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Refusal to Cross Stranger Picket Line Not Enjoinable Under Boys Markets Exception (Buffalo Forge Co. v. United Steelworkers)

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LABOR LAW

REFUSAL TO CROSS STRANGER PICKET LINE NOT ENJOINABLE UNDER *Boys Markets* EXCEPTION

Buffalo Forge Co. v. United Steelworkers

With the enactment of the Norris-LaGuardia Act[1] in 1932, Congress inaugurated a federal labor policy permitting and encouraging complete freedom of union organization.[2] In an attempt to protect the nascent labor movement from the abuses of federal judicial intervention,[3] section 4 of the Act severely circumscribed the authority of the federal courts to issue injunctions in cases arising out of labor disputes.[4] As labor organi-

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[1] 29 U.S.C. §§ 101 *et seq.* (1970).

[2] In § 2 of the Norris-LaGuardia Act, Congress described the public policy that inspired the statute's enactment as follows:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing . . . .

29 U.S.C. § 102 (1970).

[3] From the very beginning of the labor movement, federal courts were a frequent ally of management in its disputes with employees. Indeed, they often intervened in employer-employee contests in an attempt to curtail the growth of labor organizations. To this end, the courts resorted to combinations of the criminal conspiracy doctrine, the illegal purpose doctrine, the unlawful means test, antitrust laws, and most importantly, the labor injunction. For a discussion of these methods and their effect upon the early labor movement, see W. OBERER & K. HANSLOWE, CASES AND MATERIALS ON LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY 85-87 (1972) [hereinafter cited as OBERER & HANSLOWE].

[4] 29 U.S.C. § 104 (1970) provides in pertinent part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
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> (a) Ceasing or refusing to perform any work or to remain in any relation of employment . . . .

The Norris-LaGuardia Act was the legislative response to widespread abhorrence of the labor injunction. Primarily, the concern was that the grant or denial of an injunction did not relate to the merits of the underlying social or economic dispute, which, it was agreed, the courts were powerless to remedy. The granting of an injunction in a labor dispute has been graphically described as "tying the lid on a boiling kettle of water and stuffing a rag down its spout." OBERER & HANSLOWE, *supra* note 3, at 87. Further objections to the labor injunction concerned the employment of the temporary restraining order, which was usually requested when proceedings for an injunction were commenced. Although the court issued the restraining order ex parte, having only heard the employer's side of the dispute, it would remain binding until both sides appeared at the hearing on the employer's petition for a temporary injunction. Once a strike was halted by the ex parte order, moreover, it often could not be revived. Indeed, the injunction process itself led to protracted delays of the hearings on the merits. For a summary of the criticisms leveled at the labor injunction, see A. COX & D. BOK, CASES AND MATERIALS ON LABOR LAW 70-76 (7th ed. 1969). *See generally* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930); C. GREGORY, LABOR AND THE LAW 83-200 (2d rev. ed. 1961).

zations grew in strength, however, it became necessary to equalize the competing economic forces of labor and management.[5] Congressional emphasis therefore shifted to the encouragement of collective bargaining and the promotion of peaceful settlement of labor disputes through arbitration.[6] To that end, Congress enacted section 301(a) of the Labor-Management Relations Act (LMRA),[7] giving federal courts jurisdiction to enforce agreements to arbitrate.[8] Since this shift occurred without revision of the Norris-

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The first legislative attempt to curb the use of the injunction in labor disputes, § 20 of the Clayton Act, 29 U.S.C. § 52 (1970), failed due to the Supreme Court's restrictive interpretation of the statute's scope in Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921). The framers of the Norris-LaGuardia Act, aware of their previous abortive effort, attempted to leave no loopholes for subsequent judicial interpretation. *See* OBERER & HANSLOWE, *supra* note 3, at 85-86. *See also* United States v. Hutcheson, 312 U.S. 219, 235-36 (1941). As a result, § 13 defines "labor dispute" in sweeping terms, thereby severely limiting the power of the federal courts to issue injunctions in such cases:

> The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c) (1970). For a discussion of the legislative history of the Norris-LaGuardia Act, see Witte, *The Federal Anti-Injunction Act,* 16 MINN. L. REV. 638 (1932).

[5] Between 1935 and 1947, labor unions grew rapidly with the aid and encouragement of the federal government. In 1935, only 3 million workers belonged to labor unions. By 1947, this number had increased to 15 million and the labor movement had gained tremendous power. *See Preface* to S. SLICHTER, THE CHALLENGE OF INDUSTRIAL RELATIONS at v (1947); *id.* at 1-28.

[6] To promote stable and harmonious working relations between employer and employee, Congress has encouraged recognition of collective bargaining agreements. *See, e.g.,* S. REP. No. 105, 80th Cong., 1st Sess. 17-18 (1947). Complete effectuation of this federal policy is achieved when the agreement contains both a mandatory arbitration provision and a prohibition of strikes. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 453 (1957).

