

IN RE ARBITRATION BETWEEN:

SEIU HEALTHCARE MINNESOTA

and

ALLINA HOSPITALS AND CLINICS

DECISION AND AWARD OF ARBITRATOR

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June 27, 2009

IN RE ARBITRATION BETWEEN:

SEIU Healthcare Minnesota,

and

DECISION AND AWARD OF ARBITRATOR
Strategic Alliance – Courier Outsourcing grievance

Allina Hospitals and Clinics.

APPEARANCES:

FOR THE UNION:

Roger Jensen, Jensen, Bell, Converse & Erickson
Leah Lindeman, Business Representative
Julie Schnell, Union President

FOR THE EMPLOYER:

Tim Kohls, Director of Labor Relations
Daryl Schroeder, VP of Operations

PRELIMINARY STATEMENT

The parties held a mediation on March 26, 2009 to try to find a mutually satisfactory resolution to this issue but were unable to do so. The hearing in the above matter was held on May 21, 2009 at the SEIU Healthcare Minnesota offices at 345 Randolph Ave. St. Paul, MN, Minnesota. The parties submitted pre-hearing Briefs dated May 15, 2009 and presented oral and documentary evidence and additional argument at that above hearing at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a document known as the Strategic Alliance Agreement. Section III (F) sets forth the Strategic Alliance Agreement Review Process. Pursuant to that process the parties selected the undersigned as the neutral in both the mediation and the arbitration of the matter to render a resolution of the issue. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

RELEVANT CONTRACTUAL PROVISIONS

This matter arises in a slightly different context from the “usual” collective bargaining agreement and is rather based on a separate agreement between the parties known as the Strategic Alliance Agreement. The Strategic Alliance is designed to be a more cooperative agreement to arrive at more mutually acceptable resolutions to the workplace issues facing the parties.

The Purpose and other relevant provisions germane to the issue at hand are as follows:

I. Purpose.

SEIU Healthcare Minnesota and Allina Hospitals and Clinics have embarked on a Strategic Alliance to advance each other's interests. Through the Alliance we have jointly developed a vision for our future and have set a goal to realize this vision within the next ten years. This vision is broad and aggressive and requires us to work cooperatively and efficiently.

The mission of the Alliance is to provide industry leading health care and to create an environment where employees flourish, there are opportunities for advancement and growth, and our resources are used in the most cost efficient manner. The success of this Alliance is dependent upon a trusting relationship where we can engage in frank, open and honest discussions in an atmosphere of mutual respect. Our ability to be innovative and progressive in achieving results is also critical to our success. Our work must be focused on the achievement of our strategic, operation and employee goals, which include:

- A. Achieving industry leading reputation for excellence in patient care and satisfaction measured by achieving best in class levels on patient surveys, complaints and loyalty.
- B. Becoming the regional health care Employer of choice by achieving world class employee engagement scores, industry leading wages and benefits, such as Employer paid health care and secure retirement, and the establishment of a relationship of mutual trust and respect as evidenced by employment security and neutrality and measured by engagement of the workforce.
- C. Achieving performance excellence through the efficient use of our resources and by capturing the wisdom, skills and experience of Allina employees. Specific measures will be determined for each facility (and/or system-wide as applicable) by mutual agreement and, for example, may include financial and marketplace measures, productivity, waste reduction, staff turnover and cycle time improvement.

Allina and the Union agree that the privileges of entering into a Strategic Alliance include agreements concerning income security, workforce development and planning, education and training, restrictions on subcontracting and Union representation of new positions. The obligations of entering into a Strategic Alliance include a commitment to performance improvement and patient care and satisfaction.

The Strategic Alliance is a ten-year mission. We recognize that many resources are not currently in place at Allina to fulfill the mission, privileges and obligations of the Alliance. It will take time and financial commitment to develop these resources. The Strategic Alliance will remain mindful of the financial cost associated with the requests it makes to conduct its work.

The Strategic Alliance Agreement is subject to the Strategic Alliance Review process as it appears in Part One, Section III.F of this Agreement and is not subject to the grievance and arbitration process specified in the collective bargaining agreement.

III. F Strategic Alliance Agreement Review Process

After sharing information and fully discussing and exchanging ideas and fully considering all views about issues of interest and concern to the parties, decisions should be reached that are satisfactory to all.

It is understood that the parties may not always agree. Disagreement at a facility level which arises out of the interpretation and/or implementation of the Strategic Alliance Agreement should be referred to the Facility Team for discussion in an attempt to reach consensus. If it cannot be resolved at the facility Team level, the matter will be referred to System Team which must address and attempt to resolve the issue no later than thirty calendar days following its referral. That group, after careful review of all facts and interests will craft a consensus decision designed to resolve the issue.

If consensus proves impossible, the matter may then be referred to an Alliance panel comprised of two Union and two management members, along with a predetermined neutral designee selected by the System Team. The Alliance panel will be designated immediately upon receiving a request. The Alliance panel meet, confer and ultimately craft a solution within thirty days, unless the time is extended by mutual agreement. It is the responsibility of the neutral designee to ensure that a final resolution to the issue is crafted. If a jointly arrived at solution is not forthcoming, the neutral will render a resolution. The resolution will be final and binding on all parties. The Alliance panel members should be from among those least vested in the substance of the disagreement. All questions involving interpretation and implementation of the Strategic Alliance Agreement must be submitted through this Review process and are not subject to the grievance and arbitration process.

PART TWO - ORGANIZATIONAL PERFORMANCE. VI. Insourcing and outsourcing – See Part Three, Section II

PART THREE. II. Insourcing and Outsourcing

Strategic Alliance bargaining work will not be outsourced except in extraordinary circumstances. When Allina believes that bargaining unit work should be outsourced, and there are reasons to outsource, Allina will notify the Union, in writing, of the desire to meet and discuss outsourcing of specific work. If the Union wishes to initiate consideration of insourcing of certain outsourced work, it will notify Allina, in writing, of the reason to insource specific work and the desire to meet and discuss the same. When considering insourcing and outsourcing, the Strategic Alliance Agreement principles will be considered as part of the analysis.

ISSUE

Does the Employer have the right to outsource the Allina Couriers under the facts and circumstances presented in this matter?

EMPLOYER’S POSITION

The Employer took the position that there was the requisite “extraordinary circumstances” under the relevant language in the Strategic Alliance and that it is justified in outsourcing the courier services at this time. In support of this position the Employer made the following contentions:

1. The main mission of Allina Hospitals and Clinics is and always has been patient care to which the courier services are incidental at best. The Employer pointed to the provisions of the Strategic Alliance documents in support of that main mission and the need to maintain the most efficient and cost effective services possible. The Employer acknowledged that the couriers do a good job at what they do and that many of them have been with Allina for years but asserted that under the circumstances presented here, the cost savings to be achieved by outsourcing their services meet the test of “extraordinary circumstances” justifying the outsourcing of their work.

2. The language of the Purpose of the Strategic Alliance provides as follows:

The mission of the Alliance is to provide industry leading health care and to create an environment where employees flourish, there are opportunities for advancement and growth, and our resources are used in the most cost efficient manner.

The Employer pointed to this, as well as other language, as calling for Allina to maintain its reputation for excellence in patient care and cost effectiveness. The Employer also asserted that the language calling for employees to flourish can be best met by making sure that the services it provides are delivered in the most cost effective manner possible.

3. The Employer noted that it maintains 11 hospitals and literally dozens of smaller clinics around the metro area and in greater Minnesota and western Wisconsin. It uses courier services to shuttle needed messages, supplies and medical equipment around the system.

4. The Employer noted that the courier services consist of both scheduled stops, which are largely performed by Allina’s in-house employees, known as Allina Couriers, and unscheduled stops, which are performed mostly by contracted services. The Employer argued that there is thus no legitimate expectation that the Allina Couriers do all the courier work within Allina.

5. The Employer noted that the bargaining unit is almost 1300 employees throughout the system, 17 of which are couriers. Only 13 of the couriers are full time. The rest are part-time.

6. In July 2007, in response to a request first brought by the Union to insource the non-scheduled stops, the Employer undertook a comprehensive study of courier services. Pursuant to the Strategic Alliance, the parties formed joint study group to look at this issue. Based on the information from this study it was determined that the total cost for all courier services was approximately \$2.7 million, see Employer exhibit 2.

7. The total cost for the Allina Couriers for scheduled stops was approximately \$1.1 million. The Employer noted that throughout the process the Union has not taken serious issue with these figures and acknowledged that this is what the internal couriers cost Allina for scheduled stops.

8. After some discussion, the Union dropped the request to insource the non-scheduled stops and acknowledged that it would not be cost effective to do that work with the Allina Couriers.

9. The parties studied the issue extensively and drafted a request for proposals for interested firms to bid on the scheduled stop work. Allina Couriers and the Union were allowed to bid on this. The Employer acknowledged that there were some flaws in this initial process and that some information used was not accurate but asserted that these issues were resolved. Further, the Union was allowed to re-submit a bid after the mediation, even though it was privy to the other bids, and the Union's bid was still considerably higher than that submitted by Dynamex for scheduled stop services.

10. The Employer asserted that the Dynamex bid was not only lower in costs but that their company could deliver more efficient and effective services due to upgraded tracking devices and routing than the Allina Couriers.

11. The Employer asserted most strenuously that the cost savings were extraordinary indeed and that the total savings by going to Dynamex was approximately \$447,000.00 per year. This results in a total cost savings of approximately 40% over the Allina Courier/Union bid.

