COMMENT

The Bases and Limits of Arbitral Decisionmaking in Plant Relocation and Transfer of Work Disputes*

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Plant relocations and other transfers of work are now a recurrent phenomenon on the American industrial scene. This Comment describes the manner in which labor arbitrators have decided relocation disputes, finding that arbitrators typically have not prevented relocations in the absence of specific prohibitory provisions in collective bargaining agreements. The Comment then analyzes the underpinnings of arbitral reasoning in relocation disputes. The Comment concludes by discussing the arbitrator’s institutional role in those disputes and that role’s effect on arbitral decisionmaking.

INTRODUCTION

In 1978, Trailways, Inc., closed the bus rebuilding department of its Bedford, Virginia subsidiary, Virginia Stage Lines. Trailways then transferred bus components awaiting repair or rebuilding, as well as equipment necessary to perform the work, to its Dallas and Wichita subsidiaries. The Amalgamated Transit Union protested that the transfer of work was contrary to the “essence” of the collective bargaining agreement as embodied in the recognition, wage, and seniority provisions.1 Trailways defended the transfer as an action taken under an agreement-conferred right to “manage, operate, and conduct its business,”2 as a means of reducing excess capacity and eliminating a low-profit, low-productivity operation.3

In Virginia Stage Lines, Inc., Arbitrator Samuel Ross ordered Trail-
ways to reinstate the bus rebuilding department in Bedford and to compensate mechanics and other workers for lost worktime.\textsuperscript{4} Ross found that, while no provision of the agreement controlled the dispute, Trailways had not justified the contraction of the bargaining unit by over one-half under "standards of reasonableness and good faith."\textsuperscript{5} Trailways had shown no established practice of transferring operations,\textsuperscript{6} nor had it adequately substantiated the business rationale for the transfer.\textsuperscript{7}

In 1971, Schlitz Brewing announced plans to shut down its still profitable plant in Brooklyn, New York, and to step up production of beer at its recently built plant in Winston-Salem, North Carolina. Because of automation and lower wage costs, the Winston-Salem facility was more profitable than the Brooklyn facility. In \textit{Schlitz Brewing Co.}, Arbitrator Jerome Lande barred Schlitz from "ceasing its normal business operations" at the Brooklyn plant.\textsuperscript{8} He declared that "absent a specific restriction in the parties' contract, the claims and rights of both employer and employees must be weighed, balanced, and equity done."\textsuperscript{9} Lande gave special emphasis to two equitable considerations. One was the continued profitability of the Brooklyn facility. Lande commented that he could not allow Schlitz to transfer work to make a higher profit at another plant "at the expense of the job security of those who helped to achieve the profit" at the original plant.\textsuperscript{10} The second equitable consideration cited by Lande was Schlitz's representations that the Brooklyn plant would stay open. Lande noted that Schlitz employees had decided not to look for work elsewhere and had "cooperated in full," avoiding "stoppages or disturbances" and increasing productivity, in response to company assurances.\textsuperscript{11} He concluded that Schlitz could not be permitted "to walk away from its commitments, its contract, its employees and their livelihoods."\textsuperscript{12}

Are the outcomes in \textit{Virginia Stage Lines} and \textit{Schlitz Brewing} representative of the broad range of results reached by arbitrators in relocation\textsuperscript{13} disputes? The answer is "no"; the two cases are atypical.\textsuperscript{14}

\begin{itemize}
  \item \textsuperscript{4} \textit{Id.} at 4574-75.
  \item \textsuperscript{5} \textit{Id.} at 4570-74.
  \item \textsuperscript{6} \textit{Id.} at 4571.
  \item \textsuperscript{7} \textit{Id.} at 4572-74.
  \item \textsuperscript{8} \textit{Joseph Schlitz Brewing Co.}, 58 Lab. Arb. (BNA) 653, 655 (1972) (Lande, Arb.).
  \item \textsuperscript{9} \textit{Id.} at 660.
  \item \textsuperscript{10} \textit{Id.} at 661.
  \item \textsuperscript{11} \textit{Id.} at 661-62.
  \item \textsuperscript{12} \textit{Id.} at 662.
  \item \textsuperscript{13} As used in this Comment, the term "relocation" means both the movement of production from a closed facility to new or existing facilities of the same employer and the transfer of operations from a facility which remains open to new or existing facilities of the same employer. Not included, therefore, are plant closures or contractions unaccompanied by the transfer of production to another site. Also not included is the subcontracting of operations to outside firms. However, arbitrators' approaches in subcontracting and relocation disputes are occasionally compared. A final note is that
\end{itemize}
Arbitrators have rarely prevented or recalled midterm relocations in the absence of specific agreement provisions restricting such employer action. A second question is more difficult: will arbitrators use the reasoning developed in these and other cases to seriously inhibit employers’ ability to relocate? The answer to this question requires an examination of the nature, sources, and limits of arbitral reasoning, and ultimately an examination of the arbitrator’s institutional role.

The question of how arbitrators will resolve relocation disputes has become increasingly important in light of recent National Labor Relations Board decisions. In *Milwaukee Spring II*, the Board announced that midterm relocations from unionized to unorganized facilities are permissible under the National Labor Relations Act unless the collective bargaining agreement contains a specific term prohibiting relocation. Three months after it handed down *Milwaukee Spring II*, the Board in *Otis Elevator*, concluded that an employer must bargain about a midterm relocation only when the employer action turns upon labor costs, and “not on a change in the basic direction or nature of the enterprise.” Under these decisions, if the employer bargains to impasse over a relocation motivated by labor costs considerations, or if there is no duty to bargain because the relocation is motivated by other factors, the union seeking to prevent a relocation not specifically prohibited by the agreement can expect no relief from the Board. The arbitrator is the union’s only possible resort.

The question of how arbitrators will decide relocation disputes assumes added importance in view of the intensified and controversial role of capital mobility in the American and global economies. According
to one estimate, between 450,000 and 650,000 American jobs were lost in original workplaces due to the actual transfer of plant and equipment from one site to another during the 1970's.\(^\text{24}\) The extent to which disinvestment in the form of shutdowns or contractions has been accompanied, not by the transfer of physical capital, but by monetary reinvestment in the form of start-ups of new plants or expansion of established facilities is harder to estimate. It is known, though, that the associated job loss at original worksites is much greater than that caused by the literal movement of plant and equipment.\(^\text{25}\) Increased unemployment, consequent financial and emotional distress of affected workers, and community deterioration at the site of disinvestment are among the documented results of such capital transfers.\(^\text{26}\) Some argue that these costs are outweighed by the benefits of unfettered capital mobility.\(^\text{27}\) In this view, capital mobility promotes the efficiency of American industry, thereby contributing to higher total output, higher overall employment (job gains at new or expanded facilities outnumber job losses at closed or contracted facilities),\(^\text{28}\) and an improved competitive position of American industry within the world market.

The potential impact of arbitrators' decisions in the overall drama of capital mobility, and thus the relevance of arbitral decisionmaking to the policy debate, should not be overestimated. Even if arbitrators were to systematically prevent relocations during the term of the agreement, employers would be free to undertake these actions after the agreement had expired.\(^\text{29}\) In addition, the unionized sector of the economy, though critical, from one worksite to another. It includes both the actual movement of plant and equipment and the reduction or termination of monetary investment in one facility accompanied by reinvestment in another facility. For a useful discussion, see B. Bluestone & B. Harrison, The Deindustrialization of America 25-48 (1982).

\(^{23}\) For evidence that capital mobility has increased in the last decade, see id.
\(^{24}\) Id. at 25.
\(^{25}\) Id. at 26-40.
\(^{26}\) For one discussion, see id. at 49-110.
\(^{28}\) R. McKenzie, supra note 27, at 55-59. This fact is acknowledged in B. Bluestone & B. Harrison, supra note 22, at 29-31.
\(^{29}\) Relocations undertaken after the agreement has expired are subject to the duty to bargain as defined in Otis Elevator Co., 269 N.L.R.B. No. 162 (1984). This means that for relocations turning upon labor costs and not upon a major change in the nature and direction of the enterprise, the employer must bargain to impasse before acting—a relatively weak constraint. The employer wishing to avoid arbitral scrutiny of a relocation undertaken during the agreement term can resort to at least two stategems. It appears that employers are free to discontinue or reduce production at one site while the agreement is in effect and transfer production to another site after the expiration of the agreement without fear of losing a relocation dispute. That, at any rate, is the implication of Pearl Brewing Co., 77-1 Lab. Arb. Awards (CCH) ¶ 8124 (1982) (McKenna, Arb.). Or the employer may undertake the production of assertedly new products at the desired, often non-union, worksite and
cally concentrated in the basic industries\textsuperscript{30} is relatively small.\textsuperscript{31} Nonetheless, in view of the low level of regulation of relocations in the United States as compared with European nations\textsuperscript{32} and of the Board's current position that midterm relocations are permissible under the NLRA, collective bargaining and arbitration are the key components of what regulation there is of the movement of capital in the American economy. Accordingly, while this Comment addresses only indirectly the policy debate over capital mobility, the analysis of the arbitrator's role in relocation disputes offered here clarifies the institutional setting for the larger controversy.

Part I of this Comment examines how arbitrators have decided relocation disputes. It shows that arbitrators generally have not prevented relocations in the absence of a specific prohibitory provision in the collective bargaining agreement. Since these specific provisions are only infrequently included in agreements, arbitrators usually permit employers to relocate. Occasionally, though, arbitrators have disallowed or otherwise regulated relocations through recourse to implied contractual duties of good faith, fair dealing, and reasonableness. Part II explores the underpinnings of arbitral reasoning in relocation disputes. The bases of arbitrators' willingness to permit relocations are an assumption that the employer possesses a broad management power to make business decisions, and the absence of a purpose shared by the employer and the union to maintain employment at the worksite covered by the collective bargaining agreement. The source of the requirement that employers fulfill implied contractual duties is an acknowledgement of the legitimacy of workers' expectations of job security. Finally, Part III examines the limits on arbitral decisionmaking in these disputes. It argues that the potential reach of implied duties is narrowed by the arbitrator's institutional role within a collective bargaining regime whose foundations are regulated by the larger statutory scheme. A short conclusion presents the author's views as to how the relocation issue should be addressed.

\textsuperscript{30} Gradually phase out the bargaining unit at the worksite which is the target of disinvestment. This phenomenon, "evolutionary erosion" of the bargaining unit, is discussed in Page, \textit{Comment to Sinicropi, Revisiting an Old Battle Ground: The Subcontracting Dispute} in \textit{Proceedings Of The 32D Annual Meeting, National Academy of Arbitrators} 160-61 (1979).

\textsuperscript{31} "Basic industry" as used here refers to capital intensive production of goods such as autos, rubber, electrical machinery, steel, etc., which are at the core of America's heavy industrial capacity. For a breakdown of the percentage of workers organized in different sectors of the economy, see R. Freeman & J. Medoff, \textit{What Do Unions Do?} 27 (1984).