[7] 29 U.S.C. § 185(a) (1970) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[8] Relying on legislative history which indicated that § 301(a) was intended by Congress "to provide the necessary legal remedies," the Supreme Court has found the purpose of this provision to be more than merely jurisdictional. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957), *citing* 93 CONG. REC. 3656-57 (1947) (exchange between Representatives Barden and Hartley). To the unions, this meant that they could obtain specific performance of an employer's promise to arbitrate grievances. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 458-59 (1957). *See generally* Vladeck, Boys Markets *and National Labor Policy,* 24 VAND. L. REV. 93, 95 (1970). Furthermore, to ensure maximum utilization of the arbitral process, the Supreme Court has consistently emphasized its importance by creating a presumption in favor of arbitration. *See, e.g.,* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). Specifically, the Court has declared:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

LaGuardia Act,[9] harmonizing the anti-injunction terms of Norris-LaGuardia with the proarbitration policy of section 301(a) of the LMRA was left to the judiciary.[10]

The Supreme Court, in *Boys Markets, Inc. v. Retail Clerks Local 770,*[11] accommodated these conflicting federal policies by creating a narrow exception to the Norris-LaGuardia bar to injunctive relief. In *Boys Markets,* the Court held that a strike may be enjoined if it arises as a reaction to a grievance which the parties, under the terms of an effective collective bargaining agreement containing a no-strike provision, are contractually obligated to submit to arbitration.[12] Ascertaining the intended scope of this exception, however,

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With respect to employers, the Court has noted that since a no-strike obligation on the part of labor is "the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration," Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 248 (1970), the basic purpose of arbitration would be largely undercut if the no-strike obligation could not be readily and quickly enforced. *Id.* at 249. Indeed, a no-strike obligation may be implied. *See, e.g.,* Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 104-06 (1962), wherein the Court stated that the existence of an agreement pursuant to which certain disputes will be exclusively covered by mandatory arbitration gives rise to an implied promise by the union not to strike in response to these arbitrable issues. *Accord,* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 381 (1974). *See generally* Marshall, *Federal Enforcement of a No-Strike Clause by Injunctive Relief,* in SYMPOSIUM ON LABOR RELATIONS LAW 566, 571-72 (R. Slovenko ed. 1961).

[9] *Compare* Act of Mar. 23, 1932, ch. 90, §§ 1 *et seq.,* 47 Stat. 70 *with* 29 U.S.C. §§ 101 *et seq.* (1970). Congress has steadfastly refused to repeal the Norris-LaGuardia Act. Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 255-56 (1970) (Black, J., dissenting). *See also id.* at 251.

[10] Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 251 (1970). Notwithstanding the strong policy in favor of arbitration, *see* notes 6-8 and accompanying text *supra,* courts were without authority, under § 4 of the Norris-LaGuardia Act, to award injunctive relief to employers seeking to enforce no-strike provisions in collective bargaining agreements. *See* note 4 *supra.* This presented a serious obstacle to employers because noninjunctive remedies, *i.e.* suing for damages or firing employees, frequently proved unsatisfactory. *See generally* Anderson, *The Right to Strike and the Arbitration Clause,* N.Y.U. 23d CONF. ON LABOR 225, 227-28 (1970); Note, *Labor Injunctions,* Boys Markets, *and the Presumption of Arbitrability,* 85 HARV. L. REV. 636, 638 (1972); 27 RUTGERS L. REV. 190, 192 n.16 (1973).

For examples of attempts to reconcile the Norris-LaGuardia Act with other statutes, see Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n, 63 F. Supp. 254 (E.D. Pa. 1945), *rev'd on other grounds,* 155 F.2d 799 (3d Cir. 1946) (Sherman Anti-Trust Act), and Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R., 353 U.S. 30 (1957) (Railway Labor Act).

[11] 398 U.S. 235 (1970).

[12] In *Boys Markets,* the dispute concerned whether particular work was to be performed by union members rather than nonunion supervisory personnel. The union insisted that only its members could rearrange merchandise in the frozen food cases of the employer's market and demanded that the shelves stocked by the nonunion employees be unloaded. When the employer refused, the union went on strike. The dispute was subject to arbitration under the collective bargaining agreement between the parties, and the strike was a clear violation of an express no-strike clause in that agreement. *Id.* at 238-40. In affirming the district court's order enjoining the strike, the Court overruled Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962). There, the Court had held that § 4 of the Norris-LaGuardia Act prohibited a federal district court from enjoining a strike in breach of a no-strike clause even though the collective bargaining agreement contained binding arbitration provisions enforceable under § 301(a) of the LMRA. Justice Brennan, writing for the *Boys Markets* majority, reasoned that the *Sinclair* decision seriously undermined the effectiveness of arbitration since "employers will be wary of assuming obligations to arbitrate specifically

has been a particularly vexing problem for the circuit courts. Specifically, much controversy has arisen over whether a union's refusal to cross another union's lawful picket line constitutes an arbitrable dispute with the primary employer sufficient to invoke the *Boys Markets* exception. The Second Circuit recently had occasion to deal with this rather "narrow but significant question of labor law"[13] in *Buffalo Forge Co. v. United Steelworkers.*[14] There, the court determined that where union members strike "*solely* out of deference to another union's lawful picket line,"[15] and not because of a desire to avoid arbitration, the strike is not over a grievance which the union had agreed to arbitrate.[16] Since the *Boys Markets* exception is therefore inapplicable, the court held that section 4 of the Norris-LaGuardia Act precludes an award of injunctive relief.[17]

