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Labor Law-Collective Bargaining Agreements-Implied Limitation on Management's Right to Subcontract

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LABOR LAW—COLLECTIVE BARGAINING AGREEMENTS—IMPLIED LIMITATION ON MANAGEMENT'S RIGHT TO SUBCONTRACT—During the existence of a collective bargaining agreement which included both exclusive recognition and union shop clauses but did not include a management prerogatives clause, defendant employer, without the consent of the plaintiff union, contracted out janitorial work which had previously been performed by three of its employees. Subsequently, these employees were laid off and the plaintiff's protest, though in compliance with all grievance procedures, was unsuccessful. Thereupon, the plaintiff sought declaratory judgment relief under section 301 of the Labor-Management Relations Act,[1] alleging that the defendant had no right to subcontract work customarily performed on its premises by its employees to individuals who were neither defendant's employees nor members of the plaintiff union covered by the collective bargaining agreement. The district court held that the defendant, by its unilateral action, had breached the agreement.[2] On appeal, *held,* affirmed,[3]

1 61 Stat. 156 (1947), as amended, 29 U.S.C. § 185(a) (1958).

2 Local 391, UAW v. Webster Elec. Co., 193 F. Supp. 836 (E.D. Wis. 1961).

3 On another issue, the district court was reversed on the question of whether the defendant had locked out the three employees in violation of the agreement. The court held that there was no lockout since "there was no coercion or economic pressure exerted by defendant in this action." Principal case at 198.

one judge dissenting. The right to subcontract is limited by implication from the union shop provision, for if the defendant could unilaterally replace its employees with those of an independent contractor the intended purpose of that provision might be subverted. *Local 391, UAW v. Webster Elec. Co.*, 299 F.2d 195 (7th Cir. 1962).

The problem of whether an employer has a unilateral right to contract out work formerly done by its employees during the life of a collective bargaining agreement containing union security clauses has previously arisen in two somewhat different contexts.[4] The first is the courts' consideration of the merits of the question when the agreement does not contain an arbitration provision, as in the principal case. The second involves the submission of the dispute to arbitration when there is an arbitration clause.[5]

Courts considering the question have been virtually unanimous in concluding that an employer has the right to hire an independent contractor to do such work in the absence of an express prohibition in the collective bargaining agreement,[6] regardless of whether there is[7] or is not[8] a management prerogatives clause in the agreement. The apparent rationale of these cases is that a limitation on management's freedom of operation cannot be implied from the mere fact that the parties have agreed on the terms and conditions of the particular job in question. If the contract does not expressly limit the inherent rights of management, of which subcontracting is one, the employer is free to exercise them in good faith. On the other hand, the arbitrators have generally reached a different result than the

4 It should be noted that cases involving subcontracting have also arisen before the NLRB but in a different context than in the principal case. There, the questions that usually arise are whether subcontracting is a mandatory subject of bargaining within § 8(d) or whether the use of subcontracting is a discriminatory practice in violation of § 8(a)(3) of the NLRA. Here, the question is whether there is a limitation on management's right to subcontract, implied from other provisions of the collective bargaining agreement.

5 With respect to the second context, the Supreme Court's decision in United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960), held the question to be arbitrable if the contract was silent about subcontracting or even if it stated that such matters were "strictly a function of management." The Court interpreted the latter phrase to refer only to areas over which "the contract gives management complete control and unfettered discretion." It concluded that in this case the parties did not intend the phrase "to encompass any and all forms of contracting out." *Id.* at 584.

6 See, *e.g.*, Amalgamated Ass'n of St. Ry. Employees v. Greyhound Corp., 231 F.2d 585 (5th Cir. 1956); Local 386, Dairy Workers v. Grand Rapids Milk Div., 160 F. Supp. 34 (W.D. Mich. 1958); Local 600, UAW v. Ford Motor Co., 113 F. Supp. 834 (E.D. Mich. 1953); United Dairy Workers v. Detroit Creamery Co., 38 L.R.R.M. 2303 (Mich. Cir. Ct., Wayne County 1956); Standard Refinery Union v. Esso Standard Oil Co., 31 N.J. Super. 548, 107 A.2d 513 (1954). *Contra, In re* Mandel Laces, 27 Lab. Arb. 440 (N.Y. Sup. Ct. 1956).

7 Local 600, UAW v. Ford Motor Co., *supra* note 6.

8 Amalgamated Ass'n of St. Ry. Employees v. Greyhound Corp., 231 F.2d 585 (5th Cir. 1956).

courts.[9] Their decisions are usually based upon a theory of a limitation on management's rights being implied from other provisions of the collective bargaining agreement.[10] Underlying this approach is the idea that the recognition of a union as the exclusive bargaining agent for the company's employees extends to all work within the unit. Unless such work is assigned to employees in that unit the employer could subvert the purpose of the agreement and effectively defeat recognition of the union. It should be noted that contrary to the rigid approach of the courts, the decisions of the arbitrators appear to be on an *ad hoc* basis, depending upon an interpretation of the particular collective bargaining agreement and a consideration of certain extrinsic factors,[11] rather than on any generally controlling rules and principles.