\textsuperscript{32} According to the Bureau of Labor Statistics, 18.8% of private sector workers were members of unions in 1984. \textit{118 LAB. REL. REP.} (BNA) 142 (Feb. 25, 1985).

I
THE PATTERN OF ARBITRATORS' DECISIONS IN RELOCATION DISPUTES

Decisions published in the post-World War II era indicate that arbitrators generally will prevent or recall relocations only where there is a specific provision restricting relocation in the collective bargaining agreement. Arbitrators reject the argument that either the agreement taken as a whole or general provisions concerning union recognition, the seniority system, or wages, control a relocation dispute. However, language used in many decisions suggests that arbitrators will rule against relocations if the employer's action is found to be a breach of implied contractual duties of good faith, fair dealing, and reasonableness.

A. Specific Provisions of Collective Bargaining Agreements

Where there is a specific provision concerning relocation in the collective bargaining agreement, the arbitrator's decision naturally turns upon the interpretation of that provision. Virtually all of the decisions favoring the union in relocation disputes were based upon provisions explicitly restricting relocation. None of those decisions, it is worth emphasizing, were found in the nation's basic industries. Many were concentrated in the garment industry, others were found in the brewery industry, and some were scattered in other non-basic segments of the economy. The typical form of a restrictive provision in the garment industry is a prohibition against the removal of the plant outside a certain geographic area. Another form of a restrictive provision requires

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33. This Comment surveys decisions published in the Bureau of National Affairs and the Commerce Clearing House labor arbitration reporters. It should be noted that the published decisions are only a fraction of the disputes actually resolved by arbitrators, and may not always be representative. However, in view of the tendency of editors of the reporters to publish numerous cases concerning important issues such as relocation, and in view of the consistency of the approach employed by arbitrators in the cases published over three decades, one can be fairly confident that the reported decisions adequately reflect the actual pattern of arbitral decisionmaking.


37. The restrictive provision in Brooklyn Dressing Corp., 80 Lab. Arb. (BNA) at 460, reads:
that the company obtain the consent of the union or of a joint labor-management committee before undertaking relocation. A Bureau of Labor Statistics study shows that such provisions restricting relocation are found in a small percentage of collective bargaining agreements.\textsuperscript{38}

Unions sometimes win relocation disputes by trading on the ambiguity of provisions aimed at preventing the subcontracting of operations to other firms\textsuperscript{39} or at establishing the jurisdiction of bargaining unit employees over work performed at the covered facility.\textsuperscript{40} The ambiguity arises because the purpose of subcontracting and jurisdictional provisions—the protection of bargaining-unit jobs—is also served by the prevention of relocations. The ambiguity with regard to subcontracting is heightened by the fact that provisions prohibiting the transfer of operations among different facilities of the same employer are sometimes included within provisions that concern subcontracting.\textsuperscript{41} Nonetheless, where a provision by its terms is limited to the regulation of subcontracting, arbitrators generally will not interpret it expansively to include the transfer of operations.\textsuperscript{42} Similarly, jurisdictional provisions are usually interpreted to prohibit only the substitution of supervisors or non-unit employees for unit employees at the covered worksite.\textsuperscript{43}

\begin{itemize}
\item The Employers agree that they shall not move their plant or plants or any parts thereof or any branches thereof or place where work is performed beyond a radius of thirty (30) miles from Columbus Circle.
\item See \textit{Major Collective Bargaining Agreements}, supra note 34, at 8-9.
\item \textit{E.g.,} Mason & Hangar-Silas Mason Co., 42 Lab. Arb. (BNA) 1247, 1250-51 (1964) (King, Arb.).
\item In Lever Bros. Co., 65 Lab. Arb. (BNA) 1299, 1304 (1976) (Edes, Arb.), Arbitrator Edes observed that the distinction between transfers of operations among different facilities of the same employer, on the one hand, and subcontracting operations to an outside firm, on the other, “has been repeatedly and unexceptionally recognized.” See also Hastings Mfg. Co., 82-2 Lab. Arb. Awards (CCH) at 4961-62; Metal Textile Corp., 42 Lab. Arb. (BNA) 107 (1964) (Rubin, Arb.).
\item In \textit{Virginia Stage Lines}, 79-2 Lab. Arb. Awards (CCH) \textsuperscript{\#} 8436, at 4567, 4570, Arbitrator Ross ruled that the transfer of operations was not barred by a provision labelled “Manning of Service,” which stated that “employees not included in the bargaining unit shall not be used to perform work ordinarily performed by employees in the bargaining unit.” In \textit{Hercules, Inc.}, 54 Lab. Arb. (BNA) 517 (1970) (S. Wolff, Arb.), Arbitrator Wolff found that a prohibition of withdrawal of jobs from the “jurisdiction of the bargaining unit” did not bar a relocation.
\item An interesting recent case illustrates that the line between provisions prohibiting relocation and those governing the assignment of work to bargaining unit employees can sometimes be a blurry one. During the term of a collective bargaining agreement, Pabst Brewing shut down a brewery in Peoria Heights, Illinois, and transferred equipment and work to a Milwaukee plant. In \textit{Pabst Brewing Co.}, 78 Lab. Arb. (BNA) 772 (1982) (S. Wolff, Arb.), Arbitrator Wolff noted that due to a problem of overcapacity Pabst incurred a severe operating loss of over $13 million in the year preceding the shutdown. Nonetheless, Wolff ordered Pabst to restore production at Peoria Heights with backpay to affected workers, or alternatively to negotiate a settlement of all claims with the Brewery Workers. \textit{Id.} at 776-77. He did so on the basis of the following jurisdictional provision:
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Unlike unions, which typically must rely on specific agreement provisions forbidding relocation, employers often prevail in relocation disputes in the absence of provisions permitting relocation. But some arbitrators' decisions in favor of employers rest on language in the agreement addressing the relocation issue. For example, in GAF Corp., a union right to notice was combined with an employer right to move the plant or transfer work. Arbitrators may also infer an employer right to relocate when the agreement expressly gives workers rights such as severance pay or transfer privileges in the event of relocation. In such a case the workers' rights are considered to be attendant to the employer's right to relocate.

Management rights provisions sometimes contain clauses that confer upon the employer the right to determine the "number and location of plants" or to close the plant. The employer typically argues that these clauses include by implication the right to relocate the plant or to transfer production. While arbitrators count such clauses in the employer's favor, they are assessed together with other provisions of the agreement, and in light of past practice, bargaining history, and the reasonableness and good faith of the employer's conduct. Thus, in the Company shall not reassign any work presently being performed by employees covered by this Agreement, to other personnel to do such work who are not in the Bargaining Unit at this plant or other facilities as set forth and defined in the NLRB certification referred to in Article 1.00 of this Agreement.

Id. at 774. The Brewery Workers contended that this provision barred the transfer of work to "other facilities" not covered by the agreement; Pabst argued that "other facilities" referred to any other plant within the area coming under the agreement's umbrella. Despite the persuasive business rationale, the controversy over the meaning of the provision, and a disputed bargaining history, Wolff declared that the language of the provision was "clear and unambiguous" and dictated a result in the union's favor. Id. at 774-75.

44. For the role of the general management rights provision in this pattern, see infra text accompanying notes 58-60.
49. In Lever Bros. Co., Arbitrator Edes declared:

If the Company has the sole right to decide upon the number and location of its plants and the products to be manufactured there, it must necessarily (since the greater includes the lesser) also have the right to decide that part of the products manufactured at one plant shall now be manufactured at another.

65 Lab. Arb. at 1305 (BNA). It may be doubted whether this conclusion follows as logically as Edes claims, given the vagueness of the clause in question. But in any event, Edes carefully scrutinized other provisions of the agreement to ascertain whether any limitation was placed upon relocation. Finding none, he ruled that relocation was permissible. Lever Bros. thus stands for the proposition that a number and locations of plants clause not modified elsewhere in the agreement provides powerful support for an employer right to relocate. On this point, see MAJOR COLLECTIVE BARGAINING AGREEMENTS, supra note 34, at 6.
Schlitz Brewing, the evidence of bargaining history was critical to Arbitrator Lande’s finding that the words “suspend or discontinue operations” contemplated a complete cessation of production, not a shutdown accompanied by a transfer of work to another facility. In another case, Babcock and Wilcox Co., a key factor in the decision approving a transfer of production was the reasonableness of the employer’s conduct. In that case, Arbitrator Jerome Klein characterized a decision to complete work already in the production pipeline, and to transfer or subcontract work not yet in the pipeline, as an “orderly” exercise of the agreement-conferrered right to close the plant. Any other way of shutting down the facility, Klein found, would have been far more costly and inefficient.

B. The Agreement as a Whole and General Provisions

If a specific provision prohibiting relocation is absent, a natural argument for the union to make is that the collective bargaining agreement as a whole and general provisions, such as those governing union recognition, seniority, and wages, import an obligation to refrain from relocation in order to maintain employment at the covered workplace. This argument has not met with success. In one early case, John B. Stetson Co., Arbitrator Joseph McGoldrick observed:

The Union has argued with great persuasiveness that the contract was instinct with an obligation on the part of the Company not to destroy the subject matter of the agreement and that under this principle, the Company violated an implicit obligation of the contract. I recognize the moral force of this argument but in the absence of a non-removal clause I cannot hold that the Company violated the agreement.

More recent cases have echoed this rejection of the union’s argument premised upon the purpose or essence of the agreement as a whole. In Pabst Brewing, for example, Arbitrator Sidney Wolff stated that it “is well recognized that a Labor Contract per se is not an employment contract guaranteeing employment for any specified period of time.” Arbitrators similarly reject the union’s reliance upon general agreement provisions.

50. 58 Lab. Arb. (BNA) at 658-59.
51. 80 Lab. Arb. (BNA) at 218-19.
52. Id. at 218.
53. Id. at 217-18. For an award of transfer rights predicated on a finding of employer bad faith, despite a number and location of plants clause, see Ex-Cell-O Corp., 60 Lab. Arb. (BNA) 1094, discussed infra at text accompanying notes 78-79.
54. The union made this argument in Virginia Stage Lines. See supra text accompanying note 1.
55. 28 Lab. Arb. (BNA) 514, 516-17 (1957) (McGoldrick, Arb.).
A natural argument for the employer to make is that the general management rights provision recognizing the employer's power to direct the enterprise includes, by necessary implication, the right to relocate the plant or to transfer work. 58 Arbitrators are not unmoved by this argument. As has been shown, they generally require a specific agreement provision restricting relocation—not the absence of one permitting relocation—before they will halt relocations. 59 In effect, they view the management rights provision as establishing a right to relocate as a matter of presumption. However, that presumption is rebuttable by a showing that the relocation violates another specific agreement provision or that it breaches implied contractual duties in ways that will be described shortly. So arbitrators do make it clear that the appeal to a general management rights provision does not decide a dispute without further analysis. As Arbitrator Arthur Ross stated, "the exercise of the managerial function is not absolute and unrestricted, even in the absence of explicit language" limiting that function.60

Accordingly, there is a limited parallelism between the way arbitrators treat general provisions concerning wages, seniority and union recognition, on the one hand, and general management rights provisions, on the other. Neither type of provision is considered to dictate the result.61 While arbitrators refuse to find that the agreement as a whole or its general provisions impose a duty on the employer to refrain from relocating, and while they take the position that the management rights provision presumptively establishes a right to relocate, they are also willing to consider whether the employer's action breached implied contractual duties of good faith, fair dealing, and reasonableness. Arbitrators describe implied contractual duties under various rubrics, including a "covenant of good faith and fair dealing,"62 "standards of reasonableness and good faith,"63 "balancing the rights and equities,"64 or requiring the absence of an intent to "undermine" or "erode" the bargaining unit.65 In the implied duties analysis—the determination of whether the employer acted fairly, reasonably, and in good faith—arbitrators consider the following factors: 1) whether the relocation is consistent with past practice and

58. The employer made this argument in Virginia Stage Lines. See supra text accompanying note 2.
59. See supra text accompanying notes 33-43.
61. See id. at 357. See also Paragon Bridge & Steel Co., 44 Lab. Arb. (BNA) 361, 371 (1965) (Casselman, Arb.).
64. Joseph Schlitz Brewing Co., 58 Lab. Arb. (BNA) at 660.
industry custom; 2) whether the employer properly bargained with and otherwise notified the union about the relocation; and 3) whether there is an adequate business rationale for the relocation.

