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Arbitral Treatment of Subcontracting After *Milwaukee Spring II*: Much Ado About Nothing?

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I. INTRODUCTION

Subcontracting is "the process by which a company purchases goods or services from another enterprise which it might otherwise have produced or performed at its own plants and facilities."[1] The parties to labor agreements frequently and intensely dispute issues involving subcontracting.[2] The power to subcontract has been termed an entrepreneurial right that is necessary for management to operate businesses properly.[3] For a variety of reasons, an employer may decide to subcontract unit work[4] while a collective bargaining agreement is in effect. The union may consider subcontracting violative of a collective bargaining agreement's clause specifically restricting, but

1. Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 413 (1950). Another definition that is frequently used in labor relations describes subcontracting as: "making an agreement to have another person (human or corporate) do construction, perform service, or manufacture or assemble products that could be performed by payroll, unit employees." Fruehauf Corp., 62 Lab. Arb. (BNA) 37, 40 (1974) (McBrearty, Arb.).

2. "Subcontracting issues generate as much insecurity within a work force as perhaps 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." Chase Barlow Lumber Co., 76 Lab. Arb. (BNA) 336, 339 (1981) (Beckman, Arb.).

3. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223-24 (1964) (Stewart, J., concurring). For a discussion of *Fibreboard*, see *infra* notes 58-66 and accompanying text.

4. In this Comment, the term "unit work" refers to work that a particular bargaining unit performs under the terms of a collective bargaining agreement.

not prohibiting, the right to subcontract.[5] In the absence of a clause that addresses subcontracting, a union may still claim that subcontracting is a method for management to circumvent the heart of a collective bargaining agreement—the wage, seniority, and recognition clauses.[6] Unless a union and an employer agree that the decision to subcontract does not violate the collective bargaining agreement, an arbitrator will have to settle the issue.[7]

Many collective bargaining agreements contain clauses restricting subcontracting,[8] but only two percent contain clauses that strictly prohibit the practice.[9] Many of these limiting clauses, moreover, exempt the employer from the subcontracting restriction for various reasons, including instances when the necessary equipment is unavailable[10] or where a past practice of subcontracting exists.[11]

Subcontracting of work is closely related to the issues of work transfer and partial business closure. The reasons employers use for subcontracting work, transferring work, or partially closing their businesses are often the same—reducing costs.[12] For example, man-

5. *See* John Deere Horicon Works of Deere & Co., 87-2 Lab. Arb. Awards (CCH) ¶ 8407 (1987) (Staudter, Arb.), *discussed infra in* notes 159-64 and accompanying text; Tri-County Distrib., 86-1 Lab. Arb. Awards (CCH) ¶ 8082 (1985) (Perry, Arb.), *discussed infra in* notes 165-68 and accompanying text; Iowa Mfg. Co., 68 Lab. Arb. (BNA) 599 (1977) (Sembower, Arb.).

6. *See* Advertiser Co., 87-1 Lab. Arb. Awards (CCH) ¶ 8224 (1987) (Baroni, Arb.), *discussed infra in* notes 173-77 and accompanying text; Mead Corp., 75 Lab. Arb. (BNA) 665 (1980) (Gross, Arb.).

7. Ninety-eight percent of collective bargaining agreements in a survey sample contained clauses requiring arbitration of unsettled disputes. 2 Collective Bargaining Negot. & Cont. (BNA) 51:5 (1989).

8. According to a 1986 survey, 54% of the sampled collective bargaining agreements contained subcontracting clauses. 2 Collective Bargaining Negot. & Cont. (BNA) 65:2 (1989). That is up from 50% in a 1983 study and 44% in a 1979 study. 2 Collective Bargaining Negot. & Cont. (BNA) 65:2 (1986). The pattern varies in different industries. Agreements in the construction, apparel, and the mining and rubber industries have the highest levels of clauses with 90%, 89%, and 83% respectively. 2 Collective Bargaining Negot. & Cont. (BNA) 65:2 (1989). Furthermore, unlike agreements restricting the other management rights surveyed (supervisory performance of work, technological changes, and plant relocation), the percentage of collective bargaining agreements containing subcontracting clauses is higher in non-manufacturing industries than in manufacturing industries. *Id.*

9. 2 Collective Bargaining Negot. & Cont. (BNA) 65:2 (1989).

10. *Id.*

11. *Id.* It may be difficult to determine just what constitutes a past practice of subcontracting. For example, subcontracting does not include acceptance of government services without cost to the employer, regardless of whether the service is supplementing the unit work or totally replacing it. In United States Steel Corp., 86-2 Lab. Arb. Awards (CCH) ¶ 8470 (1986) (Dybeck, Arb.), a private company discontinued its in-plant firefighting and ambulance services, replacing the employees who performed these functions with municipal services. *Id.* at 4969. The arbitrator did not consider the action as falling within the definition of subcontracting, and he denied the grievance. *Id.* at 4972.

12. Because an employer's decision to subcontract work, transfer work, or partially close

agement can reduce costs either by subcontracting work to someone who can perform the work at lower cost or by moving the work to another of the company's facilities. Management can similarly reduce costs by closing an unprofitable part of its business. The effects of management's decisions to subcontract, transfer work, or partially close its business are also similar. Employee layoffs, reductions in hours worked, and decreases in a bargaining unit's size may injure employees and unions.[13] The threat also exists that management will intentionally use subcontracting, work transfers, and partial closures to injure the union.[14] By liberally subcontracting, transferring work, or closing part of a business, management can also subvert the wage, hour, and recognition clauses in collective bargaining agreements. For instance, management may agree to pay its employees a set wage for particular work, and then it might eliminate that work.[15] In spite of the many similarities among these actions, the courts and the National Labor Relations Board ("NLRB" or "Board") have not always been clear about whether their decisions in response to any one of these three management actions apply to the other two.[16]

Arbitrators, as creatures of contract, enforce the intent of the parties and are not required to follow the precedents of either the Board or the courts.[17] Commentators have frequently discussed an

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its business may often be based on the same reasons and may also have the same effects, the three areas are often considered together. *See* Otis Elevator Co., 269 N.L.R.B. 891, 893-94 (1984) (plurality opinion) (*Otis Elevator II*), *rev'g* 255 N.L.R.B. 235 (1981) (*Otis Elevator I*).

13. *See, e.g.*, Pickands Mather & Co., 78 Lab. Arb. (BNA) 1183, 1188-89 (1982) (Garrett, Arb.); Transit Auth., 74 Lab. Arb. (BNA) 616, 620 (1980) (Chapman, Arb.); Olympia Brewing Co., 72 Lab. Arb. (BNA) 20, 29 (1978) (Madden, Arb.); City of Hamtramck, 71 Lab. Arb. (BNA) 822, 826 (1978) (Roumell, Arb.); Central Ohio Transit Auth., 71 Lab. Arb. (BNA) 9, 16-17 (1978) (Handsaker, Arb.).

14. *See* Kansas City Power & Light Co., 78 Lab. Arb. (BNA) 1124, 1127 (1982) (Madden, Arb.); Delta Ref. Co., 78 Lab. Arb. (BNA) 710, 713-14 (1982) (Boals, Arb.); Blue Diamond Coal Co., 78 Lab. Arb. (BNA) 702, 704-05 (1982) (Davies, Arb.); Mead Corp., 75 Lab. Arb. (BNA) 665, 666-67 (1980) (Gross, Arb.); Transit Auth., 74 Lab. Arb. (BNA) 616, 620 (1980) (Chapman, Arb.).

15. *See* American Sugar Ref. Co., 36 Lab. Arb. (BNA) 409, 414 (1960) (Crawford, Arb.) (discussing the ability of employers to destroy the integrity of a collective bargaining agreement by subcontracting); *see also infra* note 119.

16. In two recent Board decisions, Otis Elevator Co., 269 N.L.R.B. 891 (1984) (plurality opinion), *rev'g* 255 N.L.R.B. 235 (1981), and Milwaukee Spring Division of Illinois Coil Spring Co., 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *rev'g* 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985), the Board compared work transfer and relocation to subcontracting. For a discussion of these cases, see *infra* notes 78-98 and accompanying text.

17. [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. 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.

employer's ability to subcontract, transfer work, and partially close its business.[18] The impact on the ability to subcontract resulting from the decision of the United States Supreme Court in *First National Maintenance Corp. v. NLRB*[19] and from the Board's decisions in *Milwaukee Spring Division of Illinois Coil Spring Co. (Milwaukee Spring II)*[20] and *Otis Elevator Co. (Otis Elevator II)*,[21] is the further subject of

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United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960). The Supreme Court restated its position in W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757 (1983):

> When the parties include an arbitration clause in their collective-bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "dra[w] its essence from the collective bargaining agreement," [*Enterprise*, 363 U.S.] at 597, a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous.

Grace, 461 U.S. at 764.

An arbitrator, however, does not have complete discretion in interpreting collective bargaining agreements:

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

Enterprise, 363 U.S. at 597.

18. *See, e.g.*, Comment, *Job Security, Managerial Prerogatives, and* First National Maintenance, 31 BUFFALO L. REV. 509 (1982) (discussing employers' ability to partially close businesses); Comment, *Labor Law—The Employer's Duty to Bargain Over a Decision to Close Part of Its Business*, 12 MEM. ST. U.L. REV. 185 (1981) (discussing First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981)).

19. 452 U.S. 666 (1981). In *First National Maintenance*, the United States Supreme Court held that an employer could partially close her business for purely economic reasons, even if the closure caused the discharge of employee members of a bargaining unit. *Id.* at 686. For a further discussion of *First National Maintenance*, see *infra* notes 68-77 and accompanying text.

20. 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *rev'g* 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985). While *Milwaukee Spring I* was on appeal, the membership of the Board was changed by President Reagan. His appointments shifted the majority of the Board to one more "philosophically in tune with the [Reagan] administration." Wall St. J., Nov. 23, 1982, at A16, col. 2. The Board then petitioned the United States Court of Appeals for the Seventh Circuit to remand *Milwaukee Spring I* for further consideration. Milwaukee Spring Div. of Ill. Coil Spring Co. v. N.L.R.B., 114 L.R.R.M. (BNA) 2376 (7th Cir. 1983). The Seventh Circuit granted the petition. *Id.* The Board reheard the case in *Milwaukee Spring II*. In *Milwaukee Spring II*, the Board held that the transfer of a portion of an employer's work from one of its unionized facilities to one of its non-unionized facilities, solely to save on labor costs, was not a violation of the Act. 268 N.L.R.B. at 602. For a further discussion of the *Milwaukee Spring* cases, see *infra* notes 78-94 and accompanying text.

