

**IN RE ARBITRATION BETWEEN:**

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**INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 1145**

**and**

**HONEYWELL INTERNATIONAL**

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**DECISION AND AWARD OF ARBITRATOR**

**FMCS CASE # 090402-55368-3**

**JEFFREY W. JACOBS**

**ARBITRATOR**

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**April 3, 2010**

IN RE ARBITRATION BETWEEN:

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IBT #1145,

and

DECISION AND AWARD OF ARBITRATOR  
FMCS CASE # 090402-55368-3  
Dan Brown grievance matter

Honeywell.

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**APPEARANCES:**

**FOR THE EMPLOYER:**

Susan Hansen, Attorney for the Employer  
Pam Galanter, Attorney for the Employer  
Chuck Bengston, Labor Relations Mgr.  
Mike Walters, Lead Supervisor Tool Room  
Shannon Reents

**FOR THE UNION:**

Katrina Joseph, Attorney for the Union  
Milt Nordmeyer, Sec'y Treasurer #1145  
Bob Arnold, grievant  
Larry Determan, grievant  
Dan Brown, grievant  
Gary Dahlheimer, Union Steward  
Vicki Hansen, Union Negotiating Committee

**PRELIMINARY STATEMENT**

The hearing in the matter was held on February 15, 2010 at 9:00 a.m. at the Honeywell Offices in Minneapolis, MN. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on March 19, 2010 at which point the record was closed.

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement effective January 31, 2007. The grievance procedure is contained at Article 18. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service.

**ISSUES**

The Union proposed the issues as follows:

1. Is the grievance substantively arbitrable?
2. Did the Company violate the collective bargaining agreement by failing to properly notify the Union of its intent to subcontract production of the IGS359-E1 NLOS Cal fixture? If so what shall the remedy be?

The Employer stated the issue as follows:

1. Is the grievance non-arbitrable pursuant to Article 18 – Grievances, Section 3?
2. Are the letter Agreements dated January 29, 1982 and January 29, 1988, valid?

3. If said Letter Agreements are valid, did the Company violate them?

The issues as determined by the arbitrator based on the record as a whole are as follows:

1. Is the grievance substantively arbitrable pursuant to Article 18, section 3?
2. Are the letter Agreements dated January 29, 1982 and January 29, 1988, valid?
3. If said Letter Agreements are valid, did the Company violate them or the provisions of the 131 Agreement between the parties? If so what shall the remedy be?

## **UNION'S POSITION**

The Union took the position that the Employer violated the CBA when it failed to notify the Union before subcontracting the above referenced fixture out to the non-Union MAET Department. In support of this position the Union made the following contentions:

1. The Union noted that the parties have had a long relationship and have negotiated many collective bargaining agreements, CBA's, over the years. For years there have been attached to those agreements so-called Letters of Agreements, LOA's, setting forth specific agreements with respect to various aspects of the parties' relationship on certain specific items.

2. The Union noted in particular one such LOA, which was attached to the prior CBA. That agreement covering the period from 2002-2007 contained a letter dated January 29, 1982 letter requires that the Company follow certain procedures and provides as follows:

“with respect to subcontracting in the Honeywell Minneapolis Operations under the jurisdiction of Teamsters Local 1145,” including:

3. The Department Supervisor will notify the Union Committee before work is subcontracted and will further give considerations to their thoughts and recommendations.

3. During negotiations for the 2007-2010 CBA, the parties attempted to review all of the letter agreements attached to the previous CBA's for continued necessity and relevance. The Union noted that there was considerable effort made to determine which of the LOA's would be left in the contract and which could be combined with others or simply taken out because they were no longer applicable. Because of various factors, contract negotiations ended before all the letter agreements could be reviewed and incorporated into the 2007-2010 CBA.

4. Accordingly, the parties agreed to continue their review of the Letters of Agreement even after contract negotiations had ended. The Union asserted however, that the mere fact that the LOA's were not attached to the CBA for 2007-2010 as they have been in the past did not render them "gone" as the Company alleged. The Union's firm understanding was that they would remain in the CBA until specifically taken out.

5. The Union further noted that in the past whenever the Company seeks to subcontract out work they notify and discuss this decision with the Union, pursuant to the LOA dated January 29, 1982 set forth above. Here the Company subcontracted out a fixture, where the Union members had made a very similar fixtures in the past, without that prior notification.

6. With regard to the arbitrability issue, the Union asserted that the matter is arbitrable. The Union first noted that the Company bears the burden of showing the non-arbitrability of a grievance and that it has not done so here. The Union asserted that there is a strong presumption in favor of arbitrability and cited numerous Court cases in support of that proposition.

7. The Union cited Article 18, Grievance Procedure as follows:

**Section 1.** A grievance is any controversy between the Company and the Union as to the interpretation of this Agreement, a charge of violation of this Agreement, or a charge of discrimination involving wages, hours, or working conditions resulting in undue hardships.

**Section 2.** Grievances as defined in Section 1 above shall be settled in the following manner and the steps set forth must be followed in the order listed and within the time limits prescribed.

8. The Union argued that the merits of the case are not strictly at issue in determining arbitrability. Even if the merits of the case are frivolous if there is a justiciable controversy about a matter contained within the CBA, the arbitrator has the jurisdiction to determine the matter.