1. Past Practice and Industry Custom

Where there is no specific agreement provision controlling the relocation dispute, arbitrators consider the evidence of past practice in relation to relocation. As Arbitrator Ross noted, "[p]ast practices . . . are often entitled to great weight since they represent genuine decisions of the parties. . . ." If the employer has transferred production or relocated plants at times prior to the action in dispute, arbitrators accord this past practice substantial weight in the employer's favor. If there is no past practice of relocation, the balance tips, significantly though not decisively, towards the union. The degree of weight assigned in either direction depends on such factors as whether the past practice with regard to relocation is similar to the disputed action, whether there were repeated relocations in the past, and whether the union challenged past relocations.

66. The nature of the implied duties analysis as applied to relocations is described in the following discussion. Essentially the same analysis is also applied to the issue of subcontracting. See Abrams & Nolan, Subcontracting Disputes in Labor Arbitration: Productive Efficiency Versus Job Security, 15 U. Tol. L. REV. 7 (1983); Crawford, The Arbitration of Disputes Over Subcontracting, in PROCEEDINGS OF THE 13TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 51 (1960). There are reasons to believe that arbitrators are more aggressive in applying the implied duties analysis to the subcontracting issue, especially when the subcontracting takes place at the covered worksite, than to the relocation issue. See infra text accompanying notes 195-98. One requirement for the invocation of implied duties to prevent subcontracting is that the employer action must significantly impact the bargaining unit. See Abrams & Nolan, supra, at 27-29. Because a plant relocation or transfer of operations either destroys or reduces the bargaining unit in the typical case, this requirement is usually not at issue in the relocation context. But see Inland Tool & Mfg. Inc., 71 Lab. Arb. (BNA) 120, 124 (1978) (Lipson, Arb.) (no employer plan to eliminate or undermine bargaining unit).


68. Safeway Stores, Inc., 42 Lab. Arb. (BNA) at 357.


70. In Virginia Stage Lines, the absence of an established practice of transferring or subcontracting work is cited as one element supporting a decision for the union. See supra text accompanying note 6. However, the fact that unit employees have always performed the work management seeks to transfer does not, standing by itself, dictate a decision for the union. On this point in the subcontracting setting, see Abrams & Nolan supra note 66, at 26.


73. See id.
Similarly, industry-wide practices with regard to relocation—industry custom—also influence arbitrators. In garment manufacture, there is a tradition of negotiating restrictions on relocation. In this industry, restrictive provisions are liberally interpreted, because arbitrators are willing to invoke implied duties to extend the literal meaning of the language. Thus in Brooklyn Dressing Corp., a geographical limitation on "plant moves" was held to prevent establishment of a new facility in the Dominican Republic, even though the original factory in New York City remained in operation.74

By contrast, in the basic industries, there is no tradition of negotiating restrictions on relocations, except in the form of contractual provisions setting forth workers' rights attendant to the employer's exercise of its right to relocate.75 Recently, for example, the United Auto Workers negotiated a commitment from General Motors to provide financial support and aid in job placement for workers who lose jobs due to company actions, including the transfer of production from one facility to another.76 Similarly, a 1982 United Auto Workers agreement with Ford concerning outsourcing (the purchase of parts from outside firms) recognized a company right to relocate. In exchange for wage and benefit concessions, Ford agreed not to close any plants due to outsourcing; however, closings were permitted in the case of "internal Company consolidation of operations within the units represented by the UAW."77 Even if language permitting relocation is not contained in the particular agreement before the arbitrator, he or she will be less inclined to find that a relocation breaches implied duties if industry custom acknowledges the employer's right to relocate.

2. The Employer's Communication with the Union Regarding Relocation

Arbitrators may invoke implied duties to the employer's detriment when the employer's conduct in bargaining or communicating about the

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74. 80 Lab. Arb. (BNA) 457 (1983) (Kramer, Arb.). See also Address-O-Mat, Inc., 376 Lab. Arb. (BNA) 1074 (1961) (Wolff, Arb.). A similar dynamic may be at work in the brewery industry. Of the three cases in the brewery industry finding that a relocation breached the collective bargaining agreement, two involved agreement language which only ambiguously prohibited relocation. See Pabst Brewing, 78 Lab. Arb. (BNA) 772 (1982), discussed supra at note 43 and Schlitz Brewing, 58 Lab. Arb. (BNA) 653 (1972) discussed infra at text accompanying notes 81-88. The decision in Pabst Brewing rested squarely on the ambiguous provision; the decision in Schlitz Brewing depended on examination of equitable considerations. Arguably the decisions were influenced by an industry tradition of restricting the employer's ability to withdraw work from the bargaining unit. See Schlitz Brewing, 58 Lab. Arb. (BNA) at 65. The decision based on an unambiguous provision is Pearl Brewing, 77-1 Lab. Arb. Awards (CCH) ¶ 8125 (1976) (McKenna, Arb.).

75. See supra text accompanying note 46.

76. 117 LAB. REL. REP. (BNA) 104 (Oct. 8, 1984).

relocation evinces unacceptable disregard for the union. Types of proscribed conduct include obtaining wage and benefit cuts from the union by indicating that these concessions will enable the original worksite to remain open, misrepresenting the probability that the plant will remain in operation in order to maintain or improve productivity, and failing to notify or bargain with the union about the impending relocation. While no published decisions disallowing relocation rest only on this ground, arbitrators have regulated relocations for this reason by providing the lesser remedies of reemployment or preferential hiring at the new or expanded facility. In *Ex-Cell-O Corp.*, Arbitrator Sembower pointed to repeated concessions bargaining as the key element supporting the award of preferential hiring and retained seniority for former workers at the new facilities.  

Sembower commented:

[An] employer owes at least the obligation of complete fair-dealing frankness with the bargaining representatives of an old and established industrial operation regarding whether or not it is going to close down, and not to forever wheedle whatever concessions may be obtained in return for an illusory promise that if they are granted, the plant will remain in operation.

In *John B. Stetson Corp.*, Arbitrator McGoldrick pointed to the employer's failure to notify or bargain with the union prior to relocation as demonstrating undue carelessness with regard to a long established relationship, and he therefore awarded workers reemployment at the new location.

One of the cases described in the Introduction, *Schlitz Brewing*, also indicates that arbitrators take account of the employer's conduct in notifying the union about relocation when deciding whether the employer has breached implied duties. It is true that this factor was only one of several influencing Arbitrator Lande's decision. While Lande concluded that no specific provision controlled the dispute, he was more impressed with the agreement provisions and supplementary agreements favoring the union than with those favoring Schlitz. Lande also

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78. 60 Lab. Arb. (BNA) 1094 (1973) (Sembower, Arb.).
79.  *Id.* at 1100-01.
80. 28 Lab. Arb. (BNA) 514 (1957) (McGoldrick, Arb.).
81. 58 Lab. Arb. (BNA) 653 (1972) (Lande, Arb.).
82.  *Id.* at 660.
83.  *Id.* at 658-59.
84.  Lande found that a letter forbidding layoffs "due to the diversion of beer . . . to other plants", and also prohibiting the "importing of beer into the area if employees were on layoff," had been negotiated with the aim of preventing contraction of the Brooklyn plant caused by the transfer of work to other Schlitz facilities.  *Id.* at 658.  Lande also found that the agreement clause, "no layoff except for lack or work," favored the union's position.  *Id.* at 657.
85.  Lande was less persuaded by Schlitz's claims regarding the agreement.  He found that a clause providing that Schlitz's obligations under the agreement would be inapplicable "in the event that the Employer shall suspend or discontinue the operations of its plants in whole or in part" contemplated a true shutdown, unaccompanied by the transfer of work.  *Id.* at 658-59.  Lande similarly refused to infer a right to relocate from the provision for transfer rights and severance pay in the event of
relied on the continued profitability of the original plant in Brooklyn. Even so, a critical consideration was Schlitz’s improper conduct in repeatedly and falsely stating that the Brooklyn facility would remain open if the employees would cooperate.

A letter to employees, dated six months before the announcement of the closure, stated that Schlitz had decided that it can and will operate the Brooklyn Plant indefinitely provided that we can improve our ability to produce a quality product at a competitive cost. If you will cooperate with us rather than to resist [sic] us, we can operate this Plant indefinitely.

Lande noted that after the letter was released, “employees decided to remain on the job,” “cooperated in full,” and increased productivity. Lande also noted that when a Schlitz representative was asked why there was a sudden change of plans after months of reassurances to employees that the plant would continue to operate if they “cooperated,” the only answer given was that the earlier statements had been “over optimistic.”

It is, at best, a much too casual approach to the jobs and security of some 300 of its employees, many of long standing, to proffer in explanation of the Company’s drastic change in position, merely that it was over optimistic. This would sound either in the nature of hindsight or worse, that the original stated position was a beguilement. In any event, it raises serious doubts, as to the Company’s good faith.

It is plain, judging from the tenor of the opinion, that Lande’s decision to bar the relocation stemmed in large, and perhaps decisive, part from a finding that Schlitz had deliberately manipulated workers’ hopes of keeping their jobs in order to improve productivity.

3. The Business Rationale for the Relocation

Arbitrators will determine that an employer has breached implied duties if the business rationale offered by the employer does not ade-
quately justify the relocation. The test is variously expressed as whether the action is based upon "sound economic considerations" or "compelling business reasons," or whether it is "in accordance with conventional and customary business practice." A whole range of factors is considered legitimate in demonstrating a rationale, including reduction of overcapacity, consolidation of operations, and utilization of more advanced equipment and facilities. In *Hercules, Inc.*, Arbitrator Sidney Wolff ruled that the movement of a research laboratory from one facility to another was justified by considerations of the proximity to a complementary company facility, the inadequacy of the former facility, and the elimination of duplicative work. In *Safeway Stores, Inc.*, Arbitrator Arthur Ross relied on competitive pressures and a technological trend within the industry in approving a transfer of clerical work to a data processing center.