12. The Employer further asserted that there are “soft” costs that would be saved as well, including vehicle replacement and maintenance, workers compensation costs and potential liability costs from having Dynamex drivers rather than Allina Couriers drivers out on the roads delivering packages. The Employer maintained that the Union has not been able to even come close to matching these figures or cost savings and did not seriously dispute the numbers at either the mediation or at the hearing before the neutral decision maker in this matter.

13. The Employer argued that these facts and the remarkable cost savings meets the intent and definition of “extraordinary circumstances” in the language of the Strategic Alliance governing outsourcing as set forth above.

14. The Employer further argued that the Union’s proposals, even though they were allowed to bid on the project twice, do not meet the Employer’s needs for cost savings and are in some cases simply cost shifting measures rather than cost savings measures. The Union’s proposal did not take account of the need to replace vehicles or other costs associated with servicing the existing vehicles nor of the need to replace and upgrade tracking devices and technology. The Union’s proposal also did not account for non-productive time such as paid time off for the Allina Couriers. Such time is appropriately included in the total costs. Moreover, the Union did not properly account for the time spent by the Operations team thus skewing the numbers somewhat in the Union's favor. Even with the Union’s new proposal there is still the inchoate cost of putting drivers and Allina owned vehicles out on the streets. Finally, the fragmented service is simply not as efficient as having one provider for all routes and service.

15. The Employer asserted that the parties negotiating the Strategic Alliance Agreement eschewed a definition of “extraordinary circumstances” and instead opted to allow decisions to be made on a case-by-case basis. Thus, the application of the term “extraordinary circumstances” must depend on the situation. Here the savings alone are so large that it meets the definition of those terms as the parties intended it to be interpreted.

16. The Employer strongly resisted the Union's argument that the language in the Kaiser Permanent Strategic Alliance should apply here – the parties discussed this in negotiations and decided to leave that out. Instead they determined that “extraordinary” depends on individual situations.

17. The Employer cited the Black's Law Dictionary definition of “extraordinary”:

1. Beyond what is ordinary or usual; highly unusual or exceptional or remarkable;
2. Far more than unusual expected

(Examples omitted)

The Employer argued that while these definitions are not particularly helpful in the abstract, it is clear here that a cost savings of 40% is precisely the sort of extraordinary circumstance the parties contemplated when they negotiated the outsourcing/insourcing language.

18. The Employer argued that if these kinds of savings are not extraordinary, virtually nothing would ever fit into that definition. There is nothing in the Strategic Alliance Agreement that provides or even suggests that cost savings alone cannot arise to the level of extraordinary circumstances if the savings are large enough. The sheer size of these savings warrants that finding.

19. Further, there are other reasons beyond cost savings for the outsourcing. The Employer pointed to certain technological advantages Dynamex has to track vehicles and determine routes. While Allina could perhaps purchase the equipment necessary to match this, that would of course entail the capital expenditure of sums Allina simply does not have.

20. The Employer also pointed to the general economy and the severe cuts the healthcare industry in general and Allina in particular has had to endure in reimbursements from insurance companies and Medicare. These cuts have created the need to be even more cost effective and efficient in delivering any services and to saddle the Employer with the extra cost to run the courier service when outsourcing it gains the same or even better service at significantly lower cost does not fit into the Alliance purpose nor of Allina's mission. Dynamex delivers better service at far lower cost and the Union cannot be heard to object simply because it will lose some members.

21. The Employer argued that there was no evidence of any ulterior purpose here nor of any anti-union animus. The Employer strongly resisted any assertion that there is an effort underway to undermine the Union or to slowly erode its members.

22. Further, the Employer responded to the Union's claim that there was a conflict of interest with one of its top executives involved in the decision to outsource and strongly asserted that no such conflict existed. While it is true that Mr. Grote's son now works for Dynamex, he was not hired until March 2009, well after the decision to outsource was made. Further, the suggestion that this was a part of that decision is ludicrous given the size of the savings involved.

23. The Employer countered the claims made by the Union and the arbitral precedent they cited by distinguishing the cases that held against the Employer's decision to subcontract. The Employer cited several cases that in fact allowed subcontracting based on cost savings alone. Further, the Employer asserted that there is a balancing test to be applied here and that the Union's argument that cost savings alone can "never" be used as the basis for subcontracting is misplaced and unsupported by arbitral precedent. The Employer argued that the neutral should apply a balancing test here as well and give great weight to the cost savings achieved by outsourcing this work.

24. The Employer further argued that arbitrators tend to allow subcontracting where the work to be contracted out is incidental or tangential to the Employer's main business. Here the "main business" of Allina is patient care. At best, the courier services are an indirect adjunct to that.

25. The essence of the Employer's argument is thus that Dynamex can deliver service that is as good or better than the Allina Couriers can at a 40% lower cost, thus saving Allina some \$447,000.00 per year. Under the facts and circumstances of this case clearly meets the definition of an "extraordinary circumstance" under the terms of the Strategic Alliance Agreement and the outsourcing should be allowed.

The Employer seeks an award allowing the outsourcing of the courier services.

UNION'S POSITION:

The Union took the position that “extraordinary circumstances” are not present in this case and that the Strategic Alliance Agreement does not allow the Employer to outsource the courier services under these facts. In support of this the Union made the following contentions:

1. The Union pointed to the language and spirit of the Strategic Alliance and asserted that the clear stated intent creates a strong presumption against outsourcing and that the parties inserted the “extraordinary circumstances” language to demonstrate that it was only in extremely unusual circumstances that outsourcing should ever occur. The Union of course argued that even with savings this large, the intent of the Alliance was not to allow mere cost savings to rise to that level.

2. The Union noted that this issue arose because the Union brought forth the idea of trying to save money for the Employer by potentially insourcing the non-scheduled stops. In the spirit of cooperation consistent with the principles of the Alliance, the Union and Allina undertook a study of that issue to see if costs could be saved and efficiencies achieved by insourcing.

3. The Union noted the irony of the complete turnaround by the Employer and asserted that the Union and the affected employees were doing exactly what the Alliance intended – to look at ways to achieve efficiencies to save money for the Employer and to save jobs for the employees. Instead of working with the Union, the Employer began working against them by seeking to outsource the entire Allina Courier group of employees.

4. The Union pointed to the provisions of the Strategic Alliance that speaks to cooperation, restrictions on subcontracting out and to the need for the parties to work together to further their mutual interests. The Union also pointed to the specific provisions of Part Three section II of the Alliance document that reads as follows: “When considering insourcing and outsourcing, the Strategic Alliance Agreement principles will be considered as part of the analysis.”

5. The Union also pointed to the provision that requires that outsourcing is to be done only under “extraordinary circumstances” and asserted that when read together it becomes clear that the intent of the parties in negotiation the Strategic Alliance Agreement intended that there would be stringent restrictions on outsourcing and that the very principles that underlay that document must be taken into account as a part of the analysis of any outsourcing issue, including, the determination of what “extraordinary circumstances” means in any one given situation.

6. The Union asserted flatly that even though the figures show a potential of approximately \$447,000.00 in savings, this does not equate to an extraordinary circumstance here. It is quite predictable that the cost of Union labor is higher than non-Union employees. The Union acknowledged at the outset that Union wages are virtually always higher than wages for their non-Unionized counterparts but argued that this does not allow the Employer to simply outsource what is bargaining unit work to non-Union workers who work at lower wages, few if any benefits and who are independent contractors for Dynamex. Those workers carry their own insurance, their own workers compensation coverage and simply work for less. The Employer should not be allowed to simply “beat the Union’s prices” in this fashion and under these facts.

7. The Union asserted most strenuously that while the Employer has stated that it has no intention of eroding the Union’s position within the bargaining unit, if this is allowed to happen the Union could well suffer death by a thousand cuts. No position would be safe if cost savings alone is allowed to constitute extraordinary circumstances, even though the cost savings here approach 40%. Housekeeping, laundry, food service, janitorial, nursing aides, LPN’s and a whole host of other positions could then be outsourced to save money and soon there would be no Union left. There are already services offering cheap labor out there now who could offer workers at deflated prices to do the work the Unionized workers do now. It is only because of the efforts of the Union that those workers enjoy the benefits of hard won wage and benefits concessions from the Employer.

8. This would be a violation of the clear spirit of the Alliance and of the Union security and recognition clauses of the collective bargaining agreement to allow outsourcing here, where the sole reason to do so is cost savings. The Union argued that the very term “extraordinary circumstances” was chosen to prevent the Employer from seeking cheap replacements.

9. The Union pointed to several prior arbitration awards for the proposition that an Employer may not sign a contract with a labor Union and then subcontract that same work on the basis that it is cheaper and would further the mission of the Employer better by saving money.

10. The Union also cited to Black’s Law Dictionary and argued that the legal definition of “extraordinary circumstances” as a “highly unusual set of facts that are not commonly associated with a particular thing or event.” The Union asserted that there is nothing unusual about an Employer wanting to save money nor is there anything unusual about Unionized workers making more money and enjoying better benefits than their non-Union counterparts.

11. The Union acknowledged that there is no definition contained within the Strategic Alliance document for “extraordinary circumstances” but noted that in a similar Alliance document, i.e. that for the Kaiser Permanente AFL-CIO Unions, the one this document was patterned after, the definition there provides as follows:

I. Definitions

Extraordinary circumstances.

