SUBCONTRACTING AND THE DUTY TO BARGAIN

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INTRODUCTION

An employer's decision to subcontract should be a mandatory subject of bargaining. The United States Supreme Court appeared to settle this issue in *Fibreboard Paper Products Corp. v. NLRB*, where it declared that the "contracting out" of work traditionally performed by bargaining unit employees is a mandatory subject of bargaining under the National Labor Relations Act [hereinafter NLRA].[1] Subsequent decisions, however, have not followed that broad mandate. Although the exact limits of an employer's duty are now unclear, today many employers are only being required to bargain about subcon-

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1. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 210 (1964).

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tracting when the decision turns upon "labor costs."[2] If a subcontracting decision can be characterized as affecting the scope, direction, or nature of a business, the employer may not have to bargain with a union.[3] This interpretation of an employer's duty to bargain not only ignores actual industry practice contrary to Supreme Court directives, it fails to recognize that a fundamental purpose behind the National Labor Relations Act is the preservation of industrial peace.[4]

The Supreme Court has indicated that proof that a majority of employers engage in particular behavior is not necessary to establish that the behavior is "practiced" in an industry.[5] Nevertheless, two recent studies confirm that the majority of collective bargaining agreements in the United States do address subcontracting.[6] Most employers recognize that bargaining about subcontracting can educate employers as to options and alternatives, and unions as to competitive pressures facing particular employers. However, there are still employers who either do not recognize this benefit or exaggerate concerns about confidentiality and flexibility.

The Supreme Court has decided that industrial practices are valuable

2. Otis Elevator Co., 269 N.L.R.B. 891 (1984). Although a plurality of the National Labor Relations Board agreed that the employer did not have to bargain over its decision to consolidate and relocate research and development functions, there was no majority opinion on the question of how to determine whether a specific decision is a mandatory subject of bargaining. Chairman Dotson and Member Hunter concluded that it depends upon whether the decision turns upon labor costs. *Id.* at 893. According to Member Dennis, bargaining will be required only if the union has control over a significant consideration in the employer's decision. Furthermore, a benefit-burden balancing process should be employed and, even where labor costs are a significant consideration, a decision should not be considered a mandatory subject of bargaining unless the amenability of the decision to resolution outweighs the constraints bargaining places on management. *Id.* at 900. Member Zimmerman, who concurred in part and dissented in part, cited Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964), and stated that the duty to bargain depends upon whether the employer's decision is "peculiarly suitable for resolution within the collective-bargaining framework." *Otis Elevator*, 269 N.L.R.B. at 900.

3. Although there is agreement that employers are required to bargain about the "effects" of a decision to subcontract, this limited duty simply requires too little, too late. *See Otis Elevator*, 269 N.L.R.B. 891.

4. Furthermore, this approach to subcontracting has proven to be unworkable and susceptible to arbitrary application. *See infra* notes 107-10 and accompanying text.

5. *Fibreboard Paper Prods.*, 379 U.S. at 211 n.7; *see infra* note 43 and accompanying text.

6. *See* INDUSTRIAL RELATIONS CENTER, CLEVELAND STATE UNIVERSITY, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS (1989) [hereinafter CHARACTERISTICS OF MAJOR] (survey of 500 agreements each covering 500 or more workers revealed 56% contain language addressing subcontracting); BUREAU OF NATIONAL AFFAIRS, INC., BASIC PATTERNS IN UNION CONTRACTS 80 (1989) (stating subcontracting was mentioned in 54% of sample contracts — 51% in manufacturing and 59% in non-manufacturing. Forty-eight percent of the contracts required advance discussion with, or advance notification to, the union, up from 45% in 1986 and 36% in 1983. Limitations on subcontracting existed in 90% of construction, 89% of apparel, 86% of petroleum, 83% each of mining and rubber, 80% of communications, and 70% of utilities contracts. Furthermore, at least 50% of agreements in the following industries contained subcontracting provisions: furniture, paper, primary metals, machinery, fabricated metals, maritime, and transportation); *see also* BUREAU OF NATIONAL AFFAIRS, INC., BASIC PATTERNS IN UNION CONTRACTS 81 (1986) (stating that subcontracting was mentioned in 54% of sample contracts, up from 50% in the 1983 analysis and 44% in the 1979 study); *see infra* notes 95-98 and accompanying text.

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guides for determining what is a mandatory subject of bargaining.[7] Building upon this foundation, this Article maintains that actual industry practice reveals that subcontracting must be considered a mandatory subject of collective bargaining. Section I begins by explaining how the assumptions underlying collective bargaining and the intent behind the National Labor Relations Act require that subcontracting be considered a mandatory subject. A policy that isolates entrepreneurial discretion as a dominant concern for determining whether parties must bargain about subcontracting disregards the goals of national labor legislation. Section II outlines the cases which have shaped the current position regarding collective bargaining and explains why the pivotal concurring opinion by Justice Stewart in *Fibreboard Paper Products Corp. v. NLRB* should not have been followed in subsequent cases. Finally, Section III shows that many employers do bargain about subcontracting and that objections to mandatory bargaining can be overcome. Specific language from numerous collective bargaining agreements is provided to illustrate how various concerns can be resolved.

I.
LEGISLATIVE HISTORY

Courts have long recognized that preventing industrial disruption through collective bargaining is a fundamental concern of the National Labor Relations Act. In 1936, the United States Supreme Court decided *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[8] and confirmed that Congress has constitutional authority to impose collective bargaining as a function of its power to protect interstate commerce.[9] The Court made it clear that it considered refusal to confer and negotiate as one of the most prolific causes of industrial strife.[10] The Court found this to be such a compelling fact in the history of labor disturbances that it was a proper subject of judicial notice requiring no citations.[11]

As Professor Clyde Summers explained in a recent article, there are additional purposes behind our national labor laws.[12] Labor legislation recognizes that individual workers do not have the economic strength to bargain as equals with employers. Congress determined that this inequality could be re-

7. *Fibreboard Paper Prods.*, 379 U.S. at 211.

8. 301 U.S. 1 (1937).

9. *Id.* at 30-32. "It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grew out of labor disputes." *Id.* at 31-32.

10. *Id.* at 42. The Court referred to Virginia Ry. Co. v. System Fed'n, No. 40, 300 U.S. 515 (1937), for a description of the Railway Labor Act's effect on labor disputes, and to congressional experience dealing with the steel strike of 1919-1920. *Jones & Laughlin*, 301 U.S. at 42-43.

11. *Id.* at 42.

12. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7 (1988).

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duced by structuring a collective labor market. On the one hand, this reduces the need for government intervention directed towards assisting employees. On the other hand, this institutionalizes a form of industrial democracy that represents a logical and consistent extension of democratic principles to the work place.[13]

Section 1 of the National Labor Relations Act itself expressly recognized the importance of collective bargaining and declared that:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.[14]

Section 8(a)(5) of the NLRA established that it was an unfair labor practice for an employer "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."[15] Section 9(a) added that "representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."[16] The National Labor Relations Act did not go further in defining the subjects that required bargaining.

The 80th Congress, however, further addressed collective bargaining when it passed the Labor Management Relations Act [hereinafter LMRA] in 1947. The LMRA changed the NLRA in several respects, one of which is material to this discussion. It added section 8(d), which requires parties to bargain in good faith concerning wages, hours, and other terms and conditions

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13. *Id.* at 8-9 (citing J. HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 195 (1968)). Senator Wagner stated:

> Modern nations have selected one of two methods to bring order into industry. The first is to create a super-government. Under such a plan, labor unions are abolished or become the creatures of the state. Trade associations become the cartels of the state . . . . That is what is called the authorization state . . . . The second method of coordinating industry is the democratic method. It is entirely different from the first. Instead of control from the top, it insists upon control from within. It places the primary responsibility where it belongs and asks industry and labor to solve their mutual problems through self-government. That is industrial democracy, and upon its success depends the preservation of the American way of life.

Id. (citing L. SILVERBERG, THE WAGNER ACT: AFTER TEN YEARS 13 (1945)).

14. S. 1958, 74th Cong., 1st Sess., ch. 372, *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3270 (1985).

15. National Labor Relations Act, § 8(a)(5), 29 U.S.C. § 158(a)(5) (1988).

16. National Labor Relations Act, § 9(a), 29 U.S.C. § 159(a) (1988).

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of employment.[17] This definition of compulsory bargaining issues resulted from a proposal by the Senate which was adopted instead of the more restrictive language suggested by the House.

Congressman Fred Hartley was the original House sponsor of a bill that limited the duty to bargain to only five specific subjects.[18] Congressman Hartley also submitted the House Majority Report No. 245,[19] which explained that unless Congress provided specific guidelines for determining good faith bargaining, the National Labor Relations Board [hereinafter the Board] might gradually increase its control over the substantive terms of collective bargaining agreements.[20] The House Minority Report No. 245, however, objected to the majority's restrictive language.

> This [majority report] attempts to limit narrowly the subject matters appropriate for collective bargaining. It seems clear that the definitions are designed to exclude collective bargaining concerning welfare funds, vacation funds, union hiring halls, union security provisions, apprenticeship qualifications, assignment of work, checkoff provisions, subcontracting of work, and a host of other matters traditionally the subject matter of collective bargaining in some industries or in certain regions of the country. *The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry*, the social and political climate at any given time, the needs of employers and employees, and many related factors. *What are proper subject matters for collective bargaining should be left in the first instance to employers and trade-unions, and in the second place, to any*

17. "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder." 29 U.S.C. § 158(d) (1988).

18. H.R. 3020, 80th Cong., 1st Sess., ch. 2 (1947), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 160, 163, 166-67 (1985) [hereinafter I LEGISLATIVE HISTORY — 1947].

> The terms "bargain collectively" and "collective bargaining" as applied to any disputes between an employer and his employees or their representative, mean compliance with the following minimum requirements: . . . Such terms shall not be construed as requiring that either party reach an agreement with the other, accept any proposal or counterproposal either in whole or in part, submit counterproposals, discuss modification of an agreement during its terms except pursuant to the express provisions thereof, or discuss any subject matter other than the following: (i) Wage rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.

19. H.R. REP. No. 245, 80th Cong., 1st Sess. 6 (1947), *reprinted in* I LEGISLATIVE HISTORY — 1947, *supra* note 18, at 292.

20. *Id.* at 20, *reprinted in* I LEGISLATIVE HISTORY — 1947, *supra* note 18, at 311.

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> *administrative agency* skilled in the field and *competent to devote the necessary time to a study of industrial practices and traditions in each industry* or area of the country, subject to review by the courts. It cannot and should not be strait-jacketed by legislative enactment.[21]

The minority report's concerns were met, for the most part, by the Senate bill proposal which was much less restrictive than the House majority version. A conference committee resolved the differences between the Senate and House proposals by rejecting the House version and adopting the Senate version, which is now the governing language of section 8(d).