21. 269 N.L.R.B. 891 (1984) (plurality opinion), *rev'g* 255 N.L.R.B. 235 (1981) (*Otis Elevator I*). *Otis Elevator II* has a procedural history similar to *Milwaukee Spring II*. In *Otis Elevator I*, the Board found that the employer had committed unfair labor practices. Upon reconsideration, the Board held that an employer's decision to relocate work without bargaining was not a violation of the Act if the move was made due to a change in the "nature

comment.

Surrounding these decisions is the tendency of the Board and the courts to defer increasingly to arbitration in labor disputes.[22] How will *Milwaukee Spring II*, *Otis Elevator II*, and *First National Maintenance* affect arbitral decisions? This Comment explores arbitral reasoning used in interpreting collective bargaining agreements that contain vague language concerning subcontracting. It also addresses the Board's and the court's doctrinal developments protecting entrepreneurial discretion and the influences of these developments on arbitrator's decisions. It is the premise of this Comment that arbitrators have not changed their analysis of subcontracting disputes and embraced the reasoning of the *Milwaukee Spring II* decision.

Section II of this Comment discusses subcontracting as an entitlement[23] sought by the parties to collective bargaining agreements, and it explores possible methods for deciding to which party the entitlement belongs. Beginning with the 1964 decision in *Fibreboard Paper Products v. NLRB*[24] and continuing through the 1984 decisions in *Milwaukee Spring II* and *Otis Elevator II*, Section III of this Comment reviews the decisional law of the Board and the courts concerning subcontracting, transfer of work, and partial closure. Section IV of this Comment explores arbitrators' reasoning in subcontracting decisions and compares cases decided before and after *Milwaukee Spring II*[25] and *First National Maintenance*.[26] Finally, this Comment ends by discussing the differences between arbitral and Board treatment of subcontracting and by considering the possible effects of *Milwaukee Spring II* on arbitrators. This Comment concludes that there has been no change in the arbitral treatment of subcontracting since *Milwaukee Spring II*.

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or direction of the business." 269 N.L.R.B. at 894. For a further discussion of *Otis Elevator*, see *infra* notes 95-98 and accompanying text.

22. *See* Olin Corp., 268 N.L.R.B. 573, 574-76 (1984); United Technologies Corp., 268 N.L.R.B. 557, 560 (1984); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

23. For a more detailed description of the entitlement theory, see Lynch, *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237 (1989).

24. 379 U.S. 203 (1964). For a further discussion of *Fibreboard*, see *infra* notes 58-66 and accompanying text.

25. 268 N.L.R.B. 601 (1984), *rev'g* 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

26. 452 U.S. 666 (1981).

II. SUBCONTRACTING AS AN ENTITLEMENT IN LABOR LAW

Two primary issues arise when considering subcontracting as an entitlement in labor law. The first is whether subcontracting is an entitlement that is a mandatory subject of bargaining under the National Labor Relations Act (NLRA).[27] The second is whether the right to subcontract or to prevent subcontracting belongs to the employer or to the union; included within this second issue is the question of how to determine the ownership of these rights.

A. *The Duty to Bargain over Subcontracting*

The NLRA requires that management and unions bargain over rates of pay, wages, hours, and conditions of employment.[28] In *Fibreboard Paper Products Corp. v. NLRB*,[29] the United States Supreme Court held that subcontracting is a mandatory subject of collective bargaining.[30] Although it is an unfair labor practice to refuse to bargain over a mandatory subject of collective bargaining,[31] there is no requirement that the parties agree on mandatory subjects.[32] Nonetheless, because subcontracting is a mandatory subject of bargaining, if either party wishes to bargain over subcontracting, the other party is required to bargain as well. After bargaining to impasse[33] with management, however, a union may strike to achieve a

27. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982 & Supp. IV 1986)).

28. NLRA §§ 8(a)(1), 8(a)(3), 8(a)(5), 8(d), 9(a) (codified as amended at 29 U.S.C. §§ 158(a)(1), 158(a)(3), 158(a)(5), 158(d), 159(a)). Section 8(a)(1) of the NLRA makes it an unfair labor practice to violate employee's rights to form organizations and to bargain collectively. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1). Section 8(a)(3) makes it an unfair labor practice to discriminate "in regard to hire or tenure of employment or any term or condition of employment [so as] to encourage or discourage membership in any labor organization." NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3). Section 8(a)(5) makes it an unfair labor practice to refuse to bargain collectively over the provisions of Section 9(a). NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5). Section 8(d) requires the employer and the employees' representative to bargain collectively over "wages, hours, and other terms and conditions of employment" and provides, with some exceptions, that "where there is in effect a collective-bargaining contract . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract." NLRA § 8(d), 29 U.S.C. § 158(d). Section 9(a) makes the designated labor organization, with some exceptions, the sole representative of the employees in bargaining "in respect to rates of pay, wages, hours of employment, or other conditions of employment." NLRA § 9(a), 29 U.S.C. § 159(a).

29. 379 U.S. 203 (1964).

30. *Id.* at 215 (discussing replacement of employees in a bargaining unit with those of an independent contractor).

31. NLRA §§ 8(d), 9(a), 29 U.S.C. §§ 158(d), 159(a).

32. NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402-04 (1952).

33. The concept of impasse has been developed as "a necessary [judicial] response to a state of facts in which the parties, despite the best of faith, are simply deadlocked." NLRB v. Tex-Tan, Inc., 318 F.2d 472, 482 (5th Cir. 1963). *See generally* Stewart & Engeman, *Impasse,*

desired contract.[34]

In contrast, a permissive subject of bargaining may be brought up during negotiations, but agreement to terms regarding the permissive subject may not be insisted upon by either party.[35] Determining whether a labor issue is a mandatory or a permissive subject of bargaining is important; although the parties must bargain over mandatory subjects of bargaining, it is an unfair labor practice to insist that permissible subjects of bargaining be included in a collective bargaining agreement.[36] If subcontracting were a permissive subject of bargaining, unions and employers would be permitted, but not required, to bargain over the subject in negotiations.[37] However, if subcontracting were a permissive subject of bargaining, it would be an unfair labor practice for unions to strike solely over the issue of subcontracting or for employers to insist on a collective bargaining agreement containing a subcontracting clause.[38]

During the bargaining stage of a labor agreement, the distinction between mandatory and permissive subjects can become blurred. The parties may disagree over both mandatory and permissive subjects of bargaining, and in either case, the agreement will remain unsigned until each party is sufficiently satisfied with the language.[39] If, how-

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Collective Bargaining and Action, 39 U. CIN. L. REV. 233 (1970) (discussing the difficulties of applying the term "impasse").

34. NLRA § 8(d), 29 U.S.C. § 158(d). "[B]ut such obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession." *Id.*

35. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349-50 (1958).

36. *Id.* at 349. After the employees selected the UAW-CIO as their representative, the employer insisted that the collective bargaining agreement include two clauses. *Id.* at 344-47. The first clause recognized only the local UAW-CIO union, but not the international union, as the employees' representative. *Id.* at 345. The second clause was a ballot clause that required a minimum thirty day negotiating period, followed by a secret ballot among the employees, before the employees could strike over a nonarbitral issue. *Id.* at 345-46 & n.3. If the employees voted to strike, the employer would have seventy-two hours to give a counter-proposal. *Id.* at 346 & n.3. The company made it clear that it would not enter into an agreement unless it included the two clauses. *Id.* at 347. The Supreme Court thus confronted the issue of whether the clauses were mandatory subjects of bargaining within the definition provided by Section 8(d) of the NLRA. The Court concluded that they were not. *Id.* at 349-50. Furthermore, the Court held that, although the employer could propose the clauses, insistence upon permissible subjects of bargaining as conditions to an agreement that includes mandatory subjects is a refusal to bargain collectively. *Id.*

37. *See id.* at 349.

38. *See id.*

39. A clever negotiator can withhold agreement on the terms of mandatory subjects of bargaining until there is sufficient agreement on permissive subjects. Using this tactic, the withholding party cannot be accused of refusing to agree due to remaining disagreements over a permissive subject of bargaining. For a criticism of *Borg-Warner*, which held that a party cannot withhold agreement due to a permissive subject of bargaining, see Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1082-83 (1958); Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 271-33 (1964).

ever, the parties do not include a mandatory subject such as subcontracting in the agreement, and they later wish to bargain over it during the term of the agreement, the distinction between mandatory and permissive subjects will emerge more forcefully.

If labor and management fail to include a mandatory subject of bargaining in a collective bargaining agreement, they must bargain over that subject if it arises during the course of the agreement.[40] The Supreme Court's holding in *Fibreboard* thus suggests that a union or an employer can insist on contractual language concerning a subcontracting clause because subcontracting is a mandatory subject of bargaining.[41] A union may strike and an employer may refuse to sign a collective bargaining agreement if the agreement does not contain a desired clause addressing subcontracting.[42] *Fibreboard*, however, neither gives management the right to subcontract nor does it give a union the right to prevent subcontracting.

B. *Property Entitlements and Subcontracting*

Once subcontracting has been determined to be a mandatory subject of bargaining, two further issues concerning subcontracting as a property entitlement remain to be determined. The first issue is which party possesses the entitlement in the absence of a clause specifically addressing subcontracting.[43] The second issue is whether the entitle-

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40. Jacobs Mfg. Co., 94 N.L.R.B. 1214, 1221 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952). Midterm modifications of agreements have become less significant, however, with the extensive use of zipper clauses. When parties agree to a zipper clause, they agree to waive their rights to bargain during the term of an agreement over subject matter that is not specifically included in their collective bargaining agreement. *See id.* at 1220 & n.13. Judge Harry T. Edwards has described the zipper clause as an agreement waiving the right to force bargaining over issues not contemplated in the agreement. *See* Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23, 34 (1985). Thus, the zipper clause is an implicit agreement to maintain the status quo on certain issues. By incorporating the issues of mandatory and permissive subjects of bargaining into an agreement, the parties thus contract out of NLRA Section 8(a)(5) and, in a sense, out of NLRA Section 8(d). *See id.*

Additionally, arbitration may be required on issues not contemplated in the agreement. Section 301 of the Labor Management Relations Act (LMRA) allows suits over labor disputes to be brought in the federal courts. Labor Management Relations (Taft-Hartley) Act, ch. 120, tit. III, § 301, 61 Stat. 156 (1947) (codified at 29 U.S.C. § 185). Federal courts, however, can compel arbitration over an issue that a contract does not specifically address by finding that the issue which is not specifically addressed falls under the management rights clause. *Id.* Judge Edwards envisioned enforcement of the parties' "private ordering" agreement, rather than imposition of public law, to resolve conflicts and fill gaps in labor contracts. Edwards, *supra*, at 34-35.

41. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 215 (1964).