9. The Union countered the Company's claim that the grievance procedure specifically excludes this matter. The language relied upon by the Company reads as follows:

Article 18, Section 3 "It is agreed that the following shall not constitute issues for arbitration: ... (b) schedules for production, methods and processes for manufacturing ... ." See, Joint Exhibit 1.)

10. The Union argued that this language excludes matters regarding *how* the production is to occur but that this grievance is about *who* is to perform the work and whether the Company had the obligation under the LOA's in place to notify the Union of its decision to subcontract certain work. Therefore the exclusion does not apply and the matter is arbitrable.

11. The Union asserted that the January 29, 1982 and January 29, 1988 LOA's are still valid. Despite Mr. Bengston's assertion that he told the Union negotiating committee the LOA's would be "gone," citing nebulous provisions of Elkouri, the Union members who were part of the negotiation testified they never heard that. Further, it was their understanding that the LOA's would be discussed further and would remain part of the CBA unless and until they were specifically deleted.

12. Further, even if Mr. Bengston did make that statement during the protracted negotiation, his oral comment has no force or effect since a *written* statement is required and there is no such written statement. The Union cited the 2002-2007 CBA, Joint Exhibit 4, at page 28 (sic), as follows:

Article XXXII, Section 1. This Agreement shall become effective 2-1-02 and shall remain in full force and effect up to midnight 1-31-07. This Agreement shall remain in full force and effect from year to year thereafter unless notice of intention to terminate or modify this Agreement is given sixty (60) days prior to 2-1-07 or any anniversary date thereafter. Notice to modify shall reopen the Agreement only with respect to the terms designated in such notice. Notice of termination or modification shall be in writing and shall be served on the Company at its principal office or on the Union at its principal office.<sup>1</sup>

13. Since the LOA's were part of the 2002-2007 CBA, any attempt to terminate or modify them must have been served on the Union by the Company 60 days prior to the date specified and it was not. Therefore, the Union asserted, the purported attempt to somehow terminate the LOA's during the negotiations was of no force and effect and the LOA's are still very much part of the current CBA by the terms of the Duration Article set forth above.

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<sup>1</sup> The Union cited the 2002-2007 CBA at page 30 for this language but a review of that section revealed that the page number referenced an Appendix regarding Seniority Rules and has nothing to do with this grievance. It was assumed this was a simple typographical error since the language was found at page 28 in Article XXXII, Duration.

14. With respect to the merits, the Union alleged that the clear provisions of the LOA require that the Company notify the Union when there is a decision to subcontract work. The Union acknowledged that the company can make the decision to subcontract but that it has the obligation to notify the Union of it and that it did not do so here.

15. The terms of the January 29, 1982 LOA provide in relevant part that “the Department Supervisor will notify the Union Committee before work is subcontracted... .” The Union asserted that the plain meaning of that language is just what it says: that the Company must notify the Union before work is subcontracted. Here that did not occur and the Company is in clear violation of that specific language.

16. The Union countered the claim by the Company that the Company “has never made” the particular fixture in question and asserted that the Model Makers, i.e. Union members, have made an almost identical part on the past and that they could easily have done so in this instance. The Union cited prior awards between the parties and asserted that arbitrators have made it clear that the terms of the LOA’s cited above require that the Union employees have the right to compete for this work.

17. The Union also asserted that the work in question was bargaining not work. The Union countered the Company’s reliance on the B-11 Award by Arbitrator Bellman and noted that it is both limited to its unique facts and asserted that it requires the Company to prove that a part’s “form, fit, and function evolved as a contribution to the design.” The Union asserted that the Company failed to do so in this instance and pointed to the testimony of Union witnesses who indicated that they believed they could have easily made this part and that the changes in it from previous fixtures were minor.

18. The Union cited the so-called 131 Agreement setting forth the criteria and the process for determining whether the Model Makers should perform the work or whether the work can be subcontracted out to the MAET or some other non-Union department within the Company or outside the Company for that matter. The 131 Agreement provides in relevant part as follows:

1. At the time of building of any part of mechanical nature, those parts to be built to Engineering prints shall be built by Model Makers.

2. At the time of building of any part of a mechanical nature, those parts having detailed and dimensioned sketches, shall be built by Model Makers.
3. At the time of building of any part of a mechanical nature, those parts which can be verbally described and understood and built without the use of prints or sketches, shall be built by Model Makers.
4. At the time of building of any part of a mechanical nature, those parts where specifics of form, fit and function are evolved during fabrication as a contribution of the design, shall be built by Engineering Lab Technicians if the part cannot be built as per item 1,2, or 3.
5. As a part is developed and additional parts are required, work on such parts will be assigned to Model Makers whenever practical.

19. The Union asserted that the Company provided no such evidence as they are required to per the B-11 award. Further, the “form fit and function” were *not* evolved during design and that the Tool Room employees could easily have performed this work. The Union asserted that Union employees have performed this work in the past and that the fixture in question had only minor variations in a few holes to be drilled into it. The original fixtures were in fact made and built by Union employees. Thus it was not necessary to send this work to an outside contractor for design or fabrication.

