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NOTES

A STANDARD FOR ARBITRATORS IN SUBCONTRACTING DISPUTES

The struggle over the employer's right to subcontract work when the collective agreement is silent on subcontracting increases in importance with every passing year. During five year periods from 1945 to 1960 the number of arbitration awards involving subcontracting under a silent agreement increased in geometric progression. It is equally significant that, while from 1945 to 1960 a total of 75 awards dealing with this issue was reported, in the three year period from 1960 to 1963 alone more than 60 additional awards were reported. Today from 90 to 95 per cent of the nation's labor agreements provide for arbitration in connection with grievance procedures, but at the same time only one in four labor agreements specifically limits subcontracting, and very few prohibit it.

Agreements are silent on subcontracting principally because of the possible consequences under the National Labor Relations Act of failure to agree on a proposed limitation on subcontracting. When a proposal during contract negotiations is rejected and the resulting written agreement is silent on the matter proposed, the rejection may become part of the parties' "bargain" and the rejecting party may be relieved of the duty to bargain over the proposed limitation for the life of the contract.

1. The first volume of Labor Arbitration Reports was published in 1946. In volumes 1 through 14, which cover up to 1951, 12 awards involving subcontracting under collective bargaining agreements that were silent on subcontracting were reported. In volumes 15 through 24, covering from 1951 to 1956, 20 such awards were reported; and in volumes 25 through 33, covering from 1956 to 1961, 43 such awards were reported. In volumes 34 through 40, which cover only 1961 to 1964, over 60 awards were reported involving subcontracting under silent agreements.


4. In Jacobs Mfg. Co., 94 NLRB 1214 (1951), enforced, 196 F.2d 680 (2d Cir. 1952) the union and the employer discussed group insurance during contract negotiations; and the matter was settled outside the contract, which failed to mention group insurance. Later, during the term of the contract the union sought to bargain over pensions, a topic which had not been discussed at all in negotiations and on which the contract was also silent, and group insurance. The Board ordered the employer to bargain over pensions but did not require bargaining over group insurance. Chairman Herzog wrote: "In my opinion it is only reasonable to assume that the rejection of the Union's basic proposal, coupled in this particular instance with enhancement of the substantive benefits, constituted a part of the contemporaneous 'bargain' which the parties made when they negotiated the entire 1948 contract." Id. at 1228. In a later case, Speidel Corp., 120 NLRB 733 (1958) the Board held that after rejection of a maintenance of privileges
the other hand, bargaining may be initiated at any time on a matter not discussed in negotiations for the written agreement. The consequences of having a proposal rejected are made more imminent by the considerable unlikelihood of the parties' reaching an agreement on subcontracting. During negotiations the employer typically stands on the theory that subcontracting is exclusively a management function while the union urges that the unqualified power to subcontract is the power to destroy the union, and union approval of decisions to subcontract should therefore be required. As a result, both the union and the employer find obvious tactical advantages in not proposing subcontracting terms during negotiation of a written agreement.

The consequences of having a proposal rejected are made more imminent by the considerable unlikelihood of the parties' reaching an agreement on subcontracting. During negotiations the employer typically stands on the theory that subcontracting is exclusively a management function while the union urges that the unqualified power to subcontract is the power to destroy the union, and union approval of decisions to subcontract should therefore be required. As a result, both the union and the employer find obvious tactical advantages in not proposing subcontracting terms during negotiation of a written agreement.

The ultimate result of a failure to make provision for subcontracting in the collective agreement is the filing of a grievance by the union when the employer subcontracts. The grievance quite possibly will be settled by arbitration, and recent arbitration of subcontracting disputes has yielded more than a few seeming paradoxes. For example, in one dispute the employer was permitted to subcontract janitor service for an entire building, but in another the employer's right to subcontract the work of a single janitress was denied. In one dispute the employer was permitted to subcontract a construction project, but in a similar situation the employer was not permitted to subcontract. Past practice controlled in one dispute, but in another it did not control. Consequently, both employer and union are facing with increasing frequency and perplexity the problem of determining, according to arbitration decisions, the extent of the employer's right to subcontract when the collective agreement between the employer and the union is silent on subcontracting. A

clause in negotiations the employer had the right unilaterally to terminate bonuses, which were not mentioned in the agreement. The union was held to have waived its interest in bonuses. However, it has been held that a waiver of statutory rights will not be inferred readily, and there must be a clear and unmistakable showing that the waiver occurred. See, e.g., Beacon Piece Dyeing & Finishing Co., 121 NLRB 953, 956 (1958).

5. "Those bargainable issues which have never been discussed by the parties, and which are in no way treated in the contract, remain matters which both the union and the employer are obliged to discuss at any time." Jacobs Mfg. Co., 94 NLRB 1214, 1219 (1951). 6. Address by Donald A. Crawford before the Labor Relations Council Conference at Wharton School of Finance, University of Pennsylvania, Nov. 18, 1960, pp. 5-6. "These negotiations from principle are, of course, irreconcilable. No negotiator now alive nor yet conceived—at least to the best of my information—has devised words to provide for the simultaneous exercise of unilateral and joint decision-making. As a result the collective bargaining agreements generally remain silent on the subject of contracting out." Ibid.

synthesis of recent awards shows that, although arbitrators may express divergent theories in seeking to justify their awards, the results are consistent with a general standard.\textsuperscript{18} Arbitration awards in subcontracting disputes cannot be thoroughly understood, however, without at least some familiarity with the scope and stature of arbitration: the extent, sources, and mechanics of exercise of the arbitrator’s authority and the position of arbitration as an integral part of the machinery for settling labor-management disputes.

I. General Characteristics of the Arbitration Process

The Steelworker’s Trilogy, the familiar title given three landmark decisions handed down by the United States Supreme Court in 1960, demarcated the labor arbitrator’s jurisdiction and left no doubt regarding the general arbitrability of subcontracting disputes.\textsuperscript{14} For present purposes, the pertinent holdings from the Trilogy are that the merits of a particular grievance have no effect on the grievance’s arbitrability\textsuperscript{15} and that arbitration should be enforced in all cases except those in which the arbitration clause prevents an interpretation that would include subcontracting, with all doubts to be resolved in favor of arbitrability.\textsuperscript{16}

Technically, the only source of an arbitrator’s authority is the collective bargaining agreement;\textsuperscript{17} but the nature of the collective agreement makes it a large base of authority. By nature the collective agreement is among the broadest of contracts. The agreement may attempt to regulate all aspects of the employer-employee relation;\textsuperscript{18} and the range of sub-

\textsuperscript{13} In this study all disputes which involved subcontracting under agreements that are silent on subcontracting and appeared in volumes 37 through 40 of the Labor Arbitration Reports were considered. These volumes include more than three dozen relevant awards, which provided what seems to be a representative sample. On the basis of their facts all of the awards seem just, and it appears that whatever conflict there may be is not in the results but in the arbitrators’ reasons for the results. Hence, this note proposes a standard to guide arbitrator determinations in subcontracting disputes that is consistent with past awards.


