STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF
CITY OF NEW BRITAIN

-and-

LOCAL 1186 OF COUNCIL 4
AFSCME, AFL-CIO

DECISION NO. 3290

APRIL 6, 1995

CASE NO. MPP-15,096

APPEARANCES:

John Byrne, Personnel Director
For the City

J. William Gagne, Esq.
For the Union

DECISION AND ORDER

On November 18, 1992, Local 1186 of Council 4, AFSCME, AFL-CIO (the Union) filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the City of New Britain (the City) had engaged in practices prohibited by § 7-470 of the Municipal Employee Relations Act (the Act or MERA). Specifically, the Union alleged that the City had unlawfully subcontracted bargaining unit custodial work within the City Hall.

After the requisite preliminary steps had been taken, the parties entered into a full stipulation of facts and exhibits on May 18, 1993 and waived a hearing before the Labor Board. Both parties filed briefs, the last of which was received by the Labor Board on October 20, 1993. Based upon the entire record before us, including the stipulation of facts, we make the following findings of fact, conclusions of law and we issue the following order.

FINDINGS OF FACT

1. The City is a municipal employer within the meaning of the Act.

2. The Union is an employee organization within the meaning of the Act and at all times relevant has represented a unit of City employees, which includes custodians.

3. The City and the Union were parties to a collective bargaining agreement with effective dates June 30, 1990 to July 1, 1994.

4. For the last decade, the New Britain City Hall building has been staffed with five full-time Local 1186 custodians. The custodians were generally deployed with one working the day shift and the other four working on the night shift.

5. In January of 1990, an extensive long-term renovation of the City Hall building began, and accordingly, all functions and employees were moved to a temporary, non-city owned, leased building.

6. When the move to the temporary building was made, one of the city custodians was reassigned to work in the New Britain senior center and the other four were reassigned to other city-owned buildings.

7. All custodial services in the senior center prior to this date and dating back to the 1950's had been performed by non-union, part-time employees. The senior center is a city owned building.

8. The City has previously used one non-bargaining unit part-time employee to perform custodial services in each of the following City owned facilities: Water Department, City Public Works Yard, Welfare Department and Parking Garage. The non-bargaining unit part-timers in the City yard and parking garage were eliminated in 1991 and the Welfare Department is now housed in a leased building.. The non-bargaining unit part-timer in the Water Department continues to be employed.

9. On June 29, 1992, the City Council voted to begin using non-union private custodial services in City Hall.

10. On July 1, 1992, city-wide layoffs took effect and two of the five employees who had been City Hall custodians were laid off.

11. In August 1992, the City Hall renovations were completed and all functions moved back into the City Hall building.

12. Only the ex-City Hall custodian, who had been assigned to the senior center during the renovations, was assigned back to the City Hall on the day shift in September 1992 where he continues to work. Custodial services at the senior center reverted to non-bargaining unit employees.

13. In November, 1992, the City began using non-union private custodial services in City Hall, pursuant to a City Council vote taken June 29, 1992. The private custodial services company uses a crew of four to five employees and works from 5:30 p.m. to 10:30 p.m.

CONCLUSIONS OF LAW

1. Subcontracting or transferring bargaining unit work to non-bargaining unit personnel is a mandatory subject of bargaining.

2. Absent an adequate defense, an employer commits an unlawful refusal to bargain and a prohibited practice when it unilaterally subcontracts or transfers bargaining unit work to non-bargaining unit personnel.

3. When a Union alleges that the Employer has violated the Act by unlawfully subcontracting or transferring bargaining unit work to non-bargaining unit personnel, the Union must show all of the following to prove a prima facie case:

a. The work in question is bargaining unit work. Bargaining unit work is defined as work that is or may logically be done by the bargaining unit.

b. The subcontracting or transfer of work at issue varies significantly in kind or degree from what had been customary under past established practice.

c. The subcontracting or transfer of work in question has a demonstrable adverse impact on the bargaining unit.

4. If the Union proves a prima facie case in a case alleging unlawful subcontracting or transfer of bargaining unit work, the Labor Board will look to the Employer for any defenses.

5. When a Union alleges that an Employer has unlawfully subcontracted or transferred bargaining unit work out of the bargaining unit, the Labor Board will review any public policy considerations that are relevant to the matter.

6. In this case, the action of subcontracting the custodial work in the City Hall, without negotiating with the Union, constituted a violation of the Act because:

a. the custodial work in the City Hall is bargaining unit work;

b. subcontracting the custodial work in the City Hall varied significantly from what had been customary under the City's past established practice of using part-time, non-bargaining unit employees to perform some custodial work at certain locations in the City.

c. the subcontracting had a demonstrable adverse impact on the bargaining unit.

7. The City provided no adequate defenses.

8. Public policy supports this decision.

DISCUSSION

This case once again presents to us an issue involving subcontracting and our "shared work" doctrine. The Union claims that the City unlawfully subcontracted the custodial work in the City Hall. The City argues that it has a long history of using non-bargaining unit custodians throughout the City and, therefore, the continued use of non-unit custodians is not a violation of the Act.[1]

Our doctrine, concerning subcontracting/transfer of bargaining unit work, has developed in myriad cases since the early 1970's. In the approximately two decades that this Board has discussed the issue in detail, there have developed numerous analyses and defenses. The most commonly used "defense" to an allegation of unlawful subcontracting/transfer of work is the "shared work" doctrine. Although this area has a long and sometimes tortured history of development, the current generally cited "rule" concerning subcontracting/transfer and shared work states as follows:

> "It is well-settled that in the absence of an adequate defense an employer commits an illegal refusal to bargain and thus a prohibited practice under the Act when it unilaterally contracts out or assigns to non-bargaining unit personnel work which has been performed exclusively by bargaining unit employees.
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> However, it is clear that not all contracting out of work is impermissible. If a certain type of work has been by practice performed both by bargaining unit and non-bargaining unit personnel, continued instances of sharing such work does not violate the Act."
> *Town of Trumbull,* Decision No. 2910 (1991)

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[1] **In its brief, the City also discusses the claimed budgetary reasons for the "layoff" of City custodians in 1992. However, the stipulation of facts in this case contains no information regarding the City's budget. In the absence of such information, we cannot consider the City's claims. This is especially true where, as here, the stipulated facts clearly link the layoff of custodians in the City Hall with the subcontracting in question.**

In spite of the above seemingly clear cut rule, the body of Labor Board case law in this area contains certain inconsistent statements and some confusing analyses. We recognize that parties who appear before this Board often do not have clear guidance as to their obligations and responsibilities; indeed much written discussion and criticism from practitioners has focused on this area.

Against this backdrop, we find ourselves faced with an increasing number of cases presenting questions involving the removal of work from a bargaining unit. Many of the cases we are now encountering do not fit neatly into any of our discussions from previous cases. Perhaps more importantly, we also find that certain fact patterns are capable of analysis from several inconsistent viewpoints contained in our prior law, viewpoints that sometimes lend themselves to contradictory results in a given case. The instant matter is one such case. We are here squarely confronted, for the first time, with a situation in which the work in question (custodial work) has historically been assigned to some non-unit employees of the employer but is now being assigned in a different manner to a different group of non-bargaining unit workers (subcontractors), a group that has not before performed the work in question. In this situation, the Union has claimed a violation of the Act; the Employer denies the violation; relying in part on its understanding of our "shared work" doctrine.

Prompted by our own recognition that the law of this Board contains inconsistencies that do not provide a clear answer to the questions presented in this case and also spurred by the criticisms expressed by those who appear before us, we have done an exhaustive review of the origins and development of the various theories and "strands" of our law regarding subcontracting/transfer of work, with particular attention to the development of the shared work concept. Based on our review, we are convinced that it is time to revisit this area of the law, correct some "mistakes" and attempt to provide parties with more consistent and well-founded rules with which to resolve disputes. In doing so, we have been able to answer the unique questions presented in this particular case.

An adequate review of this area requires an initial look at the history of subcontracting/transfer of work as such topics were first discussed by this Board. We will then trace the development of the many defenses and analyses that now make up the whole body of case law in this area. It is important to review first the early federal cases upon which our decisions initially relied. We will then review the early decisions of this Board concerning "subcontracting", cases in which the work was taken from the bargaining unit and given to individuals or entities outside the direct employ of the employer.[2] In turn to the early cases concerning work that was transferred to other employees of the employer.* It is important to look separately at the cases in these categories to see clearly how the Board

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[2] **Throughout this decision, we will refer to the categories of cases as referenced above. In this regard, all subcontracting cases will be referred to as such; all cases concerning work that was otherwise taken out of the bargaining unit (including cases involving temporary employees and CETA workers) as "transfer" cases.**

first analyzed these differing fact patterns and to compare the initial analyses to later decisions in which this Board merged the standards for subcontracting and transfer cases.

We will then trace the development of the shared work theory and the "exclusivity" standard to the point at which it stands today.

The primary purpose of our review today is to honestly and frankly confront the problems associated with our standards in this area. The self critical approach undertaken in this decision enables us to see how the sometimes confusing discussion of subcontracting and transfer cases has developed. It also demonstrates why the "exclusivity" theory is not in keeping with the "past practice/unilateral change" framework discussed in our early cases and why exclusivity should now be abandoned and "shared work" should be returned to a model that is truly based on the past practice analysis. Upon completing our historical review, we set forth the appropriate standard in Section VI, at page 35.

I. THE EARLY FEDERAL DECISIONS

Almost ten years prior to this Board's first in-depth encounter with the issue of subcontracting, the United States Supreme Court decided ***Fibreboard Paper Products v. NLRB, 379*** U.S. ***203, 57*** LRRM ***2609*** (1964). In ***Fibreboard*** the employer contracted out the maintenance work in its plant, which work had previously been performed by the bargaining unit. There was no prior history of subcontracting this work. Under these circumstances, the Supreme Court determined that the decision to subcontract the work was a mandatory subject of bargaining, stating: " . . . the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment is a statutory subject of collective bargaining . . . . " ***Fibreboard, 57*** LRRM at 2613. ***Fibreboard*** was adopted by this Board and became a cornerstone of our own law concerning collective bargaining in the public sector.

One year after ***Fibreboard***, the National Labor Relations Board **(NLRB)** decided ***Westinghouse Electric Corp.***, 150 NLRB **1574,** 58 LRRM 1257 **(1965).** In that decision, the Employer had, for many years, subcontracted **hundreds of** jobs, most of which constituted work that could be performed by the bargaining unit. During at least three prior rounds of negotiations for collective bargaining agreements, the Union had sought restrictions on the Employer's use of subcontractors and had been unsuccessful in obtaining contract language to that effect. The Union then filed an unfair labor practice charge with the NLRB seeking an order for the Employer to negotiate with the Union prior to each instance of subcontracting.

In determining that the Employer had not violated the NLRA, the NLRB stated the issue as follows: " . . . whether, in the circumstances, Respondent violated its statutory bargaining obligation by failing to notify and consult with the Union before contracting work to outside employers that could be performed by its own employees." ***Westinghouse,***

150 NLRB at 1575 [emphasis added]. The Board then started its analysis with the following statement: "The contracting out of work done, or which may be done, by employees in a bargaining unit is a subject of mandatory bargaining." [emphasis added], ***Westinghouse***, 150 **NLRB** at ***1575*** (citing ***Fibreboard, supra*** and ***Town and Country Manufacturing Company, Inc.,*** 136 **NLRB** 1022).

We have emphasized this initial' language in the ***Westinghouse*** decision to show that, in analyzing the bargaining obligations of the parties, the NLRB did not spend much time determining that the work at issue was "bargaining unit 'work", even though much of the work in dispute had been done by outsiders for a significant period of time. Rather, it appears that the NLRB gave "bargaining unit work" a rather broad definition, which included work that "may be done" by members of the unit. We believe this point is important to our review. In this regard, as later discussion will point out, this Board has devoted many pages to discussing whether certain work is bargaining unit work. Such scrutiny did not take place in ***Westinghouse;*** the NLRB concentrated on other factors in reaching its determination. As we review our own case law in this area, it is important to consider whether the focus of some of our own decisions should shift away from belaboring the question of whether the work at issue is "bargaining unit work" and toward other, more relevant factors.