In this setting, the principal case reaches a result similar to that often reached by the arbitrators in analogous situations, but the court's basic approach is unclear from the opinion. In the sense that the conclusion is based upon a limitation implied from a provision in the agreement, the approach is not unlike that of the arbitrators. This process of implication has been used by courts in other settings to expand the terms of an agreement when there are facts and circumstances sufficient to warrant the conclusion that such was the intent of the parties,[12] and would appear to be a justifiable approach in the principal case also, if it had been shown that the parties in fact intended such a limitation. But the court does not appear to justify adequately the resting of its conclusion on the basis of the parties' intent. Its sole reliance on the union shop clause is questionable in two respects. First, that clause pertains only to the defendant's employees[13] and it is clear that the replacements, employees of the independent

9 See generally ELKOURI & ELKOURI, HOW ARBITRATION WORKS 341-47 (rev. ed. 1960). Note, however, that a number of arbitrators have approximated the "reserved rights" theory stressed by the courts and have held that rights which have not been expressly delegated are reserved to management. See, *e.g.*, Richmond Baking Co., 30 Lab. Arb. 493 (1957); Waller Bros. Stone Co., 27 Lab. Arb. 704 (1956); Carbide & Carbon Chemicals Co., 26 Lab. Arb. 74 (1956); A. D. Juilliard & Co., 22 Lab. Arb. 266 (1954).

10 See Electric Auto-Lite Co., 30 Lab. Arb. 449 (1958); Temco Aircraft Corp., 27 Lab. Arb. 233 (1956); General Metals Corp., 25 Lab. Arb. 118 (1955); Lorraine Mfg. Co., 22 Lab. Arb. 390 (1954); A. D. Juilliard & Co., 21 Lab. Arb. 713 (1953).

11 Some of the factors are: have bargaining unit employees been laid off; has the function been contracted out in the past; are the unit employees qualified to do the work; is the subcontracting done to discriminate against the union; is the employer losing money on the work? For a tabulation of cases and decisions depending upon the existence of these and other factors, see Celanese Corp. of America, 33 Lab. Arb. 925, 942-45 (1959). See also ELKOURI & ELKOURI, *op. cit. supra* note 9.

12 See, *e.g.*, Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962), where the Court implied a no-strike agreement from a clause in the collective bargaining agreement which expressly imposed upon both parties the duty of submitting the dispute in question to final and binding arbitration.

13 The union shop clause provided: "In order that the Union and its members be furnished with the most effective means available to demonstrate their responsibility in discharging their obligations and duties as enumerated herein, the Company agrees to a Union shop.

contractor, do not fit into that category. Second, even if the union shop clause is applicable, the court could have strengthened its position by relying on the aggregate of union security clauses in the agreement including those relating to seniority rights and exclusive recognition of the union as the bargaining agent for all employees at the plant. Furthermore, if the court was really adopting the arbitrators' approach, it is difficult to understand why it did not point out the presence of several factors which have often influenced arbitrators to imply a restriction.[14] For instance, there was no past history of subcontracting; the employees were laid off rather than given other jobs; and no special skills were required for the work involved. This lack of clarity of approach would seem to raise serious doubts as to the factors which are necessary prerequisites to a court's willingness to imply limitations on management's rights.

Another significant aspect of the principal case is left unclarified by the court. Since this is a section 301 action under which it is the duty of the federal courts to develop a body of substantive law for the enforcement of collectve bargaining agreements,[15] it is important to discern whether the court was laying down a rule of contract interpretation that must be followed whenever an agreement contains a union shop clause or whether the decision was based solely on the facts of *this* case, with the union shop provision indicating the parties' intent that there should be no subcontracting without the union's consent. Assuming the court intended its conclusion to state a rule of contract interpretation, there arises the further problem of whether such a rule would be binding on the arbitrators in cases of this type.[16] This problem might make necessary a reconsideration of the function of arbitration. Is it essentially an area of private settlement or has it now put on new attire and become primarily a public function subject to public rules of contract interpretation?

Since this case presents problems which go to the heart of the effect of language in a collective bargaining agreement and since it creates a split among the federal courts,[17] it appears to be time for the Supreme Court

"All *employees* (emphasis added) who are members of the Union . . . shall remain members . . . as a condition of continued employment. *Employees* (emphasis added) not members . . . shall be members on and after the thirtieth day thereafter and shall remain members . . . as a condition of continued employment." Brief for Appellee, p. 16.

14 See note 11 *supra*.

15 See Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

16 This consideration would seem to be of considerable significance in view of the many disputes in this area that are determined by arbitration. See, for example, Arbitrator Dash's compilation in Celanese Corp. of America, 33 Lab. Arb. 925, 942-45 (1959). Also, even more cases of this type will now be settled by arbitration because of the Supreme Court's decision in United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

17 *Compare*, for example, the principal case *with* Amalgamated Ass'n of St. Ry. Employees v. Greyhound Corp., 231 F.2d 585 (5th Cir. 1956).

to settle the question. Arguably, the Court should allow limitations on management's rights to be implied from other provisions of the agreement, but should be extremely careful to require that this result be substantiated by factors which insure that such was the intent of the parties. Hopefully, the Court will make clear the relevant criteria to be used in future cases to establish this intent.

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