, while their contract is silent on subcontracting, the parties, through their interaction at the negotiating table, have reached an unspoken but mutual understanding which they intended would guide the resolution of disputes which arose during the term of their agreement.

The reasonable subcontracting standard applicable when the agreement is silent contemplates that management retains the prerogative to subcontract in the pursuit of productive efficiency. In resolving the subcontracting dispute, the arbitrator should ascertain whether the situation is one in which management acted for reasons of productive efficiency. The business justifications for the subcontract must be examined. The union may attempt to prove that equally productive alternatives were readily available and known to the company which would not have had an impact on the job rights of unit employees. When the union shows that productive efficiency could have been achieved by strategies known and available to management that would not have affected the job rights of employees, the grievance is properly sustained. The balance of the conflicting interests contemplated by the reasonable subcontracting standard is tipped in favor of the union if it demonstrates that both productive efficiency and job security could have been achieved without subcontracting. In those rare cases where the union can prove that management's action was motivated by anti-union animus, the arbitrator, of course, must sustain the grievance. Management action designed to undermine the union is simply not reasonable subcontracting because it is not taken in pursuit of the legitimate goal of productive efficiency within a collective context.

IV. Factors Considered Under the Reasonable Subcontracting Standard

A. Business Justifications for Subcontracting

Management normally will present the arbitrator with evidence of its business reasons for contracting-out. In most cases, management will claim that efficiency considerations mandated subcontracting rather than using bargaining unit employees to do the work.\textsuperscript{71} Cost, scheduling and employee availability factors may be raised.\textsuperscript{72} A subcontractor may have been able to perform work beyond the skills of unit employees.\textsuperscript{73} The subcontractor may have the equipment necessary to do the job, equipment either not owned by the employer\textsuperscript{74} or being fully utilized by the company.\textsuperscript{75} The equipment needed to perform the function might be too expensive for the employer to purchase,\textsuperscript{76} or simply not on the market.\textsuperscript{77} A subcontractor may be able to perform the work more quickly,\textsuperscript{78} more safely,\textsuperscript{79} or at higher quality level,\textsuperscript{80} than available unit employees.\textsuperscript{81} The question to be answered by the arbitrator is:

Did the employer have a legitimate business reason to modify its affairs in such a manner as to transfer some of the work incident to the conduct of its own business either away from the bargaining unit or . . . withhold it from the bargaining unit?\textsuperscript{82}

Management must support its claim of a business justification

\textsuperscript{71} Harris-Seybold Co., 62 LA 421 (Klein, 1974).
\textsuperscript{72} Transit Authority of River City, 74 LA 616 (Chapman, 1980).
\textsuperscript{73} City of Hamtramck, 71 LA 822, 827 (Roumell, 1978) (employer acquired equipment unit employees could not operate); Safeway Stores, Inc., 42 LA 353 (Ross, 1964).
\textsuperscript{74} Sinclair Research, Inc., 41 LA 454 (Sembower, 1963) (company's equipment obsolete).
\textsuperscript{75} Green River Steel Corp., 41 LA 132 (Stouffer, 1963).
\textsuperscript{76} Universal Glass Products Co., 30 LA 714 (Reid, 1958).
\textsuperscript{77} Dutch Maid Bakery, 52 LA 588 (King, 1969).
\textsuperscript{78} Emerson Electric Co., 75 LA 810 (Warms, 1980); Harris-Seybold Co., 62 LA 421 (Klein, 1974).
\textsuperscript{79} Scott Paper Co., 72 LA 1115 (Simon, 1979); Rohm and Haas Co., 43 LA 333 (Brandschaim, 1964).
\textsuperscript{80} Consolidated Foods Corp., 45 LA 331 (Gibson, 1965).
\textsuperscript{81} Fruehauf Corp., 67 LA 618 (Strashofer, 1976).
\textsuperscript{82} West Virginia Armature Co., 68 LA 316, 320 (Hunter, 1977).
with proof, especially when the subcontracting had a significant impact on the unit. Management knows why it acted. It should be required to explain its reasons to the neutral and to supply evidence in support of its claim. As Arbitrator Sylvester Garrett has noted, a company claim that a job is “unusually difficult” which is asserted without proof may “reflect more of a retrospective effort to justify action taken . . . than to present an accurate portrayal of the situation.”