\textsuperscript{16} United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). This case is of special interest in the present discussion since it involves subcontracting under an agreement that was silent on subcontracting. Management functions were expressly excluded from arbitration. The district court held subcontracting to be a matter of business judgment not subject to arbitration under the contract. 168 F.Supp. 702 (S.D. Ala. 1958). The circuit court affirmed this ruling, 269 F.2d 633 (5th Cir. 1959), but the Supreme Court reversed, saying: “An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” 363 U.S. at 582-83.


jects it covers is vast: wages, hours, discipline, working conditions, technological changes, retirement pensions, and health and accident insurance. Typically it runs for three years and frequently may be used to determine the parties' rights in changing circumstances which the parties did not foresee and could not have foreseen when they signed it. Consequently, it is unrealistic to make the words of the contract the exclusive source of rights and duties. A collective agreement attempts to erect a system of industrial self-government; and like the constitution, public statute, and treaty which it resembles, the agreement cannot allude specifically to every situation which it covers. Much necessarily must be left to interpretation, which is peculiarly within the arbitrator's province. In interpretation the arbitrator may consider not only the implications of the written agreement itself but also the implications of practices of the industry and the shop, such as the number of employees required for a particular job or the manner in which a particular job is to be done. Nor is he bound by principles of law or by precedent, although prior awards within the same company obviously should be given great weight, and decisions involving other parties may have comparative or suggestive value. In addition, unless he is limited by statute or by the agreement, he has complete charge of the arbitration hearing and may decide the rules of procedure and evidence to be followed without reference to legal principles.

20. Cox, supra note 19, at 1498.
22. "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960).
25. Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1020 (1955). See Trans World Airlines, Inc., 39 Lab. Arb. 643 (1962) (Harold M. Gilden). In keeping with this general view, it has been suggested that the terms of an award in a previous dispute between the parties over the same issue might be acceptable to both parties so that neither desires to have the matter set forth in the collective bargaining agreement. Letter from George W. Gallagher, Law Department, Swift & Co., to Indiana Law Journal, Jan. 23, 1964.
26. See, e.g., Uniform Arbitration Act § 5 which provides for giving of notice by the arbitrator to the parties of the time and place of hearing and for presentation of evidence and cross-examination of witnesses by the parties. The text of the Uniform Arbitration Act is printed in 27 Lab. Arb. 909-12 (1956).
27. Elkouri & Elkouri, How Arbitration Works 129 (2d ed. 1960). This nearly complete freedom of the arbitrator to make his own rules is consonant with the fact that the parties bargain for the arbitrator's decision to be rendered within whatever framework they provide. Where the parties force no rules on the arbitrator it is con-
The customary informality of an arbitration proceeding does not impair the finality of an arbitrator's award, however. To some extent arbitration awards have a greater finality than decisions either of the courts or of the National Labor Relations Board. Courts may set aside awards, generally, only on grounds of fraud by the arbitrator or the parties, want of jurisdiction in the arbitrator, or violation of public policy, such as ordering an unlawful act to be done. And, while the National Labor Relations Board may exercise its jurisdiction in disputes already settled by arbitration, it has limited its scope of review to the minimum necessary to protect the interests of the National Labor Relations Act. The Board will not interfere with an award when (1) the proceedings appear to have been fair and regular, (2) all parties had agreed to be bound, and (3) the award is clearly not repugnant to the purposes and policies of the act. Therefore, both the courts and the NLRB disturb the finality of an arbitration award only reluctantly and on very narrow grounds.

sistent with the consensual nature of the arrangement to assume that the parties consented to the arbitrator making his own rules.

28. Id. at 27. Generally, under both common law and statutes, awards will not be set aside for mistake of law or fact. It should also be noted that since the Steelworkers Trilogy was handed down lack of jurisdiction in the arbitrator virtually has been eliminated as a grounds for attacking an award. See also Uniform Arbitration Act § 12, which allows vacation of an award for fraud or corruption, for partiality or prejudicial misconduct by the arbitrator, for the arbitrator exceeding his power, for such failure to comply with the provisions for hearing as to prejudice substantially the rights of a party, or for lack of an arbitration agreement. The Uniform Arbitration Act is printed in 27 Lab. Arb. 909-12 (1956).


31. The question of whether the Board will issue an unfair practice complaint based on an arbitrable subcontracting dispute prior to arbitration remains unanswered, although in cases of other types the Board has recognized arbitration as a method of settling disputes to be preferred over administrative intervention. See Montgomery Ward & Co., 137 NLRB 418, 423 (1962): "In these circumstances [collective bargaining agreement had an arbitration clause which covered a dispute over union representation of drivers at new terminals in other cities] the Board would be frustrating the Act's policy of promoting industrial stabilization through collective bargaining if we were to intervene in this dispute instead of requiring the Union in this case to give 'full play'
II. Current Arbitrator Theories in Subcontracting Disputes

In disputes where the agreement is silent on subcontracting the arbitrators have not been uniform in expressing the limits, if any, on the right of the employer to subcontract. In recently reported awards arbitrators follow or purport to follow any one of three different and more or less mutually exclusive theories of interpretation. As a result, the awards seem to form no pattern. What is needed is a theoretically sound rationale that will permit a clear definition of the limits of the employer's right to subcontract, and one that at the same time will express the results of the disputes themselves. No one of the principal theories presently given lip service by arbitrators, even if it were followed in all awards, would adequately satisfy these needs.

A rather small minority of arbitrators bases its decisions upon a strict contract, reserved rights theory of interpretation. According to this theory, the employer retains all rights not bargained away, and if subcontracting is not mentioned in the written agreement, it must be a retained right.

Interpretation is limited to the specific words of the written agreement. To imply a limit on subcontracting in the absence of words in the agreement limiting subcontracting would be to add to the written agreement rather than to interpret it, according to this view. Consequently, the strict contract, reserved rights theory places no limit on the employer's right to subcontract as far as the arbitration process is concerned.

This theory's harshly legalistic approach to what is basically an equitable problem is untenable. The notion that to imply coverage in the absence of specific words is to add to the contract rather than to interpret it conflicts with the policy expressed by the United States Supreme Court in United Steelworkers v. Warrior & Gulf Navigation Co. There the employer refused to arbitrate the subcontracting of maintenance work on the grounds that the contract was silent and subcontracting was a management function. In holding that subcontracting was arbitrable the Court

to the established grievance procedure." See also Carey v. Westinghouse Electric Corp., 375 U.S. 261, 271 (1964) : "The Board's action and the awards of arbiters are at times closely brigaded. Thus, where grievance proceedings are pending before an arbiter, the Board defers decision . . . until the awards are made."