42. NLRA § 8(d), 29 U.S.C. § 158(d).

43. The party initially possessing the entitlement can retain the entitlement or trade it for an entitlement which the other party initially possessed. This Comment, however, is

ment is alienable and can be sold or traded between the parties to a collective bargaining agreement.

Initial possession of an entitlement that is not specifically addressed in the collective bargaining agreement can be determined in several ways.[44] Two methods will be discussed here. First, issues not covered by a collective bargaining agreement could be presumed to "belong" to management, unless the duty to collectively bargain has been breached.[45] Justice Stewart's concurrence in *Fibreboard*,[46] citing the need for entrepreneurial control, classically states the employer's need to be able to act freely.[47] The advantage of this method is its predictability;[48] its major disadvantage is its lack of specificity as to particular industries.

A second means of allocating the entitlement in the face of the collective bargaining agreement's silence freezes the status quo on the basis of the parties' past practices. Use of the past practices method allows the parties to determine what entitlements are most valuable to them based on their bargaining history. Freezing the entitlements based on past practices is more beneficial than a presumption favoring management because each industry and bargaining unit can choose the formula that is most advantageous to it.[49] Although labor and management may disagree to some extent over the ownership and

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concerned primarily with subcontracting that arises during the term of a collective bargaining agreement. Although subcontracting is an entitlement that usually initially belongs to management, see *infra* text accompanying note 56, the method in which initial ownership is determined may make a difference in some cases because a method using past practices or industry standards can give the initial ownership to a union.

44. *See generally* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (discussing methods and reasons for deciding entitlements, and rules and regulations for protecting entitlements).

45. The Board recently emphasized this mode of analysis in the *Milwaukee Spring II* decision. Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601 (1984), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985); *see infra* notes 78-94 and accompanying text.

46. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

47. *Id.* at 223 (Stewart. J., concurring). The United States Supreme Court cited Justice Stewart's concurrence in First National Maintenance Corp. v. NLRB, 452 U.S. 666, 677 (1981), as did the NLRB in *Otis Elevator II*, 269 N.L.R.B. 891, 891, 893 (1984) (plurality opinion).

48. A similar method is to freeze the status quo in all collective bargaining agreements by reference to a set of objective criteria. This method also has the advantage of predictability; it fails, however, to consider the wide disparities in the modes of operation of various industries. In some industries, subcontracting is a normal method of doing business and is not of great interest to the union. In others, such as the garment and clothing industry, subcontracting could easily undermine the union. Ultimately, therefore, the lack of industrial uniformity makes the use of general objective criteria a poor choice.

49. *See* Comment, *Merging the RLA and the NLRA for Eastern Air Lines: Can it Fly?*, 44 U. MIAMI L. REV. 539 (1989).

importance of entitlements, such disagreement is preferable to having a set of fixed rules governing the parties' actions.[50]

Once the initial ownership of a property right is determined, its alienability must be determined. Few rights in labor law are inalienable;[51] subcontracting is an alienable property right that belongs to the employer until contracted away.[52] The parties are free to bargain over the inclusion of a clause in a collective bargaining agreement that addresses subcontracting. The clause may either allow an employer to subcontract freely or prohibit an employer from subcontracting. The contractual clause may also strike a balance between the two.[53] Although some argue that the party that most values an entitlement will ultimately come to possess it,[54] few bargaining agreements have

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50. *See generally* Cox & Dunlop, *supra* note 1 (describing the differences between the Board's enforcement of a duty to bargain and the enforcement of fixed requirements on the parties).

Yet another method to determine the initial placement of the entitlement is to confine the inquiry to the four corners of the collective agreement. A zipper clause is a clause in the collective bargaining agreement stating that all subjects are a part of the agreement. By agreeing to zipper clauses, the parties theoretically waive their rights to statutory enforcement provided by the Board and the courts. If zipper clauses were so interpreted, the Board and the courts would order the disputes to arbitrators. Although the Board does not yet use this approach, the United States Court of Appeals for the District of Columbia Circuit suggested such an approach in its opinion affirming the Board's *Milwaukee Spring II* decision. UAW v. NLRB, 765 F.2d 175, 181-83 (D.C. Cir. 1984), *aff'g* Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601 (1984). The court, in an opinion by Judge Harry T. Edwards, discussed the zipper clause. *Id.* Judge (now Justice) Scalia and Chief Judge Robinson joined in the opinion. Judge Edwards subsequently discussed the waiver theory in a law review article:

> When parties negotiate their respective rights and obligations and provide for binding arbitration of any disputes between them, they effectively waive many of their statutory rights. The courts and the Board should respect this bargain, require the parties to use agreed-upon grievance procedures, and refrain from second-guessing arbitration awards under the guise of determining whether there has been a breach of the continuing duty to bargain.

Edwards, *supra* note 40, at 40.

51. Even the right to have union officers free from more serious punishment for participation in illegal strikes is alienable. *See* Comment, *Arbitration and Selective Discipline of Union Officials After* Metropolitan Edison, 44 U. MIAMI L. REV. 443 (1989).

52. For a discussion of entitlements in labor law, see Lynch, *supra* note 23, at 271-312.

53. *See supra* note 8 (discussing industry statistics concerning these clauses).

54. Some authors theorize that it is of little consequence which party initially obtains the entitlements. The Coase theorem suggests that the party placing the greater value on the entitlement will bargain for its receipt regardless of which party gets the initial entitlement. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 258 (1987); *see also* Wachter & Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure and Relocation*, 135 U. PA. L. REV. 1349 (1988) (analyzing, in "Law and Economics" terms, the employer's decision to subcontract work, transfer work, or partially close its business). One factor that the Schwab article does not analyze, however, is the effect that the allocation of an entitlement has on an arbitrator's underlying values and decisionmaking.

clauses that substantially restrict subcontracting.[55] The absence of a subcontracting clause in a collective bargaining agreement, however, does not mean that an employer cannot subcontract. Because many arbitrators rule that the employer possesses the right to subcontract absent a contrary clause in the agreement,[56] a clause that explicitly permits subcontracting adds little more than additional predictability to the agreement. The absence of a subcontracting clause from a collective bargaining agreement suggests that an employer's cost to obtain a subcontracting clause would have been greater than the predictive value the clause would have provided in the employer's relationship with the union.[57]

III. PUBLIC LAW AND SUBCONTRACTING

Subcontracting has been the subject of several important decisions of the Board and the courts. In *Fibreboard Paper Products Corp. v. NLRB*,[58] the United States Supreme Court considered whether the subcontracting of work ordinarily performed by employees in a bargaining unit is a mandatory subject of collective bargaining under Subsections 8(a)(5), 8(d), and 9(a) of the NLRA.[59] For more than twenty years prior to their dispute in *Fibreboard*, the employer and the union had bargained collectively.[60] During negotiations over renewal of the agreement, the employer decided it would be more profitable to subcontract its maintenance work, and it terminated negotiations with the union.[61] The *Fibreboard* Court held, however, that subcontracting of work that the bargaining unit had previously performed was a mandatory subject of collective bargaining.[62] The Court interpreted the phrase "terms and conditions of employment"

55. For a discussion of the use of subcontracting clauses in collective bargaining agreements, see *supra* note 8 and accompanying text.

56. *See* National Sugar Ref. Co., 13 Lab. Arb. (BNA) 991, 1001 (1949) (Feinberg, Arb.) ("It has almost been universally recognized that in the absence of such a [subcontracting] provision an employer may, under his customary right to conduct his business efficiently, let work to outside contractors if such letting is done in good faith and without deliberate intent to injure his employees."); *see also* Olin Mathieson Chem. Corp., 52 Lab. Arb. (BNA) 670, 672 (1969) (Bladek, Arb.); Stoneware, Inc., 49 Lab. Arb. (BNA) 471, 473 (1967) (Stouffer, Arb.); International Harvester Co., 12 Lab. Arb. (BNA) 707, 709 (1949) (McCoy, Arb.).

57. *See generally* Schwab, *supra* note 54, at 257-61 (arguing that labor and management distribute entitlements in their collective bargaining agreements according to each party's valuation of the entitlement).

58. 379 U.S. 203 (1964).

59. *Id.* at 204-05. For a discussion of Subsections 8(a)(1), 8(a)(5), and 8(d) of the NLRA, see *supra* note 28.

60. *Fibreboard*, 379 U.S. at 205.

61. *Id.* at 206-07.

62. *Id.* at 215. For a discussion of the importance of the mandatory-permissive distinction, see *supra* notes 30-40 and accompanying text.

of Section 8(d) of the NLRA[63] to include subcontracting, and concluded that the employer's action was an unfair labor practice.[64] Justice Stewart, in a lasting and influential concurrence in which Justices Douglas and Harlan joined, wrote:

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding . . . managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.[65]

Thus, Justice Stewart's concurring opinion emphasized the importance of entrepreneurial control of businesses and guided later Supreme Court and Board opinions concerning subcontracting, work transfer, and partial business closure.[66]

Although subcontracting has been considered closely related to partial closure of a business,[67] the *Fibreboard* holding that subcontracting is a mandatory subject of bargaining does not control in partial closure situations. The United States Supreme Court specifically addressed the issue of whether employers have a duty to bargain over the partial closure of a business in *First National Maintenance Corp. v. NLRB*.[68] In *First National Maintenance*, a housekeeping and maintenance company terminated a maintenance contract with a nursing home and laid off the employees who worked at that site.[69] The union representing the employees filed an unfair labor practice charge with the Board,[70] contending that the employer was obligated to bargain with the union over the partial closure.[71] The Board held that the employer breached its duty to bargain and ordered the employer to reinstate the terminated employees.[72] The United States Court of

63. NLRA § 8(d), 29 U.S.C. § 158(d).
64. *Fibreboard*, 379 U.S. at 210-15.
65. *Id.* at 223 (Stewart, J., concurring).
66. *See supra* note 47 and accompanying text.
67. *See supra* note 12 and accompanying text.
68. 452 U.S. 666 (1981).
69. *Id.* at 668-69.
70. *Id.* at 670.
71. *Id.* at 669-70.
72. First Nat'l Maintenance Corp., 242 N.L.R.B. 462, 463 (1979), *aff'd*, 627 F.2d 596 (2d Cir. 1980), *rev'd*, 452 U.S. 666 (1981).