20. Finally, the Union sought a remedy of 40 hours of pay for the members who lost work pursuant to the Company’s contractual violation here.

The Union seeks an award sustaining the grievance and for the 40 hours of pay lost by Union members due to the Company’s contractual violations in this matter.

**EMPLOYER'S POSITION:**

The Employer took the position that there was no contract violation here. In support of this the Employer made the following contentions:

1. The Employer asserted that the matter is not substantively arbitrable and should be summarily dismissed based on the language of the parties’ grievance procedure. The Employer argued that the grievance in fact involves methods of manufacturing and processes which are specifically excluded from the grievance procedure.

2. The Employer cited the language of Article 18, Section 3 at p. 21 of the 2007-2010

CBA as follows:

It is agreed that the following shall not constitute issues for arbitration: (a) supervision and direction of the working force, (b) schedules of production, methods and processes of manufacturing, (c) the terms of a new agreement.

3. The Employer argued that the decision about whether to use an outside contractor or to use internal employees is a fundamental management right reserved to the Employer under the above language and the clear provisions of the Management Rights clause.

4. The Employer noted that the parties included a new management rights provision which gave the Employer far greater latitude than in years past about what methods and processes to utilize in designing and fabricating parts and fixtures it uses in the manufacture of its products.

5. The language, Article 4, provide in relevant part as follows;

**Section 1.** The Company retains the full and unrestricted right to assign, direct, operate and manage all manpower, facilities and equipment; to direct, plan and control Company operations and services; to establish functions and programs; to make and enforce rules and regulations; to establish work schedules and assign overtime; to contract with vendors or others for goods and services; to hire, recall, transfer, promote, demote, employees for good and sufficient reason; to discipline or discharge employees for just cause; to lay off employees because of lack of work or for other legitimate reasons; to introduce new and improved operation or production methods; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct and determine the number of personnel; and to perform any inherent managerial function not specifically limited by this Agreement.

**Section 2.** Any term and condition of employment not explicitly established by this Agreement shall remain with the Company to establish, modify, or eliminate. Joint Exhibit 1, at page 4.

6. The Employer further noted that this is new language and was added in negotiations to give the Employer greater latitude to make the exact decision it made here. The Employer asserted that the language of the Management Rights clause when read in conjunction with the Grievance procedure makes it clear that the parties intended that decisions about subcontracting work are not subject to the grievance procedure and should not be considered by the arbitrator.

7. The Employer also asserted that the LOA's are no longer in effect and that the Union was told specifically during negotiations that they were gone unless they were written into the new CBA. Mr. Bengston testified that he informed the Union that the voluminous LOA's would be gone unless there was a specific written agreement placing them in the contract – and that there was not.

8. The Employer asserted that it made it crystal clear at the outset of negotiations that it would consider any LOA that was not specifically attached and incorporated into the CBA to be gone. It gave the following written memo to the Union during negotiations. That language was in relevant part as follows:

In addition to the contract proposals contained herein, the Company proposes the elimination of all prior Letters of Agreement, Memorandums of Understanding, and all other ancillary agreements that are not fully incorporated into the successor agreement to the 2000-2007 collective bargaining agreement. This proposal is limited to only those agreements that were intended to codify mutual promises prospectively governing the terms and conditions of employment for future matters. ...

9. The Employer asserted that this also countered the claim that there was no “written” notification to the Union pursuant to the language of the 2002-2007 at page 28, see note above, relied upon by the Union. The Employer asserted that this was clear notice to the Union of the Employer's intention to delete all LOA's unless they were negotiated into the 2007-2010 agreement.

10. Moreover, the Company noted, the parties negotiated the language found at page 47, which supersedes any language in the prior contract regarding written notification of a request to modify or amend the contract. That language provides as follows:

**WHEREAS:**

During the negotiations for the labor agreement, the parties reviewed numerous past letters, communications and memorandums. The parties identified numerous letters of agreement that were placed into contract proposal format. Of these, some were incorporated into this Agreement; some were not. The parties wish to continue the process of reviewing the continued necessity for the remaining proposals.

**THEREFORE:**

The parties mutually agree to review the remaining letter of agreement proposals to determine if current business needs require that they be continued.

11. The Company further asserted that the letters committee waded through the literally dozens and dozens of old LOA's in an effort to find those that were still relevant. They came up with 22 such proposal that were specially referenced in the language cited above. The Company asserted that the parties' language is limited to the proposals not the entire litany of LOA's. Thus, the Company asserted, the parties intended that the only matters subject to continuing discussion or negotiation were the *22 proposals* – nothing more.

12. The Employer further noted that Mr. Bengston was a part of the negotiations for that language whereas the Union witnesses were not and do not have adequate foundation for their opinions. The Employer noted too that even Union witnesses acknowledged that the letters subcommittee made remarkable progress in whittling down over 500 letters to some 22 proposals and that they acknowledged further that only the 22 proposals were referenced for further discussion in the language found at page 47 of the CBA.

13. The Employer claimed that the two letters that form the basis of this grievance, i.e. the January 29, 1982 and January 29, 1988 letters were not included in any of the 22 proposals referenced in the MOU. Accordingly, the Employer argued most strenuously, those letters are gone and are no longer a part of the CBA between these parties. There is thus no agreement to notify the Union if the Employer determines to subcontract work. That decision is governed solely by the 131 Agreement.