After the NLRB made its initial statements, which set up the framework for the discussion, it went on to say that:

> . . . our condemnation in ***Fibreboard*** and like cases of the unilateral subcontracting of unit work was not intended as laying down a hard and fast new rule to be mechanically applied regardless of the situation involved. [internal citation omitted]. Thus, it is wrong to assume that, in the absence of an existing contractual waiver, it is a per se unfair labor practice in all situations for an employer to let out unit work without consulting the unit bargaining representative. As the Supreme Court indicated in a broader context, even where a subject of mandatory bargaining is involved, there may be "circumstances which the Board could or should accept as excusing or justifying unilateral action". ***NLRB v. Benne Katz, etc., d/b/a Williamsburg Steel Products Co., 369*** U.S. 748
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> . . . In ***the Fibreboard*** line of cases, where the Board has found unilateral contracting out of unit work to be violative of Section 8(a)(5) and **(1),** it has invariably appeared that the contracting out involved a departure from previously established operating practices, effected a change in conditions of employment, or resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit. [internal citations omitted].
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> ***Westinghouse,*** 150 NLRB at 1576

The NLRB then found that, under the facts of the case, the Employer had not violated the Act. Specifically, the NLRB relied on the following factors:

1. The recurrent contracting out was motivated solely by economic considerations;

2. The contracting out comported with the traditional methods by which the Respondent conducted its business operations;

3. The subcontracting did not, during the period in question, vary significantly in kind or degree from what had been customary under past established practice;

4. The subcontracting had no demonstrable adverse impact on employees in the bargaining unit; and

5. The Union had the opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings.

Because ***Fibreboard*** and ***Westinghouse*** guided this Board's early decision-making in the area of subcontracting and transfer of work, it is important today to review the lessons of these cases. The first and most basic tenet worth reiterating is that subcontracting is a mandatory subject of bargaining. Thus, absent any mitigating factors, an employer must bargain with the representative of its employees prior to subcontracting bargaining unit work. This rule, while simple, exists for an important reason. The process of collective bargaining often reveals solutions not initially apparent. Thus, while an employer may believe that its decision to subcontract is the only workable solution to a financial bind, a discussion with the union may reveal surprising cost saving measures. While neither party is obligated to concede any "ground" during negotiations, the result of bargaining is often surprising., As stated by the Supreme Court in ***Fibreboard***:

> "The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. . . . The company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly [sic] suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests. . . . although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation. . . . While 'the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position', ***Labor Board v. American Nat'l Ins. Co., 343*** U.S. 395,

404; 30 LRRM 2147, it at least demands that the issue be submitted to the mediatory influences of collective negotiations. As the Court of Appeals pointed out, 'it is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly'."

Fibreboard, supra, 57 LRRM at 2613

The basic rule regarding the nature of subcontracting as a mandatory subject of bargaining and the reason for the existence of the rule has been recognized by our own Supreme Court and remains as solid today as it was many years ago. ***West Hartford Education Association v. DeCourcy,*** 162 Conn. 566 (1972).

Obviously, the more difficult questions arise when the facts reveal a history of subcontracting in the workplace or when other unique factors arise. It was such a situation that presented itself in ***Westinghouse.*** For purposes of our discussion today, the important focus of ***the Westinghouse*** Board was its concentration on whether the Employer had, in kind or degree, changed its established practice of subcontracting. Thus, while the NLRB acknowledged that subcontracting is a mandatory subject of bargaining and also seemed to accept that the work in question was "bargaining unit work", it concluded that the subcontracting that ***occurred*** in ***Westinghouse*** could be excused or justified because of the established past practice of similar subcontracting. 'The NLRB's concentration on the nature of the past action and the comparison to the action in dispute provided a workable framework within which to evaluate the competing interests of the parties.[3]

The above review may seem quite elementary to some. However, it is very important to our discussion today because while this Board initially adopted its understanding of the NLRB's thinking in this area, we later substituted the "exclusivity" standard in our "shared work" doctrine for ***the Westinghouse*** analysis. While this Board often discusses the ***Westinghouse*** past practice analysis as if it is synonymous with "exclusivity" and "shared work", we now recognize that these analyses are, in fact, quite dissimilar. As will be discussed, the switch from the unilateral change/past practice analysis to one requiring a

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3 **Another aspect of *Westinghouse* should be mentioned. The NLRB stated that even if the subcontracting at issue is excused, the employer must still bargain upon demand at an "appropriate time". While there is no exact definition of an appropriate time, we infer, at a minimum, that the term means at regular contract negotiations. It is not clear to us whether the NLRB contemplated other times during the contract term. We do not address in detail the parties' bargaining obligations in the context of regular contract negotiations. Neither do we address the legal consequences, to subsequent mid-term contracting out, of the parties having bargained the issue during their regular contract negotiations. Certainly, the inclusion of an express contract clause may control the parties' subsequent actions and obligations.**

union to show "exclusivity" has its roots in our own early "transfer" cases; the switch has never been fully explained and has caused tremendous confusion.

II. THE EARLY CSBLR CASES AND THE ADOPTION OF THE FEDERAL MODEL

In the earliest significant cases considered by the Board after the federal decisions in ***Fibreboard*** and ***Westinghouse,*** we carefully reviewed the federal analysis and adopted our understanding of the standards employed in the federal decisions. While our initial lengthy discussions of the subcontracting issue occurred in cases that did not involve any past practice of subcontracting the work in question, the content of the decisions makes clear that we were relying on the federal model for guidance in this entire area. As a corollary to our pronouncements in the subcontracting decisions, early cases presenting issues of "transfer" of work to employees of the Employer, which did not involve a past practice of similar transferring, also relied on the federal subcontracting analysis. We review these cases below.

A. THE SUBCONTRACTING CASES

In 1974, this Board issued ***Plainville Board*** of Education, Decision No. 1192 **(1974),** a case in which the Employer subcontracted the custodial work in a new addition to the Town High School.[4] The facts in the case revealed that there was no history of subcontracting custodial work; custodial work had always been performed by the bargaining unit. It was also shown that there were no layoffs or decrease in the salaries or hours of the bargaining unit members as a result of the subcontracting.

In reaching its conclusion that the Employer had violated the Act, the Board reviewed and discussed the relevant case law from the NLRB and the Federal Courts. The Board first described the **pre-*Fibreboard*** standard and stated:

> "From early days in the history of labor relations statutes courts and boards have been troubled with the question whether a unilateral decision to contract out bargaining unit

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[4] **At least three other cases prior to 1974 touched upon the issue of taking work out of the bargaining unit. See: *Hamden Board of* Education, Decision No. 1037 (1972); *City of Bristol,* Decision No. 1157 (1973); *Town of Newington,* Decision No. 1116 (1973). However, none of these cases concerned subcontracting the work to an outsider, nor did they deal in any depth with the law regarding the parties' right or obligation to bargain concerning subcontracting/transfer of work. However, it should be noted that in Town *of Newington, supra*, the Board found a violation under the established "unilateral change" theory; this case is often cited in the developing law after 1973 concerning subcontracting/transfer of work.**

work constitutes a practice forbidden by such acts or instead, an exercise of management's right to make economic decisions not expressly prohibited by a collective bargaining agreement. See ***Timken Roller Bearing Co.,*** 70 NLRB 500 (1946). (holding contracting out to be a mandatory subject of bargaining.) One line of cases in the federal courts of appeal held that where the decision to contract out stemmed from purely economic considerations and was not motivated by anti-union bias or a desire to hurt the union, it was the exercise of a management prerogative and consequently could be taken unilaterally, without negotiation with the union. At a time when such decisions represented a majority view our Supreme Court relied on them in coming to a similar conclusion." ***Hoyt-Bedford Co. v. Conn. St. Bd. of Lab. Rel.,*** 147 Conn. 142, 157 A.2d 762 (1960). The last of this line of decisions was ***NLRB v. Adams Dairy Co., 322*** F.2d 553 (8th Cir. 1963).

Newington, supm at 4

The Board then went on to carefully consider, discuss and adopt the new standard set forth in ***Fibreboard, supm*** and its progeny and ***Westinghouse Electric Corp., supm as*** well as certain other federal cases cited by the employer.[5] The Labor Board stated:

"We have taken pains to explore the federal decisions because our courts have often stated that where our statute is patterned after the federal act we should accord the greatest weight to the decisions of the tribunals charged with interpreting and administering the federal model. Here we adopt the federal rule as we understand it not only for this reason but also because we believe it will best implement the policies of our own statute. "

Importantly, in adopting the federal guidelines the Board specifically discussed the "impact" factor and the necessary showing under this factor. The Board stated:

It is true unilateral contracting out must have some kind of substantial impact on the bargaining unit before an unfair (or prohibited) practice may be found. And of course this impact may consist in lay-offs, loss of seniority rights, and like. But the decisions also make it clear that the requirement may be satisfied where the 'impact' is much more indirect and subtle. Thus, "departure from previously established operating practices", and "impairment of . . . reasonably anticipated work opportunities" are recognized each as separate and distinct ground for finding substantial impact. So is a practice which generates fears of future encroachment

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[5] In addition to *Westinghouse* and ***Fibreboard***, the Labor Board reviewed *Centml Soya Co., Inc.,* 151 *NLRB* 1691, 58 *LRRM* 1667 (1965); *American Oil Co.,* 152 NLRB 1007 (1965); *Westinghouse Elect&* Corp. (Bettis), 152 NLRB 443, 59 LRRM 1355 (1965).

upon bargaining unit work. As the court recognized in the ***District 50, supra*** at 237 case, such "fears are palpably real and disturbing. "[6]

Plainville, supm at 6

Having adopted its understanding of the federal standard, the Board applied the ***Westinghouse*** factors to ***the*** facts of the ***case*** in ***Plainville.*** First, the Board determined that the work in question was bargaining unit work. In doing so, the Board recognized that the work in question was being performed in a new addition to the building but found that the recognition clause of the contract designated the Union as the "sole and exclusive bargaining agent of [the employer's] custodial and maintenance employees". ***Plainville, supra*** at 6. From this and other facts in the case, the Board determined that the work belonged to the bargaining unit.

Next the Board determined that the work being performed by outsiders was neither trivial nor temporary in nature[7] and that there was no past practice of contracting out such **work.**[8] Finally, with regard to the change in working conditions/impact factor, the Board concluded:

> When bargaining unit work of a permanent nature is contracted out as a new departure from past practice we believe this action does "affect the basic bargaining relationship" between the parties and that it necessarily impairs the "reasonably expected work opportunities for those in the bargaining unit". And it tends, inevitably we think, to generate "palpably real and disturbing" fears about the future of tenure and conditions of employment in the bargaining unit. Moreover there is in this case no countervailing consideration caused by the prospect of intolerably repeated full-scale bargaining (as in ***Westinghouse). . .***
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> ***Plainville, supm*** at 6

Based on its federal law analysis, the Board found a violation in this case stating: " . . . the matter of contracting out the custodial work in the addition to the high school is a mandatory subject of bargaining between the parties, and . . . the Employer's unilateral decision in the

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[6] ***The*** **Board's reference is to** ***District 50 UMW of A Local 13942 v. NLRB, 358*** **F.2d 234 (4th Cir. 1966), a Federal Circuit Court of Appeals decision discussing the issue of subcontracting.**

[7] **See** ***Central Soya Inc., supra,*** **in which the Federal Board dismissed the complaint because in part, the amount of subcontracted work was minimal.**

[8] **The Board noted that there was an "oblique reference" in the testimony to some prior subcontracting but that neither the work nor the location was identified. As such, the Board concluded that the evidence "[fell] far short of the kind of showing made, for example, in the** ***Westinghouse*** **and** ***American Oil cases . . . ." Plainville*** **at 6.**

matter constituted a prohibited practice even though it was made in good faith and for economic reasons. " ***Plainville, supra*** at 7. The Board ordered the Employer to cease and desist from contracting out the custodial work and to bargain upon demand with the Union regarding the subcontracting of custodial work.

