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NOTES

SYMPATHY STRIKES AND FEDERAL COURT INJUNCTIONS

The collective bargaining agreement between the United Steelworkers and the Buffalo Forge Company contained a broad arbitration clause and a "no strike" clause. Non-plant workers of the company, who were not covered by the agreement, picketed, and union members refused to cross the picket line. The employer sued in federal court to enjoin the sympathy strike pending arbitration on the basis of *Boys Markets, Inc. v. Retail Clerks Local 770.*[1] Affirming the lower court's denial of the injunction,[2] the United States Supreme Court *held* that a federal court injunction of a strike will issue only when the strike is intended to subvert the arbitration process in contravention of a collective bargaining agreement. *Buffalo Forge Company v. United Steelworkers of America*, 96 S. Ct. 3141 (1976).

Early organizational efforts by labor unions were often irreparably damaged by the disheartening effect of quick injunctions granted by federal courts as the budding unions began to flex their economic muscle by striking.[3] This interference by federal courts became so commonplace by the 1930's[4] that Congress responded with the Norris-LaGuardia Act.[5] The provisions of the Norris-LaGuardia Act were intended, in part, to remedy hindrance to initial growth by prohibiting strike injunctions by federal courts altogether.[6] However, as time passed the conflicts of management and labor became more and more refined and remote from the

1. 398 U.S. 235 (1970).
2. 517 F.2d 1207 (2d Cir. 1975); 386 F. Supp. 405 (W.D. N.Y. 1974).
3. H. MILLIS & E. BROWN, THE WAGNER ACT TO TAFT-HARTLEY 20 (1950). *See also* Anderson, *Disadvantages of Injunctions in Industrial Disputes*, 1975 N.Z.L.J. 179, 179-80 (1975).
4. *See* I. BERNSTEIN, THE LEAN YEARS 195-205 (1960) [hereinafter cited as BERNSTEIN].
5. 29 U.S.C. § 104 (1932) of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1932), 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 (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts: (a.) ceasing or refusing to perform any work or to remain in any relation or employment. . . ."
6. BERNSTEIN, *supra* note 4, at 391-415.

initial employee organizational and representational problems addressed by the Norris-LaGuardia Act.[7]

One indication of this refinement came in 1960 when the United States Supreme Court, in a series of cases widely known as the *Steelworkers' Trilogy*,[8] developed a judicial policy favoring the submission of disputes to arbitration in preference to taking judicial action to enforce collective bargaining agreements.[9] This policy greatly influenced the Supreme Court's subsequent examination of the scope of the Norris-LaGuardia Act's prohibition of strike injunctions by federal courts.

Two Supreme Court cases concerning employers' attempts in federal courts to specifically enforce contractual "no strike" clauses illustrate the difficulty of accommodating the Norris-LaGuardia Act's policy of refraining from court intervention in labor-management disputes with the policy of fostering agreements to arbitrate. In *Sinclair Refinery Company v. Atkinson*[10] the Supreme Court held that the Norris-LaGuardia Act's prohibition against federal court injunction of strikes even extended to those cases where a union had expressly agreed not to strike and to arbitrate all disputes, but nevertheless struck to enforce its grievance. In *Avco Corporation v. Aero Lodge 735*[11] the Supreme Court held that injunction proceedings in state courts were removable to federal court for final determination,[12] in effect destroying all possibility for injunctive relief for the employer in state as well as federal court.[13] At this point the Court had

7. For example, with the passage of the Labor Management Relations Act, 1947, 29 U.S.C. §§ 141-87 (1947), Congress enacted detailed procedures for labor organization certification, collective bargaining, and reciprocal employee-employer protection of rights.

8. United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960).

9. Contract enforcement in labor areas is available in federal court through 29 U.S.C. § 185(a) (1947), National Labor Relations Act, 1947, 29 U.S.C. §§ 141-87 (1947), which provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

10. 370 U.S. 195 (1962).

11. 390 U.S. 557 (1968).

12. 28 U.S.C. § 1441 (1948) (removal jurisdiction).

