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> The arbitrator looks to what is equitable, the judge to what is law; and it was for this purpose that arbitration was introduced; namely, that equity might prevail.
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> Aristotle, Rhetoric, Bk. 1, ch. 13

INTRODUCTION

In 1960 the United States Supreme Court proclaimed that an arbitration proceeding, rather than a judicial tribunal, is the preferred mechanism for the resolution of labor-management disputes under collective bargaining agreements. Describing the advantages of arbitration, the Court emphasized that the labor arbitrator possessed an expertise foreign to the competence of the courts.[1] The parties to arbitration expect his judgment to reflect not merely the terms of the contract, but other factors such as productivity of a particular result, its consequence on shop morale, and its ultimate effect on employer-employee tensions.[2]

Despite that "pro-arbitration" pronouncement nearly seventeen years ago, the arbitration process has not always received such favorable treatment by the Court. This article examines and analyzes the unsettled relationship between arbitration and judicial intercession, by focusing on two cases decided in the 1975-76 term that most recently addressed these issues.

BUFFALO FORGE AND SYMPATHY STRIKES

The last few decades witnessed the emergence of two competing and fundamental principles of national labor policy. First, union-management disputes are resolved through arbitration.[3] Second,

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1. United Steelworkers v. Warrior & Gulf Navigator Company, 363 U.S. 574, 582 (1960). *See* note 16 *infra* and accompanying text.

2. 363 U.S. at 582. Not only has the Supreme Court praised the arbitration process, but the Congress has also encouraged arbitration as a forum for the settlement of labor disputes. *See* United States Arbitration Act, 9 U.S.C. §§ 1-14 (1970).

3. The emphasis on arbitration as the appropriate vehicle for the settlement of industrial disputes was articulated in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). In *Lincoln Mills*, the Court fashioned the beginning of a federal substantive labor law.

federal courts have the power to intervene in labor disputes, although the power is severely limited.[4] These two principles were

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The Court relied primarily upon the legislative history of section 8 of the Norris-LaGuardia Act, 29 U.S.C. §108 (1970) and section 301(a) of the Labor-Management Relations Act, 29 U.S.C. §185(a) (1970). Section 8 of the Norris-LaGuardia Act provides:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

29 U.S.C. §108(a) (1970). Section 301(a) of the Labor-Management Relations Act provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, 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.

29 U.S.C. §185(a) (1970). The Court in *Lincoln Mills* stated:

> Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. . . [T]he 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. . . [T]he entire tenor of the [legislative] history indicates that the agreement to arbitrate grievance disputes was considered as quid pro quo of a no-strike agreement.

353 U.S. at 455.

4. Section 4 of the Norris-LaGuardia Act, 29 U.S.C. §104 (1970), severely limits the use of the injunction:

> 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:
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> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
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> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
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> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
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> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
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> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
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> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
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> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
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> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
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> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

accommodated in 1970 when the Supreme Court in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*[5] held that federal district courts may enjoin strikes arising over disputes which are subject to grievance and arbitration provisions of a collective bargaining agreement. Six years later, in *Buffalo Forge v. United Steelworkers,*[6] the Court held that, notwithstanding the existence of a no-strike clause and a mandatory arbitration procedure, section 4 of the Norris-LaGuardia Act of 1934[7] prohibited a district court from issuing an injunction to halt a sympathy strike.[8] A brief historical background is necessary to understand *Buffalo Forge*'s treatment of the conflicting policies behind section 4 of the Norris-LaGuardia Act and section 301 of the Labor-Management Relations Act.

Section 301 Injunctions Before Buffalo Forge

Widespread federal intervention in industrial disputes through the use of the injunction motivated passage of the Norris-LaGuardia Act in 1932. Section 4 of the Act[9] proscribes the use of the injunction by federal district courts when workers are involved in labor disputes. In 1947, Congress enacted the Labor Management Relations Act (LMRA) including section 301[10] which confers jurisdiction on federal district courts in any law suit that arises out of labor contract violations. Although this Act ostensibly was jurisdictional in nature without any provision for federal substantive labor law,[11] at the time of its enactment some thought section 301 did more than simply confer jurisdiction. The Supreme Court initially interpreted section 301 to be jurisdictional only[12] but later reversed itself in *Textile Workers Union v. Lincoln Mills.*[13]