The Board confirmed its ***Plainville*** approach in several other early subcontracting cases, which did not involve any past practice of subcontracting. In ***Southington Board of*** Education, Decision No. 1221 **(1974),** the Board found a violation of the MERA and also stated that the employer has the burden to initiate bargaining when it wishes to change the status quo by subcontracting bargaining unit work. In ***City of Shelton,*** Decision No. 1617 (1978) the Board again adhered to the ***Plainville*** analysis and found that the City could not subcontract the landfill operation. In doing so, the Board stated: " . . . the statutory policy requiring negotiation is based on a faith that this process often opens up possible courses of action theretofore unseen by the parties and often produces solutions that both parties can accept, thereby promoting labor peace". ***Shelton, supra*** at 3. Neither ***Plainville, Southington,*** nor ***Shelton*** presented fact patterns involving a past practice of subcontracting prior to the dispute at issue in each case. Each clearly stated, however, that the federal law analysis is appropriate for determining issues of this nature.'

B. THE TRANSFER CASES

Certain early "transfer" cases (those cases involving the transfer of work from bargaining unit employees to other non-bargaining unit employees of the same employer) also adhered to the ***Plainville*** analysis. Like their subcontracting counterparts discussed above, the next discussed cases did not contain facts showing a past practice of similar transfer of work to non-bargaining unit employees.[10]

In ***Town of Hamden,*** Decision No. 1441 **(1976),** the Employer assigned dispatching work to CETA employees, which work had historically been performed by members of the firefighters bargaining unit. No members of the bargaining unit were laid off or experienced a reduction in pay or benefits as a result of this action. The Board decided that 'the unilateral action of assigning the dispatching work to CETA employees constituted a prohibited

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[9] **Also decided during this period was *Watertown Board of Education,* Dec. No. 1619 (1978) in which the employer refused to discuss its proposed subcontracting during regular contract negotiations; it insisted on addressing this subject at separate bargaining sessions. Without citing any cases, the Board simply said that the employer was obligated to bargain about this subject during regular bargaining sessions and its failure to do so constituted a prohibited practice.**

[10] **As will be discussed, infra, several transfer decisions decided just prior to those discussed in this section did not rely on the federal cases; the cases contained facts showing some history of transferring or assigning out the work in question and were the first ones to use an "overlap/shared work theory". See discussion in Section III, infra, at page 15, concerning the emergence of the "overlap/shared work" theory.**

practice. [11] In so deciding, the Board relied on ***Plainville, supra*** and ***Southington, supm.*** The Board stated:

> We have held that an employer violates the Act in making such a change unilaterally even where it "has not resulted in the loss of job or income on the part of any members of the bargaining unit." ***Southington Bd. of*** Ed., Case No. MPP-2618, Decision No. 1221 (1974) (See P. 17, findings of fact). ***See*** also ***Plainville Bd. of*** Ed., Case No. MPP-2605, Decision No. 1192 (1974). These were cases where the employer sought to contract out work of the bargaining unit. We think them fully applicable here. " [emphasis added]. ***Hamden, supm*** at 5.

In its decision, the Board determined that the Employer's actions mandated a return to the status quo as it existed before the Employer's prohibited practice. The Board decided that such an order was appropriate because the unilateral action has "skewed the balance of advantage and put the status quo and the force of inertia. on [the employer's side]". ***Hamden, supm*** at 5, citing City ***of Bridgeport,*** Decision No. 1319-A (1975).

In 1978 the Board followed the above reasoning in City ***of Bridgeport,*** Decision No. 1658 (1978) in which the City had unilaterally assigned bargaining unit work of patrolling in boats to CETA workers. Although the Board found that the work was temporary, in that it only occurred in the summer, it was permanent in that it was assigned for the whole season. Since the bargaining unit had always performed this work, the unilateral assignment to CETA employees was a violation of the Act under ***Plainville, supra*** and its progeny. This decision was affirmed on appeal by the Superior Court in City ***of Bridgeport v. Bridgeport Police Employees, Local #1159, et al.,*** Dkt. No. 17 15 22 (Landau, J., 1980).

The Board also followed this reasoning in 1979 in ***Town of Manchester,*** Decision No. 1804 (1979). In that case, the bargaining unit position of "water department watchman" had been vacant for many months. Upon assessing its needs, the Employer determined that it did not need a position to perform merely patrol duties, and thus, did not fund the watchman's position. Instead, the Employer created several new bargaining unit positions, which performed some nominal patrol duties. The Employer also created a new non-bargaining unit position of Forestry Manager, which was funded with CETA funds. The Manager's position had primary responsibility for patrolling the watershed area, as well as other functions.

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[11] **CETA refers to the Comprehensive Employment and Training Act and involves employees hired using available federal funds resulting from that Act.**

Relying on ***Plainville, supra, Southington,*** *supm* and ***Hamden,*** *supm,* the Board stated:

> " . . . the fact remains that while a position that had been in the unit for a decade was vacant due to a retirement its duties were taken over by a newly created managerial position. Unilateral action of this type is a violation of the Act if it is a departure from past practice, permanent in nature, and has a substantial impact upon the bargaining unit such that the basic bargaining relationship is affected. Here it is clear that the Forestry Manager's assumption of the patrol function which had been the primary task of the Watchman, constituted a departure from past practice although several entirely new duties did comprise the bulk of the Manager's job. This Board has consistently held that where contracting out or assignment of bargaining unit duties to non-bargaining unit personnel is permanent and undertaken without bargaining it constitutes a violation of the Act. " [internal citations omitted]

Manchester, *supm* at ***3***

As shown above, during the 1970's the Board adopted ***the Plainville*** approach, at least in analyzing transfer cases that did not contain facts indicating some past practice of transferring work. As will be seen in the next section of our discussion, certain other transfer cases (those with unique facts concerning a history of assigning out bargaining unit work), decided during the same period of time, were not analyzed in this manner; the possible reasons for this divergent approach will be discussed. However, it is important to note and remember that at least some "transfer" cases during this period were reviewed using a ***Plainville*** federal model analysis. As we will see, this approach was later abandoned and replaced with the **"exclusivity/shared** work theory", a turn we now view as inadvisable. [12]

III. THE EMERGENCE OF THE "OVERLAP" THEORY

During the same period as discussed in the previous section, the Board decided a transfer case that would have a profound impact on the subsequent development of law of subcontracting/transfer of bargaining unit work.

In ***City of Waterbury,*** Decision No. 1436 **(1976),** the Board was presented with a situation in which the Employer laid off a number of library and teacher aides. After the layoff, the teachers and librarians absorbed the work of the aides. The-Union charged, inter

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[12] **In 1980, the Board also decided *Town of South Windsor,* Decision No. 1864 and *Borough of Naugatuck*, Decision No. 1872. While both of these cases involved the assignment of bargaining unit work to non-bargaining unit employees, neither case is entirely clear about the reasoning supporting the conclusion. Thus, while both cases fall generally within the topic discussed in this section, neither is helpful to the discussion.**

alia, that the Employer had unlawfully transferred bargaining unit work to another bargaining unit.

The facts revealed that, prior to the layoff, some. of the work performed by the aides was also performed by the teachers and librarians whom the aides assisted. Also, prior to the existence of the aides' positions, the teachers and librarians had performed all of the work at issue. Thus, the case involved a fact pattern in which there was a history of bargaining unit work being contemporaneously performed by non-bargaining unit personnel. In spite of the fact that this case seems amenable to an analysis using the past practice framework utilized in ***Plainville, supra*** and ***Westinghouse,*** the Board took a much different approach to the situation:

In determining that the Employer had not violated the Act by having the teachers and librarians absorb all the aides' work after the layoff, the Board initially acknowledged ***Plainville, supm*** and ***Fibreboard*** and recognized that the prohibitions against subcontracting apply equally to the transfer of work to another bargaining unit. ***Waterbury*** (1436) at 4.[13] However, the Board went on to say:

> In this case the facts do not warrant an application of ***Fibreboard*** and its progeny. The work of the aides had previously been performed exclusively by the teachers and librarians. Presently there is a great overlap of job duties between teachers and librarians and their respective aides . . . .
>
> As a result of these factors, if the employer decides it is economically necessary to lay off aides, the teachers who lose aides must assume the tasks formerly performed by their aides. The teachers and librarians are not performing the work of aides: they are performing their own work.
>
> This is unlike the situation in ***Fibreboard*** where the work of unit employees was assumed by non-unit workers who did only unit work. Here the aides' unit work is an integral part of the teachers' duties in addition to their primary responsibility for teaching.
>
> ***City of Waterbury*** (1436) at 4

In its discussion the Board does not mention ***Westinghouse,*** nor does it consider engaging in an analysis similar to that taken in the cases discussed in the previous section of this decision. In retrospect, it would appear to us that perhaps such an analysis would have been helpful and provided a consistency to the decision-making in this area. There are perhaps many reasons why the Board chose to change the focus of its inquiry in this case. From the

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[13] **From this point in this decision, we will begin using decision numbers, as well as names, to reference decisions due to the multiple decisions with the same name.**

perspective of the Board at this point in time, there seems to be one possible explanation that stands out. Specifically, in its conclusions of law the Board stated:

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> 3. The unilateral decision by an employer to lay off employees for budgetary or other legitimate business reasons does not constitute a violation of the Act, at least if the decision does not involve a repudiation or a bad faith violation of an existing contract or an intent to discriminate against a union.
>
> 4. Such a decision involves the exercise of a managerial function and is not a mandatory subject of bargaining under the Act unless it results in the transfer of bargaining unit work to non-bargaining unit personnel.
>
> 5. Even if the layoff results in the transfer of bargaining unit work to non-bargaining unit personnel, it still may not be a mandatory subject of bargaining. In a situation like the present, where the aides' duties overlap with the non-bargaining unit teachers, and the teachers must assume the duties of the laid off aides for the educational process to function, there is no violation of the Act.

There is no analysis concerning the above conclusions of law in the decision. However, the presence of these statements indicates a concern that the particular situation presented contained extreme tension between the Employer's right to lay off employees and still maintain the integrity of the educational system, and the Union's right to negotiate on behalf of its members. This tension may have led the Board, in this particular fact setting which concerned the area of education, to disregard the model it had begun to follow in the previous cases and to substitute it with the reasoning contained in ***Waterbury*** (1436). Arguably, the decision reflects a concern with an educational employer's right to lay off employees and maintain a quality learning environment. Clearly, the Board was also influenced by the extraordinary level of overlap and the inability to segregate the duties that were an integral part of the teaching function.

In spite of whatever specific concerns the Board may have had at the time of its statements in this case, the particular "language" used in this decision began the development of similar terms in later decisions, which ultimately resulted in the "shared work" theory and the idea of "exclusivity". It is in ***Waterbury*** (1436) that we first see the terms "overlap" and "exclusive" (see p. 4, paragraph 5). Although these terms do not carry, in this decision, the same meaning and weight that will eventually be ascribed to them, it is here that we first encounter them. As our review progresses, it is plain to see how these terms were incorporated into the language of subcontracting/transfer decisions and eventually took on a life of their own in the shared work model.