When management had a reasonable alternative to subcontracting which would not have affected the job rights of members of the unit, an arbitrator may properly sustain the grievance. For example, in Reserve Mining Co., Arbitrator Ruth Kahn concluded that such alternatives were available; while some portion of contracted work may have been of an emergency nature, other portions could have been planned ahead and assigned to unit employees.

Arbitrator Roland Strasshofer emphasized in Fruehauf Corp., that “the decision [to subcontract] must be judged by foresight, not hindsight.” In that case, the company had subcontracted the replacement of window panes in order to assure improved workmanship. The arbitrator reasoned that “although the union may be correct in arguing that the quality was no better than if the millwrights had done the work, it was not unreasonable for management to believe that an outside firm specializing in window work could perform in a superior manner.” Evidence that management may have misjudged the performance of a contractor should not vitiate arbitral censure. The fact that reasonable expectations of speed or quality by a contractor were unfulfilled should not vitiate the company’s claim of business necessity, so long as the company’s expectations were reasonable at the time the decision was made.

Management may decide to subcontract because the work may be performed at lower cost than by using unit employees. These “pure cost” situations are extremely difficult for the arbitrator to resolve, but some guideposts can be posited. In the absence of express prohibition in the agreement to the contrary, management’s decision to subcontract work should not be censured simply because the employer was motivated by economic reasons. Management has the obligation to run the enterprise in an efficient manner. The economic success of the enterprise accrues to the benefit of unit employees, as well as to management and shareholders. On the other hand, merely because a managerial decision can be justified on financial grounds does not mean that management is free to make that decision under the reasonable subcontracting standard implied from the provisions of the parties’ agreement. Thus, the fact that subcontracting was less expensive than using unit employees does not, in itself, resolve the case. A careful weighing of the relevant factors, especially the impact of the subcontract on the unit, is required in this situation.

When management subcontracts a substantial amount of unit work because contractual wage rates are too high and unit jobs are eliminated as a result, the company should be held to have acted unreasonably. As Arbitrator James Gross stated in Mead Corp:

> If a company were permitted to contract out bargaining unit work on the basis of comparative wage rate advantages elsewhere, it would constitute a privilege to engage in a course of conduct that would nullify its collective bargaining contract. Followed to its extreme but logical conclusion, all bargaining unit work could be contracted out to cheaper labor. Simply beating the union prices set forth in the contract would be comparable to a unilateral reduction in a negotiated wage which a company has no right to make—and a company cannot accomplish by indirection what it would not be permitted to do directly under the terms of a contract.

By comparison, where subcontracting motivated by economic reasons continues a prior practice or is supported by the parties’ bargaining history, management’s action should be upheld under the reasonable subcontracting standard. For example, in Burger Iron Co., Arbitrator George Van Pelt upheld subcontracting of delivery

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84. Mead Corp., 62 LA 1000 (Bothwell, 1973) (space problem could have been solved without subcontracting).
85. 74 LA 1128, 1131 (1980).
86. 67 LA 618, 621 (1976).
87. Id.
90. Central Ohio Transit Authority, 71 LA 9, 17 (Handsaker, 1978); Singer Co., 71 LA 204 (Kossoff, 1978).
work in the absence of a contract prohibition where there were some drivers on layoff. The evidence showed that the company had made a careful analysis of the comparative costs involved, the union had failed in its attempt in negotiations to obtain a contract prohibition against subcontracting, the practice in the past was to subcontract such work, and the grievances were called back to work shortly thereafter. The subcontract did not violate the agreement even if it was "a matter of economies." In resolving the "pure cost" subcontracting case, the arbitrator must remember that the interest in productive efficiency protected under the "reasonable" subcontracting standard must be considered together with the countervailing interest in job security. The parties to a collective agreement set the trade-off: compensation at certain rates for services supplied. They could not have intended that management could avoid these bargained-for conditions of employment unless the circumstances show that other factors, such as speed or quality, warranted management's action. If a subcontract is shown to have had a significant impact on the job rights of the employees, management must demonstrate that something more than cost mandated its action. However, if the prior dealings of the parties, either at the negotiation table or through their practice under the contract, demonstrate that their arrangement allowed for "pure cost" subcontracting, the arbitrator must deny the grievance.