The defendants in *Buffalo Forge,* the United Steelworkers of America and two of its locals (production unions), represented, under successive collective bargaining contracts, the production and maintenance employees of Buffalo Forge Company, a manufacturing and sales operation owning three plants and offices in or nearby Buffalo, New York. The same international union, with two other locals (technical unions), also represented the company's technical and clerical employees. While negotiating their first collective bargaining agreement, the technical unions struck the company and established picket lines at all of the Buffalo area

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enforceable against them when no similarly efficacious remedy is available to enforce the concomitant undertaking of the union to refrain from striking." 398 U.S. at 252. The Court further reasoned that the central purpose of the Norris-LaGuardia Act would not be frustrated "by a remedial device that merely enforces the obligation that the union freely undertook under a specifically enforceable agreement to submit disputes to arbitration." *Id.* at 252-53 (footnote omitted). *See also* ABA SECTION OF LABOR RELATIONS LAW, 1963 PROCEEDINGS, *Report of Special* Atkinson-Sinclair *Committee* 226, 242 (1964).

The *Boys Markets* Court adopted the principles suggested by Justice Brennan in his dissenting opinion in *Sinclair* as guidelines for the district courts in determining whether injunctive relief is appropriate:

> A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect . . . .

398 U.S. at 254 (emphasis in original), *quoting* Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting). In addition, the *Boys Markets* Court specifically noted that its holding was a narrow one and that the vitality of the Norris-LaGuardia Act was not to be thereby undermined. Nor was injunctive relief to be "appropriate as a matter of course in every case of a strike over an arbitrable grievance." 398 U.S. at 253-54.

[13] Buffalo Forge Co. v. United Steelworkers, 517 F.2d 1207, 1208 (2d Cir.), *cert. granted,* 96 S. Ct. 214 (1975).

[14] 517 F.2d 1207 (2d Cir.), *cert. granted,* 96 S. Ct. 214 (1975), *aff'g* 386 F. Supp. 405 (W.D.N.Y. 1974).

[15] 517 F.2d at 1208 (emphasis in original).

[16] *Id.* at 1210.

[17] *Id.* at 1211.

facilities. Thereafter, production and maintenance employees at one of the plants refused to cross the technical unions' picket line and engaged in a 1-day work stoppage. Three days later, the production unions called a work stoppage at all of the plants, thereby halting completely the company's manufacturing operations.[18]

The company, seeking damages and injunctive relief, brought suit in the federal district court. Plaintiff contended that the no-strike provision of the collective bargaining agreement[19] prohibited the defendant production unions from refusing to cross the technical unions' picket lines. It further argued that a *Boys Markets* injunction should issue since the parties were required to settle their differences by means of the mandatory grievance and arbitration procedures set forth in the agreement.[20] Refusing to extend the narrow *Boys Markets* exception to the facts in *Buffalo Forge,* the district court ruled that injunctive relief was barred under section 4 of the Norris-LaGuardia Act. The court reasoned that it was the strike of technical and clerical employees which had "preceded and precipitated the work stoppage of the defendant Locals."[21] The underlying dispute, therefore, was between the plaintiff and the striking members of the technical unions, not between the company and the defendant production unions, the parties to the collective bargaining agreement.[22] The court concluded that to hold that the legality of the very strike sought to be enjoined constituted an arbitrable dispute would, by enabling federal courts to issue injunctions as a matter of course, "undermine the vitality of the anti-injunction provision of the Norris-LaGuardia Act,"[23] a

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[18] 386 F. Supp. at 407.

[19] The no-strike provision provided in pertinent part:

> There shall be no strikes, work stoppages or interruption or impeding of work. No Officers or representatives of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in any such activity.

Id.

[20] The adjustment of grievances provision provided in pertinent part:

> Should differences arise between the Company and any employee covered by this Agreement as to the meaning and application of the provisions of this Agreement, or should any trouble of any kind arise in the plant, there shall be no suspension of work on account of such differences . . . .

Id. The plaintiff further contended that the production unions' work stoppage was due to a dispute over a work assignment. Nevertheless, once the district court rejected this claim as unsupported by the evidence, *id.* at 407-09, the plaintiff did not raise the issue on appeal. 517 F.2d at 1211 n.7.

[21] 386 F. Supp. at 410.

[22] *Id.*

[23] *Id., quoting* Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372, 1373-74 (5th Cir. 1972).

result specifically denounced in the *Boys Markets* decision.[24]

Convinced that the impact of *Boys Markets* had been correctly construed, the Second Circuit unanimously affirmed the decision of the district court.[25] Judge Smith, writing for the panel, stressed the significance of the accommodation process utilized by the Supreme Court in *Boys Markets*.[26] That narrow exception to the Norris-LaGuardia proscription of judicial intervention, it should be remembered, had been carved out to protect the arbitration machinery established by the collective bargaining agreement.[27] Consequently, the *Boys Markets* decision should not be considered authority for enjoining "[a] strike not seeking to pressure the employer to yield on a disputed issue" which the parties had agreed to resolve within the arbitration procedures.[28] In deciding the applicability of the *Boys Markets* exception, therefore, the *Buffalo Forge* court held the crucial determination to be whether the strike was over a grievance which the union had agreed to arbitrate. The panel was persuaded, however, that the strike in issue was not over a grievance with the employer at all, but merely a manifestation of the production unions' deference to the picket lines of other employees.[29] Accordingly, the court concluded that its denial of injunctive relief would give full effect to the Norris-LaGuardia Act without violating the federal proarbitration policy implicit in section 301(a) of the LMRA.[30]

Although *Boys Markets* is of relatively recent origin, there are a number of cases involving its application to facts similar to those presented in *Buffalo Forge*. Essentially, these decisions present two distinctly different views of the proper construction and application of *Boys Markets*.[31] The Second Circuit has elected to

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[24] *See* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 253 (1970), *discussed in* note 12 *supra*.