II.
JUDICIAL INTERPRETATION

A. Cases Preceding Fibreboard

Judicial opinions following the 1947 amendments illustrate support for a broad interpretation of the duty to bargain. *W.W. Cross & Co. v. NLRB*[22] addressed the question of whether, under the original NLRA, a group insurance program should be included within the term "wages" and therefore be a mandatory subject of bargaining. Referring to section 9(a) of the original Act, the Court of Appeals for the First Circuit determined in 1949 that group insurance was a mandatory subject of bargaining, suggesting that the National Labor Relations Act must be given an expansive reading.[23] The court considered the purpose and policy of the Act, and held that Congress did not intend to restrict the duty to bargain simply to those matters which, up until 1935, had been commonly bargained about in negotiations.[24] Rather, Congress intended to require employers to bargain with employees' representatives, "with respect to any matter which might in the future emerge as a bone of contention between them, provided, of course, that it should be a matter 'in respect to rates of pay, wages, hours of employment, or other conditions of employment.' "[25]

The Fifth Circuit, in *Town & Country Manufacturing Co. v. NLRB*,[26] examined whether an employer which terminated its trailer hauling department and subcontracted the work without bargaining with the union committed an unfair labor practice. The court, acknowledging that the employer was motivated at least in part by a desire to rid itself of the union, easily found an unfair labor practice. A company will not be forced to agree with a union as to whether work can be contracted out. The company must, however, bargain over the issue of subcontracting.[27]

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21. *Id.* at 71, *reprinted in* I LEGISLATIVE HISTORY — 1947, *supra* note 18, at 362 (emphasis added).
22. 174 F.2d 875 (1st Cir. 1949).
23. *Id.* at 878.
24. *Id.*
25. *Id.*
26. 316 F.2d 846 (5th Cir. 1963).
27. *Id.* at 847.

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In addition to identifying subcontracting as an appropriate subject for compulsory bargaining, *Town & Country Manufacturing Co.* highlights a point that is occasionally forgotten during the heat of discussions about subcontracting and the duty to bargain. Even if subcontracting is a mandatory subject of bargaining, an employer is not required to agree when a union maintains that certain work cannot be contracted out. The only requirement is that the employer engage in good faith bargaining. Overlooking this distinction contributes to the passion which typically surrounds the issue of subcontracting.

This point is emphasized in *NLRB v. American National Insurance Co.*,[28] which involved a proposal for a management rights clause listing subjects such as promotions, discipline and work scheduling as the sole responsibility of management. The union asserted that inclusion of these subjects amounted to a refusal to bargain. The Court stated, "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters . . . is an issue for determination across the bargaining table, not by the Board."[29]

B. The Fibreboard *Decision*

1. The Majority Opinion

In the wake of these decisions, the Supreme Court directly confronted the question of whether subcontracting is a mandatory subject of bargaining in *Fibreboard Paper Products Corp. v. NLRB*.[30] Fibreboard Paper Product Corporation's (the Company) collective bargaining agreement with the United Steelworkers of America (the Union), was scheduled to expire on July 31, 1959.[31] Four days prior to the expiration of the contract, the Company met with the Union and announced that substantial savings could be achieved by contracting out the maintenance work once its collective bargaining agreements expired. The Company presented a letter declaring that it had "reached a definite decision to [subcontract the maintenance work] effective August 1, 1959."[32] Although the Company agreed to meet again on July 30th, by that time it had accepted an outside contractor.

In *Fibreboard*, the Supreme Court announced that the contracting out of plant maintenance work previously performed by employees in the bargaining

28. 343 U.S. 395 (1952).

29. *Id.* at 408-09; *see also* National Labor Relations Bd. v. Insurance Agents' International Union, 361 U.S. 477, 487 (1960) (citing *American National Insurance* and stating, "it remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements."); H. K. Porter Co. v. NLRB, 397 U.S. 99, 107-08 (1970) ("[i]t is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties").

30. 379 U.S. 203 (1964).

31. *Id.* at 205-06.

32. *Id.* at 206.

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unit, which those employees were capable of continuing to perform, "is well within the literal meaning of the phrase 'terms and conditions of employment.' "[33] The Court explained that the words plainly cover the termination of employment that necessarily results from contracting out under these circumstances.[34]

Aside from recognizing that the literal meaning of the statutory language demands that contracting out be considered a compulsory bargaining issue, the Supreme Court offered additional support for its holding. According to sections 1 and 101 of the Labor Management Relations Act, one of the primary purposes of the NLRA is to promote the peaceful settlement of industrial disputes by subjecting controversies to negotiation.[35] Holding contracting out to be a mandatory subject of bargaining promotes "the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace."[36] In a statement echoing House Minority Report No. 245,[37] the majority added that industrial practices, while not controlling, do shed light on the propriety of including a particular subject within the scope of mandatory bargaining.[38]

> Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process. Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework.[39]

The Supreme Court determined that the Company was motivated to contract out by assurances from outside contractors that it would save money by reducing the work force, decreasing fringe benefits, and eliminating overtime payments.[40] The Court found these concerns to be particularly suited to collective bargaining, a finding supported by past industrial experience.[41] The Court concluded that national labor policy is founded upon the congressional determination that the chances of peaceful resolution on issues such as these are favorable enough to require collective bargaining.[42]

In *Fibreboard*, the Supreme Court relied upon a 1961 Department of Labor study to establish that it was industry practice to bargain about subcontracting even though that study revealed that fewer than one-fourth of the

33. *Id.* at 210.
34. *Id.*
35. *Id.* at 210-11.
36. *Id.* at 211.
37. *See supra* note 21 and accompanying text.
38. *Fibreboard*, 379 U.S. at 211.
39. *Id.*
40. *Id.* at 213.
41. *Id.* at 211-14.
42. *Id.* at 214.

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contracts examined actually limited subcontracting.[43] Thus, *Fibreboard* concludes that it is only necessary to show that a significant number of employers, not a majority, bargain over a subject for that subject to be a "practice." Two recent studies of collective bargaining agreements establish that more than twice as many contracts as in 1961 now limit or prohibit the subcontracting of work.[44] It is thus far more clear today that bargaining about subcontracting is an industry "practice."

2. *Justice Stewart's Concurrence*

Although Justice Stewart did not write for the majority, his concurring opinion merits special attention.[45] The concurrence, joined by Justices Douglas and Harlan, has subsequently been accorded such great weight that it has significantly limited the *Fibreboard* majority decision.[46] This has occurred even though the majority opinion includes strong language emphasizing both the importance of collective bargaining and the effectiveness with which the subject of subcontracting can be handled through negotiation.

Justice Stewart declared that *Fibreboard* should not be read as imposing a duty to bargain on those matters "which lie at the core of entrepreneurial control."[47] Justice Stewart admitted that industrial experience may be useful in determining the proper scope of the duty to bargain.[48] However, he went on to state that data establishing that many labor contracts refer to subcontracting, while not wholly irrelevant, does not carry much weight. It may indicate, he suggested, only that parties have often considered it mutually advantageous to bargain over those issues on a permissive basis.[49]

Justice Stewart's cavalier dismissal of this data is not persuasive. Not only did the majority in *Fibreboard* declare industry practice to be an appropriate guide, but in a subsequent decision, *First National Maintenance Corp. v. NLRB*,[50] the Supreme Court again held that current industrial practice should

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43. *Id.* at 213 n.7 (survey of 1,687 collective bargaining agreements, which applied to approximately 7,500,000 workers, revealed that 378 (22%) contained some form of a limitation on subcontracting).

44. BUREAU OF NATIONAL AFFAIRS, INC., BASIC PATTERNS IN UNION CONTRACTS 80 (1989) (48% of sample contracts require advance discussion with, or notification to, the union before subcontracting); CHARACTERISTICS OF MAJOR, *supra* note 6 (survey of 500 collective bargaining agreements each covering 500 workers or more, revealed 47.2% of the agreements limited or prohibited subcontracting).

45. *Fibreboard*, 379 U.S. at 217 (Stewart, J., concurring).

46. *See* Otis Elevator Co., 269 N.L.R.B. 891 (1984); *see also supra* note 2 and accompanying text.

47. 379 U.S. at 223 (Stewart, J., concurring).

48. *Id.* at 219-20.

49. *Id.* at 220.

50. 452 U.S. 666, 684 (1981); *see infra* text accompanying notes 95-99. The *First National Maintenance* Court concluded that industry practice did not support the argument that the decision to close part of a business was a compulsory bargaining issue. The case was subsequently relied upon to hold that the decision to subcontract was not a compulsory bargaining issue; however, the data relied upon by the Court is now ten years old and current data regard-

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be a consideration when determining whether or not an issue is a mandatory subject of bargaining.

The importance of this point must not be minimized. That parties consider it mutually advantageous to bargain over a particular subject and then include provisions on the subject in their collective bargaining agreement means that the matter is important enough that one party is willing to give up something of value in order to secure certain protections or limitations. Important matters are worth fighting over. When such matters are shown to be amenable to peaceful negotiation and resolution, it is clear that collective bargaining should be required.

Furthermore, the data on industry practice establishes that the parties themselves recognize the benefits to be gained from collective bargaining. New ideas can be generated and alternative proposals identified. If a significant number of parties discuss subcontracting and in turn include provisions in their contracts, it is apparent that it must be a valuable industrial practice to discuss this matter. Everyone stands to gain by at least discussing subcontracting.

3. *Additional Errors in the Stewart Concurrence*

In discussing the 1947 amendments to the National Labor Relations Act, Justice Stewart presented a view of the legislative history that allegedly supported his assertion that the duty to bargain was intended to be limited in the manner he described.[51] Legislative history does not, however, provide the asserted support.[52]

Section 8(d) requires bargaining about wages, hours, and other terms and conditions of employment. This description of compulsory bargaining issues, however, was not included in the original House version of the amendments. As explained in the preceding section on legislative history, the original House bill instead expressly limited the duty to bargain to only five specific subjects.[53] The last paragraph of House bill section 2(11) was intended to prevent the National Labor Relations Board from gradually increasing control over the terms of collective bargaining agreements by limiting the scope of collective bargaining.[54] The House Minority Report No. 245[55] objected to the restrictive language of section 2(11) and argued that the scope of collective bargaining cannot be determined by a formula but instead depends upon factors

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ing subcontracting supports compulsory bargaining. *See supra* notes 6 & 44 and accompanying text.

51. "While the language thus incorporated in the 1947 legislation as enacted is not so stringent as that contained in the House bill, it nonetheless adopts the same basic approach in seeking to define a limited class of bargainable issues." *Fibreboard*, 379 U.S. at 220-21 (Stewart, J., concurring).

52. *See supra* notes 17-21 and accompanying text.

53. *See supra* note 18 and accompanying text.