Following ***Waterbury*** (1436) the Board continued to use the overlap theory in several more cases during this time ***period.*** In ***Town of Hamden,*** Decision No. 1654 (1978) the Board relied on ***Waterbury*** (1436) to determine that the Employer had not violated the Act when it eliminated the bargaining unit position of assistant building official and transferred his duties to the non-bargaining unit position of building official. In making its conclusions, the Board found that, prior to the elimination, the two employees had performed "substantially similar duties" and as such, the "superior's" assumption of the assistant's duties after the elimination was allowable without bargaining with the Union.[14] Again in ***City of New Haven,*** Decision No. 1672 (1978), the Board relied on ***Waterbury*** (1436) to decide that the bargaining unit work of a sidewalk supervisor could be absorbed by his boss after the elimination of the bargaining unit position.

Following the introduction of the overlap language into the case law in this period, the next several years saw a metamorphosis in our law concerning subcontracting/transfer of bargaining unit work. As the Board faced increasing cases involving these issues, it borrowed certain concepts and phrases from its early decisions; this approach led to a series of decisions that each built upon the other to develop confusing and inconsistent theories.

IV. THE DEMISE OF THE FEDERAL MODEL AND THE DEVELOPMENT OF SHARED WORK

A. *WATERBURY.* DECISION *NO.* 1834-A: *MILFORD.* DECISION NO. 1849: *NEW HAVEN.* DECISION NO. 1879

In this series of three cases, the Board relied on a federal model analysis that focused on the past practice in both subcontracting and transfer cases. However, it also started to assess whether the work at issue had been performed in the past "by the workers to whom it

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[14] **In *Hamden* (1654) the Board again describes the elimination of the position as a management prerogative unless the elimination results in an illegal transfer of work. This discussion tracks the conclusions in *Waterbury* (1436) concerning the lay off of employees. It may be that these conclusions require more discussion. In this regard, it is probably more consistent with our case law concerning an employer's decisions to lay off and eliminate positions to say that both are management prerogatives but that any resulting assignment of bargaining unit work to non-bargaining unit personnel is a mandatory subject of bargaining. In other words, the resulting transfer of work may be seen as a "secondary impact" of the primary decision to lay off or eliminate or it may be viewed as a separate mandatory subject of bargaining. Either way, it seems that management does not lose its right to decide to lay off or eliminate a position merely because it must negotiate about any resulting transfer of work; it must simply make its decisions about staffing with full knowledge of its other bargaining obligations, which may proscribe implementation of the planned lay off or elimination until such other bargaining obligations are met. In any event, it appears that the distinction is without any practical significance since the result is the same under either view. As such, we do not here pronounce any change in this particular area.**

was being assigned". During this time, the Board planted the seeds that led to its merging the analyses that it had ***used*** in certain early transfer cases such as ***Waterbury*** (1436) with what it would use in subcontracting cases.

Following the developments in the Board law described above in ***Waterbury*** **(1436),** the Board considered its first subcontracting case that contained facts showing a history of some subcontracting prior to the incident complained of in the complaint. In ***City*** *of* ***Waterbury,*** Decision No. 1834-A (1979) the Employer subcontracted its entire computer operation. Prior to the subcontracting, the Employer had temporarily subcontracted some computer work during peak times. No employees were laid off or terminated as a result of the subcontracting in dispute.

Using ***Plainville*** (1192) as its basis, the Board found that the Employer had violated the Act by unilaterally subcontracting the entire computer operation. The Board laid out its opinion on "where the line should be drawn" with regard to the parameters of an employer's duty to bargain concerning subcontracting. The Board stated:

> 1. There is no duty to bargain unless the work contracted out (or otherwise removed from the unit) is bargaining unit work, ***Plainville*** **(1192),** and work not previously done by the employees to whom it is assigned. ***City*** *of* ***Waterbury,*** Decision No. 1436 (1976).
>
> 2. The unilateral elimination of a position for valid economic or other reasons does not violate the Act unless the functions of that position are transferred to persons outside the bargaining unit or unless it involves repudiation of a contract. [internal citations omitted]
>
> 3. There is no duty to bargain unless the removal of work from the bargaining unit causes a substantial impact on the wages, hours or other conditions of employment of one or more members of the bargaining unit. ***Plainville Bd.*** *of Ed.,* ***supm*** at 5.
>
> 4. **[T]his** impact may consist in lay-offs, loss of seniority rights, and the like. But the decisions also make it clear that the requirement may be satisfied where the "impact" is much more indirect and subtle. Thus "departure from previously established operating practices", and "impairment of . . . reasonably anticipated work opportunities" are recognized, **each** as a separate and distinct ground for finding substantial impact. So is a practice which generates fears of future encroachment upon bargaining unit work. As the court recognized in the ***District 50, supra*** at 237 case, such "fears are palpably real and disturbing . . . " **Ibid.**

5. If the contracting out does involve a substantial impact (as defined above) then it is a mandatory subject of bargaining even though the City is required by law or by circumstances to take some action in the premises. ***City of Shelton,*** Decision No. 1617 (1978).

6. The duty to negotiate before removing work from the bargaining unit does not depend on the **pendency** of ongoing negotiations.

7. The duty to negotiate may not exist where

(a) the contracting out is only a continuation of past practices, or

(b) negotiation is not feasible because of the multiplicity of instances, because of an emergency or the like. ***See*** **e.g.**, ***Plainville Bd. of Ed., supra*** at ***5; District SO, UMW, Local 13942 v. NLRB, 358*** **F.2d** 234, 238 (4th Cir. 1966).

Using the above criteria, the Board first found that the computer work to be subcontracted was bargaining unit work because the contract with the private company described the work to be subcontracted as the very function performed by the City's computer department. The Board found the work to be bargaining unit work in spite of the fact that the private company would perform the work using new methods and systems. The Board stated:

> . . . this does not, we think, mean that bargaining unit work is no longer involved. The job, though expanded and done by improved methods, is still fundamentally the same. If custodial work in a building is done by a bargaining unit that operation is bargaining unit work whether done by hand broom or by the most modern vacuum cleaner. And that is true even though the vacuum cleaner can and does, do custodial tasks that the hand broom cannot perform.
>
> ***Waterbury*** (1834-A) at **5**

Also, the Board did not take into consideration the fact that subcontractors had performed some computer work in the past, during peak times, in making its determination that the work to be contracted out was "bargaining unit work"; the fact that the work had consistently and normally been performed by the bargaining unit made it bargaining unit work.

The Board then distinguished this case from ***Waterbury*** (1436). The Board stated:

> "This case is quite different from the former ***Waterbury*** case (Decision No. 1436, (1976)). There some bargaining unit positions were eliminated and the

functions of those positions taken over by employees of another bargaining unit who had performed the same functions historically and were still performing some of them just before the unit positions were eliminated. That was a case of overlapping functions of employees of the City. This is a case where functions formerly performed by bargaining unit employees are transferred to persons outside the City's service who had never before performed those functions for the City."

Waterbury (1834-A) at 5

The Board next found that the subcontracting would have a serious impact on the bargaining unit even though employees were not scheduled to lose their jobs and even though the contract only effected a small percentage of the overall unit. The Board, rejecting the City's arguments regarding the small number of employees effected, stated:

> . . . If an employer were free to contract out each function of the bargaining unit because only a few employees were engaged in performing it, then the employer could make successive inroads on bargaining unit work that could reduce it substantially or even eliminate it altogether by easy stages. We think that the impact on the bargaining unit is substantial (for present purposes) if the impact on affected employees is substantial even if they are relatively few in number.

City of Waterbury (1834-A) at 5

With regard to the no-layoff argument) the Board said:

> The City's argument seems to proceed on the premise that the impact of contracting out is not substantial if no bargaining unit employee loses his job. That is not the law. In ***Plainville*** no job was lost and no bargaining unit member suffered diminution of benefits. The same thing ***was*** true in ***Southington Board of Education,*** Decision No. 1221 (1974). Yet in both cases we found that unilateral contracting out of bargaining unit work was violation of the Act. . . . In the present case, the contract with Computer Assistance meant the complete cessation of the City's computer department and at least a change in work assignments of the displaced employees. This change is in itself substantial enough to constitute a mandatory subject of bargaining. [internal citations omitted]. Beyond that the change clearly had a tendency to chill legitimate expectations of additional work opportunities and "generate fears of future encroachment upon bargaining unit work", fears which a federal court of appeals has described as "palpably real and disturbing".

Waterbury (1834-A) at 6

The Board also rejected the City's arguments that its actions should be considered the exercise of managerial prerogative so that unilateral action was justified. Recognizing that

the action of the City was aimed at introducing efficiency and productivity into the computer functions, the Board was unconvinced that those goals justified unilateral action. Again the Board recognized the principle that bargaining is required because the proposed action has such a substantial impact on the bargaining unit and because bargaining may reveal solutions and alternatives to subcontracting. The Board noted its acknowledgment that negotiations take time and that an employer may be faced with an emergency that would require immediate action. While conceding that an emergency may modify the duty to bargain, the Board found no such need for haste in the facts of this case and left the question for decision in another matter. *Waterbury* (1834-A) at 7.

The Board then found that the past practice of using an outsider during peak periods in the past did not justify subcontracting the whole computer operation. The Board found that "the difference between this and the former contracts is so great that the past practice cannot justify unilateral action in the present *case*". *Waterbury* (1834-A) at 8.

Finally, the Board noted that in *Westinghouse* the NLRB had stated that bargaining might be excused where it was "not feasible"." The Board in *Waterbury* (1834-A) said that such a justification exists only where the bargaining is not feasible **and** there is a past practice of subcontracting similar work.

The *Waterbury* (1834-A) decision is critical in our historical review for several reasons. First, it constitutes the first lengthy discussion of subcontracting in the context of facts showing a past practice of subcontracting certain bargaining unit work. In this context the Board showed nearly complete adherence to a *Westinghouse* type analysis. In this regard, the decision clearly reiterated that subcontracting is a mandatory subject of bargaining; reviewed the past practice for comparison to the disputed action and described the "impact" on the bargaining unit that must be shown in order to obligate the employer to bargain regarding its decision. Indeed, in this decision the Board seemed to not only reaffirm, but to further explain its position that the impact need not necessarily consist of layoffs and loss of benefits but may be even more subtle.

The Waterbury (1834-A) decision also makes two other statements, which had not previously **been** addressed. The first was a determination that the small number of employees affected by a decision to subcontract work will not excuse the subcontracting as long as the impact on those employees is substantial. The Board also further explained its interpretation of the factor contained in *Westinghouse*, which stated that the NLRB would consider whether the bargaining was "feasible" for the employer. This Board stated that the feasibility of bargaining would only be considered if the Employer also shows that there is a past practice of similar subcontracting.

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[15] The reader will recall in Westinghouse that there were thousands of annual subcontracts to contend with, which the **NLRB** took into consideration in making its decision.

The decision is also important for one other reason. In initially discussing the parameters of an employer's duty to bargain, the Board stated that there exists no duty to bargain unless the work is bargaining unit work "and work not previouslv done bv the employees to whom it is [now] assigned". *Waterbury* (1834-A) at 4 [emphasis added]. Although the Board appears to follow a federal model analysis throughout the rest of this decision, this particular statement is attributed to the Board's decision in *Waterbury* (1436), the first "transfer" case to use the "overlap" theory. No such factor appears in previous subcontracting cases nor in the federal cases upon which we had relied up to that point. Thus, it seems that the Board simply "made the leap" between the subcontracting cases and the cases involving the internal transfer of work between employees of the same employer and began to intermingle ideas from both.

