BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

HOTEL EMPLOYEES AND RESTAURANT
EMPLOYEES LOCAL 122

and

HYATT REGENCY - MILWAUKEE

Case 1
No. 54234
A-5496
The 333 Restaurant

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North River Center Drive, Suite 202, Post Office Box 12993, Milwaukee, WI 53212, by Ms. Naomi E. Soldon appearing on behalf of Hotel Employees and Restaurant Employees, Local 122.

von Briesen, Purtell & Roper, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 700, Milwaukee, WI 53202-4184, by Mr. Charles P. Magyera, appearing on behalf of the Hyatt Regency - Milwaukee.

ARBITRATION AWARD

Hotel Employees and Restaurant Employees, Local 122 (hereinafter referred to as the Union) and the Hyatt Regency - Milwaukee hotel (hereinafter referred to as the Employer or the Hotel) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff as arbitrator of a dispute over the Company's plans to lease the 333 - An American Restaurant to an outside restaurant, without requiring the new operator to sign a contract with the Union or to retain Union represented employees. The undersigned was designated. A hearing was held on July 29, 1996 in Milwaukee, Wisconsin, at which times the parties were afforded full opportunity to present such testimony, exhibits, stipulations, other evidence and arguments as were relevant to the dispute. No stenographic record was made. The parties submitted post-hearing briefs and the record was closed on August 21, 1996.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

I. Issue

The parties were unable to agree on a framing of the issue and agreed that the arbitrator should frame the issue in his Award. The Union asserts that the issue is:

> Will the Hyatt Regency-Milwaukee violate the parties' collective bargaining agreement by subcontracting or transferring to non-bargaining unit personnel the operation of a restaurant in the space now occupied by the 333 Restaurant operated by the Hyatt? If so, what is the appropriate remedy?

The Employer contends that the issue is:

> Will the Hyatt Regency-Milwaukee violate the terms of the 1995-1999 collective bargaining agreement with Local No. 122 by leasing the space previously occupied by the 333 Restaurant operated by the Hyatt to a third party restaurant operation which will not be subject to the terms of the 1995-1999 collective bargaining agreement? If so, what is the appropriate remedy?

Each proposed statement presupposes certain legal conclusions. The issue may be fairly stated as follows:

> Will the Hyatt Regency-Milwaukee violate the terms of the 1995-1999 collective bargaining agreement with Local No. 122 if it enters into an agreement to allow a third party to operate a restaurant in the space occupied by the 333 Restaurant without the new restaurant being subject to the terms of the 1995-1999 collective bargaining agreement? If so, what is the appropriate remedy?

II. Relevant Contract Language

> **THIS AGREEMENT** made and entered into effective June 16, 1995, by and between **MILWAUKEE MECCA HOTEL ASSOCIATES**, a Wisconsin limited partnership d/b/a Hyatt Regency Milwaukee, hereinafter referred to as "HYATT" and **HOTEL EMPLOYEES, RESTAURANT EMPLOYEES UNION, LOCAL 122, of the HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION,**

AFL-CIO, hereinafter called the "UNION."

WITNESSETH

WHEREAS, labor agreement and supplements thereto affecting hours, wages and working conditions have been executed from time to time by and between the parties for the period from June 16, 1938; and

WHEREAS, the parties have negotiated and agreed upon the terms and conditions for the current labor agreement;

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto mutually agree as follows:

. . .

ARTICLE II UNION SECURITY, HIRING AND DISCHARGE

Section 1.

The UNION shall be the exclusive bargaining agent for all of the employees of HYATT who are listed in Appendix A of this Agreement and who come within the current jurisdiction of the UNION. It is expressly provided, however, that any group or classification of employees not covered under this Agreement shall not be added to the bargaining unit unless the UNION is certified as bargaining representative for those employees by the National Labor Relations Board or recognized as such by HYATT in writing.

. . .

Section 6.

When HYATT needs additional employees equal opportunity shall be given to the UNION to provide suitable applicants. HYATT shall not be required to hire those referred by the UNION.

. . .

Section 8.