54. H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947), *reprinted in* I LEGISLATIVE HISTORY — 1947, *supra* note 18, at 311, 313.

55. *Id.* at 71, *reprinted in* I LEGISLATIVE HISTORY — 1947, *supra* note 18, at 355.

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which include the traditions of an industry, social and political climates, and the needs of employers and employees.[56]

A conference committee rejected the House version and adopted the Senate version as the language of section 8(d).[57] The three managers of that committee submitted a statement explaining that the Senate amendment "did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill."[58] In drawing a comparison between the House bill and the Senate bill, however, the report noted that neither version compelled either party to agree to a proposal or require the making of any concession. Thus, the report concluded, the Senate amendment had substantially the same effect as the House bill. This specific declaration, however, was strictly limited to the observation that the Senate Amendment also rejected any good faith test that required the parties to make concessions.[59]

The comparison was thus limited to the conclusion that both the Senate and House versions of the bill prevented the National Labor Relations Board from determining the merits of each party's bargaining position. This comment did not refer to either the rejection of the House limitations on the subjects of collective bargaining or acceptance of the broader language included in the Senate version. That change clearly did not result in the two versions having the "same effect" as to the scope of mandatory bargaining. Rather, the scope of compulsory bargaining was the critical difference between the Senate amendment and the House bill.

The end result was that the compromise bill did not include the five detailed categories found in the original House bill, adopting instead the broader phrase "terms and conditions of employment,"[60] to define the mandatory subjects of bargaining.

Six years before *Fibreboard*, Justice Harlan, in a separate concurring and dissenting opinion written for *NLRB v. Wooster Division of Borg-Warner Corp.*,[61] reviewed the conference report comments quoted above and the legislative history to section 8(d) and concluded that this "foregoing history evinces a clear congressional purpose to assure the parties to a proposed collective bargaining agreement the greatest degree of freedom in their negotiations . . . ."[62] The purpose of the conference report comment was merely to

56. *See supra* note 21 and accompanying text.

57. H.R. Rep. No. 510, 80th Cong., 1st Sess. 34 (1947), *reprinted in* I LEGISLATIVE HISTORY — 1947, *supra* note 18, at 505, 512.

58. *Id.* at 34, *reprinted in* I LEGISLATIVE HISTORY — 1947, *supra* note 18, at 538. The Senate amendment did not define "collective bargaining," but did contain section 8(d), the provision explaining what is included in collective bargaining for the purposes of section 8. That duty was described as the performance of the mutual obligation to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."

59. *Id.*

60. H.R. Rep. No. 510, 80th Cong., 1st Sess. 8 (1947), *reprinted in* I LEGISLATIVE HISTORY — 1947, *supra* note 18, at 1668.

61. 356 U.S. 342 (1958).

62. *Id.* at 356.

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emphasize that section 8(d) as enacted does not require bargaining concessions.

In his *Fibreboard* concurrence, Justice Stewart acknowledged that the limiting language of the House bill had been rejected in favor of a more permissive compromise.[63] Yet, Stewart went on to argue that the substituted compromise language adopted the same approach as the House bill in seeking to define a limited class of bargainable issues.[64] In support of his claim, he cited the conference report statement that although the compromise bill "did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, [it] had to a very substantial extent the same effect."[65] Justice Stewart then admitted, however, that "although this statement refers to the entire section, it is clear from the context that the focus of attention was upon the *procedures* of collective bargaining rather than its *scope*."[66]

The conference report Justice Stewart relied upon was written by the three managers to the committee, including the sponsor of the original House bill, Congressman Fred Hartley. If the conference report had truly intended to adopt the same subject matter limitations as the original bill, the Senate language would not have been used. Even more importantly, when the conference report stated that the Senate amendments had substantially the same effect as the House bill, the subject of that comparison was not the scope of bargaining but rather whether the test of good faith bargaining should be defined so as to require parties to make concessions.[67] The Senate amendments, like the original House bill, did not require such concessions and in that way had the same effect as the House bill. Justice Stewart's terse statement that the focus of the conference report was on procedures[68] does not adequately explain the fact that his professed attention to legislative detail suggests an inappropriate reliance upon a committee statement. The conference report's statement was directed not towards the scope of mandatory bargaining but rather towards defining the concept of "good faith" in the context of whether or not to require concessions.

C. Why Not Only Permissive Bargaining?

Justice Stewart did more than merely misrepresent the NLRA's legislative history. In the sixth footnote of the opinion he stated:

> The opinion of the Court seems to assume that the only alternative to compulsory collective bargaining is unremitting economic warfare. But to exclude subjects from the ambit of compulsory collective bargaining does not preclude the parties from seeking

63. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 220 (1964) (Stewart, J., concurring).

64. *Id.* at 220-21. *But see supra* note 59 and accompanying text.

65. *Fibreboard*, 379 U.S. at 221 n.5 (Stewart, J., concurring).

66. *Id.* (emphasis added).

67. *See supra* notes 57-60 and accompanying text.

68. *Fibreboard*, 379 U.S. at 221 n.5.

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> negotiations about them on a permissive basis. And there are limitations upon the use of economic force to compel concession upon subjects which are only permissively bargainable.[69]

The comparison of compulsory and permissive bargaining is not proper. The emphasis should not have been upon alternatives to compulsory bargaining but rather alternatives to economic warfare.

To support his argument that unremitting economic warfare will not result when subjects are only permissive, because there are limitations on the use of economic force in regard to permissive matters, Stewart cited *NLRB v. Wooster Division of Borg-Warner Corp.*[70] In *Borg-Warner*, the Supreme Court decided that because an employer's proposed "ballot" and "recognition" clauses were not mandatory subjects of bargaining, the employer could not refuse to enter into a collective bargaining agreement because that agreement did not include those clauses. The employer's refusal to bargain based upon the "ballot" and "recognition" clauses amounted to a failure to bargain about other matters which were within the scope of mandatory bargaining.[71] Thus *Borg-Warner* established that "it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without."[72]

Justice Stewart implied that disruptive economic warfare would not occur if subjects are excluded from mandatory bargaining because, as *Borg-Warner* tells us, such behavior would not be lawful. The implication is that if unlawful economic pressure were exercised, it would be suppressed.

This argument is, however, unpersuasive. The labor disruptions that preceded the National Labor Relations Act were not all lawful actions. If anger and frustration are intense enough, parties may take action regardless of legality. The National Labor Relations Act was enacted to preserve industrial peace and to protect the flow of interstate commerce by providing a system where tension and frustration could be controlled. It is unrealistic to infer that because the use of economic pressure is prohibited with regard to permissive subjects such pressure will not be utilized. To hint that organized unlawful actions can easily be "limited" is to bring back memories of labor history's bloodier incidents.[73] Additionally, permissive bargaining has been available since the inception of labor unions. Yet if the employer is not in a permissive and cooperative mood, permissive bargaining will never be an alternative to economic warfare.

Thus, to say that there will not be unremitting warfare because there are

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69. *Id.* at 221 n.6.

70. 356 U.S. 342 (1958).

71. *Id.* at 349.

72. *Id.*

73. *See generally* C. DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY (5th ed. 1941) (noting extent and causes of violence arising from labor disputes); S. PERLMAN & P. TAFT, HISTORY OF LABOR IN THE UNITED STATES 1896-1932 (1935) (which recounts the incidence of violence caused by labor unrest prior to passage of the NLRA).

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limitations on the use of economic force in permissive bargaining situations ignores the fact that the decision to engage in organized and possibly disruptive action is not based exclusively on issues of propriety. Feelings of impotence and frustration are powerful motivators. The Act provides a method to control and avoid these emotions by compelling negotiation. In any event, even if open economic warfare is not selected as a response, there can be negative reactions short of economic warfare that impact on productivity and efficiency.

Finally, Justice Stewart's observations ignore one of the primary assumptions underlying mandatory bargaining. The fact remains that some employers do not recognize the value of collective bargaining. Collective bargaining can educate employers as to options and alternatives they may never have considered which can be adopted to both the employer's and industry's benefit. As the Supreme Court itself expressly recognized just four years earlier in *National Labor Relations Board v. Insurance Agents' International Union*,[74] "[d]iscussion conducted under that standard of good faith may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take."[75]

D. First National Maintenance Corporation

Despite the current popularity of Justice Stewart's concurrence, cases subsequent to *Fibreboard* recognized subcontracting as a mandatory subject of collective bargaining.[76] In 1980, the Court of Appeals for the Second Circuit in *NLRB v. First National Maintenance Corp.*[77] examined a partial closing in which a cleaning and maintenance company, First National Maintenance, determined it was losing money servicing one of its clients, a nursing home. The partial closing resulted in the discharge of employees. The court analyzed *Fibreboard* and determined that, while helpful, that case was distinguishable because it involved a less significant change in the employer's business.[78] While in *Fibreboard* the business continued to operate unchanged, in *First National Maintenance* the business ceased to operate.[79]

The Second Circuit identified the relevant concern:

> [T]he determination whether to impose a duty to bargain should not depend on the relative injury to the employer and the employees, but rather on the relative merits of the arguments put forth as to those classic considerations of whether the purposes of the statute are fur-

74. 361 U.S. 477 (1960).

75. *Id.* at 488.

76. *See* AMCAR Div., ACF Indus., Inc. v. NLRB, 592 F.2d 422 (8th Cir. 1979) (employer committed unfair labor practice by unilaterally subcontracting bargaining work without notice and failing to provide lawfully requested information regarding subcontracting).

77. 627 F.2d 596 (2d Cir. 1980).

78. *Id.* at 599.

79. *Id.*

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> thered by the decision to impose a duty to bargain in a particular case.[80]

The appropriate inquiry for determination of mandatory subjects of bargaining, the court reasoned, is "whether the imposition of a duty to bargain would further the purposes of the statute."[81] The court held that the partial closing should be a mandatory subject of bargaining, without discussing the goal of industrial peace.[82]

Judge Kearse, in dissent, adopted the language of Justice Stewart's *Fibreboard* concurrence and concluded that this decision to refuse to bargain was at the core of entrepreneurial control and thus not suitable for collective bargaining.[83]

On appeal, the Supreme Court initially acknowledged that a fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace.[84] Citing section 1 of the Act, the Court agreed that "[c]entral to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management."[85] The Court added that the phrase "wages, hours, and other terms and conditions of employment" was deliberately left without further definition because Congress "did not intend to deprive the Board of the power further to define those terms in light of specific industrial practices."[86] The Court also accepted that the concept of mandatory bargaining is based upon the belief that collective decisionmaking will lead to better results for labor, management and society in general.[87] It cited *John Wiley & Sons, Inc. v. Livingston* for the proposition that the prerogative of owners independently to rearrange, and perhaps even close, their business must be balanced by some protection for the employees.[88]

Nevertheless, the Supreme Court reversed and held that there was no duty to bargain over the decision to terminate the nursing home contract. It stated that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for both labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business."[89] The

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80. *Id.* at 601.