Appeals for the Second Circuit sustained the order,[73] but the United States Supreme Court reversed.[74] The Supreme Court held that the partial closure of a business for purely economic reasons was not a mandatory subject of bargaining even though the closure resulted in the discharge of employee members of a bargaining unit.[75] Relying on Justice Stewart's concurrence in *Fibreboard*,[76] the Court concluded that the potential harm to the employer's entrepreneurial interests outweighed any benefit that bargaining over the closure could gain.[77]

Although the Supreme Court has addressed subcontracting and partial closure, it has not addressed whether the transfer of work is a mandatory subject of collective bargaining. The Board, however, has addressed the subject in the *Milwaukee Spring* cases.[78] In *Milwaukee Spring I*,[79] an employer transferred work from one of its unionized facilities to one that had a non-union workforce in order to save labor costs.[80] The employer bargained with the union before moving the work, but it was unable to gain concessions from its employees that it felt were necessary to keep the unionized plant open. The issue before the Board was whether an employer could move bargaining unit work during the course of a collective bargaining agreement, after the employer had engaged in bargaining, solely because labor costs at a non-unionized facility would be lower.[81] The parties had stipulated that union animus was not an issue in the dispute.[82] The Board held that the move violated Subsections 8(d), 8(a)(1), and 8(a)(5) of the NLRA[83] and ordered the employer to restore the status quo ante.[84]

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73. NLRB v. First Nat'l Maintenance Corp., 627 F.2d 596 (2d Cir. 1980), *rev'd*, 452 U.S. 666 (1981).

74. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

75. *Id.* at 686.

76. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring); *see supra* note 65 and accompanying text.

77. *First National Maintenance*, 452 U.S. at 677-86. The Court distinguished *First National Maintenance* from *Fibreboard* on the ground that a third party's concession prevented the employer's action in *First National Maintenance*, whereas *Fibreboard* involved only union concessions. *Id.* at 687-88.

78. *Milwaukee Spring I*, 265 N.L.R.B. 206 (1982); *rev'd*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

79. 265 N.L.R.B. 206 (1982).

80. *Id.* at 207. Employees at the unionized plant earned $8 an hour in wages and $2 an hour in benefits. *Id.* At the non-unionized plant, management set wages at $4.50 an hour and fringe benefits at $1.35 an hour. *Id.*

81. *Id.* at 206.

82. *Id.* at 207. Union animus, also referred to as anti-union animus, has been defined as "an inclination or feeling against unions." Reliance Ins. Cos., 415 F.2d 1, 5 n.4 (8th Cir. 1969). The stipulation that there was no union animus evidences the fact that both parties agreed that the move was made to reduce labor costs, not to injure the union.

83. *Milwaukee Spring I*, 265 N.L.R.B. at 210.

84. *Id.*

While the decision in *Milwaukee Spring I* was on appeal to the United States Court of Appeals for the Seventh Circuit, the court of appeals granted the Board's motion to remand the case for additional consideration.[85] In *Milwaukee Spring II*,[86] the Board reversed itself and held that midterm transfers of work during the course of a collective bargaining agreement were permissible unless the agreement contained a specific clause forbidding work transfers.[87] Although subcontracting per se was not an issue in the case, the Board's decision grouped work reassignment and relocation together.[88] Although the Board specifically declined to decide whether work relocation was a mandatory subject of bargaining,[89] it stated that "the same standard applies in both instances,"[90] further implying that the *Milwaukee Spring II* decision did indeed cover subcontracting.

The dissent in *Milwaukee Spring II* analogized the transfer of work to the subcontracting in *Fibreboard*.[91] Unlike the employer in *Fibreboard*, the employer in *Milwaukee Spring II* relocated the work solely to avoid the collective bargaining agreement's wage obligations rather than in response to a change in either the market for the product or the direction of the business.[92] The dissent viewed the employer's motive as the determinative factor in deciding whether Section 8(d) of the NLRA proscribed the employer's midterm relocation decision.[93] According to the dissent, the decision violated Subsections 8(a)(5) and 8(d) because the employer's sole purpose in transferring the work was to avoid paying the contractual wage—a mandatory subject of bargaining.[94]

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85. Milwaukee Spring Div. of Ill. Coil Spring Co. v. NLRB, 114 L.R.R.M. (BNA) 206 (7th Cir. 1983). While *Milwaukee Spring I* was on appeal, there was a major change in Board membership: President Reagan appointed members who were more closely aligned with his conservative labor philosophy. Wall St. J., Nov. 23, 1982, at A16, col. 2. Later, they were in the majority in the *Milwaukee Spring II* decision. 268 N.L.R.B. 601 (1984), *rev'g* 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

86. 268 N.L.R.B. 601 (1984), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

87. *Id.* The Board said that finding protection in the collective bargaining agreement would "create an implied work-preservation clause in every American labor agreement based on wage and benefits or recognition provisions, and we expressly decline to do so." *Id.* at 602.

88. *Id.* at 604.

89. *Id.* at 601 n.5. The parties had stipulated that work relocation was a mandatory subject of bargaining. *Id.*

90. *Id.* at 604.

91. *Milwaukee Spring II*, 268 N.L.R.B. at 608 (Zimmerman, Member, dissenting); *see* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); *supra* notes 58-66 and accompanying text.

92. *Milwaukee Spring II*, 268 N.L.R.B. at 611 (Zimmerman, Member, dissenting).

93. *Id.*

94. *Id.*

In *Otis Elevator II*,[95] the Board discussed the legitimacy of an employer's decision to transfer work for reasons other than labor costs. The Board held that an employer may relocate without bargaining if the reason for the move is a change in the "nature or direction of a business."[96] It concluded that in a transfer for reasons other than labor costs, the effects on the employees or the bargaining unit are not important.[97] In dicta, the Board said that subcontracting decisions should be viewed in the same light as work transfer; only cases based on labor costs fall within the rule of *Fibreboard*.[98] Thus, when read as a single body of "public law," the decisions of the Board and the Supreme Court blur the distinctions between transfers, closures, and subcontracting.

IV. PATTERNS OF ARBITRATORS' DECISIONS IN SUBCONTRACTING DISPUTES

In *Milwaukee Spring II*,[99] the Board considered the issue of whether the transfer of work during the term of a collective bargaining agreement was an unfair labor practice; it held that it was not.[100] The need for entrepreneurial control of a business—the ability to respond to changes in the product market—provided the basis for holding that the right to transfer work belonged to the employer in the absence of contractual language providing otherwise.[101] This holding could lead one to believe that, after *Milwaukee Spring II*,

95. 269 N.L.R.B. 891 (1984) (plurality opinion).

96. *Id.* at 894.

97. *Id.* at 891. The Board stated:

> [T]he decision turned not upon labor costs, but instead turned upon a change in the nature and direction of a significant facet of its business. Thus it constituted a managerial decision of the sort which is at the core of entrepreneurial control outside the limited scope of Section 8(d) [of the NLRA].

Id. However, the Board did not say that unions could not bargain over the effects of work transfer. The Board remanded the allegations that management refused to bargain over the effects of the decision to transfer work to the administrative law judge for further consideration. *Id.* Because the *Otis Elevator II* opinion was a plurality opinion and three tests were enunciated by the Board, there is some confusion about which test applies. For a discussion of the three tests and the confusion arising from them, see Lynch, *supra* note 23, at 277 n.225.

98. *Otis Elevator II*, 269 N.L.R.B. at 893. "Included within Section 8(d), however, . . . are all decisions which turn upon a reduction of labor costs. This is true whether the decision may be characterized as subcontracting, reorganization, consolidation, or relocation, if the decision in fact turns on . . . a change in the basic direction or nature of the enterprise." *Id.*; *see also* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); *supra* notes 58-66 and accompanying text.

99. 268 N.L.R.B. 601 (1984), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

100. *Id.* at 604.

101. *Id.* at 602.

arbitrators would tend to hold that subcontracting was an entitlement belonging to the employer, absent contrary language in the collective bargaining agreement. If arbitrators, like the Board, value the ability of employers to react to changes in the product market and to lower labor costs, then their decisions after *Milwaukee Spring II* should reflect those values. Arbitrators' decisions in subcontracting disputes should swing more in the direction of management. The Board, however, did not consider whether the employer's actions were made with union animus because the parties had stipulated that it was not.[102] Nonetheless, the method arbitrators use to determine whether subcontracting violates a collective bargaining agreement applies principles of good faith in a way which is similar to determining union animus.[103] The next Sections will show that arbitrators continue to use the good faith test in subcontracting disputes after the *Milwaukee Spring II* decision. Because the test for bad faith is similar to the test for union animus, little has changed in arbitral decisionmaking since the *Milwaukee Spring II* decision.

A. *The Arbitral Principles of Good Faith*

In addressing subcontracting issues, arbitrators frequently refer to the good faith analysis spelled out in the preeminent authority on arbitration, Elkouri and Elkouri's *How Arbitration Works*.[104] They do so even more frequently than they cite judicial and Board precedent.[105] In even more cases, arbitrators have applied the principles of

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102. *Id.* at 604.

103. *See infra* notes 104-14 and accompanying text.

104. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS (4th ed. 1985). This treatise is cited frequently in subcontracting cases. *See, e.g.*, Mike-Sell's Potato Chip Co., 90 Lab. Arb. (BNA) 801, 807 (1988) (Cohen, Arb.); Arvin Indus., Inc., 88 Lab. Arb. (BNA) 1188, 1190-92, 87-2 Lab. Arb. Awards (CCH) ¶ 8369, at 5337-39 (1987) (Volz, Arb.); Certainteed Corp., 88 Lab. Arb. (BNA) 995, 998 nn.1-2 (1987) (Nicholas, Arb.); Kiefaber Co., 87 Lab. Arb. (BNA) 396, 398 (1986) (Modjeska, Arb.); Bechtel Civil & Minerals, Inc., 87 Lab. Arb. (BNA) 153, 159 (1986) (Beck, Arb.); Ormet Corp., 86 Lab. Arb. (BNA) 705, 708 (1986) (Baroni, Arb.); Georgia Kaolin Co., 86 Lab. Arb. (BNA) 81, 86 n.3, 87 n.7 (1985) (Clarke, Arb.); Ashland Oil, Inc., 85-2 Lab. Arb. Awards (CCH) ¶ 8474, at 4957 (1985) (Flannagan, Arb.); Willamette Indus., Inc., Red River Mill Div., 85-2 Lab. Arb. Awards (CCH) ¶ 8396, at 4635 (1985) (Fox, Arb.); Federal Signal Corp., Fed. Signal Div., 85-2 Lab. Arb. Awards (CCH) ¶ 8386, at 4597 (1985) (McAlpin, Arb.).