... [s]ub-contracting could be appropriate in extraordinary circumstances, defined as significant quality, service, patient safety, workplace safety or cost savings opportunities that are of sufficient magnitude as to override the presumption against subcontracting. ...

Costs:

Capital expenditures, equipment, supplies and FTE efficiencies, but excluding the cost of wages and benefits.

12. The Union acknowledged that this definition does not appear in the current Alliance document but asserted that this was clearly what the parties meant when they included extraordinary circumstances in this language – i.e. that it was to exclude the cost of wages and benefits from any discussion of cost savings as the basis for subcontracting and that the Kaiser Permanente language may and should be used to measure the intent of the parties in negotiating this language.

13. In addition, the Union cited several arbitral awards for the proposition that even where a labor agreement is silent, the Employer is bound by a covenant of good faith and fair dealing and cannot justify simply subcontracting away bargaining unit work for cost savings alone. The Union relied on this precedent as further support that even under a “balancing test” approach as advocated by the Employer, cost savings alone do not constitute sufficient grounds to allow an Employer to simply back away from its bargain, so to speak, by subcontracting out the existing members.

14. These cases, discussed more below, generally stand for the proposition that a Company generally does not have the right to bring subcontractors on to the premises to perform the tasks normally done by bargaining unit members simply because those employees will work at a cheaper rate. They further hold that there are indeed special circumstances where subcontracting is appropriate, such as those where the unit employees do not possess the skill, tools or time necessary to do a certain task. Others may include bringing subcontractor in on a temporary or “one time” basis to handle a special task. The Union argued that no such conditions are present here; the drivers already have the needed skills, training and equipment to do the job. Moreover, they are being replaced permanently if the Employer is allowed to go forward with its plan to outsource them. See e.g. *National Distillers and Chemical Corp.* 78 LA 286 (Gibson 1981); *Champion Papers*, 51 LA 997 (Volz 1968); *Bendix Corp.* 41 LA 905 (Warns 1963).

15. The Union further argued that precedent supports the Union’s claim that if cost savings alone cannot be the sole basis for justification of subcontracting or a showing of true bad faith would be the only grounds to overturn such an attempt. See *Sealtest Foods* 48 LA 797 (Valtin 1966).

16. The Union cited to a well-known article published by Archibald Cox and asserted that his comments there are as germane now as they were when they were written. In that article he noted that subcontracting is in effect nothing more than an attempt to take back what had been negotiated at the bargaining table and “undercuts the very bargain which was at the heart of the contract.” Here, even though the Employer could save considerable money – to allow the couriers to all lose their jobs without more, neither meets the definition of extraordinary circumstances nor of the very bargain the Employer and the Union struck in the labor agreement and the Strategic Alliance Agreement.

17. The Union also noted that the Employer did attempt to insert subcontracting language in the collective bargaining agreement, which was negotiated during the time the outsourcing issue was being discussed and analyzed by these parties, but was unsuccessful in doing so. See, letter dated March 20, 2009 from James Bialke, former SEIU representative for the Allina unit. The Union argued that the Employer dropped their proposal from the negotiations for a new collective bargaining agreement due to the objection from the Union and from other departments who liked the current courier arrangement. The Union further asserted that its representatives were assured by the then CEO, Gary Strong, that Allina had no intention of “throwing long term employees into the street” and that use of independent contractors was inconsistent with Allina’s philosophical approach to labor and its relationship with the SEIU. The Union asserted that the Employer is now simply trying to achieve something through the guise of the Strategic Alliance it was unable to gain through negotiations.

18. Finally, the Union asserted that the entire process was tainted by a fact discovered somewhat late in the process that the son of Mr. Tim Grote, Director of Facility Management, and who was deeply involved in the decision to outsource to Dynamex, is now working for Dynamex. The Union asserted that this conflict of interest taints the entire process and that the arbitrator should deny the Employer’s position based on this alone.

The Union seeks an award denying the proposal to outsource the couriers at this time.

MEMORANDUM AND DISCUSSION

The essential facts of the case were virtually undisputed. Allina Hospitals owns and operates 11 hospitals in the Minneapolis and St. Paul area along with dozens of smaller clinics in Minnesota and Wisconsin. When equipment, information or supplies are needed in one location from another Allina has for years operated a courier service to shuttle that from place to place.

Currently, Allina uses a mixed approach to courier services and utilizes both scheduled stops as well as non-scheduled stops. The Allina Courier group, represented by the SEIU, currently provides most of the scheduled stop service. As noted, this group is presently comprised of 17 employees, some of whom have been with the Employer for many years. The entire bargaining unit is now approximately 1263 employees.

The Employer also uses outside contractors for non-scheduled stops, including Dynamex. These third party contractors are not represented by the Union in this matter.

The evidence showed that the annual cost for all courier services was approximately \$2.7 million. Of this amount, \$1.4 million was for internal courier services and \$1.3 million for the outside contractors. The annual cost for the Allina Courier group was \$1.15 million. Approximately 95% of the work the Allina Couriers do is scheduled stops so the annual cost for scheduled stops provided by the Allina Couriers is thus approximately \$1.09 million.

In 2007 the Union sought to insource some of the non-scheduled stop work and asked for a study to be done of that possibility. This was done, not surprisingly, to see if the Union could increase the work its members were doing, but also after Union drivers noticed some duplication of stops by outside vendors. Union drivers noted that many times they were at a location at the same time as outside vendor drivers were also and thought greater efficiency and cost savings could be achieved by consolidating courier services by using the Union drivers. The parties began an extensive study to determine the feasibility of such a result.

The process was in two parts: to determine how much was currently being spent on courier services and for which such services and second, to determine the needs for courier services. The first portion of the study resulted in the cost figures noted above. As the result of the second part of the study it was determined that the Allina Couriers could not realistically provide non-scheduled services, sometimes referred to as “on demand” services.

At some point however the process turned to a question of whether the scheduled stop service, presently provided by the Union Allina Courier drivers, could be provided more cost effectively by outside sources. A Request for Proposals, RFP, was prepared by Allina’s Supply Chain Management department, which also facilitated this process. The RFP was sent to several outside vendors and Dynamex was the lowest bidder.

The Union claimed that some parts of the initial process were flawed and that the Union did not get the same information or have an equal opportunity to bid as the outside contractors. The evidence showed that while there were some flaws in the initial process, eventually the Union was given the chance to bid on the project. The Union submitted a revised bid following the mediation of this case and after the other outside bidders had already submitted their bids. At the arbitration though, the Union did not assail the figures themselves and acknowledged that if the Allina Couriers were replaced by Dynamex drivers the Employer would save money. The parties further were quite clear that the arbitrator is being asked solely whether the term “extraordinary circumstances” as used in the Alliance Agreement allows the Employer to subcontract courier services to Dynamex under these unique facts. The arbitrator was not being asked to somehow re-form the existing contract or select a better cost saving mechanism to provide courier services.

The Union made some reference to the possibility that the cost savings may be something of a loss leader by the outside contractor and that the figures may not reflect the true cost of delivering that service and raised the prospect that the costs might well creep up in subsequent years. There was no actual evidence of that either. Thus, for now, the bids used provide the factual basis for this decision.

The Dynamex bid was significantly lower than the Allina Couriers/Union bid for scheduled stop courier services. The Employer compared the current expenditure of approximately \$1.09 million for the Allina Couriers to the Dynamex bid of just under \$645,000.00 for scheduled stops and noted that the cost is lower by approximately 40%. The Union did not assert that this was “wrong” nor did it assail the numbers themselves. It is this cost saving that is at the heart of this case.

It is of some significance that this case arises not out of the traditional collective bargaining agreement, but rather out of a Strategic Alliance Agreement. The evidence showed that the underlying principles of the Alliance Agreement is for the parties to work more cooperatively to better serve the core mission of Allina and at the same time strengthen the ongoing relationship between the parties and to protect the jobs currently held by Union members. In most cases, the parties’ interests are not at odds with one another and there is much to be gained by working cooperatively to deliver better and more cost effective services and to maintain employee loyalty and longevity.

As Mark Twain once wrote though, “in theory there is no difference between practice and theory but in practice, there is.”

The basis of the Employer’s argument is that the nearly 40% cost savings, i.e. some \$447,000.00 annually, is an “extraordinary circumstance” within the meaning of the outsourcing language cited above. There is no further definition of that term in the Agreement. As one can imagine, the parties differed diametrically over what the term means in this context.

Before diving into the analysis and arguments and precedent relied upon by the parties, several things can be dispensed with now. First, there was the allegation that the entire process was tainted due to a conflict of interest by one the principals in the decision making process at Allina. The Union asserted that Mr. Tim Grote’s son works for Dynamex and that this creates the appearance of impropriety that should give the arbitrator grounds to halt the entire process.

The Employer did not dispute that Mr. Grote's son does indeed work for Dynamex as a contract driver. There was no evidence that he was hired to perform work at Allina though, as Dynamex has many other accounts and he may or may not perform work for Allina in the future. Further, the Employer asserted, and the Union did not dispute, that Mr. Grote's son only began working for Dynamex in March of 2009. It was clear that this process has been going on since 2007 and that the Employer's decision to attempt to outsource to Dynamex was made well before March of 2009. Thus, there was no evidence whatsoever that the decision to outsource was in any way related to Mr. Grote's son being hired by Dynamex.