81. *Id.* at 602 n.8.

82. *Id.* at 602. The court's decision turned upon the question of whether bargaining could reasonably be expected to modify or reverse an employer's decision.

83. *Id.* at 605.

84. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 674 (1981).

85. *Id.*

86. *Id.* at 675. In its footnote 14 the Court also quoted with approval H.R. Rep. No. 245, 80th Cong., 1st Sess. 71 (1947), *reprinted in* I LEGISLATIVE HISTORY — 1947, *supra* note 18, at 362; *see supra* text accompanying note 21.

87. *First Nat'l Maintenance*, 452 U.S. at 678.

88. *Id.*, at 678 n.16 (citing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964)).

89. *Id.* at 679.

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result of this approach, however, is that the balancing of employers' and employees' interests identified in *John Wiley & Sons* is ignored and the focus becomes the employers' interests alone. The Court accepted that in a closing situation unions will offer concessions, information, and alternatives that can be helpful to management and either forestall or prevent the termination of jobs.[90] But the Court then declared that it is unlikely that requiring bargaining over the decision itself will augment this flow of suggestions.[91]

It is not convincing to state that someone allowed to participate in the making of a decision will contribute no more than someone simply asked how to deal with the implementation of a decision already made. It simply is not credible to assert that "effects" bargaining will bring forth discussion substantially similar to "decision" bargaining.

Additionally, the Court ignored a fundamental assumption concerning the duty to bargain. Some employers do not believe they can ever be educated and do not understand the value of discussion.[92] Thus, it also is not credible to suggest that employers will always understand when it is useful to bargain.

Justice Brennan's dissent exposed the inconsistencies in the majority opinion. He rejected the speculation that unions will not contribute any more significantly if allowed to participate in the closing decision itself and referred to recent industrial experiences contradicting the majority's assumptions.[93] Furthermore, he refused to accept the Court's analysis because it considered only the interests of the employer.[94]

1. First National Maintenance Corporation *Accepts Industry Practice as Guide*

Yet, the *First National Maintenance* majority recognized that actual industry practice is a reliable tool in deciding what constitutes a compulsory bargaining issue. Although it stated that evidence of current labor practice is not binding, the majority used evidence of provisions it found in collective bargaining agreements to bolster its position.[95] The majority concluded that because provisions giving unions a right to participate in the decision making process "appear" to be relatively rare, this weighed against mandatory bargaining.[96]

The data that is available today, however, supports the view that subcon-

90. *Id.* at 681.

91. *Id.*

92. For an example of an employer who appears to fit this description, see NLRB v. J.P. Stevens & Co., 563 F.2d 8 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

93. *First Nat'l Maintenance*, 452 U.S. at 690 (Brennan, J., dissenting) (referring specifically to highly publicized negotiations between Chrysler Corporation and the United Auto Workers).

94. *Id.* at 689.

95. *Id.* at 684. The majority cited a U.S. Dep't of Labor, Bureau of Labor Statistics study that charts provisions found in collective bargaining agreements. There is no Bureau of Labor Statistics table focusing on decision making and the majority "presumed" that this is because such provisions do not exist.

96. *Id.*

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tracting should be a mandatory subject of bargaining. The Bureau of National Affairs reported that 54% of its 1989 sample contracts mentioned subcontracting (up from 50% in 1983 and 44% in 1979) and that 48% of those contracts require the employer either to discuss subcontracting in advance or provide notification to the union.[97] A recent study by the Industrial Relations Center at Cleveland State University stated that not only do 56% of the contracts examined address subcontracting, 47.2% limit or prohibit the employer's decision to subcontract.[98]

The *First National Maintenance* Court declared that "labeling a matter a mandatory subject of bargaining" will benefit labor, management, and society "only if the subject proposed for discussion is amenable to resolution through the bargaining process."[99] The prevalence of subcontracting language in collective bargaining agreements establishes that this subject is amenable to resolution through collective bargaining.

E. Cases After First National Maintenance Corporation

1. The Impact of Otis Elevator

Although *First National Maintenance* was identified as a closing case as distinguished from a subcontracting case, it established an analytic approach and a tone that has carried over into subcontracting cases. For instance, in *Garwood-Detroit Truck Equipment, Inc.*,[100] the National Labor Relations Board reviewed the finding of an administrative law judge that an employer had violated sections 8(a)(1), 8(a)(5), and 8(d) by unilaterally subcontracting its mounting and service work without proper notice to the union and without affording the union an opportunity to bargain about the subcontracting decision. The employer hired outside contractors and leased facilities and equipment to them. Under this arrangement the contractors paid a percentage of the rent and in addition provided insurance coverage. The employer's own employees were replaced by contractors doing the same work, with the same tools and equipment, and in the same working area.[101]

The Board applied a test articulated in *Otis Elevator Co.*,[102] a subcontracting case which expressly relied upon *First National Maintenance*, as a controlling precedent.[103] The governing rule, the Board explained, is that management decisions which affect the scope, direction, or nature of the enterprise are not subject to mandatory bargaining.[104] The critical factor is whether the decision turns upon labor costs, not upon the impact on employ-

97. BUREAU OF NATIONAL AFFAIRS, INC., BASIC PATTERNS IN UNION CONTRACTS 81 (1989).
98. CHARACTERISTICS OF MAJOR, *supra* note 6, at Table 7.3.
99. *First Nat'l Maintenance*, 452 U.S. at 678.
100. 274 N.L.R.B. 113 (1985).
101. *Id.* at 114.
102. 269 N.L.R.B. 891 (1984).
103. *Id.* at 892.
104. *Id.* at 892-93.

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ees or a union's ability to offer alternatives.[105] The Board in *Garwood* added that, according to *Otis Elevator*, subcontracting was subject to mandatory bargaining in *Fibreboard* because the employer's decision turned upon a reduction in labor costs.[106] Applying this approach, the Board concluded in *Garwood* that the employer's decision to subcontract was not a mandatory subject of bargaining.

In reviewing the Board's language in *Garwood* one has to ask what happened to the employees' interests, to encouraging collective bargaining, and to the purposes of the National Labor Relations Act? The standard now being used for determining what is a mandatory subject of bargaining simply ignores these concerns. Collective bargaining was designed to provide a resolution system for industrial disputes which would preserve industrial peace.

The current position regarding the duty to bargain about subcontracting is built upon Justice Stewart's concurrence in *Fibreboard*. Yet Justice Stewart's position as to the intent of the National Labor Relations Act is not supported by the legislative history he cited. Furthermore, his arguments addressing the comparative value of compulsory versus permissive bargaining are unpersuasive. Subcontracting falls within the literal meaning of the phrase "other terms and conditions of employment," and current industry practice supports the view that concerns about this subject can be resolved through the collective bargaining process.

Otis Elevator did not produce a majority opinion and continued reliance upon that decision has resulted in confusion.[107] In August 1989, the Court of Appeals for the District of Columbia remanded the Board's summary affirmance of an administrative law judge's decision because the administrative law judge appeared to indicate that any decision which can be "justified" after the fact on grounds other than labor costs is not subject to bargaining.[108] The court criticized the Board and stated:

> If the Board desires to adhere to the "turned upon" formula as controlling . . . it must identify for us the kinds of factors it takes into consideration in determining the employer's contemporaneous motive for its decision, and then apply those factors.
>
> Conversely, if the Board has decided to apply a new approach where all it requires is that the decision be justified on the basis of entrepreneurial factors, then we ask the Board to explain why it has made that shift . . . . As it is now, we are at a loss to know what kind of standard it is applying or how it is applying that standard to this record.[109]

105. Garwood-Detroit Truck Equipment, Inc., 274 N.L.R.B. at 114.

106. *Id.*

107. *See supra* note 2 (explaining the three approaches outlined in *Otis Elevator*).

108. United Food & Commercial Workers Int'l Union Local 150 v. NLRB, 880 F.2d 1422, 1434-35 (D.C. Cir. 1989). The court, however, was not willing to reject *Otis Elevator* as fundamentally inconsistent with the National Labor Relations Act.

109. *Id.* at 1435-36.

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The court concluded by urging the Board to articulate a majority-supported statement of a rule that the Board will apply in the future to determine whether a particular decision is subject to mandatory bargaining.[110]

III.
THE COLLECTIVE BARGAINING AGREEMENTS

Voluntary trends or patterns of behavior in an industry are a strong indication that the behavior is useful. The value to be derived from reviewing current collective bargaining agreements comes from seeing what subjects the parties themselves recognize as appropriate for discussion. When certain unions and management find it desirable not only to discuss subcontracting but also to include language in their agreements limiting or defining subcontracting, this confirms that subcontracting is the type of issue appropriate for collective bargaining.

The Seventh Circuit Court of Appeals recognized in *Inland Steel Co. v. NLRB*[111] that it is appropriate to examine matters included within collective bargaining agreements when defining the duty to bargain. The steel company asserted that the complicated nature of its retirement plans made it essentially impossible to engage in bargaining over those plans. The company further argued that because sections 8(5) and 9(a) of the Act do not refer to retirement and pension plans "*in haec verba*," there was no duty to bargain. Identifying a number of subjects that the company and union had included in their contract, the court concluded there was a duty to bargain over retirement plans, stating among other reasons that "[n]one of these matters and many others which could be mentioned are referred to in the Act '*in haec verba*' yet we think they are recognized generally and they have been specifically recognized by the Company in the instant case as proper matters for bargaining and, as a result, have been included in a contract with the Union."[112]

Similarly, in *Fibreboard*, the Court held that industrial practices do shed light on the propriety of including a particular subject within the scope of mandatory bargaining.[113]

> Industrial experience reflects the amenability of such subjects to the collective bargaining process. Experience illustrates that subcontracting in one form or another has been brought, widely and successfully, within the collective bargaining framework.[114]

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110. *Id.* at 1436-37.

111. 170 F.2d 247 (7th Cir. 1949). Although the unfair labor practices alleged occurred in part prior to the 1947 amendments to the National Labor Relations Act, the court stated that there were no material changes so far as the relevant issue was concerned. *Id.* at 249 n.2.

112. *Id.* at 251.

113. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964).

114. *Id.* In its footnote 14, the court also quoted with approval H.R. Rep. No. 245, 80th Cong., 1st Sess. 71 (1947), *reprinted in* I LEGISLATIVE HISTORY—1947, *supra* note 18, at 362. *See supra* note 21 and accompanying text.

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The Bureau of Labor Statistics[115] maintains a library of collective bargaining agreements from businesses employing one thousand or more workers.[116] Only the railroads, the airlines and government employers are excluded.[117] There is an ongoing effort to acquire the most current copies of collective bargaining agreements.