105. Only two post-*Milwaukee Spring II* subcontracting arbitrations specifically mentioned *Fibreboard*. *See* Ormet Corp., 86 Lab. Arb. (BNA) 705, 708 (1986) (Baroni, Arb.); Federal Signal Corp., Fed. Signal Div., 85-2 Lab. Arb. Awards (CCH) ¶ 8386, at 4596 (1985) (McAlpin, Arb.). For a discussion of *Ormet*, see *infra* notes 191-97 and accompanying text. Employers have not argued for the application of *Milwaukee Spring II* in cases concerning subcontracting, but they have made the argument in two work transfer cases. In both of those cases, the arbitrator rejected *Milwaukee Spring II* as a basis for arbitral decisionmaking. *See* Teledyne Monarch Rubber, 89 Lab. Arb. (BNA) 565, 570-72 (1987) (Shanker, Arb.); Fisher-Stevens, Inc., 89 Lab. Arb. (BNA) 556, 563-64 (1987) (Kramer, Arb.).

this good faith analysis, but without attribution to Elkouri and Elkouri.[106] Arbitrators typically consider eleven good faith factors when ruling on subcontracting disputes. The eleven factors considered in a good faith analysis are: (1) past practice; (2) justification; (3) effect on the union or bargaining unit; (4) effect on unit employees; (5) type of work involved; (6) availability of properly qualified employees; (7) availability of equipment and facilities; (8) regularity of subcontracting; (9) duration of subcontracted work; (10) unusual circumstances; and (11) the history of negotiations on the right to subcontract.[107] These good faith factors play an important part in arbitral decisionmaking regardless of whether the collective bargaining agreement addresses subcontracting.

Many collective bargaining agreements contain specific subcontracting clauses.[108] Only two percent of such clauses prohibit subcontracting entirely.[109] Other clauses require the employer to notify the union of subcontracting,[110] prohibit subcontracting that would result in layoffs,[111] or allow subcontracting only if employees with the necessary skills and equipment are unavailable.[112] Although the presence of clauses prohibiting subcontracting are important in arbitrators' subcontracting decisions, a good faith analysis can defeat even a specific clause which prohibits subcontracting.[113] If an employer has shown good faith and a valid economic reason for subcontracting,

106. The good faith analysis used in F. ELKOURI & E. ELKOURI, *supra* note 104, utilizes a flexible set of criteria that incorporates concepts of good and bad faith. The bad faith, discussed by Elkouri and Elkouri, is similar to the discrimination forbidden by the NLRA. F. ELKOURI & E. ELKOURI, *supra* note 104, at 538-40; *see* NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3). If an employer decides to subcontract in an effort to discriminate against the union, the subcontracting is likely to violate Elkouri and Elkouri's good faith principles and thus, the collective bargaining agreement.

107. F. ELKOURI & E. ELKOURI, *supra* note 104, at 540-43.

108. 2 Collective Bargaining Negot. & Cont. (BNA) 65:2 (1986); *see supra* notes 8-10 and accompanying text.

109. 2 Collective Bargaining Negot. & Cont. (BNA) 65:2 (1986); *see supra* notes 8-10 and accompanying text.

110. Forty-five percent of collective bargaining agreements contain notification or advanced discussion clauses. 2 Collective Bargaining Negot. & Cont. (BNA) 65:2 (1986). For further discussion of notification and advanced notification clauses, see *infra* notes 129-32 & 198-202 and accompanying text.

111. Twenty-five percent of surveyed collective bargaining agreements contained layoff clauses. 2 Collective Bargaining Negot. & Cont. (BNA) 65:2 (1986). For a discussion of the arbitral treatment of layoff clauses after *Milwaukee Spring II*, see *infra* notes 220-40 and accompanying text.

112. Thirty-one percent of collective bargaining agreements contained clauses addressing necessary employee skills and equipment. 2 Collective Bargaining Negot. & Cont. (BNA) 65:2 (1986).

113. *See, e.g.*, Laurel Run Mining Co., 85-1 Lab. Arb. Awards (CCH) ¶ 8247 (1985) (Feldman, Arb.); *see also infra* notes 185-87 and accompanying text.

arbitrators have construed very narrowly the express clauses forbidding subcontracting, thereby allowing subcontracting in many instances.[114]

If there is no specific clause in a collective bargaining agreement restricting management's subcontracting rights, a union may take the position that the contractual provisions covering wages, recognition, and seniority imply an obligation that the employer refrain from subcontracting.[115] The generally accepted standard in determining whether subcontracting violates wage, recognition, and seniority clauses has been succinctly stated:

> [M]anagement 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. This general right to contract out may be expanded or restricted by specific contractual language.[116]

Although arbitrators are loath to imply restrictions on management's entitlement to subcontract, arbitrators are concerned that management's subcontracting decision might subvert the collective bargain-

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114. An interesting discussion of arbitrators' interpretations of subcontracting clauses is provided in Abrams & Nolan, *Subcontracting Disputes in Labor Arbitration: Productive Efficiency Versus Job Security*, 15 U. TOL. L. REV. 7 (1983). In interpreting a clause prohibiting subcontracting of work "normally performed" by unit employees, Arbitrator Fred Whitney held one case of subcontracting to be within the clause because employees could not have refused to do the work without risking disciplinary action, even though such work was not a daily responsibility. Mobile Chem. Co., 51 Lab. Arb. (BNA) 363, 372 (1968) (Whitney, Arb.). As pointed out in Abrams & Nolan, *supra*, the contractual construction in *Mobile Chemical* was overbroad because the clause was not intended to protect any jobs that employees *might* do. Rather, the clause was intended to protect the ordinary job assignment of the workers. Abrams & Nolan, *supra*, at 12.

115. *See* Advertiser Co., 87-1 Lab. Arb. Awards (CCH) ¶ 8224 (1987) (Baroni, Arb.), *discussed infra in* notes 173-77 and accompanying text.

116. Shenango Valley Water Co., 53 Lab. Arb. (BNA) 741, 744-45 (1969) (McDermott, Arb.). This statement is also excerpted in F. ELKOURI & E. ELKOURI, *supra* note 104, at 540, and in Abrams & Nolan, *supra* note 114, at 15. For a list of other arbitration cases that have expressly applied the *Shenango Valley* standard, see F. ELKOURI & E. ELKOURI, *supra* note 104, at 540 n.424.

In *Shenango Valley*, a subcontracting clause in the collective bargaining agreement required the employer to consider utilizing its own employees before subcontracting. *Shenango Valley*, 53 Lab. Arb. (BNA) at 741. The clause also forbade subcontracting of maintenance work when the employer had qualified employees available to do the work. *Id.* The employer in *Shenango Valley* had subcontracted the majority of its installations of new water mains over several years. *Id.* at 742. The union filed a grievance because the installation of new mains had been subcontracted, but the grievance was denied. *Id.* at 746. Although there had been a 20% decline in the size of the bargaining unit caused by attrition, the arbitrator found that the decline was not in itself evidence of bad faith. *Id.* at 742, 746.

ing agreement as a whole.[117] If the factors indicate bad faith on the part of the employer and if the collective bargaining agreement does not contain a subcontracting clause, arbitrators often find violations of the collective bargaining agreement as a whole, or of particular wage, recognition, and seniority provisions.[118] For example, arbitrators often use the good faith analysis to find a violation of the collective bargaining agreement when work that was previously performed under a collective bargaining agreement is subcontracted immediately after the renewal of the agreement.[119]

B. *The Principles of Good Faith as Applied to Pre-*Milwaukee Spring II *Arbitrations*

One of the most important factors in determining whether an employer's decision to subcontract was made in good faith is the past subcontracting practice of the parties, including the industry's customs. A substantial number of collective bargaining agreements incorporate past practices into the subcontracting clause.[120] Even if a subcontracting clause does not specifically allow subcontracting of work based on past practices, such practices can demonstrate the parties' contractual intent, and "when not in conflict with the agreement become an extension of the agreement."[121] In *Alpha Portland Cement Co.*,[122] for example, the collective bargaining agreement allowed subcontracting but had no provision specifically allowing subcontracting based on past practices.[123] When the employer purchased machine guards which could have been produced by union welders,[124] the union filed a grievance.[125] In denying the grievance,[126] however, the arbitrator relied on the company's past practice of subcontracting the

117. *See* Advertiser Co., 87-1 Lab. Arb. Awards (CCH) ¶ 8224, at 3940-41 (1987) (Baroni, Arb.).

118. This use of wage, hour, and seniority clauses has not met with success in the work transfer area. *See* Comment, *The Bases and Limits of Arbitral Decisionmaking in Plant Relocation and Transfer of Work Disputes*, 7 INDUS. REL. L.J. 362, 370-72 (1985).

119. One arbitrator has remarked: "The power to subcontract is the power to destroy. Obviously the Company cannot recognize the Union as the 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." American Sugar Ref. Co., 36 Lab. Arb. (BNA) 409, 414 (1960) (Crawford, Arb.).

120. 2 Collective Bargaining Negot. & Cont. (BNA) 65:2 (1986). Seventeen percent of subcontracting clauses require past practices to be considered. *Id.*

121. Alpha Portland Cement Co., 63 Lab. Arb. (BNA) 1143, 1148 (1974) (Hilgert, Arb.); *see* Safeway Stores, Inc., 51 Lab. Arb. (BNA) 1093 (1969) (Koven, Arb.).

122. 63 Lab. Arb. (BNA) 1143 (1974) (Hilgert, Arb.).

123. *Id.* at 1143-44.

124. *Id.* at 1145.

125. *Id.* at 1143.

126. *Id.* at 1149.

production of a product that its own employees produced.[127] In considering past practices, arbitrators frequently consider whether the past practice was of a sufficient duration and frequency to bind the parties.[128]

Arbitrators also consider an employer's communication with the union concerning the subcontracting decision. Many collective bargaining agreements contain clauses requiring that management communicate with the union before subcontracting.[129] In *FMC Corp.*,[130] the collective bargaining agreement contained a clause requiring the employer to notify the union before subcontracting.[131] The arbitrator held that, although the notification clause did require the employer to notify the union of its intention to subcontract, the clause did not imply that the union's consent was required.[132]

Arbitrators examine whether employers' decisions to subcontract are supported by genuine business justifications,[133] and they may find that a genuine need to reduce costs is a legitimate reason for subcontracting in the absence of union animus.[134] Although an arbitrator may disallow subcontracting if an employer's cost savings are essentially recouped solely from lowered labor costs,[135] reduction in other

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127. *Id.* at 1148.

128. *See, e.g.*, Safeway Stores, Inc., 51 Lab. Arb. (BNA) 1093, 1095 (1969) (Koven, Arb.).

129. 2 Collective Bargaining Negot. & Cont. (BNA) 65:2 (1986). A 1986 survey found that 45% of collective bargaining agreements had a clause requiring communication with the union before subcontracting. *Id.*

130. FMC Corp., Indus. Chem. Group, 75 Lab. Arb. (BNA) 485 (1980) (LeWinter, Arb.).

131. *Id.* at 486.

132. *Id.* at 492. Communication clauses generally appear to incorporate the holding in Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964)—that employers have a duty under the NLRA to bargain over subcontracting.

133. *See, e.g.*, Shenango Valley Water Co., 53 Lab. Arb. (BNA) 741 (1969) (McDermott, Arb.). For a discussion of *Shenango Valley*, see *supra* note 116 and accompanying text.