Second, the Union asserted that while there is no definition of "extraordinary circumstances" in this agreement, the arbitrator should take into account the definition of that term as used in another such Strategic Alliance Agreement between the SEIU and Kaiser Permanente. The Union asserted that this Agreement was based on the Kaiser Agreement and that the definitions used there should be taken into account in determining the parties' intent in this Agreement.

While it would certainly have been helpful to include these definitions found in the Kaiser language, the parties made a conscious decision not to include that language here. See Letter from James Bialke dated March 20, 2009. Further, while there were discussions about including subcontracting language in the collective bargaining agreement, see below, it was clear as asserted by the Employer, that the parties decided to leave the term "extraordinary circumstances" to a case-by-case analysis. Thus, the definitions found in the Kaiser language were of little evidentiary value here. While they may well have influenced how the Union viewed this in negotiating the Alliance language; it is the intent *as expressed to the other party* to the negotiations that governs the determination of contractual intent. Here, what was expressed was that the parties did not want this language in this agreement and the Union cannot now rely on it to form the basis of the determination of what "extraordinary circumstances" means now.

Turning to the language of the Strategic Alliance Agreement itself, is clear that the language does create something of a presumption against subcontracting and states that “bargaining work will not be outsourced except in extraordinary circumstances.” How much of a presumption of course depends on the facts and circumstances of each individual case and therein lies the rub.

As noted above, the basis for the Employer’s claim is that such a significant cost savings based on lower wages and benefits alone is an “extraordinary circumstance” and should be allowed. The Employer also noted that there are “soft” costs to be saved by outsourcing and pointed to the cost of workers compensation, the cost of maintaining and replacing vehicles and the inchoate liability of having drivers on the road with the possibility of personal injury and property damage accidents.

The parties did not emphasize nor provide any detailed explanation of how much these items cost but it would appear that this was something of a false argument. Obviously, these costs will be incurred by someone and if the costs are being accounted for in the bids, they would be also presumably part of the Dynamics bid as well. Vehicles will need to be replaced and maintained and these costs must be paid for somehow. These costs should, under most circumstances, be accounted for in the various bids of the companies bidding on the Allina work. So too would the costs of liability and other insurance. The Dynamex drivers are independent contractors and may well not have their own workers compensation insurance under Minnesota law, see Minn. Stat. Ch 176, but that was not clear on this record.

It was apparent then that the soft costs alone would not account for the significant reduction in costs between the Dynamex and Allina Courier bids. Here it was clear that the vast bulk of the cost reduction was based on the lower wages and benefits being paid to the Dynamex drivers as compared to the Allina Couriers. It is this fact that is at the very heart of this issue as well and is the very thing that makes this case so difficult to decide.

Before launching into the discussion of the respective arguments and assertions made by each party it is important to note that seldom has there been a more difficult case to decide. Frankly too, there was no satisfaction in either outcome – ruling in favor of the Employer results in significant cost savings which will free up funds to do other tasks, such as patient care. It would also mean that 17 individuals, many of whom have been with the Employer for decades, will likely lose their jobs.

On the other hand, ruling in favor of the Union preserves the courier drivers' jobs and maintains the status quo but also preserves an institutional inefficiency that will "cost" the Employer some \$447,000.00 per year. Neither outcome is particularly satisfying. While the arbitrator cannot order it, it would be best for the parties' relationship as expressed in the Alliance to work together to implement this decision to continue to work toward the mission set forth in the Alliance Agreement.

The Employer argued that a 40% savings is critical in order to stay competitive, especially in an economic environment that is literally squeezing the reimbursements and insurance payments made to healthcare providers like Allina to a bare minimum. There is of course some cogency to this argument, as the economic headlines reveal. The Employer also noted that the Union's proposals either did not result in any cost savings or were merely cost shifting proposals. The question though is not whether the Union's bid is competitive but rather whether this is an "extraordinary circumstance" as contemplated by the Alliance Agreement.

The Union acknowledged that it is not at all surprising that the costs are higher since it is predictable that Union wages and benefits are higher. That is the result of the collective bargaining process and years of hard work to gain those concessions. The Union also argued that if the outsourcing is allowed it will open the door to have this happen over and over with other positions. Janitorial, housekeeping, laundry, food service employees, even nursing assistants and LPN's could be outsourced and eventually the Union's very position within this unit could be threatened.

While there is no evidence of the Employer's intent to do this now, there is also some cogency to this argument. Both parties cited prior arbitration cases and commentators in support of their position. These cases will now be discussed, and it is clear, as noted by one of the authors, that there is something here for everyone.

The starting point for this discussion is generally Elkouri's *How Arbitration Works*, BNA, 6th Ed. P 743 et seq. who notes as follows: "The right of management to subcontract, in the absence of specific contract restriction, has been the subject of numerous arbitration cases. The basic and difficult problem is that of maintaining a proper balance between the Employer's legitimate interest in efficient operation and effectuating economies, on the one hand, and the Union's legitimate interest in protecting the job security of its members and the stability of the bargaining unit, on the other." Id at p. 744. As asserted by the Employer, and supported by Elkouri, "the Employer's business interests must be balanced against the impact on the bargaining unit." Id at 745-46. These comments, as well as those cited below, were certainly taken into account in making this decision.

Elkouri notes as follows:

"where the labor agreement is silent about subcontracting, one important factor considered by arbitrators under the 'balancing' test is the effect of subcontracting on the bargaining unit or unit employees. Where the subcontracting has little or no effect on the unit or its member, it is likely to be upheld by the arbitrator. Where subcontracting is used either to replace current employees in lieu of recalling employees on layoff, it is less likely to be upheld. A second factor – the Employer's justification for subcontracting work – also is an important factor. Arbitrators are more likely to uphold the contracting out of work where it is justified by sound business reasons." Id at 747.

Professor Theodore St. Antoine's well regarded *Common Law of the Workplace*, BNA Books, 2nd Ed., Section 4.4, p. 122-125 (2005) provides similar conclusions as follows:

"when the contract is silent, many arbitrators hold that the Employer retain the right to subcontract in pursuit of efficiency. No arbitrator, however, deems this right to be unfettered. ... Arbitrators who acknowledge implied rights to subcontract may also infer implied restrictions based on standards of reasonableness or good faith.

The factors most commonly used to assess whether the Employer's decision was reasonable include: Business justification, such as efficiency or competitiveness. Merely paying lower wages for the same work is generally not considered a reasonable justification. Past practice – if certain work has been contracted out in the past without protest, arbitrators usually will conclude that it is reasonable to do so again. Bargaining history – Parol evidence may be considered when the parties' intent is not clear from the contract language. Generally a party may not achieve at arbitration something it tried and failed to achieve at the bargaining table. Impact on employees, the bargaining unit or the Union – many arbitrators will conclude that a decision to subcontract is not reasonable if it causes a substantial portion of the bargaining unit to lose employment or is designed to undermine the Union's presence in the workplace." *Common Law of the Workplace*, at 123-124.

Several commentators have even gone so far as to develop various sets of criteria to determine the propriety of subcontracting. Elkouri lists these as follows:

1. Past practice: whether the company has subcontracted the work in the past.

Here this is something of a mixed bag. The work has been contracted out to third parties for the non-scheduled stops but has apparently not used third parties in the past for the scheduled work.

2. Justification: whether subcontracting is done for reasons such as economy, ... or other sound business reasons.

Here this factor mitigates slightly in favor of the Employer. The cost savings are significant although there are no other significant reasons for this, such as safety, plant security or maintenance of secondary sources for production. The footnotes cite cases that refer to cost savings but those cases seem to be based on Employer's who were facing economic catastrophe unless something radical was done. See, *Nexitra, LLC*, 116 LA 1780 (Gregory 2002). There the arbitrator noted that "business as usual would have guaranteed business disaster." That is certainly not the case here but a 40% cost savings potential is clearly nothing to be ignored or minimized.

3. Effect on the Union or bargaining unit. Whether subcontracting is being used as a method as a method of discriminating against the Union or whether it substantially prejudices the status and integrity of the bargaining unit.

Here there is no evidence of discrimination or that this is being done to undermine the Union security clause. However, the entire courier unit would be replaced by the outsourcing so this too is something of a mixed bag here. The Employer correctly points out that this is a very small percentage of the total unit. However, when 17 employees lose their jobs it is not to be taken lightly or ignored.

4. Effect on unit employees. Whether members of the bargaining unit are ... displaced, deprived of jobs previously available to them or laid off.

Here this mitigates solidly in favor of the Union as it is clear, as will be discussed more below, that the outsourcing is not a one-time or temporary replacement of the work but is rather a permanent displacement of 17 workers.

5. Type of work involved: Whether it is work that is normally done by unit employees or work that is frequently the subject of subcontracting or work that is marginal or incidental in nature.

This will also be discussed more below and was the source of considerable dispute. The scheduled stops work has typically not been subcontracted out even though the on demand work currently is. Moreover, the Employer argued that the work is incidental to the main mission of Allina – patient care. Here though the Union correctly points out that all jobs are necessary to the main mission, whether that job is the surgeon wielding the scalpel or the doctor prescribing life giving medication, the nurse who cares for the patients in ICU or the courier that delivers necessary information supplies or equipment to enable those professionals to perform their jobs. A modern day aircraft carrier is staffed by some 5000 “employees,” only approximately 250 of which are pilots, yet the main mission of such an operation is to launch and recover airplanes. Simply stated, the work, while not direct patient care, is not marginal in nature. If for example, one of the jobs the drivers had been performing was light maintenance on the vehicles and this was the work sought to be outsourced, this would be a very different discussion. *That* work would be incidental to the main tasks performed by the drivers. Here however the work sought to be outsourced *is* their work. Thus, this factor mitigates in favor of the Union.