This contract shall not include private secretaries, auditors, managers, assistant managers, or those in executive positions.

HYATT may discharge non-probationary employees for just cause,

subject to subsequent arbitration when demanded by the UNION. Section 9.

HYATT may hire non-UNION casuals during peak periods, but only when all regular employees are working and when no floaters are available. In the event any type of UNION temporary / casual agency is established or re-established which meets HYATT's employment needs, this provision is null and void.

This provision shall not be used to in any way substitute regular employees with casual employees and shall not be used as an alternative to hiring of regular employees.

ARTICLE III
GRIEVANCE AND ARBITRATION PROCEDURE

. . .

D. If the matter is not resolved in Step (c), then either the Local UNION or HYATT may refer the matter to arbitration by notifying the other of such intention in writing within one week after the decision of the Joint Grievance Committee. The parties shall attempt to agree upon an arbitrator within three (3) working days of the delivery of the request for arbitration. If the parties fail to reach agreement on the selection of an arbitrator within said three (3) day period, the party referring the matter to arbitration shall request the Federal Mediation and Conciliation Service to submit a list of seven (7) names for consideration as arbitrator. The Parties shall alternately strike one name from the list of the proposed arbitrators and the last remaining name shall be that of the arbitrator. The parties shall flip a coin to determine who shall strike the first name. The arbitrator so selected shall meet with the respective parties as soon as practicable following appointment and shall render the decision in writing within thirty days of such hearing. The arbitrator shall be specifically limited to determining issues involving the interpretation or application of terms of this Agreement (including the Appendices hereto) and shall have no authority to add to or subtract from or change existing wage rates or any of the other terms of this Agreement. The award of the arbitrator shall be final, binding and conclusive on all parties. All expenses incident to arbitration shall be borne equally by the parties.
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III. Background

Since 1980, the Employer has operated the Hyatt Regency Hotel in Milwaukee, Wisconsin. The Union is the exclusive bargaining representative for non-exempt employees in the Food and Beverage Division and Rooms Division of the Hotel. When the Hotel opened, the Employer signed onto the collective bargaining agreement between the Union and the multi-employer group of Milwaukee area hotels and restaurants. It remained a member of the multi-employer bargaining group until 1987, when it broke off and started bargaining a separate contract with the Union. At all times the contract has covered the employees in the three restaurants contained in the Hotel -- the Pilsner Palace in the lobby, the roof-top Polaris restaurant, and a second floor restaurant originally known as the La Rotesserie.

The La Rotesserie operated from May of 1980 until the end of 1984 as a fine dining French restaurant. La Rotesserie operated with a staff of 32, 27 of whom were members of the bargaining unit. It was closed from January 1, 1985 until April 1st of that year, during which time it was remodeled into a smaller restaurant. It reopened in April as The 333 - An American Restaurant, focusing on seafood and American cuisine. Despite a number of promotions and other efforts to increase the volume of business for the restaurant, there was a fairly steady decline in revenues and, with them, a decline in the level of staffing. When it opened, The 333 operated with a staff of 19, 15 of whom were members of the bargaining unit. This level of staffing declined over time, to a total of 7-1/2 (5-1/2 in the bargaining unit) in December of 1993, and a total of 4 (2 in the unit) by the summer of 1996.

In the late spring of 1996, Hotel General Manager Murray Burnett decided to close The 333 Restaurant. He was contacted by representatives of the Ruth Chris Steak House, an upscale chain of steak houses interested in moving into the Milwaukee market. Ruth Chris expressed an interest in possibly leasing the space occupied by The 333 and operating one of its steak houses there. Burnett contacted Vincent Gallo, the Business Manager for the Union, and advised him of the Hotel's intention to close the restaurant and lease out the space. In a follow-up letter to Gallo, Burnett informed Gallo that the Hotel believed that it was "well within our rights under the collective bargaining agreement" in deciding to enter into the lease. In response, the Union's attorneys filed the instant grievance, seeking as a remedy "that the Company cease and desist from removing the Union workforce from the Restaurant, and make the Union, and affected employees, whole." The parties agreed to proceed directly to arbitration, and the Hotel refrained from any negotiations with Ruth Chris pending the outcome of the case.