14. The Employer noted, arguendo, even if the LOA's are a part of the CBA there was no violation of any of their provision. The 1988 LOA dealt only with certain situation involving a layoff. Here no bargaining unit employee is on layoff so the 1988 LOA does not apply. The Employer countered the claim that one such employee is on layoff by showing that he is in fact on a voluntary layoff. See Employer Exhibit 7 and 8.

15. The 1982 letter applies solely “with respect to subcontracting in the Honeywell Minneapolis Operations under the jurisdiction of Teamsters Local 1145.” Further, the 1988 LOA only applies where bargaining unit members has previously performed the work. As bargaining unit employees has never produced this device neither LOA applies even by their own terms.

16. The Employer also cited a prior award by Arbitrator Chris Ver Ploeg that limited the application of the 1988 LOA to the 1988 conversion of seniority systems. The Employer asserted too that this limitation might well explain why that was not included in the 122 proposals set forth by the letters committee in the current negotiation – the letter simply no longer has any relevance to present day operations.

17. On the merits of the fabrication of this particular part, the Employer argued that this is not and never has been Local 1145’s work. Further, the determination of whose work it is must be based on the 131 Agreement and the B-11 award by Arbitrator Bellman decided in 2003 as well as the matrix the parties use routinely to determine whether certain work must be done by Tool Room employees or whether it can be done by others.

18. The Employer also cited the 131 Agreement in place for many years. For clarity sake, it will be reproduced here as follows:

1. At the time of building of any part of mechanical nature, those parts to be built to Engineering prints shall be built by Model Makers.
2. At the time of building of any part of a mechanical nature, those parts having detailed and dimensioned sketches, shall be built by Model Makers.
3. At the time of building of any part of a mechanical nature, those parts which can be verbally described and understood and built without the use of prints or sketches, shall be built by Model Makers.
4. At the time of building of any part of a mechanical nature, those parts where specifics of form, fit and function are evolved during fabrication as a contribution of the design, shall be built by Engineering Lab Technicians if the part cannot be built as per item 1,2, or 3.
5. As a part is developed and additional parts are required, work on such parts will be assigned to Model Makers whenever practical.

19. The Employer argued that the fixture was such that its form, fit and function were evolving during the design and as such was appropriately sent to MAET Lab for design and then to an outside contractor for fabrication. The B-11 Award held that where that is the case the Employer may appropriately subcontract the work. It is thus not bargaining unit work and the Tool Room employees have no “right” to that work.

20. The Employer asserted that it has a decision matrix in place to aid in the application of the 131 Agreement and to determine if the form fit and function are in fact evolving in the design. Here the Employer put on witnesses to establish that they applied this matrix appropriately and that this fixture was in fact evolving in its design.

21. The fixture in question was “new” in the sense that it needed to be able to hold and test six fixtures at the same time. Further, the proximity of the devices was apparently critical and even though it was similar in appearance to other fixtures that had been designed and built by Tool Room employees, it was not. The Employer asserted that this is not “the same fixture” as other similar looking fixtures from the past but is in fact for a new purpose and that it evolved during its design. The fixtures referenced by the Union witnesses were from 1988 and 1996 – those were not the same fixtures and are not for the same purpose. The Employer asserted that this is a classic example of a fixture that falls into category #4 from the 131 Agreement.

22. The Employer asserted that the Union bears the burden of showing that the Employer violated some part of the Agreement and the only part of the Agreement that could even arguably have been violated is the 131 Agreement. Here though there was no showing that anyone from the Union discussed the fixture with the engineers nor was there any showing that the Employer was incorrect or wrong about the assessment that the form fit and function of the fixture in question evolved as a contribution of the design. There was thus no evidence to show a violation of the CBA or the 131 Agreement. The Employer noted that the question is not whether the Union employees can do the work it is about whether there was a violation of the 131 Agreement or the CBA – here there was not.

23. The Employer distinguished the awards cited by the Union as inapplicable. The Employer asserted that these cases are now quite out of date and pre-dated the new agreement, which it still asserted does not include the letter agreements relied upon by the Union as the basis for this grievance. The more recent awards between the parties support the Employer's right to subcontract and adhere to the more recent, stronger Management rights clause in the parties' agreement. The Employer argued that the Union wants to try to turn back the clock by citing these older irrelevant awards and that the arbitrator should reject that effort.

The Employer seeks an award denying the grievance in its entirety.

### **MEMORANDUM AND DISCUSSION**

The underlying facts of the case are straightforward although there was considerable dispute about whether the fixture in issue could be designed and built by the Tool Room employees and whether its form fit and function evolved as a function of the design.

Honeywell is an electronics systems manufacturing company with residential, defense contracting and aerospace/avionics division facilities located throughout the Twin Cities. Local 1145 has a longstanding collective bargaining relationship going back decades. In addition to the CBA's that have been negotiated between the parties, the record showed that these parties have separately negotiated so-called letter agreements setting forth various procedures for a wide variety of subjects. The record showed that there are quite literally hundreds of such agreements. One of the subjects covered by letter agreements, LOA's, provide for certain procedures for the Company to follow when assigning work. One such agreement is Agreement 131, which addresses the jurisdiction of work between the engineering lab technicians (who are non-bargaining unit workers now known at the Minneapolis-Stinson facility as the MAET Lab) and the model makers (who are bargaining unit workers now referred to as the Tool Room and Tool Design employees.)