134. *See, e.g., Shenango Valley*, 53 Lab. Arb. (BNA) at 744-46.

135. One arbitrator has remarked:

> 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.

Mead Corp., 75 Lab. Arb. (BNA) 665, 667 (1980) (Gross, Arb.); *see also* F. ELKOURI & E. ELKOURI, *supra* note 104, at 540 n.427.

For a presentation of this argument in "Law and Economics" terms, see Wachter & Cohen, *supra* note 54. According to Wachter & Cohen, the sunk-cost-loss rule allows the employer to subcontract as a response to the product market, but not to reduce labor costs. *Id.* at 1378. The sunk-cost-loss rule is placed in the context of subcontracting and partial closure

business costs is generally an acceptable reason for subcontracting.[136] An employer's good faith belief that a subcontractor can perform a specialized type of work with higher quality may also be a valid reason for subcontracting.[137] In *Fruehauf Corp.*,[138] the employer subcontracted a large job for the replacement of window panes even though the unit employees had performed the work in the past.[139] The employer believed that the subcontractor would perform the larger job better.[140] The opinion extensively quoted Elkouri and Elkouri,[141] particularly stressing that the decision to subcontract was made in good faith.[142] The arbitrator denied the union's grievance even though he believed that the union members' work could have been of the same quality as the subcontractor's.[143] The employer's honest belief that quality would improve with outside subcontracting was an overriding factor in the arbitrator's good faith analysis.[144]

If an employer's decision to subcontract effectively discriminates against the union, or if the subcontracting discriminates, displaces, or causes layoffs among the employees, arbitrators may hold that the subcontracting violates the collective bargaining agreement.[145] In fact, these issues of discrimination are raised in most arbitrations, regardless of whether there is a subcontracting clause in the contract.[146]

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questions using the $W * H$ formula. *Id.* at 1379. The freedom to reduce H (the total hours worked) is an entitlement belonging to the employer, but the employer is not entitled to unilaterally reduce W (the wage rate). *Id.* at 1378-82. If the employer reduces the hours worked because a change in the market requires less production, then the employer also suffers the loss of profits resulting from its sunk investment in capital and labor, a situation similar to the partial closure situation in First National Maintenance v. NLRB, 452 U.S. 666 (1981). *See supra* notes 68-77 and accompanying text. If hours worked by both unit and subcontracted employees remains constant, but wages are reduced, then the contract is violated. Wachter & Cohen, *supra* note 54, at 1389. Arbitrators tend to find subcontracting cases contravening the sunk-cost-loss rule to be violative of wage and recognition clauses. If the hours worked are reduced by the subcontracting, but the wage rate remains the same, arbitrators are presumably more likely to find a violation of the contract. *Id.* at 1387-90.

136. *See* Wachter & Cohen, *supra* note 54, at 1378.

137. *See* Fruehauf Corp., 67 Lab. Arb. (BNA) 618 (1976) (Strasshofer, Arb.).

138. *Id.*

139. *Id.* at 618-19. The collective bargaining agreement contained no clause prohibiting subcontracting. *Id.* at 618.

140. *Id.* at 619.

141. F. ELKOURI & E. ELKOURI, *supra* note 104.

142. Fruehauf Corp., 67 Lab. Arb. (BNA) at 620.

143. *Id.* at 621. "[T]he decision must be judged by foresight, not hindsight; and th[is] arbitrat[or] is persuaded that management was of a good faith belief that it was making a correct decision." *Id.*

144. *Id.*

145. *See* F. ELKOURI & E. ELKOURI, *supra* note 104, at 541 & nn.433-36.

146. *See infra* notes 220-40 and accompanying text.

C. *The Principles of Good Faith as Applied to Post-*Milwaukee Spring II *Arbitrations*

In recent arbitrations, employers have urged arbitrators to accept the *Milwaukee Spring II*[147] holding, claiming that management has the right to transfer work during the course of a collective bargaining agreement without receiving a union's consent.[148] Nonetheless, arbitrators have not cited *Milwaukee Spring II* as a rationale for allowing either work transfer or subcontracting.[149] In fact, arbitrators mention *Fibreboard*[150] more often than *Milwaukee Spring II* when deciding subcontracting disputes.[151] Furthermore, most arbitrators still decide cases using principles of good faith, without mentioning Board precedent.[152] Even those arbitrators mentioning *Fibreboard* still perform an analysis resembling the good faith test.[153]

Arbitrators have not incorporated the reasoning of the *Milwaukee Spring II* decision, possibly because the parties in that case stipulated that union animus was not a factor in the employer's decision to subcontract.[154] In *Milwaukee Spring II*, the union was not seeking a ruling from the Board that the employer's decision to transfer work was made in bad faith;[155] rather, the union argued that the decision to transfer work violated the collective bargaining agreement based on the status quo embodied in the wage and recognition clauses.[156] In response, the Board reasoned that all subjects not in the agreement were rights belonging to management.[157]

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147. 268 N.L.R.B. 601 (1984), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 206 (D.C. Cir. 1985).

148. *See, e.g.*, Fisher-Stevens, Inc., 89 Lab. Arb. (BNA) 556, 563 (1987) (Kramer, Arb.). The arbitrator was not swayed by this argument, and he ruled against the company in a factually complicated case. *Id.* at 564-65.

149. *See supra* notes 105 & 148.

150. Fibreboard Paper Prods. Corp. v. NLRB, 279 U.S. 203 (1964).

151. *See supra* note 105. In Federal Signal Corp., Federal Signal Division, 85-2 Lab. Arb. Awards (CCH) ¶ 8386 (1985) (McAlpin, Arb.), the arbitrator cited *Fibreboard* as background material, but he nevertheless denied the grievance over subcontracting. *Id.* at 4596-97.

152. *See supra* note 105.

153. In Federal Signal Corp., Federal Signal Division, 85-2 Lab. Arb. Awards (CCH) ¶ 8386 (1985) (McAlpin, Arb.), the arbitrator cited *Fibreboard*, but then proceeded with what was essentially a good faith analysis. *Id.* at 4596. He performed this good faith analysis utilizing a seven part test: (1) motivation on the part of the employer; (2) effect on the union and the bargaining unit; (3) availability of qualified employees; (4) availability of appropriate equipment; (5) permanent or temporary nature of the subcontract; (6) emergency or unusual circumstances; and (7) the history of negotiations. *Id.* (quoting BUREAU OF NATIONAL AFFAIRS, GRIEVANCE GUIDE (6th ed. 1982)).

154. *Milwaukee Spring II*, 268 N.L.R.B. 601, 601 (1984), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

155. *Id.*

156. *Id.* at 602.

157. *Id.*

Since *Milwaukee Spring II*, arbitrators generally do not prevent subcontracting unless a collective bargaining agreement contains a clause forbidding it.[158] Arbitrators follow this practice notwithstanding their failure to incorporate the Board's reasoning in *Milwaukee Spring II*. In *John Deere Horicon Works of Deere and Co.*,[159] for example, an arbitrator permitted the sale of equipment and the subcontracting of work due to the absence of an express clause prohibiting the sale of the equipment.[160] The collective bargaining agreement included a clause prohibiting subcontracting if the company had the necessary equipment to perform a job.[161] Although the arbitrator cited no court cases or Board precedent, he did cite to the treatise by Elkouri and Elkouri.[162] The arbitrator noted that a genuine business reason for subcontracting existed (the employer's lack of proper equipment)[163] and that no layoffs ensued.[164] Conversely, in *Tri-County Distributing Co.*,[165] an arbitrator found that the subcontracting of work that employees previously performed violated the collective bargaining agreement. He did so even though there was no subcontracting clause in the collective bargaining agreement, the employer had sold the necessary equipment (thereby making the subcontracting decision necessary), and there was a history of subcontracting.[166] The arbitrator noted that an addendum to the collective bargaining agreement stated that "[o]utside carriers shall not be used as subterfuge to avoid use of Employer-owned equipment."[167] He then used this clause to imply that the elimination of two employees and the substitution by subcontracted labor and equipment violated the agreement.[168] The arbitrator's determination was based on an interpretation of express language in the collective bargaining agreement and on the parties' understanding of that language.[169] The employer's desire to lower labor costs did not outweigh the contrac-

158. *See supra* note 56.

159. 87-2 Lab. Arb. Awards (CCH) ¶ 8407 (1987) (Staudter, Arb.).

160. *Id.* at 5515.

161. *Id.* at 5513.

162. *Id.* at 5516 n.1 (citing F. ELKOURI & E. ELKOURI, *supra* note 104).

163. *Id.* at 5516.

164. *Id.* at 5517. The arbitrator noted that the large increase in the size of the bargaining unit was the result of the employer's new methods of production. *Id.* at 5516.

165. 86-1 Lab. Arb. Awards (CCH) ¶ 8082 (1985) (Perry, Arb.).

166. *Id.* at 3353.

167. *Id.* at 3356.

168. *Id.* The arbitrator also relied heavily on the negotiation history in ruling that the subcontracting was a violation of the contract. *Id.* The union had asked for the clause to minimize the impact of pending congressional legislation that would deregulate the trucking industry. *Id.* at 3353.

169. *Id.* at 3356.

tual language.[170] In *John Deere*, however, the arbitrator's analysis of good faith appeared to weigh more heavily in his decision to allow subcontracting than any language contained in the collective bargaining agreement.[171]

Nonetheless, since *Milwaukee Spring II*, some arbitrators have used both collective bargaining agreements as a whole and their specific provisions, such as general wage, recognition, and seniority provisions, to invalidate subcontracting.[172] In *Advertiser Co.*,[173] the employer subcontracted over fifty percent of the bargaining unit's work shortly after entering into a new agreement.[174] Although the collective bargaining agreement contained no subcontracting clause, the arbitrator held that the subcontracting of most of the unit's work was an attempt to destroy the bargaining unit.[175] The arbitrator therefore ordered reinstatement, back pay, and payment of the employees' union dues.[176] Although the case occurred after *Milwaukee Spring II*, the arbitrator applied the same good faith approach that had been used in arbitrations prior to *Milwaukee Spring II*.[177]

Prior to *Milwaukee Spring II*, past practices of subcontracting

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170. *Id.* at 3354.

171. John Deere Horicon Works of Deere & Co., 87-2 Lab. Arb. Awards (CCH) ¶ 8407, at 5516 (1987) (Staudter, Arb.).

172. *See, e.g.*, Advertiser Co., 87-1 Lab. Arb. Awards (CCH) ¶ 8224 (1987) (Baroni, Arb.).

173. *Id.*

174. *Id.* at 3940-41.

175. *Id.* at 3941.