In *Lincoln Mills,* a collective bargaining agreement contained a grievance-arbitration provision and a no-strike clause. When the employer refused to arbitrate a dispute, the union initiated an action in federal district court. The district court ordered arbitration but the Court of Appeals for the Fifth Circuit reversed. On appeal,

5. 398 U.S. 235 (1970).
6. 428 U.S. 397 (1976).
7. *See* note 4 *supra.*
8. 428 U.S. 397.
9. *See* note 4 *supra.*
10. *See* note 2 *supra.*
11. Wimberly, *The Labor Injunction—Past, Present, and Future,* 22 S. CAR. L. REV. 689, 728 (1970). *See also* Note, *Labor Injunction and Judge-Made Law: The Contemporary Role of Norris-LaGuardia,* 70 YALE L.J. 70 (1960).
12. Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955).
13. 353 U.S. 448 (1957).

the Supreme Court held that section 301 implicitly authorized federal district courts to create a body of federal substantive labor law.[14] In addition, the Court held that the Norris-LaGuardia Act did not prevent federal courts from ordering specific performance of provisions in collective bargaining agreements.[15] Accordingly, the Court ordered the employer to arbitrate.

The *Steelworkers Trilogy*[16] cases represent the next significant development of federal substantive labor law. In these cases, decided only a few years after *Lincoln Mills,* the Court emphasized that arbitration is the preferred method for peaceful settlement of labor-management disputes arising out of collective bargaining agreements. The Court declared that the union's consideration for the arbitration provision in a collective bargaining agreement is the no-strike clause. The Supreme Court further held that district courts can require arbitration and can also enforce the award of an arbitrator.[17]

Following *Lincoln Mills* and the *Steelworkers Trilogy,* the issue arose whether federal district courts, notwithstanding section 4 of Norris-LaGuardia, could enforce the other side of the *quid pro quo, i.e.,* the no-strike clause. The Supreme Court in *Sinclair Refining Co. v. Atkinson*[18] concluded that a district court may not issue an injunction to restrain a strike over a grievance despite the existence of a no-strike clause in the collective bargaining agreement.[19]

In *Sinclair,* the Court reasoned that a "labor dispute" was involved within the terms of section 13 of the Norris-LaGuardia Act. Therefore, the district court had no jurisdiction to issue an injunction unless section 301 of the LMRA could be considered to have narrowed the scope of Norris-LaGuardia.[20] The Court concluded that the legislative history of section 301 demonstrated no intent to

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14. *Id.* at 451.

15. *Id.* at 458. *See* note 3 *supra.*

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

17. *Id.* The importance of arbitration as the device for resolution of labor-management disputes is emphasized in D. Box & H. Dunlop, Labor and the American Community 220-21 (1970), where it is reported that nearly 95% of all collective bargaining agreements contain arbitration provisions.

18. 370 U.S. 195 (1962).

19. *Id.* at 199-210. "Following *Sinclair,* employers initiated their actions in state courts. The unions parlay was to remove the actions to federal district court. In Avco Corp. v. Lodge 735, IAM, 390 U.S. 557 (1968), the Supreme Court upheld the right of removal." 390 U.S. at 560.

20. In dissent Justice Brennan stated that the district court should be able to issue an injunction, but only after a careful examination of the dispute's arbitrability. 370 U.S. at 228.

limit the scope of the Norris-LaGuardia Act.[21] Thus, the Supreme Court in *Sinclair* effectively removed an important remedy from the arsenal of section 301 of the Labor-Management Relations Act.[22] This limitation was, however, short lived.

In *Boys Markets, Inc. v. Retail Clerks Union Local 770,*[23] a California supermarket chain and a local union were parties to a collective bargaining agreement which provided that contractual interpretation or application controversies should be resolved by a grievance procedure including arbitration. The contract also contained a clause proscribing unauthorized work stoppage, lockouts, picketing and boycotting. A dispute arose over the performance of work by non-bargaining unit employees. Subsequently, a strike ensued and the mandatory arbitration clause was invoked.