The work at issue in this grievance includes the new design and build of a prototype for a calibration fixture as part of a government program for smart munitions.<sup>2</sup> The fixture was designed and developed by Honeywell's Minneapolis Area Electronic Test, MAET, department, which is staffed by non-Union Engineers and Engineer Technicians. The evidence showed that the fixture is for the purpose of testing six devices at the same time and that the location of those devices on the fixture itself is critical. After the fixture in question was designed by MAET it was then sent to a non-Union shop in Onamia, Minnesota for further fabrication.

Significantly, the grievance in this matter did not allege a violation of the 131 Agreement nor of any provision in the CBA itself. Rather, the grievance reads as follows:

IGES350-E1 NLOS Cal fixture sent out for subcontract without notification violating subcontracting Letter Agreements dated 1/29/82 1/29/88

Relief sought: Follow proper subcontract procedure, 40 hrs backpay

Accordingly, the main focus of this case will be on whether there was a violation of those letter agreements. That of course will entail both a discussion of whether the matter is substantively arbitrable under the terms of the parties' grievance procedure and then whether the letter agreements are still in force after the negotiation of the 2007-2010 CBA and finally whether there was a violation of the terms of those agreement on the merits, i.e. whether the Employer violated the terms of the letter agreements in question in this case.

### **SUBSTANTIVE ARBITRABILITY**

The Employer argued that the provisions of the grievance procedure prevents this matter from being considered at all. Both parties cited to the grievance language but relied upon different sections of that language. The grievance procedure language provides in relevant part as follows:

Section 1. A grievance is any controversy between the Company and the Union as to the interpretation of this Agreement, a charge of violation of this Agreement, or a charge of discrimination involving wages, hours, or working conditions resulting in undue hardships.

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<sup>2</sup> The fixture at issue was apparently of a highly sensitive nature and was in fact so secret that the plans for it could not be taken from the hearing room without specific clearance from the military.

Section 2. Grievances as defined in Section 1 above shall be settled in the following manner and the steps set forth must be followed in the order listed and within the time limits prescribed.

Section 3 It is agreed that the following shall not constitute issues for arbitration: (a) supervision and direction of the working force,(b) schedules for production, methods and processes for manufacturing, (c ) the terms of a new agreement. See, Joint Exhibit 1 at page 21.

The Employer relies on the language of Section 3 excluding from the grievance process any issue of “methods and processes for manufacturing.” The Employer asserted that the issue of subcontracting is a method or process of production that is excluded. The Employer further asserted that under the Management Rights clause, the decision to subcontract is specifically reserved to management. These arguments miss the point however. The question is not whether the Union has a persuasive case on the merits but whether the terms of the grievance procedure specifically exclude this from consideration at all.

The Union cited to considerable authority for the proposition that irrespective of the merits of a dispute the question initially is whether the controversy is to be considered under the terms of the parties’ grievance procedure. See, *Local No. 381 Operating Engineers v. Tosco Corp.*, 823 F.2d 265, 268 (8th Cir. 1987). There is some merit to the Union’s assertion that “even if it appears to the court to be frivolous, the Union’s claim that the Employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator” *Id* at 268 n. 6. See also, *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The Steelworkers Trilogy expressed a clear policy in favor of having arbitrators consider grievances rather than the Courts irrespective of the merits of those grievances.

Further, there is some merit to the Union's argument that the cited language on its face does not expressly exclude this matter from being arbitrable. The plain reading of this language indicates as the Union suggests that it excludes from the grievance procedure the question of *how* production is to be accomplished *or who can direct the work force* in order to meet production goals. It does not exclude the question of whether there was a violation of the LOA's nor of whether there was a violation of the 131 Agreement.<sup>3</sup> That is a question of who is to perform the work and whether the Employer violated the notification provisions of the LOA's. Whether those LOA's are still valid or not is a question to be considered on the merits based on the evidence and is not expressly excluded from the grievance process. Accordingly, the matter will proceed to the next question.

### **VALIDITY OF THE LOA'S**

Having made the preceding determination that the matter is arbitrable does not imply any decision on the merits of the case, just as the cases cited above and by the Union suggest. The question of whether the LOA's are still a part of the CBA is a question to be considered based on the parties' language and the evidence.

Clearly, the parties have had a long history of negotiating letter agreement that have covered a wide variety of subject. The two involved here are dated January 29, 1982 and January 29, 1988. Both were attached to the CBA covering the period from 2002-2007. Clearly too the language of the current contract is quite different from the prior contract and that difference provides considerable guidance in how this matter must be decided.

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<sup>3</sup> There was some dispute about whether the LOA's were still in effect but there was no question that the 131 agreement is still in place. As noted herein, the question of whether the 131 Agreement even applies in this matter, since it was not the basis of the Union's grievance is again a matter to be considered in determining the merits of the controversy, but does not govern whether the matter is arbitrable and may be considered by the arbitrator.