Although it is perhaps understandable that the Board would review the *Waterbury* (1436) type cases when considering a subcontracting case, the proposition that the Board chose to include is rather confusing when examined carefully. First, the above-emphasized statement, by the Board, is not a conclusion of law in the *Waterbury* (1436) case; it is, instead, the Board's interpretation of 1436 as it apparently tried to distinguish *Waterbury* (1436) from *the* facts contained in *Waterbury* (1834-A). Further, when the Board distinguished *Waterbury* (1436) from the case before it in *Waterbury* 1834-A, it stated: " . . . [1436] was a case of overlapping functions of employees of the City. [1834-A] is a case where functions formerly performed by bargaining unit employees are transferred to persons outside the City's service who had never before performed these functions for the City". *Waterbury* (1834-A) at 5. While the fact that the subcontractor in 1834-A had never before performed the work in question may be a perfectly reasonable way to distinguish the two cases, and, in fact, makes the conclusion in 1834-A more supportable, the Board could have drawn the factual distinction without making a pronouncement that, in every case in which the Board is asked to analyze a subcontracting issue, it must find that the employees to whom the work is now assigned had never before performed the work. However, by the inclusion, in the summary list of guidelines, of the factor that states that the work at issue not have been "previously done by the employees to whom it is assigned", the Board took a fact in this specific case and translated it into a necessary factor for all other subcontracting cases. Thus, by taking the specific facts in 1834-A, and trying to distinguish them from 1436, the Board instead came up with a new and unprecedented criterion in the analysis.

By including the above pronouncement in *Waterbury* (1834-A) the Board began merging the reasoning in *Waterbury* (1436) and its progeny with subcontracting and other types of cases. In relying on the facts in 1436 to make a statement of law in 1834-A, the Board laid the foundation for the inevitable development of the "exclusivity" criterion in the "shared work" doctrine.

In spite of the additional factor referred to above, the Board continued to use the federal model in several more cases after *Waterbury* (1834-A). In Town *of Milford*, Decision No 1849 (1980), the Board found that the Employer had violated the Act by

subcontracting out the custodial work in a new police station. Although this was a case in which there was no past practice of similar subcontracting, the Board found substantial impact on the bargaining unit members in the fact that the subcontracting eliminated a request for three new employees and blocked the growth of the Union. In deciding this case, *the* Board again cited ***Plainville*** (1192); ***Southington*** (1221); ***Waterbury*** (1834-A); and ***Fibreboard***.

More relevant to our review, however, is ***City of New Haven,*** Decision No. 1879 (1980). In this case, the Union alleged that the City had violated the Act by its use of temporaries to perform clerical bargaining unit work and by the use of non-bargaining unit personnel to perform work during snowstorms, which work was customarily done by bargaining unit workers. The evidence showed that the bargaining unit had always done the snowstorm work referred to above, which sometimes amounted to large amounts of overtime for the employees involved. With regard to the clerical work complained of, the evidence showed that the City had, for many years, used temporaries from outside agencies in the following circumstances: (1) to help out during seasonal peak loads in such offices as the tax office; (2) to fill in during emergencies caused by illness and the like; and (3) to fill vacancies temporarily during the time taken by the civil service process to fill the vacancies on a permanent basis.

The evidence showed that there had been no change in the practice of using temporaries to perform bargaining unit work during peak loads and emergencies. However, in 1975 the Board of Finance ordered all vacated positions to be "frozen". This change necessitated the use of temporaries for longer periods of time while departments requested the frozen positions to be filled on a permanent basis.

With regard to the work performed during snowstorms, the record revealed that bargaining unit workers had been replaced for performance of emergency "desk" work by non-bargaining unit workers during the winter of 1979.

Citing ***Plainville*** (1192); ***South Windsor*** (1864); ***Waterbury*** (1834-A); and ***Fibreboard,*** the Board first noted that unilateral subcontracting may constitute a violation of the Act. The Board then cited ***Westinghouse*** for the proposition that unilateral subcontracting may not be a prohibited practice where there is a past practice of subcontracting a specific type of work and the employer is merely continuing that past practice.

Concerning the use of non-bargaining unit employees during the snowstorms, the Board simply found that a change had been made by the employer, when it failed to call in bargaining unit personnel to handle the phones during a snowstorm, and instead used non-bargaining unit personnel to perform that function. The Board ordered the City to cease and desist and to pay backpay to the members of the bargaining unit. The Board did not engage

in any in-depth analysis with regard to this claim; none seemed required. The violation appeared clear as a departure from past practice.

The question concerning the use of temporaries was more complicated. The Board quickly found no violation concerning the use of temporaries during peak loads and emergencies because no change had been shown. With regard to the use of temporaries to fill in for vacant positions, the Board noted that there had been a substantial increase in the time it took to fill a vacant position due to the freeze on positions resulting in temporaries being used for longer periods of time. The Board first noted that the decision to freeze positions was a management prerogative, since there was no evidence to support a conclusion that the action was taken to undermine or otherwise thwart the collective bargaining process. However, the Board then found that the "... the impact of the freeze order upon the manner of filling vacancies was probably so substantial as to make it a mandatory subject of bargaining. Before the City continued to hire agency temporaries for the longer periods of vacancy resulting from the freeze order, it should have negotiated with the Union about the ways of covering bargaining unit work during ***the*** vacancy". ***New Haven*** (1879) at 5. At this point, the Board went on to examine the bargaining obligations of each party. The Board determined that the City's use of the temporaries to fill the vacant positions had become "open, notorious and protracted" and, therefore, the Union's failure to request bargaining during that time debarred it from claiming compensation for any loss incurred by its member because of the City's use of temporaries. Because the Board found that no demand for bargaining had been made by the Union, it dismissed this portion of the case because no relief could be awarded.

This case is important to our review for at least two reasons. First, the Board again appeared committed to its use of the federal model for analysis at least where the case concerned the ongoing use of temporary employees. There is no mention in this case of the fact that those to whom the work was assigned had performed the work in the past; there is no mention of ***Waterbury*** (1436) ***as*** there ***was*** in ***Waterbury*** (1834-A). And secondly, with regard to the use of non-bargaining unit personnel to perform snow emergency work, the Board easily found a violation on the ground that there had been a change in the practice.

The above cases contain significant discussions and are very helpful in focusing our attention on some of the subtle and complicated issues that arise in a subcontracting/ transfer case. Equally important to our historical perspective, however, is the fact that during this time period, the Board was using a federal model analysis, in most cases, concerning both the subcontracting and transfer of work. The next section, however will show the dramatic turn taken by the Board in its analysis immediately after the above cases were issued.

B. ***MIDDLETOWN*, DECISION *NO.* 1880 (1980); *BOARD OF EDUCATION OF THE CITY OF HARTFORD*. DECISION *NO.* 1938 (1980); AND *TORRINGTON*, DECISION NO. 2172 (1983)**

In this next series of cases, the Board cultivated the approach that it had begun in ***Waterbury*** (1834-A) and moved toward a complete mixing of the federal model analysis previously used in subcontracting ***cases*** with ***the*** theory of transfer ***cases*** like ***Waterbury*** (1436). This approach gave rise to the "shared work" and "exclusivity" theories that were then applied in subcontracting cases as well as transfer cases. In the process, the Board abandoned the broad definition of bargaining unit work that was part of the foundation of the ***Westinghouse*** analysis.

Immediately after the New ***Haven*** (1879) decision, the Board decided ***Middletown***, Decision No. 1880 (1980). In this case, the Board relied on its ***Waterbury*** (1436) theory and added the terms "shared" and "exclusive". ***Middletown*** (1880) involved the work of a bargaining unit position of bookkeeper who had been hired for a period of time using HUD funds. Prior to creation of the bookkeeping position, the work had been done by the non-bargaining unit position of executive secretary. When the federal money ran out, the bookkeeper was laid off and the work reverted to the executive secretary. The Board acknowledged that assigning out bargaining unit work can violate the Act. However, the Board then stated:

> "To do so, however, the work assigned must clearly belong to the bargaining unit and we have held that this is not the case where, before the assignment, the work was shared by bargaining unit employees with the non-unit employee who falls heir to the balance of it. " [emphasis added]
>
> ***Middletown*** (1880) at ***8*** citing ***Waterbury*** (1436)

In finding no violation, the Board stated, in the very last line of the discussion: "On these facts we conclude that what remained to be done after [the bookkeeper's] lay-off was not exclusively bargaining unit work". [emphasis added]. ***Middletown*** (1880) at 8.

The developments in this case are important. Primarily, this is the first time the Board uses the words "shared" and "exclusive". These words would eventually become an integral part of the fabric of our subcontracting/transfer cases. Perhaps even more important, however, is the Board's analysis.

Upon careful review, it is clear that the Board moved substantially toward a complete "mixing" of the federal model analysis previously used in prior subcontracting cases with the theory articulated in its ***Waterbury*** (1436)-transfer type cases. This mingling, which began in ***Waterbury*** (1834-A), determined the future developments in the law. Specifically, in this case, the Board initially acknowledged that assigning out bargaining unit work can be a

violation of the Act and cited Waterbury (1834-A) for that proposition, which, in turn, relied on the federal model. The Board then went on to define bargaining unit work, in a case such as this one, as that which was not "shared" in the past with non-bargaining unit personnel, citing ***Waterbury*** (1436). With its last sentence in the discussion, the Board then defined sharing as occurring when the bargaining unit has not done the work exclusively. With these two seemingly simple statements, the Board changed the definition of bargaining unit work from "work that is or may be done by the bargaining unit" ***(See Westinghouse)*** to "work that has been done exclusively by the bargaining unit". While ***Middletown*** (1880) apparently limited such a definition to the facts as found therein, the language used by the Board would later (in ***Torrington,*** Decision No. 2172 (1983)) be applied to dramatically shift the way the Board viewed subcontracting cases.

In ***Board of Education of*** C&y ***of Hartford,*** Decision No. 1938 **(1980),** the Board further developed its theory concerning exclusivity. This case involved an administrator's unit and a rather complicated series of events in which positions grew and changed. Originally, the Employer had two non-unit positions of Planner and Manager. The Employer then created a bargaining unit position of Assistant Administrator; the Assistant performed duties similar to the Planner and Manager, as well as other duties. When the Assistant's responsibilities grew, the incumbent was made a full-time director with supervisory responsibility. The Planner position was also changed and retitled "Coordinator". The new Coordinator performed some duties originally performed by the Assistant and remained outside the unit because the position did not require an administrator's certificate. The Union charged that the Employer had unlawfully transferred the bargaining unit work of the Assistant to the non-bargaining unit Coordinator.

The Board took this opportunity to develop its theory of "bargaining unit work" and "exclusivity". The Board first acknowledged that we follow the NLRB and federal courts in holding that a unilateral change in a condition of employment is a violation of the Act, citing ***Plainville*** (1192). The Board then correctly stated that contracting out or transferring work performed by members of a bargaining unit concerns a mandatory subject of bargaining when the transfer is to non-unit personnel. Instead of citing ***Plainville*** (1192) and the federal ***cases,*** however, the Board cited ***Waterbury*** (1436). The Board then went on to discuss its ideas of what constitutes bargaining unit work and the idea of exclusivity:

> "Work may become 'bargaining unit work' in a number of ways. In crafts or trades, there are traditional types of work which historically have been exclusively within the province of a particular craft or trade e.g., carpentry, masonry, etc. Such work would be 'bargaining unit work' of the appropriate craft or trade bargaining unit. Another possible way is where the law defines the type of work done by a particular unit. Under the Act, work which requires an administrator certificate is bargaining unit work for the administrators bargaining unit. Finally, work may become exclusive work for a particular bargaining unit through a past practice of that

work having been assigned only to bargaining unit members. It is the latter two categories which the present case primarily concerns.

Sometimes a certain type of work is performed both by bargaining unit and non-bargaining unit members. That is, such work is shared between the two groups. When a practice has been developed of sharing work in this fashion, the continuation of the practice constitutes no violation of the Act, because no substantial change in an established practice occurs. "

Board of Education of Hartford (1938) at 4

Finding that the work in question had not been net-formed solely by bargaining unit employees, the Board dismissed the complaint in this case.