Ordinarily arbitrators find the business rationales offered by employers to be adequate. In assessing the significance of this fact, note that the record is not yet established as to how arbitrators will regard the rationale of seeking lower labor costs. Clearly a relocation motivated by the employer's subjective hostility to the union will not be approved; such hostility reveals an impermissible intent to erode or subvert the bargaining unit. However, for two reasons, the lack of cases on point and of

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92. Babcock & Wilcox Co., 80 Lab. Arb. (BNA) at 217. Klein found that Babcock & Wilcox's transferring and subcontracting of operations were reasonable means of exercising its agreement-conferred right to close the plant. See *supra* text accompanying notes 51-53. Klein also found that these actions were legitimate ways of avoiding declining productivity due to lowered employee morale in the face of an impending closure. *Id.* at 217. Compare this finding with Arbitrator Lande's censure of Schlitz's misrepresentation of the likelihood the plant would not close in order to increase productivity. 58 Lab. Arb. (BNA) at 658. See *supra* text accompanying notes 81-88.
93. Leeds-Dixon Laboratories, Inc., 74 Lab. Arb. (BNA) 407, 408 (1980) (Kramer, Arb.); Curtiss-Wright Corp., 43 Lab. Arb. (BNA) 5, 6-7 (1964) (Seitz, Arb.). However, the fact pattern in Sealtest Dairy, 65 Lab. Arb. (BNA) 958 (1975) (Blum, 1975), suggests that where consolidation of operations, unaccompanied by major changes in technology, work organization, or the market served, is the sole factor motivating a relocation, arbitrators are less inclined to approve the employer's action. In that case Arbitrator Blum found that the employer had wrongfully transferred operations and employees from a facility used as a base for wholesale trucking to its main plant in another locality.
96. 42 Lab. Arb. (BNA) at 358.
97. *See Hercules*, 54 Lab. Arb. (BNA) at 521 (finding no "improper desire by the Company to subvert the collective bargaining agreement and to discredit or weaken the Union"). Evidence of anti-union bias rarely surfaces in relocation disputes. The inquiry into the business rationale in part represents an indirect means of ascertaining the absence of such bias; if the rationale is legitimate, good faith towards the union—the absence of bias—is inferred. *Id.* See also Babcock & Wilcox, 80 Lab. Arb. (BNA) at 218 ("sound economic considerations" and not "a desire to undermine or harm
the presence of an economically convincing rationale, matters are less clear in relation to relocations motivated not by anti-union bias, but by a desire to escape conditions negotiated by the union, notably the wage rates. As will be shown in Part II, arbitrators may very well find that employers undertaking labor costs relocations have breached implied duties.

Another of the cases described in the Introduction, *Virginia Stage Lines*, represents a sharp departure from the normal pattern of arbitral deference to business rationales for relocations. In that case, Trailways had transferred bus rebuilding operations from its Bedford, Virginia subsidiary to its Dallas and Wichita subsidiaries. Arbitrator Samuel Ross ordered Trailways to return the work to Bedford, citing the substantial impact on the bargaining unit of the elimination of over one-half the jobs, the absence of a past practice of transferring operations, and failure of Trailways to establish that the transfer "was required by sound economic considerations." This last point was the critical step in concluding that the action did not measure up to standards of reasonableness and good faith. Ross found that Trailways failed to establish each of its claims of overcapacity, low profitability, and low productivity. An abundance of work was waiting to be done in the bus rebuilding department before it was shut down; profitability was always low or negative in the winter months upon which the Trailways figures were based; and no evidence was adduced to support the claim that the department was inefficient compared to its rebuilding operations in the other subsidiaries.

Ross noted that it is not the arbitrator's function to substitute his or her judgement about how the business should be operated for that of the employer. Despite this disclaimer, Ross took a closer look at the business rationale than do most arbitrators. One indicator of his probing rather than deferential approach is his comment that if Trailways was truly faced with an overcapacity problem, it could best meet its collective bargaining commitments by reducing production at all three bus rebuilding facilities instead of closing down the Virginia Stage Lines rebuilding department. *Virginia Stage Lines* thus points to the possibility that, by
examining business rationales in a searching way, arbitrators could seriously restrict employers' ability to relocate.\textsuperscript{105}

II

THE BASES OF ARBITRAL REASONING IN RELOCATION DISPUTES

So far it has been shown that while arbitrators generally will not prevent or recall relocations unless they are specifically prohibited by the agreement, they will scrutinize these actions under the implied duties analysis. What are the conceptual and practical underpinnings of the reasoning employed by arbitrators in these decisions? Three propositions are advanced here. First, arbitrators' typical insistence on a prohibitory provision if relocation is to be halted is based on the assumption of the employer's broad power to manage the business, an assumption rooted in the realities of collective bargaining. Second, arbitrators' refusal to construe the agreement as a whole or its general provisions as barring relocation is due to the limited relevance of contractual analysis dependent upon a reference to shared purposes. Third, the sources of implied duties are to be found in workers' expectations of job security, and in the condition of limited community inherent in a collective bargaining relationship. The implications of these arguments for the case of the labor costs relocation are then considered.

A. The Assumption of Broad Managerial Power

As has been shown,\textsuperscript{106} arbitrators tend to view management rights provisions as conferring a right to relocate upon the employer where there is no specific provision restricting that right and where the employer has not breached implied duties. This tendency is powerfully reinforced by the pattern of bargaining over relocation. A recent Bureau of Labor Statistics study, based on a sample of agreements each covering more than 1,000 workers, reveals the following pattern:

---only a tiny percentage (less than 3\%) contained provisions restricting the employer's power to relocate
---a small percentage (6\%) recognized the employer's right to relocate
---a small percentage (11\%) included provisions recognizing the union's jurisdiction or the applicability of the agreement at the new facility
---a small percentage (13\%) provided for notice or bargaining about the relocation or its effects

\textsuperscript{105} Schlitz Brewing also points to this possibility. Arbitrator Lande rejected a business rationale of greater profitability based on lower wage costs and more advanced facilities. \textit{See supra} text accompanying notes 8-10. However, in Schlitz there were other factors supporting a decision for the union barring relocation. \textit{See supra} text accompanying notes 81-88. In \textit{Virginia Stage Lines}, however, the adequacy of the business rationale was the main issue.

\textsuperscript{106} \textit{See supra} text accompanying notes 58-66.
a slightly larger percentage (18%) included provisions granting workers transfer rights or preferential hiring at the new worksite in the event of relocation
—over one-half made no reference to relocation

This pattern should be assessed in light of the simple fact that if unions and employers considered relocations to be impermissible during the agreement term, there would be no need for unions to negotiate restrictions on relocations. But unions do negotiate such restrictions. Moreover, they do so in a way which suggests a recognition of the employer's right to relocate. Only a tiny percentage actually bar relocation. Other restrictions, such as those requiring notice or bargaining, recognition of the union at the new site, or hiring of workers at the new site, impliedly assume the right of the employer to relocate. Overall, only about one-third of the agreements in the sample contain restrictions.

The percentages listed in the text were calculated by dividing the number of agreements in each category by the total number in the sample, 522. The number of agreements in each category were derived as follows. Ten agreements required consent of the union or a joint union-management committee to relocate, and three imposed geographical limitations, making altogether 13 agreements restricting the employer's power to relocate. Thirty-three agreements conferred a right to close the plant or to determine the number and location of plants, or otherwise recognize implicitly or explicitly an employer's power to relocate. These 33 agreements contained no limitation on that power elsewhere in the agreement. The four agreements "mentioning relocation" were not included in this number. Fifty-seven agreements required recognition of the union or the applicability of the agreement at the new location. Sixty-six agreements required notice or bargaining regarding a relocation or shutdown. The 10 agreements requiring consent of the union or a joint union-management committee to a relocation were not included in this number. Ninety-three agreements provided for workers' interplant transfer rights in the event of relocation. Two hundred twenty-six agreements "addressed plant location or shutdown issues," leaving 296 which made no reference to relocation.

The categories listed in the text are overlapping. For example, one agreement may contain requirements relating to bargaining, union jurisdiction at the new location, and transfer rights. Consequently, though less than one-half of the sample agreements mention relocation, the percentages for the different categories add up to over 50%. Also, the BLS study included agreements regulating the employer's ability to close a plant. Since a relocation usually involves reducing or eliminating a bargaining unit, provisions regarding shutdowns also regulate relocation. Most of the agreements concerning the plant closure issue are included in the category of notice or bargaining. Finally, many agreements contained severance pay provisions not limited to the contingency of relocation; these provisions are discussed, but not quantitatively analyzed, by the BLS.

See text accompanying note 46.

One hundred eighty-nine agreements, or 36% of the sample of 522 agreements, regulated the employer's power to relocate in some fashion. Regulations ranged from prohibition of relocation
suggesting that in the remainder employers are free to relocate.

There are countervailing considerations. The fact that some employers negotiate provisions which establish their right to relocate indicates an ambiguity about whether they could relocate in the absence of an enabling provision. Unions' negotiation of provisions regulating the process of relocation does not necessarily demonstrate an acceptance of the employer's right to relocate, and especially not of the employer's right to relocate under all circumstances. The fact that a majority of agreements contain no provisions governing relocation may be due in part not to unions' acquiescence in the employer's right to relocate, but rather to an unwillingness to engage in the bargaining required to draft such provisions. Bargaining about relocation might involve tradeoffs the parties would rather avoid, and it might delay finalization of an agreement. Relocation may also be viewed as such a remote prospect that bargaining over a relocation provision seems pointless.

Nonetheless, the pattern of bargaining over relocation supports arbitrators' tendencies to view relocation as an inherent right of management. Broad management rights provisions are included in most agreements. Moreover, the employer typically, though not universally, has the upper hand in the negotiation of agreements, at least with regard to matters outside the union's traditional province of wage rates, seniority systems, and working conditions. Against this background, the pattern of bargaining over relocation implies that provisions restricting relocation or granting workers rights attendant to relocation represent concessions wrested by unions from employers who otherwise retain a broad management right to make business decisions, including the right to relocate operations or facilities.

Arbitrators' recognition of broad managerial rights presumptively including the right to relocate is further reinforced by their acceptance of market-oriented values and thinking. They place a high priority upon the goal of efficiency, and they believe that the unimpeded operation of the market — capital mobility — promotes the achievement of this goal. Arthur Ross was more self-conscious than most arbitrators about the importance of this market orientation in arbitral decisionmaking. In approving the transfer of clerical work to a computerized facility, he noted the often unstated premise that attaining higher productivity through the use of superior technology is intrinsically desirable:

For better or worse, it is almost unchallenged in the United States that employers should be entitled to take full advantage of science and technology. . . . Perhaps we have made a mistake in elevating economic progress to the status of an absolute, but this is a philosophical question

to provision for transfer rights. MAJOR COLLECTIVE BARGAINING AGREEMENTS, supra note 34, at 6.
which need not be answered here. It is sufficient to find that Safeway’s computer installation was in line with current business practice and in accordance with prevailing ideology concerning the benefits of unrestricted technological change.\(^{110}\)

Arbitrators’ ready endorsement of other rationales for relocation, such as coordination of facilities or elimination of overcapacity, indicates that the desirability of efficiency, and the effectiveness and acceptability of capital mobility as a means of achieving efficiency, are widely adopted as premises in arbitral decisionmaking.