176. *Id.* The reinstatement and back pay was ordered notwithstanding the automatic renewal of the collective bargaining agreement provided for in the prior agreement. *Id.* The previous collective bargaining agreement contained a renewal clause stating that when one party did not respond within twenty days to a proposal submitted by the other party, "[f]ailure to file a counter-proposal shall be construed as offering the existing contract as the party's counter-proposal." *Id.* at 3937. The employer did not respond to the union's proposal, and the union announced that it had accepted the offer of a contract renewal for a three year period. *Id.* at 3936.

177. *Id.* at 3940. The arbitrator used the following six standards in deciding whether the subcontracting violated the contract: (1) past practices; (2) justification; (3) effect on unit employees; (4) duration of the subcontracting; (5) unusual or emergency circumstances; and (6) the history of negotiations on the right to subcontract. *Id.* Although the arbitrator did not directly recognize F. ELKOURI & E. ELKOURI, *supra* note 104, both the arbitrator and the Elkouri treatise cited many of the same arbitrations, including Shenango Valley Water Co., 53 Lab. Arb. (BNA) 741 (1969) (McDermott, Arb.). *Advertiser*, 87-1 Lab. Arb. Awards (CCH), at 3940; *see* F. ELKOURI & E. ELKOURI, *supra* note 104, at 540. The arbitrator and the treatise also cited arbitrations that approved the statements in *Shenango Valley* (excerpted *supra* in text accompanying note 116) which expressed management's general right to subcontract work in good faith. *See, e.g.*, Hess Oil & Chem. Corp., 51 Lab. Arb. (BNA) 752, 757 (1968) (Gould, Arb.); Sealtest Foods, 48 Lab. Arb. (BNA) 797, 801 (1966) (Vatlin, Arb.); Pennsalt Chems. Corp., 46 Lab. Arb. (BNA) 1166, 1169 (1966) (Kesselman, Arb.); Lynch Corp., 44 Lab. Arb. (BNA) 762, 766 (1964) (Dworkin, Arb.); *see also Advertiser*, 87-1 Lab. Arb. Awards (CCH), at 3940; F. ELKOURI & E. ELKOURI, *supra* note 104, at 540 n.424.

could establish an employer's right to subcontract in the arbitration setting.[178] Nonetheless, arbitrators have continued to apply the same good faith analysis and factors. In *Public Service Co.*[179] for example, the employer had repeatedly subcontracted the removal of waste ash from a generating plant over a period of ten years.[180] After the ten year subcontracting period ended, a unit employee performed the waste removal for thirty-five days.[181] Subsequently, when the ash pile became too large for the company's own equipment, the employer again subcontracted the work.[182] The union filed a grievance protesting the subcontracting of ash removal.[183] The arbitrator denied the grievance on the grounds that the employer's past practice of subcontracting work was well established.[184]

A past practice of subcontracting can overcome a clause in a collective bargaining agreement prohibiting subcontracting even if there are employees on layoff. For example, in *Laurel Run Mining Co.*,[185] the arbitrator interpreted a provision that prohibited subcontracting when the employer had available employees on layoff.[186] Although laid-off employees were available for work, the arbitrator held that the employer's past subcontracting of the work—without complaint by the union—was controlling.[187] Arbitrators will also consider special circumstances when viewing past subcontracting practices and their effects. In *Island Creek Coal Co.*,[188] following an explosion and fire in the coal mine, the union had allowed subcontracting of repair work without filing a grievance.[189] The arbitrator ruled that the subcontracting was not sufficient precedent to allow subsequent unlimited subcontracting.[190]

Other instances of past subcontracting practices, moreover, have

178. *See supra* notes 120-28 and accompanying text.
179. 87-1 Lab. Arb. Awards (CCH) ¶ 8179 (1986) (Seidman, Arb.).
180. *Id.* at 3726.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 3727.
185. 85-1 Lab. Arb. Awards (CCH) ¶ 8247 (1985) (Feldman, Arb.).
186. The provision reads as follows:

> Repair and maintenance work customarily performed by classified Employees at the mine or central shop shall not be contracted out except . . . where the Employer does not have available equipment or regular Employees (including laid-off Employees at the mine or central shop) with necessary skills available to perform the work at the mine or central shop.

Id. at 4031.
187. *Id.* at 4033-34.
188. 87-1 Lab. Arb. Awards (CCH) ¶ 8040 (1986) (Stoltenberg, Arb.).
189. *Id.* at 3166.
190. *Id.* at 3167.

been insufficient to sway arbitrators to permit further subcontracting. In *Ormet Corp.*,[191] for example, some past subcontracting of a bargaining unit's work had occurred.[192] The arbitrator held that the permanent subcontracting of unit work resulting in the permanent layoff of ten employees violated the collective bargaining agreement.[193] In so holding, he concluded that the employer's previous use of subcontracting was not decisive[194] because layoffs had occurred only once in the employer's previous use of subcontracting.[195] In that one instance, the union filed a grievance that the company settled by discontinuing the subcontracting.[196] According to the arbitrator, that one incident did not establish a history that the employer could use as evidence of a past practice of subcontracting.[197]

In *Bowman Construction Products*,[198] a clause in the collective bargaining agreement prohibited subcontracting of production work, maintenance, and repairs unless the company met with the union in an attempt to keep the work in the plant.[199] The employer felt that it had trouble retaining janitors to clean employee restrooms, and it took bids on prospective subcontracts before sending notice to the union and scheduling a meeting.[200] The union filed a grievance, claiming that the employer had, in effect, decided to subcontract before the union and the employer could hold the meeting.[201] The arbitrator held that the employer substantially met the contract's requirement for a meeting with the union and that the union's subsequent failure to offer a compromise had relieved the employer from any further requirement of meeting with the union.[202]

A genuine business justification may support an employer's deci-

191. 86 Lab. Arb. (BNA) 705 (1986) (Baroni, Arb.).

192. *Id.* at 707.

193. *Id.* at 711.

194. *Id.*

195. *Id.*

196. *Id.* at 707.

197. *Id.* at 710. Although *Ormet* was decided after *Milwaukee Spring II*, 268 N.L.R.B. 601 (1984), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985), the arbitrator cited only Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964), finding that the employer breached its duty to bargain under the NLRA. *Ormet*, 86 Lab. Arb. (BNA) at 710.

198. 86 Lab. Arb. (BNA) 33 (1985) (Bolte, Arb.).

199. The clause prohibited subcontracting unless "[t]he Company [met] with the Union before subcontracting or farming out and afford[ed] the Union the opportunity to see what [could] be done to keep the work in the plant." *Id.* at 34.

200. *Id.* at 33-34.

201. *Id.* at 34-35.

202. The arbitrator stated: "What the employer usually seeks when it has a 'meet and discuss' situation is a compromise solution, which was not offered by the Union in this case." *Id.* at 36. The arbitrator, however, did not address the likely union goals sought by a contractual "meet and discuss" clause.

sion to subcontract. In *Granite City Steel, Division of National Steel Group*,[203] for example, the arbitrator upheld an employer's decision to lease cars under mechanical warranties instead of continuing to purchase vehicles and have company mechanics repair them.[204] In *Granite City Steel*, although the employer's action reduced the amount of overtime worked, the approximate size of the bargaining unit remained constant.[205]

An emergency, such as the need for the immediate repair of equipment so that production can continue, may constitute another valid business reason for subcontracting. In *International Salt Co.*,[206] a clause in the collective bargaining agreement prohibiting subcontracting was subject to certain exceptions, including instances in which the company's employees were not properly skilled for particular work.[207] The employer admitted that skilled employees and the necessary equipment were available, but claimed that it could not afford the delay in the repair of a front end loader needed for production.[208] The employees were all fully employed,[209] and it was possible that they could not have performed the repairs as quickly as the subcontractor.[210] The arbitrator denied the union's grievance, holding that the employer's need to have the work performed immediately was a valid reason to subcontract.[211]

An employer may also subcontract in order to obtain better quality work.[212] In *Fruehauf Corp.*,[213] another pre-*Milwaukee Spring II*[214] case, an arbitrator allowed subcontracting because the employer believed that the subcontractor's work would be of higher quality.[215] In *Wyandott, Inc., Jeffersonville Division*,[216] however, an arbitrator disallowed the subcontracting of painting work normally performed

203. 85-1 Lab. Arb. Awards (CCH) ¶ 8172 (1985) (McDermott, Arb.).

204. *Id.* at 3721.

205. *Id.* at 3720. The *Granite City Steel* ruling may seem opposed to the wage * hour (*W* * *H*) test described in Wachter & Cohen, *supra* note 54, because it reduces the wage paid by subcontracting and keeps the total number of hours worked constant. There was no guarantee of overtime under the contract, however, and it cannot be implied that the parties intended to provide guaranteed overtime. *See supra* note 135.

206. 86-1 Lab. Arb. Awards (CCH) ¶ 8187 (1986) (Williams, Arb.).

207. *Id.* at 3799.

208. *Id.* at 3800.

209. *Id.*

210. *Id.*

211. *Id.*

212. *See supra* notes 137-44 and accompanying text.

213. 67 Lab. Arb. (BNA) 618 (1976) (Strasshofer, Arb.).

214. 268 N.L.R.B. 601 (1984), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

215. *Fruehauf*, 67 Lab. Arb. (BNA) at 621.

216. 87-1 Lab. Arb. Awards (CCH) ¶ 8209 (1987) (Duda, Arb.).

by unit painters despite the fact that the unit painters work was of poor quality.[217] In *Wyandott*, the collective bargaining agreement contained a clause that allowed subcontracting of normal maintenance and production work only if the work was performed off the plant site.[218] The arbitrator concluded that the clause limited the employer's options in that instance to better training, supervision, or discipline of his employees; subcontracting was not a proper option.[219]

Arbitrators have also continued to consider the effects of subcontracting on the union and unit employees in post-*Milwaukee Spring II* decisions. In *Advertiser Co.*,[220] the primary factor that the arbitrator considered in denying subcontracting was the layoff of over fifty percent of the unit, a layoff attributable to subcontracting.[221] The arbitrator concluded that the layoff was the deciding factor, notwithstanding the absence of a contractual clause prohibiting subcontracting.[222] The arbitrator viewed the layoffs of all but three of the eight unit employees as an attempt to "reduce labor costs at the expense of undermining the integrity and strength, and [the] eventual existence of the bargaining unit."[223] In *Ormet Corp.*,[224] the reduction of the unit by eighteen percent was a predominant reason for the granting of the grievance.[225] In *Tri-County Distributing, Inc.*,[226] subcontracting caused the layoff of fifty percent of the bargaining unit.[227] According to the arbitrator, the past practice of subcontracting was insufficient to allow subcontracting that in effect was a subterfuge used to defeat the agreement.[228]

Layoffs, although an important factor in resolving whether an employer decided to subcontract in good faith, do not conclusively establish bad faith on the part of the employer. In *Rohr Industries*,[229] although unit electricians already on layoff could have performed some of the work, the arbitrator held that using a subcontractor to

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217. *Id.* at 3871.