In those rare instances where management presents no justification for its actions or asserts business reasons that do not withstand analysis and the union demonstrates a substantial impact on the job rights of employees, the arbitrator should sustain the grievance. The protected interest in productive efficiency is simply not implicated in such a situation.

In the absence of contract restrictions, arbitrators generally recognize an implied reserve of managerial power to subcontract in a true emergency situation. A genuine emergency is precisely the type of situation in which the interest in productive efficiency must be given preeminence. An emergency is generally of limited duration and the subcontract will not have a long-term impact on the job.

B. Past Practices and Bargaining History

One common argument made by the parties in a subcontracting case is that the contracting-out was consistent with (or inconsistent with) an established prior practice. Past practices and customs of operation which have been developed over time become mutually accepted ways of operating and in effect become an extension of the agreement. Past practices of the parties have "more than usual significance" in the area because the "whole doctrine of implied obligations against subcontracting is so fraught with conditions and exceptions ..." The prior practices of the parties may indicate their mutual understanding on the permissibility of subcontracting.

In reviewing the evidence in support of a past practice claim, the arbitrator first must ascertain whether the proven prior instances of subcontracting are sufficient to constitute a binding practice. The practice must be "well established and generally acquiesced in over a period of years." Secondly, the arbitrator must determine whether the subcontracting in question constitutes a repetition of the prior situations or whether it constitutes a distinctly different type of management action. For example, a management decision to subcontract work which results in the layoff of employees is distinctly different from an established practice of contracting-out rights of the employees. However, an implied exception for emergencies should not be allowed to negate express contract prohibitions on subcontracting. While the exigencies of the moment might explain management's action, the contract has been breached and a remedy is in order. Where "[s]ubcontracting is specifically regulated by the contract . . . that regulation must be observed."
work which had little impact on employee job security.\textsuperscript{106}

In the absence of a contract limitation on subcontracting, if the evidence presented demonstrates that management’s contested action constitutes a repetition of prior actions, the arbitrator should deny the grievance. On the other hand, simply because the subcontract varies from the prior practice does not mean the grievance should be sustained. The reasonable subcontracting standard recognizes that the interest in productive efficiency may warrant unprecedented management action if justified by business considerations not present in the earlier situations. Evidence that unit employees have always performed certain work does not foreclose management, in the absence of express contract prohibition, from subcontracting work as a result of technological change.\textsuperscript{107} For example, in Safeway Stores, Inc., Arbitrator Arthur Ross upheld the subcontracting of payroll and billing work to an outside data processing center where computers were available.\textsuperscript{108}

In addition to evidence of past practice, parties commonly will present proof concerning negotiation history in support of their positions in the arbitration of a subcontracting dispute.\textsuperscript{109} The company may proffer documents and testimony which indicate that during negotiations the union unsuccessfully sought to expressly limit management’s right to subcontract or a union may try to show that management asked for, but did not win, a broader right to subcontract.\textsuperscript{110} Although the history of contract negotiations is clearly relevant,\textsuperscript{111} it would be incorrect to conclude that, because a union was not successful in obtaining an express contract prohibition on subcontracting during negotiation, management is free to contract-out at will. As Arbitrator Russell Smith explained in Allis-Chalmers Mfg. Co:

\begin{quote}
[I]t would be unrealistic to interpret futile bargaining efforts as meaning the parties were in agreement that the Agreement implies no restriction at all. Parties frequently try to solidify through bargaining a position which they could otherwise take, or to broaden rights which otherwise might arguably exist.\textsuperscript{112}
\end{quote}

If the evidence shows that during negotiations the parties discussed the subcontracting of particular work, and management refused to accept the union’s proposal to restrict such action, insisting instead on maintaining its right to subcontract certain work as it had done in the past, the arbitrator should deny the grievance.\textsuperscript{113} When the parties have bargained over the particular disputed matter, the neutral must not disturb their “deal.”