**B. The Problem of Conflicting Purposes**

Reference to the shared purposes of contractual partners greatly facilitates the interpretation of contracts.\(^{111}\) However, because the relationship between management and labor is one of authority and dependence,\(^{112}\) with the bounds on authority established partly through a power struggle,\(^{113}\) it is not always possible to refer to shared purposes in interpreting collective bargaining agreements. As Archibald Cox observed:

\[\text{[M]any of the most important questions of interpretation are not soluble by reference to the fundamental purposes of the collective agreement—} \]

\[\text{at least not in the sense in which that term is usually understood. The difficulty arises from the fact that management and labor often have conflicting aims and objectives, and the interpretation put upon the contract may depend upon which objective is chosen as the major premise.}^{114}\]

For the union, one of the animating purposes of the agreement is job security.\(^{115}\) That purpose, however, is not necessarily shared by the employer, at least not to the extent that it is inconsistent with the employer’s purpose of profit-making.\(^{116}\) In *Curtiss-Wright Corp.*, Arbitrator Seitz rejected the union’s argument that work which “was to be performed by employees in the bargaining unit . . . may not legally be alienated.”\(^{117}\)

In so doing, he remarked that a collective bargaining agreement is a ‘contract’ . . . not subject to the rules of construction that one would

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111. See Restatement (Second) of Contracts § 202(1) (“if the principal purpose of the parties is ascertainable it is given great weight”); E. Farnsworth, Contracts § 7.10, at 494 (1982) (“it seems proper to regard one party’s assent to the agreement with knowledge of the other party’s general purposes as a ground for resolving doubts in favor of a meaning that will further those ends”).


113. See American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317 (1965) (the NLRA “contemplated resort to economic weapons should more peaceful measures not avail”).


116. See infra text accompanying notes 159-60.

117. 43 Lab. Arb. (BNA) 5, 7 (1964) (Seitz, Arb.).
apply to an undertaking under seal to pay a sum certain to an identified
person at a particular place at a stated time. The Agreement under con-
sideration here, because it contemplates a continuing relationship, or
what some might call a status, must be construed, interpreted and ap-
plicated with due consideration of its purposes and objectives. Among the relevant purposes identified by Seitz were the production of
profits for investors and the provision of jobs for employees. The
thrust of Seitz's opinion is that these sometimes divergent purposes pre-
vent blocked any implication of an obligation to refrain from transferring
production to another facility.'

Curtiss-Wright Corp. illustrates that, because the employer and
union disagree on the nature and implications of the agreement's under-
lying purposes, it is difficult to prevent the employer from altering a basic
assumption of the undertaking, the maintenance of employment at the
covered worksite. Accordingly, arbitrators refuse to characterize reloca-
tion as inimical to the essence of the collective bargaining agreement,' and they typically require a specific prohibitory provision before they will
disallow relocation.

C. The Sources of Implied Contractual Duties

Due to the infrequency of provisions restricting relocation and the
absence of a shared purpose to maintain employment, arbitrators focusing
on the language and intent of an agreement usually will not bar relo-
cation. Consequently, in the typical case, implied contractual duties of
good faith, fair dealing, and reasonableness are the only possible bases for
halting a relocation. Reference to implied duties, at least in passing, is a
consistent theme in arbitrators' opinions, though arbitrators normally
find that the employer has fulfilled those duties. This acknowledge-
ment of the theoretical relevance of implied duties to the relocation issue,
along with the rare cases disallowing relocation, points to an avenue of
decisionmaking with the potential of seriously restricting capital mobility
during the agreement term. It is worth examining the sources of implied
duties, as a first step in assessing whether this potential could be more
fully realized.

In Virginia Stage Lines, Arbitrator Samuel Ross referred to the
union's right, based upon the recognition, wage, and seniority provisions,
"to protect the job security of its members and the stability of the bar-
gaining unit." In Safeway Stores, Arbitrator Arthur Ross observed:

118. Id.
119. Id.
120. Id. at 7-9.
121. See supra text accompanying notes 54-57.
122. See supra text accompanying notes 61-105.
It is implied in every contract that neither party will take any action which improperly impairs or destroys the right of the other party to receive the fruits of the bargain.\textsuperscript{124}

These and other cases\textsuperscript{125} indicate that arbitrators understand implied duties to be founded on the requirement that employers accord the expectations of workers and the union appropriate consideration in making business decisions.\textsuperscript{126} For the arbitrator, the acknowledgement of the significance of these expectations does not dictate a decision in the union's favor. But it does impel the examination of the employer's action under "standards of reasonableness and good faith"\textsuperscript{127} or a "covenant of good faith and fair dealing,"\textsuperscript{128} an examination particularly focused on whether the action was "justified by sound economic considerations"\textsuperscript{129} or was "in accordance with conventional and customary business practice."\textsuperscript{130}

Where workers' expectations of job security have been heightened by employer representations or concessions bargaining, the balance tilts towards the union, regardless of the persuasiveness of the business rationale. The \textit{Schlitz Brewing} result depended in large measure on a finding that Schlitz made repeated assurances, apparently aimed at increasing workers' output rather than depicting the reality of the situation, that work would not be transferred if productivity improved.\textsuperscript{131} Indeed, because there were indications that workers decided not to seek other jobs because of these assurances,\textsuperscript{132} there are overtones of promissory estoppel in Arbitrator Lande's reasoning. That is, Schlitz was estopped from relocating in contradiction with its earlier statements which had induced acts of reliance by workers foregoing a search for new jobs. In other cases,\textsuperscript{133} lesser remedies such as transfer rights at the new facil-

\begin{thebibliography}{99}
\bibitem{124} 42 Lab. Arb. (BNA) 353, 357 (1964).
\bibitem{125} \textit{E.g.}, \textit{Schlitz Brewing}, 58 Lab. Arb. (BNA) at 659-60; Paragon Bridge & Steel Co., 44 Lab. Arb. (BNA) 361, 371 (1965) (Casselman, Arb.).
\bibitem{126} In part, the inquiry into the adequacy of the business represents an indirect means of determining that the employer is not motivated by anti-union bias. \textit{See supra} note 97. This may partly explain why arbitrators are deferential to employer business rationales. Once it is established that there is some substance to a rationale, it is less probable that the relocation is motivated by anti-union bias. But the language used in many cases, such as the ones quoted in the text, indicates that there is more to the examination of the business rationale than this minimal protection of the union's role as a contractual partner deserving of respect. Arbitrators are also concerned to establish that the business rationale put forward in good faith by the employer adequately justifies the disappointment of workers' expectations.
\bibitem{127} \textit{Virginia Stage Lines}, 79-2 Lab. Arb. Awards (CCH) ¶ 8373, at 4570.
\bibitem{128} \textit{Safeway Stores}, 42 Lab. Arb. (BNA) 353, 357 (1964) (A. Ross, Arb.).
\bibitem{129} \textit{Virginia Stage Lines}, 79-2 Lab. Arb. Awards (CCH) ¶ 8373, at 4571.
\bibitem{130} \textit{Safeway Stores}, 42 Lab. Arb. (BNA) 357.
\bibitem{131} 58 Lab. Arb. (BNA) at 661-62. \textit{See supra} text accompanying notes 81-88.
\bibitem{132} \textit{Id.}
\end{thebibliography}
ity have been premised on similar representations or on concessions bargaining.

Undoubtedly arbitrators' willingness to consider workers' expectations in resolving relocation disputes stems in part from a recognition that the employment relationship cemented by a collective bargaining agreement amounts to more than a simple business transaction in which workers receive wages for work performed. To a greater or lesser extent, depending upon the circumstances of the collective bargaining relationship, employees become committed to the enterprise and form friendships at the workplace. Moreover, employees establish ties of school, church, and recreation outside the workplace, all of which will be affected if they are forced to relocate or seek a new job. In short, the business transaction becomes overlaid with aspects of community within and without the workplace. The arbitrator's acknowledgement of expectations bespeaks a concern that these bonds of community not be lightly or arbitrarily disrupted. It also bespeaks a recognition of the vulnerability of workers to the employer's power to eliminate or modify the business. It is these factors that lend an emotional force to Arbitrator Sembower's reference to the near cruelty of stirring "hopes in a work force whose average age is more than fifty years that the plant where they have spent the bulk of their worklife will be kept open if only they make enough concessions," and to Arbitrator Lande's criticism of Schlitz's willingness to "walk away from its commitments, its contract, its employees and their livelihoods."

As arbitrators frequently observe, expectations of job security are arranged by the formation of an agreement which includes provisions governing the remuneration of employees and the recognition of the union as the bargaining agent. What goes unsaid, but surely influences arbitrators, is that these expectations gain added weight because they derive from the condition of limited community inherent in the employment relationship, a condition reinforced and solidified by the establishment of a collective bargaining agreement.137

D. Implied Duties and the Labor Costs Relocation

Arbitrators have not yet been squarely faced with the issue of relocation motivated by the employer's desire to lower wage costs. But there are strong indications, in both the relocation and the subcontracting contexts, of the approach arbitrators will take. An examination of this approach will deepen the analysis of the sources of implied duties presented

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134. Ex-Cell-O Corp., 60 Lab. Arb. (BNA) at 1100.
135. Schlitz Brewing, 58 Lab. Arb. (BNA) at 662.
here. It will also provide some clues as to how arbitrators will decide the labor costs relocation issue, an important question in its own right.\textsuperscript{138}

The available evidence suggests that at least some arbitrators would rule against employers who are motivated only by the desire to lower wage costs. In several cases approving relocations, arbitrators note that labor costs were not a factor or not a central factor in the decision to relocate, thereby inviting the inference that the result would have been different if labor costs had played an important role. For example, in Leeds-Dixon Laboratories, Arbitrator Kramer pointed to the "sound business reasons" for a transfer of operations, including increased productive capacity and better "functional coordination," and then observed that "the increase in production herein at a lower unit cost is completely unrelated to wages."\textsuperscript{139} Statements directly disapproving labor costs relocations also occasionally surface in the cases. In Paragon Bridge and Steel Co., Arbitrator Casselman commented that taking advantage of lower wage costs at the new facility merely to increase profits would be unacceptable:

If the company were seeking to move the work \textit{simply because it could be done more cheaply, the union interest would predominate}, but this is not the case, it is moving because it cannot compete and will otherwise \textit{abandon} this kind of work. On balance the employer's interest predominates \textsuperscript{140}

Finally, in the subcontracting setting, arbitrators commonly reject labor costs rationales. Citing recent cases, two commentators conclude that "when management subcontracts a \textit{substantial} amount of unit work because wage rates are too high and unit jobs are eliminated as a result, the company should be held to have acted unreasonably."\textsuperscript{141} Arbitrators' hostility to labor costs relocations plainly flows from the view that these employer actions are baldfaced attempts to escape the collective bargaining agreement. Thus Arbitrator Kronish remarked that a relocation motivated by a search for lower wage costs would be prohibited as "avoiding

\textsuperscript{138} See \textit{infra} text accompanying notes 148-49.


