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Labor Law

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LABOR LAW — OCCUPATIONAL SAFETY AND HEALTH ACT — THE SECRETARY OF LABOR IS EMPOWERED TO COMPEL AN EMPLOYER TO BARGAIN TO RETAIN THE RIGHT TO DISCHARGE EMPLOYEES FOR THE WILFUL VIOLATION OF REASONABLE SAFETY STANDARDS WHICH ARE FEASIBLE EXCEPT FOR PREDICTABLE EMPLOYEE NONCOMPLIANCE

Atlantic & Gulf Stevedores, Inc. v. Occupational Safety & Health Review Commission (1976)

Petitioners were stevedoring concerns which employed longshoremen and operated in the Port of Philadelphia.[1] In April 1973, after inspecting petitioners' docks in Camden, New Jersey,[2] an Occupational Safety and Health Act (OSHA)[3] compliance officer[4] charged petitioners with violating a "longshoring hardhat" standard,[5] which requires employees to wear protective hats.[6] The United States Secretary of Labor, who promulgated the standard,[7] proposed an assessment of civil penalties[8] against petitioners

1. Atlantic & Gulf Stevedores, Inc. v. Occupational Safety & Health Review Comm'n, 534 F.2d 541, 544 (3d Cir. 1976).

2. *Id.*

3. 29 U.S.C. §§ 651–678 (1970). For a discussion of the relevant provisions of OSHA, *see* notes 20–23 and accompanying text *infra*.

4. Section 8(a) of OSHA authorizes the Secretary to enter any workplace at reasonable times "to inspect and investigate . . . within reasonable limits and in a reasonable manner . . . ." 29 U.S.C. § 657(a) (1970).

5. 534 F.2d at 544. 29 C.F.R. § 1918.105(a) (1975) provides: "Employees shall be protected by protective hats meeting the specifications contained in the American National Standard Safety Requirements for Industrial Head Protection . . . ." *Id.*

6. The standard at issue, which was adopted pursuant to section 941 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–950 (1970), and the regulations promulgated thereunder, 29 C.F.R. § 1918.6(b)(1), (2) (1976), is enforceable under section 4(b)(2) of OSHA, which provides that the aforementioned longshoring hardhat standard and similar standards "shall be deemed to be occupational safety and health standards issued under this Chapter." 29 U.S.C. § 653(b)(2) (1970).

The evidence presented at trial established that, out of 225 longshoremen employed by the petitioners who were observed by the compliance officer, approximately 50 wore the required hardhats. 534 F.2d at 544 n.2.

7. Section 6(a) of OSHA empowers the Secretary of Labor to promulgate specific safety standards under the Act. 29 U.S.C. § 655(a) (1970).

8. 534 F.2d at 544. The Secretary cited petitioners for violation of section 5(a)(2) of OSHA, which provides that "each employer . . . shall comply with occupational safety and health standards promulgated under this Chapter." 29 U.S.C. § 654(a)(2) (1970). The monetary penalties assessed aggregated $455. 534 F.2d at 544 & n.3.

Although the Secretary of Labor is empowered to propose penalties in connection with violations of the provisions of OSHA, 29 U.S.C. § 659(a) (1970), section 17(i) provides that "the [Occupational Safety and Health Review] Commission shall have authority to assess all civil penalties provided in this section . . . ." *Id.* § 666(i).

Section 12(a) provides for the establishment of the Occupational Safety and Health Review Commission (Commission), a three-member tribunal appointed by the President to conduct hearings, via hearing examiners under its command pursuant to section 12(i) in the event that employers contest the charges of violation of OSHA proposed by the Secretary. *Id.* § 661(a), (i).

and ordered immediate abatement of the violations.[9] Claiming that opposition to the hard hat standard by the longshoremen and their union rendered its enforcement impossible, petitioners filed notices of contest,[10] which culminated in a hearing before an administrative law judge of the Occupational Safety and Health Review Commission (Commission).[11] The judge held petitioners in violation of the longshoring hardhat standard[12] but vacated the Secretary's proposed penalties.[13] Petitioners subsequently sought review by the Commission,[14] which affirmed the judge's decision.[15]

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9. 534 F.2d at 544.

10. *Id.* Section 10(a) provides that the employer has "fifteen working days within which to notify the Secretary that he wishes to contest the citation . . . ." 29 U.S.C. § 659(a) (1970).

11. 534 F.2d at 544. Section 10(c) provides that "the Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty . . . ." 29 U.S.C. § 659(c) (1970).

12. 534 F.2d at 545; *see* note 5 and accompanying text *supra.* Petitioners testified that, beginning in 1971, they had undertaken exhaustive but unsuccessful measures to obtain compliance with the standard by their employees. 534 F.2d at 545. Their efforts entailed furnishing the required headgear, encouraging their use at safety meetings, posting hardhat signs on the working premises, using payroll envelope stuffers advocating use of hardhats, and placing hardhat safety messages on the hiring tapes. *Id.* However, all attempts met with failure, and each employer witness testified that wildcat strikes would result from more strenuous efforts to enforce compliance, *e.g.,* firing employees who refused to wear a hardhat. *Id.* The evidence showed that in 1970 a wildcat strike resulted in the Port of New York over that very issue, and that in 1971 petitioners themselves had weathered an angry demonstration by longshoring foremen who objected violently to threats of dismissal for failure to comply. *Id.* at 545 n.4, 546 n.7. However, the petitioners presented no testimony to indicate that they had ever dismissed a longshoremen employee for failure to comply with the hardhat standard. *Id.* at 545. Petitioners therefore contended that, since their compliance was unattainable due to the unwavering opposition to the standard by the longshoremen employees, the Secretary's citations and proposed penalties should be abandoned and the standard declared infeasible. *Id.*

13. 534 F.2d at 545.

14. *Id.* Section 12(i) provides that "[t]he report of the hearing examiner shall become the final order of the Commission within thirty days . . . unless within such period any Commission member has directed that such report shall be reviewed by the Commission." 29 U.S.C. § 661(i) (1970).

15. 534 F.2d at 545. Of the three Commissioners who heard the appeal, Commissioners Cleary and Van Namee voted to affirm the decision by the administrative law judge, and Commissioner Moran dissented. *Id.* Each filed a separate opinion. Commissioners Moran and Van Namee agreed that the evidence tended to show that a work stoppage would occur if petitioners attempted to enforce the standard by dismissing recalcitrant employees. *Id.* at 546. However, while Commissioner Van Namee expressed his belief that the Commission itself was empowered under OSHA to issue cease and desist orders against employees, Chairman Moran disagreed as to the validity of these orders, concluding that the employers had fulfilled all requirements under OSHA. *Id.* On the other hand, Commissioner Cleary believed that the threat of wildcat strikes was "largely speculative," and that where, as in the instant case, employee noncompliance was neither unpredictable or sporadic, the employer had an absolute statutory obligation to enforce the applicable standard. *Id.*

On petition for review,[16] the United States Court of Appeals for the Third Circuit[17] affirmed the Commission's order,[18] *holding, inter alia,*[19] that the Secretary of Labor is empowered to command that an employer in the collective bargaining process bargain to retain the right to discipline employees for the wilful violation of reasonable safety standards which are feasible except for foreseeable employee resistance. *Atlantic & Gulf Stevedores, Inc. v. Occupational Safety & Health Review Commission,* 534 F.2d 541 (3d Cir. 1976).

Enacted in 1970, OSHA was designed to effectuate the express congressional intent "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."[20] To promote its primary objectives, the statute commands each employer to provide his employees with a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm."[21] In addition to this general duty clause, OSHA requires that employers and employees adhere to specific safety standards promulgated by the Secretary of Labor[22] by

16. Judicial review of an order of the Commission is provided for under section 11(a) of the Act. *See* 29 U.S.C. § 660(a) (1970).

17. The case was heard by Judges Forman, Gibbons, and Rosenn. Judge Gibbons wrote the opinion.

18. Specifically, the Third Circuit concluded that petitioners had failed to introduce evidence indicating that they had bargained in good faith for the requisite disciplinary privilege, actually discharged or disciplined employees or threatened to do so, petitioned the Secretary for a variance of the standard (*see* 29 U.S.C. § 655(d) (1970)), or requested an extension of the time within which compliance was to be attained (*see id.* § 659(c) (1970)). 534 F.2d at 555–56. Consequently, the court held that petitioners failed to establish the infeasibility of the challenged standard. *Id.* at 556.

19. In addition, the Third Circuit ruled that employers were not held to a higher standard of care under specific OSHA standards than under OSHA's general duty clause; that the validity of a specific safety standard may be determined by the Commission in an enforcement proceeding under section 11(a); that the Court of Appeals may also entertain challenges to the validity of a specific safety standard in an enforcement proceeding, as well as in a direct petition for review under section 6(f); that OSHA does not confer upon the Secretary of Labor or the Commission the power to sanction employees who fail to adhere to the terms of the Act; and that the reviewing court may, under certain circumstances, consider the fact of employee recalcitrance to determine if enforcement of the safety standard would prove inequitable, in which case enforcement could be denied or limited. 534 F.2d at 544–56.

20. 29 U.S.C. § 651 (1970). In this section Congress enunciated its determination that "personal injuries and illnesses arising out of work situations impose a substantive burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." *Id.* For discussions of OSHA, *see* Cohen, *OSHA and the Workplace Environment: An Unfulfilled Promise,* 27 N.Y.U. CONF. LAB. 213 (1974); Greenberg, *OSHA: More Headaches for the Building Industry,* 7 PUB. CONT. L.J. 106 (1975); Marinelli, *OSHA: The Right of a Worker to a Safe Work Place Environment,* 78 W. VA. L. REV. 57 (1975); Mullins, *OSHA — The Federal Government and Job Safety,* 11 ROCKY MTN. MIN. L. INST. 155 (1974); Comment, *The Occupational Safety and Health Act of 1970: An Overview,* 4 CUM.-SAM. L. REV. 525 (1974); Comment, *The Occupational Safety and Health Act of 1970: Its Role in Civil Litigation,* 28 SW. L.J. 999 (1970).

21. 29 U.S.C. § 654(a)(1) (1970).

22. Sections 5(a)(2) and 5(b) impose upon an employer a duty to comply with all safety and health standards promulgated under OSHA and with all rules, regulations, and orders issued pursuant to OSHA which apply to his own actions and conduct. *Id.* § 654(a)(2), (b). Section 2(b)(3) authorizes the Secretary to set mandatory occupational

providing that "employers and employees have separate but dependent responsibilities and rights with respect to achieving healthful working conditions."[23]

One issue which arose under these statutory provisions was the extent to which, and under what circumstances, an employer incurred liability for a violation of either the general duty clause of OSHA or a specific safety standard promulgated by the Secretary when such violation was a direct result of wilful employee noncompliance. In *National Realty Construction Co. v. Occupational Safety & Health Review Commission*,[24] in which an employer was charged with a violation of the general duty clause of OSHA[25] stemming from a reckless and fatal act by a company employee,[26] the District of Columbia Circuit held that the general duty clause of OSHA did not impose strict liability on employers but merely required the elimination of preventable hazards.[27] Consequently, the court reasoned, an employer could not be held liable for grave hazards arising as a result of "demented, suicidal, or wilfully reckless"[28] employee misconduct for which no "demonstrably feasible measures"[29] existed to materially reduce its likelihood. Such acts would be held to constitute "unpreventable"[30] hazardous conduct.[31] In

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safety and health standards applicable to businesses affecting interstate commerce. *Id.* § 651(b)(3). Procedures for the promulgation of these standards are established in section 6. *See id.* § 655.

23. *Id.* § 651(b)(2).

24. 489 F.2d 1257 (D.C. Cir. 1973).

25. *See* note 22 and accompanying text *supra*.

26. The employee, a foreman with the company, clung to the exterior of a front-end loader driven by a subordinate employee, contrary to a company policy prohibiting employees from riding on heavy equipment. The loader's engine stalled, the employee leaped off and was killed when the vehicle toppled over on him. 489 F.2d at 1262. The employee's supervisor testified at a hearing that loader riding was an extremely rare occurrence at *National Realty*, and that he had personally witnessed only four or five employees in the past two years riding on heavy equipment. *Id.*

27. The court maintained:

> Hazardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program . . . [or] if its elimination would require methods of hiring, training, monitoring or sanctioning workers which are either so untested or so expensive that safety experts would substantially concur in thinking the methods infeasible.

Id. at 1266.

28. *Id.*

29. *Id.* at 1267.

30. *Id.* It is interesting to note that the court was not totally convinced that the employee misconduct at issue constituted "unpreventable" conduct, since an incident involving a foreman's wilful noncompliance with a stringent company policy was indicative of a general laxity of enforcement. *Id.* at 1267 n.3. However, since the Secretary failed to introduce evidence concerning measures which *National Realty* could have taken to improve its safety policy, the court held that the Secretary failed to carry the burden of proof on this issue. *Id.* at 1267.

31. *Id.* at 1266–67. Other decisions support the conclusion espoused in *National Realty* that the general duty clause requires only the elimination of preventable hazards and does not impose strict liability on employers for the willful and unforeseeable conduct of employees. *E.g.*, Brennan v. Occupational Safety & Health Review Comm'n (Hanovia Lamp Div.), 502 F.2d 946 (3d Cir. 1974); *see* REA Express, Inc. v. Brennan, 495 F.2d 822 (2d Cir. 1974). This analysis has also been adopted in cases concerning violations of specific safety standards promulgated by the Secretary

Brennan v. Occupational Safety & Health Review Commission (Hanovia Lamp Division),[32] wherein a previously reliable employee apparently committed suicide,[33] the Third Circuit followed the reasoning of the District of Columbia Circuit in *National Realty* and remanded the case for a determination of whether the means suggested by the Secretary of Labor to prevent such occurrences were "demonstrably feasible."[34]

The lack of statutory guidance necessitated judicial disposition of another aspect of OSHA: whether in determining the validity of a given safety standard and the employer's duty to comply therewith, the Secretary has statutory authority to consider the economic impact upon an employer who was forced to comply with that standard. The Third Circuit, in *AFL-CIO v. Brennan*,[35] relying heavily upon the District of Columbia Circuit's decision in *AFL-CIO v. Hodgson*,[36] held that the Secretary could consider economic consequences in his "quasi-legislative standard setting."[37]

The principal case was the first decision to consider whether the Secretary could insist upon employer compliance with an occupational safety and health standard even though employer enforcement had resulted in predictable noncompliance and was likely to be resisted by wildcat strikes and work stoppages.[38] This case was also the first to raise the issue of whether the validity of a standard being imposed was subject to challenge and review in an enforcement proceeding, as opposed to the usual pre-

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of Labor under 29 U.S.C. § 655 (1970) and included in the ambit of OSHA under 29 U.S.C. § 651(3) (1970). *E.g.*, Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Comm'n, 528 F.2d 564 (5th Cir. 1976); Brennan v. Butler Lime & Cement Co., 520 F.2d 1011 (7th Cir. 1975); *see* Arkansas-Best Freight Sys., Inc. v. Occupational Safety & Health Review Comm'n, 529 F.2d 649 (8th Cir. 1976); Accu-Namics, Inc. v. Occupational Safety & Health Review Comm'n, 515 F.2d 823 (5th Cir. 1975).