In Shenango Valley Water Co., Arbitrator Thomas McDermott relied upon a bargaining history that showed that the union attempted in negotiations to delete from the subcontracting prohibition the exception for a situation “where the company does not have qualified employees available in the numbers necessary to complete a project within the time allotted to such projects by the company or its customers.”\textsuperscript{114} The Arbitrator emphasized that the union was aware the company had been subcontracting work based in this “availability” exception when it sought to eliminate the contract exception. The union was not successful in making the change during negotiations, and the Arbitrator ruled that the revision cannot be made by the neutral.\textsuperscript{115}

\section*{C. Impact on Unit Employees and Union}

A union commonly will attempt to show in subcontracting cases that the employer’s action had a significant impact upon the work or the jobs of unit employees.\textsuperscript{116} Arbitrators have recognized that subcontracting which results in employee layoffs\textsuperscript{117} or the elimination of jobs\textsuperscript{118} must be closely scrutinized. As Arbitrator Saul Wallen noted in an early subcontracting case: “Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of

\begin{itemize}
\item \textsuperscript{106} Eaton Mfg. Co., 47 LA 1045 (Kates, 1966).
\item \textsuperscript{107} City of Hamtramck, 71 LA 822 (Rouenell, 1978).
\item \textsuperscript{108} 42 LA 353 (1964); Monsanto Chemical Co., 27 LA 736 (Roberts, 1956).
\item \textsuperscript{109} National Airlines, Inc., 41 LA 765 (Vadakin, 1983).
\item \textsuperscript{110} Harris Seybold Co., 62 LA 421 (Klein, 1974); Weatherhead Co., 30 LA 1066 (Dworkin, 1958).
\item \textsuperscript{111} Diebold, Inc., 42 LA 536, 544 (Klein, 1964).
\item \textsuperscript{112} 39 LA 1213, 1218 (1962); National Distillers & Chemical Corp., 76 LA 286, 290 (Gibson, 1981); Fruehauf Corp., 62 LA 37, 42 (McBrearty, 1974).
\item \textsuperscript{113} Shenango Valley Water Co., 53 LA 741, 746 (McDermott, 1969).
\item \textsuperscript{114} 53 LA 741 (1969).
\item \textsuperscript{115} Id. at 746.
\item \textsuperscript{116} Hi-Ram, Inc., 68 LA 54 (Daniel, 1977) (massive layoffs followed by subcontract); Schuderberg & Kuldie Co., Inc., 53 LA 818 (Seidenberg, 1969) (reassignment of five employees in unit of 1300 not harmful).
\item \textsuperscript{117} City of Hamtramck, 71 LA 822, 825 (Rouenell, 1978); Bolens Products Corp., 33 LA 972 (Seitz, 1959).
\item \textsuperscript{118} General Metals Corp., 25 LA 118 (Lennard, 1955).
\end{itemize}
the labor agreement, job security may be considered its soul."

In the first instance, the union must establish the causal connection between the challenged subcontracting and the impact on the unit. Layoffs resulting from declining customer orders and not the challenged subcontract should not be considered by the arbitrator in assessing management's action. Even if the causal nexus is demonstrated by the union, management actions with only a de minimus impact on unit employees may be presumed valid. Proof that unit work was diminished by an insignificant amount or evidence that the unit actually increased in size during the period of subcontracting weighs heavily in management's favor.

A subcontract may result in reduction in the opportunity of unit employees to work overtime. Management will contend that employees have no right to work overtime, but where the contract contains an express limitation on subcontracting, arbitrators should reject that argument, unless it is shown that employees were not available to perform overtime work and the contract clause allowed subcontracting when employees were not available. When the contract is silent on the issue of contracting out, the reasonable subcontracting standard would allow management to consider the comparative productivity of having employees perform the work on an overtime basis as opposed to using an outside firm. The issue is not resolved by simply stating that employees have no contractual right to demand overtime work. Management may rightfully be concerned that employees working on an overtime basis are less attentive to their jobs as a result of being tired from having completed their full shifts. Overtime work is paid at premium rates, a cost that is appropriately considered in evaluating the reasonableness of management's action.