The Court held that the Norris-LaGuardia Act had to be accomodated with section 301 of the LMRA in order to achieve industrial peace and expeditious settlement of labor disputes.[24] To achieve these goals, the Court reshaped its national labor policy to allow for more liberal use of the injunction. The Court overruled *Sinclair,*[25] holding that the Norris-LaGuardia policies against issuance of injunctions must be balanced with the endorsement of arbitration.[26] Thus, by sanctioning reliance on the injunction, the Court indirectly encouraged the settlement of disputes by arbitration because parties to the labor agreement felt constrained to arbitrate.

Regarding the right of the district court to issue an injunction, the Court stated:

> [T]he unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy, and consequently that

21. *Id.* at 199-203.

22. *Id.*

23. 398 U.S. 235 (1970). For an excellent discussion of *Boys Markets, see* Vladeck, *Boys Markets and National Labor Policy,* 24 VAND. L. REV. 93 (1970).

24. *See* Note, *Labor Injunctions: A Look at the Boys Markets Case,* 5 U. SAN FRAN. L. REV. 516 (1971) [hereinafter cited as *Labor Injunctions*].

25. The Court's decision in *Sinclair* was supported in part, because section 301 of LMRA did not explicitly repeal the Norris-LaGuardia Act and no other legislation in the Norris-LaGuardia era expressly stated that the anti-injunction provisions of the statute were inoperative.

26. For an analysis of the statutory interpretation employed in *Boys Markets, see Labor Injunctions, supra* note 24, at 525-26.

> the Norris-LaGuardia Act does not bar the granting of injunctive relief in the circumstances of the instant case.[27]

However, in holding that the district court could issue an injunction, the Court limited its decision to situations in which the bargaining agreement contained a mandatory grievance adjustment and arbitration procedure:

> 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. . . . When a strike is sought to be enjoined because it is over a grievance which *both* parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract does have that effect; and the employer should be ordered to arbitrate as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity. . . .[28]

While the Court did not specifically mandate a presumption of arbitrability in the injunction decision-making process, it did require a careful scrutiny of arbitrability. Thus, the Court strayed from it's language in the *Steelworkers Trilogy* cases which established a "presumption of arbitrability" for labor disputes.[29]

The *Boys Markets* holding was reinforced in *Gateway Coal Co. v. UMW*,[30] where an injunction was deemed proper notwithstanding the absence of a contractual no-strike provision. The contract in *Gateway* did have an arbitration provision. The Court indicated that the obligation to arbitrate imposed by a collective bargaining agreement gave rise to an implied no-strike duty that supports the issuance of an injunction against a work stoppage. The Court reasoned that "[a]bsent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application."[31]

Contrary to the language used in *Boys Markets*, in *Gateway* the Court expressly reinforced its support of a "presumption of arbitrability" when it announced that the *Steelworkers Trilogy* presumption should be applied.[32]

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27. 398 U.S. at 253.

28. *Id.* at 253-54 (emphasis added). This language is an adoption of Mr. Justice Brennan's dissent in *Sinclair*. *See* note 20 *supra*.

29. 363 U.S. at 582-83.

30. 414 U.S. 368 (1973).

31. *Id.* at 382.

32. *Id.* at 379-80. For a discussion of the *Gateway* decision, *see* Oppenheim, *Gateway & Alexander—Whither Arbitration?* 48 TUL. L. REV. 973 (1974).

Buffalo Forge: Recasting the Parties

The propriety of the sympathy strike was extensively litigated in the courts and before the National Labor Relations Board following the *Boys Markets* decision. In *Buffalo Forge Co. v. United Steelworkers*[33] the Supreme Court considered for the first time whether a federal court could "enjoin a sympathy strike pending the arbitrator's decision as to whether the strike is forbidden by the express no-strike clause contained in the collective bargaining contract to which the striking union is a party."[34]

The employer in *Buffalo Forge* operated several plant and office facilities in the Buffalo and New York City communities. At Buffalo Forge, production and maintenance employees (P&M) were represented by the United Steelworkers of America, AFL-CIO and its local unions.[35] The locals and the employer were parties to two separate collective bargaining agreements.

Two provisions in the agreements kindled the dispute in *Buffalo Forge*. First, the contracts contained a no-strike clause,[36] and second, the collective bargaining agreements contained grievance and arbitration procedures for settling disputes over the interpretation and application of each contract. These latter procedures provided that should differences arise concerning application of the agreement, "an earnest effort" must be made to settle the dispute through arbitration and without the suspension of work.[37]

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33. 428 U.S. 397 (1976). For a discussion of sympathy strikes *see* Connolly & Connolly, *Employers' Rights Relative to Sympathy Strikes*, 14 DUQ. L.REV. 121 (1975) [hereinafter cited as Connolly & Connolly].