First, there is a vastly different Management Rights clause in the 2007-2010 CBA than was found in the prior contract. As noted above, the provisions of this new language clearly give the Employer the right to subcontract as it sees fit. The Union acknowledged this at the hearing. Indeed, the Union's claim here is not that the Employer did not have the right to subcontract this work but that it failed to notify the Union of the decision to do so pursuant to the LOA's.

Second, and more importantly, the parties decided to examine the letter agreements to determine if they were still applicable and would be placed in the contract. Further, they placed specific language in the agreement governing this very subject. Some history of how it got there is important in this discussion.

The evidence showed that the Employer's representatives made it clear at the outset of the negotiations that the Company would consider the letter agreements null and void unless they were specifically placed into the new agreement. The preponderance of the evidence showed that the Company in fact did submit a written proposal to modify the contract pursuant to the terms of the 2002 – 2007 agreement as follows:

In addition to the contract proposals contained herein, the Company proposes the elimination of all prior Letters of Agreement, Memorandums of Understanding, and all other ancillary agreements that are not fully incorporated into the successor agreement to the 2000-2007 collective bargaining agreement. This proposal is limited to only those agreements that were intended to codify mutual promises prospectively governing the terms and conditions of employment for future matters. ...<sup>4</sup>

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<sup>4</sup> The Employer relied upon its Exhibit 1 for the evidence of this along with the testimony of Mr. Bengston. The cited language comes from that Exhibit which is a letter written to the Union after the negotiations in question. The letter, dated February 10, 2009, contains the cited language and references the actual proposal in question but did not contain the Company's written proposal made at the negotiations session. It would have been better frankly to have introduced that document as an exhibit. Here though, the Union did not provide evidence that the February 10, 2009 letter was in error in this regard or that the Employer never gave it the written proposal as asserted in its letter. The Union did assert that its negotiators did not hear Mr. Bengston's oral statements to the same effect but the evidence showed that the Company did in fact notify the Union of its desire to declare any letters of agreement not specifically in the new agreement null and void and that they would be "gone."

The evidence further showed that the parties, in response to this proposal by the Company in negotiations, formed a letters subcommittee whose job it was to sift through the volume of LOA's to determine which of any of them would remain in the contract and which would not. It was clear that both parties knew exactly what that committee was charged with and what its responsibilities in regard to the negotiations were.

After considerable effort had been made the letters committee arrived at 22 proposals to be discussed by the larger negotiations group. There is no question that the two LOA's in question in this matter were not part of those proposals.

It is here that the parties diverge diametrically as to whether the old LOA's remained in force or whether any of them that were not made into contract proposals and placed in Employer Exhibit 2, i.e. the 22 proposals, would be declared out of the contract and would expire with the old CBA.

The Union asserted most strenuously that it never intended that any of the LOA's would be out of the contract. Rather, it asserted that they would all remain in effect past the expiration of the old contract unless and until they were expressly declared out of the contract or were superseded by other language of another LOA.

The Employer on the other hand asserted that its understanding was that any LOA not expressly made a part of the proposals by the letter subcommittee was "gone." The Employer relied on a line of authority regarding repudiation of past practices, at least in part, as the basis of its argument that the practices referenced by the LOA's were repudiated and expired with the 2002-2007 CBA.

The Employer argued that its notice to the Union is consistent with arbitration precedent which establishes that when a Union is on notice during negotiations of a proposed discontinuation of an alleged practice, the change may be implemented unilaterally by the Employer on the effective date of the new collective bargaining agreement. See Employer Brief at page 6, citing *Standard Oil Company*, 79 LA 1333, 1336 (1982) and *Alpena General Hospital and United Stone and Allied Workers*, 50 LA 48, 51 (Jones 1967).

Elkouri supports the notion that a past practice may be discontinued by giving proper notice during contract negotiations that the past practice will no longer be honored. Practices are creatures of the contract from which they derive and can be discontinued under the right circumstances. Elkouri notes as follows:

...[A]n impressive line of arbitral thought holds that a practice that is not subject to unilateral termination during the term of the collective bargaining agreement is subject to termination at the end of said term by giving due notice of intent not to carry the practice over to the next agreement; after being so notified, the other party must have the practice written into the agreement to prevent its discontinuation. See, Elkouri & Elkouri, *How Arbitration Works*, p. 619 (6<sup>th</sup> ed. 2003).

The Employer asserted that it placed the Union on clear notice that the Employer would consider the LOA's out of the CBA and of no further force and effect unless they were specifically negotiated and placed in the new agreement,. The Employer relied on these statements by Elkouri and asserted that it repudiated the practices memorialized by the LOA's in so doing. The Employer further cited Bornstein and Gosline regarding the repudiation of a past practice:

Clear notice given during negotiations that one party intends to discontinue a past practice that is not rooted in ambiguous or general contractual language or protected by contractual language maintaining prior practices is generally deemed to effectively terminate the past practice as of the conclusion of the prior agreement. Bornstein and Gosline, *Labor and Employment Arbitration*, § 10.03[2], p. 10-21 (2003).