32. 502 F.2d 946 (3d Cir. 1974).

33. In *Hanovia Lamp*, petitioner's employee, an experienced technician who had been employed by Hanovia Lamp for 21 years and who had possessed an accident-free record, apparently committed suicide by manipulating high voltage wires in such a manner as to constitute " 'a classic, fundamental, basic illustration as to what not to do, and it couldn't have been done better had you tried.' " *Id.* at 949, *quoting* Trial Transcript at 24.

34. 502 F.2d at 951–53. As in *National Realty*, the court was not convinced that the Secretary had met his burden of proof in establishing the feasibility of preventive measures. The case was remanded, however, because testimony of an expert witness at trial suggested that there was some evidence to support the Secretary's contention. *Id.* at 952.

35. 530 F.2d 109 (3d Cir. 1975).

36. 499 F.2d 467 (D.C. Cir. 1974). In *Hodgson*, the court determined that, although Congress anticipated substantial increases in production costs for employers who complied with specific safety standards, Congress did not intend the implementation of protective measures without regard to their economic impact. *Id.* at 477.

37. 530 F.2d at 123. The courts in *Brennan* and *Hodgson* referred to the amendment of section 6(b)(5), which authorized the Secretary to set *feasible* standards. *See* 29 U.S.C. § 655(b)(5) (1970). According to Senator Javits, the amendment's author, this was intended to require expressly the Secretary to consider the feasibility of proposed standards. S. REP. No. 1282, 91st Cong., 2d Sess. 58 (1970), The *Hodgson* court interpreted this to mean that "practical [economic] considerations can temper protective requirements." 499 F.2d at 477. The *Brennan* court adopted this construction. *See* 530 F.2d at 122–23.

38. 534 F.2d at 547; *see* notes 55–63 and accompanying text *infra*.

enforcement hearing.[39] The Third Circuit began its determination of whether petitioners were compelled to comply with the safety standard in question, notwithstanding employee resistance in the form of uniform and predictable work stoppages.[40] Although distinguishing the present case from *Hanovia Lamp*[41] on the ground that the latter case did not involve uniform and predictable employee conduct,[42] the present court nevertheless employed the test used in *Hanovia Lamp* and held that petitioners had available "demonstrably feasible measures"[43] which would reduce the incidence of such employee noncompliance — specifically, the decision not to employ those persons who would not comply.[44] However, the court acknowledged that economic repercussions should be considered in order to determine whether the "demonstrably feasible" means were so unreasonable as to render the safety standard invalid and thus unenforceable.[45]

Before examining the merits, the court considered whether it had jurisdiction to determine the validity of the safety standard.[46] The court noted that in the typical case, the validity was challenged in a pre-enforcement proceeding through a petition for review under section 6(f) of

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39. 534 F.2d at 548; *see* notes 45–51 and accompanying text *infra.*

40. 534 F.2d at 547. The court, pursuant to section 11(a), accepted the findings of Commissioners Van Namee and Moran that a massive work stoppage would likely result from attempted enforcement of the hardhat standard, in its belief that such a finding would be supported by substantial evidence on the record as a whole. *Id.* at 546, *citing* 29 U.S.C. § 660(a) (1970). Section 11(a) provides that the reviewing court is to accept the "findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole . . . ." 29 U.S.C. § 660(a) (1970).

41. 534 F.2d at 547, *citing* Brennan v. Occupational Safety & Health Review Comm'n (Hanovia Lamp Div.), 502 F.2d 946. For a discussion of *Hanovia Lamp, see* notes 32–34 and accompanying text *supra.*

42. 534 F.2d at 547. Furthermore, despite the Secretary's apparent position that a higher standard of employer care applied where, as here, the violation was of a specific safety standard rather than the general duty clause, as was the case in *National Realty* and *Hanovia Lamp,* the court declined to make any distinction on this basis. Thus, the court concluded, "the *Hanovia Lamp* standard governing employer responsibility applies, in our view, to [the longshoring hardhat standard] to the same extent as to the general duty clause." *Id.*

43. *Id., citing* Brennan v. Occupational Safety & Health Review Comm'n (Hanovia Lamp Div.), 502 F.2d 946, 952 (3d Cir. 1974); *see* notes 24–34 and accompanying text *supra.*

44. 534 F.2d at 547. The court maintained that a discussion of strict employer liability such as was present in *Hanovia Lamp* was inapplicable to the *Atlantic & Gulf* facts, since in the latter instance, demonstrably feasible measures were available. *Id.* However, the court declared that the proposition enunciated in *Hanovia Lamp,* that OSHA shall not be construed to impose unreasonable burdens on employers, applied with equal force to an *Atlantic & Gulf* situation. *Id.* at 547–48.

45. *Id.* at 548; *see* notes 35–37 and accompanying text *supra.* The court, in its discussion of the economic feasibility factor, relied upon its decision in AFL-CIO v. Brennan, 530 F.2d 109 (3d Cir. 1975). In *Brennan,* the court declared that economic feasibility of a specific safety standard was relevant in determining its validity. The court had reasoned that since an economically infeasible standard would likely be uniformly ignored, the burden of policing such a regulation would prove overwhelming. *Id.* at 122–23.

46. *See* 534 F.2d at 548–51.

OSHA,[47] whereas the present appeal was from a ruling by the Secretary of Labor in an enforcement proceeding under section 11(a).[48] Notwithstanding the differences between the two proceedings, the court considered the legislative history[49] and policy considerations[50] surrounding OSHA and held that the validity of a safety standard was determinable in the enforcement proceeding.[51] It thus followed that a court had similar power to determine the validity through a petition for review from an enforcement proceeding as well as from a pre-enforcement proceeding.[52] The court held, however, that the burden of proof as to validity differed in the two proceedings: whereas in a section 6(f) pre-enforcement proceeding the Secretary bore an affirmative burden to demonstrate the reasonableness of

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47. *Id.* at 548. Section 6(f) of the Act provides in pertinent part:

> Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States Court of Appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard . . . .

29 U.S.C. § 655(f) (1970).

48. 534 F.2d at 548, *citing* 29 U.S.C. § 660(a) (1970); *see* note 16 *supra.*

49. 534 F.2d at 548–50; *see* H.R. REP. NO. 1291, 91st Cong., 2d Sess. 47–52 (1970); S. REP. NO. 1282, 91st Cong., 2d Sess. 54–57 (1970). The Commission was created, according to the court, only to enhance the fairness of enforcement proceedings by segmenting executive and adjudicatory functions. 534 F.2d at 549; LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 982, 991, 999, 1014–15, 1050, 1058, 1070–71, 1074, 1090–91 (1971). Stating that there was no evidence in the legislative history "suggesting that the amendment curtailed in any way the nature and scope of inquiry at the administrative adjudicatory stage," the court concluded that section 11(a) allows the determination of validity at the enforcement proceeding. 534 F.2d at 549. Furthermore, the court recognized that Congress could "restrict review of administrative rule making to a particular forum and withhold from a sanctioning court the power to review the validity of the underlying rule when the specified forum had not been availed of." *Id.* at 550–51, *citing* Yakus v. United States, 321 U.S. 414 (1944), *and* Lockerty v. Phillips, 319 U.S. 182 (1943). Since Congress had not done so with regard to OSHA, the court argued, reviewability at the enforcement stage would be presumed allowed. 534 F.2d at 551.

50. 534 F.2d at 549–50. In support of its assertion that Congress did not intend to eliminate all challenges to a standard's validity that are not asserted within 60 days of the standard's effective date, the court relied upon two modes of analysis. *Id.* Although section 6(f) of the Act provides for pre-enforcement review of a challenged standard, the filing of a 6(f) petition for review will not operate to stay enforcement proceedings stemming from a violation of the standard prior to a judicial ruling on its validity. Therefore, the court reasoned, the Commission must be authorized to consider defenses of invalidity, lest it be reduced to "rubber-stamping" potentially invalid citations. *Id.* at 550.

In addition, the court asserted that a standard may prove economically or technologically infeasible only after the 60-day period for pre-enforcement review has elapsed, in which case the Commission would be the only forum available in which to plead the defense of invalidity. *Id.*

51. *Id.*

52. *Id.* at 551. The court further noted that "judicial review of the Commission's adjudicatory [decisions] is plenary . . . ." *Id.* at 550, *citing* Brennan v. Occupational Safety & Health Review Comm'n (Hanovia Lamp Div.), 502 F.2d 946 (3d Cir. 1974), *and* Budd Co. v. Occupational Safety & Health Review Comm'n, 513 F.2d 201 (3d Cir. 1975); *see* 29 U.S.C. § 660(a) (1970), which provides in pertinent part: "Upon such filing [of a petition for review], the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to [enter a] decree affirming, modifying, or setting aside in whole or in part, the order of the Commission . . . ." *Id.*

the promulgated standard,[53] the petitioning employer had the burden in an enforcement proceeding to prove as an affirmative defense that the standard as applied was "arbitrary, capricious, unreasonable, or contrary to law."[54]

Turning to the merits of the principal case, the court concluded that petitioners had met their burden of proof.[55] The court then considered the legal sufficiency of petitioners' defense.[56] Although acknowledging that neither the Secretary nor the Commission could issue cease and desist orders to the petitioners' *employees*,[57] the court concluded that the standard was nevertheless economically feasible, since the policy of OSHA was to place primary responsibility on the *employer*.[58] Furthermore, the court listed several alternatives open to the employer to enforce compliance: 1) to

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Further support for this conclusion, although apparently not relied on by the court, can be found in the Senate Report on OSHA which stated in pertinent part:

> Section 6(f) provides that any person who may be adversely affected by a standard may, within 60 days of its issuance, seek judicial review in an appropriate United States Court of Appeals. While this would be the exclusive method for obtaining pre-enforcement judicial review of a standard, the provision does not foreclose an employer from challenging the validity of a standard during an enforcement proceeding.

S. REP. NO. 1282, 91st Cong., 2d Sess. 8 (1970), *reprinted in* LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 148 (1971). For an analysis of OSHA's legislative history concerning the issue of review of standards within an enforcement proceeding, *see* Morey, *Mandatory Occupational Safety and Health Standards — Some Legal Problems,* 38 LAW & CONTEMP. PROB. 584, 596–99 (1974).

53. 534 F.2d at 551; *see* note 47 *supra*. To support this conclusion, the court looked to its prior holding in Synthetic Organic Chem. Mfr's Ass'n v. Brennan, 503 F.2d 1155 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975), which mandated that the section 11(e) requirement that the Secretary explain his actions, and the section 11(f) requirement that he proffer substantial evidence to support the validity of a challenged standard, be read together. *Id.*

54. 534 F.2d at 551–52. The court's conclusion was based in part on the fact that Congress intended to limit a validity challenge to some extent by providing for a 60-day limitation for which to bring such a challenge under section 6(f). *Id.*, *citing* 29 U.S.C. § 655(f); *see* note 47 *supra*.

55. 534 F.2d at 552.

56. *Id.*

57. 534 F.2d at 555. Despite the Secretary's express opinion that Commissioner Van Namee was incorrect and that the issue was not relevant to the appellate proceeding, *id.* at 552–53 & nn.14 & 15, the court believed it necessary to refute specifically the Commissioner's view that OSHA mandated the issuance of cease and desist orders directly to employees. *Id.* at 552–55. The Commissioner found support for this conclusion in section 2(b)(2), 29 U.S.C. § 651(b)(2) (imposing responsibilities and rights on employees to achieve safe working conditions) and in section 5(b), *id.* § 659(c) (admonishing employees to obey OSHA standards and acknowledging that employees' misconduct could be the basis of a violation). Notwithstanding these sections, the court examined sections 9(a) and 10(a), *id.* §§ 658(a), 659(a) (1970) (referring to the issuance of citations and notifications of proposed penalties only to employer), section 10(c), *id.* § 659(c) (allowing employee intervention in the contesting of a citation only after the employer has filed a notice of contest), and the legislative history pertinent to section 5(b), concluding that OSHA could be enforced only against employers. 534 F.2d at 555. There is no case support for Commissioner Van Namee's thesis and much opinion to the contrary. For a partial list of commentators who have agreed with the court's conclusion, *see* Greenberg, *supra* note 20, at 106; Morey, *supra* note 52, at 584; Silberman, *The Occupational Safety and Health Act: Major Policy Issues,* 23 LAB. L.J. 504, 508–09 (1972); Stender, *An OSHA Perspective and Prospective,* 26 LAB. L.J. 71, 75 (1975); Comment, *supra* note 20, at 1006.

58. 534 F.2d at 553.

discipline or discharge those employees who failed to comply;[59] 2) to bargain collectively for the right to discharge or discipline noncomplying employees;[60] 3) to petition the Secretary for a variance from the standard[61] or an extension of time within which to comply.[62] Because petitioners had failed to show that they did or attempted to do any of these alternatives,[63] the court held that as a matter of law, petitioners failed to establish the infeasibility of the hardhat standard, the standard was valid as applied, and the Secretary could enforce such standard.[64] The court therefore dismissed petitioners' petition for review.[65]

Factual distinctions between *Atlantic & Gulf* on the one hand, and *National Realty*[66] and *Hanovia Lamp*[67] on the other, as well as the procedural rather than doctrinal bases upon which those latter cases rest,[68] warranted the court's refusal to equate employees' wilful misconduct with unpreventable violations.[69] Considered in a vacuum, the suggested means of prevention — firing noncomplying employees — was "demonstrably feasible."[70]

The documented repercussions[71] likely to occur when such preventive measures are taken, however, and the court's insistence that employers pursue measures which, although likely futile, could nonetheless be employed, served to underscore the generally held view that employers — and employers only — will be accountable for OSHA violations.[72] It is submitted that the ways suggested by the court for an employer to establish

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59. *Id.* at 555.