\textsuperscript{140} 44 Lab. Arb. (BNA) 361, 372 (1965) (Casselman, Arb.). The business rationale disapproved in Schlitz Brewing was that of attaining higher profitability on the basis of lower wage costs and more advanced facilities. 58 Lab. Arb. (BNA) at 661. However, Arbitrator Lande did not emphasize the labor costs factor; rather he pointed to the continued profitability of the original plant. \textit{Id.} at 661.

\textsuperscript{141} Abrams & Nolan, \textit{supra} note 66, at 23, (citing Mead Corp., 75 Lab. Arb. (BNA) 665, 667 (1980) (Gross, Arb.); and Uniroyal, Inc., 76 Lab. Arb. (BNA) 1049, 1053 (1981) (Nolan, Arb.)). Crawford noted that 12 of 16 cases disallowing subcontracting as violating the "implied limitation" "presented factual situations wherein the primary advantage of the subcontract lay in wage rates below the unit rates." Crawford, \textit{supra} note 66, at 67. The sample used by Crawford, a total of 64 cases, comprised decisions made in the 1950's.
obligations to employees resulting from collective bargaining.\footnote{142} Arbitral decisions in disputes concerning subcontracting motivated by wage costs considerations exhibit the same reasoning.\footnote{143}

Taken at face value this reasoning is not compelling, because arguably the wage provision is not a commitment to supply jobs, but only to pay certain rates if those jobs are supplied. In fact, the Board majority makes this argument in Milwaukee Spring II\footnote{144} in response to the dissenting Board member's position that a labor costs relocation is an "indirect" violation of the wage provision.\footnote{145} The majority's argument is especially trenchant when the assumption of a broad managerial power and the problem of labor and management's conflicting purposes are acknowledged. While the union may see the wage provision as embodying the purpose of job security, the employer will disagree and regard this view of the wage provision as unduly infringing on its power to manage the enterprise. If the question is limited to the literal meaning of the wage provision, the arbitrator will be hard pressed to disagree with the employer.

Characterization of the labor costs relocation as an avoidance or indirect violation of the wage provision becomes more appealing when the issue is placed within the perspective of the implied duties arising from the act of entering into a contractual relationship. Once it is acknowledged that by this act the employer incurs duties of good faith, reasonableness, and fair dealing in relation to the union and the workers, the decisive question becomes whether a labor costs rationale adequately justifies the disappointment of workers' expectations. A business rationale such as consolidation of operations or reduction of transportation costs unrelated to the obligations set out in the agreement will pass muster if it is adequately proved by the employer. But the labor costs rationale is different; it asserts that the wage provision, which is a voluntarily assumed contractual obligation,\footnote{146} is too burdensome. This rationale is il-
legitimate because the employer seeks to justify the disappointment of expectations of job security by reference to the agreement which gives rise to those expectations.

In summary, if it is assumed that the employer has no obligations other than those specified in the agreement, the wage provision provides little support for the invalidation of a labor costs relocation. However, if it is acknowledged, as it is by most arbitrators, that the employer must act reasonably and in good faith in relation to workers and their expectations, the fact that a relocation is motivated by a desire to escape the agreement becomes highly suspect. The dubiousness of the labor costs rationale is underscored where expectations of continued employment are intensified by concessions bargaining, employer representations, or other factors. Thus an understanding of implied duties founded upon the recognition of workers' expectations supplies the basis for an equitable extension of the wage provision.

III

THE LIMITS OF ARBITRAL DECISIONMAKING IN RELOCATION DISPUTES

In response to Milwaukee Spring II—which held that, absent a specific prohibition in the agreement, midterm relocations are permissible under the National Labor Relations Act—unions may attempt to negotiate either provisions restricting relocations or conditional no-strike clauses which reserve the right to strike in the event of a plant move or transfer of operations. Unions may also bring more relocation disputes before arbitrators now that the Board has been closed off as an avenue of redress, at least for the time being. Moreover, if employers are encouraged by Milwaukee Spring II to undertake midterm labor costs relocations, it is probable that more of the disputes brought before arbitrators will turn upon the legitimacy of the labor costs rationale. It is known that plant location decisions are heavily influenced by a desire to avoid unions, no doubt this would also be true of midterm relocation.

148. Cf. Sinicropi, supra note 29, at 159-60 ("growth in number of clauses retaining the right to strike over subcontracting disputes").
149. B. BLUESTONE & B. HARRISON, supra note 22, at 165-66. It is worth quoting the relevant passage:

The business community fairly widely admits now that it consciously chooses locations in order to avoid unionization wherever possible. For example, "Donovan Dennis, vice-president of Fantus Corporation, the well-known plant location consulting firm, was asked by the Wall Street Journal to name the single most important determinant of plant location. He responded, 'Labor costs are the big thing, far and away. Nine out of ten times you can hang it on labor costs and unionization.'"

From his information on the industrial location practices of the Fortune 500, Roger Schmenner concludes than an anti-union "climate" is an extremely important factor influencing industrial plant location managers. In particular, inside the United States, "location is directed to the . . . right-to-work states, most of which are located in the Sunbelt
decisions, assuming acquiescence of the Board (a condition now obtaining) and arbitrators (prospect uncertain).

To the extent that specific provisions restricting relocation are increasingly negotiated in the aftermath of Milwaukee Spring II and in response to the recently heightened degree of capital mobility, arbitrators will naturally enforce those provisions if called upon to do so. The more interesting question is whether arbitrators will prevent relocations in the absence of specific prohibitory provisions. Insofar as the pattern of past decisions can be taken as a guide, the answer is generally negative. Examination of the business rationale, the key element in the implied duties analysis, rarely turns out to have detrimental results for the employer. But caution should be exercised in projecting future outcomes on the basis of this pattern. Arbitrators have not decided disputes over labor costs relocations, perhaps because employers have been reluctant to attempt such relocations for fear of losing before the Board or arbitrators. Moreover, in one atypical decision, Virginia Stage Lines, an arbitrator prevented a relocation in the absence of a prohibitory provision in the agreement. Finally, the examination of the underpinnings of implied duties undertaken in this Comment suggests the potential for more far-reaching arbitral regulation of relocation.

Accordingly, it is worth closely considering what stands in the way of a realization of this potential. The following discussion first briefly examines two obstacles to the use of implied duties to prevent relocations: the assumption of broad managerial power and the limited relevance of contractual analysis dependent upon a reference to shared purposes. Next, the impact of the statutory scheme to arbitral decisionmaking is considered at length. Finally, the main points are restated in terms of the arbitrator's institutional role.

A. Two Barriers to Arbitral Regulation of Relocation: The Assumption of Managerial Power and the Problem of Conflicting Purposes

As the Supreme Court has observed, typically the arbitrator is not
interpreting a contract negotiated at arms-length by two parties who could have chosen other contractual partners. Rather, the arbitrator interprets an agreement between a group of workers and an employer who have a relationship antecedent to the formation of the agreement, a relationship in which the employer already possessed the legally recognized power to manage the enterprise. In this circumstance, the arbitrator cannot presume that the parties have no power over each other unless the agreement so provides. Instead, the arbitrator acknowledges the existence of a pre-existing private structure of power which is only partially regulated by the agreement. That acknowledgement is embodied in the assumption of a broad managerial power to make business decisions. One consequence is that the potential of the implied duties analysis to regulate relocations is undermined. While that analysis is in principle applicable to any employer action, its force in relation to an action traditionally understood to be a "management prerogative"—relocation—is weakened by the arbitrator's recognition of the power relationship underlying the collective bargaining agreement.

Another barrier to the aggressive use of the implied duties analysis is the problem of conflicting purposes. Like the assumption of a broad managerial power, it too is rooted in the fact that the collective bargaining agreement only partially regulates a pre-existing structure of power. Within the employment relationship—within the private structure of power—there is a fundamental conflict of interests: the employer has an interest in productive efficiency and the workers have an interest in job security. Superimposing a collective bargaining agreement upon the employment relationship moderates, but does not resolve, this fundamental conflict. Instead, the agreement bears the marks of diverging purposes created by the conflicting interests. Thus, while the management rights provision reflects management's interest in productive efficiency, the seniority, wage, and union recognition provisions reflect the workers' interest in job security. Moreover, the agreement tends to exhibit pervasive vagueness and ambiguity arising from the inability of labor and management to strike a bargain on all issues, an inability due in part to

156. See id. at 580, 583.
157. The assumption of managerial power is often also based upon a general management rights provision in the collective bargaining agreement. See supra text accompanying notes 58-65. However, arbitrators' recognition of the underlying power relationship tends to induce generous interpretation of such provisions. Moreover, even when a management rights provision is comprehensive in scope and unqualifiedly stated, the question remains as to the implied contractual duties of the employer. As is argued in the text, the recognition of underlying power relationships tends to diminish the force of these duties.
158. See Abram & Nolan, supra note 66, at 7-8, 15-16, 19-20.
the conflict in interests. Consequently, the arbitrator cannot always refer to shared purposes in interpreting the intent of the agreement. Instead, in filling in the gaps and reconciling the contradictory provisions of the agreement, the arbitrator must resort to the "common law of the shop," embracing past practice and industry custom.

Reference to past practice and industry custom is one element of the implied duties analysis. Such reference serves as only a limited restraint on employer actions, for the pattern of practice and custom tend to reflect the employer's predominance within the employment relationship. More broadly, the problem of conflicting purposes, the phenomenon which induces the arbitrator to have recourse to the common law of the shop, tends to require a strong justification for regulation of relocation on the basis of any element of the implied duties analysis.