No blanket rule is applicable to every subcontracting situation when employees claim they could have performed the work on an overtime basis and the agreement is silent on the subcontracting issue. It can be said, however, that the fact that employees lost an overtime opportunity as a result of a subcontract is relevant in applying the reasonable subcontracting standard. On balance, the fact that employees lost overtime should weigh less heavily than, for example, evidence that employees were laid off as a result of the contested management action.

D. Anti-Union Motivation

A union may view a subcontract as an attack on its status as exclusive bargaining representative. Having bargained for a contract setting forth wages, hour and conditions of employment, the union may believe that its negotiation efforts were worthless when the company later contracts out unit work. The company's actions demonstrate to members of the unit that their representative is ineffective and that they would be better off without the union. The union may claim in arbitration that the subcontract was a deliberate effort on management's part not only to violate the terms of the parties' agreement but to undermine the position of the union.

The union must bear the burden of proving to the arbitrator that management's action was based on anti-union animus. Mere generalities will not suffice. Direct evidence of management's "scheming," however, should certainly be considered. Similarly, if the union were to prove that management's asserted business justification was pretextual, an inference of anti-union motivation may be drawn. On the other hand, evidence that management transferred, or attempted to transfer, the employees displaced by subcontracting to other jobs may rebut the inference of censurable motive.

The union may rely on proof of the significant impact on the unit of the subcontract as evidence that management's action was designed to undermine the union's status as exclusive bargaining representative of the employees. Standing alone, proof of substantial impact does not prove anti-union motivation. It is relevant, of course, in determining whether management's action passes muster under the reasonable subcontracting standard.

It is clear that subcontracting designed to undermine the union

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120. City of Milwaukee, 59 LA 537, 542 (Mueller, 1972); American Cyanamid Co., 13 LA 652 (Copeland, 1949).
122. Fruehauf Corp., 62 LA 37, 45 (McBrearty, 1974) (A "crucial point" is the fact that no employees were on layoff); Electro Physical Laboratories, Inc., 7 LA 474 (Kaplan, 1947).
127. Keene Corp., 63 LA 798, 801 (Ludolf, 1974).
128. Consolidated Aluminum Co., 66 LA 1170, 1176 (Boals, 1976) (threat to the "survival of the bargaining unit"); Keene Corp., 63 LA 798, 80 (Ludolf, 1974) (union "attempting to safeguard its integrity").
should not be upheld by an arbitrator.\textsuperscript{129} Such an action is not taken in pursuit of productive efficiency. It cannot be considered "reasonable." On the other hand, cases where the anti-union motivation is actually demonstrated appear to be rare.

V. IMPACT OF FEDERAL LABOR LAW ON SUBCONTRACTING

In 1964, the Supreme Court ruled in \textit{Fibreboard Paper Products Corp. v. NLRB}, that some forms of subcontracting are mandatory subjects of bargaining under the National Labor Relations Act.\textsuperscript{130} In the years that followed, unions commonly relied on \textit{Fibreboard} in arbitration cases, requesting that subcontracting be prohibited or that a prior notice and bargaining requirement be imposed on management based on this precedent.\textsuperscript{131} Most arbitrators correctly have recognized the distinction between court decisions under the N.L.R.A. and the arbitral resolution of disputes based on the interpretation and application of contract provisions and have denied claims which are based on the statutory precedent.\textsuperscript{132}

\textit{Fibreboard} requires under national law that management give reasonable notice to a union of its decision to subcontract. The Labor Board, and not the arbitrator, should apply this rule, unless the parties specifically request their neutral to review the statutory issue.\textsuperscript{133} Most arbitrators will examine the notice factor in any case under a contract silent on subcontracting in order to determine the reasonableness of the company's action.\textsuperscript{134} The wholesale replacement of an entire unit of employees by subcontracting their work, as was the case in \textit{Fibreboard}, undoubtedly would be remediably in arbitration under traditional arbitral guidelines without recourse to national labor law.\textsuperscript{135} Thus, \textit{Fibreboard} may afford a union an independent statutory right to advance notification perfected through the process of the National Labor Relations Board. It should not be read as supplying a substantive contractual right to halt subcontracting or receive prior notification perfected through arbitration.\textsuperscript{136}