A hearing was held on this grievance at the Hyatt Regency on July 29, 1996. At the outset, the parties stipulated that the following facts were true, although not necessarily relevant to the contractual issues in dispute:

1. The Hyatt Regency - Milwaukee ("Hotel") opened for business in May, 1980. At that time, it operated three (3) separate restaurants within the Hotel: 1) The Polaris, a revolving rooftop restaurant; 2) The Pilsner Palace, an informal restaurant located in the main lobby area of the Hotel, and; 3) La Rotesserie, a fine dining restaurant featuring traditional French quisine (sic) and located on the second (2nd) floor of the Hotel.

2. In 1980, the La Rotesserie had a seating capacity of 107 and in addition to the Restaurant itself, there was a separate and distinct cocktail lounge area. The La Rotesserie also had its own separate kitchen to service its dining customers.

3. In 1980, the approximate staffing of the La Rotesserie Restaurant was as follows:

Fourteen (14) Servers
Five (5) Bus Persons
One (1) Sous Chef (non-union)
One (1) Manager (non-union)
Two (2) Hostesses (non-union)
One (1) Cashier (non-union)
Two (2) Bartenders
One (1) Steward
Two (2) Pantry Cooks
One (1) Saut Cook
One (1) Grill Person
One (1) Expediter Cook

Unless otherwise indicated, all of the above-listed thirty-two (32) employees were members of the Hotel Employees & Restaurant Employees Local Union No. 122 ("Union").

4. In 1980, the hours of operation of the La Rotesserie were 11:00 a.m. to 11:00 p.m. seven (7) days a week and the Restaurant served both lunch and dinner menus.

5. From its opening in 1980 through December 31, 1984, the La Rotesserie Restaurant operated and was staffed in a manner substantially identical with the descriptions contained in paragraphs I through 4 above. The food and beverage sales for the La Rotesserie for May, 1980 through December 31, 1984 are set forth on Exhibit A attached hereto and made a part hereof.

6. On December 31, 1984, the La Rotesserie was closed and no restaurant operated on the second floor of the Hotel from the period of January 1, 1985 until April 1, 1985. During the shut down period, the entire La Rotesserie Restaurant was remodeled at a cost of $106,942.00, The seating capacity was reduced from the previous 106 to 70. A portion of the La Rotesserie floor space was converted into a separate meeting/entertainment room called the Crystal Room. The Cocktail Lounge area was totally eliminated and was converted into storage space for convention service operations. It remains storage space today for convention services.

7. On April 1, 1985, a new restaurant was opened in a portion of the space previously occupied by the La Rotesserie Restaurant. The new restaurant was named Three Thirty-Three - An American Restaurant ("The 333"). The 333 had an entirely separate and distinct concept from the La Rotesserie French quisine (sic). The 333 featured exclusively all American dishes with an emphasis on fresh fish and it served American wines exclusively.

8. The staffing of the seventy (70) seat 333 Restaurant in April, 1985 was approximately as follows:

Six (6) Servers
Three (3) Bus Persons
One (1) Sous Chef (non-union)
One (1) Manager (non-union)
Five (5) Cooks
One (1) Hostess (non-union)
One (1) Cashier (non-union)
One (1) Steward

Unless otherwise indicated, all of the above-listed nineteen 19 employees were members of the Union.

9. In April, 1985, the hours of operation of The 333 were 4 p.m. to 11:00 p.m. seven (7) days a week and The 333 served only a dinner menu. The 333 continued to have its own separate kitchen facilities, however, it no longer had a separate cocktail lounge. The 333 drink orders were serviced from the Atrium Bar located on the second floor of the Hotel.

10. For a period beginning from approximately June, 1988

through June, 1990, The 333 was open for a lunch menu in addition to the dinner menu and the hours of operation were 10:30 a.m. to 2:00 p.m. and 4:00 p.m. to 11:00 p.m.