The first important point of this case is that the Board defines "bargaining unit work" as work that has been done "exclusively" by the bargaining unit. Further the Board cements its ideas of "sharing". The proposition that bargaining unit work is only defined as work done exclusively by the bargaining unit is a significant departure from the historical view of bargaining unit work. (See e.g., our discussion herein concerning the federal view of "bargaining unit work" contained at Section I). We believe that accepting such a definition has led, in many later cases, to a confused and complicated analysis regarding whether the work in question is "bargaining unit work".

In ***Hartford*** (1938) the Board also shored up its concept of shared work. An initial review of the idea of "sharing" does not, on its face, contradict the federal model discussed before, which requires a comparison between past practice and current events. In this regard, the Board stated in ***Hartford*** (1938) that "continued instances of such sharing" would not violate the Act. Thus, on its face, the "sharing doctrine" seems to be largely in keeping with the federal model. It is the requirement of "exclusivity", as discussed above, which makes this concept confused and largely unworkable. First, the two concepts seem to contradict each other. It appears that if the requirement of "exclusivity" is not met, the work in dispute is not "bargaining unit work" and no further analysis would be required. The analysis of shared work seems to be superfluous at that point, or at best, included under the initial definition of bargaining unit work. On the other hand, by saying that "continued instances of such sharing" would not violate the Act, the Board seems to be focusing on past practice and implies that a change in the nature of the sharing might violate the Act. For this view, "exclusivity" might become meaningless. This potential conflict was not discussed by the Board. It is clear to us now that pairing the concepts of sharing and exclusivity fostered much confusion.

In City ***of Torrington***, Decision No. 2172 (1983) the Board applied the concepts of sharing and exclusivity to a subcontracting case for the first time and completed the merging of the two categories of cases. This was a dramatic turn in the manner of analyzing cases;

prior to this decision, the Board had continued using a federal model analysis in subcontracting cases (See *Town of East Haven,* Decision No. 2082 (1981)).

In ***Torrington,*** the Employer subcontracted to have a fence erected 'in a city park. The evidence showed that subcontractors had, in the past, performed maintenance, construction and repair work in the park. The evidence also showed that neither bargaining unit nor non-bargaining unit personnel had ever constructed a fence in the park. The Board found no violation based on the following reasoning: (1) a unilateral change in conditions of employment is a violation of the Act; (2) unilateral transfer of bargaining unit work to non-bargaining unit personnel concerns a mandatory subject of bargaining; (3) unilateral change implies a fixed practice; (4) when a union alleges that a unilateral change has occurred, it is the union's initial burden in showing a prima facie case to establish that a change in practice has in fact occurred; (5) in the present case, it is the union's burden to show that the work in question has by practice been performed exclusively by bargaining unit employees; (6) if the work in question has historically been shared by both bargaining unit and non-bargaining unit employees, a continuation of such practice will not constitute a violation of the act; (7) since outsiders have historically performed normal daily work and some construction work in the park, the work in question is not "exclusively" bargaining unit work and the complaint should be dismissed.

Thus, the Board took on the "shared work" theory for subcontracting cases, with all its inherent contradictions, as described in the previous paragraphs. Again, we see the contradiction between placing the burden on the Union to prove a past practice and a departure therefrom and defining the past practice, which must be moved as "exclusivity". Perhaps realizing that the concept of exclusivity did not fit nicely within either the shared work doctrine or the unilateral change doctrine, the Board added a footnote at the end of the decision in which it said:

> "It may be that where work has been shared to a limited degree with non-bargaining unit employees, an extreme increase in the proportion of such work given to the non-bargaining unit personnel would constitute a change in practice We do not see the present case as presenting such a situation."
>
> ***Torrington*** (2172) at 3

V. THE AFTERMATH OF *HARTFORD,* 1938 AND *TORRINGTON,* 2172 AND THE DEVELOPMENT OF DEFENSES

The impact of the exclusivity/shared work doctrine showed up immediately in the Board's decisions in the early 1980's. In the "transfer" type cases, the Board repeated its message in City ***of Bridgeport,*** Decision ***No.*** 1994 (1981); ***Town of East Haven,*** Decision No. 2020 (1981); ***City of Bristol,*** Decision No. 2066 (1981). Interestingly, the above cases began citing ***cases*** such as ***Plainville*** (1192) and ***Milford*** (1849) for the concepts of shared

work and exclusivity. Yet we must admit that we believe that these citations were erroneous as the cited cases analyze the issues in a substantially different manner. Also, ***Town of East Haven (2020)*** is particularly noteworthy for its results. Although the Employer admitted to hiring more temporaries during one summer than it had in the past, the Board found no violation because the work had been shared with some summer temporaries in the past. Of particular importance is the Board's statement that the "most tenuous of the Union's arguments is that it lost job opportunities". ***East Haven (2020)*** at 4. The Board found no lost job opportunities because no one had been laid off, in spite of the fact that all parties agreed that there was increased workload, due to new and renovated parks. The Board's finding should be compared to its rulings contained in previous cases discussed above concerning the nature of the "impact" sufficient to support a violation using the federal model. As we see it now, this statement seems to be in direct contravention of the ideas enunciated by the Board in previous cases. Also, the result in this case should be compared to ***City of*** New ***Haven*** (1879) discussed previously, where the Board identified a duty to bargain concerning an increase in the use of temporaries, to show the shift in the Board's position.

After 1981, the Board expanded and developed the exclusivity/shared work standard in other ways. The major developments are discussed below.

A. **THE "SUBSEQUENT REASSIGNMENT" LANGUAGE**

In ***City of New Britain***, Decision No. 2108 (1982), the Board added a slightly new factor to its analysis. The case involved a unit employee whose supervisory responsibilities were given to a non-unit supervisor who had not previously performed the work. Prior to the transfer, the work had been "shared" between the unit employee and the Director of her department. In finding no violation, the Board stated:

> ". . . where the reassigned work has by practice been substantially shared between bargaining unit and non-bargaining unit employees, a subsequent reassignment of that work away from bargaining unit employees to non-bargaining unit employees will not constitute a violation of the Act." [emphasis added]
>
> ***New Britain*** (2108) at 3

This language arguably lends some support to the theory that as long as the work has been shared with any non-unit nersonnel, it may be reassigned to anv other non-unit personnel without violation. If this interpretation of the terminology is correct, it is certainly an expansion of the original shared work theory and is, in fact, contradictory to the original shared work language, which spoke of a "continuation of such sharing" as not being a

violation of the Act. (See e.g., ***Hartford*** (1938)).[16] This theory was repeated in a subcontracting case in 1983 in ***City*** of ***Stamford***, Decision No. 2194 (1983).

B. DE MINIMIS DEFENSE

In ***Town of Willington,*** Decision No. 2238 (1983), the Board found no violation in the transfer of certain duties of a bargaining unit secretarial position to a non-unit position of "Assistant". The Board found that much of the work performed by the secretary had also been performed by the First Selectman prior to the creation of the Assistant position. There was, however, some work transferred to the Assistant that had been performed exclusively by the secretary. With regard to this work, the Board found that it was a "residue" of work and, therefore, de minimis, dismissed the complaint. This has been relied on in other ***cases.*** (See e.g., ***Torrington Board*** of ***Education,*** Decision No. 3252 (1994)).

C. SUBSTANTIAL. DISCRETE. CLEARLY RECOGNIZABLE JOB DUTIES

In ***Town of Watertown,*** Decision No. 2515 (1986), the Board introduced the concept of "substantial, discrete and clearly recognizable job duties" as a way of finding exclusivity and defining bargaining unit work. Here, the Employer had subcontracted the hauling of chip stones. Although outsiders had hauled other materials in the past, only the bargaining unit had hauled chip stone. In finding a violation, the Board stated:

> "Whatever practices have existed with respect to other hauling work within the Town, it is clear and uncontradicted in the record that hauling of chip stone has been a regular and substantial duty performed exclusively by bargaining unit employees. The town's argument, if accepted, would allow unilateral contracting out of exclusively bargaining unit work through the device of broadly redefining such work so that it is lumped into a larger category which includes work that has been shared. Such an approach would seriously undermine the duty of employers to bargain over contracting out. Where as here, a substantial, discrete and clearly recognizable duty has been performed exclusively by the bargaining unit, it would be irrational and defeat the purposes of the Act to construct and apply an analysis that would remove the contracting out of such work from the scope of mandatory bargaining. "

Watertown (2515) at 4

See also Metropolitan District Commission, Decision No. 3116 (1993).

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[16] **We also note that the Board used the term "substantially shared" without definition. Again, this is another new term, which has potential for great confusion. For example, if the work is not "substantially shared", would it be a violation to assign that work to non-unit personnel even though there is no exclusivity?**

While we have attempted to disallow over-broad definitions of the work at issue, the Board has also had to consider whether a Union is attempting to "micro-divide" the work in order to prove a violation. Thus, in ***Thomaston Board of Education,*** Decision No. 3008 (1992) the Board did not allow the Union to "break up" the work in question into micro-divisions of attendance keeping. ***See also City of Hartford,*** Decision No. 3049 (1992).

The above cases clearly illustrate the difficulty the Board and parties have in defining "bargaining unit work" in these cases. The need to define bargaining unit work results from the presence of the exclusivity factor in our past doctrine. In this regard, the parties are often forced to initially argue over the definition of bargaining unit work in order to prove or disprove "exclusivity". This can result in a skewed view of the case and often results in confusing and unpredictable determinations of the Employer's bargaining obligations, frequently giving the parties little guidance in anticipating the Board's rulings. This difficulty was avoided in the initial federal cases by a common sense approach to the definition of bargaining unit work, which included work "which may be done by the bargaining unit". By not focusing on the issues of exclusivity and shared work, the reviewing bodies were more able to concentrate on truly important criteria, such as whether there was an actual change in the practice of using non-bargaining unit personnel, an approach consistent with general principles of the unilateral change doctrine. Unfortunately, the shared work analysis, with its "exclusivity" counterpart, does not allow for such an approach.

VI. THE PROBLEMS ASSOCIATED WITH THE EXCLUSIVITY STANDARD, THE RECOGNITION OF THE PROBLEMS AND THE FAILURE TO RESOLVE THE PROBLEMS

This Board's subcontracting/transfer of bargaining unit work cases are too numerous to fully review here. Many of the decisions reiterate the requirement of "exclusivity", although the definition of that term is elusive and its application to the facts of individual cases demonstrates its awkwardness. [17]

With the benefit of hindsight, we now see two related problems with the legal reasoning in many prior cases. First many of the decisions incorrectly cite cases such as ***Plainville*** (1192) to support the proposition of "exclusivity". This error perpetuates adherence to the shared work/exclusivity doctrine when that doctrine is in fact, inconsistent with the seminal cases. This inconsistency is of dramatic significance because the seminal cases relied on the unilateral change doctrine.

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[17] **We have not attempted in this decision to review certain cases containing very unique facts such as *Berlin Board* of Education, Decision No. 2375 (1985). An individual review of such cases will have to wait for similar situations to present themselves to the Board.**

This leads to the second problem. Since the 1980's, we have repeatedly and erroneously equated the exclusivity analysis with the unilateral change doctrine. However the two concepts are different. Under the exclusivity analysis, the past practice that must be proven is pre-defined for the parties; the Union must prove that "exclusive performance of the work" is the past practice in order to prove a violation of the Act. This is an "all or nothing" approach; there is no room for the Union to prove, as it does in standard unilateral change cases, that there has been a substantial change in major terms and conditions of employment. In other words, exclusivity does not allow the Union to prove that there has been a substantial change in the practice concerning subcontracting/transfer of work. In contrast, in the standard "'unilateral change" analysis, the past practice is not pre-defined; a complainant may make its case by proving a substantial change based on the particular facts and the bargaining relationship of the parties.

In sum, while the early subcontracting cases, discussed in this decision, are based on a traditional unilateral change concept, the idea of "exclusivity" is not.