6. Availability of qualified employees. Whether the skills possessed by available members of the bargaining unit are sufficient to perform the work.

This clearly is a factor in favor of the Union. The Dynamex drivers would simply be asked to perform virtually the same work as do the current employees.

7. Availability of equipment and facilities.

This too mitigates in favor of the Union. The Employer asserted that the Dynamex routing and tracking system is superior to what Allina has now. The Union did not seriously challenge that the tracking system used by Dynamex is somewhat “better” although it was not clear how or by how much. Clearly, the work is being done now by the Allina Courier drivers and the equipment and software necessary to match the Dynamex routing and tracking system could certainly be purchased and the Allina Couriers trained to use it. This would of course require an expenditure of capital monies that Allina may or may not have. On balance though while it is possible that the Dynamex system could achieve some efficiency, it is not the case that their operation is so far superior that it became a major factor In this case.

8. Regularity of subcontracting: Whether the particular work is frequently or only intermittently subcontracted.

Here, as noted above, the scheduled work is apparently only rarely subcontracted even though the on demand work is currently contracted out virtually all the time. On balance this too mitigates in favor of the Union.

9. Duration of subcontracted work: Whether the work is subcontracted for a temporary or limited period.

This factor mitigates in favor of the Union as well as it is clear that the intent is to replace the Allina Couriers permanently.

10. Unusual circumstances involved: Whether the action is necessitated by an emergency, some urgent need or a time limit for getting the work done.

Here this too mitigates in favor of the Union as it was clear that there is no emergency or other exigency the Employer was trying to meet. Indeed, the entire issue arose because of the Union’s initiative in seeking to insource the on demand services. Clearly, the economy in general is shaky at best and this is especially true for the healthcare industry. The facts here however did not demonstrate that the subcontracting was motivated by an emergency or some impending economic shortfall to justify this action.

11. History of negotiations on the right to subcontract: Whether management's right to subcontract has been the subject of contract negotiations.

Here, there is some evidence that the Employer brought this up in negotiations but that any restrictions in the collective bargaining agreement were rejected by the Union. Instead the parties opted to place the language found in the Alliance Agreement; i.e. extraordinary circumstances. While there was no direct evidence as to what the statements were in those negotiations or the exact facts are, we do know that the Employer was not successful in getting language in the agreement. Elkouri notes though that the Employer always has the right to subcontract, within the limitations set forth in this discussion. This was but one factor to be considered but did mitigate slightly in the Union's favor.

Other commentators have a slightly different set of criteria but the essential features are similar. Professor Anthony Sinicropi in his treatise on subcontracting, *Revisiting An Old Battleground – The Subcontracting Dispute*, Proceedings of the 32nd Meeting of the NAA, p. 125, (1979), added a 12th factor to those listed by Elkouri as follows: Was the required work included within the duties specified for a particular job classification? Here this too appears obvious and cuts in the Union's favor.

More important to this discussion are some of Professor Sinicropi's observations about the nature of the bargaining relationship and subcontracting. Sinicropi summarized data and conclusions based on prior arbitral commentators and outlines the somewhat extreme positions put forward by Unions and management. He notes that the implied limitation on subcontracting is invoked with considerable caution and that contracting out is generally not a present threat to the scope of the bargaining unit. This undercuts the Union's claim that there will be a "parade of horrors" leading eventually to many other bargaining unit positions being contracted out if the door is opened here. See also, Arbitrator Nolan's discussion in *Uniroyal, Inc and United Textile Workers Local 1800*, 76 LA 1049 (Nolan 1981), noted below.

Sinicropi observed that recognition clauses do not establish a bargain that all of the jobs must be performed by the bargaining unit but pointed out that management cannot avoid the contract or undermine the Union by placing it in the “impossible situation of having to agree to cut contract wage rates in order to prevent the company from contracting the work out.” Sinicropi further noted that “the great preponderance of awards sustaining the Union were in situations where the only apparent or stated economy of operations possible to the subcontractor were lower wage rates. The company cannot ‘contract out’ bargaining unit work to its nonunit employees. The arbitrators will take a long look at contracting out regular, permanent work since Union jurisdiction and employee status are involved.” Id at p 129.

He further notes that “if the work is temporary or irregular, the awards seem to say that the company *can* contract it out – that there is no impact on the status of the exclusive bargaining agent or the employees.” Id. (Emphasis in original). Here however, the work is not being contracted on a temporary or irregular basis and the evidence showed that this would be a permanent replacement of all of the drivers by non-union contractors.

Sinicropi then discusses the various types of situations and clauses where contracting out becomes an issue. His 12-factor outline derives from decisions involving situations where the contract is silent. Here obviously there is a limitation placed on the right to subcontract and Sinicropi discusses various types of clauses where there is such a limitation but none appear to directly apply here.

In discussing clauses that restrict subcontracting where products are customarily made by the unit employees however he found that some arbitrators go so far as to deny the right to subcontract where “the *effect* tended to deprive and undermine, even with no ill-will, then the original ‘good intentions,’ the wag says, ‘pave the road to hell.’” *Consolidated Aluminum, Co. and aluminum Workers Union*, 66 LA 1170 (Boals 1976). (Emphasis in original).

The arbitrator in *Consolidated Aluminum* also went through an exhaustive analysis weighing the factors in favor of the respective parties and determined that the contracting out was not allowed in that case even though there was no actual evidence of anti-Union animus or intent to undermine the unit since the effect of the contracting out had that very effect. Even Sinicropi observed that Arbitrator Boals' analysis seem to go a bit too far but that it does affirm the Union's concerns here. While the "creeping effect" raised by the Union may or may not be the deciding factor, it is certainly a factor to be considered. These principles and general findings support the Union's position given the facts here.

Studies like this are helpful but do not provide "bright line" guidance. As one arbitrator put it, "after examining these studies [on subcontracting] and many of the decisions discussed, it is fair to conclude that no one, whatever his initial inclinations or prejudices, will go away from them without finding something he likes. Like the town fair, there is something for everyone." See, *United Papermakers and United Paperworkers*, 40 LA 737 (Kadish 1962). See also, *Olin Mathieson Chemical Corp.* 36 LA 1147 (1956) "there is no general agreement as the basic principles which should serve as the guide to a fair and equitable decision [on the question of the propriety of subcontracting.]" It is fair to say that the passage of time has not made this question any easier.

The Union cited *Bendix Corp and IAM, District Lodge 71*, 41 LA 905 (Warns 1963) for the proposition that cost savings alone do not provide adequate grounds to justify subcontracting even where the contract was silent on subcontracting. The arbitrator discussed the sorts of "special circumstances" that could justify subcontracting of work normally performed by unit members. To paraphrase the arbitrator's rationale: subcontracting may be appropriate where the bargaining unit employees do not possess the skills or training necessary to do a certain job. Under those circumstances, it is appropriate to bring in personnel who do possess those skills or expertise for a finite period of time. Likewise, if there is a time constraint that necessitates bringing in outside help, again for a finite period of time, subcontracting may be appropriate. The arbitrator noted that there may be other circumstances where contracting out may be appropriate but did not elaborate.

The arbitrator in *Bendix* noted that the motive of saving money is not only perfectly legitimate but is also management's right and responsibility. However, he noted that "this sound principle of management in its more immediate aspects is sometimes limited by contracts with other companies; if for example, the Company enters into an exclusive agreement to purchase all of its raw materials from another Employer, it cannot force the renegotiation of that agreement, simply because it later found a supplier that could 'beat the rate.' The traditional sanctity of contract prevents this." 41 LA at 906.

The Union also cited *Sealtest Foods and IBT Local 246*, 48 LA 797 (Valtin 1966). The arbitrator again ruled against the attempt to contract out work previously done by the bargaining unit. The grievance arose over the proposed subcontracting out of certain janitorial work. The parties' contract provided only that the "Employer will make every effort to maintain the existing job content, services and work performed by employees covered by the contract consistent with economic conditions. If [the] Employer desires to subcontract, transfer, assign or lease such job content, service or work, the Union will be consulted before such change is made and every effort will be made to relocate employees whose work or services are to be subcontracted, transferred, assigned or leased."

The arbitrator noted that the proposed contracting out would permanently displace the affected employees and that any call back rights they had would be extinguished within one year from the layoff. The Company had alleged that the janitorial services were not being done well enough and that the Company would save nearly \$19,000.00 annually. After going through an exhaustive and mostly irrelevant discussion of how the agreements in question should be interpreted the arbitrator determined that the agreement in question should be interpreted as though they were silent on the question of subcontracting even though it contained the provisions set forth above.

The arbitrator noted that “it goes without saying that I neither dismiss a saving of nearly \$19,000 a year as something insignificant nor lightly make a ruling which in effect tells Management that it is not empowered to run its enterprise in accordance with what it considers the clear dictates of its first responsibility. As indicated, however I do not believe that a ‘good cause’ showing is itself enough to sustain a contracting-out action. (If it were, bad faith would be the only ground for overruling Management). It is, rather, by a balance process of all the pertinent considerations on *both* sides of the coin that a decision is to be formulated.” 48 LA at 801. (Emphasis in original).