34. *Id.* at 399.

35. Local No. 1874 and Local No. 3732.

36. Collective Bargaining Agreement § 14(b) (1971):

> There shall be no strikes, work stoppages or interruption or impeding of work. No Officers or representatives of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in any such activity. The Union recognizes its possible liabilities for violation of this provision and will use its influence to see that work stoppages are prevented. Unsuccessful efforts by Union officers or Union representatives to prevent and terminate conduct prohibited by this paragraph, will not be construed as 'aid' or 'condonation' of such conduct and shall not result in any disciplinary actions against the Officers, committeemen or stewards involved.

See 428 U.S. at 399 n.1.

37. Collective Bargaining Agreement § 26 (1971):

> 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 sections 27 through 32.

See 428 U.S. at 400.

Immediately before the dispute in *Buffalo Forge* arose, the United Steelworkers along with two other local unions were certified to represent the company's clerical and technical (O&T) office employees. After unsuccessful negotiations to reach their first collective bargaining agreement, the O&T employees struck and set up picket lines at every company plant and office. Shortly thereafter, the P&M employees honored the O&T picket lines and stopped work in support of their sister unions respecting the O&T employees.

The employer initiated an action in federal district court under section 301(a) of the Labor Management Relations Act seeking an order for arbitration, damages and injunctive relief. First, the employer alleged that the work stoppage contravened the no-strike clause.[38] Second, the employer argued that if the no-strike clause was not violated, then the strike was caused by a specific incident involving P&M truck drivers' refusal to follow a supervisor's instructions to cross the O&T picket line. Therefore, the employer argued that the issue whether the P&M employees' work stoppage violated the no-strike clause was arbitrable under the grievance and arbitration contractual provision for settling disputes over the interpretation and application of each contract.[39]

The District Court for the Western District of New York concluded that the work stoppage was the result of the P&M employees engaging in a sympathy strike solely out of deference to a lawful picket line established by a sister union. Accordingly, the district court held that section 4 of the Norris-LaGuardia Act prohibited it from issuing an injunction because the sympathy strike by the P&M employees was not over an "arbitrable grievance" and hence not within the "narrow" exception to Norris-LaGuardia established in *Boys Markets*.[40] The Second Circuit Court of Appeals[41] and the Supreme Court[42] of the United States affirmed the decision of the district court.

Buffalo Forge In The Supreme Court—Blossom Arbitration?

The Supreme Court began its consideration of whether a sympathy strike may be enjoined by noting that federal courts have taken

38. *See* note 35 *supra.*

39. *See* text accompanying note 36 *supra.*

40. 386 F. Supp. 405 (W.D.N.Y. 1974).

41. 517 F.2d 1207, 1210 (2nd Cir. 1975). The Second Circuit adopted the reasoning of the district court.

42. 428 U.S. at 397.

diverse views on the issue.[43] One line of appellate decisions held that a sympathy strike was not enjoinable because the strike is not "over a grievance."[44] Another line of cases took the position that *Boys Markets* permits the use of the injunction to halt sympathy strikes in deference to another's line.[45] The Court further recognized the

43. *Id.* at 404.

44. The Fifth and Sixth Circuit Courts of Appeals have applied the same rationale as the Second Circuit in *Buffalo Forge.* In Amstar Corp. v. Amalgamated Meat Cutters & Butcher Workmen, 468 F.2d 1372 (5th Cir. 1972), some company refineries had collective bargaining agreements with the International Longshoremen's Association (ILA) and with the Meat Cutters similar to the contract in *Buffalo Forge. See* text accompanying notes 30-31 *supra.* The Meat Cutters and ILA agreements had different expiration dates. When the longshoremen's contract expired they struck and established picket lines. The presence of these picket lines caused a work stoppage by the Meat Cutters. Following the work stoppage, the company sought injunctive relief. After the district court had granted the injunction, 337 F. Supp. 810 (E.D.La. 1972), the Fifth Circuit reversed, reading *Boys Markets* to require a finding that the strike was precipitated by a grievance against the company. The court concluded that the injunction was not a proper remedy because the strike was not caused by another union's picket line. *See also* Plain Dealer Publishing Co. v. Cleveland Typographical Union #53, 520 F.2d 1220 (6th Cir. 1975), *cert. denied,* 428 U.S. 909 (1976), where the Sixth Circuit affirmed the district court's denial of an injunction against unions to cross lawful pickets established by a sister union. Injunctive relief was not granted because the court of appeals viewed the failure to cross the picket line as a "dispute which [resulted] from a work stoppage" rather than a *Boys Markets* work stoppage which was the result of a labor dispute. 520 F.2d at 1221.