60. *Id.* The court sought to underscore the effectiveness of this measure in deterring concerted employee work stoppages. It argued that since occupational safety and health would qualify as a subject of mandatory collective bargaining, the employer could insist upon the right to discharge or discipline obdurate employees without breaching its obligation to bargain in good faith, under the doctrine of NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952). 534 F.2d at 555. If a work stoppage nonetheless resulted, the court maintained, the presence of a no-strike or grievance-arbitration contractual provision would render injunctive relief available under Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). 534 F.2d at 555.

61. 534 F.2d at 555, *citing* 29 U.S.C. § 655(d) (1970).

62. 534 F.2d at 555, *citing* 29 U.S.C. § 659(c) (1970).

63. 534 F.2d at 555–56.

64. *Id.* at 556.

65. *Id.*

66. *See* notes 24–31 and accompanying text *supra.*

67. *See* notes 32–34 and accompanying text *supra.*

68. In both cases, the court based its conclusion on the fact that the Secretary did not meet his burden of proof. *See* notes 30 & 34 *supra.*

69. The court also presented persuasive arguments for its determination that it had jurisdiction to consider the validity of a safety standard in an enforcement proceeding. *See* notes 46–52 and accompanying text *supra.* There does not appear to be any authority to the contrary and at least one circuit has reached the same conclusion based solely on its interpretation of legislative history. *See* Arkansas-Best Freight Sys., Inc. v. Occupational Safety & Health Review Comm'n, 529 F.2d 649 (8th Cir. 1976). *See also* Brennan v. Occupational Safety & Health Review Comm'n (Santa Fe Transport Co.), 505 F.2d 869 (10th Cir. 1974); Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230 (5th Cir. 1974).

70. *See* notes 29, 34 & 40–45 and accompanying text *supra.*

71. *See* notes 12 & 40 *supra.*

72. *See* note 57 *supra.*

that the economically feasible steps had been taken to prevent violations[73] seem in this instance an exaltation of form over substance. It is unlikely that even if the petitioners had collectively bargained for the right to discharge or dismiss violating employees, or had sought a variance or an abatement from the Secretary, the longshoremen would have more readily donned their hardhats.[74] This emphasis on external affirmative acts may prove to be the legacy of *Atlantic & Gulf*; the case seems to propose that despite the apparent futility of an enforcement effort, such effort must be made before the Commission or a court will be persuaded that an employer has done all he can.[75]

A question remains concerning the role of OSHA in the collective bargaining process. The opinion is not clear as to whether an employer should bargain for his employees' generic compliance with OSHA, including applicable standards promulgated after the collective bargaining agreement is concluded, or whether the bargaining should be more specifically

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73. *See* notes 59–62 and accompanying text *supra*.

74. The employers were fearful of wildcat strikes and work stoppages, *i.e.*, activities not authorized by the union. It should be noted that the union's "lukewarm support" for the hardhat standard, 534 F.2d at 545, would not render the concerted acts of employees official. *See* W. Addition Community Org. v. NLRB, 485 F.2d 917, 926 (D.C. Cir. 1973); Western Contracting Corp. v. NLRB, 322 F.2d 893, 979 (10th Cir. 1963). Thus a collective bargaining agreement which specifically mentions employees' obligation to comply with OSHA would be no greater protection from employees' activities unsanctioned by the union.

If instead, official union action was anticipated, the specificity of the contract would again be of little significance. The opinion indicated that the existing contract contained a grievance-arbitration procedure. 534 F.2d at 546. This presumably was accompanied by a no-strike clause, but even were it not, "the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." Gateway Coal Co. v. UMW, 414 U.S. 368, 382 (1974). Since *Gateway Coal*, injunctions against strikes in violation of an express no-strike clause, first allowed in Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970), have also been permitted where the no-strike clause was implied. The applicability of a *Boys Markets* injunction would turn on whether discharge of an employee for violation of the hardhat standard was an arbitrable dispute. The principal court apparently presumed it would be. *See* 534 F.2d at 545 n.6. If the employees' duty to comply with OSHA were expressly incorporated into the contract along with a grievance-arbitration procedure and a no-strike clause, the remedies available to an employer upon an official strike would remain the same.

Alternatively, if the petitioners had taken the court's advice and sought a variance pursuant to 29 U.S.C. § 655(d) (1970), it is unlikely that they would have succeeded. Legislative history reveals that "[t]he economic implications of a standard for an employer are not to be considered in the determination as to whether a variance is to be allowed." LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 1201 (1971).

Given the reasons for the OSHA violations, it is doubtful that an extension of the time allowed for their abatement, pursuant to 29 U.S.C. § 659(c), would have enabled the petitioners to persuade the longshoremen to comply with the hardhat standard.

75. The court would probably not agree with the severity of this characterization of its holding. The court did state that it was authorized to "take into account the fact that employee intransigence in spite of employer's best efforts would make enforcement inequitable" and that "in such a case we could deny or limit enforcement." 534 F.2d at 555. Given the record of employer efforts to get the longshoremen to wear hardhats, *id.* at 545, it is submitted that this case might well have been a situation in which enforcement *was* inequitable.

concerned with existing standards for which employee recalcitrance is expected. The former possibility would appear to be departure from prior case law which considered an employer liable only for foreseeable employee misconduct.[76] If, on the other hand, *Atlantic & Gulf* is read to compel an employer to bargain only with respect to existing standards, the scope of its impact remains uncertain: to what extent must an employer have the means to foresee widespread employee disregard of a safety standard, and to what level must the risk of such potential employee recalcitrance rise before an employer will be bound to safeguard against such noncompliance at the collective bargaining table?

Atlantic & Gulf, therefore, represents a significant departure from the underlying philosophy enunciated in *National Realty* and other decisions that attempted to limit employer liability for OSHA violations resulting directly from wilful employee misconduct. Its effect will be to impose on employers a task usually assumed by labor — the obligation to place safety considerations on the collective bargaining table.[77]

Robert E. Greshes

LABOR LAW — UNION AFFILIATION VOTE RAISES QUESTION OF REPRESENTATION IF CHANGES IN UNION'S LOCUS OF POWER OR ECONOMIC OPTIONS RESULT.

NLRB v. Bernard Gloekler North East Co. (1976)

On October 25, 1972, an independent labor organization known as Employee Representatives (Representatives) voted without National Labor Relations Board (Board) supervision to affiliate with the preexisting United Auto Workers Local 1461 (UAW local).[1] Shortly after this vote, the UAW

76. Cape & Vineyard Divs. v. Occupational Safety & Health Review Comm'n, 512 F.2d 1148, 1152 (1st Cir. 1975).

77. There is a general presumption that occupational safety was of primary concern to employees and of interest to employers only to the extent that a good safety record affected an employer's insurance and workmen's compensation rates. *See, e.g.,* Cohen, *The Occupational Safety and Health Act: A Labor Lawyer's Overview,* 33 OHIO ST. L.J. 788, (1972); Comment *Occupational Safety: A New Dimension in Labor-Management Relations,* 25 SYRACUSE L. REV. 838 (1974); FEDERAL EMPLOYMENT SERVICE, JOB SAFETY AND HEALTH § 9.25 (1976).

1. NLRB v. Bernard Gloekler N. E. Co., 540 F.2d 197, 198 (3d Cir. 1976). This vote followed two earlier attempts by Dominic Cassesa, an international representative of the UAW, to enable the employees of Bernard Gloekler North East Company to join the UAW. *Id.* In February 1972, Cassesa filed a charge with the Board's Regional Director alleging that the company had violated Section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. § 158(a)(2) (1970), by dominating and interfering with the organization and administration of representatives. 540 F.2d at 198. The Regional Director found no evidence to support this charge, and his determination was upheld

local informed respondent Bernard Gloekler North East Company (Gloekler) that an existing collective bargaining agreement between Representatives and Gloekler would be honored.[2] Gloekler refused to recognize the UAW local, insisting that Representatives was the bargaining agent of the employees.[3] The UAW local filed charges of unfair labor practices against Gloekler before an Administrative Law Judge (ALJ), who found violations of sections 8(a)(1)[4] and 8(a)(5)[5] of the National Labor Relations Act (Act).[6] The ALJ concluded, however, that since the UAW local was succeeded by Representatives as of the February 24, 1973, disaffiliation vote, no order was necessary to remedy these violations.[7] The Board disagreed with the ALJ's recommendation ordering Gloekler to recognize and bargain with the UAW local.[8] Upon Gloekler's refusal to comply with the order, the Board petitioned for enforcement.[9] The United States Court of Appeals for the Third Circuit[10] refused to enforce the Board's order, *holding* that because of changes in the union's locus of power and in its economic options, Gloekler had no duty to bargain with the UAW local since the affiliation vote of October 25 raised a question of representation. *NLRB v. Bernard Gloekler North East Co.*, 540 F.2d 197 (3d Cir. 1976).

The policy underlying the National Labor Relations Act[11] is the promotion of industrial peace through negotiation between employers and the accredited representative of a group of employees.[12] To encourage this

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when appealed to the Office of the General Counsel. *Id.* Cassesa then petitioned the Regional Director for a certification election to determine the exclusive bargaining agent for the Gloekler employees, but the contract bar rule prevented the Board from acting affirmatively upon the petition. *Id.*; *see* notes 19 & 20 and accompanying text *infra*.

2. Bernard Gloekler N. E. Co., 217 N.L.R.B. 626 (1975).

3. *Id.* Thereafter, on February 24, 1973, the employees voted to disaffiliate with the UAW local in order to negotiate through the Bernard Gloekler Committed, an organization which was identical to the former Representatives. *Id.*

4. 29 U.S.C. § 158(a)(1) (1970). This section provides: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . ." *Id.* Section 157 grants to employees the right to organize and bargain collectively through representatives of their own choosing. *See id.* § 157.

5. *Id.* § 158(a)(5) (1970). This section provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." *Id.*

6. 217 N.L.R.B. at 626.

7. *Id.*

8. *Id.* at 628.

9. NLRB v. Bernard Gloekler N. E. Co., 540 F.2d 197 (3d Cir. 1976).

10. The case was heard by Judges Biggs, Gibbons, and Hunter. Judge Biggs wrote the opinion of the court.

11. 29 U.S.C. §§ 141–187 (1970).

12. *Id.* § 151. Section 151 provides in pertinent part:

> The denial by some employers of the right of the employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife and unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . . .
>
> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . . .

Id.

system of collective bargaining, the Act requires the employer to bargain in good faith with the representative selected by a majority of the employees in an appropriate bargaining unit.[13] A tension sometimes arises between the aim of industrial stability and the Act's policy of majority representation[14] since frequent changes in the designated bargaining representative, even if reflective of employee sentiment, would disrupt the employer-employee relationship.[15]

The conflict between these opposing statutory goals has resulted in the Board's adoption of a set of rules which places certain restrictions on employees' free choice by limiting the frequency of representational challenges in order to promote stability in bargaining relationships.[16] Under ordinary circumstances, an election petition filed within twelve months of a union's certification[17] by the Board as the exclusive bargaining representative of a unit of employees is deemed untimely.[18] Similarly, when a union

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13. *Id.* §§ 158(a)(5), 159(a). For the text of section 158(a)(5), *see* note 5 *supra.* The duty to bargain collectively must be read in conjunction with section 158(d) of the Act. This section defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." 29 U.S.C. § 158(d) (1970). The Board must decide on "the unit appropriate for the purposes of collective bargaining." *Id.* § 159(b); *see* Cox, *The Duty to Bargain in Good Faith,* 71 HARV. L. REV. 1401, 1403 (1958), wherein the author suggests that the duty to bargain in good faith may lead to government regulation of the collective bargaining process.

14. *See* Cushman, *The Duration of Certifications by the National Labor Relations Board and the Doctrine of Administrative Stability,* 45 MICH. L. REV. 1, 37-38 (1946).

15. *See* Note, *The Bargaining Obligations of Successor Employers,* 88 HARV. L. REV. 759, 761 (1975). For example, an employer might use delaying tactics in the hope that the union's majority would dissipate. *See* Brooks v. NLRB, 348 U.S. 96, 100 (1954).

16. R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING ch. 4, § 7 (1976). For a recapitulation of these rules, *see* Brooks v. NLRB, 348 U.S. 96, 98-99 (1954). *See also* 29 U.S.C. § 159(c)(1) (1970). For the text of this section, *see* note 20 *infra.*

17. A board certification has been defined as "a statement of fact that the union has been designated by a majority of the employees in an appropriate unit as their bargaining representatives and that it is the exclusive bargaining representative of all the employees in such unit." *Hearings before the Special Committee to Investigate Executive Agencies on the War Labor Board and the National Labor Relations Board,* 79th Cong., 1st Sess. 1222 (1945). For a discussion of the certifications bar's contribution to the doctrine of administrative stability, *see* Cushman, *supra* note 13.