Occasionally, management will rely on national law in arguing that a contractual subcontracting prohibition constitutes an illegal "hot cargo" agreement which the arbitrator should not enforce. Faced with such a claim in \textit{Keen Mountain Construction Co.}, Arbitrator Bernard Cantor warned that any effort to interpret section 8(e) of the National Labor Relations Act was fraught with danger that he might misunderstand, misjudge or fail to see some pertinent decision on which a proper court, or a learned academician would rely. We do not presume to detail the scope and effect of section 8(e). We will presume to consider the present case in terms of [contract] language that is before the arbitrator.\textsuperscript{137}

An arbitrator should limit his focus to the parties' agreement as interpreted in light of generally established principles of industrial jurisprudence. Although some arbitrators may feel more qualified than Arbitrator Cantor to interpret the mysteries of Section 8(e), there is good reason why they should avoid doing so. The parties appointed the arbitrator to read and apply the contract.\textsuperscript{138} The Labor Board is available to resolve questions of national law.

VI. REMEDIES

If the union's grievance is sustained, the arbitrator must determine an appropriate remedy. When the union seeks only a declaration that the company's action violated the agreement and it should not be repeated, the arbitrator's remedial task is simplified. Unions often ask arbitrators to order the company to halt a continuing subcontracting arrangement and return subcontracted work to the unit. Were the company to demonstrate that it would be impossible to "unscreambled the egg," an arbitrator should not order the impossible.

\textsuperscript{129} Campbell Truck Co., 73 LA 1036 (Ross, 1979).

\textsuperscript{130} 379 U.S. 203 (1964).

\textsuperscript{131} Hess Oil & Chemical Corp., 51 LA 752 (Gould, 1968); Anaconda Aluminum Co., 48 LA 409, 411 (Volz, 1967); Fraser-Nelson Ship Building, 45 LA 177 (Gundemann, 1965).

\textsuperscript{132} \textit{Id. See generally, Bernhardt, Subcontracting During the Term of a Contract: A Clash Between the NLRB and Arbitral Principe, 37 ARB. J. 45 (1982).}

\textsuperscript{133} Campbell Truck Co., 73 LA 1036 (Ross, 1979) (case deferred by the Labor Board to the arbitrator).

\textsuperscript{134} Kenworth Truck Co., 73 LA 947, 949 (Doyle, 1979) (early notice to union evidenced Company's good faith). However, the failure to give advance notice standing alone should not be determinative of the reasonableness of the subcontract. Haveg Industries, 52 LA 1146 (Kates, 1969).

\textsuperscript{135} Hearst Consolidated Publications, Inc., 26 LA 723 (Gray, 1956).


\textsuperscript{137} 76 LA 89, 94 (1980); Mobil Chemical Co., 51 LA 363, 380 (Whitney, 1968).

As Arbitrator Donald Lee stated in Verifine Dairy Products Corp.: “In an attempt to fashion an appropriate remedy the undersigned is faced with a situation akin to that confronting ‘all the king’s horses and all the king’s men’—that is, ‘how to put Humpty Dumpty together again.’” 139 When return to the status quo ante is possible, arbitrators correctly impose such a remedy if the agreement has been found to have been violated. 140 Promises made in collective agreements must be enforced. Employees laid off as a direct result of the wrongful subcontracting should be ordered recalled with full back pay. 141

The most common remedy in subcontracting cases is a monetary award to employees who have lost work because of the contract violation. 142 Employees are to be paid a measure of damages equal to what they would have earned had the work not been subcontracted. 143 The process of precise calculation can be difficult, or, as Arbitrator Harry Dworkin noted in Cardinal Printing Co., “well nigh impossible.” 144 The issue may arise as to how many hours the work would have taken had it been performed by unit employees. The number of hours actually worked by the contractor’s employees is one useful measure of calculation. There may be some question as to which employees would have performed the subcontracted work. If that determination cannot be made with reasonable certainty, it would be appropriate for the arbitrator to order the calculated amount distributed equally among all eligible employees.