These two courts viewed *Boys Markets* as having two requirements: (a) a dispute subject to the contract's grievance procedure; (b) a work stoppage caused by the dispute. *See* Connolly & Connolly, *supra* note 33, at 130. *See also* United States Steel Corp. v. United Mine Workers, 519 F.2d 1236 (1975), *reh. denied,* 526 F.2d 376 (5th Cir.), *cert. denied,* 428 U.S. 910 (1976); General Cable Corp. v. IBEW Local 1644, 331 F. Supp. 478 (D. Md. 1971); Ourisman Chevrolet Co. v. Automotive Lodge 1486, 77 L.R.R.M. 2084 (D.D.C. 1971); Stroehmann Bros. Co. v. Confectionery Workers Local 427, 315 F. Supp. 647 (M.D. Pa. 1970); Simplex Wire & Cable Co. v. Local 2208, IBEW, 314 F. Supp. 885 (D.N.H. 1970).

45. The Third, Fourth and Eighth Circuits adopted the position that an injunction is proper. For instance, in Monongehala Power Co. v. Local 2332 IBEW, 484 F.2d 1209 (4th Cir. 1973), employees of one union went on strike and set up picket lines. Fellow employees, who were represented by a sister union, refused to cross the picket line. The collective bargaining agreement contained a no-strike provision and broad grievance and arbitration provisions. The court held that the "dispute as to whether the refusal to cross the picket line and resulting work stoppage violated Article X [no-strike clause] was clearly subject to mandatory adjustment. . . ." *Id.* at 1214. *See also* NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Local Union No. 926, 502 F.2d 321 (3d Cir.), *cert. denied,* 419 U.S. 1049 (1974); Island Creek Coal Co. v. United Mine Workers, 507 F.2d 650 (3rd Cir.), *cert. denied,* 423 U.S. 877 (1975); Armco Steel Corp. v. United Mine Workers, 505 F.2d 1129 (4th Cir. 1974), *cert. denied,* 423 U.S. 877 (1975); Pilot Freight Carriers, Inc. v. International Brotherhood of Teamsters, 497 F.2d 311 (4th Cir.), *cert. denied,* 419 U.S. 869 (1974); Wilmington Shipping Co. v. International Longshoremen's Assn., 86 L.R.R.M. 2846 (4th Cir.), *cert. denied,* 419 U.S. 1022 (1974); Valmac Industries v. Food Handlers Local 425, 519 F.2d 263 (8th Cir. 1975), *vacated and remanded,* 428 U.S. 906 (1976); Associated General Contractors v. International Union of Operating Engineers, 519 F.2d 269 (8th Cir. 1975).

The Seventh Circuit Court of Appeals adopted an intermediate position. In Hyster Co. v. Independent Towing Ass'n, 519 F.2d 89 (7th Cir. 1975), the court held that work stoppage which resulted from refusal of the union and their members to cross a stranger picket line did not give rise to an arbitrable issue under the collective bargaining agreement. The court

division of opinion between appellate courts on the issues of whether a sympathy strike should be enjoined pending arbitration and whether the strike was permissible under the no-strike clause. The Court then reviewed the *Boys Markets* decision in which it held that a union could be enjoined from striking over a dispute which it was bound to arbitrate.[46]

The Court emphasized that the holding in *Boys Markets* was a "narrow one" restricted to situations where the collective bargaining contract contained mandatory grievance and arbitration procedures.[47] Moreover, the Court held that under *Boys Markets* a district court may not issue an injunction until it first holds that a dispute exists which is over "a grievance which both parties are bound to arbitrate."[48]