11. In April, 1990, the Hotel hired Steve Samata as its Sous Chef. He was paid an annual salary of $30,000 per year. Mr. Samata was previously employed by The Ocean Club as a Sous Chef and Manager. In June, 1990, the Hotel eliminated the position of Manager of The 333 and Mr. Samata served as both Manager and Sous Chef of The 333. In February, 1991, Mr. Samata quit his employment at the Hotel.

12. At the time of Mr. Samata's departure from the Hotel, the staffing of The 333 was approximately as follows:

Four (4) Servers
One (1) Bus Person
One (1) Sous Chef (non-union)
Three (3) Cooks
One (1) Steward
One (1) Hostess/Supervisor (non-union)

Unless otherwise indicated, all of the above-listed eleven (11) employees were members of the Union. The salary paid to the Sous Chef who replaced Mr. Samata was $20,800 per year.

13. After Mr. Samata's departure in February of 1991, and continuing to the present, the hours of operation of The 333 were as follows:

Sunday - brunch only; Closed Monday; Tuesday through Saturday dinner only from the hours of 5 p.m. to 9 p.m. Tuesday through Friday and Saturday 5 p.m. to 9:30 p.m..

During the non-peak periods of occupancy at the Hotel, there were periodic shutdowns of the entire 333 Restaurant which would continue for periods of several days to as long as one (1) week.

14. By December, 1993, the staffing of The 333 consisted of the following:

Two (2) Full-Time Servers
One (1) Part-Time Server

One (1) Bus Person
One (1) Sous Chef (non-union)
One (1) Cook
One (1) Steward
One (1) Hostess/Supervisor (non-union)

Unless otherwise indicated, all of the above-listed seven and one-half (7 1/2) employees were members of the Union.

15. As of the date hereof, the hours of operation of The 333 remains the same as described in paragraph 13 above. The current staffing of The 333 is as follows:

Two (2) Part-Time Servers
One (1) Full-Time Server
One (1) Sous Chef (non-union)
One (1) Supervisor (non-union)

There are no cooks assigned to The 333 Restaurant. If the Sous Chef requires assistance, he calls up Cooks from the main kitchen.

. . .

In addition to the stipulation, Vincent Gallo testified that Union had always had the exclusive right to represent restaurant employees working in the Hotel, as well as all other workers in the classifications listed in the collective bargaining agreement. Employees covered by the contract have seniority-based transfer rights between jobs, and other job security protections. Gallo testified that the Hotel had the right to bring in a third party to run a restaurant, but not to have the restaurant run on a non-Union basis even if, as here, all affected employees were promised other Hotel jobs in their classification. Gallo characterized the introduction of non-union operations as a foot in the door that could encourage the Hotel to start contracting out other services, such as cleaning, bell service or room service. He cited other area hotels and service providers covered by the contract that had leased out food service operations to third parties, but noted that the third party had in every case been required by the operator to sign onto the collective bargaining agreement.

Karen Spindler, the Human Resources Director of the Hotel, testified that bargaining unit work had been subcontracted in the past, noting that 14 third shift cleaners had been laid-off and replaced by a cleaning service in 1991. The night cleaner classification was bargained out of the contract after this. Spindler recalled discussing the cleaning subcontractor with Gallo twice, first in the context of finding a job for one of the night cleaners who had been let go, and later when she proposed using the same service to do dishwashing in the Polaris restaurant. Gallo approved this extension of the subcontract, on the condition that no unit employee be displaced. The Hotel has used the subcontractor for dishwashing in the Polaris, in addition to third shift cleaning, ever

since.

Murray Burnett testified that it was unusual for a hotel the size of the Hyatt Regency to have three restaurants. Burnett said that the labor costs at The 333 had nothing to do with the decision to close it, and that it would not be profitable even if the employees agreed to work for free. He noted that the Hotel had other independent companies, such as a travel agency and a gift shop, leasing space in the Hotel, although he conceded that neither operation had ever been staffed by Union represented employees. Burnett said that he would be the negotiator with Ruth Chris, and that he would strongly prefer a straight lease agreement, although anything was possible including a profit sharing arrangement. Contacts with Ruth Chris had been put on hold pending the outcome of the arbitration, and only general discussions expressing interest on both sides had been held so far. If negotiations with Ruth Chris were not satisfactory, Burnett said, the space could be leased to some other types of business. He said he was unaware of any specific standards that a lessee would have to meet, but that no matter what type of business leased the space, the Hotel would exercise some level of quality control in order to protect its reputation.