18. This denial is known as a "certification bar." *See, e.g.,* Brooks v. NLRB, 348 U.S. 96 (1954). In *Brooks,* the Supreme Court held that "the Board's view that the one-year period [during which an election petition should be dismissed] should run from the date of certification rather than the date of election seems within the allowable area of the Board's discretion . . . ." *Id.* at 104. Under ordinary circumstances, the certification will be valid for a reasonable period of time — usually about one year. Kimberly-Clark Corp., 61 N.L.R.B. 90, 92 (1945). Unusual circumstances have been found in three situations. *See* Brooks v. NLRB, 348 U.S. 96, 98-99 (1954). The first instance existed when a certified union had become defunct. *See, e.g.,* Public Serv. Elec. & Gas Co., 59 N.L.R.B. 325 (1944). The second situation arose upon a transfer of affiliation as a result of a schism. *See, e.g.,* Brightwater Paper Co., 54 N.L.R.B. 1102 (1944). The *Gloekler* court commented that "in our case, there has been no serious allegation of schism." 540 F.2d at 203 n.10. The third unusual circumstance occured when the size of the bargaining unit fluctuated radically within a short time. *See, e.g.,* Westinghouse Elec. & Mfg. Co., 38 N.L.R.B. 404, 409 (1942).

has acquired representative status through voluntary recognition by the employer, the recognition bar rule prevents challenges to the union for a "reasonable time."[19] An even greater limitation upon the employees' freedom of choice is the contract bar rule, under which the Board may dismiss as untimely an election petition filed during the term of an existing collective bargaining agreement of reasonable duration.[20]

The Board has express authority under section 9(c)(1) of the Act to certify a union as the bargaining representative of the employees.[21] Although there are no specific provisions in the Act relating to amendment of certification, the Board has held, with Supreme Court approval,[22] that its express authority to issue certifications under section 9(c)(1) implies an authority to police its certifications by amendment or clarification in order to effectuate the policies of the Act.[23] The filing of a petition under section 9(b)[24] of the Act is the accepted method of instituting amendment of certification procedures,[25] and the Board's contract bar rule does not apply to such an amendment.[26] Strict limitations have been placed upon the amendment of certification procedure because it was not intended to substitute for other procedures provided by the Act.[27] Petitions involving a mere name change present no problem and are often handled by stipulation of the parties.[28] However, when the amendment involves a change in the

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19. *See, e.g.*, NLRB v. Cyauga Crushed Stone, Inc. 474 F.2d Cir. 1970); Freeman Co., 194 N.L.R.B. 595, 598 (1971), *rev'd in part sub nom.*, NLRB v. Freeman Co., 471 F.2d 708 (8th Cir. 1972).

20. *See, e.g.*, General Cable Corp., 139 N.L.R.B. 1123 (1962); American Seating Co., 106 N.L.R.B. 250 (1953). For a discussion of the contract bar doctrine before *American Seating, see* Note, *Change of Status of a Party to a Collective Labor Agreement*, 60 YALE L.J. 1026, 1033–36 (1951).

21. 29 U.S.C. § 159(c)(1) (1970). This section states in pertinent part: "If the Board finds upon the record . . . that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." *Id.*

22. *See* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964), in which the Court stated that "the unions . . . might petition the Board under § 9(c)(1) to obtain a clarification of the certificates they already have from the Board; and the employer might do the same." *Id.* at 267.

23. Bell Tel. Co., 118 N.L.R.B. 371, 373 (1957); *accord*, Daily Press, Inc., 110 N.L.R.B. 573 (1954); Amperex Elec. Corp., 109 N.L.R.B. 353 (1954); United Aircraft Corp., 108 N.L.R.B. 52 (1954).

24. 29 U.S.C. § 159(b) (1970). This section provides in part that "[t]he Board shall decide in each case . . . , in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining . . . ." *Id.*

25. *See* NLRB R. & Reg., 29 C.F.R. § 102.60(b) (1976).

26. East Dayton Tool & Die Co., 190 N.L.R.B. 577, 579 (1971); *see* Hamilton Tool Co., 190 N.L.R.B. 571 (1971); A.O. Smith Corp., 166 N.L.R.B. 845 (1967); Westinghouse Elec. Corp., 162 N.L.R.B. 768 (1967).

27. *See* Gulf Oil Corp., 135 N.L.R.B. 184 (1962). The Board held that "[t]he Act and the Board's policy . . . require that [a question concerning representation] be determined through a petition and secret ballot of the employees concerned." *Id.* at 185 (footnote omitted); *accord*, R.M. Hollingshead Corp., 111 N.L.R.B. 840 (1955); Weatherhead Co., 106 N.L.R.B. 1266 (1953); Wagner Elec. Corp., 91 N.L.R.B. 220 (1950).

28. *See e.g.*, Wisconsin Elec. Power Co., 145 N.L.R.B. 260, 262 & n.6 (1963). For a discussion of amendment and clarification procedures, *see* Goske, *Clarifications of Bargaining Units and Amendments to Certifications*, 1968 WIS. L. REV. 988.

affiliation, function, or structure of the bargaining agent, the petition must be dismissed if it[29] raises a "question concerning representation."[30] This rule is also determinative of the employer's continuing obligation to bargain. The Board's

> test of survival of bargaining obligation in each case is whether the successor organization continues to constitute . . . the "representative[s] of [the employees'] own choosing." (Section 7 of the Act.) The industrial stability sought by the Act would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship.[31]

Under this approach, the Board has focused upon such factors as the representation of the same unit of employees by the new union,[32] the results of an affiliation election,[33] the continuation of the same officers,[34] the certified union's opposition to amendment,[35] and the continuation of the collective bargaining agreement.[36] The Board advocates that "[e]mployees, seeking to secure more effective and economical representation, may combine to form a larger and more potent labor organization."[37] Consistent with the Board's approach, the courts have conditioned enforcement of a Board order amending certification upon a finding that the "new union [is] a continuation of the old union — [rather than] a substantially different organization."[38] The courts have sought, as has the Board, to ensure against "a substantial *departure from the rights and duties of the local's members* and their officers."[39]

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29. *See* Crucible Steel Casting, 162 N.L.R.B. 1513 (1967); General Elec. Co., 160 N.L.R.B. 504 (1966); Beaunit Fibers, Inc., 153 N.L.R.B. 987 (1965).

30. A question concerning representation exists when a labor organization (or individual) seeks recognition as the bargaining agent of the employees and the employer declines to recognize it. THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 153–54 (C. Morris ed. 1971).

31. Canton Sign Co., 174 N.L.R.B. 906, 908–09 (1969), *enf. denied on other grounds,* 457 F.2d 832 (6th Cir. 1972).

32. *See* 174 N.L.R.B. at 908.

33. *See* East Dayton Tool & Die Co., 190 N.L.R.B. 577 (1971).

34. *See* Equipment Mfg., Inc., 174 N.L.R.B. 19 (1969).

35. *See* Missouri Beef Packers, Inc., 175 N.L.R.B. 1100 (1969).

36. *See* Prudential Ins. Co., 106 N.L.R.B. 237 (1953).

37. Canton Sign Co., 174 N.L.R.B. 906, 908 (1969), *enf. denied on other grounds,* 457 F.2d 832 (6th Cir. 1972).

38. Carpinteria Lemon Ass'n v. NLRB, 240 F.2d 554, 557 (9th Cir. 1956) (citation omitted), *cert. denied* 354 U.S. 909 (1957); *accord,* NLRB v. Commercial Letter, Inc., 496 F.2d 35, 39 (8th Cir. 1974); NLRB v. Hershey Chocolate Corp., 297 F.2d 286 (3d Cir. 1961); NLRB v. Harris-Woodson Co., 179 F.2d 720 (4th Cir. 1950); Continental Oil Co. v. NLRB, 113 F.2d 473 (10th Cir. 1940), *modified and remanded,* 313 U.S. 212 (1941).

39. American Bridge Div., United States Steel Corp. v. NLRB, 457 F.2d 660, 664 (3d Cir. 1972) (emphasis added), *accord,* Retail Store Employees v. NLRB, 528 F.2d 1225 (9th Cir. 1975). For examples of cases where the courts have used the continuity of representation reasoning in concluding that there was no "substantial departure," *see* NLRB v. Pearl Bookbinding Co., 517 F.2d 1108 (1st Cir. 1975); NLRB v. Newspapers, Inc., 515 F.2d 334 (5th Cir. 1975); NLRB v. Commercial Letter, Inc., 496 F.2d 35 (8th Cir. 1974).

The *Gloekler* court's analysis examined the criteria relevant to determine whether the affiliation vote raised a question of representation.[40] Despite the absence of a certified union, the Third Circuit found that the policy considerations raised by the case at bar were identical to those in an amendment situation and therefore that amendment precedent should be examined for guidance.[41] Specifically, the court cited *American Bridge Division, U.S. Steel Corp. v. NLRB*,[42] where a certified independent union had sought affiliation with the United Steelworkers of America (USW).[43] In *American Bridge*, the Third Circuit had refused to enforce an order issued by the Board against the employer for failing to bargain with the USW, reasoning that the transfer of important powers to the officers of the USW International might raise serious discontent among the employees because the USW International was responsible for the interests of its 1,120,000 members rather than solely for the interests of the original independent union members.[44] The *Gloekler* court found such reasoning persuasive, noting that the employer in the instant case "would be facing a markedly different contractual partner if the UAW were to represent the employees."[45]

Although the *Gloekler* court framed the issue in the traditional context of whether the "record contained substantial evidence to support a finding of continuity of the same representation,"[46] the court extended the conventional inquiry from mere consideration of the union's locus of power to an examination of its economic options.[47] The *Gloekler* court stressed the prior existence of the UAW local, indicating that the affiliation would substantially alter the union's locus of power.[48] As examples of this change, the court observed that the UAW would exercise substantial authority over the grievance procedure[49] and "the employees' power to strike would be

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40. 540 F.2d at 198.

41. *Id.* at 201. Judge Biggs stated that the Board never addressed the issue of how the representation of the UAW local might differ from that of Representatives. *Id.* at 200. At the hearing before the ALJ, Gloekler had attempted to introduce evidence pertaining to the nature of the representation provided by the UAW local and the international UAW. *Id.* at 199. This evidence was excluded as irrelevant. *Id.* at 200. The Board never addressed Gloekler's specific objections to these exclusions. *Id.*

42. 457 F.2d 660 (3d Cir. 1972).

43. *Id.* at 662–63.

44. *Id.* at 664.

45. 540 F.2d at 201. In arriving at this determination, the court found the material excluded by the ALJ to be relevant. *Id. See* notes 48 & 49 and accompanying text *infra*.

46. 540 F.2d at 200. Such a factual determination is initially made by the Board, and the court is precluded by statute from reexamining the decision if it is supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e) (1970); *see* NLRB v. Commercial Letter, Inc., 496 F.2d 35, 39 (8th Cir. 1974); Universal Camera Corp. v. NLRB, 340 U.S. 474, 487–88 (1951).

47. *See* 540 F.2d at 201–03.

48. *Id.* at 202.

49. *Id.* The material excluded from the hearing before the ALJ indicated that several provisions regarding the resolution of employee grievances were included in the UAW local's bylaws. *Id.* at 199. Article 19 of these bylaws directed the UAW local's executive board to "assess the 'validity' of cases which [appeared] to require arbitration. Article 12 define[d] requirements for shop officers within the UAW local." *Id.* The UAW local's executive board was permitted by article 6 to act for the

removed by the UAW's international constitution."[50] Further, the economic power of Gloekler's employees might be augmented by the membership and resources of the UAW, which could be used to support the employees during a strike.[51] Thus, Gloekler would be dealing with a union with significantly different economic options.[52] As a result of this change in the employees' economic options and in the locus of power, the Third Circuit held that the attempted affiliation was actually a "palpable change of representation," relieving Gloekler of its obligation to bargain.[53]

To the extent that the *Gloekler* court relied on the determination that the locus of power would be altered, it remained consistent with the Board's position,[54] with other circuit court decisions,[55] and with its own *American Bridge* decision,[56] in examining the continuity of representation from the employees' perspective.[57] However, the court departed from traditional analysis and placed more emphasis on the perspective of the employer[58] when it shifted its focus to the potential change in the local's economic options.[59] Writing for the court, Judge Biggs found a question of representation arising not because of the absence of a continuity of representation but because Gloekler "would be facing a *markedly different contractual partner*."[60] This new criteria advanced by the *Gloekler* court may upset the balance sought by the Board between the Act's twin statutory goals —

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membership when urgent business so required. *Id.* The court also concluded that the UAW bylaws could affect the autonomy of the employee grievance committee which had been designated by name in the terms of the collective bargaining agreement. *Id.* at 202.

50. *Id.* Article 50, section 4 of the excluded UAW constitution required the assent of the executive board or the president of the international before a local could call a strike. *Id.* at 200. Article 50, section 8 authorized the executive board to call a strike by a two-thirds vote when the existence of the international was at stake, subject to the approval of the entire membership. *Id.*

51. *Id.* at 201-02. The court observed that in the past the UAW international had aided the UAW local with strike benefits. *Id.* at 202.

52. *Id.*

53. *Id.* The court concluded its analysis by distinguishing its earlier decision in NLRB v. Hershey Chocolate Corp., 297 F.2d 286 (3d Cir. 1961), in which the Third Circuit had permitted a local of one international union to enforce a clause in an existing contract after the union had disaffiliated and joined a new international. 540 F.2d at 203. The *Gloekler* court perceived no threat in *Hershey Chocolate* to the preservation of "industrial stability under existing contracts" since the employer had not objected to the change in the local's affiliation. *Id.* Therefore, any change in the local's economic options or in its locus of power was unimportant, rendering the *Hershey Chocolate* case inapposite to the instant case. *Id.*

54. *See* text accompanying notes 31-36 *supra.*

55. *See* text accompanying notes 37 & 38 *supra.*

56. *See* text accompanying notes 41-43 *supra.*

57. Even the Third Circuit had previously focused upon the rights of a union's members. *See* note 38 and accompanying text *supra.*

58. The court's inquiry into the UAW local's economic options was beneficial to Gloekler because, by preventing a change in the local's economic options, the court had substantially frozen the bargaining power of the local for the duration of the collective bargaining agreement.

59. *See* notes 50 & 51 and accompanying text *supra.*

60. 540 F.2d at 201 (emphasis added). In the context of the opinion, it is somewhat unclear whether both increased economic options *and* transfer of power need be present for a finding of a "markedly different contractual partner." *See Id.* at 201-02.

industrial stability and majority representation — by further restricting employees' free choice[61] when a union's economic position is enhanced, despite the continuity of the same representation.