The arbitrator listed the reasons for his decision in favor of the Union as follows:

“The contracting-out for providing the janitorial services would be a *permanent* arrangement. It is not a special one-shot project that is here involved. The janitorial work has long been done by the Company’s own employees; it has never been anything but bargaining unit work from the inception of the Office Agreement; and the internal means of doing it has therefore been heretofore been considered a perfectly satisfactory means. By virtue of the above, there are 5 long service employees whose sole and full-time occupation is and has been that of Porter. Accompanying that is the fact that they are without seniority rights in any other job. It cannot be accepted that the work in question requires unusual skills, equipment or managerial or technical know-how. The very contrary is true. The industry practice in the Washington area, though not uniform, favors the Union. The savings which the contracting out means would bring is the result of two things: 1) the contractor’s estimate that the work on most occasions could be accomplished with less than half the manpower ... 2) the fact that the contractor’s employees are compensated at an hourly rate about \$0.60 below that of the [the affected employees].” Id at 802.

The arbitrator rejected the notion that the work could be done with so vastly a reduced workforce and focused instead on the notion that the work will be done at the lower hourly rate. The arbitrator referenced to the so-called Crawford report, referenced in Professor Sinicropi’s paper noted above, as “beating the Union’s prices.” The arbitrator noted too that the janitorial work here was not merely incidental or peripheral activity. It occupied 10% of the bargaining unit workforce and the arbitrator saw that as having substantial effect on bargaining unit work.

As with many of the cases cited by the parties, there was something for everyone. Several of the factors listed by the arbitrator in *Sealtest* cut in opposite directions when applied to the facts here. Certainly, the fact that this will be a permanent replacement supports the Union's claims. Further, the scheduled stop work has largely been done by Allina Couriers in the past but not apparently exclusively, as a small percentage of the work is apparently done by others. The evidence showed that out of the \$1.15 million spent on scheduled stops, some \$1.09 million is done by the Allina Couriers. The implication is that at least some of that work is done by someone other than the Allina Couriers.

It is not clear on the facts presented what seniority or bumping rights the couriers would have if they are laid off. There was some discussion regarding statements made by the past CEO of Allina and his commitment that Allina intended to find appropriate jobs for them but no hard evidence of that. Accordingly, this factor did not weigh heavily one way or the other on these facts.

Here it is clear that no special skills or training is necessary. The Employer argued that Dynamex has better tracking equipment that would make it somewhat more efficient but there was no evidence that the present couriers could not learn this technology or equipment easily. There was certainly evidence that it would cost more to provide this technology but no hard evidence that the efficiencies to be achieved through the better tracking equipment justifies subcontracting on its own.

There was no evidence as to how many employees would be used by Dynamex so no hard determinations can be made on the question of whether the cost saving is being achieved through the use of fewer employees. It would seem that the same sort of analysis by Arbitrator Valtin in *Sealtest* would apply here as well but the preponderance of the evidence shows that the vast bulk of the savings is related to lower wages and benefits. Accordingly, this mitigates in favor of the Union on these facts.

There was the question of whether the courier work was incidental to the main mission of providing the best quality healthcare. Certainly only 17 of perhaps nearly 1300 employees would be laid off if the contracting out is allowed to go forward – far fewer than the 10% in *Sealtest*. Certainly too however, the same sort of analysis applies here to the incidental nature of the work. The couriers are clearly important to the overall operation; without them the function of delivering healthcare would not be as effective or as efficient. Without them patient care would most possibly suffer. Again, as noted above, if the work being proposed to be subcontracted were incident to the *courier* work, such as light maintenance or the like, then the factor would have vastly different impact. Here however, simply because the courier service is not the main function of a healthcare facility it cannot be said that the couriers are merely peripheral.

The Union also cited *National Distillers and Chemical and Distillery Workers #32*, 78 LA 286 (Gibson 1981) for the proposition that subcontracting out of bargaining unit work is not permissible merely because the work can be done cheaper by a subcontractor. There the facts showed that the Employer was losing money bottling certain miniature sizes of beverages. There pursuant to a contract provision requiring that the Union be “consulted” whenever subcontracting is being considered, the Union was asked for ideas that might help the situation and to find ways to save money.

The arbitrator in *National Distillers* noted that the “basic problem in subcontracting disputes is to strike the proper balance between the Employer’s legitimate interest in efficient operation and effectuating economies and the Union’s legitimate interest in protecting job security of its members and the stability of the bargaining unit. ... Elkouri, on the basis of extensive analysis of the cases, asserts that more recent cases fall into either one of two categories – (a) those finding the recognition, seniority wage and other clauses of the agreement contain an implied limitation upon management’s right to subcontract; or (b) those in which management is permitted to subcontract when it does so reasonably and in good faith.” Arbitration Gibson then cited to the 11 factors noted above from Elkouri’s treatise and found that these weighed in favor of the Union in that matter.

He also cited *Pet Milk* 33 LA 278 (McCoy 1946), where the venerable arbitrator Whitley McCoy held that “ a company and a union do not bargain for wages, hours, overtime, etc., in a vacuum. They bargain for the performance of certain work, and set the terms for such performance. If, having set those terms, the Company can avoid compliance by the simple device of contracting; the entire contract could become a nullity merely because of the legal concepts surrounding independent contractors and the master-servant relationship.” 33 LA at 279.

The arbitrator further found that the Union attempted to insert a provision against contracting in the most recent negotiations but failed to do so. Despite the line of cases holding that generally a party may not gain in arbitration what it failed to gain through negotiations, the arbitrator still held that there must be a balance of the respective interests with respect to the implied obligation not to contract out where that decision has the effect of injuring the bargaining unit.

It was somewhat apparent that the arbitrator there was tilting to a large degree to rule in favor of the Union, however, the balance came out in favor of the Union in that particular case. The cost of bottling the miniatures was related to several factors *other* than wages and benefits. Further, and significantly, the arbitrator found that the subcontracting might not actually save as much money as the Company was asserting, the implication being that the Company’s motives may well have been to undercut the Union, although that was not directly stated in the opinion.

The holding there was very much based on the facts of that case and the arbitrator went through a somewhat exhaustive discussion of the costs of contracting versus the cost of retaining the bargaining unit employees. No such analysis can be made here since the parties specifically instructed the arbitrator in this matter was not being asked to determine of a “better” way to cut costs. Further, there was little if any evidence upon which such a determination could be made here.

The arbitrator refused to allow the subcontracting of certain trash hauling services in *Champion Papers and United Paperworkers Local 1967*, 51 LA 997 (Volz 1968). There however the contract provisions were very different from those here and actually required the consideration of a specific list of factors. Those factors included timely availability of required skills and personnel, tools and equipment, the time limits within which the particular work must be done, the availability of related services cost and the continuity of the other operations within the plant. Significantly, there was also a provision that “no qualified regular employees in the concerned departments will be laid off or caused to lose regular scheduled time as a direct result of using outside contracting services.” 51 LA at 997.

The arbitrator also went through a series of factors, such as the cost savings, the fact that it would not be a “one-shot affair” but rather a permanent layoff of the affected employees and held that the totality of the evidence, coupled with the very strong language against subcontracting in that contract, prevented the proposed subcontracting. He further rejected the argument that the subcontracting was to coincide with several proposed retirements and admonished that if subcontracting could be substituted for the requirement of filling job vacancies in this fashion, such would erode the integrity of the unit.

This case, while providing strong language in support of the Union on its holding was based on very different facts and a very different contract. It was not given much weight.

Finally, the Union relied perhaps most heavily of all the cases it cited in support of its position, on *Uniroyal, Inc and United Textile Workers Local 1800*, 76 LA 1049 (Nolan 1981). Arbitrator Dennis Nolan, a past president of the National Academy of Arbitrators, noted that the work had been divided up between bargaining unit and non-unit employees and outside contractors, very similar to the situation presented here. The Company sought to subcontract certain janitorial work and that this would save some \$11,000.00 per year.

Here of course the savings are far higher and while the Union questioned the validity of the numbers at first and even raised the scepter that this would be a “loss leader” for the subcontractor in an effort to get the business and then it would slowly raise prices to make up the losses, there was no hard evidence of that. As noted, the Union did not raise that in any serious way at the arbitration.

In *Uniroyal*, the Union was asked to submit cost saving ideas but did not submit any. After examining the facts Arbitrator Nolan found that “in short, the decision was an economic one: the Employer now has the same work done in largely the same fashion but at a much lower price. There is no express reference to subcontracting in the collective bargaining agreement.” 76 LA at 1049.

The arbitrator further analyzed the various arguments made by the parties. He first rejected the Union’s claim that the length of service by many of the employees should be considered. Arbitrator Nolan’s determination was particularly cogent in this regard. He noted that the dispute was over the Employer’s power under the agreement lay off the janitors. He further noted “that power exists or not regardless of the length of time the jobs concerned have been in the bargaining unit.” Id at 1049

He further rejected the Union’s claim that the working conditions and the work itself were similar. He ruled that “this is a distinction without a difference. ... The Employer either has the right to subcontract the work or it does not, and in either case it matters not whether the subcontracted work is performed in the plant or miles away.” Id.