13. The Norris-LaGuardia Act itself did not address state court injunctions. See the text of the act at note 5, *supra*.

reached what has been termed a "self-created dilemma":[14] while having announced a strong policy favoring arbitration of labor disputes, the Supreme Court still refused to allow injunctions of employee strikes specifically aimed at undermining arbitration by use of self-help measures.

Subsequently, in *Boys Markets, Inc. v. Retail Clerks Local 770*,[15] the Supreme Court addressed this difficulty and recognized a particular area where federal court injunctions of strikes would be allowed in deference to the national policy favoring the arbitration process rather than the potentially disruptive self-help method of resolving grievances through strikes.[16] For a federal court to enjoin a strike, three elements must be present:[17] the collective bargaining agreement must contain a mandatory arbitration provision, there must be an agreement by the union not to strike,[18] and a subsequent strike by the union must be over an arbitrable dispute, *i.e.*, the union must have attempted to circumvent the contractual arbitration process through the self-help measure of striking.

While the prerequisites for a federal strike injunction were announced, the extent to which the new exception to the Norris-LaGuardia Act prohibition would specifically affect sympathy strikes[19] was unclear, and subsequent decisions in the circuit courts took two radically different positions. Beginning with *Monongahela Power Company v. IBEW Local 2332*,[20] one line of cases, reasoning that either the policy of arbitation was superior to any Norris-LaGuardia restraints[21] or that *any* "no strike" provision was arbitrable,[22] held that sympathy strikes are circumventions

14. Abrams, *The Labor Injunction and the Refusal to Cross Another Union's Picket Line*, 26 CASE W. L. REV. 178 (1975) (exhaustive case history analysis of sympathy strike injunctions).

15. 398 U.S. 235 (1970).

16. *Id.* at 250. The Norris-LaGuardia Act was distinguished as being aimed at protection for employee organization in the formative stages of unionism rather than at the mature contract stage where a labor organization had bargained for the preference of arbitration to strikes.

17. *Id.* at 253-54.

18. In *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974), the Court held that an agreement not to strike can be implied from a broad arbitration clause on the basis of a "quid pro quo" promise by the union not to strike in consideration of the employer's granting an arbitration clause. *See* Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

19. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2317 (1969): "Sympathetic strike *n*: a strike in which the strikers make no demands on their own employers but try to bring pressure against the employers of other workers on strike—called also *sympathy strike*."

20. 484 F.2d 1209 (4th Cir. 1973).

21. *Id.* at 1212.

22. NAPA Pittsburg, Inc. v. Automotive Chauffeurs, Local 926, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974). Interestingly, in this case the union

of the arbitration process and, hence, enjoinable.[23] Another line of cases maintained that a sympathy strike is not a circumvention of the arbitration process because there is no showing that a union which is engaged in such a strike is unwilling to arbitrate the subject matter of the dispute, and that therefore sympathy strikes are not enjoinable.[24]

In the instant case this latter line of reasoning prevailed as the Supreme Court held that sympathy strikes are not directly aimed at a circumvention of the aribtration process, and therefore do not fall within the *Boys Markets* exception.[25] The collective bargaining agreement contained a very broad arbitration clause[26] as well as an explicit agreement by the union not to strike.[27] During a three day sympathy strike by the union honoring a newly established co-worker bargaining unit's picket line the company sought injunctive relief in federal district court pending arbitration of the legality of the sympathy strike.[28]

In affirming the district and appellate courts' denial of injunctive relief under these circumstances, the Supreme Court clarified the underlying theory of *Boys Markets*. Recognizing the importance of complying

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had expressly reserved the right to respect primary picket lines of other unions. In a subsequent sympathy strike the employer contested the "primary" status of the picket line honored, claiming (successfully) that the status of the picket line was an "arbitrable" matter, that the union was circumventing arbitration of the dispute by honoring the picket line without initial arbitration, and, therefore, that the sympathy strike was enjoinable on those grounds.

23. *See also* Valmac Indus., Inc. v. Food Handlers Local 425, 519 F.2d 263 (8th Cir. 1975); Inland Steel Co. v. Local 1545, 505 F.2d 293 (7th Cir. 1974).

24. The initial decision in this line of cases was *Amstar Corp. v. Amalgamated Meat Cutters*, 468 F.2d 1372 (5th Cir. 1972). *See also* Plain Dealer Publishing Co. v. Typographical Union No. 53, 520 F.2d 1220 (6th Cir. 1975); Hyster Co. v. Independent Machine Ass'n, 519 F.2d 89 (7th Cir. 1975). A body of legal literature arose supporting each of these diametrically opposed positions. *Compare* Dawson, *The Scope of the Boys Markets Rule*, 28 OKLA. L. REV. 794 (1975) *with* Abrams, *supra* note 14.

25. 96 S. Ct. 3141, 3147 (1976).

26. *Id.* at 3143: "Should differences arise between the [employer] and any employee covered by this Agreement, as to the meaning and application of the provisions of this Agreement, or should *any trouble of any kind* arise in the plant, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately [under the six-step grievance and arbitration procedure provided in the contract]" (emphasis added).

27. *Id.* at n.1.

28. Under the *Boys Markets* holding an order to compel arbitration and the employer's agreement to arbitrate forthwith are prerequisites to a strike injunction. 398 U.S. 235, 254 (1970).

with the dictates of the Norris-LaGuardia Act,[29] the Court emphasized that the holding in *Boys Markets* was very "narrow" and designed solely to frustrate union attempts at circumventing the arbitration process by self-help measures. The Court reasoned that in a sympathy strike the essential element of an attempted undermining of the arbitration process is not present, and that to allow the injunction of such a strike would extend the holding of *Boys Markets* beyond the fundamental policy reasons underlying that decision.[30] A vigorous dissent by Justice Stevens[31] argued that the Norris-LaGuardia Act was never intended to eliminate injunctions to enforce contractual commitments to arbitrate grievances, and that the Court had, in previous holdings, stipulated that injunctions were possible even when the injunction was based solely on a contractual duty not to strike.[32]

Despite the dissent's position that the majority was departing from previous holdings, the decision in *Buffalo Forge Company* was not surprising. In *Boys Markets*, the Court recognized that its holding left open the possibility of otherwise prohibited injunctive relief, and the Court even foresaw that it would have to delimit the scope of the judicial exception to the Norris-LaGuardia Act it had created.[33] Nevertheless, a problem which undoubtedly led to the conflict in the circuits over sympathy strike injunctions was the confusion caused by the *Boys Markets* decision concerning the relative merits of a national policy favoring arbitration and the express dictates of the Norris-LaGuardia Act. While stating very broad policy reasons favoring injunctions of self-help strikes circumventing arbitration

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29. 96 S. Ct. at 3148. See the text at note 5, *supra*.

30. *Id.* The Court additionally stated that despite "quid pro quo" contractual theories (see note 18, *supra*) federal courts can not enjoin a strike simply because it violates a "no strike" clause. The Court reasoned that if injunctions were obtainable on these grounds it would follow that an injunction would be appropriate for every breach of contract accompanied by a broad arbitration clause. *See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1959) (Court stated that "judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance . . . .").

31. The case was a 5-4 decision with Justice Stevens, joined by Justices Brennan, Marshall, and Powell dissenting.

32. The dissent cited *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974) (see the case discussion at note 18, *supra*) as supporting this proposition; however, the majority distinguished *Gateway Coal* (where there was present a unilateral enforcement of an underlying grievance by the union striking). 96 S. Ct. at 3147-48, n.10.

33. 398 U.S. at 253-54 (1970): "Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance."

proceedings, the Court in *Boys Markets* repeatedly warned that its decision was a "narrow" one. This led at least one commentator to conclude that the "narrowness" announced in that decision referred to enjoining strikes in general where a union had agreed to a broad arbitration clause rather than to enjoining strikes aimed at enforcing specific grievances.[34]

However, the instant case implies that the actual policy which formed the basis of *Boys Markets* was one of disfavoring a circumvention of the arbitration process rather than one generally favoring arbitration over self-help measures. This position is perhaps more consistent with both the literal dictates of the Norris-LaGuardia Act[35] and the Court's repeatedly articulated policy of leaving the parties to a collective bargaining agreement free to formulate and police their own contract.[36] Enjoining a sympathy strike which was originally contemplated by the union as allowable under the collective bargaining contract may have the effect of enjoining a contractually "legal" activity as well as requiring the union to arbitrate in areas where arbitration was not contemplated during contract bargaining. If such an injunction has the effect of supplying an additional unbargained-for term to the collective bargaining contract on behalf of the employer, namely a greater duty by the union to arbitrate, then the federal court has clearly exceeded the bounds of neutrality envisioned by the framers of the Norris-LaGuardia Act.

Furthermore, such a very broad policy of enforced arbitration via immediate injunction of sympathy strikes may not be completely realistic given the nature of labor-management relations. The strike is the basic economic weapon of the employee in the employment relation. While a union may indeed bargain away the right to strike on its own behalf for economic or other causes via a broad arbitration clause, a sympathy strike may be directly related to the organizational efforts of another union, and an injunction to stop this activity pending arbitration may impinge upon the intervention-free environment sought by the Norris-LaGuardia Act far more than an injunction to stop the unilateral enforcement of grievances pending arbitration. While a sympathy strike may indeed be a contractual violation, an injunction of an ultimately contractually permissible sympathy strike would be much more of an interference than the injunction of a strike to enforce a grievance, for in the latter case, regardless of the just

34. Dawson, *supra* note 24, at 806.
35. See the text of the act at note 5, *supra*.
36. See the discussion in note 30, *supra*.

nature of the underlying grievance, the union has already agreed to settle grievances by arbitration rather than by strike.

Clearly, the federal court policy of minimal interference is of little comfort to the employer faced with a sympathy strike or strike of similarly protected status[37] under the Norris-LaGuardia Act.[38] However, still open to the employer is the arbitrator's issuance of an injunction subsequent to arbitration,[39] which has been a method of relief utilized by employers subsequent to the *Sinclair Refinery Company* case.[40] Additionally, it is clear that in cases where strikes aimed at undermining the arbitration process are alleged or disguised to be sympathy strikes or similarly protected strikes, federal courts can properly grant injunctive relief.[41]

C. John Caskey

37. It appears likely from the Court's decision that other strikes than sympathy strikes are now within the Norris-LaGuardia Act's prohibition against federal court injunctions, because the qualifying element of an injunction-free strike is defined as one not circumventing arbitration through self-help measures. Two examples of strikes possibly falling within this category are employee safety protest strikes and politically inspired strikes by employees; however, the Court made no specific mention of strikes falling within this category other than sympathy strikes.

38. Although theoretically a forum open to the employer, injunctive relief in state court cannot be realistically sought in light of the *Avco Corporation* rule. See the text at note 11, *supra* for the rule allowing removal of injunction cases to federal court where the Norris-LaGuardia Act's prohibition would come into play.

39. *See, e.g.*, Ruppert v. Egelhofer, 3 N.Y.2d 576, 170 N.Y.S.2d 785 (N.Y. 1958) (the arbitrator's award of injunctive relief was upheld in state court). The United States Supreme Court has noted this practice. *See* Drake Bakeries, Inc. v. Local 50, 370 U.S. 254, 260 n.5 (1962). An arbitrator's award of injunctive relief is enforceable in federal court via § 301 of the Labor Management Relations Act. See the text of the act at note 9, *supra*.

40. *See, e.g.*, Drake Bakeries, Inc. v. Local 50, 370 U.S. 254, 260 n.5 (1962) (Supreme Court recognized this practice on the state level).

41. This conclusion is based on a logical extension of the Court's reasoning and is supported, in part, by statements in the current legal literature in this area. *See, e.g.*, Axelrod, *The Application of the Boys Markets Decision in the Federal Courts*, 16 B.C. IND. & COM. L. REV. 893, 920, 929-30 (1975); Comment, *Federal Labor Policy and the Scope of the Prerequisites for a Boys Market Injunction*, 19 ST. LOUIS U.L.J. 328, 343-44 (1975).