B. The Arbitrator's Position Within the Statutory Scheme

1. The Complementary Roles of the Board and Arbitrators

In promoting the ability of workers to engage in collective bargaining through the exercise of the rights to organize unions, to strike, and to negotiate with employers, the NLRA established a framework of countervailing power to remedy an inequality of bargaining power otherwise fatal to the formation of contracts within the sphere of labor relations. As the Supreme Court noted in American Ship Building, "a primary purpose of the National Labor Relations Act was to redress the perceived imbalance of economic power between labor and management." The Court explained that, through the establishment of workers' rights to engage in concerted activity and the prohibition of employers' interference with the exercise of those rights, the Act "protected employee organization in countervalance to the employers' bargaining power, and . . . established a system of collective bargaining whereby the newly coequal adversaries might resolve their disputes. . . ." However, within the framework so established, the Board is supposed to avoid the substantive

160. See Cox, supra note 114, at 25-32.
161. Warrior & Gulf Navigation Co., 363 U.S. at 581-82. Another cause of the recourse to a "common law of the shop" is the impossibility of foreseeing all issues when negotiating and writing the agreement. See Cox, supra note 114, at 32.
162. See supra text accompanying notes 67-77. The other elements of the implied duties analysis are the quality of the employer's communication regarding relocation and the adequacy of the business rationale. See supra text accompanying notes 78-105.
165. 380 U.S. 300 at 317.
regulation of labor relations.\textsuperscript{166} It does not have "a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other. . . ."\textsuperscript{167} Nor does the Board have the authority to dictate the terms of collective bargaining agreements, for section 8(d) of the statute provides that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession. . . ."\textsuperscript{168}

The significance of the statutory scheme for arbitral decisionmaking in relocation disputes derives from the fact that arbitrators operate within the confines of a larger system in which it is the task of the Board to secure the essential procedural conditions which enable contract formation within the labor market. If those conditions are fulfilled, the agreement as negotiated by the parties is deemed to be valid and enforceable. Consequently, the arbitrator tends to view his or her task as one of dispute resolution within a collective bargaining relationship whose global legitimacy is established by reference to the statutory scheme. Here it is useful to analogize the concept of contract as used in the sphere of labor relations to that of the "social contract" of political philosophy.\textsuperscript{169} In this analogy, the initial act of forming a collective bargaining agreement is a consensual, "contractual" establishment of a structure of governance. Beyond this original act, the concept of contract has limited application; there is a shift to problems of regulating the relationship of the governor—the employer—and the governed—the employees. The role of the Board, in this perspective, is to safeguard the creation of "social contracts," while that of the arbitrator is to ensure consistent and reasoned rule application within the private regime of governance.

This picture of the arbitrator's position within the statutory scheme is consistent with the use of the implied duties analysis in arbitral decisions. Arbitrators do go beyond rule application to determine whether employers have breached implied duties. However, the implied duties analysis is founded upon a recognition of expectations generated within the context of established collective bargaining relationships. Arbitrators assume that the relationship itself is a valid contractual undertaking. They are not concerned with the question of whether the employer's action is consistent with the premise that the agreement is a contract formed by parties each possessing the bargaining power necessary to ensure a voluntary exchange, untainted by duress. Although this question is an essential one in the adjudication of any contractual dispute, in the labor relations context it is settled by the Board in its establishment of

\textsuperscript{166} See Unger, supra note 138, at 629 ("whole machinery of countervailing power is designed to avoid" the "substantive regulation of labor relations").
\textsuperscript{167} American Ship Bldg., 380 U.S. at 317.
\textsuperscript{168} 29 U.S.C. § 158(d) (1982).
the conditions for contract formation through the securing of workers' ability to engage in concerted activity.

This picture of the respective roles of the Board and arbitrators is also consonant with the underlying institutional realities. Since labor and management jointly select arbitrators to resolve their disputes, the arbitrator's professional career is critically dependent upon acceptability to both sides. The arbitrator must be responsive to their needs, and sensitive to the private structure of power only partially regulated by the agreement. Unlike the Board, which is responsible to society at large, equipped with resources for information collection and analysis, and empowered to effect enforcement, the arbitrator is not in a position to develop a mode of reasoning (the implied duties analysis) going to the foundations of the law of contracts—especially in relation to an issue (relocation) fraught with consequences for the basic economic posture of a company or industry. In this context, it is not surprising to find an arbitrator declaring that he or she "is not enthroned as a lawmaker" and may not "impose new obligations or restraints which cannot be fairly grounded on the Contract as the parties have negotiated it."

It should not be concluded, however, that the arbitrator's position within the statutory scheme is an insurmountable barrier to a systematic arbitral invalidation of relocations. As has been shown, the implied duties analysis, founded upon the recognition of workers' expectations, is in principle antithetical to labor costs relocations. Nonetheless, the natural tendency of the implied duties analysis is to focus on the expectations aroused within the setting of a particular collective bargaining relationship, in light of factors such as duration of the relationship, bargaining history, and past practice and industry custom. For this reason, arbitral hostility to labor costs relocations will probably be most intense when expectations of job security have been heightened by the specific circumstances of the collective bargaining relationship before the arbitrator. Thus the particularistic character of the implied duties analysis is consistent with the understanding that arbitrators act within a larger statutory scheme governing issues of contract formation common to all agreements.

2. *The Effects of Otis Elevator and Milwaukee Spring II*

So far the discussion has centered on the general question of how the arbitrator's position within the statutory scheme affects decisionmaking in relocation disputes. A more specific question concerns the effects, if any, of the Board's recent decisions in *Otis Elevator* and *Milwaukee*
Spring II upon arbitral decisionmaking. Before addressing this question, it should first be noted that the courts may not approve these decisions, and that some arbitrators will decide relocation and other disputes without regard for statutory doctrine. Nonetheless, in the uncertain event that Otis Elevator and Milwaukee Spring II are endorsed by the courts, they will undoubtedly influence many arbitrators’ decisions in relocation disputes. The following discussion assumes that these decisions will become settled doctrine, and speculates as to the nature and extent of arbitrators’ accommodation of that doctrine.

a. The Duty to Bargain About Relocation After Otis Elevator

Under sections 8(a)(5) and 8(d) of the NLRA as interpreted by the Supreme Court, the duty to bargain in good faith is limited to terms and conditions of employment classified as mandatory subjects of bargaining. An employer may not take unilateral action in relation to a mandatory subject without first bargaining to impasse. Thus, although the Board held in Milwaukee Spring II that relocation not specifically prohibited by an agreement is permissible under the statute, the employer must first bargain to impasse regarding those relocations which are classified as mandatory subjects of bargaining. In Otis Elevator, the Board, applying criteria derived from First National Maintenance Corporation, held that employers must bargain over midterm relocations only when they turn upon labor costs considerations and not upon “a change in the nature and direction of a significant facet” of the enterprise. Two of four Board members deciding the case broadened the labor costs element to include factors within the union’s control. Here it will be assumed that this latter, slightly broader, holding will control future decisions.

Arbitral decisionmaking may be affected when the employer whose relocation is challenged by the union has complied the duty to bargain as clarified in Otis Elevator. If the employer has notified and bargained with the union in timely and truthful fashion regarding its intent to relocate...
due to factors within the union's control, there will be no occasion for the arbitrator to find that the employer has breached implied duties due to inadequate communication with the union. Similarly, if the employer is not required to bargain with the union because the relocation is motivated by factors outside the union's control, arbitrators may be at least reluctant to find a breach of implied duties due to poor communication. More generally, arbitrators may hesitate to find a breach of implied duties for any reason — inconsistency with past practice, poor communication, or an inadequate business rationale — in relation to a permissive subject of bargaining, an issue classified as falling outside the scope of the collective bargaining agreement unless both parties consent to its inclusion while negotiating the agreement. Accordingly, a result such as that reached in Virginia Stage Lines becomes less probable. In that case, the arbitrator found a business rationale of excess capacity inadequate to justify a transfer of operations. After Otis Elevator, it is clear that a relocation motivated by the desire to reduce excess capacity, a factor outside the union's control, is a permissive subject of bargaining.

b. The Permissibility of Midterm Relocations Under Milwaukee Spring II

The Milwaukee Spring II holding, that midterm relocations are permissible absent a specific prohibitory provision in the agreement, is based on the proposition that the Board is not to dictate the terms of collective bargaining agreements. The Board noted that the parties to an agreement could draft a clause stating that the functions performed by the bargaining unit are to remain at the covered worksite. It then added, It is not for the Board, however, to create an implied work-preservation clause in every American labor agreement based on wage and benefits or recognition provisions, and we expressly decline to do so. The advantage of this approach, in the view of the current Board, is that it enables the labor market to operate on true market principles. The absence of administrative regulations constricting the ability of contractual partners to choose their own terms and to be bound only by those terms encourages, in the Board's words, "the exercise of rational economic discussion and decisionmaking which ultimately accrue to the benefit of all parties."

181. See supra text accompanying notes 99-105.
182. See supra text accompanying notes 166-68.
183. 268 N.L.R.B. at 602.
184. Id.
185. Id. at 603.
After *Milwaukee Spring II*, as refined by *Otis Elevator*, the employer seeking to relocate when there is no specific prohibitory provision in the agreement is subject to two statutory constraints. Neither of these constraints seriously infringes on the employer's ability to relocate. The first is that the employer must bargain over the decision to undertake a labor costs relocation and over the effects of any relocation. The second constraint is that the employer must not relocate because of anti-union animus. In practical terms, this means that the employer must not display any subjective hostility towards the union.

It is worth emphasizing that the implied duties analysis employed by arbitrators, and especially the willingness of arbitrators to assess the adequacy of business rationales, is considerably broader than the Board's requirements that the employer fulfill the duty to bargain and not act out of anti-union animus. The question then arises whether *Milwaukee Spring II* will cause arbitrators to narrow or soften the implied duties analysis as applied to the relocation issue. One observation is that, at least in the short run, *Milwaukee Spring II* may have no effect whatsoever on how arbitrators decide future relocation disputes. In fact, as was argued earlier, it is quite possible that some arbitrators will disallow labor costs relocations. Since the Board's decision in *Milwaukee Spring II* is predicated on the finding that a midterm labor costs relocation is not a breach of the collective bargaining agreement, the spectre is raised of a direct contradiction between Board and arbitral contractual interpretations. For some arbitrators this would only serve to demonstrate that the Board is outside its competence when it comes to the interpretation of collective bargaining agreements. The possibility of diverging Board and arbitral positions on the relocation issue is a reality in the subcontracting context. It has long been accepted that once the employer has satisfied the duty to bargain midterm subcontracting not expressly prohibited by the agreement is permissible under the NLRA. Arbitrators' willing-

186. See supra text accompanying notes 174-79.
188. Milwaukee Spring II, 268 N.R.L.B. at 604 (citing to University of Chicago, 210 N.L.R.B. 190, enforcement denied, 514 F.2d 942, 949 (7th Cir. 1975)).
189. A case illustrative of the direct evidence of the employer's state of mind required to find a § 8(a)(3) violation predicated on anti-union animus is Local 57, ILGWU v. NLRB (Garwin Corp.), 374 F.2d 295 (D.C. Cir.), cert. denied, 387 U.S. 942 (1967). In that case, the court upheld a Board finding that a "runaway" was illegal, since it was motivated by opposition to unionization. The court cited three elements supporting the finding: "direct evidence of antiunion bias and hostility," such as statements from the employer to the trial examiner that "I was darned well fed up with union terrorism"; "concealment from the union of plans for the move"; and "the inadequacy of the economic explanations offered by the Company." Id. at 298.
190. See supra text accompanying notes 138-46.
191. After the Supreme Court held, in Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964), that under certain circumstances subcontracting is a mandatory subject of bargaining, the Board attempted to determine just when subcontracting came under this category. However, the
ness to disallow subcontracting suggests that they may display a similar independence from the Board in the relocation setting.