It would be a monumental task to review every collective bargaining agreement in the collection.[118] This Article presents a representative sample based on several distinct industries in order to illustrate the frequency and the manner in which subcontracting issues are included in collective bargaining agreements. Although contracts from the automobile industry and steel industry will be examined, the electric utility industry will receive special attention. The utility industry provides a sample that is manageable in terms of numbers as well as a body of collective bargaining agreements where subcontracting clauses are both frequent and diverse in nature. The relatively succinct treatment subcontracting receives in the utility contracts will become apparent after an examination of the automobile and steel industry collective bargaining agreements.

Employers often raise two objections to bargaining about subcontracting. First, they assert that bargaining involves an unmanageable and inescapable confidentiality problem. Good faith bargaining necessitates a dangerous disclosure of sensitive information. Second, employers argue that bargaining about subcontracting will lead to costly and expensive delays that will interfere with efficient operation. Although recent studies confirm that most collective bargaining agreements contain subcontracting language,[119] the following agreements will be examined to illustrate that employers' most frequent objections to bargaining can be overcome.

A. The Electric Companies

The Bureau of Labor Statistics library contains collective bargaining agreements from eighty-five utility companies. Ten of those companies are gas companies and were not reviewed for this Article. Upon the request of the respective employers, five of the collective bargaining agreements have "restricted" status and are not available for public inspection. Of the seventy remaining contracts, one was removed from the collection at the time of review and could not be examined. Thus, this study of the electric utility industry will include sixty-nine collective bargaining agreements.

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115. Division, U.S. Dep't of Labor.

116. *See* BUREAU OF LABOR STATISTICS, UNITED STATES DEPARTMENT OF LABOR, MAJOR COLLECTIVE BARGAINING AGREEMENTS: SUBCONTRACTING (1969) [hereinafter MAJOR AGREEMENTS: SUBCONTRACTING].

117. *Id.* at iii.

118. For anyone so inclined, it would be valuable to pursue a truly exhaustive study of collective bargaining agreements and subcontracting clauses. This Article does provide, however, concrete examples of clauses limiting an employer's decision to subcontract.

119. *See supra* notes 6, 44 & 97-98.

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Fifty-two of these contracts, slightly more than three out of every four, have clauses addressing subcontracting. Of particular importance for this Article, all of the clauses require more from the employer than merely notice of a decision to subcontract.

The clauses can be loosely categorized according to their content.[120] First, a substantial number of contracts protect employees from subcontracting decisions that threaten in-plant employment. Subcontracting may result in layoffs and discharges. In-plant protection clauses focus upon these specific concerns. Second, a number of contracts permit subcontracting but require either that union contractors be hired or that the contractors adhere to union standards or the employer's own standards. Finally, some agreements require management to discuss individual subcontracting decisions with the union.

1. Clauses Protecting In-Plant Employment

Forty-six of the contracts, fully two-thirds of the agreements in the industry, contain clauses protecting in-plant employment. The Cincinnati Gas and Electric Company contract[121] illustrates not only the simple directness found in many contracts but also the limited nature of some clauses: "[T]he Company will not contract any work which is ordinarily done by its regular employees, if as a result thereof, it would become necessary to lay off any such employees."[122] Unions have also focused attention upon decreases in wages (as hours worked decline). Consequently, many contracts, such as that of Consolidated Edison Company of New York,[123] add that the company will not "let out to contractors work . . . so as to cause a layoff or demotion in rate of pay by reason thereof."[124] Although the majority of contracts with these clauses protect against layoffs, a few contracts are comparable to the Kansas Power and Light Company contract[125] and provide protection only against discharge.[126]

Although these clauses are evidence that employers discuss subcontracting and agree to contract language concerning this subject, the employer's dis-

120. *See generally* MAJOR AGREEMENTS: SUBCONTRACTING, *supra* note 116.

121. Collective Bargaining Agreement, Apr. 1, 1985, The Cincinnati Gas & Electric Co. — Local 1347, International Brotherhood of Electrical Workers, U.S. Dep't of Labor, Bureau of Labor Statistics.

122. *Id.* at 37; *see also* Collective Bargaining Agreement, May 1, 1986, West Penn Power Company — Local 102, Utility Workers Union of America, U.S. Dep't of Labor Statistics. The West Penn Power Company agreement is careful to provide that subcontracting is prohibited where "the employment of the contractor will directly or indirectly result in the necessity for the layoff of regular employees who are willing, able and qualified to perform the work being contracted." *Id.* at 88.

123. Collective Bargaining Agreement, June 18, 1980, Consolidated Edison Company of New York — Utility Workers Union of America, Dep't of Labor, Bureau of Labor Statistics.

124. *Id.* at 29.

125. Collective Bargaining Agreement, July 1, 1985, The Kansas Power and Light Company — Local 304, International Brotherhood of Electrical Workers, U.S. Dep't of Labor, Bureau of Labor Statistics (amendments) [hereinafter CBA: Kansas Power — IBEW].

126. *Id.* at 5.

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cretion to contract out work can be, and has been, more broadly restricted. The differences in the ways terms are handled demonstrate that parties have great flexibility regarding protecting in-plant employment. Employees can receive salary and wage protections or simply protection against discharge. Employers particularly concerned with losing the ability to manage the size of their work force can be comforted by language similar to the clause in Article I of the Long Island Lighting Company contract.[127] That employer promises only that it "will make every effort to stabilize employment in the various departments of the Company, within the limits announced to the Union, and agrees that contracting of work will not be used as a means of disturbing such stabilization."[128] Again, however, this leaves a great deal of discretion with the employer. Incremental moves away from this rather open grant of authority to the employer are possible. Parties can structure agreements whereby employers retain the right to contract out work only under specific circumstances. The Pennsylvania Power and Light Company contract provides:

> The Company will have the right to contract out work when needed skills are not available from present employees; when public and customer relations require it; when present employees cannot complete the work in the required time; when it is economical to do so; or when peaks of work would require a temporary increase of the Company's forces with subsequent layoff of such additional forces. No employee will be laid off or suffer loss of regular straight time pay as a result of this provision.[129]

If these examples were fully representative of the extent of collective bargaining, however, evidence of specific contract language would not present a very compelling case for moving beyond the current position as to subcontracting. Employees have been able to obtain impressive protections that go beyond guarantees against layoff, wage decreases, or discharges. Agreements

127. Collective Bargaining Agreement, July 1, 1982, Long Island Lighting Company — Local 1049, International Brotherhood of Electrical Workers, U.S. Dep't of Labor, Bureau of Labor Statistics [hereinafter CBA: LILCO — Local 1049, IBEW].

128. *Id.* at 4. The Salt River Project Agricultural Improvement and Power District agreement requires only that the Project "endeavor in good faith not to contract out work usually and customarily performed by its regular employees." Collective Bargaining Agreement, Dec. 1, 1984, Salt River Project Agricultural Improvement and Power District — Local 226, International Brotherhood of Electrical Workers, U.S. Dep't of Labor, Bureau of Labor Statistics at 19. Identical language is found in the Southern California Edison Company contract. Collective Bargaining Agreement, Jan. 1, 1987, Southern California Edison Company — Local 47, International Brotherhood of Electrical Workers, U.S. Dep't of Labor, Bureau of Labor Statistics at 9. Similarly, the Cleveland Electric Illuminating Company agreement establishes that the company does not intend to expand the use of outside contractors and "will continue efforts to minimize" such employment. Collective Bargaining Agreement, May 1, 1985, The Cleveland Electric Illuminating Company — Local 270, Utility Workers Union of America, U.S. Dep't of Labor, Bureau of Labor Statistics at 62.

129. Collective Bargaining Agreement, July 29, 1985, Pennsylvania Power and Light Company — Local 1600, International Brotherhood of Electrical Workers, U.S. Dep't of Labor, Bureau of Labor Statistics at 7.

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may contain clauses resembling that found in the Wisconsin Public Service Corporation agreement,[130] which includes a general prohibition against subcontracting except when "regular crews cannot perform the work or when the work requires the use of special construction equipment which the company does not possess."[131] It would be possible to decrease the number of instances where employees cannot perform work if an employer would be willing to purchase additional equipment. The Public Service Electric and Gas Company of New Jersey agreement[132] attempts to further reduce contracting out by adding that "in order to render it more practicable, and make costs of such work reasonably comparable with charges by outside contractors, the Company will purchase or lease equipment and machines to enable it to do its normal main construction work with its own people."[133]

These contracts illustrate that agreements can be structured to address an unlimited range of concerns. Parties can, and do, agree to language that limits managerial discretion in areas that might otherwise be identified as being at the core of entrepreneurial control. If subcontracting occurs because employees are not qualified to service certain equipment, collective bargaining agreements can be designed to avoid this in the future. The Jersey Central Power and Light Company contract[134] recognizes a need to use outside servicemen but adds that "the Company will at all times endeavor to assign regular, qualified, available employees to assist such servicemen in their work for the purpose of training and instruction on the equipment involved."[135] The Utility Workers Union of America[136] was able to acquire almost an absolute prohibition against contracting out:

> Section 5. It is the policy of the Company not to employ outside contractors for work ordinarily and customarily done by its regular employees and the Company agrees that no such construction or maintenance work will be let to outside contractors except the Union shall not have veto power where specific jobs are required to be done within a specified time and such jobs cannot be done in the time required for completion by the regular employees because of volume

130. Collective Bargaining Agreement, Nov. 1, 1985, Wisconsin Public Service Corporation — Local 310, International Union of Operating Engineers, U.S. Dep't of Labor, Bureau of Labor Statistics.

131. *Id.* at 31.

132. Collective Bargaining Agreement, May 1, 1987, Public Service Electric and Gas Company (Gas Transmission & Distribution Department) — The Public Utility Construction and Gas Appliance Workers of the State of New Jersey, Local 855, U.S. Dep't of Labor, Bureau of Labor Statistics [hereinafter CBA: PSE & G — Public Utility Workers].

133. *Id.* at 34.

134. Collective Bargaining Agreement and Supplements, Nov. 1, 1985, Jersey Central Power & Light Company — Locals 327, 1289, 1298, 1303, 1309, 1314, International Brotherhood of Electrical Workers, U.S. Dep't of Labor, Bureau of Labor Statistics.

135. *Id.* at 36.

136. Collective Bargaining Agreement, July 1, 1986, Ohio Edison Company — Utility Workers Union of America, Local 181-Toronto, Local 350-Shadyside, Local 351-Lorain, and Local 457-Stratton, U.S. Dep't of Labor, Bureau of Labor Statistics.