While it may seem a bit esoteric, the question here is not strictly whether the Employer properly repudiated a past practice since the LOA's were not true "past practices" but rather parts of the CBA that were incorporated and included in the agreement itself. See pages 52 and 55 of Joint Exhibit 4. The LOA's were, at least in regard to the two at issue here, side agreements made by the parties to provide clarity and predictability to future similar scenarios. It was not clear whether the LOA's involved here were intended to memorialize practices that had developed over time or whether they were specifically negotiated in response to a scenario that created a dispute between the parties. On these facts the answer to that question is not strictly germane; the question here is whether through the course of negotiations whether they were intended to be left out of the CBA or not.

Further, the line of authority cited by the Employer applies to true past practices, i.e. practices that are “not rooted in ambiguous or general contract language.” This distinction is worth some brief discussion as it relates to these circumstances even though, as will be discussed later, the parties took the “extra step” of drafting specific language regarding the old LOA’s.

Past practice has been defined as a “prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.” See, Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961). A past practice is thus nothing more or less than a custom or an accepted way of doing things as between parties to a labor agreement that can provide either assistance in interpreting ambiguous contract language or actually provide a binding set of terms for matters not included in the agreement.

Elkouri states that a practice can be repudiated during negotiations if done correctly and cites Professor Mittenthal as follows:

Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For ... if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

That inference is based largely on the parties’ acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of the new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In the face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.” Elkouri, 6<sup>th</sup> ed, at p. 619, Citing Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, proceedings of the 14<sup>th</sup> Annual Meeting of the NAA.

Mittenthal goes on to note as follows however:

In contrast, repudiation of a practice that gives meaning to ambiguous language in the written agreement would not be significant – the effect of this kind of practice can be terminated only by rewriting the language. Similarly, a practice could not be unilaterally terminated where such action would defeat rights under a newly adopted contract provision that was premised on the practice.” Elkouri at 619 n. 56, citing Mittenthal 14<sup>th</sup> Annual Meeting of the NAA, at p. 56.

In the Supplement to the 6<sup>th</sup> edition, Elkouri's authors note as follows:

“It remains well settled that a practice may be discontinued by a proper repudiation of the practice during negotiations. On arbitrator noted that ‘ a practice may be eliminated ... where the parties dissatisfied with the past practice, negotiate language that makes the former custom a nullity ... but mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. (Citing *Standard Furniture Mfg.*, 122 LA 986, 993 (Howell 2006)(The arbitrator found that the language at issue was ambiguous and would not alter it, preferring instead to allow the parties to negotiate any changes in it for themselves.) Elkouri, Supplement to 6<sup>th</sup> Ed. of *How Arbitration Works*, at . 246.

There is thus a difference between the repudiation of a past practice where the language is **ambiguous**, and thus reliant upon the practice to give it the meaning the parties intended, versus the repudiation of a practice based upon clear and **unambiguous** language, which may not. In the former instance the parties would need to negotiate different language in order to overcome the practice even where there has been a repudiation of that practice during negotiations by one party. In the latter instance, unless the parties do negotiate different language, the clear language would overcome the practice where one party has properly repudiated it during negotiations.

These facts do not fall neatly into either of those categories however. Neither does this case proceed nicely along the analytic lines set forth by Elkouri and Mittenthal and others with respect to the repudiation of past practices in negotiations since the scenarios discussed by the commentators appears to be slightly different from that which is presented here.

There is no question that the language of the LOA's is unambiguous and could thus be repudiated through the use of the procedure used by the Employer. Neither party asserted that the language was ambiguous and needed a separate set of facts regarding practice to give it meaning.

Indeed, the Union's sole response to the assertion that the LOA's had been negotiated out of the CBA was that the notice provided by the Company's negotiators during bargaining was inadequate. As noted above, the evidence demonstrated that adequate notice had been provided.<sup>5</sup>

Further, the language of the LOA's is clear that even if it had been considered a "past practice" under the above analysis, the Employer's action would have been sufficient to repudiate it unless they had been specifically placed back into the new Agreement.

On this record, the best evidence of the parties' intent was not so much whether the practices referenced in those LOA's were properly repudiated during negotiations, although the Employer placed Union on clear notice to that effect, but rather because of the language of the MOU found at page 47 of the current contract. The parties **did** negotiate specific language regarding the LOA's and placed that agreement in the new CBA. It was thus on this basis that the decision proceeds.

That language provides as follows:

**WHEREAS:**

During the negotiations for the labor agreement, the parties reviewed numerous past letters, communications and memorandums. The parties identified numerous letters of agreement that were placed into contract proposal format. Of these, some were incorporated into this Agreement; some were not. The parties wish to continue the process of reviewing the continued necessity for the remaining proposals.

**THEREFORE:**

The parties mutually agree to review the remaining letter of agreement proposals to determine if current business needs require that they be continued.

It is clear that the Employer's argument in this regard has merit. The language clearly references the "agreement proposals." In a case like this where the parties' testimony diverges completely about what they assert they understood, it is the language that is actually negotiated and agreed to that provides the best and in many cases the only measure of that intent.