Occasionally in response to more flagrant instances of contract violation, an arbitrator will order comprehensive remedies. For example, in Buhr Machine Tool Corp., in addition to traditional back pay remedies, Arbitrator John Sembower ordered the company to increase the size of the unit to status quo, reinstate and actively promote its apprenticeship program, seek referrals from employment agencies, notify high schools of the job opportunities and supply the union with the information it needed to monitor management’s compliance. 144 Such extraordinary remedies were warranted, according to the arbitrator, because the company’s subcontracting went “to the heart of the relationship between the employer and the employee . . . .” 145 In designing remedies, the arbitrator must be mindful that awards should be remedial, not punitive. Extraordinary remedies should be ordered only in those rare cases when they are shown to be necessary in order to carry out the mandate of the parties’ agreement concerning subcontracting.

One significant controversy in the remedial arena concerns the appropriate remedy when management fails to comply with a contractual notice requirement. Arbitrator Raymond Hilgert in Alpha Portland Cement Co. excused the company’s failure to give the fourteen days notice required by the contract as an “honest oversight” unaccompanied by “anti-union animus.” 146 By way of remedy, the arbitrator “admonishe[d] the Company” and directed it to make “every effort in the future” to meet the notice requirement. 147

Some arbitrators have ordered monetary relief where management has failed to fulfill its contractual notice obligation. Arbitrator Robert Foster in Indian Head, Inc., ordered a back pay remedy in the amount the employees would have received had they performed the contracted work where the company admitted its failure to give the contractually required advanced notice. 148 Arbitrator Somers ruled in a similar situation that a violation of a contract notice requirement warranted a penalty to deter future violations: “A remedy which involves no penalty or deterrent for the violator and no solace for the violated can hardly be considered an appropriate remedy.” 149

In order to remedy management’s failure to fulfill its contractual obligation to give prior notice of a decision to subcontract, the arbitrator must focus on the nature of the injury suffered by the union and the employees covered by the collective agreement. If the contract clause required management to give notice and obtain the consent of the union prior to subcontracting, the failure to give notice can be seen as the direct cause of the loss of the contested work. In such an instance, however, the union’s grievance has merit whether the company gave the required notice or not, since management did not obtain the union’s consent prior to acting. Full remedial relief

139. 51 LA 884, 891 (1968).
140. Milprint, Inc., 51 LA 748 (Somers, 1968).
144. 60 LA 1208, 1214 (1973).
146. Id. at 337.
149. 65 LA 706 (1975); Kaiser Foundation Hospitals, 61 LA 1008, 1014 (Jacobs, 1973) (money award as “damages for breach of the contract.”); Rock Island Refining Corp., 70 LA 322 (High, 1978).
would then be in order. On the other hand, if the union has no veto power under the agreement, the harm suffered from the lack of notice is not the loss of the work—only the loss of the opportunity to suggest alternatives or to argue about the advisability and impact of the subcontract. In most instances, the monetary harm, if any, is purely speculative. The focus on “punishing” the offending employer is misguided. Contract remedies should be remedial, not punitive. The arbitrator should rule that the contractual notice requirement was violated and direct the company to comply with its contractual obligations in the future period. If it has a legitimate concern about possible repetition, the union may seek to enforce this arbitral order in court.

VI. Conclusion

Subcontracting disputes often present the labor arbitrator with his or her greatest challenge. Faced with a basic conflict between the interests of productive efficiency and job security, an arbitrator must resolve the subcontracting dispute based on the evidence presented of the parties’ mutual undertaking. When the parties have reached an express understanding on the issue and balanced their conflicting interests, the arbitrator must carry out their contract direction. When the contract is silent, the arbitrator must review the contested management action under the standard of reasonableness, the appropriate principle implied from the express provisions of the parties’ agreement.

Every case is different, but the standards for the adjudication of the subcontracting case have crystallized into a fairly definite form over the past half-century. This common law of the labor agreement provides the arbitrator with necessary guideposts for resolving these difficult disputes.