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of work.[137]

Unions and management in the electric utility industry have been able to agree upon in-plant protection clauses that are brief and flexible as to the degree of protection. Although parties will not be required to reach an agreement concerning subcontracting, requiring bargaining can lead to understandings that do not interfere with employers' so-called prerogatives while recognizing some of the employees' major concerns. For instance, the Arkansas Power & Light Company contract[138] states:

> The Brotherhood and its members recognize the right of the Company to contract out work or to utilize other AP&L employees where it can be done more advantageously than by its own forces, provided the Company shall not contract out any work if it would result in laying off any Company personnel.[139]

Requiring bargaining over subcontracting may also lead to a situation where the employer, rather than being locked into any specific action, simply commits to a process of review which provides an opportunity for employees to demonstrate that subcontracting may not be the most desirable practice. As in the Boston Edison Company contract,[140] the employer can agree to "continue to review the matter of assigning ordinary maintenance and repair work to outside contractors for the purpose of reducing such work assignments to the end that such work assignments be performed by employees of the Company when economically feasible to do so."[141] This provision also illustrates that the employer was willing to discuss the question of subcontracting.

2. *Union Preference and Wage Scale*

In an effort to gain some input into the subcontracting decision, unions have acquired subcontracting clauses which frequently contain language asserting either that work contracted out should be directed to a specific contractor or that the work must be performed at wages matching a particular scale.[142] Unions are well aware that job security will be eroded if increasing amounts of work are transferred to lower-paid outside contractors. Additionally, if the work performed by outside contractors is complex or potentially dangerous, legitimate concerns for safety and performance arise.

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137. *Id.* at 32.

138. Collective Bargaining Agreement and Supplemental Agreement, June 1, 1985, Arkansas Power and Light Company — Locals 647, 1703, and 750, International Brotherhood of Electrical Workers, U.S. Dep't of Labor, Bureau of Labor Statistics.

139. *Id.* at 18.

140. Collective Bargaining Agreement, June 21, 1983, Boston Edison Company — Utility Workers Union of America and Local 369, U.S. Dep't of Labor, Bureau of Labor Statistics.

141. *Id.* at 62.

142. For a discussion of the legality of such clauses under the "hot cargo" provisions of section 8(e), see Truck Drivers, Union Local 705 v. NLRB, 820 F.2d 448, 452-53 (D.C. Cir. 1987), and the cases cited therein.

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Some agreements focus upon the contractors themselves. Agreements may require that union contractors be preferred, although certain exceptions may be allowed. The New York State Electric and Gas Corporation contract[143] states that "qualified contractors in good standing with the trades shall be given preference, provided that nothing herein shall require the Company (a) to violate Federal or State regulations, (b) to delay the work and (c) to employ a contractor either not readily available, or not equipped to do the work."[144]

Some contracts, while limiting the choice of contractors, still provide some discretion. The Niagara Mohawk Power Corporation contract[145] provides that contracts "shall be let to a contractor when such a contractor is available, who agrees to employ labor in harmony with the trades."[146]

Rather than focusing on the contractors themselves, clauses may simply dictate wages and conditions. The Public Service Company of Colorado agreement[147] requires the company to "advise [the] contractor that the employees of such contractor having the same classifications as those covered herein shall be paid not less than the wage scale provided herein for such job classification."[148]

The Kansas Power and Light Company contract[149] clearly illustrates that there is a distinction between awarding contracts to certain contractors and requiring those contractors to satisfy certain standards. Whereas only contractors complying with contract terms of local unions may be hired, if the terms themselves are excessive they will not be applied.

> The Company agrees to award contracts for electrical work for classifications of work covered by this Agreement to contractors who comply with terms and conditions of agreements with local electrical

143. Collective Bargaining Agreement, July 1, 1985, New York State Electric & Gas Corporation — System Council U-7 of the International Brotherhood of Electrical Workers, Locals 249, 945, 951, 961, 966, 992, 994, 1111, 1125, 1126 and 1143, U.S. Dep't of Labor, Bureau of Labor Statistics.

144. *Id.* at 11.

145. Collective Bargaining Agreement, June 1, 1986, Niagara Mohawk Power Corporation — System Council U-11, and Locals 1339, 1352 (Western Division) 79, 310, 478, 554, 836, 1484 (Central Division) and 137, 1369, 1371, and 1385 (Eastern Division) International Brotherhood of Electrical Workers, U.S. Dep't of Labor, Bureau of Labor Statistics.

146. *Id.* at 12. Other clauses are more limiting. The Atlantic City Electric Company contract directs the company "to give preference to contractors paying the prevailing wage rates in the area in which the work is being performed." Collective Bargaining Agreement, Dec. 12, 1983, Atlantic City Electric Company — Local 210, International Brotherhood of Electrical Workers, U.S. Dep't of Labor, Bureau of Labor Statistics at 26.

147. Collective Bargaining Agreement, Dec. 1, 1984, Public Service Company of Colorado — International Brotherhood of Electrical Workers, Local 111, U.S. Dep't of Labor, Bureau of Labor Statistics.

148. *Id.* at 59. The Florida Power Corporation contract declares that subcontracted work "shall be performed under the applicable building trades wages and conditions." Memorandum of Collective Bargaining Agreement, Dec. 9, 1985, Florida Power Corporation—Locals 433, 626, 682, 1412, and 1491, International Brotherhood of Electrical Workers, U.S. Dep't of Labor, Bureau of Labor Statistics at 3.

149. CBA: Kansas Power — IBEW, *supra* note 125.

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> unions. Terms and conditions of local agreements which are excessive in relation to the rates applied on the prevailing work in the area shall not be recognized or applied.[150]

Thus it is even possible to structure a situation where an employer can select a contractor who meets union standards but the employer itself need not be bound by those standards.

Employers should not equate bargaining over subcontracting with losing the ability to subcontract. Compulsory bargaining does not require concessions. Employers may discover through bargaining that employees' concerns are quite specific. A fear of discharge or lay-off may be resolved by limiting subcontracting when lay-offs would occur. The limitation may be only that the employees have an opportunity to discuss the decision. A total ban on subcontracting would be unnecessary. Employees may fear that their wages will decline or they may have safety concerns. Several agreements, including the Kansas Power and Light Company agreement, expressly require contractors to comply with safety rules.[151]

3. *The Decision to Subcontract*

Unions have successfully bargained not only for language that broadly defines or limits each subsequent subcontracting decision an employer may make, but also for provisions that allow the union to participate in each distinct decision as to whether certain work will be subcontracted. Subcontracting is of such importance that employees may not simply want to negotiate once and establish a fixed pattern for all subcontracting situations. Unions may want to insure not only that each subcontract will be made according to established guidelines, but also that each decision by the employer to subcontract will offer an opportunity for discussion. The degree to which each decision triggers union participation can be established by the collective bargaining agreement.

The scope of those discussions may be very narrow and perhaps only certain events may trigger the obligation to confer. The Dayton Power and Light Company agreement[152] states that when "it is known a contractor will use Company-owned manually operated equipment and such equipment is to be used during the same period of time by the Company and operated by an employee, the Company will discuss the matter with the Union."[153] An obligation to meet and discuss may arise in connection with union preference clauses. The Public Service Electric and Gas Company (New Jersey) contract with the International Brotherhood of Electrical Workers[154] asserts a prefer-

150. *Id.* at 5.

151. *Id.*

152. Collective Bargaining Agreement, Dec. 29, 1982, The Dayton Power and Light Company — Local 175, Utility Workers Union of America, U.S. Dep't of Labor, Bureau of Labor Statistics.

153. *Id.* at 72.

154. Collective Bargaining Agreement, June 10, 1982, Public Service Electric and Gas

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ence for qualified contractors employing trade union members. If unionized contractors are unavailable or the employer believes they are unreasonably expensive, the presidents of the company and the union are instructed to cooperate in order to resolve the issue.[155] The same company's contract with the plumbers and pipefitters[156] includes a provision on subcontracting directing that "[w]hen contracts for an entire job are to be let out to outside contractors, such matter shall be discussed between the Division Manager and local Union representative."[157] If those parties cannot reach agreement, the matter is then referred to the general manager (or her designees) and the union grievance committee.[158]

The obligation to confer need not be limited to a single type of occurrence. Contracts are being successfully negotiated such that any change in an existing practice may require discussion. This is the type of provision that obviously most closely achieves the industrial democracy contemplated by the Act. The Board is not forcing these parties to discuss this issue and is certainly not requiring employers to make any concession. Yet parties to these agreements understand that an exchange of ideas, information, and proposals to compromise which occur before any decision is made offer the best prospect for an efficient, productive resolution.

The Long Island Lighting Company agreement[159] provides that "in the event the present practices and policies pertaining to the contracting of work are to be extended or changed, the Union shall be advised in advance and given a reasonable opportunity to meet with the Company and discuss the matter."[160] Contracts may establish an ongoing duty to discuss subcontracting. The Union Electric Company contract[161] states simply that "[t]he Company will continue the present practice of discussing contract work with the Union."[162] Two Pacific Gas and Electric Company contracts[163] schedule quarterly labor-management meetings to improve communications "through discussions of matters of policy and operation which are of general system

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Company (New Jersey) — International Brotherhood of Electrical Workers, U.S. Dep't of Labor, Bureau of Labor Statistics.

155. *Id.* at 24.

156. CBA: PSE & G — Public Utility Workers, *supra* note 132.

157. *Id.* at 39.

158. *Id.*

159. CBA: LILCO — Local 1049, IBEW, *supra* note 127.

160. *Id.* at 4.

161. Collective Bargaining Agreement, July 1, 1985, Union Electric Company — Local 148, International Union of Operating Engineers, U.S. Dep't of Labor, Bureau of Labor Statistics.

162. *Id.* at 5.

163. Collective Bargaining Agreement, Jan. 1, 1984, Pacific Gas and Electric Company — Local 1245, International Brotherhood of Electrical Workers (office and clerical employees), U.S. Dep't of Labor, Bureau of Labor Statistics [hereinafter CBA: PG & E — IBEW (office and clerical)]; Collective Bargaining Agreement, Jan. 1, 1984, Pacific Gas and Electric Company — Local 1245, International Brotherhood of Electrical Workers (operation, maintenance, and construction employees), U.S. Dep't of Labor, Bureau of Labor Statistics [hereinafter CBA: PG & E — IBEW (operation, maintenance, and construction)].

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concern."[164] Such meetings would presumably allow for subcontracting discussions.

The Toledo Edison agreement[165] responds to the employers' argument that speed is essential and that bargaining over subcontracting will lead to unnecessary and costly delays. This agreement shows that time limits can be built into subcontracting clauses. Because these brief time limits are outside limits, the matter may be resolved even more quickly.