He then analyzed the Employer’s arguments and rejected the notion that greater efficiency could be achieved if the subcontracting were allowed. He stated as follows:

“The Employer ... suggested that there were other reasons besides money for the subcontracting, among them the desire to eliminate a ‘fragmented’ cleaning force, improvement of the quality of the work and safety and health considerations. ... ‘fragmentation’ is simply a factor bearing on efficiency, which is really a question of money. There was no evidence of any lack of quality in the janitorial work prior to subcontracting ... Stripped of these side issues and stated in the baldest terms possible, the problem to be resolved is this: in the absence of any express contractual prohibition, may the Employer subcontract bargaining unit work to save a substantial amount of money, if doing so requires layoffs? That issue is easier to state, but more difficult to answer, than the preliminary matters discussed above.” Id at 1050.

Arbitrator Nolan commented on the plethora of arbitral awards and other analysts that have weighed in on the subcontracting debate. He like many others found that “those fine discussions, suffice it say ... offer a few general rules, a great many overlapping and sometimes contradictory guidelines, and far too many arbitration awards on both sides of the question to be of much help in resolving it.” *Id* at 1051. Truer words were never spoken.

From the vast body of literature and awards Arbitrator Nolan distilled several general rules, which frankly was as cogent a discussion as can be found. He pointed out that even a silent contract impose some limitations on management’s freedom to subcontract. He cites Professor Archibald Cox’ article, *The Legal Nature of Collective Bargaining Agreements*, 57 Michigan Law Review 1 (1958) and Elkouri’s passages on subcontracting cited above. From these, he found that “the general rule is that management has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in subversion of the labor agreement and it does not have the effect of seriously weakening the bargaining unit or important parts of it. *Id* at 1051.

Arbitrator Nolan found, as has any arbitrator who has ever struggled with this thorny question, that finding the general rules is one thing; applying them in a rational way to any given set of facts is quite another. As Nolan states quite bluntly: “there is no absolute truth.”

He dismisses the Union’s slippery slope argument, which was virtually the same one made here, and noted that “parties and arbitrators alike should have little trouble distinguishing between integral and ancillary functions and prohibiting subcontracting of the former while often permitting the latter.” *Id*. The difficulty, as discussed, is in determining what is “integral” and what is “ancillary.” He further notes that there is a danger if the subcontracting were to develop into a trend but that “at this early point the danger is not a serious one. ‘Before the Union is entitled to seek relief on this score, it must show by competent evidence that the hazard against which it is seeking protection is current and immediate, rather than prospective.’” *Id*. (Citing *Schluderberg and Kurdle Co.*, 53 LA 819 (Seidenberg 1969)).

One difficulty with this argument is that one may not know when the “danger” has gone too far and it is too late and the damage to the integrity of the Union may have already occurred. Further, “hard” evidence of the Employer’s intent to harm the Union may be exceedingly difficult to prove, especially if the “trend” Nolan discusses occurs over several years and the affected number of employees is small with each attempt to contract out.

In *Uniroyal*, the work to be contracted was janitorial work performed in a factory that built tires. Here the work is certainly different and is frankly a bit closer to the main mission of Allina but again, there appear to be no hard and fast rules for making this determination either – the cases must be decided on a case-by-case basis.

Arbitrator Nolan further found that “numerous cases permit subcontracting for substantial reasons, particularly when the conditions of the subcontracting impose no harm and pose no threat to the Union.” *Id.* Nolan cited several cases on this question that appear to allow the contracting if bargaining unit employees are not permanently laid off, although several allowed it where some overtime would be lost. Here, of course, the issue is not the loss of overtime but rather contemplates the permanent loss of 17 bargaining unit jobs.

Finally, there is the question of the impact on the bargaining unit and its members. In *Uniroyal* 3 unit employees lost their jobs as a result of the contracting there; here it would be 17. Nolan pointed out that while this is a very small percentage of the overall workforce, it is “a significant part of one department.” Here of course it is essentially the entire department, even though that too is a relatively small percentage of the overall workforce at Allina.

The Employer too cited several cases that allowed the contracting; and clearly there are as many such cases out there as there are those that disallowed it. In addition, the Employer argued that there are distinguishing factors in the cases cited by the Union that make this case different enough that the subcontracting should be allowed.

In *Burger Iron and IBT Local 957*, 78 LA 57 (Van Pelt 1982) the arbitrator allowed the subcontracting of delivery services. There however it was apparent from her discussion that the basis of the decision was largely that the Union had attempted to gain language in the contract limiting subcontracting during negotiations but failed to do so. The contract was silent on subcontracting. There was also evidence that the Employer had contracted out delivery services in the past but never when regular employees had been on layoff. These facts certainly distinguish the case from that presented here.

The arbitrator noted though that the question of whether the figures were accurate or not was not relevant. (The case involved a savings of some \$70.00 per trip between the company's two plants in Tennessee and Indiana but the total savings did not appear in the opinion.) What was important was whether the Company used good faith economic reasons for contracting the delivery services. This certainly mitigated in favor of the Employer here but as noted above, the basis was the lack of any contractual restriction and the bargaining history.

In *American Air Filter and United Automobile, Aerospace & Agricultural Implement Workers Local 1346*, 54 LA 1251 (Dolnick 1970) the arbitrator provided a good discussion of the rules with respect to subcontracting and held that the Employer was allowed to subcontract outside yard and garden work to professional gardeners and eliminated that work from the tractor drivers' job classification. Arbitrator Dolnick provided yet another set of guidelines for determining the propriety of subcontracting that can be paraphrased as follows: 1) was the decision to subcontract for lower wages and benefits; 2) was the work substantial; 3) was the work to be contracted basic to the manufacture or service of the Company's product; 4) did the bargaining unit employees have the skill, equipment or tools to do the work; 5) did the contracting out adversely affect the size of the bargaining unit.

On the facts presented there, the arbitrator determined that the work of the truck drivers performing yard and lawn work was not basic to their functions or to the functions of the Company. Also, only one such employee had ever done it and it was far more cost effective and efficient to have an outside contractor perform this work. Finally, the decision was not done because of lower cost but rather because of the desire to have a professional take care of the grounds rather than a truck driver.

Here, for example, if the drivers had been doing light maintenance on the vehicles, such as routine oil changes and very light maintenance, in the past and that had been subcontracted, the argument would be very different. In that scenario, the work to be subcontracted was not only tangential to the main mission of the employer but also to the main mission of the drivers.

Drivers are presumably hired to drive and deliver packages. They are not hired as mechanics and it could well be that such work could be done far better and more efficiently by contractors. That example is just that but provides a basis for the analysis here on what is truly tangential work and what is not and further explains the decision in *American Air Filter* where professional truck drivers had apparently been spending their time mowing lawns and trimming bushes around the facility.

Applying those factors here, it is again apparent that there are factors that weigh in both directions. The proposal to outsource is largely based on lower wages and benefits and the work appears to be “substantial,” although the arbitrator did not provide a very helpful definition of that, and the employees have the skills, tools and equipment to do the job. These factors help the Union here. The remaining factors are somewhere in the middle. While the work is not truly basic to the main service Allina provides it is apparent that the work could not be done as effectively without it. Again, the impact on the bargaining unit appears minimal, 17 of 1300 employees, but the impact on the department is of course far more serious. These last two factors mitigate slightly in the Employer favor here.

In *Westvaco Corp. and United Paperworkers Local 112*, LA 1083 (Duff 1999) the arbitrator again allowed contracting out of certain work in the plant. There the arbitrator noted that the contract was silent and that the only restriction was that the decision be done in good faith. The arbitrator found that the contractor afforded the cost savings through its bulk purchasing of certain materials, rather than from the lower cost of the work force. Further, the Union again attempted to get language restricting subcontracting without success. Finally there was no evidence that the Employer was doing this to undermine the Union or the bargaining unit. This case was distinguishable in that the cost savings were largely the result of a larger contract with the subcontractor that saved the company other costs as a part of that contract. The decision seemed thus to be based on the bargaining history and the lack of any restrictions on contracting.

In *Gruma Corp. and UFCW Local 7*, 120 LA 749 (Greer 2004) the arbitrator allowed contracting of certain driving positions to an outside contractor. Suffice it say that again, there was bargaining history of a failed attempt to gain the very restriction on subcontracting the Union wanted the arbitrator to impose in the case and that this was a significant basis for the decision.

In addition, there was a provision that specifically allowed the Employer the right to “subcontract out any part of its current operations as the requirements of the business demands ... provided that no bargaining unit employee (employed as of the date of the ratification of this Agreement) is terminated or laid off as a result of such subcontracting.”

This seemed clear enough but the grievant was not employed at the time of the ratification of the Agreement so that limitation did not apply. There was another grievant but he had apparently resigned his position with the company and went to work for the very contractor the Company sought to subcontract with. Finally, there were apparently other arbitration decisions involving the predecessors to the agreement that had allowed the contracting in very similar circumstances.

The Employer relied heavily on *Friendship Village and Service Employees Local 1199P*, 121 LA 1760 (Franckiewicz 2005). The arbitrator allowed the subcontracting of laundry work in a nursing home. The evidence showed that the County had fallen on very hard financial times and that the nursing home was losing approximately a million dollars per year. In addition, the County had already laid off a number of laundry personnel before the decision to subcontract. As here, the parties discussed at some length ways to deal with the shortfalls but none were successful so the County decided to outsource the laundry operations. The contract was silent on the subject of subcontracting.