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<sup>5</sup> It should be noted that the Union witnesses testified credibly that they did not recall Mr. Bengston's statements regarding the LOA's "being gone." That was not enough to change the result here. There was adequate written notice and there was evidence that the witnesses who did testify were either not at the bargaining sessions or were not a part of the parts of it where Mr. Bengston alleged he made those statements. Further, the fact that the letters subcommittee was formed and the language of the MOU resulted from that was sufficient to establish notice that the LOA's would need to be specifically negotiated and placed in the agreement in this round of bargaining.

Here, the parties mutually agreed to “review the remaining **letter of agreement proposals** to determine if current business needs require that they be continued.” (Emphasis added) It does not reference the old LOA’s or those found in the prior agreements or language to that effect. It references the letter of agreement proposals; this is a clear reference to the 22 proposals drafted by the letter of agreement subcommittee found at Employer Exhibit 2.

Moreover, the Employer witness testified credibly that he was a part of that subcommittee and that it was everybody’s clear understanding that these 22 were the only proposals that would be further considered for possible placement in the contract. Union witnesses were credible but many were not there for the negotiations and lacked the same knowledge that the Employer witnesses had in this regard. Further, the MOU found at page 47 is the sole language pertaining to the LOA’s in this agreement since there are no other LOA’s referenced in the new agreement. Based on this record it is apparent that the two LOA’s in question here, i.e. January 29, 1982 and January 29m, 1988 were not included in the current agreement and cannot provide an adequate basis for the Union's grievance.

### **VIOLATION OF THE 131 AGREEMENT AND DECISION MATRIX**

While it may well be a moot point given the ruling above, the parties spent considerable time on whether this fixture was subject to the 131 Agreement and how that agreement applied here.

The Company argued initially that the 131 Agreement provides the sole determiner of where work will be sent. Clearly it does by its own terms; the question here is whether the evidence showed that form fit and function evolved during fabrication as a contribution to the design.

The Employer further argued that the B-11 Award by Arbitrator Bellman control this situation and that it essentially trumps all prior awards. A reading of this award indicates that it does not. It is clearly limited to its own unique facts. Here the Employer sought to assign to the Lab Technicians, and not to the Tool Room employees, the development of a modified fixture used in a tool called a Robodrill. This fixture according to the decision was originally designed by bargaining unit employees and was apparently a redesign of that fixture.

Relying on the terms of the 131 Agreement, the arbitrator ruled that the newly modified fixture evolved as it was being fabricated. Further, the arbitrator ruled that the Company had provided evidence that as the technician attempted to modify the fixture in order to overcome certain complaints about its operation, a number of configurations were tried and either rejected or accepted. Based on that the Arbitrator ruled that there had been no violation of the 131 Agreement under those facts.

Clearly, that decision is limited to its facts, just as those cited by the Union are as well. The question is whether there was a violation of the 11 Agreement on those facts and under differing facts arbitrators, even the same arbitrator in some cases, came to different results under different facts. No surprises there. Here however it is a misreading of these prior awards to assert that they somehow trump all future arguments on this question on different facts.

Here the parties diverged greatly on whether form, fit and function evolved during fabrication as a contribution to the design. Clearly, this involved a greater degree of engineering expertise than the arbitrator possessed so the testimony of the parties was critical in making this decision.

The Employer witnesses indicated that even though similar fixtures had been fabricated in the past this was a “new” fixture and would be put to different purposes than those in the past. They also provided credible testimony that the fixture’s design indeed evolved during fabrication given the new purpose for which it was intended to be used. Accordingly, it could not be “verbally described and understood and built without the use of prints and sketches.”

This case too is limited to its facts. As Arbitrator Bellman said, “the letter agreement indicates that when the Company is contemplating an assignment it determines whether it is covered by paragraphs 1-3 or 4, [of the 131 Agreement] and the Union may grieve that assignment thereafter.”<sup>6</sup>

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<sup>6</sup> Obviously, as fixtures are redesigned to meet the needs of a fast changing technology, few if any fixtures that are being designed now have ever been done before. Some caution must be exercised when these “new” fixtures are designed lest the Company seek use the language of the 131 Agreement to argue that every such new fixture “was never designed or built by Tool Room employees” and that its design and fabrication can be subcontracted because it is not Tool Room employees’ work. Such an argument would certainly be a severe threat to the Union security clause and nothing in this award should be read as condoning that. The evidence showed that the 131 Agreement remains in full force and effect and that it is subject to the grievance procedure just as Arbitrator Bellman suggested.

Here the Company provided adequate evidence that this particular fixture's form fit and function evolved during fabrication as a contribution to the design. This makes the case fit into the purview of paragraph 4 of the 131 Agreement. Thus no violation of that agreement occurred on these facts.<sup>7</sup>

## **AWARD**

The Grievance is DENIED.

Dated: April 3, 2010

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Jeffrey W. Jacobs, Arbitrator

IBT #1145 and Honeywell award – Brown.doc

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<sup>7</sup> It should be noted that the grievance was based solely on whether there was a violation of the two LOA's at issue here. Given the decision in the impact of the MOU at page 47 and the effect that had on the continuing force and effect of the LOA's at issue here, the decision need go no further than that. Because the parties spent so much time and energy on the questions of whether the fabrication and design of this fixture by non-Union personnel, it was clear that the parties desired some guidance on the question of whether the 131 agreement was also violated. The evidence showed that it was not on these unique facts.