> Before contracting out work normally done by regular employees of the Company to outside contractors, the Company, emergencies excepted, will notify representatives of the Union of its intent to so contract out and, if requested to do so within two (2) days after such notification has been given, will meet with authorized representatives of the Union to discuss the possibility of establishing make-up crews comprised of its own employees to perform the work in question. If the Company and the Union cannot agree as to the method and condition for establishing such make-up crews within five (5) working days after notifying the Union of its intent to contract out work normally done by its work forces, the Company will, at its discretion, contract out the work.[166]

B. The Automobile Industry

If for no other reason, the sheer number of workers affected by collective bargaining agreements in the automobile industry requires that these agreements be accorded substantial weight in determining what are mandatory subjects of bargaining. Contract negotiations in automobile manufacturing affected approximately 575,000 workers in 1987, the largest number of workers affected in a single private sector industry that year.[167] Furthermore, the automobile industry has been regarded as a leader in establishing labor agreement patterns[168] and, as a leader, its contracts acquire representational significance.

Subcontracting clauses in the automobile industry tend to be further developed by numerous supplemental agreements and letters of understanding. Because the International Union, United Automobile, Aerospace and Agricultural Implement Workers (hereinafter UAW) negotiates with General Motors Corporation, Chrysler Corporation, and Ford Motor Company, the resulting

164. CBA: PG & E — IBEW (office and clerical), *supra* note 163, at 91; CBA: PG & E — IBEW (operation, maintenance, and construction), *supra* note 163, at 12.

165. Collective Bargaining Agreement, April 30, 1987, Toledo Edison — Local 245, International Brotherhood of Electrical Workers, U.S. Dep't of Labor, Bureau of Labor Statistics.

166. *Id.* at 83.

167. Borum, Conley & Wasilewski, *Collective Bargaining in 1987: Local, Regional Issues to Set Tone*, 110 MONTHLY LAB. REV. 23, 31 (1987).

168. Fischer, *Collective Bargaining and Fifty Years of the CIO*, 36 LAB. L. J. 659, 660 (1985) (discussing national wage movement paths in the three decades following 1948 and concluding parameters were either dictated or strongly influenced by the GM formula).

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agreements have predictable similarities. The General Motors Corporation agreement with the UAW, representing production and maintenance employees in engineering,[169] sets out several limitations. Section 183(a) prohibits using outside contractors to replace seniority employees doing production assembly or manufacturing work or fabrication work when the work involves corporation-owned machines, tools, or equipment maintained by corporation employees.[170] Subsection (b) explains that subsection (a) does not affect current arrangements or limit warranty work by vendors.[171] Subsection (c) affirms the corporation policy of fully utilizing senior employees in maintenance and construction work.[172] Subsection (e) provides that no seniority employee shall be laid off as a direct or immediate result of work being performed by any outside contractors.[173] Subsection (d) addresses the duty to discuss subcontracting decisions.[174]

Subsection (d) provides management with as much flexibility and protection as it might need. The subsection begins, "[i]n all cases, except where time and circumstances prevent it, Local Management will hold advance discussion with and provide advance written notice . . . prior to letting a contract."[175] Local management is expected to describe its plans for subcontracting including the nature, scope and approximate dates as well as the reasons justifying subcontracting.[176] Management is also expected to afford union representatives an opportunity to comment on management's plans and to give "appropriate weight to those comments in light of all attendant circumstances."[177] A special grievance procedure is provided for subcontracting complaints.[178]

The General Motors Corporation contract thus goes beyond electric utility contracts in developing the nature and extent of discussions involving subcontracting. Even though it is a massive employer competing in a highly competitive international market, General Motors Corporation has nonetheless agreed to discuss subcontracting questions before any decision is made. This employer is, if not desperately, determinedly competing with exceptionally efficient foreign manufacturers and is slowly realizing what those foreign manufacturers realized long ago: allowing workers to participate in decisions creates a more loyal and productive enterprise. A more loyal work force will certainly further industrial peace.

The General Motors Corporation contract does, however, allow for the

169. Collective Bargaining Agreement, Sept. 21, 1984, General Motors Corporation — International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.S. Dep't of Labor, Bureau of Labor Statistics [hereinafter CBA: GM-UAW].

170. *Id.* at 128.

171. *Id.*

172. *Id.*

173. *Id.* at 129.

174. *Id.* at 128-29.

175. *Id.* at 128.

176. *Id.* at 128-29.

177. *Id.* at 129.

178. *Id.* at 36.

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excuse that time and circumstances do not permit discussion. A letter of understanding was drafted to further explain subsection (d).[179] The letter confirms that advance discussion is to take place before any decision has been made to contract out work. The required explanation as to why management is contemplating subcontracting should inform the union as to whether manpower, skills, equipment or facilities are a concern.[180] The letter also advises that the corporation should consider whether it can do the work competitively in terms of quality, cost, performance and time limits.[181]

The letter of understanding is an attempt to improve the chances for the union to participate productively before any subcontracting decision is made. The extent of this attempt exceeds that found in the provisions of the electric utility contracts. As compared to the Toledo Edison contract discussed earlier, however, there is less likelihood that a discussion will occur because General Motors Corporation has the broad excuse of "time and circumstances."

Many of the alleged problems with bargaining about subcontracting are manageable. The Toledo Edison contract illustrates that concerns with speed and timing can be managed. The General Motors Corporation contract proves that large employers can find it in their best interest to agree to share subcontracting information with unions. Employers use a concern for confidentiality to justify the argument that subcontracting should not be a mandatory subject of bargaining. The General Motors Corporation agreement and the related letter of understanding overcome this problem by establishing a presumption that a broad range of information should be produced in advance of any discussion.

The contract between Chrysler Corporation and the UAW (production and maintenance)[182] also addresses subcontracting[183] and is supplemented by a similar letter of understanding.[184] Like the General Motors Corporation agreement, the Chrysler Corporation agreement requires advance discussions before any final decision regarding subcontracting is made.[185] In the Chrysler Corporation letter of understanding, a "Roundtable" group is empowered to examine certain issues, including "major outsourcing."[186] A major outsourcing decision results in either a permanent lay-off of ten percent of a plant's work force or one hundred employees, whichever is less.[187] A similar provi-

179. *Id.* at 396, Document No. 58.

180. *Id.* at 396-97.

181. *Id.* at 397.

182. Collective Bargaining Agreement, Oct. 25, 1979, Chrysler Corporation & Chrysler Canada — International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.S. Dep't of Labor, Bureau of Labor Statistics.

183. *Id.* at 76-77.

184. Collective Bargaining Agreement, Oct. 25, 1979, Chrysler Corporation & Chrysler Canada — International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.S. Dep't of Labor, Bureau of Labor Statistics (amendments Sept. 5, 1983; Dec. 10, 1982) [hereinafter CBA: Chrysler — UAW].

185. *Id.* at 59.

186. *Id.* at 59-61.

187. *Id.* at 60.

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sion is triggered in the General Motors Corporation letter when twenty-five or more existing jobs are affected.[188]

According to both letters, the union is entitled to at least sixty days written notice when "practicable."[189] The union then has thirty days from the date of notice to propose changes in work practices or deviations from the national agreement that will make it feasible for the corporation to continue producing components.[190] If the corporation accepts the proposals, the union has fourteen days to obtain necessary approval.[191] Thus although advance notice and discussion are prescribed for all subcontracting decisions, a more detailed procedure is designed for major decisions.

Even for major decisions a timetable can be arranged in order to overcome the concern regarding interminable delays. Employers arguing that unions will be primarily interested in delaying any decision fail to appreciate that if a system exists where an employer is genuinely prepared to receive, discuss and weigh timely union proposals, the union will have a strong incentive to offer promptly a workable alternative.

The Ford Motor Company agreement[192] includes clauses addressing job security and outside contracting resembling those described above,[193] as well as special grievance procedures for outside contracting.[194] The agreement also is accompanied by a letter of understanding establishing a sixty-thirty-fourteen day notice, response and approval sequence for major outsourcing decisions.[195] These letters of understanding recognize that the release of information regarding such major changes will involve confidentiality issues. The Ford Motor Company letter and the General Motors Corporation letter express comparable levels of concern.[196] The Ford Motor Company letter explains that "the Company's open discussion with the Union of major outsourcing and related plans may require the Union to keep information confidential until the Company consents to its release."[197]

Although confidentiality issues can be addressed directly in the agreement or through supplements, some employers may believe that express pro-

188. CBA: GM — UAW, *supra* note 169, at 454.

189. CBA: Chrysler — UAW, *supra* note 184, at 60-61; CBA: GM — UAW, *supra* note 169, at 454.

190. CBA: Chrysler — UAW, *supra* note 184, at 61; CBA: GM — UAW, *supra* note 169, at 456.

191. *Id.*

192. Collective Bargaining Agreement, Oct. 29, 1989, Ford Motor Company — International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.S. Dep't of Labor, Bureau of Labor Statistics.

193. *Id.* at 23-24.

194. *Id.* at 61-62.

195. Letters of Understanding, Feb. 13, 1982, UAW — Ford Motor Company, U.S. Dep't of Labor, Bureau of Labor Statistics at 38-39 [hereinafter UAW — Ford Letters of Understanding].

196. *Id.* at 39; Letters of Understanding, Sept. 21, 1989, General Motors Corp. — UAW, U.S. Dep't of Labor, Bureau of Labor Statistics at 456.

197. UAW — Ford Letters of Understanding, *supra* note 195, at 39.

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tection of confidentiality is unnecessary. The Chrysler Corporation letter of understanding contains major outsourcing provisions basically mirroring those of Ford Motor Company and General Motors Corporation.[198] The Chrysler Corporation letter, apparently recognizing that the union will understand both the significance of information and that the successful protection of confidential information is in the union's own best interest, does not include a specific demand for confidentiality.

The three contracts discussed above all expired in late 1987. The new contracts for all three employers contain identical job security programs that far exceed security provisions adopted in 1984.[199] The Ford Motor Company plan, which is backed by a $500 million Ford commitment, requires the company to "maintain current job levels at all units in all locations and will prevent layoffs for virtually any reason except carefully-defined volume reductions linked to market conditions."[200] The automobile companies have also agreed to a broader definition of outsourcing, to establish joint local committees on outsourcing (with unresolvable issues subject to appeal to a joint national committee), and to provide ninety days notice of outsourcing decisions instead of the previous sixty days notice.[201] The General Motors program is backed by a $1.3 billion financial commitment[202] and Chrysler's program is backed by a $210 million commitment.[203]

C. *The Steel Industry*

Collective bargaining agreements from the steel industry provide additional examples as to how unions and management are handling subcontracting. The Empire-Detroit Steel Division, Cyclops Corporation contract[204] simply states that, "[i]n considering the subject of contracting out work, due respect will be given to the availability of qualified craft personnel and the availability of equipment required to complete the job."[205] The agreement also provides for Labor-Management Participation Teams to resolve problems at the work site.[206] The teams have no jurisdiction over initiating or processing grievances and cannot modify the terms of the collective bargaining

198. Letters of Understanding, Dec. 10, 1982, Chrysler Corp. — UAW, U.S. Dep't of Labor, Bureau of Labor Statistics.

199. The job security programs are known as the Guaranteed Employment Numbers program at Ford, the Secure Employment Numbers program at General Motors, and the Base Employment Level program at Chrysler. Ruben, *Developments in Industrial Relations*, 111 MONTHLY LAB. REV. 38 (1988).