33. Pure Oil Co., supra note 32, at 1045.
35. At least there would be no limit if the arbitrators really mean what they say; but there is some reason to doubt that they always do. In Pure Oil Co., 38 Lab. Arb. 1042, 1045 (1962) (John D. Larkin), the arbitrator held that the strict contract theory applied but then carefully pointed out that there was no evidence that the employer was seeking to cripple or destroy the union.
declared that the collective agreement and its interpretation should not be limited to express provisions. This view of collective agreement interpretation conflicts with the strict contract theory's presumption that coverage is limited to the specific words in the agreement. Moreover, under the strict contract theory the employer, without violating the agreement, could subcontract all of his work and avoid the agreement to a great extent or even entirely if it were silent on subcontracting. To permit such action would be to subvert the federal labor policy of encouraging industrial peace through the faithful performance of agreements.

A large number of arbitrators, taking a second approach, imply a limitation on the employer's right to subcontract from the recognition, seniority, wage rate, job classification, or other clauses which might be construed to imply that certain work is to be performed exclusively by the company's employees. For example, it has been held that subcontracting jobs represented by the union derogates the status of the union as the employees' representative, and thus exceeds a limit implied by the clause declaring the union the employees' representative. Also, giving jobs to outsiders instead of to employees with seniority has been held to violate the seniority clause.

There are two principal weaknesses in this theory. The first is its inconsistency in application. While the advocates of this theory agree that a limitation is implied from certain clauses, they are not in agreement as to what constitutes the limitation. One arbitrator defines the limitation in terms of reasonableness, another in terms of harm to the union, and still another in terms of good faith. These terms, though

37. Id. at 581-82.
38. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 454 (1957). See also the concurring opinion to the Steelworkers Trilogy, 363 U.S. 564 (1960), where it is noted that failure to imply a limit on subcontracting would leave the employer free to destroy the collective agreement by subcontracting all the work. Id. at 572.
42. Pacific Laundry & Dry Cleaning Co., supra note 41, at 681.
43. KVP Sutherland Paper Co., 40 Lab. Arb. 737, 740 (1963) (Sanford H. Kadish).
equally broad, are not synonymous. For example, one arbitrator ad-
mitted the employer's good faith in a subcontracting dispute but ruled
against the employer nonetheless.45 The second weakness is that the
theory itself is predicated on an inconsistency. A broad, liberal inter-
pretation must be given to recognition or seniority clauses, while a very
narrow interpretation must be given to management clauses, which fre-
quently are framed in the broadest language imaginable.46 Such inconsis-
tent interpretation would result in meaningless agreements.47 In one
dispute, for example, the agreement contained a management prerogative
clause explicitly reserving to management decision on all matters except
those specifically covered in the agreement, which was silent on sub-
contracting. Nevertheless, a strict limitation on subcontracting was im-
plied from the recognition and seniority clauses.48 In recognizing the
need for an implied limit on the employer's right to subcontract the advo-
cates of this theory are on firm ground, but in attempting to meet the
need by seeking implication in, for example, the recognition and seniority
clauses, they become tangled in inconsistency.

Many arbitrators, adhering to a third theory, imply a limitation on
the employer's right to subcontract not from specific clauses but simply
from the contractual relationship of the parties.49 Since this limitation is

to the union).

46. See, e.g., the retained rights clause quoted in Los Angeles Standard Rubber Co.,
37 Lab. Arb. 784, 786 (1961) (Howard LeBaron): "The right of Management in the
operation of its business is limited only by the provisions of this Agreement."

47. "To take such liberties, through implication, with these particular provisions
would also, if consistency is to be maintained, require that management rights and union
cooperation clauses also be subject to the same broad and sweeping interpretations.
Should such type of arbitration interpretations be allowed to develop, it could only
mean that the labor agreements themselves would become rather meaningless documents."

pertinent wording of the management functions clause, followed by the arbitrator's
comment, reads:

"'All matters . . . are exclusively within the jurisdiction of the Company . . .
except such matters of employment . . . and other conditions of employment
affecting the employer-employee relationship as are specifically provided for
in the terms of this agreement.'

"Where does the contract provide specifically for contracting out of work? In my
opinion, specific provision is made in those clauses cited by the Union." Id. at 447. The
union cited recognition, seniority, and job classification clauses.

A. Smith) ("[T]his standard [good faith] is implicit in the union-management relation-
ship represented by the parties' Agreement, in view of the quite legitimate interests
and expectations which the employees and the Union have in protecting the fruits of
their negotiations with the Company. . . ."); Curtiss-Wright Corp., 38 Lab. Arb. 924,
926-27 (1962) (Thomas J. McDermott) ("The right to subcontract, in the absence of a
specific provision, is not an unlimited right. Where there is evidence of bad faith or a
specific basis for questioning the true nature of the contracting arrangement, there is
justification for limiting management's right to contract out," stated in spite of an
express rejection of implication of limitation from the clauses); Harnishfeger Corp.,
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derived without reference to the written agreement, it does not have the
effect of interpreting individual clauses unequally. But, while implying
the limitation from the contractual relationship of the parties avoids the
inconsistency inherent in implying a limitation from the clauses, it has two
notable deficiencies. First, the theory merely recognizes the need for
an implied term and a proper source for implying it; it does not advance
a rationale that supports any implication from the parties' contractual
relationship. Second, it states the limitation in terms so general as to be
meaningless. It requires the employer's acts to be in good faith, for
legitimate business reasons, non-discriminatory, non-retaliatory, 50 or non-
arbitrary. 51 These terms are not inherently inadequate but can be given
sufficient content to make most satisfactory standards. In the form in
which they have been stated by arbitrators thus far, however, they have
no useful or specialized meaning in terms of an employer's right to sub-
contract. Most probably the lack of meaningful content in the terms used
to define this subcontracting limitation results from the absence of a
rationale to support the implication of the term. Nonetheless, whatever
its shortcomings, implying a limitation simply from the contractual rela-
tionship of the parties points the way to a useful analogy.

III. THE IMPLIED TERM LIMITING SUBCONTRACTING

Since the theories expressed by the arbitrators fail to yield a rationale
that will support a definition of the limit on subcontracting consistent
with the awards, perhaps an analogy might provide such a rationale. Of
course, an analogy should be regarded as no more than a point of de-
parture. Arbitrators are not bound by rules of law and to rationalize
arbitration decisions by analogy to a strict rule of law would be wholly
artificial. Nonetheless, an appropriate analogy might reveal controlling
policy considerations.

The theory which implies a subcontracting limitation simply from
the contractual relationship of the parties suggests the judicial practice of
implying terms in commercial agreements. In commercial law, once the
intent of the parties to agree is established the law will imply whatever

37 Lab. Arb. 685, 688 (1961) (George H. Young) ("[T]he very nature and purpose
of the Agreement impose implied limitations of good faith and business justification
on the part of the Company in hiring independent contractors . . ."); Square D Co., 37
Lab. Arb. 892, 898 (1961) (Edwin R. Teple) ("If any limitation upon the right to
subcontract particular work is to be found it must come from the broad principle,
accepted by some, that there are certain existing, unwritten terms and conditions of
employment which the parties to a collective agreement must be considered to have
accepted when the contract was executed.").