The above "mixing" of doctrines naturally results in other confusion. For example, what exactly does the term "exclusive" mean; what is the significance of the Board's use of the term "substantially shared"; will the Board take into consideration the "amount" or "nature" of the past sharing in order to evaluate a current practice; how does the Board draw the line in defining "bargaining unit work"; when does a definition constitute a micro-division and when is it overly broad; is there a difference in evaluating the "sharing" between an employee and his superior as opposed to other types of sharing? These questions have never been answered and, perhaps, are not amenable to resolution due to the inherent conflicts in the law. To follow are two cases that best exemplify the problems with this analysis.

In ***Naugatuck Board of Education,*** Decision No. 2534 (1987), we reviewed a situation in which the Union alleged a violation because the Employer had allowed volunteer mothers to come into school to make phone calls to parents regarding absent students. Prior to the mothers being asked to make the phone calls, the bargaining unit employees made the initial phone calls at the high school with the follow-up phone calls being made by non-bargaining unit employees. At the middle school, the work was divided among bargaining unit employees, guidance counselors and the school nurse. Although the Union acknowledged that some of the work had been done in the past by non-unit personnel, it claimed that this situation was different because the mothers were making the initial calls; work that the union claimed had not been shared in the past.

In finding no violation because the work had previously been shared, the Board stated in its conclusions of law: "Where work has been by practice shared between bargaining unit and non-bargaining unit personnel, the continuation or augmentation of non-bargaining unit personnel performing such work results in non-substantial change in conditions of employment. " [emphasis added]. ***Naugatuck (2534)*** at 4.

In its discussion, the Board noted that even the making of initial calls had been shared to some extent in the past. The Board stated: "It has been our rule that sharing need not be done in every location to constitute a practice. What happens in one part of a bargaining unit is applicable to all." ***Naugatuck (2534)*** at ***5,*** citing ***New Britain Board of*** Education, Decision No. 1786-A (1979); ***Portland Board of*** Education, Decision No. 1670 (1978).

The Board then said: "even a minimal erosion of exclusivity would suffice to establish a practice of sharing." ***Naugatuck*** (2534) at 5. In spite of this statement and the Board's determination that no violation had occurred in this matter, the Board added a footnote near the end of the decision in which it said:

> "We do not suggest that no duty to bargain exists in a case where work which has been only minimally shared with non-bargaining unit members, is wholly transferred to non-bargaining unit members creating a substantial impact on the bargaining unit (EG layoff or reduction in hours). "
>
> ***Naugatuck (2534)*** at 5

The statements in ***Naugatuck*** exemplify the problems for both the Board and the parties in grasping at the elusive exclusivity/shared work doctrine. First, we now find it difficult to reconcile the discussion in the body of the decision and the concluding footnote with regard to the legal significance of "minimal sharing". Further, the footnote refocuses attention from the Board's early acknowledgment of subtle impacts on a bargaining unit to more pronounced impacts such as lay offs and reduction in hours. Thus, as we look back, ***we see Naugatuck*** as exemplifying uncertainty about application of our exclusivity/shared work doctrine; the same uncertainty that has troubled the parties in the workplace.

In 1990, we recognized that our decisions contained inconsistencies. In ***Weston Board of Education,*** Decision No. 2809 **(1990),** we were presented with a situation, in which the Employer eliminated the bargaining unit positions of health aides and transferred the work to the non-bargaining unit positions of registered nurses. Addressing the Union's argument that the transfer of work increased the amount of bargaining unit work done by the registered nurses, the Board stated:

> ". . . Without conceding that the work was truly shared, the Union argues that because the reassignment increased the amount of unit work done by non-unit personnel, there was a significant departure from past practice which triggered the duty to bargain. The Union cites ***City of New Haven,*** Decision No. 1879 (1980). [footnote omitted] While New ***Haven, supra*** and some comments in other cases arguably could be used to support a proposition that a duty to bargain arises whenever there is a substantial change in the amount of 'shared' work being performed by non-bargaining unit employees, or where layoff of unit employees results, some of our

previous cases present a different approach. Specifically, in ***City of Waterbury*** (1436) . . . despite what appears to have been a rather substantial change in the amount of aide-type work which was being performed by the teachers, we held that there was no prohibited practice. And in ***Norwich Board of*** Education, Decision No. 2579 **(1987),** we held that elimination of unit 'catalogers' positions did not violate the Act even though the work was transferred to non-unit professional librarians since the work had previously been shared. See also ***City of*** New ***Haven,*** Decision No. 1672 (1978).

We concede that there is some contradiction between our analysis in New ***Haven,*** Decision No. 1879 and our analysis in ***Waterbury, Norwich*** and New ***Haven,*** Decision No. 1672. However the facts in this case do not require us to resolve that conflict . . ."

Weston Board of Education **(2809)** at 8

In declining to resolve the conflicts in our law, we relied on the facts in ***Weston,*** which showed that there was substantial sharing between the unit and non-unit personnel prior to the elimination and transfer of duties. The case pinpoints the fact that the exclusivity/shared work doctrine seemed to the Board, even then, to represent a track uncomfortably at odds with the well-established unilateral change doctrine. However, while we acknowledged the defects in the analysis, we did not feel compelled to resolve them at that time.'* Now, with the benefit of a careful review of more than two decades of case law, we believe the time has come to attempt resolution of these problems and embark on a revised course of analysis.

VI. A RETURN TO THE EARLY FEDERAL MODEL

Based upon our review of the development of the exclusivity standard and the shared work doctrine, with its inconsistencies, questionable foundation and difficult application, we are convinced that it is time to return to an analysis that is more akin to our early thinking in the area of subcontracting. Moreover, that original analysis was entirely consistent with the well-established principles concerning unilateral change, which focus on past practice and whether, during the course of the contract, the Employer has made substantial changes to major terms and conditions of employment.

'As previously discussed, we again note that the idea of "shared work", which contains a rule saying that "continuation of such sharing does not violate the Act", is not necessarily antithetical to our early subcontracting analysis and the early federal model.

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18 **Interestingly, although we acknowledged some of the shortcomings of our decisions, we continued in** *Weston* **to cite cases for the proposition of exclusivity, which cases do not contain any reference to this concept. We believe these incorrect references only show how ingrained the concept of "exclusivity" has become to our thinking and may explain our hesitation to scrutinize the topic before this time.**

Indeed, on its face, this analysis comes strikingly close to a traditional past practice analysis in which the historical events are compared to the current events to determine if a violation has occurred. It was the addition of the exclusivity factor, tied to the focus on whether the work at issue was "bargaining unit work" that has so greatly confused the issues and led to inconsistent statements of law. However, because we have associated shared work with exclusivity for so long, we believe it is appropriate to abolish this language as we begin our revised approach to these situations in order to avoid confusion in the future and to clearly inform parties that the idea of exclusivity, as a factor in our analysis, is now abandoned.

In place of the shared work theory, we are substituting an analysis that is truly based on a past practice focus. In coming to our conclusions in this case, we are convinced that most of the statements made in ***Plainville*** **(1192),** ***Waterbury*** (1834-A) and New ***Haven*** (1879) provide a workable framework within which to analyze both subcontracting and transfer cases. As such, in subcontracting and transfer of work cases, we will now consider the following factors in determining if an employer has unlawfully assigned bargaining unit work to non-bargaining unit personnel without bargaining with the Union:

1. Is the work in question bargaining unit work? Bargaining unit work will be defined in most circumstances as work that is or may logically be done by the bargaining unit. This definition returns to the common sense approach and gets away from the confusing arguments concerning micro-divisions of work. By refusing to become entangled in these arguments, we believe we are simplifying the approach to these problems, providing better guidance to the parties in the workplace and refocusing our attention to more important factors. In keeping with the above, we note that the definition of bargaining unit work will **not** include consideration of whether the work has previously been done by the non-unit employees to whom it is to be assigned. **(See *Waterbury*** (1834-A) and our discussion of this factor herein at page 22). This factor, if relevant, will be considered later in the analysis with respect to whether there is a substantial change in kind or degree from what had been customary under the past established practice.

2. Does the subcontracting/transfer of work vary significantly in kind or degree from what had been customary under past established practice? Under this factor, we will look at the history of subcontracting/transfer of work including the type and amount of work performed previously by non-unit personnel and compare this historical information to the current action. We will also consider the "category" of non-bargaining unit personnel who have previously performed bargaining unit work. In this regard, we will consider the importance of facts that show that an employer's action differs from past practice because the personnel to whom the work is to be assigned are of a different type than those to whom work was previously assigned. (e.g., part-time non-unit employees v. outside subcontractor's personnel).

3. Whether the employer's action has a demonstrable adverse impact on the bargaining unit? We intend to adhere to our long-established tenet that adverse impacts may be much more subtle than lay-offs or loss of benefits. Regardless of any statements contained in our case law over the years, we state clearly here that impacts may consist of "impairment of reasonably anticipated work opportunities" and "a practice that generates fears of future encroachment upon bargaining unit work" as each of the above have been recognized traditionally as separate and distinct grounds for finding substantial impact. ***Plainville*** (1192).

In order to establish a prima facie case in these matters, the union must show that the work in dispute is bargaining unit work; that the current subcontracting/transfer of the work varies in kind or degree from what had been customary under past established practice; and that there is a substantial impact on the bargaining unit as a result.[19] If the union makes such a showing, we will look to the employer to provide any available defenses to its actions. We continue to recognize as among the valid defenses, (1) contractual provisions allowing the action; (2) the work assigned outside the unit is de minimis; (3) the contested action is in keeping with what has been customary under the Employer's past practice.

In addition to the factors and defenses listed above, we also recognize the importance of at least one other consideration; whether there are any public policy implications that would either support or weigh against either party in a proceeding. We recognize that although we have borrowed heavily from the private sector in arriving at the instant decision, there are many differences between the public and private sectors that might necessitate a deviation from a purely "scientific" application of the above factors to a given case. Thus, we will also allow parties to note and argue public policy considerations when presenting their cases. We do not, at this time, label this factor as either a required part of a prima facie case for unions or a standard defense for employers. Instead, we leave to the parties their determination of the appropriateness of this argument in a case.[20]

We do not, by our pronouncements herein, believe that we have resolved all our problems, nor do we blind ourselves to the fact that there remains to be seen whether this standard, indeed, simplifies the analysis or merely rearranges "labels". At the outset, we are

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[19] **Of course, if the Union argues that the Employer took the disputed action for an illegal reason, such as anti-union animus, our analysis would be different.**

[20] **We also recognize that there have been significant and much-debated developments in the federal sector since the issuance of** Westinghouse. **Our decision, in this case, is a product of our determination that the *Westinghouse* type of analysis suits the majority of cases that come before us. We are not unaware that the federal sector has engaged in much debate since that time. We do not comment on further analysis and peculiar fact patterns contained in more recent federal cases. And, most specifically, we do not comment on the form of our analysis should we be faced with a situation in which the public employer truly "shut down" a service as such a situation has been described in *First National Maintenance Cop, 452* U.S. 666, 107 LRRM 2705 (1981).**

able to foresee at least one situation that will require careful scrutiny when presented to this Board. It is a situation that has presented itself repeatedly to us under our "shared work" doctrine and, in fact, formed the basis for our decision in ***Waterbury*** (1436). In this type of case, we are faced with facts showing that bargaining unit employees are "aides" or "assistants" to non-bargaining unit employees and, as such, have historically performed many job functions similar or identical to their non-bargaining unit counterparts. This type of matter will undoubtedly come to this Board when an Employer eliminates or lays off the "assistants" for legitimate economic reasons and attempts to transfer all the work to the non-bargaining unit personnel. It was precisely this type of situation that first caused this Board to engage in an analysis different from the federal model. We must be clear that we will begin our analysis of these factual situations using the standard set forth today in this decision. However, we encourage and anticipate debate over the proper placement of these particular factual situations in the overall analysis. As history shows, these cases are among the most difficult to analyze and naturally raise legitimate questions regarding the public employer's right to effectively rearrange and utilize its resources when faced with a difficult economic situation within a collective bargaining context.