Relying on this non-expansive language, the Court indicated that *Boys Markets* was not controlling. The Court believed that the sympathy strike did not ensue from any management-union dispute that was subject to the arbitration provisions of the collective bargaining agreement. Rather, the work stoppage was a sympathy strike honoring the picket line of a sister union.[49]

The Court further found that an injunction was "not authorized solely because of the company's allegation that the sympathy strike violated the express no-strike provision of the contract. As justification for it's conclusion, the Court summarily announced that it had never suggested that district courts have the power to enjoin actual or threatened contract violations notwithstanding the Norris-LaGuardia Act.[50] Support for its conclusion was found by looking to Congress' refusal to lift the Norris-LaGuardia ban against labor-dispute injunctions.[51]

The Court next focused on the grievance and arbitration provisions for the settlement of disputes over the interpretation and application of the no-strike clause. In *Buffalo Forge,* the parties disagreed as to whether the sympathy strike violated the union's no-strike provision. The Court sided with the employer in determining that the issue was arbitrable. However, the Court said

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stated that because there was no "waiver of any collective bargaining right" and because the dispute was not arbitrable, a *Boys Markets* injunction was not proper. *But see* Inland Steel Co. v. Local Union No. 1545, United Mine Workers, 505 F.2d 293 (7th Cir. 1974).

46. 398 U.S. 235.

47. 428 U.S. at 406, *citing* Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. at 253.

48. *Id.* at 407, *citing* Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. at 254.

49. *Id.* at 409.

50. *Id.*

51. 370 U.S. at 205-08.

> . . . it does not follow that the District Court was empowered not only to order arbitration but to enjoin the strike pending the decision of the arbitrator, despite the express prohibition of § 4(a) of the Norris-LaGuardia Act against injunctions prohibiting any person from "[c]easing or refusing to perform any work or to remain in any relation of employment."[52]

The Court reached this conclusion because it foresaw possible abuses of the injunction that might result after an employer's allegation of a breach of contract. The majority believed it would be improper for federal courts to become involved in intensive fact-finding missions in order to interpret collective bargaining agreements. Such involvement would undermine its pro-arbitration policy and cut deeply into the Norris-LaGuardia Act, thus making district courts ". . . potential participants in a wide range of arbitrable disputes . . . not just for the purpose of enforcing promises to arbitrate, which was the limit of *Boys Markets*, but for the purpose of preliminary dealing with the merits of factual and legal issues that are subject for the arbitrator."[53] Furthermore, it was suggested that the arbitrators would be unduly influenced or prejudiced were district courts to undertake the initial fact-finding and then determine that the conduct was a clear violation of the collective bargaining agreement. The Court also indicated that temporary injunctions tend to permanently settle the issue. Finally, the time and expense of re-litigation before an arbitrator would discourage the losing party in the district court from initiating arbitration proceedings. In denying the district court the power to use the injunction, the Court apparently reasoned that the issuance of an injunction would have an adverse affect on the arbitration process.

The dissent perceived the issue differently. For them the question was not whether a federal court could enjoin a sympathy strike, but rather, whether the union's *quid pro quo* for the employer's undertaking to arbitrate, *i.e.*, a contractual obligation not to strike, is severable into two parts—one part which the court is permitted to enforce by injunction and another which it may not.[54] The only part

52. 428 U.S. at 410.

53. *Id.* at 410-11. The Court noted that

> in 1972, the most recent year for which comprehensive data have been published, more than 21,000,000 workers in the United States were covered under more than 150,000 collective bargaining agreements. *Bureau of Labor Statistics, Directory of National Unions and Employee Assns.* 87-88 (1973).

Id. at 411 n.12. The dissent stated, however, that these figures do not shed light on the number of sympathy strikes which might violate no-strike provisions. Only 12 cases were heard in recent years. 428 U.S. at 414 n.3 (Stevens, J., dissenting).