The arbitrator's observations on the general subject of subcontracting are instructive as follows:

“One can posit two prototypical situations of outsourcing one of which would generally be regarded as at the impermissible end of the spectrum and the other as acceptable, in the absence of any explicit contractual provision. Perhaps the clearest example of improper subcontracting would be the case in which the Employer replaced the entire bargaining unit with a temporary agency, using outsiders who performed the same functions, under the same supervision, at the same location and using the same equipment and processes that the replaced bargaining unit employees had formerly done, but at a lower wage and benefits level. ... By contrast an Employer's decision to purchase a hammer used in its operation might be considered subcontracting, since its own employees could have been used to fabricate the hammer. Unless the Employer is a hardware manufacturer ... the use of a hammer is tangential to its operation. , the adverse impact on the bargaining unit is minimal and in all likelihood the cost of fashioning a hammer from raw materials would be many times the price for which for a better quality could be purchased at a store.” 121 LA at 1773.

The arbitrator noted, as by now has become obvious, that this is not a mathematical calculation nor a list that can be checked off and added up at the end. No single consideration is dispositive.

The arbitrator in *Friendship Village* found that the motivation to outsource was made good faith to cope with a severe revenue shortfall. He further found, similar to the facts presented here, that the laundry operation was “not exactly tangential to its purpose, neither was the laundering of linens at the core of its function of providing care for the elderly and infirm. ... [i]nstitutional laundry is somewhat at the periphery of the Employer's operation, and the question in this case is not whether the institutional laundry could have been saved at all costs, but rather whether it is economically feasible to do so, and ultimately whether upon consideration of all relevant circumstances, the contracting out violated any implicit obligation under the collective bargaining agreement.” *Id.*

He further noted that the parties' history indicated a mutual recognition that outsourcing was necessary and proper and that on past occasions several bargaining unit jobs have been lost to outsourcing. That was not shown to be the case here.

Perhaps the salient point in the case though was that while the impact on the overall bargaining unit was relatively minimal, "unless the home reversed the trend of losses, the effect on the overall bargaining unit might well be far worse than gradual erosion [of the bargaining unit.]" Id at 1275. In short, it was apparent that the home would likely close unless drastic cost cutting measures were taken and soon. The arbitrator was persuaded by the notion that the sacrifice of a few might save the many. Here however, the Union is concerned that the sacrifice of a few might well lead to the sacrifice of the rest, at least over time.

Further, and more importantly, there was no showing that the Employer's operation was at serious financial risk unless this outsourcing occurred. Certainly, the sheer size of the potential cost savings was what gave this arbitrator great pause here but there was no evidence that the Employer's operation was undergoing the same level of financial jeopardy as in *Friendship Village*.

Further inquiry into the standards used by other arbitrators and commentators would be to turn what has already become far too long a discussion into an even more unnecessarily lengthy law review article. The question here after all is said and done and after all of the standards and considerations are reviewed, weighed and considered is this what did the parties intend when they inserted the term "extraordinary circumstances" into the Alliance Agreement and do the facts presented here rise to that level such that the courier services can be outsourced.

The parties did not insert a definition of the term "extraordinary circumstances" into the Alliance document but it is not for the arbitrator to create one. The determination, and it will be based on a balancing of the respective interests of the parties here, is based on whether outsourcing of these employees under these facts was within the intent of the parties in negotiating that language.

As in many of the cases cited above, there is something for everyone and a decision in either direction could easily be justified; which is precisely what makes this case so difficult. The basis of the Employer's argument is that the sheer size of the cost savings potential justifies outsourcing. The Employer further argued that there may be other issues, such as greater efficiency in routes and tracking but many of those equate to cost savings as well. There was an insufficient showing that the efficiencies to be achieved or the difference in service arose to the level of extraordinary however. The assertion that vehicle maintenance costs could be saved is again directly related to cost, albeit not all to employee cost.

As the fabled king who once asked his most trusted advisors for a piece of universally true economic advice was told: there ain't no such thing as a free lunch. In other words, these costs will have to be borne by someone and presumably will be worked into the eventual cost of delivery services by Dynamex, whether it is now or later on. This is also true of liability insurance and workers compensation costs as well. While there was no direct evidence on this point, simple economics dictates that these costs will be borne by the end user – here that would be Allina.

Thus, it is clear that the real and perhaps sole basis for this decision is the lower wage and benefits costs that could be achieved by using the lower paid, independent contractor drivers used by Dynamex.

At its heart then the issue boils down to a question of whether these cost savings, as large as they are, meet the "extraordinary circumstances" as intended by these parties here. Despite the compelling precedent cited by the Union, this is a close case indeed. A cost savings of 40% and of nearly \$450,000.00 per year is by no means insignificant in any operation, even one as large as this one and must always be taken seriously. There is no manager worth his or her salt that wouldn't jump at the chance to save that kind of money in any operation.

If this were a simple case of economics or of efficiency this would be easy but it is not. Labor arbitrators are not social engineers nor are we typically hired to be industrial engineers. We interpret disputed language negotiated by parties who now have differing views of what it means as applied to certain facts.

Certainly, the fact that the Employer tried to gain additional language in the collective bargaining agreement was a significant fact that weighs in favor of the Union here. It was not dispositive on its own however since the Employer argued that the size and scope of these cost savings are extraordinary enough to warrant allowing it. Also, this case arises from the Alliance Agreement and the bargaining history was but one factor to consider.

Certainly too the fact that there was no showing that the current employees were not able to do the job was significant. They have the requisite skills, equipment and knowledge to do this job. Indeed, they could probably do it as well or better, at least initially, given their vast experience of the routes and of the personnel with whom they interact at the various locations.

The arbitral precedent went both ways as noted above. No one case was dispositive. Those rulings will not be belabored further but there were factors that weighed in both directions. It was significant that there was no showing of financial crisis at work here, such as in *Friendship Village* that mitigated in the Employer's favor. Certainly if the financial condition of the Employer deteriorates to that level, and it is certainly in everyone's best interest to hope it does not, that would have potentially created an extraordinary circumstances.

Here too the very language and spirit of the Strategic Alliance helped the Union's case. It is clear from the language of the agreement that the parties intended that a significant limitation be placed on subcontracting and that the presumption was to keep bargaining unit jobs. The language of PART THREE II Insourcing and Outsourcing, requires that "When considering insourcing and outsourcing, the Strategic Alliance Agreement principles will be considered as part of the analysis."

It is further apparent from the language of the Alliance Agreement that the parties mutually desired to work together in a collaborative relationship to find ways to deliver the best quality services possible in the most cost effective and efficient way possible and to “create an environment where employees flourish.” These two purposes are noble indeed but find themselves somewhat at odds here. What was clear though, and this was also a significant factor considered in this case, was that the intent as expressed by the parties was to restrict outsourcing even though outsourcing might save some money. It was further apparent from a reading of the Alliance document as a whole that, while some outsourcing is clearly permissible and contemplated, it was clearly not contemplated that lower wage and benefit cost would be used to justify the wholesale layoff of an entire set of bargaining unit members, except in truly extraordinary circumstances. Despite the large potential cost savings shown here, those extraordinary circumstances are not presented as intended by the parties as expressed in the document they drafted.

The Employer may well be left wondering after this what might constitute “extraordinary circumstances” if an annual cost savings of 40% within a department and over \$400,000 does not. The arbitrator cannot render a future looking decision but certainly if the factors such as those cited above; i.e., lack of tools, equipment, training, or lack of time were present, that might constitute such a circumstance. If the economic condition becomes so serious that the very health of the organization is at stake that too might be a significant factor in reviewing a future case. Certainly if the outsourcing is the one time, temporary situation presented in some of the cases cited above (as opposed to a permanent layoff of an entire set of employees); this too would certainly be a factor to consider. Of course, future determinations must wait until future facts arise but those factors will certainly be ones to consider.

As acknowledged by the Union itself, Union workers do cost more. Unions are quite adept at negotiating higher wage and benefits packages for their members than unrepresented employees generally earn and have been for a great many years. There seemed to be little argument that most unionized Employers could get the work done cheaper – if they could just “get rid of” the Union. But Unions do exist and there is a legitimate and well-established societal and statutory basis for their existence. They are part of the basic landscape of the American workplace. While there was no evidence whatsoever that the Employer intended this to be a way to slowly erode the Union’s presence, the final factor that tipped the scale in the Union’s favor was the very factor that seemed to persuade Arbitrator Nolan in *Uniroyal* – the impact on the affected employees.

While a very large savings could be achieved and that might bode well for the operation as a whole and allow the Employer to deliver even better medical care than it does now – and the parties agree wholeheartedly that Allina is one of the premier healthcare providers in the Twin Cities and Minnesota area – 17 employees will be laid off permanently with no solid prospects for their future. They may or may not be qualified to perform other jobs and may or may not have rights to other positions that may or may not have the same wages and benefits as they enjoyed as couriers.

Both parties would have presumably survived and even thrived had this decision gone either way. This is a balancing test and the language of the Alliance was one critical piece in that endeavor. Arbitrator Nolan’s comments in *Uniroyal* about the case with which he was faced (which involved the potential layoff of a much smaller number of employees) could virtually be overlaid to this one: “We cannot know with certainty what the parties had in mind with regard to subcontracting when they negotiated the last contract ... however I am confident they did not intend to permit the body blow to the contract delivered by the Employer in this case.”

AWARD

The facts in this matter did not establish the “extraordinary circumstances” intended by the parties to justify the proposed outsourcing in this matter on these unique facts. Thus, the request to outsource the couriers in this case is DENIED as set forth above.

Dated: June 27, 2009

Jeffrey W. Jacobs, arbitrator

SEIU #113 and Abbott Northwestern Hospital.doc