As a final comment, we specifically do not consider whether any of the previous complaints, presented to this Board, would have turned out differently had we used the standard we adopt today. Our own review of our cases reveals that many were "close calls" with significantly differing nuances; some involved complex questions of the employer's right to lay off and eliminate positions. We also note that, at times, we engaged, without acknowledgment, in an analysis quite similar to the one discussed today. As such, we cannot determine the outcome of any of our previous cases. We now turn to the specific facts in the case before us.

VII. THE INSTANT CASE

The striking facts presented in the instant matter have provided us with a choice opportunity to engage in the review and discussion that has been set forth thus far in this decision. It was precisely because we were unable to reconcile the facts of this case with any of our more recent cases that we were forced to scrutinize our law.[21] A review of the important facts in this case clearly shows why we could not use our more recent cases to analyze this factual situation, why we were led back to our early federal model analysis for use in analyzing this case and why we then determined that such an analysis should also be applied in future cases involving subcontracting/transfer of bargaining unit work.

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[21] **We must note that neither party may be blamed nor credited with the discussion contained herein. Neither party urged such a review of our law and neither argued for a change. Instead, both parties relied, at least in part, on our traditional shared work doctrine.**

We first note that this case is unlike any that we have been confronted with previously. Specifically, this is the first case in which the Employer undisputedly changed the type of non-bargaining unit personnel to whom it assigned the work in dispute. Our review has not revealed a prior case in which the work in question was arguably previously "shared" to some extent with non-bargaining unit part time employees of the Employer and then later assigned to a subcontractor.[22] Here, the Employer undisputedly used some part time, non-bargaining unit employees, in the past, to perform some custodial work in the City. However, the Employer had not previously used subcontractors to perform custodial work. In the summer of 1992, after renovations had been completed on the City Hall, the City hired subcontractors to clean the City Hall at night. Not only had subcontractors not previously performed custodial work in the City, but only bargaining unit employees had previously cleaned the City Hall. Thus, we have here a very unique set of facts that simply cannot be analyzed using our more recent, often inconsistent pronouncements. The following discussion focuses the problem.

Upon first glance at this case, it is apparent there was no bargaining unit wide practice of the custodial work being performed exclusively by the bargaining unit and therefore, pursuant to the Board's statement in ***Naugatuck*** **(2534),** the complaint might be summarily dismissed because "even minimal erosion of exclusivity would suffice to establish a practice of sharing". ***Naugatuck*** (2534) at 5. That conclusion might arguably be supported by the language in other previously discussed cases, which indicate that, as long as the work at issue has been substantially shared in the past with non-bargaining unit personnel, a subsequent reassignment of that work will not constitute a violation of the Act. These cases provide some support for the proposition that the Employer is free to assign the work to anyone once it has been shared in any manner.

On the other hand, we must contend with the often repeated language from many of our other cases, which states that, if the work has been substantially shared in the past, a continuation of such sharing does not violate the Act. See ***Torrington*** (2172) and cases cited therein. This language indicates that only a continuation of the same kind of sharing will excuse the employer's bargaining obligation. Further, in ***City of*** New ***Haven*** **(1879),** we determined that an increase in the amount of sharing triggered the bargaining obligation. Thus, it is certainly arguable, under this line of cases that a unilateral change in the manner or scope of sharing would constitute a violation and that, here, the shift from using some part time, non-bargaining unit employees to using subcontractors to replace an entire shift of workers in the City Hall does constitute such a violation.

Added to the above are the cases in which we have talked at length about the definition of "bargaining unit work". Under certain of these cases (see e.g., ***MDC*** **(3116)),**

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[22] **We note the cases of *City of* New *Britain* (2108) and *City of Stamford*, Decision No. 2194 (1983) in which there appear vaguely similar facts. However, neither of these cases squarely presented the situation in the current case.**

the Union should not be allowed to "micro-divide" the work in dispute to demonstrate that the work at the New Britain City Hall is viewed differently from other custodial work, in order to prove a violation. On the other hand, the custodial work at the City Hall had been performed solely by bargaining unit members in the past and there is at least an argument that such work is a discrete and recognizable job duty.

In sum, in reviewing the facts of this case, we realized that none of the pronouncements in our recent case law was adequate for analysis of this matter. In so deciding we were influenced by the fact that the action of subcontracting in this case was inherently different than any past action of the employer and yet, this inherent difference could not be addressed using our current case law because our current law does not contain a consistent focus on past practice and unilateral change. When we realized that this type of case is precisely the type of difficult situation that is not capable of logical analysis under our current standards, we reached into our case law and to early federal case law in search of a more logical approach. In doing so, we developed this standard, which is based on a past practice/unilateral change framework; which finds its origins in the early federal model and which does not contain the inconsistencies borrowed from shared work/exclusivity doctrine. We also found that by engaging in this review and looking for the correct standard for this particular case, that we were able to see how this standard should also be applied to our future subcontracting/transfer cases.

Analyzing the instant case using the framework we have adopted today, we are not faced with the problems inherent in our shared work doctrine. First, the work in question is clearly bargaining unit work. The record shows that the custodial work in the City had historically been done primarily by the bargaining unit with part-time employees supplementing the work force. Further, the custodial work at the City Hall had been performed solely by the bargaining unit prior to the action in this case. As such, there is no doubt that the work at issue is bargaining unit work.

We next find that the subcontracting does vary significantly in kind from what had been customary under past established practice. The established practice in this case was the use of some part-time, non-bargaining unit employees of the City to perform custodial work in certain locations. We believe that subcontracting is substantially different from assigning certain custodial work to non-unit, part-time employees of the City. Under the usual circumstances, subcontracting supplants the City's own employees, whereas the use of part-timers usually supplements the bargaining unit work force. In our review of cases concerning subcontracting, the outside enterprise is proposed to perform an entire function for the City (e.g., in this case to clean the new City Hall at night); the employer's own employees are essentially replaced with the outsiders. This kind of intrusion into the bargaining unit and its work, is much more significant than the use of part-time employees of the employer to assist the bargaining unit in its work or to fill in for absent bargaining unit members. We also believe that the introduction of a third party (the subcontractor) into the relationship is an act that is understandably much more threatening to the current bargaining

unit employees than the use of part-time employees at different locations in the City. Allowing the use of a subcontractor, without bargaining, in one location in the City, could arguably lead to the use of a subcontractor in many other locations. Such incremental use of an outsider could eventually replace the entire bargaining unit. We doubt that the City would be able to accomplish such an end with the use of part-time employees. In the type of situation presented in this case, to allow the Employer to change its method of assigning the work in this location could provide a basis for the Employer to subcontract out other "portions" of the bargaining unit work over a period of time without negotiating with the Union and, thus, accomplish in the end what it probably would not have been allowed to do in one action; that is, contract out the entire bargaining unit. See ***Oxford Board*** *of Education*, Decision No. 3126 (1993) (discussion concerning contracting out the entire bargaining unit as a mandatory subject of bargaining). Thus, we see subcontracting as much different from simply assigning this work to part-timers.

We next turn to the impact on the bargaining unit, which we believe is quite clear. In addition to the more "subtle" impacts, which consist of the genuine fears of the bargaining unit of the encroachment of their work, there is no dispute that two of the custodians who had previously been assigned to work in the City Hall were laid off just after the City Council voted to subcontract the custodial work in City Hall. Further, here there is actual loss of work to the bargaining unit in that four bargaining unit custodians used to work at night in the City Hall and now outsiders have completely replaced them. Thus, the impact on the bargaining unit is clear.[23]

Because we find that the Union has presented a prima facie case under the standard articulated today, we now turn to the City's defenses. The only relevant defense presented by the City is its claim that it was allowed to take this action because it had assigned custodial work to non-bargaining unit employees in the past. Since we have found that the subcontracting was not in keeping with what had been customary under the established past practice of the City, we reject this defense.[24] The City presents no other defenses and we, therefore, turn to any public policy considerations in this case.

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[23] **We note that we do not consider whether the City had an illegal motive in subcontracting this work. Although the parties presented certain newspaper articles to us with their stipulation of facts which contained alleged statements by both parties, we do not consider the truth of the statements contained in those articles. The articles were offered without explanation or foundation.**

[24] **As noted at the beginning of this decision, we do not consider the City's arguments regarding its financial situation. We further note that the parties entered into evidence a letter from the Mayor to the Union which contains certain ambiguous statements about the parties' bargaining positions in this case. We simply do not know what transpired between the parties after the issuance of this letter. Inasmuch as the City has not, in any manner, advanced a waiver defense in this case, and, in the absence of facts necessary to determine if there were a waiver, we decide this case on other grounds.**

We are assured that public policy is served by our decision herein. In this regard, we are not telling the City that it cannot eliminate positions, nor are we telling it that it cannot lay off employees. Further, we are not even forbidding the City from subcontracting the work in question. We are merely requiring the City to fulfill its bargaining obligation concerning any proposed decision to subcontract the work. As stated in many previous cases, public and labor policy support such bargaining, which often results in fruitful discussions leading to solutions not initially considered.

In conclusion, we find that the City was obligated to bargain with the Union prior to subcontracting the custodial work at the City Hall. We stress that the analysis, which led us to this conclusion, is based on our early subcontracting cases, which have never been overruled. Because the facts of this matter did not fit within the analyses contained in many of our more recent cases, we believe our rationale herein is the most fundamentally fair to all parties. We are also convinced that this analysis is now the most appropriate framework for future subcontracting/transfer cases. As a remedy, it is appropriate to return employees to the situation as it would have occurred had the City not taken the prohibited action, in order for bargaining to take place in the proper context.

ORDER

By virtue of and pursuant to the powers vested in the Connecticut State Board of Labor Relations by the Municipal Employee Relations Act, it is hereby ORDERED that the City of New Britain:

I. Cease and desist from failing to bargain in good faith with the Union concerning the subcontracting of custodial work at the City Hall;

II. Take the following affirmative steps, which the Board finds will effectuate the purpose of the Act:

a. Unless mutually agreed otherwise, reinstate and make whole any City Hall custodian who was laid off in July 1992;

b. Unless mutually agreed otherwise, transfer bargaining unit custodians back to their former positions as custodians in the City Hall;

c. Bargain in good faith with the Union, regarding subcontracting custodial work at the City Hall;

d. Post immediately and leave posted for a period of sixty (60) consecutive days from the date of posting, in a conspicuous place where the employees of the bargaining unit customarily assemble, a copy of this Decision and Order in its entirety.

e. Notify the Connecticut State Board of Labor Relations at its office in the Labor Department, 200 Folly Brook Boulevard, Wethersfield, Connecticut, within thirty (30) days of the receipt of this Decision and Order of the steps taken by the City of New Britain to comply herewith.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

s/Margaret A. Lareau
Margaret A. Lareau,
Chairman

s/Anthony Sbona
Anthony Sbona,
Board Member

s/Antonia C. Moran
Antonia C. Moran,
Board Member

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 6th day of April, 1995 to the following:

John Byrne, Personnel Director
City of New Britain
City Hall, 27 West Main Street
New Britain, Connecticut 06051

RRR

Linda A. Blogoslawski, Mayor
City of New Britain
City Hall, 27 West Main Street
New Britain, Connecticut 06051

Charles E. Lombard
Staff Representative
Council 4, AFSCME, AFL-CIO
444 East Main Street
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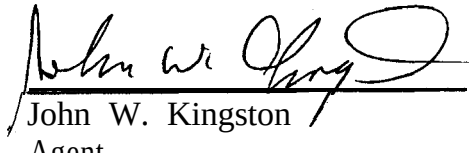

John W. Kingston
Agent
Connecticut State Board of Labor Relations