Burnett expressed the opinion that the Hotel could, if it chose, rent space to contractors who would then provide a variety of services to Hotel guests, such as bell service, room service, banquets, and coffee breaks, but he said that such contracting would be inconsistent with the Hotel's policy of providing these services as part of its own operation. He testified that the Hotel already subcontracted for third shift cleaning and for laundry service.

Additional facts, as necessary, will be set forth below.

IV. Arguments Of The Parties

A. The Position of the Union

The Union takes the position that the Hotel's plans for bringing an outside contractor in to run part of its restaurant operation is a subcontract, which violates the collective bargaining agreement's implied covenant of reasonableness and fair dealing. Allowing an unfettered right to subcontract would give the Hotel the right to destroy the Union by "leasing" every function now carried out by members of the bargaining unit. This would be an absurd result, leaving the Union with a contract covering no work whatsoever.

Depending upon the facts of a given case, arbitrators have weighed a wide variety of factors considered in attempting to determine whether management has met the implied standard of reasonableness and fair dealing. Among these are past practice, the justification for the subcontract, the effect on the union and on individual employees, the type of work subcontracted, whether the employer has the proper personnel and equipment to do the work, the regularity with which the work has been performed in the bargaining unit and whether the removal is permanent or temporary, the existence of unusual circumstances leading to the decision to contract out the

work, and the history of negotiations over the subject of subcontracting. 1/

Analyzed in accordance with these factors, the Hotel's proposed subcontract does not meet the standard of reasonableness. The most important factor is past practice, and the Hotel's proposal plainly has no precedent in this bargaining relationship. Restaurant work has been within the exclusive jurisdiction of the Union for 15 years. While the Hotel attempted to show that it had subcontracted some cleaning work and dishwashing, these arrangements were made without the Union's knowledge or consent.

The justification for the subcontract also fails to meet the test of reasonableness. The Hotel attempted to prove that it had sound business reasons for closing The 333. This is beside the point. The issue here is not whether the Company has the right to close The 333, nor whether it may lease the space to another company. The issue is whether the Hotel can sponsor a restaurant on its premises, with workers doing work covered by the contract, without requiring that the restaurant's employees be covered by the contract. The contract clearly requires that employees on the Hotel's premises, performing work within the Union's jurisdiction, be included in the bargaining unit. The ruse of "closing" a restaurant and then reopening the same operation providing the same services to the same customers in the same location is simply a subterfuge to the collective bargaining agreement. Carried to its logical extreme, it would allow the Hotel to subcontract every aspect of its operation. The arbitrator should look below the surface, and address the reality of the Hotel's proposal -- the subcontracting of normal Hotel services to a non-union firm. This is not a clothing store or some other enterprise outside of the Hotel's customary day to day operations. Requiring that the new restaurant's employees be covered by the contract would in no way limit the Hotel's right to have a restaurant in The 333's location, and is analogous to the Hotel's own insistence that this "independent" operator meets the Hyatt's standards of quality. Thus the supposed business justification does not support the actual decision being made. Given that the Hotel can meet its objectives without inflicting serious harm on the bargaining unit, through the simple expedient of requiring that employees be covered by the contract, the arbitrator should strike the balance in favor of the unit's integrity.

Many of the remaining factors are undisputed, and uniformly argue against the subcontract. The work being removed is fundamental to the bargaining unit, has never been the subject of subcontracting before, and is being permanently removed from the unit. There is nothing unusual about the Hotel's situation that would justify this extreme action, and the Hotel has never even attempted to bargain with the Union over a right to subcontract. Since all of the relevant criteria customarily used to evaluate subcontracting decisions militate against the Hotel's effort, the arbitrator should sustain the grievance.