[25] 517 F.2d at 1211. The panel consisted of Chief Judge Kaufman and Judges Smith and Timbers.

[26] *Id.* at 1211. For a discussion of the *Boys Markets* rationale, see notes 11-12 and accompanying text *supra*.

[27] *See* 398 U.S. at 252-53.

[28] 517 F.2d at 1211.

[29] *Id.* at 1210.

[30] *Id.* at 1211. The defendant had also argued that the plaintiff was not entitled to injunctive relief because it did not comply with § 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108 (1970), which mandates that every reasonable effort be made to settle the dispute by negotiation. The Second Circuit did not reach the merits of this contention, however, since it agreed with the basis upon which the district court denied injunctive relief. 517 F.2d at 1209 n.4.

[31] Primarily, the conflict exists between the approach of the Second, Fifth, and Sixth Circuits and that of the Fourth. *See* notes 32-41 and accompanying text *infra*. The Seventh Circuit has yet to affirmatively declare its position on this issue. Although its most recent

follow the Fifth Circuit's decision in *Amstar Corp. v. Amalgamated Meat Cutters,*[32] the leading case for the proposition that a refusal to cross a stranger picket line is not enjoinable.

In *Amstar,* the court determined that the refusal of union members to cross a picket line established at their place of employment by another union was not a strike "over a grievance" which the parties were contractually bound to arbitrate.[33] In the court's opinion, the work stoppage, rather than being over, or a reaction to, a grievance, had actually precipitated the dispute, the dispute being whether the union's no-strike obligation precluded member-employees from honoring stranger picket lines. Thus, the court concluded, the case fell outside the scope of the *Boys Markets* exception to the Norris-LaGuardia Act and the district court was without jurisdiction to issue an injunction.[34] In essence, the Fifth Circuit's reasoning was that if the legality of the very strike sought to be enjoined were held to constitute an arbitrable dispute sufficient to justify the grant of a *Boys Markets* injunction, virtually every strike would be enjoinable. Such a reading of the narrow *Boys Markets* exception would, according to the court, undermine the viability of the Norris-LaGuardia Act.[35]

The Fourth Circuit, however, adopted the contrary point of view in *Monongahela Power Co. v. Electrical Workers Local 2332.*[36] Presented with facts almost identical to those of *Amstar,* the *Monongahela* court ruled that the legality, pursuant to a no-strike provision of a collective bargaining agreement, of a union's refusal to cross a stranger picket line is a dispute clearly subject to mandatory arbitration under the agreement.[37] The court reasoned that a collective bargaining agreement prohibiting employees from

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decision appears to indicate that it considers itself more closely aligned with the majority, its approach does vary. *See* note 39 *infra.*

[32] 468 F.2d 1372 (5th Cir. 1972).

[33] *Id.* at 1373.

[34] *Id.* at 1373-74. *Accord,* Plain Dealer Publishing Co. v. Cleveland Typographical Local 53, 88 L.R.R.M. 2155 (N.D. Ohio 1974), *aff'd per curiam,* 520 F.2d 1220 (6th Cir. 1975); Carnation Co. v. Teamsters Local 949, 86 L.R.R.M. 3012 (S.D. Tex. 1974). The same theory was succinctly set forth in General Cable Corp. v. Electrical Workers Local 1644, 331 F. Supp. 478 (D. Md. 1971), wherein the court stated:

> The only grievance or dispute between the Company and Local 1644 is the result of the strike and not the cause of the strike. It does not come within the narrow exception created by the rule in *Boys Market* [*sic*] to the applicability of the Norris-LaGuardia Act.

Id. at 482. *Accord,* Simplex Wire & Cable Co. v. Electrical Workers Local 2208, 314 F. Supp. 885 (D.N.H. 1970) (mem.); *cf.* Parade Publications, Inc. v. Philadelphia Mailers Local 14, 459 F.2d 369, 374 (3d Cir. 1972).

[35] 468 F.2d at 1373-74.

[36] 484 F.2d 1209 (4th Cir. 1973).

[37] *Id.* at 1214.

participating in *any* strike, and requiring *any* grievance involving a claimed violation of its provisions to be resolved through arbitration,[38] mandates that a dispute regarding the legality of a work stoppage be submitted to arbitration.[39] The claimed violation of the no-strike provision, therefore, was thought to be "a grievance which both parties [were] contractually bound to arbitrate"[40] within

[38] *Id.* at 1213. With respect to the settlement of grievances, the collective bargaining agreement in *Monongahela* provided:

> Any dispute between the Company or employees covered by this Agreement with respect to the interpretation, application, or *claimed violation* of any express provision of this Agreement shall constitute a grievance which shall be settled in accordance with the provisions of this Article.

Id. at 1210 (emphasis added by court). With respect to union strikes, it further provided:

> No employee shall participate in any such strike, *work stoppage*, slowdown or any other interference with or impeding of work and the Union will not authorize, instigate, aid or condone any such activity.

Id. (emphasis added by court).

[39] *Id.* at 1214. Although it was expressly noted that the *Monongahela* decision was distinguishable on its facts, the Seventh Circuit took a similar approach in Inland Steel Co. v. UMW Local 1545, 505 F.2d 293 (7th Cir. 1974). The *Inland Steel* court held that a dispute concerning Local 1545's right, under its collective bargaining agreement, to engage in a sympathy strike was arbitrable within the scope of the agreement's broad arbitration provisions. The agreement in question had provided that differences over the meaning and application of its provisions as well as differences not specifically mentioned and "any local trouble of any kind" were ultimately to be resolved through arbitration procedures. *Id.* at 297 n.5. Having determined that the defendant's work stoppage certainly constituted "local trouble of any kind," the court implied an obligation not to strike over that arbitrable dispute. *Id.* at 299-300. In other words, the court reached the somewhat implausible result of implying an obligation not to strike over a preexisting strike. The court thus concluded it had established the proper prerequisites for allowing the district court to issue a *Boys Markets* injunction. *Id.* Hence, although the *Monongahela* decision involved an express no-strike clause, both decisions predicated a *Boys Markets* injunction primarily on a determination that the legality of the very work stoppage sought to be enjoined was an issue to be resolved through arbitration procedures.

The *Inland Steel* court, by refusing to express an opinion on the *Amstar-Monongahela* conflict, *id.* at 299, left the Seventh Circuit's position on this issue somewhat uncertain. Subsequent cases from that circuit involving *express* no-strike clauses, moreover, did little to crystalize its stand. In Gary Hobart Water Corp. v. NLRB, 511 F.2d 284 (7th Cir.), *cert. denied*, 96 S. Ct. 269 (1975), the court did not enjoin a union's refusal to cross another local's picket line, finding such refusal not to be an arbitrable dispute. The court distinguished *Inland Steel* by noting that that decision rested upon an exceptionally broad arbitration clause, whereas the clause in *Gary Hobart* merely provided for arbitration of "any and all disputes arising under or in connection with [the agreement]." 511 F.2d at 287-88. The *Gary Hobart* court did not refer to either *Amstar* or *Monongahela*, but apparently accepted the approach of *Inland Steel* that the resolution of the issue of the work stoppage's arbitrability was the crucial determination.

Again focusing on whether the work stoppage was arbitrable under the terms of the collective bargaining agreement, the court in Hyster Co. v. Independent Towing Mach. Ass'n, 519 F.2d 89 (7th Cir.), *petition for cert. filed*, 44 U.S.L.W. 3253 (U.S. Oct. 6, 1975) (No. 75-524), disallowed the issuance of a *Boys Markets* injunction in a stranger picket line situation. The *Hyster* court found the language of the arbitration clause in this case to more closely resemble the language of the *Gary Hobart* provision than that of *Inland Steel.* 519 F.2d at 91-92. Interestingly, the court at this juncture made abstruse references to the *Amstar* decision and in footnotes apparently declared itself to be in accord therewith. *Compare id.* at 92 & n.3 *with id.* at 91 & n.2. Arguably, therefore, while the Seventh Circuit's approach resembles, in spirit, the *Monongahela* view, the trend of its decisions indicates future holdings more in keeping with *Amstar.*

[40] 484 F.2d at 1214.

the meaning of the *Boys Markets* exception. Hence, injunctive relief to prevent the union from refusing to cross another union's picket line was considered proper.[41]

In addition, it should be noted that other decisions have allowed the issuance of injunctions in such picket line situations. These cases may be distinguished, however, since the injunctions were predicated on explicit language in the collective bargaining agreement pursuant to which the unions specifically reserved to themselves the right to refuse to cross stranger picket lines.[42]

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[41] *Id.* at 1213. *Accord,* Armco Steel Corp. v. United Mine Workers, 505 F.2d 1129 (4th Cir. 1974), *cert. denied,* 96 S. Ct. 150 (1975); Barnard College v. Transport Workers Union, 372 F. Supp. 211 (S.D.N.Y. 1974); *cf.* Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 442 F.2d 251 (8th Cir.) (per curiam), *cert. denied,* 404 U.S. 871 (1971).

[42] *See, e.g.,* NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3d Cir.) (en banc), *cert. denied,* 419 U.S. 1049 (1974). In *NAPA,* members of the local union in Pittsburgh refused to cross picket lines set up by another union. The collective bargaining agreement required the settlement, by arbitration, of "any and all grievances, complaints or disputes arising between the employer and the union." 502 F.2d at 323. Although the agreement also contained a no-strike provision, another clause provided:

> It shall not be a violation of this Agreement . . . in the event an employee refuses to enter upon any property involved in a primary labor dispute or refuses to go through or work behind any primary picket lines . . . at the Employer's [NAPA Pittsburgh's] place or places of business.

Id. at 322 (addition by court). A dispute arose as to whether the picket line which the union had refused to cross was in fact "primary." *Id.* The court concluded that the issue of whether the picket line should be classified as primary or secondary was an arbitrable dispute under the terms of the contract and therefore a *Boys Markets* injunction was appropriate. *Id.* at 324. *Accord,* Wilmington Shipping Co. v. Longshoremen's Local 1426, 86 L.R.R.M. 2846 (4th Cir.), *cert. denied,* 419 U.S. 1022 (1974) (whether picket line is bona fide is arbitrable issue). *See generally* Comment, Boys Market: *Developments in the Third Circuit,* 48 TEMP. L.Q. 281, 304-10 (1975). In making this determination, the *NAPA* court relied on the presumption in favor of arbitration. 502 F.2d at 323, *citing* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). Application of the presumption in a *Boys Market* situation has been criticized, however, since, as one commentator has noted, it may lead to "an indiscriminate use of the injunctive power by federal courts . . . ." Note, *Labor Injunctions,* Boys Markets, *and the Presumption of Arbitrability,* 85 HARV. L. REV. 636, 639 (1972).

At least one court has characterized the decision in *NAPA* as anomalous. In Pilot Freight Carriers, Inc. v. Teamsters Local 560, 373 F. Supp. 19 (D.N.J. 1974), the court, referring to the district court holding in *NAPA,* stated:

> When coupled with *Amstar, Nappa* [*sic*] stands for the proposition that the refusal to cross a picket line cannot be enjoined even if the contract contains an arbitration clause and a no-strike pledge; but if the contract also contains an express reservation, *preserving the right to refrain from crossing a picket line,* then the court may compel the union members to cross the picket line.
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> When coupled with *Monongahela, Nappa* [*sic*] is similarly anomalous in that it stands for the proposition that an arbitration provision and a no-strike pledge, in absence of a reservation to honor the picket line of others, waives the right of union members to refrain from crossing other union's picket lines, and therefore such refusal to cross may be enjoined; but if the union seeks to reserve that right by way of an express contractual provision, then the refusal to cross may still be enjoined since the right not to cross is embodied in the contract and thereby becomes an arbitrable issue.

Id. at 26-27 (emphasis in original). For further criticism of the court's holding in *NAPA,* see 88 HARV. L. REV. 463 (1974). Although the New Jersey district court in *Pilot Freight* disagreed with the Pennsylvania district court's holding in *NAPA,* it noted that if *NAPA* were subsequently affirmed by the Third Circuit, it would, of course, be bound by it. 373 F. Supp.

It is clear that the lack of uniformity in the circuits arises out of differing views of the applicability of the *Boys Markets* exception.[43] In this regard, it would seem that the line of reasoning advanced by *Amstar,* and strengthened in *Buffalo Forge,* is more closely attuned than that of *Monongahela* to the spirit of the Supreme Court's decision in *Boys Markets.* The *Boys Markets* Court explicitly limited the propriety of granting an injunction to the situation where the work stoppage is "*over* a grievance which both parties are contractually bound to arbitrate . . . ."[44] As recognized by the *Amstar* and *Buffalo Forge* courts, this language appears to dictate that before the *Boys Markets* exception can be operative a threshold determination must be made that the arbitrable grievance between the parties precipitated the work stoppage.[45] The *Monongahela* court, however, finding an arbitrable dispute, namely, the legality of the very strike sought to be enjoined, apparently ignored the absence of a grievance between the parties which preceded and in fact caused the strike.[46]

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at 27. *NAPA* was so affirmed. NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3d Cir.) (en banc), *cert. denied,* 419 U.S. 1049 (1974), *aff'g* 363 F. Supp. 54 (W.D. Pa. 1973). Although the *Pilot Freight* decision no longer has precedential value, its rationale is nonetheless illustrative of the effect of the conflicting judicial views of the *Amstar* and *Monongahela* courts upon the resolution of conflicts involving collective bargaining agreements containing such an express contractual provision.

[43] The uncertain state of the law is demonstrated by the fact that within a week of each other, two district courts, in different circuits, reached conflicting conclusions on the same facts. *Compare* Pilot Freight Carriers, Inc. v. Teamsters Local 391, 375 F. Supp. 1254 (M.D.N.C.), *modified sub nom.* Pilot Freight Carriers, Inc. v. International Bhd. of Teamsters, 497 F.2d 311 (4th Cir. 1974) *with* Pilot Freight Carriers, Inc. v. Teamsters Local 560, 373 F. Supp. 19 (D.N.J. 1974). The plaintiff in both cases, Pilot Freight Carriers, Inc., is an interstate common carrier of freight. Teamsters Local 512 went on strike against Pilot in Jacksonville, Florida, and in an attempt to gain recognition by Pilot at its operation in Florida, Local 512 established picket lines at Pilot's operations in other states. Among others, Local 560 in Moonachie, New Jersey and Local 391 in Kernersville, North Carolina refused to cross the picket lines. Pilot brought suit in the two district courts to enjoin the strikes of both locals. The collective bargaining agreement in each case was identical. The New Jersey district court, relying on *Amstar,* refused to enjoin Local 560 from continuing to honor Local 512's picket line. The district court in North Carolina, however, relying on *Monongahela,* granted injunctive relief.

[44] 398 U.S. at 254, *quoting* Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 228 (1962) Brennan, J., dissenting) (emphasis added).

[45] *See* Amstar v. Amalgamated Meat Cutters, 468 F.2d 1372, 1373 (5th Cir. 1972); Buffalo Forge Co. v. United Steelworkers, 517 F.2d 1207, 1210 (2d Cir. 1975). *See also* note 34 *supra.* The *Boys Markets* decision has been characterized by *Amstar* as having

> established three prerequisites to jurisdiction in a federal district court to enjoin a strike: (1) the strike must be in breach of a no-strike obligation under an effective collective bargaining agreement, (2) the strike must be *"over"* an arbitrable grievance, and (3) both parties must be contractually bound to arbitrate the *underlying* grievance which caused the strike.

468 F.2d at 1373 (emphasis added).

[46] *See* 484 F.2d at 1213-14. The *Monongahela* court, having found that the work stoppage resulting from the refusal to cross the picket lines violated the collective bargaining agreement, held that the strike was "a grievance which both parties are contractually bound to

Even assuming the presence of a sufficiently arbitrable underlying dispute, undue expansion of the narrow *Boys Markets* holding should be discouraged in light of the Court's caveat that injunctive relief is not appropriate "as a matter of course in every case of a strike over an arbitrable grievance."[47] The very language of the decision, moreover, necessarily limits the situation in which an injunction may properly be granted to a particular set of facts.[48] The *Boys Markets* dispute was unmistakably one the union had consented to resolve through arbitration. The union not only ignored both its no-strike commitment and its agreement to arbitrate, but deliberately struck to pressure the employer into yielding before the disputed issue could be brought to arbitration.[49] Such a strike surely undermines the public policy favoring the peaceful resolution of labor disputes through arbitration. Just as clearly, the issuance of an injunction in such a situation fosters that policy, although it necessarily conflicts with the prohibition of injunctions contained in the Norris-LaGuardia Act. Faced with this conflict, the Supreme Court chose to create a narrow exception to the Norris-LaGuardia Act so that a union may be prevented from engaging in conduct "plainly designed to circumvent and defeat its explicit agreement to arbitrate."[50]

In cases involving a refusal to cross a stranger picket line, no such motive to elude arbitration exists. The strike is not the result of a dispute over the union's right to engage in such a work stoppage, but of the union's deference to the presence of another union's picket line.[51] The end of the walkout cannot be obtained by the employer's concession that the union in fact has the right to

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arbitrate" and therefore enjoinable under the *Boys Markets* decision. *Id.* at 1214. It is submitted, however, that a careful reading of *Boys Markets* indicates that injunctive relief is only proper if the strike to be enjoined is " '*over* a grievance which both parties are contractually bound to arbitrate' " 398 U.S. at 254, *quoting* Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting) (emphasis added). Noticeably absent from the language of the *Monongahela* court's holding was the qualifying word "over." This omission highlights the court's apparent disregard of the necessary causal relationship between the arbitrable grievance and the strike.

[47] 398 U.S. at 253-54.

[48] The facts of *Boys Markets* are set forth in note 12 *supra.*

[49] *See* 398 U.S. at 254; NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 325 (3d Cir.) (en banc) (Hunter, J. & Seitz, C.J., dissenting), *cert. denied,* 419 U.S. 1049 (1974).

[50] NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 325-26 (3d Cir.) (en banc) (Hunter, J. & Seitz, C.J., dissenting), *cert. denied,* 419 U.S. 1049 (1974).

[51] *But see* Food Fair Stores, Inc. v. Food Drivers Local 500, 363 F. Supp. 1254 (E.D. Pa. 1973), where the court found the union's refusal to cross a stranger picket line not to have been motivated by deference to the other union. Rather, the evidence established that the defendant local had used the picket line as a shield for its own attempts to force the employer to resolve other arbitrable disputes. *Id.* at 1256. Consequently, the injunction was issued. *Id.* at 1259.

engage in the work stoppage. This can only be achieved by a resolution of the dispute with the other union and removal of the picket lines. As the union's work stoppage is therefore not intended to force settlement of an arbitrable issue before arbitration can take place, the denial of injunctive relief would not undermine the labor policy that favors the arbitration of disputes.[52] Granting the injunction, on the other hand, would frustrate the intent of the anti-injunction provision of the Norris-LaGuardia Act since the issuance of an injunction under these circumstances would make it "difficult to conceive of any strike which could not be so enjoined"[53] and thus "permit the narrow exception . . . to subsume the rule."[54] This is particularly true since a no-strike provision, even if not in fact present in the collective bargaining agreement, will be implied where the agreement sets up mandatory arbitration procedures.[55]

The exception to the Norris-LaGuardia Act carved out by the *Boys Markets* Court may represent the "judiciary's most ambitious foray into an area seemingly pre-empted by statute."[56] Absent a more definitive statement from the Supreme Court, or subsequent modification of the Norris-LaGuardia Act by Congress,[57] that

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[52] *Id.; see* Stokely-Van Camp, Inc. v. Thacker & Cannery Warehousemen Local 788, 394 F. Supp. 715, 718 (W.D. Wash. 1975).

[53] Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372, 1373 (5th Cir. 1972), *quoted in* Buffalo Forge Co. v. United Steelworkers, 517 F.2d 1207, 1211 (1975).

[54] Inland Steel Co. v. UMW Local 1545, 505 F.2d 293, 301 (7th Cir. 1974) (Fairchild, J., dissenting) (citation omitted). *Accord,* Wilmington Shipping Co. v. Longshoremen's Local 1426, 86 L.R.R.M. 2846, 2847 (4th Cir.) (Adams, J., concurring), *cert. denied,* 419 U.S. 1022 (1974); Plain Dealer Publishing Co. v. Cleveland Typographical Local 53, 88 L.R.R.M. 2155, 2160 (N.D. Ohio 1974), *aff'd per curiam,* 520 F.2d 1220 (6th Cir. 1975); Pilot Freight Carriers, Inc. v. Teamsters Local 560, 373 F. Supp. 19, 23 (D.N.J. 1974).

[55] Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 104-06 (1962). At least one commentator has argued that the no-strike clause should not be implied in a *Boys Markets* situation. *See* Note, *The New Federal Law of Labor Injunction,* 79 YALE L.J. 1593, 1600 (1970). The author contends that since the absence of a no-strike clause generally indicates that such a provision has been rejected, its implication in an injunction situation subordinates both freedom of contract and the Norris-LaGuardia Act to industrial peace through arbitration.

[56] NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 334 (3d Cir.) (en banc) (Adams, J., dissenting), *cert. denied,* 419 U.S. 1049 (1974). *See* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 255-61 (1970) (Black, J., dissenting); Note, *The New Federal Law of Labor Injunctions,* 79 YALE L.J. 1593, 1598-99 (1970); note 57 *infra.*

[57] The legislative history of § 301(a) of the LMRA clearly demonstrates that Congress considered and affirmatively rejected exempting § 301(a) actions from the operation of the Norris-LaGuardia Act. *See* Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 203-08 (1962), *overruled,* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). The House version of the LMRA, H.R. 3020, 80th Cong., 1st Sess. § 302(e) (1947), authorized injunctions against breaches of collective bargaining agreements. This proposal was eliminated, however, in conference. H.R. MISC. REP. No. 510, 80th Cong., 1st Sess. 65-66 (1947). The Supreme Court, in Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962), therefore refused to make Norris-LaGuardia inapplicable by judicial fiat, but invited Congress to act if public policy demanded otherwise. The Court stated:

Strong arguments are made to us that it is highly desirable that the Norris-

exception should not be expanded.[58] Since certiorari has been granted, the opportunity now exists for the Supreme Court to approve the conclusion reached in *Buffalo Forge*. As the Second Circuit noted, its decision comports "with the Supreme Court's direction to district courts . . . to reconcile [section 4 of the Norris-LaGuardia Act and section 301(a) of the LMRA] rather than simplistically read a repeal of § 4 into the later enactment."[59]

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> LaGuardia Act be changed in the public interest. If that is so, Congress itself might see fit to change that law and repeal the anti-injunction provisions of the Act insofar as suits for violation of collective agreements are concerned, as the House bill under consideration originally provided. . . . The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress — it is a question for lawmakers, not law interpreters.

Id. at 214-15. In agreement with the court's position that this issue required congressional resolution, several commentators maintained *Sinclair* should not be reversed. *See* Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 464-65 (1969); Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on* Sinclair v. Atkinson, 72 YALE L.J. 1547, 1565-66 (1963). The Supreme Court did of course reverse its earlier *Sinclair* decision in Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). Quite arguably, this is as far as the Supreme Court desires to relax the anti-injunction policy of the Norris-LaGuardia Act.

Subsequent to the Supreme Court's decision in *Sinclair*, moreover, a bill was proposed in Congress which would have amended § 301 of the LMRA to permit parties to collective bargaining agreements to secure for themselves an exemption from the anti-injunction provisions of the Norris-LaGuardia Act. S. 2132, H.R. 9059, 89th Cong., 1st Sess. (1965). The bill proposed the addition of the following subsection:

> The provisions of the [Norris-LaGuardia Act] shall be inapplicable in any proceeding to enjoin the violation of, or to enforce an arbitration award arising out of an alleged violation of [a labor contract], if the contract includes (i) a provision for submission to binding arbitration of any claim asserted by such labor organization alleging a violation of such contract by such employer, and (ii) a provision expressly stating that the provisions [of the Norris-LaGuardia Act] shall be inapplicable in any such proceeding.

Id. Again, Congress refused to effect a change in this area of the law.

[58] As one judge has stated:

> Further modifications in the field of labor law may be in order, but this is a task that must devolve upon the legislature, for in the face of a clear Congressional command it is in the halls of Congress, not the corridors of courthouses, that the changed emphasis in public policy is to be transfigured into new law.

Pilot Freight, Inc. v. Teamsters Local 560, 373 F. Supp. 19, 28 (D.N.J. 1974) (Stern, J.). In contrast, in Comment, *Sister Union Strikes and "No Strike" Clauses: The Logic and Necessity of a Presumption of Inclusivity*, 11 SAN DIEGO L. REV. 1044 (1974), the author advocates a broad interpretation of the *Boys Markets* decision which would allow for the presumption that "sister union strikes are prohibited [in a collective bargaining agreement], unless the right to honor them is specifically reserved." *Id.* at 1059. Interestingly, the Third Circuit, in NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1049 (1974), has since enjoined a union's refusal to cross a stranger picket line notwithstanding its explicit reservation of the right to so refuse in the collective bargaining agreement. *See* note 42 *supra*.

[59] 517 F.2d at 1211.