A second observation, however, is that elements of the Board's approach resonate with the reasoning customarily employed by arbitrators, which suggests that in the long run they may be influenced by *Milwaukee Spring II*. In particular, the Board's stress on the parties' ability to choose their own terms and to be bound only by those terms is echoed in the arbitral context by the general view that the employer's broad power to manage the enterprise is limited only by specific provisions of the agreement. To a lesser extent, the Board's concern with avoiding substantive regulation of labor relations is consonant with arbitrators' reluctance to stray from the confines of the agreement and past practice. This reluctance is no doubt more pronounced in relation to an issue as consequential as relocation. Finally, many arbitrators are probably less convinced of the utility of the market as a societal organizing principle than is the current Board. Nonetheless, in justifying a readiness to enforce only explicit bargains as promoting the "rational decisionmaking" of the market, the board appealed to a view deeply entrenched in American society. That view is shared to some degree by arbitrators, as suggested by their acceptance of employer "efficiency" rationales for relocation.

C. The Arbitrator's Institutional Role

The preceding examination of the obstacles to the use of the implied duties analysis can now be recapitulated and expanded in a description of the arbitrator's institutional role. The experience and expertise of the arbitrator are in resolving disputes concerning the everyday operation of the enterprise. More specifically, the arbitrator's role is to limit management's exercise of power according to rules explicitly or implicitly agreed upon by both sides and in light of the sometimes conflicting purposes of the two sides. Thus the arbitrator is the adjudicator of a particular set of rules constituting a particular regime of private governance, the foundations of which are regulated by the larger statutory scheme. The implications of this institutional role for the invocation of implied duties to prevent relocations are as follows.

The arbitrator's acceptance of the structure of power underlying the regime of governance, signified by the adoption of the assumption of managerial power, makes the arbitrator reluctant to invoke implied duties to limit management's exercise of power, absent a strong reason for doing so. Furthermore, the absence of a shared purpose of maintaining

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193. See supra text accompanying notes 89-96.
194. See *Feller*, supra note 112, at 736-55.
employment renders the arbitrator hesitant to decide against the employer on a hotly contested and momentous issue concerning the existence or scope of the enterprise. Because of the problem of conflicting purposes, there is little guidance in the agreement as to how to resolve such issues. In this circumstance, the assumption of managerial power will tilt the arbitrator towards the employer.

Additionally, the arbitrator's expertise in making the everyday functioning of the enterprise smooth and productive has only limited relevance to the relocation issue. The arbitrator seeks to promote cooperation between the two sides, or at least to minimize tensions, so that they can pursue, in the Supreme Court's phrase, the "common goal of uninterrupted production for the agreement term." Because of this commitment to making the employment relationship practicable, the arbitrator will closely scrutinize employer's actions such as reassignment of work to non-unit employees or subcontracting, which may become highly visible and constant sources of irritation to employees at the covered worksite. The degree of scrutiny afforded reassignment or on-site subcontracting is no doubt increased by workers' expectations in relation to work performed at the covered worksite, as contrasted with work transferred elsewhere, and perhaps also by employer's grudging acknowledgement of the legitimacy of these expectations. By contrast, in the case of the relocation of an entire plant, the issue for the arbitrator does not concern the quality of an established employment relationship, but whether there will be a relationship at all.

The case of transfer of operations, however, is comparable to the on-site subcontracting or the reassignment issue. The transfer of work contemplates the removal of only part of a bargaining unit; a relationship between workers and management remains which the arbitrator seeks to make viable. This suggests that, as in the case of on-site subcontracting and reassignment, arbitrators may be more assertive in seeking to restrict management action in the case of work transfers than in the case of plant movement. In this connection it is interesting to note that in *Virginia Stage Lines*, a transfer of operations dispute, Arbitrator Samuel Ross re-

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196. Crawford observes that work which the subcontractor performs off the employer's premises is "less apt to be a source of Union grievances," and that "[a]lmost all published arbitration awards [in the 1950's] involve performance on the premises by the contractor." Crawford, *supra* note 66, at 56 n.14. Crawford also suggests, citing Arbitrator Garrett's decision in United States Steel Corp., 33 Lab. Arb. (BNA) 282, 284 (1959) (Garrett, Arb.), that "the implied limitation applies essentially to the contracting out of permanent and continuing work on the premises..." *Id.* at 66.

lied heavily on subcontracting cases in developing his analysis. Nevertheless, it is probably fair to say that, because of the lesser intensity of employee hostility and expectations, arbitral scrutiny of transfers of operations will be less searching than in the case of on-site subcontracting or reassignment.

Finally, the arbitrator's position within the statutory scheme tends to narrow the arbitrator's inquiry to the circumstances of the collective bargaining relationship in question, making widespread invalidation of relocations unlikely. Moreover, if *Otis Elevator* and *Milwaukee Spring II* become settled doctrine, the reluctance of arbitrators to disallow relocations will be further reinforced.

The willingness of arbitrators to countenance relocations is puzzling in a contractual frame of reference: who would bargain for benefits which can be removed at the will of the other party? It is explicable, however, when viewed in the setting of a regime of private governance. So long as that regime exists, so long as the employer continues production, the exercise of managerial power will be limited by rules adjudicated by the arbitrator—but the arbitrator is not in a good position to enforce an obligation to maintain the regime itself. In short, as a creature of the regime, the arbitrator is hard pressed to exert influence over its existence.

For these reasons, essentially reasons of institutional role, for the arbitrator the implied duties analysis will remain "an uncertain penumbra of the articulated agreement," capable of preventing relocations under particular circumstances, but incapable of rising to the level of an approach systematically restraining relocations.

**CONCLUSION**

This Comment aims primarily at describing and explaining how arbitrators actually decide relocation disputes, and only secondarily at suggesting how they should resolve these disputes. Also, although the role of the Board is examined, the question of how the NLRA should be interpreted in relation to relocation is left to one side. In conclusion, however, some remarks are offered about how both the Board and arbitrators should handle the relocation issue. The purpose of these remarks is to indicate the evaluative judgments underlying the analysis of arbitral decisionmaking, and to further place the arbitrator's role in its proper context within the statutory scheme.

In the author's view, the most desirable mode of regulating midterm relocations within the unionized sector of the economy is the following division of responsibility between the Board and arbitrators. The Board

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198. 79-2 Lab. Arb. Awards (CCH) ¶ 8373, at 4570, 4574.
199. The phrase is from Unger, *supra* note 137, at 639.
should proscribe midterm relocations motivated by factors embedded in collective bargaining agreements and under the control of unions, such as labor costs, seniority systems, and work rules. Arbitrators should critically assess the business rationales for relocations that the employer asserts are motivated by factors outside the union’s control under standards of reasonableness and good faith.

The advantage of the proposed Board posture is that it would prevent disruption of the statutory framework of countervailing power that makes contract formation possible.\textsuperscript{200} The essential point here is that to permit employers to relocate in order to avoid conditions negotiated by the union renders the statutory right to bargain collectively\textsuperscript{201} hollow and meaningless. It is this consideration that lends force to the dissenting view in \textit{Milwaukee Spring II} that labor costs relocations are “indirect” violations of the wage provision, unlawfully modifying the collective bargaining agreement.\textsuperscript{202}

The advantage of the proposed arbitral posture is that it would require that the reasons proffered for relocation are sufficiently weighty to justify the disappointment of employee expectations of job security. It would also help to assure that the relocation is in fact undertaken for legitimate reasons, and not because of a desire to escape conditions negotiated by the union.

In the view of the current Board, the relocation issue does not implicate the integrity of the statutory framework securing workers’ rights to organize and to bargain collectively. It is merely another matter over which labor and management must bargain before the employer is per-

\textsuperscript{200} See supra text accompanying notes 163-65.

\textsuperscript{201} 29 U.S.C. § 157 (1982) (“Employees shall have the right . . . to bargain collectively through representatives of their own choosing . . . .”).

\textsuperscript{202} 268 N.L.R.B. at 610-11 (Zimmerman, Member, dissenting).

While it is not the purpose of this Comment to argue for any one doctrinal resolution of the relocation controversy, it is worth noting that the objective of preserving the integrity of the statutory framework is perhaps better accommodated by a § 8(a)(3) theory. In the first \textit{Milwaukee Spring} decision, the Board found an 8(a)(3) violation, but the rationale was not well developed. 265 N.L.R.B. at 208. It could be analyzed in the following way. When employees are discharged through the termination of business at a unionized worksite and work is transferred to non-union employees at another worksite, surely the employer is engaging in “discrimination in regard to . . . tenure of employment . . . to . . . discourage membership in a labor organization. . . .” 29 U.S.C. § 158(a)(3) (1982). Moreover, surely this discrimination qualifies as being “inherently destructive,” removing the need to prove that the employer is motivated by anti-union animus. See NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967). It is true that when the employer can offer legitimate business reasons justifying inherently destructive conduct, no 8(a)(3) violation is found. \textit{Id.} at 33-34. But when the employer attempts to justify a midterm relocation by reference to the burdensomeness of the wage rates or other working condition which the employer promised to supply, the employer demonstrates a blatant disregard for the union’s central purpose of negotiating agreements regulating such matters as wage rates. See \textit{Los Angeles Marine Hardware Co.}, 602 F.2d at 1307 (“employers’ desire to escape financial burden they contracted for voluntarily is not an adequate business justification”). Rejection of the asserted justification would serve to protect workers’ right to bargain collectively, secured by § 7. 29 U.S.C. § 157 (1982).
mitted to take unilateral action. The result of the bargaining will be a happy one: "rational economic discussion and decisionmaking accruing to the benefit of all parties." Those who reject this rosy picture of the labor market and who believe that midterm relocations undermine the integrity of collective bargaining agreements as contractual devices for the organization of labor relations are not likely to find much comfort in arbitrators' decisions in relocation disputes. Arbitrators are not concerned with the overarching problem of protecting workers' ability to negotiate meaningful contracts.

It is true that where expectations of job security are heightened by particular circumstances, notably concessions bargaining or employer representations, arbitrators may prevent relocations, as in Schlitz Brewing. And some arbitrators may prevent relocations motivated by labor costs, especially when expectations have been reinforced by special circumstances. It is even possible, though less likely, that some arbitrators will critically examine and reject non-labor costs rationales for relocations as inadequate to counterbalance the disappointment of workers' expectations, as in Virginia Stage Lines. While these outcomes are potentially disruptive wild cards in the current Board's optimistic vista of a smoothly operating labor market, they are unlikely to be realized in a systematic way. Arbitrators have developed and applied the implied duties analysis of relocations in a limited and halting manner. Their institutional role as adjudicators within a private regime of governance whose foundations are regulated by the larger statutory scheme does not encourage them to do otherwise.

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203. Even this requirement of bargaining is limited in scope, applying only when factors within the union's control motivate the relocation. Otis Elevator, 269 N.L.R.B. No. 162, discussed supra at text accompanying notes 174-79.

204. Milwaukee Spring II, 268 N.L.R.B. at 603.