B. The Position of the Company

The Hotel takes the position that nothing in the contract limits its right to lease space to

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1/ Elkouri, HOW ARBITRATION WORKS, 4th Ed. (BNA, 1985) at pages 541-543.

whomever it chooses, and that attempting to force a third party to extend recognition to the Union would violate federal law. The Hotel has a fundamental entrepreneurial right to go out of the business of running The 333, and is not obligated to bargain with the Union before doing so. It is well established that any company may control the scope and direction of its business, and that the duty to bargain does not encompass getting Union approval of those decisions. The Hotel has not engaged in such bargaining now or in the past. As a result, there is no contract violation.

The Union claims that the Hotel's proposed lease to Ruth Chris is a subcontract, but the Hotel notes that this claim is completely at odds with the record evidence. A subcontract would be a fair description of the arrangement for third shift cleaning and the dishwashing in the Polaris Restaurant, both of which were made with the full knowledge and acquiescence of the Union. The lease at issue here is not a subcontract. The Hotel has partially gone out of the restaurant business, insofar as the operation of a second floor restaurant is concerned. Nothing requires the Hotel to operate a third restaurant, and it is unusual to have three restaurants in a hotel of this size. The Hotel is satisfied with operating two restaurants, and can adequately serve its guests without the Ruth Chris operation. The question of who leases the space, and for what, is not the Hotel's primary concern. It is Ruth Chris which believes that a restaurant on the second floor can be a profitable enterprise, and which wishes to operate such an enterprise. It is Ruth Chris which will be the employer of any workers at the proposed restaurant, and it must be Ruth Chris which decides whether it is appropriate to recognize the Union. The Hotel is not proposing to control any aspect of the new restaurant, and will function solely as a landlord.

The Hotel points out that the contract under which this grievance is brought is between the Hotel and the Union, and that any attempt by the arbitrator to bind Ruth Chris or its employees to its terms would be illegal. While it would not be impossible for the Hotel to act as a joint employer for the Ruth Chris operation, there is no plausible reason to believe this will happen. If the Union wishes to represent the employees of Ruth Chris, it has the option of running an organizing campaign. It cannot gain representation rights via an arbitration with a completely separate employer, before the Ruth Chris employees are even hired. For all of these reasons, the Hotel asks that the grievance be denied.

V. Discussion

The dispute in this case centers on the Union's belief that the operation of a non-union restaurant on the Hotel's premises would amount to a subcontracting of bargaining unit work. Although there is no express provision of the contract addressing subcontracting, the Union points to a variety of arbitral authorities for the proposition that every contract has some implicit limitations, so as not to allow evisceration of the contract and the bargaining unit. While the Union is correct in asserting that there are implicit restrictions on the right to subcontract, applying those factors to the potential leasing of the second floor restaurant yields the conclusion that, even if the space is leased to a restaurant and even if the alleged real estate lease actually constitutes a subcontract, the subcontracting does not violate the implied duty to act reasonably and in good faith.

As detailed in the Union's brief, subcontracting decisions are generally evaluated by reference to 11 criteria, not all of which are necessarily relevant in a given case:

> 1. The existence of any past practice of subcontracting work;
>
> 2. The justification offered for transferring the work outside of the bargaining unit and whether it represents a sound business reason;
>
> 3. The effect of the transfer of work on the union itself and the integrity of the bargaining unit;
>
> 4. The effect of the subcontract on individual bargaining unit employees, and whether employees are thereby deprived of their jobs, regular or overtime earnings, or promotional opportunities, or are discriminated against;
>
> 5. The type of work subcontracted and whether it is the customary work of the employees, or merely marginal or incidental, and whether such work is often the target of subcontracting in the industry;
>
> 6. The availability of properly qualified employees to perform the work if it was retained in the bargaining unit;
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> 7. The availability of the equipment and facilities to perform the work within the bargaining unit;
>
> 8. The frequency with which the work was performed in the bargaining unit;
>
> 9. The extent to which the subcontract represents a permanent removal of the work from the bargaining unit;
>
> 10. Whether there are unusual circumstances, such as time limits, emergencies, or outside forces which mandate performance of the work by a subcontractor;
>
> 11. Whether the parties have negotiated over subcontracting in the past, and the outcome of such negotiations.