218. *Id.* at 3873.

219. *Id.* at 3875.

220. 87-1 Lab. Arb. Awards (CCH) ¶ 8224 (1987) (Baroni, Arb.). For a further discussion of *Advertiser*, see *supra* notes 173-77 and accompanying text.

221. *Advertiser Co.*, 87-1 Lab. Arb. Awards (CCH) ¶ 8224, at 3940-41.

222. *Id.* at 3941.

223. *Id.* at 3940-41.

224. 86 Lab. Arb. (BNA) 706 (1986) (Baroni, Arb.). For a further discussion of *Ormet*, see *supra* notes 191-97 and accompanying text.

225. *Ormet*, 86 Lab. Arb. (BNA) at 710-11.

226. 86-1 Lab. Arb. Awards (CCH) ¶ 8082 (1985) (Perry, Arb.). For a further discussion of *Tri-County*, see *supra* notes 165-68 and accompanying text.

227. *Tri-County*, 86-1 Lab. Arb. Awards (CCH) ¶ 8082, at 3355.

228. *Id.* at 3356.

229. 85-1 Lab. Arb. Awards (CCH) ¶ 8115 (1984) (Gentile, Arb.).

install a new telecommunications system did not violate a memorandum of understanding prohibiting maintenance subcontracting.[230] The work was not considered maintenance, and the layoffs were not the result of subcontracting.[231] In *Laurel Run Mining Co.*,[232] the work subcontracted was not work that the unit members customarily performed.[233] The presence of unit members on layoff was not determinative of whether the subcontracting violated the contract.[234]

In many subcontracting decisions in which arbitrators denied grievances and permitted subcontracting, however, the fact that no layoffs resulted from the subcontracting was a consideration mentioned in arbitrators' opinions. In *Granite City Steel*,[235] the leasing of cars with warranties for mechanical work caused no layoffs.[236] In *Illinois Cereal Mills, Inc.*,[237] the arbitrator held that subcontracting of snow removal did not violate the collective bargaining agreement.[238] Power plant operators, unit employees who used front end loaders in their power plant work, also occasionally used front end loaders to plow snow.[239] Among the factors listed by the arbitrator in denying the grievance was the lack of effect on the bargaining unit employees.[240]

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230. *Id.* at 3473.

231. *Id.* at 3472-73.

232. 85-1 Lab. Arb. Awards (CCH) ¶ 8247 (1985) (Feldman, Arb.). For a discussion of other aspects of *Laurel Run*, see *supra* notes 185-87 and accompanying text.

233. *Laurel Run*, 85-1 Lab. Arb. Awards (CCH) ¶ 8247, at 4032-33.

234. *Id.*

235. Granite City Steel, Div. of Nat'l Steel Group, 85-1 Lab. Arb. Awards (CCH) ¶ 8172 (1985) (McDermott, Arb.). For a discussion of other aspects of the case, see *supra* notes 203-05 and accompanying text.

236. *Granite City Steel*, 85-1 Lab. Arb. Awards (CCH) ¶ 8172, at 3716.

237. 85-2 Lab. Arb. Awards (CCH) ¶ 8575 (1985) (Cox, Arb.).

238. *Id.* at 5354.

239. *Id.*

240. *Id.* Only a small amount of overtime was lost. *See also* Sheet Metal Workers' Int'l Ass'n, 87-1 Lab. Arb. Awards (CCH) ¶ 8277 (1986) (Maxwell, Arb.) (citing the lack of layoffs as a part of the decision allowing subcontracting); Thompson Steel Co., 87-1 Lab. Arb. Awards (CCH) ¶ 8131 (1986) (Bernhardt, Arb.) (citing full employment and increase in bargaining unit size as part of the decision allowing subcontracting). *But see* United States Steel Corp., Eastern Steel Div., Nos. USS-23,431, et al., slip op. (Board of Arbitration Nov. 18, 1988). In *United States Steel Corp.*, the Board of Arbitration awarded a large back pay settlement to the union. *Id.* at ¶ 49. No union members were on layoff at the time of the subcontracting, but back pay was awarded for foregone overtime. *Id.* at ¶ 1. Although the collective bargaining agreement contained a subcontracting clause, *id.* at ¶ 2, the Board of Arbitration held that the employer's difficulties in hiring new employees did not allow them to circumvent the clause. *Id.* at ¶ 28. The back pay order was reported to be worth $11 million. Wall St. J., Dec. 27, 1988, at A1, col. 5.

D. *Comparing Pre- and Post-*Milwaukee Spring II *Arbitrations*

Post-*Milwaukee Spring II* arbitrations indicate that the manner in which arbitrators make decisions has not changed since before *Milwaukee Spring II*. The good faith test remains the dominant inquiry in which arbitrators engage. In determining whether an employer used good faith in the decision to subcontract, arbitrators continue to focus on such factors as past subcontracting practices, the effects of the subcontracting on the union and the employees, and the employer's communications with the union. Arbitrators still mention Elkouri and Elkouri[241] as a guide for determining whether subcontracting violates a collective bargaining agreement more often than they refer to judicial or Board precedent.[242]

V. CONCLUSION

In assessing subcontracting, the Board and the courts use methods different from those used by arbitrators. The Board and the courts determine whether the NLRA has been violated.[243] The Board and the courts are bound by precedent. They begin their analyses of subcontracting disputes by looking to whether the employer has breached its statutory duty to bargain.[244] If the employer has breached that duty, that breach constitutes an unfair labor practice.[245]

Conversely, arbitrators addressing subcontracting disputes look to the four corners of the agreement and to the parties' intent.[246] Arbitrators may be bound by arbitral precedent between the parties to the agreement, but they are not bound by arbitration awards made during the course of other collective bargaining agreements.[247] Arbitrators, however, continue to determine whether the parties acted in good faith. Good faith is a flexible doctrine, and it allows the arbitrator to tailor the inquiry to unique circumstances of the individual bargaining relationship in the particular workplace.[248]

The National Labor Relations Board is a body created by stat-

241. F. ELKOURI & E. ELKOURI, *supra* note 104.

242. *See supra* note 105.

243. NLRA §§ 8-10, 29 U.S.C. §§ 158-60.

244. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5).

245. *Id.*

246. *See supra* note 17 and accompanying text.

247. In arbitrations, the labor arbitrator is interpreting the contract, not the public law. *See supra* note 17 and accompanying text.

248. "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop . . . ." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); *see* F. ELKOURI & E. ELKOURI, *supra* note 104, at 538-44; *supra* notes 104-14 and accompanying text.

ute.[249] Its rulings are subject to appeal to the United States Courts of Appeals and the United States Supreme Court.[250] Its decisions are public, and a decision in one case can determine the course of other collective bargaining agreements throughout the nation. Arbitrators, however, are creatures of contract.[251] Most collective bargaining agreements contain arbitration clauses,[252] and the Board and the courts look favorably upon arbitration.[253] Although there is no requirement that the parties to a collective bargaining agreement assent to have an arbitration clause in their agreement, courts may impose arbitration on the parties.[254]

In *Milwaukee Spring II*,[255] the parties stipulated that good faith was not at issue in their dispute.[256] Thus, in allowing the transfer of work to take place, the Board may not have meant to affect arbitrators' use of the good faith analysis that dominates today's arbitrations. Since *Milwaukee Spring II* and *First National Maintenance v. NLRB*,[257] the course of arbitrators' decisions has not differed significantly from prior decisions and rationales. There are three possible explanations for the consistency of arbitrators' rationales throughout the periods preceding and following *Milwaukee Spring II*. The first is that *Milwaukee Spring II* and its progeny cover work transfers but not subcontracting cases. If this is true, then subcontracting is still a mandatory subject of bargaining, regardless of whether an employer's decision to subcontract hinges on labor costs.[258]

The second explanation is that the Board and the courts intended for *Milwaukee Spring II* and *First National Maintenance* to cover transfer of work, partial closure, and subcontracting during the term of a contract. If so, arbitrators are either unaware of the doctrines, or they are avoiding these precedents—which do not bind arbitrators. The final possibility is that the Board and the courts never meant to affect arbitrators' decisions concerning subcontracting: Arbitration is

249. NLRA §§ 3-5, 29 U.S.C. §§ 153-155.

250. NLRA § 10(e), (f), 29 U.S.C. § 160(e), (f).

251. *See supra* note 17 and accompanying text.

252. 2 Collective Bargaining Negot. & Cont. (BNA) 51:5 (1989). Ninety-nine percent of sampled manufacturing collective bargaining agreements and 96% percent of sampled non-manufacturing collective bargaining agreements had arbitration clauses. *Id.*

253. *See* Olin Corp., 268 N.L.R.B. 573, 574 (1984); United Technologies Corp., 268 N.L.R.B. 557, 560 (1984). *See generally* Lynch, *supra* note 23.

254. *See* Lynch, *supra* note 23, at 250 & n.50. In the absence of an arbitration clause, the Board and the courts will imply one. *Id.*

255. 268 N.L.R.B. 601 (1984), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

256. *Id.*

257. 452 U.S. 666 (1981).

258. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 215 (1964).

a creation of contract and, therefore, arbitrators' decisions are intended only to enforce the will of the parties. Notwithstanding that the United States Supreme Court and the Board may have intended that *Milwaukee Spring II* and *First National Maintenance* not be binding on arbitral decisions, it is likely that the rationale used by the Board and the courts will eventually affect the minds of arbitrators.

Does this mean that the *Milwaukee Spring II* decision is meaningless where an arbitrator is concerned? This Comment concludes that *Milwaukee Spring II* has not affected arbitral decisionmaking in subcontracting. Only a relatively short time has passed, however, since the Board decided *Milwaukee Spring II*. Moreover, the principles of good faith are well entrenched in the minds of arbitrators. If the duty to bargain in good faith was somehow no longer necessary, arbitrators might be less likely to find a breach of an implied duty to communicate with the union.[259] Arbitrators view breaches of other implied duties, such as deviations from past practices, as less important if the subject of the breach is only a permissive subject of bargaining.[260] An arbitrator is unlikely to rule that the parties intended to include something in the collective bargaining agreement that was unnecessary and unrequired. On the other hand, an arbitrator is more likely to find that the parties' agreement implies an omitted item when the subject is a mandatory subject of bargaining.

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259. It has been theorized that arbitrators would be less likely to find a breach of an implied duty to communicate with a union if transfer of work were a permissive, rather than a mandatory subject of bargaining. Comment, *supra* note 118, at 398.

260. *Id.*