Furthermore, the *Gloekler* court's use of *American Bridge* as support for its decision[62] is misleading when applied to the economic options analysis. The *American Bridge* court did stress the significance of the change in size when a small local associates with an international organization of over one million members.[63] However, the increase in size supported the court's finding of a "change in the fulcrum of union control and representation,"[64] rather than as may be implied from *Gloekler,* a finding that the increase in size enhanced the union's economic position vis-à-vis the employer.[65]

To the extent that the *Gloekler* court considered the "fulcrum of union control and representation,"[66] it is in accord with the traditional procedure of simply determining the existence of a continuity of representation.[67] However, the extension of the court's inquiry into a union's economic options may tend to undermine what the Third Circuit has acknowledged to be "the overriding policy of the Act . . . in favor of the interest in employees to be represented by a representative of their own choosing for the purposes of collective bargaining."[68]

The undermining of this policy may be limited if the Third Circuit restricts *Gloekler* to situations in which the prospective union would alter the locus of power *and* reinforce the employees' economic position.[69] However, since the Third Circuit could have easily avoided its discussion of different economic options by restriciting itself solely to the traditional analysis,[70] the court may be implying that an employer can refuse to bargain solely because a union has increased its economic strength through affiliation.[71] At the very least, *Gloekler* announces the Third Circuit's deemphasis of the Board's decision in *Canton Sign Company,*[72] reserving to employees the unfettered right to "combine to form a larger and more potent labor organization."[73]

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61. *See* notes 15–19 & 26 and accompanying text *supra.*
62. 540 F.2d at 201.
63. 457 F.2d at 664.
64. *Id.*
65. *See* 540 F.2d at 201.
66. *Id.* at 202.
67. *See* notes 30–38 and accompanying text *supra.*
68. NLRB v. Western & S. Life Ins. Co., 391 F.2d 119, 123 (3d Cir.), *cert. denied,* 393 U.S. 978 (1968).
69. However, such an analysis might have significantly increased Gloekler's burden by requiring it to prove both a change in the union's economic options *and* its locus of power in order to sever his bargaining obligation.
70. The court did conclude that the affiliation changed the union's locus of power. *Id.* at 202.
71. *See* text accompanying note 60 *supra.* This conclusion is supported by the court's discussion of *Hershey Chocolate,* distinguished because "[a]ny change in the local's economic options *or* in its locus of power was not of importance. . . ." 540 F.2d at 203 (emphasis added).
72. 174 N.L.R.B. 906 (1969), *enf. denied on other grounds,* 457 F.2d 832 (6th Cir. 1972).
73. *Id.* at 908; *see* note 36 and accompanying text *supra.*

LABOR LAW — INJUNCTIONS — A PROSPECTIVE *Boys Markets* INJUNCTION MAY PROHIBIT ONLY VIOLATIONS LIKELY TO OCCUR AND MUST SPECIFY STEPS TO BE TAKEN TO AVOID VIOLATIONS.

United States Steel Corp. v. UMW (1976)

After members of Local 1248 of the United Mine Workers of America (Local) staged a number of short-lived wildcat strikes[1] at United States Steel Corporation's (U.S. Steel) mining complex in Washington County, Pennsylvania,[2] U.S. Steel brought suit against the United Mine Workers of America (UMW), District No. 5 of the UMW (District), and the Local (collectively, the unions) seeking a preliminary injunction prohibiting future work stoppages by members of the Local.[3] The United States District Court for the Western District of Pennsylvania issued the injunction, framing it in the language of the collective bargaining agreement then in effect between the UMW and the mine operators.[4] On appeal,[5] the United States Court of Appeals for the Third Circuit[6] vacated the injunction order and remanded the case to the

1. A wildcat strike is a strike unauthorized by proper union procedure. *See* Campbell v. Jones & Laughlin Steel Corp., 70 F. Supp. 996, 1002 (W.D. Pa. 1947).

2. United States Steel Corp. v. UMW, 534 F.2d 1063, 1067–68 (3d Cir. 1976). The work stoppages that precipitated the order occurred between February 12, 1975, and February 25, 1975. They concerned the union members' demand for a permanent security guard in the complex's parking lot, a refusal to work with a fellow member who had crossed a picket line during a previous work stoppage, and a dispute over a member's job assignment. *Id.*

3. United States Steel Corp. v. UMW, 393 F. Supp. 936 (W.D. Pa. 1975). The district court had granted U.S. Steel's requests for temporary restraining orders in separate actions after each strike had begun. In the first, union members returned to their jobs only after the district court found the local in contempt and imposed a conditional fine, which was suspended when the members returned to work. 534 F.2d at 1067–68.

In each action, U.S. Steel proceeded under section 301 of the Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 185(a) (1970). Section 301 provides: "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or . . . the citizenship of the parties." *Id.* The applicability of this section to actions by an employer to end an unauthorized strike by a union was established by *Boys Markets v. Retail Clerks Local 770*, 398 U.S. 235 (1970), *noted in* 16 VILL. L. REV. 176 (1970). For discussion of this case, *see* notes 23 & 24 and accompanying text *infra*.

4. The district court's order provided in relevant part:

> 1. [A] Preliminary Injunction is hereby issued enjoining the defendants . . . from
>
> (a) Engaging in a strike or work stoppage . . . or
>
> (b) Picketing or in any other manner interfering with operations at the plaintiff's Maple Creek Mine located in Washington County, Pennsylvania, because of any difference concerning the meaning and application of the provisions of the Agreement or any difference about matters not specifically mentioned in the Agreement or because of any local trouble of any kind arising at the mine.

393 F. Supp. at 941.

5. Two separate work stoppages, occurring respectively on February 12 and February 24, 1975, were enjoined by the district court in two separate actions brought by U.S. Steel on those dates. The Third Circuit consolidated the two cases in a single appeal. 534 F.2d at 1066 n.2.

6. The case was heard by Chief Judge Seitz and Judges Rosenn and Gibbons. Judge Gibbons delivered the opinion for the court, and Judge Rosenn concurred in a

district court, *holding, inter alia,*[7] that although a prospective injunction could properly issue against the unions, the particular injunction issued was both overbroad and insufficiently specific.[8] *United States Steel Corp. v. UMW,* 534 F.2d 1063 (3d Cir.), *rehearing denied,*[9] 534 F.2d 1084 (3d Cir. 1976).

In order to aid nascent labor unions, Congress in 1932 passed the Norris-LaGuardia Act,[10] which prohibited federal courts from enjoining certain conduct of labor unions.[11] Subsequently, in response to significant increases in union power, Congress passed the Labor Management Relations Act (Taft-Hartley Act),[12] which restored to federal courts some of

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separate opinion. Chief Judge Seitz concurred in part and dissented in part, also in a separate opinion.

7. The court also found the injunction defective because it did not order the plaintiff-employer to arbitrate the disputes as a condition to injunctive relief. Such a direction, the Third Circuit noted, has been required by the United States Supreme Court. 534 F.2d at 1078, *citing* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970), *quoting* Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 228 (Brennan, J., dissenting). The Third Circuit held that "[i]f the court orders a prospective injunction such as United States Steel here seeks, it should include an order directing compliance with the settlement of disputes clause at least as broad, and for the same period, as the injunction." 534 F.2d at 1079.

8. 534 F.2d at 1078. The district court's order was found to be overbroad because it went further than seemed to be necessary from the pattern of violations. *Id.* at 1077.

The Third Circuit agreed with defendants' notice-vagueness objection under Federal Rule of Civil Procedure 65(d), emphasizing that "any prospective injunctive decree must tell the local what steps it must take to prevent illegal work stoppages from recurring and must tell the parent organization what prophylactic steps it must take to assure that the local fulfills its contractual obligation." *Id.* at 1078.

9. The Third Circuit, although conceding that "in banc consideration ordinarily would be appropriate," nonetheless denied defendants' petition for rehearing, stating that only the Supreme Court could resolve the conflict among the circuits with respect to "the application of the federal law of labor arbitration to the same national labor contract." *Id.* at 1084–85. The court noted that a petition for certiorari had been filed seeking review of United States Steel Corp. v. UMW, 519 F.2d 1236 (5th Cir. 1975), and declared that rehearing en banc might hinder such considerations. 534 F.2d at 1078. The Supreme Court, however, eventually denied the petition. United States Steel Corp. v. UMW, 96 S. Ct. 3221 (1976).

10. 29 U.S.C. §§ 101–115 (1970).

11. In the early 20th century, employers frequently obtained broadly worded injunctions prohibiting most union organizing activities. *See* Boys Markets v. Retail Clerks Local 770, 398 U.S. 235, 250 (1970); F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930). The Norris-LaGuardia Act provides in 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 . . .
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> . . .
>
> (d) By all lawful means aiding any person participating in or interested in any labor dispute who is being proceeded against in . . . any action or suit in any court of the United States or of any State;
>
> . . .
>
> (f) Assembling peacefully to act or to organize to act in promotion of their interests in a labor dispute; . . .

29 U.S.C. § 104 (1970).

12. 29 U.S.C. §§ 141–187 (1970).

the jurisdiction eliminated by the Norris-LaGuardia Act.[13] Through the judiciary, a national labor policy gradually developed favoring the quick and peaceful settlement of labor disputes through arbitration.[14] In *Sinclair Refining Co. v. Atkinson*,[15] however, the Supreme Court emphasized that section 301 of the Taft-Hartley Act had not impliedly repealed the Norris-LaGuardia Act's prohibition of labor injunctions, even where the operative bargaining agreement contained a compulsory arbitration clause.[16] Subsequent decisions, leading to similarly anomalous results,[17] compelled the

13. As the national economy changed from that of the Depression to the postwar boom of the late 1940's, the Republican-controlled 80th Congress became concerned over the rapidly increasing number of strikes called by unions in major industries. Comment, *The Return of the Strike Injunction*, 51 B.U. L. REV. 665, 666 (1971). The Taft-Hartley Act was passed over President Truman's veto. 20 L.R.R.M. 22 (1947). It allows injunctions to issue prohibiting certain "unfair" labor practices.

14. In Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), the Supreme Court affirmed the entry of an order requiring an employer to arbitrate certain grievances as provided in the collective bargaining agreement between the employer and the union. The Court relied on section 301 of the Taft Hartley Act (*see* note 3 *supra*) to express its view of what the federal labor policy should be. The Court explained:

> Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of *or against* labor organizations and that industrial peace can be best obtained only in that way.

353 U.S. at 455 (emphasis added).

Three years later, in United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960), and United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960), popularly known as the *Steelworkers Trilogy*, the Court found that "[t]he present federal policy is to promote industrial stabilization through the collective bargaining agreement." 363 U.S. at 578, *citing* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456–57 (1957). In the Court's view, arbitration was to be "[a] major factor in achieving industrial peace. . . ." 363 U.S. at 578. The Court made it clear that "[a]n 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." *Id.* at 582. *See generally* Comment, *The Return of the Strike Injunction*, 51 B.U. L. REV. 664, 667 (1971) (discussing suggested limitations on the coverage of injunctions prohibiting work stoppages violative of the operative collective bargaining agreement, popularly known as *Boys Markets* injunctions). For additional discussion of the permissible breadth of such injunctions, *see The Supreme Court, 1969 Term*, 84 HARV. L. REV. 192 (1970); Comment, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593 (1970); Note, *Prospective* Boys Markets *Injunctions*, 90 HARV. L. REV. 790 (1977); Note, *Labor Injunctions*, Boys Markets, *and the Presumption of Arbitrability*, 85 HARV. L. REV. 636 (1971).

15. 370 U.S. 195 (1962), *overruled in* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970).

16. 370 U.S. at 203. This holding, combined with Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), left employers in the anomalous position of being unable to enforce arbitration clauses against recalcitrant unions, while remaining subject themselves to enforcement of the same clauses by unions acting on behalf of employees. *See* note 14 *supra*.

17. In Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), the Court held that section 301(a) of the Taft-Hartley Act did not divest state courts of concurrent jurisdiction over suits for violation of contracts between employers and the unions representing employees. *Id.* at 507. However, the Court's decision in Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968), rendered *Dowd Box* virtually meaningless. In *Avco*, an employer

Court to reconsider *Sinclair*,[18] and in 1970, in *Boys Markets, Inc. v. Retail Clerks Local 770*,[19] the Court held that under certain conditions,[20] the Norris-LaGuardia Act would not prohibit an injunction against a work stoppage violative of a no-strike compulsory arbitration clause embodied in a collective bargaining agreement.[21]

Recent decisions in the area of *Boys Markets* injunctions have concerned the issue of whether such injunctions may be issued prospectively, and if so, how broad they may be in describing prohibited activities.

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sued the union to which its employees belonged to enjoin a strike violative of the collective bargaining agreement then in force. The state court granted an injunction in an ex parte hearing. On removal, the federal district court, after asserting original jurisdiction, dissolved the injunction. Avco Corp. v. Aero Lodge 735, 263 F. Supp. 177 (M.D. Tenn. 1967). The court of appeals and the Supreme Court affirmed. Avco Corp. v. Aero Lodge 735, 376 F.2d 237 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968). By holding that an action brought under section 301 by an employer in a state court was subject to removal to federal court, *Avco* encourages forum shopping among union defendants, since such a dispute was controlled by federal substantive law, and "removal is but one aspect of the primacy of the federal judiciary in deciding questions of federal law . . . ." 390 U.S. at 560. In addition, the federal courts were prohibited by *Sinclair* from granting relief otherwise available in state courts. 370 U.S. at 203–10. Employers were thus effectively deprived of injunctive relief even against a union which had violated a no-strike provision of the operative collective bargaining agreement, while unions could enforce a mandatory arbitration clause even though such a provision was generally viewed as the consideration for a union's agreement not to strike. Island Creek Coal Co. v. UMW, 507 F.2d 650, 653 (3d Cir. 1975); *see* 21 VILL. L. REV. at 610 n.20 (1976).

18. The Court, in *Boys Markets*, evidenced the following concern:

> The principal practical effect of *Avco* and *Sinclair* taken together is nothing less than to oust state courts of jurisdiction in § 301(a) suits where injunctive relief is sought for breach of a no-strike obligation. Union defendants can, as a matter of course, obtain removal to a federal court, and there is obviously a compelling incentive for them to do so in order to gain the advantage of the strictures upon injunctive relief which *Sinclair* imposes on federal courts. The sanctioning of this practice, however, is wholly inconsistent with our conclusion in *Dowd Box* that the congressional purpose embodied in § 301(a) was to *supplement*, and not to encroach upon, the pre-existing jurisdiction of the state courts. It is ironic indeed that the very provision that Congress clearly intended to provide additional remedies for breach of collective-bargaining agreements has been employed to displace previously existing state remedies. We are not at liberty thus to depart from the clearly expressed congressional policy to the contrary.

Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 244–45 (1970) (emphasis supplied by the court).

19. 398 U.S. 235 (1970). In *Boys Markets*, the defendant union called a strike over a work assignment rather than submit the dispute to arbitration. After the employer obtained a temporary restraining order in state court, the union removed the case to the federal district court, which granted a similar injunction. The Court of Appeals for the Ninth Circuit reversed, 416 F.2d 368 (9th Cir. 1969), holding that such relief was barred by section 4 of the Norris-LaGuardia Act under *Sinclair*. The Supreme Court reversed the court of appeals, holding that the Norris-LaGuardia Act would not prohibit a section 301 order for binding arbitration of the grievance for which the strike was called. 398 U.S. at 253.

20. The necessary conditions are: 1) the dispute must be over a grievance which both parties are contractually bound to arbitrate, 2) the employer should be ordered to arbitrate, and 3) the issuance of an injunction must be warranted under ordinary principles of equity. 398 U.S. at 254.

21. *Id.* at 253. Any significance inherent in the fact that the collective bargaining agreement under consideration in *Boys Markets* contained an express no-strike clause was rendered nugatory in Gateway Coal Co. v. UMW, 414 U.S. 368 (1974). In that case, the employees' union walked out over falsification, by three company foremen,

While the Seventh Circuit has approved a prospective injunction framed as broadly as the bargaining agreement itself,[22] the Fifth Circuit has held that *Boys Markets* calls for a case-by-case adjudication and therefore proscribes all prospective injunctions.[23] Alternatively, the Tenth Circuit has adopted an intermediate position, approving a prospective injunction encompassing only the violations that the district court found likely to occur.[24]

In addition to the split in authority regarding the availability of prospective *Boys Markets* injunctions, another controversial area concerns the extent of a union's responsibility for preventing and terminating unauthorized strikes. The leading Third Circuit decision addressing this problem is *Eazor Express, Inc. v. International Brotherhood of Teamsters,*[25] wherein the court held that the inclusion of an express no-strike provision in

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of certain safety records, which permitted miners to continue to work in unsafe conditions. The company suspended the foremen, and the miners returned to work. When the company reinstated two of the foremen (the third having retired) after receiving permission to do so from the Pennsylvania Department of Environmental Resources, the miners walked out again. The company then obtained a preliminary injunction under section 301 ordering the union to end the strike and to submit the dispute to arbitration. *Id.* at 370–73.

The United States Court of Appeals for the Third Circuit reversed and vacated the injunction. Gateway Coal Co. v. UMW, 466 F.2d 1157 (3d Cir. 1972). The Supreme Court reversed the court of appeals, holding 1) that the dispute was covered by the arbitration provision in the bargaining agreement; 2) that the duty to arbitrate gave rise to an implied no-strike obligation; and 3) that the circumstances of the case satisfied traditional equitable principles controlling the availability of injunctive relief. 414 U.S. at 374. The Court found that the presumption of arbitrability announced in the *Steelworkers Trilogy* applied to disputes found to be arbitrable for purposes of a section 301 order. *Id.* at 379. The Court thus upheld a section 301 injunction obtained against a striking union local, even though the bargaining agreement did not contain such a provision. *Id.* at 382. The Court stated that absent an explicit negation of any no-strike obligation, "the agreement to arbitrate and the agreement not to strike should be construed as having coterminous application." *Id.*

Similarly, in Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962), the Court upheld an award of damages to an employer who had sustained losses due to an unauthorized strike over an arbitrable grievance, reasoning that the presence of a compulsory arbitration clause implied a no-strike agreement. *Id.* at 105.

22. The Seventh Circuit held, in Old Ben Coal Corp. v. Local 1487, UMW, 500 F.2d 950 (7th Cir. 1974), that the breadth of an injunction was to be determined by the extent of the misconduct and that an injunction as broad as the agreement was permissible. *Id.* at 953.

23. The Fifth Circuit, in United States Steel Corp. v. UMW, 519 F.2d 1236 (5th Cir. 1975), found that a prospective injunction against strikes based on arbitrable grievances and "local trouble of any kind" was violative of the Norris-LaGuardia Act and Federal Rule of Civil Procedure 65(d). 519 F.2d at 1245. However, the Third Circuit noted that the Fifth Circuit seemed generally hostile to *Boys Markets* injunctions. 534 F.2d at 1075, *citing* Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972).

24. In CF&I Steel Corp. v. UMW, 507 F.2d 170 (10th Cir. 1974), the Tenth Circuit affirmed the issuance of an injunction that prohibited any "strike, work stoppage, interruption of work, or picketing" at plaintiff's mine, over "disputes arising from employee suspensions, employee discharges, and work assignments" for the duration of the collective bargaining agreement. *Id.* at 173. The court found "no incapacitating vagueness in the decree," stating that the applicability of the order was sufficiently delineated, and that the terms of the order were "of reasonably specific content in the 'common law of the shop.'" *Id.*, *quoting* Cox, *Reflections upon Labor Arbitration,* 72 HARV. L. REV. 1482, 1498–99 (1959).

25. 520 F.2d 951 (3d Cir. 1975), *cert. denied,* 424 U.S. 935, *rehearing denied,* 425 U.S. 908 (1976).

a collective bargaining agreement implied an obligation on the part of the union to use "every reasonable means" to terminate an unauthorized strike by its members.[26]

To the extent that these issues were involved in the instant case, however, the defendant unions contended, *inter alia*,[27] that 1) since the work stoppages were unauthorized, the Local, District, and UMW should not be subject to the injunction; 2) even if a prospective injunction could be validly issued, the particular injunction in question was overbroad;[28] and 3) the particular injunction was "so vague as to be inconsistent with" Federal Rule of Civil Procedure 65(d).[29]

Rejecting the unions' contention that an "all reasonable efforts" obligation could be implied only from collective bargaining agreements which contain *express* no strike clauses,[30] Judge Gibbons, writing for the

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26. 520 F.2d at 959. The court observed that "collective bargaining agreements . . . impose a continuing day-to-day obligation on the parties to fulfill their terms in good faith." *Id.*

27. The defendant unions also argued that a *Boys Markets* injunction was improper since neither the disputes covered by the injunction nor the actual disputes upon which the order was based were arbitrable within the terms of the 1974 collective bargaining agreement. 534 F.2d at 1069. The basis for this argument seems to have been that the Supreme Court's construction of the 1971 bargaining agreement as implying a no-strike obligation in *Gateway* could not be relied upon because of the inclusion in the 1974 agreement of the phrase, "Disputes arising under this agreement shall be resolved as follows:" preceding the same grievance-arbitration arrangement contained in the 1971 agreement. *Id.* at 1070. The unions claimed that the import of this phrase was that grievance-arbitration was restricted to contract issues only, excluding "local trouble" and "matters not specifically covered." *Id.* The court concluded, however, that the language made no substantive change in the rights and obligations of the parties and that *Gateway* still controlled interpretation of the agreement. *Id.* at 1071. Thus, the court's finding that each of the three disputes leading to the order from which the appeal was taken was "at least 'local trouble' of some kind" within the language of the arbitration clause of the agreement was dispositive of this argument. *Id.*

The unions further contended that the injunction which required them to arbitrate failed to impose a corresponding obligation on the employer, and that the employer had not shown that irreparable injury would ensue if the injunction were not granted. *Id.* at 1067. The Third Circuit found no merit in the latter argument, *id.* at 1079, but did require that if the district court ordered a prospective injunction on remand, "it should include an order directing compliance with the settlement of disputes clause at least as broad, and for the same period, as the injunction. *Id.* at 1078–79.

28. *See* note 8 *supra*.

29. 534 F.2d at 1067. Rule 65(d) provides in part: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. FED. R. CIV. P. 65(d); *see* note 8 *supra*.

30. Judge Gibbons, relying on Gateway Coal Co. v. UMW, 414 U.S. 368 (1974), first found a no-strike clause implied in the bargaining agreement, 534 F.2d at 1073, and then, relying on *Eazor Express*, concluded that such an obligation gave rise to an implied promise by the unions to use "all reasonable means" to prevent or end unauthorized work stoppages. *Id.* In response to the defendants' contention that a "reasonable efforts" clause could not be implied from an implied no-strike clause, the court stated:

> The unions are parties to a contract not to strike over an arbitrable dispute, and they have a contractual obligation to use all reasonable efforts to perform that

court, concluded that such an obligation also follows necessarily from an *implied* no-strike obligation.[31] Moreover, Judge Gibbons recognized that although the Local could also be found liable on the basis of the so-called "mass action" theory,[32] under which a union can be held responsible for the concerted action of its members, union liability thereunder would be no more than coextensive with that under a reasonable efforts obligation.[33]

The court also made an extensive comparison of the positions taken by other circuits in regard to prospective *Boys Markets* injunctions.[34] Attempting to reach a position "somewhere between the extremes,"[35] Judge Gibbons held that while a prospective injunction may be appropriate under certain conditions,[36] the injunction issued in the instant case was both overbroad and vague.[37] The court stated that before issuing a prospective injunction, the district court must make specific findings of fact concerning the types of violations that have occurred and those that were likely to occur.[38] Furthermore, Judge Gibbons reasoned that in accordance with rule 65(d), a

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contract. Concern with the integrity and efficacy of the agreed-upon arbitration process is no less compelling when the covenant not to strike is implied rather than express.

Id. The court also found as support for this conclusion the defendants' promise in the bargaining agreement to "maintain the integrity of the contract." *Id.*

31. 534 F.2d at 1073. In so holding, Judge Gibbons extended the application of *Eazor Express,* reconciling it with Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962). In that case, the Supreme Court found a no-strike obligation implicit in a binding arbitration clause as a matter of "traditional contract law." *Id.* at 105.

32. 534 F.2d at 1073–74. The mass action theory was approved by the Third Circuit in *Eazor Express,* wherein the court explained:

> When all the members of a union employed by a given employer engage in a concerted strike not formally authorized by the union, as happened here, many courts hold the union responsible on the theory that mass action by union members must realistically be regarded as union action. The premise is that large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members.

520 F.2d at 963. By finding the mass action theory to be applicable in the present case, the Third Circuit implicitly rejected the unions' theory that their liability for damages caused by the unauthorized breach of a contractual agreement by its officers or members is controlled by "ordinary doctrines of agency." 534 F.2d at 1072 & n.14, *quoting* UMW v. Gibbs, 383 U.S. 715, 736 (1966).

33. 534 F.2d at 1074. The court in the instant case pointed out that the only entity whose membership will act normally in concert is the local union. Entities higher in the organizational structure can be held liable under the mass action theory only upon a showing of complicity in the unlawful strike. *Id.* Judge Gibbons additionally stated that under his understanding of the mass action theory, a union cannot be held liable for damages unless there is a showing of failure to use "all reasonable efforts" to prevent or terminate an unauthorized strike. *Id.* For Judge Rosenn's opposing view, *see* note 42 *infra.*

34. *See* notes 22–24 *supra.*

35. 534 F.2d at 1077.

36. *Id.* As Judge Gibbons emphasized, "The court that has once determined in an adversary proceeding the meaning of a contract must have the power to protect the parties and itself from the necessity for and burden of repeatedly adjudicating what often may be the identical issue." *Id.* He noted, however, that the prospective relief should go only as far as the pattern of violations suggests is necessary. *Id.*

37. *Id.*; *see* note 8 *supra.*

38. 534 F.2d at 1077. The district court must also "relate the likelihood of occurrence or recurrence to some act, omission or responsibility of each defendant against whom such injunctive relief is ordered." *Id.*

prospective injunction must inform the local of the steps it must take to prevent recurring violations and must inform the parent organizations of the procedures that they must follow to ensure that the local fulfills its contractual obligations.[39]

In a concurring opinion, Judge Rosenn viewed the mass action theory as differing significantly from the contractual theory.[40] In Judge Rosenn's view, the implication of a best efforts promise was unnecessary in light of the explicit promises of good faith performance by the unions.[41] Judge Rosenn's interpretation of the mass action theory would hold a local strictly liable for those acts of its members that violate the agreement, thus rendering irrelevant any consideration of whether the local's leadership exercised reasonable efforts.[42] Furthermore, under Judge Rosenn's view, rule 65(d)'s requirements of specificity and detail would not preclude the issuance of an injunction against strikes over "any arbitrable grievance."[43]

Chief Judge Seitz filed a separate opinion stating that a *Boys Markets* injunction should be available, but only against the Local, and only with regard to those work stoppages specifically before the court.[44] Arguing in favor of the imposition of these two limitations, the Chief Judge reasoned that the purpose of a *preliminary* injunction is to preserve the status quo and that a more broadly framed order was unnecessary to serve that purpose.[45]

The contrasting opinions of the court present certain analytical difficulties. Perhaps the most important distinction to be drawn between the opinions of Judges Gibbons and Rosenn is their differing interpretations of the mass action theory. While dicta in *Eazor Express* supports Judge Gibbons' theory that the scope of a local's liability cannot be extended

39. *Id.* at 1078; *see id.* at 1078 n.19.

40. *Id.* at 1079 (Rosenn, J., concurring).

41. *Id; see* note 30 *supra.*

42. Judge Rosenn, apparently viewing the local unions as being identical to their membership, applied the mass action theory to hold the local strictly liable on the basis that the local had violated the agreement when, through its membership, it began an unauthorized work stoppage. 534 F.2d at 1080–81. Judge Gibbons, on the other hand, viewed the unions as organizational bodies composed of, but distinct from, their membership for liability purposes. *Id.* at 1074.

Judge Rosenn would have found liability under the mass action theory only on the part of the Local, "because the theory presumes that the leadership for the mass action comes from within the group that generates the unlawful action." *Id.* at 1080. Under this theory, therefore, liability would be imposed upon the Local for actions taken by the membership prior to the strike regardless of whether "all reasonable efforts" were made by Local officials to end the strike after it had begun. *Id.* at 1081. The district and international unions could be held liable, according to Judge Rosenn, only if they failed to use reasonable efforts to terminate an illegal strike. "Reasonableness" would be determined by the degree of control held by the larger organizational units over the Local. *Id.* at 1081 n.6.