Taking these criteria in order, the first is the existence of any past practice regarding

subcontracting. The Union argues that there is no relevant past practice because there is no history of subcontracting restaurant work, and any other subcontracting has been without its knowledge or approval. The assertion that restaurant work has not previously been subcontracted is not controlling, nor is it completely accurate. The record indicates that dishwashing in the Polaris restaurant has been completely subcontracted for several years. It is true that an entire restaurant has not been subcontracted in the past, but work in the restaurant that is plainly within the jurisdiction of the Union has been. In addition to the dishwashing, night cleaning of the Hotel's public areas was subcontracted in 1991. Although Gallo testified that he was unaware of these subcontracts, this testimony is rather difficult to credit. When the night cleaners were eliminated, 14 employees were laid-off and, according to Spindler, special arrangements were made by the Union to secure one of them another job. The night cleaner classification was negotiated out of the contract the next time the parties went to the bargaining table. Spindler also claimed that Gallo had specifically approved the subcontracting in the Polaris's kitchen so long as no bargaining unit employees were laid-off. Even if Spindler is somehow mistaken about her conversations with Gallo about finding a job for one of the night cleaners and subcontracting the dishwashing, it is very hard to understand how the Union could have been unaware of the layoffs, why it would have agreed to eliminate the classification of night cleaner for no reason, and how the dishwashing duties could have been reassigned and the outside dishwashers could have worked in the kitchen side by side with the bargaining unit employees for several years without being noticed. The two subcontracts have been in place for some time, and the weight of the evidence establishes that the Union was aware of them and did not challenge management's right to remove the work from the unit. Thus, contrary to the Union's arguments, past practice indicates that subcontracting is not an entirely new feature of the parties' relationship.

The second criterion is the justification offered for the proposed subcontract. The record shows that the Hotel has invested a good deal of time and money in attempting to make its second floor restaurant a profitable enterprise, to no effect. Assuming that the proposed lease is negotiated as planned by Burnett, the Hotel will receive an income stream from the rent without any overhead for supplying, managing or staffing the restaurant operation. 2/ It does not appear that escaping from the Union contract forms a part of the Hotel's justification for the proposed lease. The food service and restaurant dining needs of the Hotel's conferees and guests are adequately served by the food service operation and the remaining two restaurants, all of which remain in the Union's jurisdiction. Burnett testified that labor costs were not a factor in deciding to close The 333, and that the volume of business would not justify keeping it open even if the employees worked for free. The primary motive for leasing the space to an outside party is to reduce the degree of entrepreneurial risk associated with the second floor venue, and the representational status of the tenant's employees would not be a factor in that calculation. Changing the entrepreneurial direction of an enterprise is a basic management prerogative. Given the history of in-house operation of the second floor restaurant, the justification offered for the

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2/ Given that the discussions about the restaurant lease have been entirely informal to this point, the observations concerning the Hotel's degree of direction, control and/or ownership interest are all premised on Burnett's representations at the hearing.

Hotel's decision to lease is both reasonable and legitimate.

The proposed lease has no direct impact on the Hotel's current employees at The 333, since they are all to be offered other jobs at the Hotel within their classifications. There is no layoff, reduction in pay or loss of seniority. The impact on the Union and the bargaining unit of the proposed lease is limited, in that no classifications are to be eliminated and no division will be eliminated. As noted above, the Hotel will continue to operate its own separate food service operation and two restaurants, a number which is on the high end of industry standards for a Hotel of this size. As for the Union's concern that allowing a lease/subcontract will open the door to more such arrangements to the great detriment of the bargaining unit, any such move would have to be justified and supported on its own merits. Were the Hotel to enter into a supposed lease arrangement where it, rather than the general public, was the primary customer and/or beneficiary of the supposed independent business's services (for example, a lease for such core lodging functions as bell services, break service or room service) it would bear a heavy burden to show that such a lease was not merely a subterfuge, and to justify that very unusual arrangement.