200. *Id.* at 31.

201. *Id.* at 32.

202. Ruben, *Developments in Industrial Relations*, 110 MONTHLY LAB. REV. 51 (1987).

203. Ruben, *supra* note 199, at 38.

204. Collective Bargaining Agreement, Oct. 1, 1983, Empire-Detroit Steel Division Cyclops Corporation (Mansfield Ohio plants) — United Steelworkers of America, U.S. Dep't of Labor, Bureau of Labor Statistics [hereinafter CBA: Empire-Detroit Steel — USWA].

205. *Id.* at 9.

206. *Id.* at 121-22.

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agreement.[207]

Subjects identified as proper for consideration by the Participation Teams include quality of products and work environment, absenteeism, overtime, job alignments and contracting out.[208] Participation Teams are organized at the departmental level and are made up of a management and an employee co-chair, as well as employee and management members.[209] Employers select their own representatives and the teams meet as often as the parties agree.[210] By creating these teams and naming subcontracting as a proper subject for discussion, the contract provides a structure for ongoing discussion.

The Standard Steel agreement[211] establishes that employees are to be preferred for any work in or about the plant except: work not traditionally performed; where equipment, skills or supervisor knowledge do not exist; where qualified employees are unavailable; or where manufacturer's or supplier's warranties dictate.[212] The union must be notified in advance if any other work is intended to be subcontracted.[213] Regarding maintenance work, the union may request a meeting where the company "will explain its reasons for its tentative decision to subcontract such work and give the Union the opportunity to suggest ways in which the work might otherwise be performed in a practical manner. The Company will give due consideration to the suggestions of the Union before making its final decision . . . ."[214]

Such opportunities for dialogue contribute significantly towards preserving industrial peace. The Armco Inc. and Butler Armco Independent Union agreement[215] insures that subcontracting decisions receive continual review. The agreement establishes a four person committee (two designated by the union and two by the company) to meet at least monthly to discuss subcontracting issues.[216] Production, service and routine maintenance work are to be assigned to bargaining unit employees insofar as practicable.[217] If notice of intent to contract out is not provided and such omission is unjustified, arbitrators are expressly empowered to award lost earnings to employees who would have performed the work.[218] A common union concern is that when contracting out occurs, employee hours may decline and in effect decrease wages.

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207. *Id.* at 122.

208. *Id.*

209. *Id.* at 121-22.

210. *Id.* at 122.

211. Collective Bargaining Agreement, Jan. 1, 1984, Standard Steel — United Steelworkers of America, Local No. 1940, U.S. Dep't of Labor, Bureau of Labor Statistics [hereinafter CBA: Standard Steel — USWA].

212. *Id.* at 4-5.

213. *Id.* at 5.

214. *Id.*

215. Collective Bargaining Agreement, Aug. 1, 1983, Armco — Butler Armco Independent Union, U.S. Dep't of Labor, Bureau of Labor Statistics [hereinafter CBA: Armco — Butler Armco Independent Union].

216. *Id.* at 114-15.

217. *Id.* at 115.

218. *Id.* at 116.

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The Armco agreement offers protection to trade, craft and apprentice employees by guaranteeing forty hours of pay whenever there are contractors doing work the unit employees would otherwise perform.[219]

The Bethlehem Steel Corporation contract[220] sets out a detailed procedure for review of subcontracting decisions. As in the Armco Inc. contract, a contracting out committee is established that meets at least once a month.[221] Work traditionally performed by Bethlehem employees "shall not be contracted out for performance within the Plant, unless otherwise mutually agreed [by this committee]."[222] Before the corporation contracts out work, union members of the committee must be notified (with an exception for emergencies).[223] The notice must describe location, type of work (service, maintenance, major rebuilding or new construction), nature of work (crafts, equipment, skills and warranties involved), expected duration, expected use of unit employees during this period, and the anticipated result if not completed in timely fashion.[224]

Union committee members can request discussion within five days of receipt of notice and the discussion is to be held within three days of the request.[225] If the matter is not resolved, a grievance may be initiated within thirty days.[226] If either management or the union believes that good faith efforts are not being made by committee members, an appeal can be made to the District Director of the union and the company's Manager of Industrial Relations for prompt investigation.[227] This appeal is not to interfere with the processing of any complaints.

The Bethlehem Steel contract thus provides an additional response to the common argument that mandatory bargaining over subcontracting will only result in delay. This contract provides an internal appeal mechanism to ensure the bargaining process remains efficient and responsive.

Committees are designated to review subcontracting issues in each of the agreements examined from the steel industry. This limited examination involved the random selection of collective bargaining agreements from Armco Inc. at Butler (PA),[228] Armco Inc. at Middletown (OH),[229] Bethlehem Steel Corp.,[230] CF&I Steel Corp.,[231] Continental Steel Corp.,[232] Copperweld Steel

219. *Id.* at 121.

220. Collective Bargaining Agreement, Aug. 1, 1980, Bethlehem Steel Corporation — United Steelworkers of America, U.S. Dep't of Labor, Bureau of Labor Statistics [hereinafter CBA: Bethlehem Steel — USWA].

221. *Id.* at 6-7.

222. *Id.* at 5.

223. *Id.* at 7.

224. *Id.*

225. *Id.*

226. *Id.* at 8.

227. *Id.*

228. CBA: Armco — Butler Armco Independent Union, *supra* note 215.

229. Collective Bargaining Agreement, May 15, 1983, Armco — Armco Employees Independent Federation, U.S. Dep't of Labor, Bureau of Labor Statistics.

230. CBA: Bethlehem Steel — USWA, *supra* note 220.

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Company,[233] Granite City Steel (division of National Steel),[234] Great Lakes Steel,[235] Inland Steel,[236] Empire-Detroit Steel Division (Cyclops Corp.),[237] Interlake Inc.,[238] and Standard Steel (Freedom Forge Corp.).[239] Eleven of the twelve contracts established union-management committees specifically to resolve subcontracting issues. The Standard Steel contract, the only exception, provided for a joint union-management committee to discuss matters of interest for either party, including work preference for covered employees.[240]

The collective bargaining agreements from the steel industry adopt the view that it is not sufficient to establish guidelines for subcontracting decisions. Rather, it is desirable to structure joint committees to examine individual decisions. The contracts often provide both appeal and grievance procedures to guarantee the proper functioning of the committee. Although the review, appeal and grievance procedures might appear to create delay problems, time limits for discussion and review can be built into the contracts.

D. Summary of Collective Bargaining Agreements

Subcontracting clauses are frequently included in collective bargaining agreements. The variation in the nature of these clauses confirms that they can be tailored to fit specific concerns. For instance, it may be that lay-offs are the employees' major fear and they only want a meaningful opportunity to discuss alternatives. Concerns about discussions resulting in costly and lengthy delays can be addressed by designing clear time limits which, as the Toledo Edison contract illustrates, can be as short as a few days. The automobile industry contracts evidence a willingness to discuss even the largest and most fundamental decisions to subcontract ("major outsourcing"), while at the same time recognizing there is a concern for confidentiality. This concern, however, does not preclude discussion and at most warrants a statement in the

231. Collective Bargaining Agreement, Oct. 1, 1983, CF&I Steel Corporation — United Steelworkers of America, U.S. Dep't of Labor, Bureau of Labor Statistics.

232. Collective Bargaining Agreement, Mar. 1, 1983, Continental Steel Corporation — United Steelworkers of America, Local 1054, U.S. Dep't of Labor, Bureau of Labor Statistics.

233. Collective Bargaining Agreement, Mar. 1, 1983, Copperweld Steel Company — United Steelworkers of America, Local 2243 (production and maintenance employees), U.S. Dep't of Labor, Bureau of Labor Statistics.

234. Collective Bargaining Agreement, Mar. 1, 1983, Granite City Steel Division of National Steel Corporation — United Steelworkers of America, U.S. Dep't of Labor, Bureau of Labor Statistics.

235. Collective Bargaining Agreement, Mar. 1, 1983, Great Lakes Steel — United Steelworkers of America (production and maintenance employees), U.S. Dep't of Labor, Bureau of Labor Statistics.

236. Collective Bargaining Agreement, Mar. 1, 1983, Inland Steel Company — United Steelworkers of America (Indiana Harbor Works), U.S. Dep't of Labor, Bureau of Labor Statistics.

237. CBA: Empire-Detroit Steel — USWA, *supra* note 204.

238. Collective Bargaining Agreement, Aug. 1, 1982, Interlake Inc. (Riverdale Plant) — United Steelworkers of America, U.S. Dep't of Labor, Bureau of Labor Statistics.

239. CBA: Standard Steel — USWA, *supra* note 211.

240. *Id.* at 5.

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agreement. One cannot easily summarize the complexity of employee concerns and the infinite variety of solutions. Yet one can easily understand how bargaining facilitates achieving those solutions. Contracts from the steel industry establish that it is possible to design standing committees in order to ensure opportunities for on-going discussion.

The importance of automobile industry contracts should not be understated. These contracts affect a tremendous number of workers and have historically provided models for other industries. The Ford, Chrysler and General Motors contracts clearly illustrate that employers are bargaining with employees concerning how to approach subcontracting decisions.

The frequency with which subcontracting clauses appear in agreements indicates that employers in major industries understand that there are distinct benefits to be gained from considering subcontracting when negotiating a collective bargaining agreement. These clauses were negotiated because management found it useful to do so. Yet there is nothing unique about the value of such clauses to these industries or employers. The same benefits generated through these contracts can be duplicated for other employers and employees.

CONCLUSION

Collective bargaining is a desirable practice because, by engaging in bargaining, employers and employees exchange ideas and reach understandings that might otherwise not be achieved. The current law as to subcontracting, which requires bargaining over decisions to subcontract only when those decisions are based upon labor costs, overlooks fundamental assumptions underlying labor legislation and rests upon a misreading of legislative history. Furthermore, abstract fears concerning a broad duty to bargain about subcontracting can be alleviated by examining collective bargaining agreements.

When parties execute collective bargaining agreements, it may be that they only establish broad guidelines as to how the employer shall make each decision. Alternatively, they may design a procedure allowing for employee participation in each decision. The fact that workable arrangements are being agreed upon, however, should resolve employers' fears concerning bargaining about subcontracting. When numerous examples can be provided of employers realizing that discussing subcontracting leads to understanding significant enough to be included in collective bargaining agreements, the potential for all employers to achieve valuable insights is substantial enough to conclude that an employer's decision to subcontract should be a mandatory subject of bargaining.

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