43. *Id.* at 1083.

44. *Id.* at 1082–83 (Seitz, C.J., concurring and dissenting).

45. *Id.* Chief Judge Seitz stated that a preliminary injunction against the Local was all that was necessary to preserve the situation pending final determination of the case, and that liability on the part of the district or international union should be determined only after a full trial on the merits. *Id.* at 1084. He specifically expressed no opinion as to whether section 9 of the Norris-LaGuardia Act, 29 U.S.C. §109 (1970), precludes a federal court from permanently enjoining such conduct. 534 F.2d at 1084.

beyond the reasonable efforts obligation by the mass action theory,[46] it is submitted that Judge Rosenn's view is more convincingly supported by both logic and policy. Liability under the mass action theory is based upon the premise that since "large groups of men do not act collectively without leadership . . . a functioning union must be held liable for the mass action of its members."[47] Given such a premise, when the membership of the union breaches en masse a no-strike provision by which the union is contractually bound, the union should be held responsible and the question of reasonable efforts should be irrelevant.[48] Judge Gibbons' view of the mass action theory as merely raising an obligation on the part of the union to use reasonable efforts to prevent or resolve a strike[49] seemingly disregards this basic premise. Furthermore, Judge Rosenn's view that a local should be held strictly liable for the en masse action of its membership would also promote the national labor policy of encouraging settlement through arbitration by impressing upon the union members the seriousness of the union's agreement not to strike.[50]

Another analytical difficulty arises from Judge Gibbons' view of the relationship between a union's obligation to use reasonable efforts and the mass action theory. While Judge Gibbons pointed out that *Eazor Express* and other cases have discussed reasonable efforts in relation to the mass action theory of liability,[51] the theory is not discussed in those cases as a limitation upon the scope of liability. Rather, the efforts exercised by a union to prevent or terminate a strike are merely a factor for the courts to consider, along with the extent of mass participation and the involvement of union officials, in determining whether the mass action theory should apply.[52]

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46. *See* 520 F.2d at 965.

47. *Id.* at 963. From this premise, it follows that the liability must be limited to the organizational unit (*e.g.*, local, district, etc) whose membership is participating in the unauthorized work stoppage. 534 F.2d at 1074.

48. *See* note 42 *supra.*

49. 534 F.2d at 1074. Judge Gibbons stated that, whatever the theory upon which liability is premised, the district court must examine the reasonableness of the attempts of the Local or parent union officials to avert or end an unauthorized or illegal strike. Reasonableness would depend upon the circumstances of each case. *Id.*

50. *Id.* at 1080 n.3.

51. *Id.* at 1074, *citing* Wagner Elec. Corp. v. Local 1104, Int'l Union of Elec. Workers, 496 F.2d 954, 956 (8th Cir. 1974), Vulcan Materials Co. v. United Steelworkers, 430 F.2d 446, 455 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971), United Textile Workers v. Newberry Mills, Inc., 238 F. Supp. 366, 373 (W.D.S.C. 1965), Portland Web Pressmen's Union v. Oregonian Publishing Co., 188 F. Supp. 859, 866 (D. Ore.), *aff'd on other grounds*, 286 F.2d 4 (9th Cir. 1960), *cert. denied*, 366 U.S. 912 (1961), *and* United States v. UMW, 77 F. Supp. 563, 566–67 (D.D.C. 1948), *aff's on other grounds*, 177 F.2d 29 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949).

52. For example, in Wagner Elec. Corp. v. Local 1104, Int'l Union of Elec. Workers, 496 F.2d 954 (8th Cir. 1974), the Eighth Circuit affirmed the finding of the district court that the union was responsible for its members' unauthorized strike. Even though the defendant issued an exculpatory press release *after the strike had begun*, the court of appeals agreed with the district court in considering this as only one element of the action taken by the union and its membership both prior to and during the strike. The district court had based its finding of liability upon "the involvement of union officers and stewards in initiating the strike, the participation of every one of the 2,700 union members in the strike, and the minimal efforts of the union hierarchy in attempting to end the walkout." *Id.* at 956.

It would seem that the disagreement between Judges Gibbons and Rosenn on the applicability of the mass action theory is crucial not only because the respective interpretation of the theory determines the scope of the local's liability, but also because it results in potentially different consequences when a *Boys Markets* injunction is tested under rule 65(d). Judge Gibbons' view that the injunction should specify exactly what action the local must take[53] stems from his conclusion that the local can avoid liability by making reasonable efforts to end an unauthorized work stoppage. This seems unnecessary under Judge Rosenn's theory because, in his opinion, reasonable efforts by the local in such a situation would serve only to mitigate what is apparently strict liability for the consequences of an illegal strike. Moreover, Judge Gibbons' conclusion that under rule 65(d) a prospective *Boys Markets* injunction must state, first, what steps a local will be expected to take to prevent the recurrence of illegal work stoppages, and, second, what procedure the parent organizations must follow to ensure that the local performs its contractual obligations, is significantly more restrictive than the decisions in other circuits.[54]

In holding that a prospective injunction was available against the unions but that such relief was to be limited to violations which the district court found likely to occur in the future,[55] the Third Circuit attempted to balance the federal labor policy favoring the peaceful settlement of disputes through arbitration against the conflicting policy of discouraging injunctions against labor unions.[56] Although, as the Fifth Circuit has noted, *Boys Markets* was intended to be a narrow exception to the prohibition against injunctions set forth in the Norris-LaGuardia Act,[57] it is submitted that the

53. 534 F.2d at 1078.

54. The court in Old Ben Coal Corp. v. Local 1487, UMW, 500 F.2d 950 (7th Cir. 1974), considered the language of the contract between the parties to be sufficiently specific to inform the union of which differences or local troubles were arbitrable. *Id.* at 953. In CF & I Corp. v. UMW, 507 F.2d 170 (10th Cir. 1974), the court found the decree, which listed any "strike, work stoppage, interruption of work, or picketing" as prohibited activities, to be reasonably specific in the "common law of the shop." 507 F.2d at 173, *quoting* Cox, supra note 24, at 1498–99.

55. 534 F.2d at 1077. Judge Rosenn agreed with Judge Gibbons on this point, *id.* at 1082, but did not join the court's statement that the district court must " 'relate the likelihood of recurrence or occurrence to some act, omission, or responsibility of each defendant against whom such injunctive relief is ordered.' " *Id.* at 1082 n.9, *quoting id.* at 1077. Under certain conditions, however, Judge Rosenn apparently would not limit an injunction to specific types of violations, but rather would allow a broad injunction. As an example, Judge Rosenn noted:

> If the district court finds that strikes have occurred and likely will occur over two types of arbitrable grievances, e.g., employee suspensions and vacation pay, the injunction can be limited to enjoining future strikes over only these categories of grievances. If, however, the district court finds a proclivity to strike over every arbitrable grievance, it may conclude that the grounds for future strikes cannot be adequately forecast and it appropriately may issue a broad injunction.

Id. at 1082.

56. 534 F.2d at 1076. In this regard, the Third Circuit following the example of the Supreme Court in *Boys Markets*. *See* 398 U.S. at 246–53; Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593 (1970).

57. United States Steel Corp. v. UMW, 519 F.2d 1236 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 1332 (1976), *discussing* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 253 (1970). In this case, the Fifth Circuit reversed a prospective anti-strike

case should not be read so narrowly as to exclude *all* injunctive relief.[58] Justice Brennan's oft-cited dissent in *Sinclair,* partially adopted by the *Boys Markets* Court, indicates that an injunction may clearly be appropriate when breaches are "threatened or will be committed."[59] Furthermore, once the intent of a specific provision of a labor agreement has been litigated, it would seem unnecessary for a federal court or an employer continually to "relitigate essentially the same issue in a slightly different context."[60] An injunction limited to the particular work stoppage before the court would ineffectively protect the employer's contractual rights since that stoppage could be terminated and another unauthorized strike begun over a different arbitrable issue.[61] Thus, an ad hoc adjudication of each situation as required by the Fifth Circuit appears unsupportable when it results in

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injunction drawn in the language of the bargaining agreement. The Third Circuit in the instant case noted that it was not at all clear whether the Fifth Circuit had found that prospective *Boys Markets* relief was entirely unavailable, and even if such were the import of the case, the Third Circuit would respectfully disagree. 534 F.2d at 1077. The Fifth Circuit's requirement that a finding be made in each case that the strike was over an arbitrable issue before a *Boys Markets* injunction may issue seems to indicate that the latter interpretation of the Fifth Circuit decision may indeed be the case. *See* 519 F.2d at 1245. However, this particular discussion was merely dicta, since the order of the district court was reversed on the ground that the work stoppages at issue were not based upon arbitrable grievances. *Id.* at 1247–48.

58. The *Boys Markets* Court reasoned:

> The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions.
>
> A leading example of this accommodation process is Brotherhood of Railroad Trainmen v. Chicago River & Ind. R. Co., 353 U.S. 30 (1957). There we were confronted with a peaceful strike which violated the statutory duty to arbitrate imposed by the Railway Labor Act. The Court concluded that a strike in violation of a statutory arbitration duty was not the type of situation to which the Norris-LaGuardia Act was responsive, that an important federal policy was involved in the peaceful settlement of disputes through the statutorily mandated arbitration procedure, that this important policy was imperiled if equitable remedies were not available to implement it, and hence that Norris-LaGuardia's policy of nonintervention by the federal courts should yield to the overriding interest in the successful implementation of the arbitration process.

398 U.S. at 250–52.

59. Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 254 (1970), *quoting* Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 228 (1962) (Brennan, J. dissenting). Justice Brennan stated that, beyond the situation in which an injunction is sought against a strike based upon an arbitrable grievance, the court must consider whether an injunction would be warranted under traditional equitable principles:

> [T]he District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity — whether breaches are occurring and will continue or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.

370. U.S. at 228 (Brennan, J. dissenting).

60. 534 F.2d at 1077.

61. This occurred in the instant case. *See* note 2 *supra.*

little more than wasted judicial resources and frustration of employers' remedies.

On the other hand, unlike the Seventh Circuit, the Third Circuit gave renewed strength to the policy of discouraging injunctions against labor unions by refusing to approve an injunction framed broadly in the language of the collective bargaining agreement. Such an injunction will be approved in the Third Circuit only if supported by findings of the district court that certain types of violations have occurred in the past and that they are likely to occur in the future.[62] Although objections can obviously be made to such an approach, restricting the district courts in this way is at least consistent with the policy of discouraging the abuse of labor injunctions — a policy which *Boys Markets* was not intended to undermine.[63] It is submitted that, because this policy remains viable, district courts should hesitate to find facts that would support an injunction framed in the contract language.

Obviously, this decision places district courts within the Third Circuit in a difficult position. In issuing an injunction against an unauthorized strike, a court must determine specifically the types of violations of the agreement that have occurred, the likelihood of their recurrence, and other types of violations expected to arise.[64] It would seem difficult for a district court to determine at a preliminary hearing the precise disputes likely to trigger future wildcat strikes. Moreover, district courts may be required to determine which measures available to the union leadership constitute "reasonable efforts" to end or prevent a strike in advance of the strike itself.[65]

This decision presents further difficulties because no opinion was joined by a majority of the court. While it seems that both Judge Gibbons and Judge Rosenn agreed that any prospective injunction issued must be limited in coverage to violations of the collective bargaining agreement that a district court finds likely to recur, there was no agreement as to the extent of the Local's liability under the mass action theory and, therefore, no agreement as to the requirements of rule 65(d).[66] Unfortunately, in regard to these two important questions, the Third Circuit's opinion in *United States Steel* eliminates little of the uncertainty currently surrounding the area of prospective *Boys Markets* injunctions.

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62. *See* 398 U.S. at 253.
63. 534 F.2d at 1077.
64. *See id.* at 1077–78.
65. As Judge Rosenn stated:

> A union should not be allowed to escape injunctive restraints merely because the range of previous violations by its members defies categorization. The injunction "should be broad enough to prevent evasion." When past violations may be reasonably categorized, the order should do so. When, however, the pattern of past conduct does not readily lend itself to such treatment, I see no objection to the use of carefully considered language broadly restraining strikes over arbitrable grievances, especially if it can be joined with specific language, to provide effective relief.

534 F.2d at 1083 (citations omitted).
66. *See* notes 46–54 and accompanying text *supra*.

LABOR LAW — UNION'S WAIVER OF ITS RIGHT TO BE PRESENT DURING PRE-GRIEVANCE PROCEDURE HELD NOT TO AUTHORIZE EMPLOYER'S IMPLEMENTATION OF COMMUNICATION PROGRAM TO ADJUST GRIEVANCES.

United Steelworkers v. NLRB (1976)

In late 1972, Dow Chemical Company (Dow) instituted a "Speak Out" program under which its employees were permitted to direct questions or suggestions concerning their employment to the program coordinator.[1] Although these communications were required to be made on a special form, an employee was not required to sign the form.[2] Upon receiving a communication, the program coordinator would either reply or forward the communication to a member of Dow's management staff having knowledge of the subject matter of the communication.[3] Any reply that was made was reviewed by Dow's management before it was sent to the employee.[4]

Six months after the Speak Out program was initiated, Local 12075 of the United Steelworkers of America (Union) filed an unfair labor practice charge with the National Labor Relations Board (NLRB) wherein it asserted that by engaging "in the adjustment of grievances without permitting the Union the opportunity to be present,"[5] Dow had violated section 9(a) of the National Labor Relations Act (Act),[6] which requires that the union designated as the collective bargaining representative be "given an opportunity to be present" when employee grievances are adjusted by the employer.[7]

1. United Steelworkers v. NLRB, 536 F.2d 550, 552 (3d Cir. 1976) The employees' union, Local 12075 of the United Steelworkers of America, was given no notice prior to the institution of the program. *Id.*

2. *Id.*

3. *Id.*

4. *Id.* Only those employees who had signed their communications received replies. *Id.* Responses which the management found interesting were published in a monthly employee magazine edited by Dow, although an employee could request that his reply not be published. *Id.* In all, 284 communications were received from the employees between December 1972 and November 1973. *Id.* at 552–53.

5. *Id.* at 553.