The type of work at issue here is not occasional, marginal or incidental, and if the Hotel leases the second floor space to an outside firm, the removal of the restaurant work in that area of the Hotel will be permanent. However, the Hotel represents that the proposed restaurant is to be operated as a stand-alone entity. It will not be integrated into the Hotel's banquet, food service and restaurant operations, and will not service Hotel guests and conferees, except to the extent that they enter the restaurant in the same fashion as members of the general public. Thus the vast majority of the food service work on the Hotel's premises will remain in the bargaining unit.

The final two criteria are the existence of extraordinary circumstances motivating the use of outside personnel, and the history of negotiations on subcontracting. On this latter point, the parties have not specifically addressed subcontracting in negotiations, except to the extent that the removal of the night cleaners from the contract served to finalize the 1991 decision to transfer that work to an outside firm. As for unusual circumstances, the Hotel's reluctance to commit to having the proposed restaurant's employees covered by the collective bargaining agreement is at least partially caused by its belief that it cannot legally make such a commitment. The recognition clause of the contract acknowledges the Union's role as the exclusive bargaining representative for the Hotel's employees:

> The UNION shall be the exclusive bargaining agent for all of the employees of HYATT who are listed in Appendix A of this Agreement and who come within the current jurisdiction of the UNION. *It is expressly provided, however, that any group or classification of employees not covered under this Agreement shall not be added to the bargaining unit unless the UNION is certified as bargaining representative for those employees by the National Labor Relations Board or recognized as such by HYATT in writing.* [Emphasis added]

The employees of the proposed Ruth Chris steakhouse would have to be considered a "new group" of employees, who under this clause can only be included in the bargaining unit if the Union is certified as their representative by the National Labor Relations Board, or if the Hotel extends recognition in writing. Certification by the NLRB is not within the Hotel's power, and written recognition of the Union as the bargaining agent for another company's employees would be a pointless exercise. The other options would be to require Ruth Chris to operate its business with Hotel employees or to require Ruth Chris to recognize the Union as a condition of the lease. The former option would be peculiar, and would at least partially defeat the Hotel's aim of becoming a landlord on the second floor rather than a restaurateur, in part because the Hotel would still be involved in the day to day operations of the restaurant and in part because such a proviso would discourage potential tenants who would lose control over a critical component of their business. The latter option would be of questionable validity without first having any expression of interest in representation by the Ruth Chris employees, and would go far beyond anything that has been required of the Hotel's other lessees (such as the lobby gift shop) or subcontractors.

Conclusion

Assuming solely for the sake of analysis that a lease to a third party to operate a restaurant on the second floor of the Hotel would constitute subcontracting of bargaining unit work, the putative subcontract would meet the standard of reasonableness and good faith implied by the labor agreement. The Hotel has a legitimate business reason for wishing to close The 333 Restaurant, and change the focus of its business operation in that space to receiving rents rather than operating a restaurant is valid, non-discriminatory and well within its right to determine the scope and direction of its business. There is a history of limited subcontracting at the Hotel, and the proposed subcontract will have no effect on current employees and only a very minimal effect on the bargaining unit or the Union. The proposed restaurant would be functionally isolated from the Hotel's banquet, food service and restaurant dining operations, and the vast majority of the existing food service work would remain in the bargaining unit. Finally, there is no practical option which would allow the Hotel to achieve its desired goal of acting as a landlord rather than a restaurateur while simultaneously guaranteeing continued Union representation for employees at the second floor restaurant.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The Hyatt Regency-Milwaukee will not violate the terms of the 1995-1999 collective bargaining agreement with Local No. 122 if it enters into an agreement to allow a third party to operate a restaurant in the space occupied by The 333 Restaurant without the new restaurant being subject to the terms of the 1995-1999 collective bargaining agreement. The grievance is denied.

Dated at Racine, Wisconsin this 11th day of September, 1996.

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator