

Lessons For Reforming 21st Century Labor Subcontracting: How 19th Century Reformers Attacked “The Sweating System”

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Subcontracting out work is an old phenomenon. Until about 70 years ago, the use of labor intermediaries was commonly known as “the sweating system” and its victims worked in “sweating shops.” The quintessential subcontracted worker was the garment worker toiling in a tenement in New York City during the last two decades of the 19th century. But the problem was much more widespread. The sweating system existed in many other locations, including Chicago, Cincinnati, Indianapolis, Philadelphia, and Boston. The “sweated trades” included production of a wide variety of garments as well as cigars, artificial flowers, dolls, brushes and purses.

Worker advocates put much thought and effort into addressing problems in the “sweated trades,” which included low wages, long hours, piece-rate abuses, dangerous conditions and child labor. A century later, we seem to be fighting similar battles. Labor subcontracting, temp agencies, employee leasing, misclassifying employees as “independent contractors,” outsourcing and other methods of “sweating a profit” out of workers through labor intermediaries are prevalent. One of the central and enduring lessons from that time is that reform efforts on behalf of workers must focus on the larger entities that subcontract, not on the subcontractors.

Labor Subcontracting, or “The Sweating System”

During the late 1800s and early 1900s, labor subcontracting was commonly referred to as the “sweating system.” As a state agency wrote, “In practice, sweating consists of the farming out of the competing manufacturers to competing contractors the

material for garments, which, in turn, is distributed among competing men and women to be made up. *The middle-man, or contractor, is the sweater (though he also may be himself subjected to pressure from above) and his employés are the sweated or oppressed.* He contracts to make up certain garments, at a given price per piece and then hires other people to do the work at a less price. His profit lies in the difference between the two prices.” (Ill. Bureau of Labor Statistics 1893: 358)(emphasis added).

These terms had longstanding pejorative connotations. A journal author in 1895 wrote, “In the days of Queen Anne the name sweater was given to a class of ruffians who went about the streets and formed a circle about any hapless way farer whom they met, and by pricking him with their swords compelled him to dance until he sweated from the exertion. The sweater is not now looked upon as a ruffian, but he gathers his victims by the score in city shambles and goads them to work until their life blood fairly oozes out of their pores.” (Goodchild 1895: 261–62; see Select Committee of the House of Lords on the Sweating System 1890: iv, xlv).

The sweated workers performed their tasks outside the factory, either in “workshops” or their own homes, both of which were often located in urban “tenements” or apartment buildings. The low wages and terrible conditions in the tenements gave way, by the early 1900s, to the modern concept of a “sweatshop.” “The term ‘sweating’ to which at one time the notion of sub-contract was attached, has gradually come to be applied to almost any method of work under which workers are extremely ill-paid or extremely over-worked. . . .” (Black 1907: 23).

The sweating system frequently operated to the advantage of the manufacturers, who avoided the higher labor costs associated with their factories by producing some of

their goods with “out workers” hired through contractors. Because subcontracting required little skill or capital, there was intense competition among the sweaters, who “use every device to get the work done as cheaply as they can.” The contractors’ principal method of lowering their costs to win bids from the manufacturers was to reduce the wages they paid. (Willoughby 1900: 4; Boris 1994: 53-54). “Outwork also opens up more avenues of exploitation of the worker than any other form of industry. . . . One contractor, with 40 to 50 outworkers making Irish lace, let weeks pass without any payment, and the workers dare not stop for fear they would never be paid. Some worked all summer, some four and five months, waiting for payment And with all this, the pay given the outworker is invariably less than that paid [by the manufacturer to] the factory hand for the same work . . .” (Nat’l Child Labor Committee 1913: 69).

Strategies to End Sweating System Abuses: Aiming at the Manufacturers

It became apparent to workers, reformers and legislatures that regulating sweaters and conditions in their sweatshops was important but was difficult and ultimately inadequate. “The first attempts at legislation were all defective in one vital particular. The prohibitions were all directed against and the penalties imposed on the petty sweater or the family [performing homework]. Experience soon showed that unless an army of inspectors was employed, it was impossible to ferret out the thousands of small shops located in cellars, attics and back buildings of tenement houses. In most states, therefore, amendments were enacted placing the responsibility on the wholesale manufacturer and on the merchant. These were no longer allowed to shelter themselves behind the statement that they gave out the work to contractors and did not know where or under what conditions it was made up.” (Willoughby 1900:10, 15).

Reformers and legislatures used a variety of methods to attempt to place responsibility on the larger companies that utilized the contractors. These efforts often were impeded by court decisions striking down much labor legislation as an interference with the companies' (and workers') right to contract. (See *Lochner v. New York*, 198 U.S. 45, 64 (1905) (overturning a law restricting bakers to 10 hours per day); *In re Jacobs*, 98 N.Y. 98, 115 (1885) (overturning statute that prohibited cigarmaking in tenement houses); Commons 1916: 424-25; Hall 1943: 83-84.) Consequently, the most direct method – prohibition of subcontracting – was generally out of the question. However, in 1890, the Select Committee on the Sweating System of the British House of Lords suggested that at least government contracts for clothing should insist “that the work should be done in factories. . . .” (Select Committee 1890: xlv).

Courts were more likely to uphold labor laws if they could be justified as necessary to protect public health and safety. See *Muller v. Oregon*, 208 U.S. 412, 422–23 (1908) (upholding state maximum-hours laws for women); *Holden v. Hardy*, 169 U.S. 366, 398 (1898) (upholding maximum-hours law in mining due to health considerations). In the 1890's in Massachusetts, all places of garment manufacturing, not just factories, had to be licensed by the board of health. In addition, if not made in the factory, then a garment had to contain a tag marked “tenement made” to offer consumers a choice to promote more sanitary working conditions. (U.S. Industrial Commission on Labor Legislation 1900: 116; Willoughby 1900: 10-11). Under laws in New York and several other states, the manufacturer had to keep a record of the names and addresses of all contractors it used and had to stop using contractors whose conditions had been found by

state inspectors to violate health and safety law. See, e.g., Act of Apr. 1, 1899, ch. 191, sec. 1, § 101, 1899 N.Y. Laws §§ 345, 348.

Reformers, such as the Consumers' League, created "white labels" which manufacturers were permitted to purchase and place in their garments if produced in accordance with the League's standards. Under these standards, the goods had to be produced in a factory, rather than a sweatshop, and without child labor. Through organizing and publicity, the reformers encouraged consumers to purchase only goods that included these labels to ensure fair treatment of workers. Manufacturers who relied on sweatshops were subject to boycotts. (Consumer's League of Philadelphia 1911: 18; Consumer's League of Eastern Pennsylvania 1912: 12.)

State legislatures also began to broaden the answer to the question "who is the worker's employer?" The traditional common law definition of employment relationships allowed companies to fairly easily avoid status as a worker's "employer" by claiming that they had not hired a worker and did not directly supervise the worker's daily activities on the job. To implement laws restricting labor of children and women, new laws in the 1880's began defining employment relationships more broadly. These definitions, which eventually were used in labor laws in every state, would consider a company to be the employer of a worker if it "suffered or permitted" the work of that person. An official with the National Child Labor Committee in 1905 said: "Legislation should definitely prohibit not only the employment of young children but their *permission* to work. The name of every person working on the premises, whether that person is officially employed or is simply "permitted or suffered to work," should appear on the roll of the firm or corporation. Otherwise factory inspection is a farce. In states

failing to make this definite prohibition little children, sometimes pitifully young, have been found in the mills and factories working as helpers of older members of the family. They are not technically employed . . .” (Lovejoy 1905: 47, 51; *People v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474 (N.Y. 1918) (applying standard under state child labor law)).

When Congress enacted the federal minimum wage, overtime pay, and child labor restrictions in the Fair Labor Standards Act of 1938 (FLSA), it adopted the “suffer or permit” standard. 29 U.S.C. § 203(g). The Supreme Court recognized the expansiveness of the definition when it held that a slaughterhouse was the “employer” of meat deboners, despite the presence of contractor who had been retained by the slaughterhouse to operate the deboning operation. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). The Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 324 (1992), again commented on the “striking breadth” of FLSA’s definition. More recent examples of the usefulness of this definition include a court decision which applied this concept to a garment manufacturer. *Lopez v. Silverman*, 14 F. Supp. 2d 405 (S.D.N.Y. 1998). Congress also used this broad definition when it enacted the Migrant and Seasonal Agricultural Worker Protection Act of 1983 (AWPA), an employment law that, among other things, regulates the widespread use of labor contractors in agriculture. 29 U.S.C. § 1802(5). In AWPA cases, the workers frequently attempt to persuade the court that the larger company (the grower) and the labor contractor “jointly employ” the workers and are therefore jointly responsible for any violations of wage and other obligations. The larger company usually argues that it does not “employ” the farmworkers on its farm and that the sole employer is the labor contractor. See *Antenor*

v. D & S Farms, 88 F.3d 925 (11th Cir. 1996). Thus, more than one hundred years after its introduction, courts still wrestle with the “suffer or permit” definition.

Labor unions have long recognized the need to address the roles of manufacturers and contractors. Union organizing and collective bargaining picked up momentum in the garment industry around 1891. Unions, through large-scale strikes in the garment industry in various cities began to break apart the sweating system. They organized not only at the manufacturers but also in the sweatshops and began preventing manufacturers from using the subcontracting system to push down wages. “Fortunately, under these circumstances, the garment workers themselves have realized that if the economic condition is to be improved they must themselves organize and fight for better terms. At first glance it would seem to be almost impossible to conceive of more unfavorable conditions for attempting such a struggle; a trade in which women and children are largely employed, the workingmen and women scattered through the city in innumerable small shops, for the most part foreigners unable to speak the English language . . . without previous experience in organization and absolutely without financial resources. That such a body of men and women under such circumstances could unite and fight determined and often successful contests is one of the greatest demonstrations of the possibility of all classes of labor under free legal institutions to unite for mutual protection that has ever been made.” (Willoughby 1900: 18.) For years, there would be ups and downs in the unions’ efforts to enforce and “improve upon the conditions already wrested from the wholesale firms through their subservient tools, the contractors.” (Willoughby 1900: 23, quoting United Garment Workers newsletter from 1896.)

The International Ladies' Garment Workers Union, in a 1938 article, described its strategy for attacking the subcontracting problem: "The collective agreement of 1936 eliminated the evil of contractor competition and instead introduced an industry-wide uniform system of settling piece rates. *Under the terms of this agreement the jobber, jobber-manufacturer, or manufacturer, as actual owners of the garments, assume sole responsibility for the labor cost of the dresses manufactured for them. All dresses manufactured in the contracting shops working for a jobber are considered as a unit and the piece rates determined automatically apply to all workers in these shops.*" (Gould 1938: 1) Through a system of negotiation and arbitration known as "settling the garment," each garment was assigned a cost and each portion of the operations on the garment was assigned a portion of that cost to be paid to the workers. Most importantly, the manufacturers were ultimately responsible for the wages of subcontracted workers.

Conclusion: Lessons from the 19th Century Sweating System

The history of the sweating system offers us useful lessons for today. Any strategy to ameliorate the harms of subcontracting must focus on the entities that have the economic power to change the system: the companies that retain the subcontractors. Efforts to regulate the subcontractors themselves will rarely be sufficient because the subcontractors are too numerous, the economic pressures on contractors to compete by undermining labor standards are too intense, and new subcontractors will always replace ones that are put out of business.

Laws, regulations, law enforcement efforts, consumer boycotts, and collective bargaining agreements should attempt to place responsibility for wages and working conditions on the companies that subcontract out. Emphasizing the responsibility of the

company that subcontracts, rather than that of the subcontractor, will maximize the impact of the limited resources available to prevent substandard employment practices. This approach also benefits those employers that prefer to treat their workers well. Companies deserve protection against unfair competition by unscrupulous employers that seek to undermine labor standards and lower labor costs by resorting to labor contractors.

Workers in many occupational settings during the 21st century seem to be fighting the same labor practices that were used to weaken workers' bargaining power and suppress improvements in wages and working conditions during the 1880's. The reform efforts from that time period offer us valuable lessons in struggling against labor contracting abuses. Perhaps we should even start speaking again in terms of the "sweating system."

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