6. 29 U.S.C. § 159(a) (1970). The Union also alleged violations of sections 8(d), 8(a)(1), and 8(a)(5) of the Act. 536 F.2d at 553. Under section 8(d), termination or modification of a collective bargaining contract without following certain specified procedures is a breach of the duty to bargain collectively. 29 U.S.C. § 158(d) (1970). The Union contended that by instituting the Speak Out program in violation of section 9(a), Dow had modified the contract, thus violating section 8(d). 536 F.2d at 554 n.11. Such a breach of the duty to bargain collectively constitutes an unfair labor practice under section 8(a)(1) and 8(a)(5). *See* 29 U.S.C. § 158(a)(1), (5) (1970).

7. 536 F.2d at 551. Section 9(a) provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided*

Upon examining the collective bargaining agreement between the Union and Dow,[8] the administrative law judge determined that although Dow's conduct was, on its face, violative of section 9(a) of the Act,[9] the Union had waived its rights under that section.[10] The administrative law judge reasoned that the grievance adjustment procedure under the Speak Out program "involved no variance of any material significance" from the procedure agreed to by the Union in the collective bargaining agreement, wherein an employee was required to present his complaint to his immediate supervisor *before* resorting to the grievance procedure.[11]

Upon the NLRB's subsequent adoption of the administrative law judge's finding,[12] the Union petitioned the Court of Appeals for the Third Circuit for review.[13] The Third Circuit reversed,[14] *holding* that the distinctions between the Speak Out program and the pre-grievance procedure authorized in the collective bargaining agreement were "sufficiently material" that a consent by the Union to abide by the pre-grievance procedure did not constitute

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further, That the bargaining representative has been given opportunity to be present at such adjustment.

Id. (emphasis added).

While section 9(a) gives a union the right to be present during the adjustment of *grievances*, it grants no similar right with regard to *nongrievance* matters. A number of courts have discussed the definition of "grievance." *See, e.g.*, Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945) (grievance under the Railway Labor Act relates both to rights possessed by employee under collective bargaining agreement and rights of the employee arising outside of such agreement); Douds v. Local 1250, Retail Wholesale Dep't Store Union, 173 F.2d 764 (2d Cir. 1949) (reinstatement of former striking employees is grievance within meaning of section 9(a)); Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945) (grievance under National Labor Relations Act is usually a claim that a right under the collective bargaining agreement has not been respected); Toledo Local 15-P, Lithographers, 175 N.L.R.B. 1072 (1969) (grievance includes both personal grievances and contracted grievances).

8. Article III, section 3A of the collective bargaining agreement provides:

> It is the intent of this Section, to establish means for prompt adjustment of grievances at the job level with the immediate supervisor and the employee. Therefore, in order to promote better cooperation, understanding, and labor relations between employees, Union Representatives, and the Company, it is agreed that an employee with a complaint or request, must first state his complaint or request to his immediate supervisor, and will give that supervisor a reasonable opportunity to adjust the problem before resorting to grievance procedure. The employee may have a steward present at this meeting, but the employee must state his own complaint.

536 F.2d at 554.

9. *Id.* The administrative law judge based his finding upon the assumption that many Speak Out communications were grievances within the meaning of the Act. *Id.*; *see* note 7 *supra*.

10. 536 F.2d at 554. It has been held that a union's waiver of a statutory right must be clear and unmistakable and will not be lightly inferred. *See, e.g.*, Radio Television Technical School, Inc. v. NLRB, 488 F.2d 457 (3d Cir. 1973); Texaco, Inc. v. NLRB, 462 F.2d 812, 815 (3d Cir. 1972). In *Texaco*, the union activity was alleged to be a relinquishment of a protected right was ambiguous, and therefore the court concluded that it did not constitute a valid waiver. 462 F.2d at 815.

11. *See* note 8 *supra*.

12. Dow Chemical Co., 215 N.L.R.B. 139 (1974).

13. 536 F.2d at 554. Dow intervened in the Union's appeal. *Id.*

14. *Id.* at 559. The case was heard by Judges Biggs, Gibbons, and Hunter. Judge Hunter wrote the opinion for the unanimous court.

consent to the procedure embodied in the Speak Out program. *United Steelworkers v. NLRB,* 536 F.2d 550 (3d Cir. 1976).

The Third Circuit premised its analysis upon the well-established principle that "a waiver of a statutory right must be clearly and unmistakably established, and that express language will not be read expansively."[15] Then, focusing upon the difference between the Speak Out program and the pre-grievance procedure embodied in the collective bargaining agreement,[16] the court pointed to several crucial distinctions between the two: 1) unlike the procedure embodied in the collective bargaining agreement, Speak Out submissions were to be reviewed by members of Dow's middle and upper management;[17] 2) Speak Out submissions were permitted to be made *after* a formal grievance had been filed;[18] and 3) unlike the procedure described in the collective bargaining agreement, employees submitting communications under Speak Out could remain anonymous.[19] The court concluded that these distinctions taken together were "material"; therefore, the consent given by the Union to the pre-grievance procedure embodied in the collective bargaining agreement did not constitute consent to the Speak Out program.[20]

In so holding, the Third Circuit recognized that the Speak Out program could impair the Union's position as the collective bargaining representative in several ways.

> [T]he "Speak Out" procedure may increase the likelihood that a particular grievance issue will be considered and decided by middle and

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15. *Id.* at 555; *see* note 10 *supra.* For the text of the contractual provision in which the Union allegedly waived its section 9(a) rights, *see* note 8 *supra.* The court conjectured that the goal of such a procedure might well have been "[to minimize] unwarranted resort to the grievance mechanism by 'weeding out' those complaints resulting from simple misunderstanding or oversight, as well as those so trivial that the employee would be unwilling to make an initial statement of his own case to his immediate superior." 536 F.2d at 555.

16. 536 F.2d at 555.

17. *Id.* at 555–56. This review might be held before the Union had the opportunity to make its position known, or even before it had notice of the dispute. Furthermore, a question would arise as to whether the resolution of a matter in a Speak Out reply would become binding precedent in later grievance matters. *Id.* at 557. The court did not decide this question, but noted that it could foresee some practical and psychological effect were the same issue decided in a Speak Out reply to arise in a subsequent grievance hearing. *Id.*

18. *Id.* at 556. Under the collective bargaining agreement, the presentation of a grievance to an immediate supervisor had to occur *before* resort to the grievance mechanism. *See* note 8 *supra.* Under the Speak Out program there were no safeguards to protect against simultaneous adjustments of the same grievance under both the collective bargaining agreement and Speak Out since a Speak Out submission could be made either before, during, or after filing a formal grievance. 536 F.2d at 556. The possibility of dual proceedings made it difficult to argue that Speak Out was the equivalent of the pre-grievance procedure authorized under the collective bargaining agreement. *Id.*

19. 536 F.2d at 556.

20. *Id.* The court commented that the administrative law judge's reliance upon Westinghouse Elec. Corp. v. NLRB, 325 F.2d at 126 (7th Cir. 1963), had been improper. 536 F.2d at 556 n.20. *Westinghouse* did not involve the question of whether there had been a waiver of section 9(a) rights, but whether any grievances had been adjusted. 325 F.2d at 128.

> upper management before the Union's position is heard, or before the Union even has notice of the dispute
>
> . . . "Speak Out" replies may well take on greater impact, as compared to a response from an immediate supervisor, in determining whether the complaining employee will follow through with a formal grievance and whether other employees will pursue similar claims.
>
> . . . (T)he "Speak Out" system offers flexibilities of time and source of relief . . . [that] could . . . reduce the Union's ability to plan the processing of grievances in an orderly and internally consistent manner.[21]

The court sought to avoid such a detrimental impact upon the Union's ability to represent the employees effectively.[22]

With the instant decision the Third Circuit has maintained a balance between the competing interests of the employer and the union in the area of grievance adjustment. While the employer seeks to ensure that the grievance adjustment procedure does not substantially affect the daily operation of its business, the union, as the collective bargaining representative, desires to provide the employees whom it represents with a grievance adjustment system which is free from potential for employer abuse.[23] Section 9(a), enacted to ensure that a fair and workable grievance procedure would exist despite these competing interests,[24] evidences congressional concern that a union which is not permitted to be present during grievance adjustment may

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21. 536 F.2d at 557.

22. Dow introduced figures demonstrating that grievance activity had not declined following the inception of the Speak Out program. *Id.* at 558. The court rejected the relevance of such evidence, noting that the congressional determination that possible adverse consequences could occur from failing to have a union representative present at grievance adjustment proceedings, rendered unnecessary a finding of the occurrence or nonoccurrence of such consequences. *Id.* The court indicated that many factors may affect the filing of grievances; furthermore, Dow's figures failed to indicate whether there were any changes in the type of grievances filed or in the Union's rate of success in the processing of grievances. *Id.*

23. *See* Dunau, *Employee Participation in The Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731 (1950). Some of the abuses foreseen by Congress were the potential for employer discrimination between employees who support the union and those who do not, the possibility that an employer may take inconsistent positions in resolving similar grievances presented by different employees, and the possibility that an employer will endeavor to make it appear that employees will be treated more favorably if they do not avail themselves of the union's grievance procedure. 93 CONG. REC. 3624 (1947) (remarks of Rep. Lanham); *see* note 25 *infra*.

24. The House version of section 9(a) did not contain the second proviso guaranteeing the union the right to be present during grievance adjustment. Congressman Lanham criticized this omission:

> To grant individual employees or minority groups of employees the right to present and settle grievances which relate to wages, hours, and conditions of employment without permitting the representative of the majority of the employees to participate in the conference and join in any adjustment is to undermine the very foundations of the act. To create rivalry, dissension, suspicion, and friction among employees, to permit employers to play off one group of employees against another, to confuse the employees would completely undermine the collective-bargaining representative and would be disastrous.

93 CONG. REC. 3624 (1947). The second proviso was later added by the Senate, and this version was subsequently enacted. For the text of section 9(a), *see* note 7 *supra*.

lose its ability to represent effectively those employees who are artfully "persuaded" by their employer to accede to a position unfavorable to the union.[25] However, balanced against its concern for the union was Congress' recognition that a grievance procedure should not be so cumbersome as to constitute a major interruption in an employer's business; thus, under section 9(a), a union is permitted to be present *only* during the adjustment of *grievances* and has no statutory right to be present during an employer-employee discussion of *nongrievance* matters.[26] The Third Circuit, in deference to these congressional concerns, narrowly construed the Union's limited waiver of its section 9(a) rights as contained in the collective bargaining agreement.[27]

The instant decision does not invalidate all employee communication programs in which the union is not given an opportunity to be present. Employers wishing to implement programs similar to Dow's Speak Out program have several options available to them. As suggested by the court, these employees could negotiate a waiver provision to be included in the collective bargaining agreement which would be broad enough to cover a program of this nature.[28] However, the potential for employer abuse in such a program would likely make the union uneasy with the employer's increased control over grievances.[29] Moreover, as a practical matter, it is doubtful that a union would be willing to waive its statutory right to be present at grievance adjustment unless strict procedural guidelines were imposed.[30] Nevertheless, the Third Circuit's adherence to the rules that a waiver of statutory rights must be clearly established and that express language should not be read expansively may alleviate some of the union's uneasiness with such a waiver provision, as the union might not fear an

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25. 93 CONG. REC. 3624 (1947) (remarks of Rep. Lanham). This type of "persuasion" by the employer serves to create the impression that a better deal or even the same deal could be had without resort to the union. Due to a resulting lack of support by the member employees, this would weaken the union's position when it does bargain with the employer. To permit this situation would tend to destroy the uniform application of the collective bargaining agreement. Elgin, J. E. Ry. v. Bailey, 325 U.S. 711, 737 n.35 (1945).

26. *See* notes 6 & 7 *supra*. It should be noted that while a number of cases have discussed the definition of a "grievance," the distinction between a "grievance," where a union has a right to be present, and a "gripe," where no right to be present exists, has elicited no clear answer. *See* note 7 *supra*.

27. *See* notes 15–20 and accompanying text *supra*.

28. 536 F.2d at 559. Such a waiver would also have to be explicit in order to be effective in light of the courts' policy regarding waiver by a union of a statutory right. *See* note 10 *supra*.

29. *See* note 23 and accompanying text *supra*. A union might worry about inconsistent interpretations of the collective bargaining agreement which could destroy its uniform application. *See* note 25 and accompanying text *supra*. Also, a question decided during a procedure similar to that authorized by the Speak Out program may take on practical or psychological precedental value in a later grievance procedure. 536 F.2d at 557.

30. Such a procedural standard might provide, for example, that an employer give the union a summary of the grievance matters that the employer had adjusted and that the union have the right to demand and be present at a rehearing of any grievance adjustment of which it disapproves.

interpretation of the waiver provision that would authorize forms of employer action not contemplated at the time the waiver was negotiated.[31]

As a second option available to employers wishing to implement programs similar to Speak Out, the court suggested a program which would not involve the union's waiver of its section 9(a) rights.[32] Under such a program, an employer could invite employees to submit communications, examine the submissions to ensure that no grievances were involved, and then handle only the nongrievance communications.[33] Although such a program would not be able to accommodate as wide a range of communications as a program instituted by exacting a waiver of the union's section 9(a) rights, since only nongrievance submissions could be handled, it would nevertheless encourage employer-employee communications.

In conclusion, the instant decision demonstrates that while innovative programs such as Speak Out may add flexibility to the grievance procedure, these programs must be structured so as to avoid infringing upon a union's section 9(a) rights. If this can be achieved, the working relationship between an employer and its employees could be enhanced without undermining the union's position as an effective collective bargaining representative.

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31. *See* note 10 and accompanying text *supra*. The Third Circuit made a similar suggestion concerning the use of the waiver. 536 F.2d at 559 n.26.

32. 536 F.2d at 559.

33. *Id.* However, since there is no clear definition of what constitutes a "grievance" as compared to a "gripe," it would be diffficult for a program coordinator to draw this distinction. *See* note 7 *supra*. An employer may find such a program unworkable due to administrative difficulties in determining what can and cannot be resolved, or may find that once the grievances are eliminated, the matters actually dealt with may prove so trivial as to make the program virtually useless in resolving difficulties in the plant.