50. See, e.g., Harnishfeger Corp., supra note 49, at 688; Los Angeles Standard

Terms are necessary to make their contract workable. Terms are implied not from specific clauses in the agreement but from the intent of the parties to have a workable contract. In implying terms the courts do not contend that the parties intended to agree on the particular term omitted but that the parties intended to have a workable contract which only the implied term can assure.

It seems that the policy on which the practice of implying terms in commercial contracts is based should apply with equal force to labor agreements. The present federal labor policy is to promote industrial stabilization through the medium of the collective bargaining agreement. Since industrial stability is essential to a healthy national economy, the public interest in having collective bargaining agreements succeed would seem as insistent as its interest in the performance of commercial contracts. In addition, no tenable theory of strict construction exists that would restrict implication of terms in labor agreements as in commercial contracts. Consequently, those devices used to ensure workable commercial contracts, one example being the practice of implying necessary terms, should also be used in labor agreements. By analogy, entering a collective bargaining agreement should imply an intent to limit subcontracting, since if the employer had an unlimited right to subcontract it could avoid the agreement completely or at least render the contract in large measure unworkable.

This analogy to the implication of terms in commercial contracts may be useful in two ways. First, the analogy suggests a sound rationale for implying a term limiting subcontracting. Second, it suggests what the content of the term should be. The term is implied to make the agreement workable, and its content should be the limitation necessary to prevent an avoidance of the agreement.

A term based on the rationale of implied terms in commercial agreements and consistent with the awards themselves might be stated as

52. See, e.g., Wood v. Lucy, Lady Duff Gordon, 222 N.Y. 88, 118 N.E. 214 (1917) (consideration implied); Wells v. Alexandre, 130 N.Y. 642, 29 N.E. 142 (1891) (promise to give notice implied). See also Uniform Commercial Code §§ 2-305 (price implied); 2-308 (place of delivery implied); 2-309 (time of delivery implied).
55. "The generalities, the deliberate ambiguities, the gaps, the unforeseen contingencies, and the need for a rule even though the contract is silent all require a creativeness in contract administration which is quite unlike the attitude of one construing a deed, a promissory note, or a 300-page corporate trust indenture." Cox, Reflections upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1493 (1959). (Emphasis added.)
56. Several writers have studied and analyzed arbitration awards in subcontracting cases. A statistical breakdown of 64 awards has been prepared by G. Allen Dash, Jr., himself an arbitrator. Dash, The Arbitration of Subcontracting Disputes, 16 Ind. & Lab.
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follows: The employer may subcontract work only when to require it to use its own employees would be unreasonable. This implied provision would prevent the interests of one party to the contract from being circumvented or undermined and consequently satisfies the general rationale of implied terms.

It seems that use of this term should not be limited to rationalizing the result of past awards though, for it could serve well as a standard for arbitrators in deciding subcontracting disputes. Admittedly there is

Rel. Rev. 208 (1963). Dash reaches six general conclusions:
1. The reserved rights theory gets little if any real attention.
2. The implied limitation theory is recognized with increasing frequency.
3. Subcontracting of work not a present threat to the scope of the union is not often ruled against.
4. Signed agreements and recognition clauses do not guarantee that all jobs then performed or to be performed will be performed by union members.
5. The company ordinarily will be ruled against if it has acted in bad faith or weakened the union by forcing it to agree to a reduction in wages to avoid subcontracting.
6. Arbitrators are more likely to rule against subcontracting of regular, permanent work. Id. at 214-15.

Dash's study has been updated. Greenbaum, The Arbitration of Subcontracting Disputes: An Addendum, 16 Ind. & Lab. Rel. Rev. 221 (1963). Miss Greenbaum's study agrees at least partially with Dash in all of his conclusions except the second. She found the implication of limitations from the clauses to be declining. Donald A. Crawford, also an arbitrator, has analyzed awards in subcontracting disputes. Crawford, The Arbitration of Disputes over Subcontracting, in Challenges to Arbitration 51 (McKelvey ed. 1960). Crawford finds consistency in the decisions on the basis of their facts. He says the questions on which the awards turn are: Was the subcontracting based on lower wage rates of the subcontractor? If so, it violates the recognition clause. If not, is permanent work being contracted out? If not, the work may be contracted out; but if so, the contracting out must be based on "compelling logic or economies of operation." Id. at 72. Miss Greenbaum, however, found Crawford's first question no longer useful and the second not controlling. She found the third question most valid. "By discovering what is meant by 'compelling logic' or 'a reasonable business decision,' one is able to acquire some idea of where contracting out will be upheld and where it will be denied." Greenbaum, supra, at 234. Neither she nor Crawford define "compelling logic," although Miss Greenbaum suggests that it falls within a category used both by her and by Dash: "Act was dictated by requirements of the business for efficiency, for economy, or for expeditious performance." Id. at 230. But none of these labels seem to add much to the knowledge of what it is that determines whether or not subcontracting will be allowed. Arbitrator Kadish reviewed the Crawford and Greenbaum articles in KVP Sutherland Paper Co., 40 Lab. Arb. 737 (1963), and concluded: "After examining these studies and many of the decisions discussed, it is fair to conclude that no one, whatever his initial inclinations or prejudices, will go away from them without finding something he likes. Like the town fair, there is something there for everyone." Id. at 740.

57. "Collective agreements, because of the institutional characteristics already mentioned, are less complete and more loosely drawn than many other contracts; therefore, there is much more to be supplied from the context in which they were negotiated. The governing criteria are not judge-made principles of the common law but the practices, assumptions, understandings, and aspirations of the going industrial concern. The arbitrator is not bound by conventional law although he may follow it. If we are to develop a rationale of grievance arbitration, more work should be directed towards identifying the standards which shape arbitral opinions; if the process is rational, as I assert, a partial systematization should be achievable even though scope must be left for art and intuition."

possible impropriety in suggesting a fixed standard for arbitrators, since when the parties agree to settle their disputes by arbitration they may have chosen to substitute a third party's reaction to facts and the exigencies of industrial life for an impersonal judgment dictated by rules of law. In some instances the reason for settling labor-management disputes by an arbitrator instead of a court is that the parties have confidence in a given arbitrator's judgment, special knowledge, and expertise regarding their shop or industry. Where subcontracting is concerned, however, the employer has a considerable interest in knowing with some certainty the extent of its right to subcontract. The employer's ability or inability to subcontract can have impact on its long range planning, particularly in an area such as capital equipment acquisition. In addition, improper subcontracting can result in awards against the employer of sizable sums of money. It seems that the proposed term, if adopted by arbitrators as a uniform standard, would provide both the desirable certainty of result and the principal benefits of arbitration.

Unreasonableness in a particular situation would be determined by balancing the interests of the employer and the union. If the employer's interest in subcontracting clearly outweighs the union's interest in preventing subcontracting, it is unreasonable to require the employer to use its own employees. On the other hand, if the interests of both parties are about the same it is not unreasonable to require the employer to use its own employees. To assure the workability in the agreement the employer must be required to use its employees whenever reasonable, and when the interests of the parties are equal, it is reasonable to require the employer to use its own employees. If the union interest is greater than the employer's interest it is clearly reasonable to require the employer to use its own employees. The arbitrator, with his expertise and special knowledge, would continue notwithstanding the implied term to have complete freedom in assessing the interests of the parties and would be restricted only to the extent that the weight of the opposing interests would compel an award for one party or the other. At the same time, the

59. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). Other reasons prompting parties to agree to settle their disputes by arbitration would include the greater speed and lower cost of arbitration in comparison with litigation.
60. See, e.g., United States Steel Corp., 38 Lab. Arb. 756 (1962) (Clare B. McDermott). To stay abreast of technological advances in the industry the employer was forced either to subcontract to a subcontractor with the necessary equipment, or to purchase the equipment itself at a cost of over $1,000,000.
61. See, e.g., United States Potash Co., 37 Lab. Arb. 442 (1961) (Carl Schell). The union sought payment for employees for a number of hours equal to those spent on the job by the subcontractor's workers. Labor cost for the job was more than $35,000.
parties would have the benefit of reasonable certainty of result within a given set of facts.

The effectiveness of the suggested standard, both for deciding cases and for predicting results, depends on the identification and assessment of the parties' interests. The employer's chief interest in subcontracting is the economical and efficient operation of his business. Subcontracting enables the employer to take advantage of skills which its employees do not have, equipment which it is impractical for it to acquire, and methods of operation which it cannot employ with its own resources. Advancing the employer's interest in economically efficient operation solely by reducing labor costs through subcontracting is not a valid interest, however. To permit the employer to obtain labor at a cost less than that provided in the agreement would be to permit the employer to avoid the agreement and undermine the union.62

The chief union interests are preservation of its status as representative of a bargaining unit and expansion of its jurisdiction and membership. The union's status as a bargaining unit representative depends on three things: the jobs it represents, the employees who fill those jobs, and the agreement which it negotiated. Consequently, its existence will be threatened by acts which either eliminate jobs or employees which it presently represents or avoid the agreement which it negotiated; and its most vital interest is in these areas. While a union interest in expansion through new jobs is sufficiently justified to be recognizable, the expansion interest lacks the immediacy of the interest in maintaining the union's existence and has less weight as a result.

In some cases subcontracting affects no union interest,63 so the slight-

62. None of the disputes considered turned on this point alone, although Pacific Laundry & Dry Cleaning Co., 39 Lab. Arb. 676 (1962) (Ted T. Tsukiyama), nearly did. Night shift work was subcontracted to another laundry which was non-union, and the employer urged his laid off night shift employees to seek employment with the subcontractor. It appeared that the subcontracting was done to avoid paying wages promised in the agreement, and the grievance was sustained. The point is mentioned in KVP Sutherland Paper Co., 40 Lab. Arb. 737, 741 (1963) (Sanford H. Kadish); Collins Radio Co., 39 Lab. Arb. 181, 182 (1962) (Roy R. Ray); Elizabeth Arden Sales Corp., 39 Lab. Arb. 1048, 1051 (1962) (James V. Altieri). Crawford recognized this point. He found, judging the awards by their facts, that the employer cannot avoid the contract by placing the union in the impossible position of having to agree to cut contract wage rates to prevent subcontracting by the employer. Crawford, op. cit. supra note 56, at 68. Miss Greenbaum observes that this finding no longer appears in enough cases to enable a conclusion regarding it to be drawn. Greenbaum, op. cit. supra note 56, at 231.

63. See, e.g., Griffin Pipe Products Co., 40 Lab. Arb. 946 (1963) (John D. Larkin) (work subcontracted was an additional duty for two employees who continued to have full time employment at their primary jobs after the subcontracting); KVP Sutherland Paper Co., 40 Lab. Arb. 737 (1963) (Sanford H. Kadish) (testimony that the work subcontracted would not have kept even one employee occupied during the period when employees who might have performed the work were on layoff); United States Steel Corp., 39 Lab. Arb. 1089 (1963) (Clare B. McDermott) (management's use of a tire
est employer justification for subcontracting is sufficient to make requiring the employer to use its own employees unreasonable. Cases where there is no injury to a union interest involve the subcontracting of work which does not require the full time of one or more employees. Since the work does not require full time it does not constitute a "job" in itself, nor can the subcontracting of it cause a layoff; and if it affects neither jobs nor employees, to subcontract it cannot be an avoidance of the agreement. An excellent example of the no-injury principle can be found in the Los Angeles Standard Rubber Co. dispute. The work subcontracted was the scraping of silicone from fabric scraps with putty knives. Employees not needed on their regular jobs did the work; and since it was unskilled and tedious at least some employees preferred not to do it. The employer first allowed the children of an employee do the work, and later it subcontracted the job. As well as can be determined from the facts in the report, the only effect of this subcontracting on the employees was beneficial. Meanwhile, the employer's cost of salvage was reduced from $2.60 to $1.00 a pound. Since there was no injury to a union interest offsetting the employer's interest in economy and efficiency, to have required the employer to forego the advantage he realized from subcontracting would have been unreasonable.

A large number of disputes in which subcontracting does harm the union by taking a job or causing an employee to be laid off arises from subcontracting temporary work. The union's interest in temporary vendor to install new tires when installation was part of the purchase price, the vendor would guarantee only if installed by his employees, and the total work involved was four to five hours monthly; Carborundum Co., 38 Lab. Arb. 327 (1962) (Robert G. McIntosh) (trash collection performed by a general laborer was subcontracted but the general laborer's employment according to his job description continued unaffected); Pure Oil Co., 38 Lab. Arb. 1042 (1962) (John D. Larkin) (subcontractor performed 19 hours of intermittent, unpredictable work monthly); Lukens Steel Co., 37 Lab. Arb. 544 (1959) (Donald A. Crawford) (employer supplemented its own truck force with trucks subcontracted to perform as required work which totalled 564 hours a year for both hired trucks together).

64. A.B. Chance Co., 38 Lab. Arb. 769 (1962) (Clarence M. Updegraaff), seems to be an exception to the rule. Janitorial work was subcontracted and jobs were eliminated. The facts stated in the award indicate no employer interest sufficient to outweigh the union interest in protecting the jobs. Nonetheless, the arbitrator held that only substantial injury to the union would justify sustaining the grievance, and he determined that no such injury had been occasioned.


67. The impermanence of the work as a significant factor has received the attention of several analysts. Dash, in considering the status of nonpermanent or surplus work, noted as reasons for upholding the employer's right to subcontract that the employer need not hire temporary workers and that the work need not be postponed nor cause a change in projected schedule. Dash, op. cit. supra note 56, at 214. These observations
work cases is stronger than in the no-injury cases; but it is considerably less than the union's fundamental interest in the permanent jobs which give it its scope and status as representative of the bargaining unit. The subcontracting of temporary jobs normally does not threaten the security of existing jobs and injures only the union's interest in expanding its membership. On the other hand, the employer's interest in subcontracting temporary work may be great. It is in the area of temporary work that the employer can most profitably take advantage of rented skills and equipment for which its own needs are insufficient to justify training employees or purchasing equipment.

In some cases involving temporary work the employer's interest is to avoid buying expensive equipment to perform temporary work. For example, in *Celotex Corp.* the employer subcontracted two repair projects and two construction projects. One job required about four and one half months, another about two months, a third required one day, and the other was not completed after more than a year's work. All four projects required capital equipment which only the subcontractor had. The arbitrator held that the employer had made every reasonable attempt to use its own employees and found its lack of necessary equipment to be a controlling factor. This award, although it reaches a result which seems proper, might have been better supported by reasoning that the considerable saving to the employer, who avoided buying a great deal of capital equipment for temporary work, outweighed the slight injury to the union, which merely lost jurisdiction of the temporary jobs.

In other cases involving the subcontracting of temporary work a strong employer interest may be to avoid training employees to perform temporary work. In *Kennametal, Inc.* for example, the employer subcontracted painting while its two regular painters were on vacation. The support the notion that the employer may subcontract when it is unreasonable to require him to use his own employees. Crawford went further and concluded as a general proposition that the subcontracting of temporary or irregular work is allowed since there is no impact on the status of the employees or the union. Crawford, *op. cit. supra* note 56, at 69. This conclusion is too general, however, since subcontracting of temporary work can have an impact on the bargaining unit. See, *e.g.*, Mead Paper Co., 37 Lab. Arb. 342 (1961) (Langston T. Hawley); United States Potash Co., 37 Lab. Arb. 442 (1961) (Carl R. Schedler).

68. 40 Lab. Arb. 554 (1963) (Peter M. Kelliher). See also Station KQED, 40 Lab. Arb. 638 (1963) (Adolph M. Koven) (employer subcontracted making of videotape because it did not have proper equipment).


70. See, *e.g.*, United States Steel Corp., 39 Lab. Arb. 1091 (1963) (Clare B. McDermott) (employer subcontracted the design and critical work on a close tolerance air conditioning system); Kennametal, Inc., 38 Lab. Arb. 615 (1962) (Myron L. Joseph) (employer subcontracted painting for which available employees were not trained); United States Steel Corp., 38 Lab. Arb. 754 (1962) (Clare B. McDermott) (employer subcontracted the repair work on a high smoke stack).

subcontractor used a crew of five or six men. No layoffs or discharges resulted from the subcontracting. The available employees would have needed training and upgrading to do the work, yet the employer apparently did not have enough regular painting work for five or six painters.\textsuperscript{2}

The arbitrator confined his discussion to the facts and held that under the circumstances there was no limit on the employer's right to subcontract. The same result could have been reached by weighing the union's interest in jobs so temporary that they could be performed during the vacations of the regular painters, with the employer's interest in saving the cost of upgrading and training five or six employees to perform work of short duration. The subcontracting of the project in no way diminished or threatened the security of any permanent employees or jobs.

An employer's interest in subcontracting temporary jobs also may be to avoid hiring additional employees to do temporary work.\textsuperscript{3} For example, in \textit{Quaker Oats Co.}\textsuperscript{4} the employer undertook a thorough, six-month modernization of its plant. Because of a managerial misunderstanding, one project was not started until three weeks before the deadline for completion of the modernization. Available employees would have had to work six days a week, 20 hours a day to do the work, so to use union members the employer would have had to hire additional employees for a three-week job. Moreover, during the period of subcontracting and for weeks thereafter, union employees were working substantial amounts of overtime. This grievance was denied on the basis of past practice,\textsuperscript{5} but the same result could have been reached by weighing the parties' interests. The employer's interest in avoiding the hiring of employees for temporary jobs with the attendant seniority, pension, pay, administrative, and other problems which would have resulted upon layoff when the jobs were completed seems to outweigh the union's expansion interest in the new temporary jobs. Since the new jobs were of very short duration, the union's interest must have been slight at best.

\textsuperscript{2} Id. at 617.

\textsuperscript{3} See, e.g., Allis-Chalmers Mfg. Co., 39 Lab. Arb. 1213 (1961) (Russell A. Smith) (employer subcontracted janitorial work that had to be completed over one weekend in connection with relocation of offices); Curtiss-Wright Corp., 38 Lab. Arb. 924 (1962) (Thomas J. McDermott) (employer subcontracted construction because employees could not have completed the project in the time allotted while performing their regular work); Reactive Metals, Inc., 38 Lab. Arb. 565 (1962) (Thomas C. Begley) (employer subcontracted unloading work of intermittent nature and repair work needed on short deadline). Accord, Mead Paper Co., 37 Lab. Arb. 342 (1961) (Langston T. Hawley) (employer subcontracted carpenter work); United States Potash Co., 37 Lab. Arb. 442 (1961) (Carl R. Schell) (employer subcontracted a construction project). In neither case was there any evidence indicating that it would have been unreasonable for the employer to use its own employees to do the work subcontracted, and in both cases the grievance was sustained.

\textsuperscript{4} 38 Lab. Arb. 744 (1962) (Richard A. Moore).

\textsuperscript{5} Id. at 746.
This is not to say, however, that the union will never have a significant interest in temporary jobs.

An example of the situation in which the union does have a comparatively strong interest in temporary work is illustrated by *Mead Paper Corp.* The employer subcontracted carpenter work and, while the subcontractor was working, reclassified its own carpenters into less skilled, lower paying jobs. At the same time the employer arranged for its own electricians to work with the subcontractor. There was no showing that the carpenters could not have been handled as were the electricians, that the use of the carpenters would have raised costs, or that their use would have been inefficient or for practical purposes impossible. The arbitrator could find no logical explanation for the employer's failure to use its own employees; and the grievance was sustained on the theory of limits implied from the clauses. The same result could have been reached more soundly by weighing the interests. Although the employer argued that technological change had eliminated the need for carpenters, it is apparent that there was work for them, at least until the temporary work was completed, since the subcontractor used carpenters. The employer established no valid interest whatever in its favor. The union, however, had an interest in protecting the carpenters' jobs as long as their work was needed. Unlike the customary subcontracting of temporary work, in *Mead Paper Corp.* the subcontracting of temporary work did have impact, however slight, on the union's vital interest in its existence.

Some subcontracting disputes involve work that, although permanent, is incidental or collateral. Incidental work is best defined as service work which is completely removed from the employer's line of business. Examples of incidental work include food service for employees, janitorial service, lawn maintenance, and plant protection. Collateral work, on the other hand, might be defined as by-product operations which could be classed as a part of the production process but which are clearly outside the employer's principal line of production. Slag and scrap processing in steel making or silicone recovery in rubber production are examples of collateral work. In both incidental and collateral work the union's interest is in protecting its representative status since the jobs concerned are permanent jobs which help provide the basis for the union's existence. As a result the union's interest in this area is greater than in temporary work, where its interest is merely in expanding its jurisdiction and membership. However, the seriousness of the threat to the union's interest which results from the subcontracting of incidental or collateral work can be somewhat discounted; by subcontracting such work the em-

ployer can never avoid the bargain entirely, nor can it seriously under-
mine the union since the line or production jobs and employees continue
within the union's jurisdiction. Meanwhile, the employer's interest in
subcontracting incidental or collateral work may be substantial. Since
incidental work is not undertaken for profit and contributes only slightly
if at all to the operation's overall effectiveness, the employer has a con-
siderable interest in keeping the cost of incidental work at a minimum.
The work is not within the employer's principal area of operation; and,
consequently, the efficiency with which the employer performs it is likely
to be quite low in comparison with the work of a subcontractor. With
collateral work the situation is similar. The employer's principal effort
and investment is in its line production. To keep line production at a
maximum it must keep costs and effort in collateral operations at a mini-
num. In either case, an employer frequently may reduce costs sub-
stantially by taking advantage of a subcontractor's efficiency and special
equipment.

A typical example of subcontracting collateral work was at issue in
United States Steel Corp.,\textsuperscript{77} where the employer subcontracted scrap recla-
mation to a subcontractor who had the equipment required for methods
proved effective throughout the employer's industry. It would have cost
the employer, who had been using an obsolete method, more than
$1,000,000 to provide its employees with the equipment needed to do the
job in the modern manner. The subcontracting affected twenty to twenty-
five jobs in a unit of 5,000. The arbitrator found that the subcontracting
did not violate a limit implied from the clauses,\textsuperscript{78} but the result could have
been reached more soundly by weighing the interests. The loss of col-
lateral work posed no serious threat to the union's existence, for the
harm to the union was limited chiefly to the layoff of a comparatively
small number of workers. On the other hand, the employer realized a
tremendous economy and greatly increased efficiency in a collateral
operation. It would not have been difficult to have found the employer's
interest to be greater than the union's.\textsuperscript{79}

\textsuperscript{77} 38 Lab. Arb. 756 (1962) (Clare B. McDermott).
\textsuperscript{78} Id. at 759.
\textsuperscript{79} In Bethlehem Steel Co., 30 Lab. Arb. 678 (1958) (Ralph T. Seward), the
arbitrator sustained a union grievance based on the employer's subcontracting of scrap
reclamation because the union had established a local working condition. However,
he said in dicta:

Though scrap reclamation is a continuing operation which feeds directly into
the Company's steel making processes, its most efficient performance seems to
call for specialized skills and equipment which the Company has not developed
within its own organization.

Scrap reclamation is frequently contracted out in the steel industry. . .
Management anticipated from the Heckett process benefits which are real and
important. . . By contrast only a small number of its employees would be
A case illustrative of the subcontracting of incidental work is *Square D Co.*, which involved a company cafeteria that had been operating at an annual loss of more than $13,000 for about three years. When the annual loss exceeded $20,000 a detailed analysis was made and resulted in a recommendation that the operation either be discontinued or subcontracted. The cafeteria provided five jobs and was used by sixty percent of the clerical personnel and thirty-five percent of the factory personnel. As a result of the subcontracting two employees were laid off. The incidental nature of the jobs eliminated precluded their loss seriously threatening the scope of the union, which represented primarily the company's production workers. While the layoff of two workers undoubtedly did harm the union, the employer's interest in utilizing a subcontractor's superior resources and know-how to eliminate a significant and unnecessary loss would seem sufficient to have overcome the union's interest.

It is possible that disputes will arise over an employer's subcontracting of all or a part of its line production work, although such disputes seem to be rare. Altercations of this nature should be decided in the same manner as any other subcontracting dispute—by balancing employer-union interests. It is conceivable that an employer could show a great enough interest to overcome the union's colossal interest in line production work, but the possibility seems slim.

**IV. WAIVER OF THE IMPLIED TERM**

Although the suggested implied term should be considered a minimum term present in every agreement unless it is expressly excluded or modified, it may be waived. Waiver may be implied from past practice in the shop, but not all past practice is relevant. In dealing with past

affected by the change.

*Id.* at 683.

80. 37 Lab. Arb. 892 (1961) (Edwin R. Teple). For other cases in which the employer's interest prevailed and the grievance was denied, see, e.g., ACF Industries, 38 Lab. Arb. 14 (1962) (Jerre S. Williams) (lawn work subcontracted; three employees laid off and their jobs, which lasted 8-9 months out of the year, were eliminated, but employer showed 50 per cent saving and increase in quality of work); American Sugar Refining Co., 37 Lab. Arb. 334 (1961) (Marion Beatty) (employer eliminated one trash collector's job by subcontracting with no layoffs resulting; employer avoided buying new truck and service improved greatly). For cases in which the employer failed to establish an interest greater than the union's, see, e.g., Crompton & Knowles Corp., 40 Lab. Arb. 1333 (1963) (Frank E. Sander) (three janitorial jobs eliminated by subcontracting; employer claimed dissatisfaction with quality of work, but dissatisfaction resulted from turnover in jobs caused by bumping which was guaranteed by the agreement); Container Corp., 37 Lab. Arb. 252 (1961) (Harold T. Dworet) (subcontracting eliminated janitress' job and caused her layoff; employer showed no valid interest in the subcontracting).

81. "Evidence of custom and past practice may be introduced for any of the following major purposes: (1) to provide the basis of rules governing the matters not included in the written contract; (2) to indicate the proper interpretation of ambiguous contract language; or (3) to support allegations that clear language of the written
practice, as with subcontracting in general, the arbitrators express different and conflicting views; but the results of arbitration cases indicate that past practice has been given consistent practical effect. According to the awards, past practice must be unambiguous to support an implication of a waiver. Three requirements have to be met to establish a lack of ambiguity.

First, the past practice should concern work that is substantially identical to that in dispute. Proof of subcontracting of work in areas related or similar to the one in dispute does not necessarily evidence waiver of any limitation on the subcontracting of the work in point, and for sound reason. Union interests in different types of work are not the same. For example, a union would not have the same interest in the job of painting water towers or smoke stacks as it would have in the job of painting the interior of a building. Nor would a union likely be as interested in an exterior maintenance program that involved three employees as in interior maintenance jobs that required twenty employees. Since waiver of the implied limit in an area is tantamount to abandonment of the work and the jobs involved by the union, waiver should be implied only on the clearest evidence and, when implied, be limited strictly in scope. Second, the prior subcontracting of work of the type involved should have been sufficiently consistent under circumstances substantially identical to those under which the dispute arose to establish a pattern of waiver.

For example, a history of subcontracting that did not involve contract has been amended by mutual action or agreement.” Elkouri & Elkouri op. cit. supra note 58, at 266. The use of past practice to interpret ambiguous language is applied as an exclusive rule in Carborundum Co., 38 Lab. Arb. 327 (1962) (Robert M. McIntosh). Support for the amendment effect of past practice is found in Cox, Reflections upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1500 (1959).


83. See, e.g., ACF Industries, supra note 82, where the employer proved a past practice of subcontracting major, one shot lawn improvement projects to support its subcontracting of regular, routine lawn maintenance performed by permanent company employees.

84. This position seems consistent to a considerable extent with the National Labor Relations Board position, which is that waiver of statutory rights will not be inferred readily and that there must be a clear and unmistakable showing that the waiver occurred. See, e.g., Beacon Piece Dyeing & Finishing Co., 121 NLRB 953 (1958); The Press Co., 121 NLRB 976, 978 (1958).

85. For consistent prior practice see, e.g., Collins Radio Co., 39 Lab. Arb. 180 (1962) (Roy R. Ray) (all janitor work in the employer's buildings in a particular city had been subcontracted in the past). For inconsistent prior practice see, e.g., Mead Paper Corp., 37 Lab. Arb. 342 (1961) (Langston T. Havley) (previous instances of subcontracting had not resulted in layoff or displacement of employees); United States Potash Co., 37 Lab. Arb. 442 (1961) (Carl R. Schedler) (employer had subcontracted work of the same kind in some but not all instances). Inconsistent prior practice does have a place, however, in rebutting a contention that prior practice indicates an implied agreement. See, e.g., United States Steel Corp., 39 Lab. Arb. 1089 (1963)
layoffs would not support an implication of waiver of the limitation on subcontracting that did involve layoffs, even if identical jobs were concerned. The union interest is much stronger when present members whom it is obligated to represent are affected than when mere vacant jobs are concerned. Third, and perhaps most obviously, the prior subcontracting must have occurred under a collective bargaining agreement. Since the term comes into existence with the contractual relation of the parties, it could clearly not be waived by conduct prior to the contract’s existence. Past practice that has met these requirements has controlled the results of those disputes in which it was offered in evidence.

While it rarely seems to control a case, arbitrators frequently speak of waiver based on rejection of a subcontracting term proposed in negotiations. Two arguments militate strongly against using a rejection to imply complete lack of coverage. First, the failure to agree on a term limiting subcontracting does not indicate lack of intent to have a workable agreement and should not lessen the need for an implied term to implement that intent. Second, it would seem to be an unsound policy

(86) See, e.g., Pacific Laundry & Dry Cleaning Co., 39 Lab. Arb. 676 (1962) (Ted T. Tsukiyama) (subcontracting history not significant when grievance involved first subcontracting following organization). The effect of a change in union on the relevance of prior practice is uncertain. In Allis-Chalmers Mfg. Co., 37 Lab. Arb. 944 (1961) (Donald J. White), the union changed affiliation in the mid-fifties but since the subcontracting had occurred from well before the change up to the time the grievance was brought, the change was held to be of no consequence. Strictly speaking, a complete change in union should render irrelevant all practice prior to the change, since a waiver by one union could not be implied on the basis of acts of another. A change in ownership, on the other hand, did not seem to militate against the owner who claimed past practice was applicable in Griffin Pipe Products Co., 40 Lab. Arb. 946 (1963) (John D. Larkin).

(87) Rejection of a union proposal in negotiations to limit subcontracting is frequently considered, but in most awards it is accorded the position of makeweight, and in all awards there are sufficient grounds for the finding other than rejection of a proposal in negotiations. See, e.g., Collins Radio Co., 39 Lab. Arb. 180 (1962) (Roy R. Ray); Allis-Chalmers Mfg. Co., 37 Lab. Arb. 944 (1961) (Donald J. White); Harnischfeger Corp., 37 Lab. Arb. 685 (1961) (George O. Young); Square D Co., 37 Lab. Arb. 892 (1961) (Edwin R. Teple). See also McLaughlin, Custom and Past Practice in Labor Arbitration, 18 Am. J. 205, 214 (1963), stating that waiver is often used to substantiate a decision already made.

(88) It also seems possible to argue that the trend of the Board is away from implication of waiver of rights and duties of a fundamental nature from rejection of a proposed term during negotiations. The Board cases in which such a waiver has been implied seem to involve benefits which are not basic to the workability of the agreement. See, e.g., Speidel Corp., 120 NLRB 733 (1958) (bonuses); Jacobs Mfg. Co., 94 NLRB 1214 (1951) (group insurance). Where fundamental rights and duties are concerned waiver has not necessarily been implied. See, e.g., Beacon Piece Dyeing & Finishing Co., 121 NLRB 953 (1958) (workload); The Press Co., 121 NLRB 976 (1958) (commissions). Both decisions pointed out that to find waiver in the mere rejection of a term in the give and take of bargaining would encourage employees to resist firmly inclusion in contracts of as many subjects as possible and would discourage unions from presenting any subjects for negotiation.
to allow such an important limitation or right to be eliminated without
the clearest evidence of intent of the parties to do so, particularly since
it is not uncommon for a party to seek to put even clearly implied rights
in writing or to broaden existing rights with express contract terms.

V. CONCLUSION

Suggesting the need for and desirability of a standard for deciding
subcontracting disputes may be symptomatic of a necessary development
in the entire labor arbitration process. As it matures as a means of
settling labor disputes, arbitration seems to be following the general
pattern of the development of equity and administrative law. With age
tribunals acquire collective experience and the sources of their rulings
inevitably become routinized. This result is brought about by many fac-
tors, and among the most significant is the tendency of the parties, as the
tribunal becomes older and more respected, to raise the stakes by bringing
before it disputes of increasing importance. When the stakes rise, the
need for the greater certainty of result which is afforded by a clearly
articulated standard increases. Already the handling by arbitrators of
problems of "just cause" in dismissals has become standardized. Sub-
contracting now seems ripe for similar treatment. Perhaps the time is
not so distant when arbitrators will evolve a set of standards for the
recurring problems of shop and industry which, like the subcontracting
standard proposed, will be compatible with the much prized informality
of the arbitration process and yet will provide the necessary certainty
and uniformity of result.

DIVERSITY JURISDICTION:
STATE POLICY AND THE INDEPENDENT FEDERAL FORUM

The Supreme Court in *Erie R.R. v. Tompkins*1 initiated the first of

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89. To show the required clear and unmistakable waiver it would seem necessary
to prove that in rejecting a proposed subcontracting term the parties had agreed that
all limits on subcontracting were waived. It also seems reasonable, however, to presume
that if such a drastic agreement had been reached it would have been included in the
written agreement. In other words, the fact that the agreement is silent on subcon-
tracting rebuts the contention that rejection shows waiver clearly and unmistakably.

90. "Yet it 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 might arguably exist." Allis-Chalmers Mfg. Co., 39 Lab.
1. 304 U.S. 64 (1938).