54. 428 U.S. at 413 (Stevens, J., dissenting).

which was enforceable according to the majority, the dissent suggested, was the part relating to a strike "over an arbitrable grievance." The dissent observed a two-tiered foundation for the Court's holding: (1) a literal interpretation of Norris-LaGuardia; and (2) a fear that the federal courts would make a massive entry into contract interpretation—a field reserved for arbitrators. The dissent contended that the first major rationale of the majority had been rejected in cases where the central concerns of the Norris-LaGuardia Act were not implicated. They also argued that the "massive entry" rationale was unrealistic[55] and that it had been rejected in *Gateway Coal* when the Court held "'a substantial question of contractual interpretation' was a sufficient basis for federal equity jurisdiction."[56]

Like the majority, the dissent looked to *Boys Markets* as support for the use of the injunction. First, they discussed the underlying purposes of the Norris-LaGuardia Act. The dissent pointed out that it was the history of injunctions against strike activity in furtherance of "union organization, recognition and collective bargaining" and not court negotiation and enforcement of contracts that prompted the enactment of the Norris-LaGuardia Act in 1932.[57] Second, it was emphasized that section 301 of the LMRA, passed twelve years after Norris-LaGuardia, expanded the scope of federal jurisdiction in dealing with a violation of labor-management contracts. The dissent reviewed the *quid pro quo* argument, *i.e.*, a no-strike provision in return for an undertaking to arbitrate, and disagreed with the Court that the strike did not deprive the employer

55. *See* note 52 *supra*.

56. 428 U.S. at 414 (Stevens, J., dissenting).

57. *Id.* at 416. To lend support to this conclusion the dissent referred to the following statement by the neutral members of the Special Atkinson-Sinclair Committee of the A.B.A. Labor Relations Law Section which was quoted in *Boys Markets*, 398 U.S. at 253 n.22.:

> Any proposal which would subject unions to injunctive relief must take account of the Norris-LaGuardia Act and the opposition expressed in that Act to the issuing of injunctions in labor disputes. Nevertheless, the reasons behind the Norris-LaGuardia Act seem scarcely applicable to the situation . . . [in which a strike in violation of a collective bargaining agreement is enjoined]. The Act was passed primarily because of widespread dissatisfaction with the tendency of judges to enjoin concerted activities in accordance with "doctrines of tort law which made the lawfulness of a strike depend upon judicial views of social and economic policy." [citation omitted]. Where an injunction is used against a strike in breach of contract, the union is not subjected in this fashion to judicially created limitations on its freedom of action but is simply compelled to comply with limitations to which it has previously agreed. Moreover, where the underlying dispute is arbitrable, the union is not deprived of any practicable means of pressing its claim but is only required to submit the dispute to the impartial tribunal that it has agreed to establish for this purpose.

428 U.S. at 416 n.7.

of the bargain.[58] Third, the dissent examined the Norris-LaGuardia Act[59] and concluded that its literal wording was not an "insuperable obstacle to specific endorsement of a no-strike commitment in accordance with 'the usual processes of law.'"[60] They noted that several decisions previously held that the courts could use the injunction in labor disputes to fulfill obligations under the Railway Labor Act.[61] Finally, the dissenting justices reasoned that the policy which favors arbitration also favors the making of enforceable agreements to arbitrate. If a no-strike clause is not enforceable against a sympathy strike, it will discourage employers from agreeing to binding arbitration because union assurance against work stoppages would be tainted. In addition, the dissent reviewed the LMRA's legislative history which was discussed in the *Lincoln Mills* case.[62] The statute's legislative history supported the use of the injunction to compel parties to honor the collective bargaining agreement.[63]

In an extensive consideration of the importance of arbitration, the dissent stated that the net effect of the arbitration process is to

> remove completely any ambiguity in the agreement as it applies to an unforeseen, or undescribed, set of facts. But if the specific situation is foreseen and described in the contract itself with such precision that there is no need for interpretation by an arbitrator, it would be reasonable to give the same legal effect to such an agreement prior to the arbitrator's decision.[64]

In summation, it was asserted that injunctions against sympathy strikes should be permissible where the action is clearly a violation of the collective bargaining agreement.

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58. *Id.* at 418 (Stevens, J., dissenting).

59. *See* notes 3 and 4 *supra.*

60. 428 U.S. at 422 (Stevens, J., dissenting).

61. 45 U.S.C. §§151-88 (1936). Under the Railway Labor Act, if the parties to a labor agreement referred the case to arbitration the arbitration award was enforceable in federal district court. In Brotherhood of Railroad Trainmen v. Chicago, R. & I.R. Co., 353 U.S. 30, 39-42 (1957), the Supreme Court held that a federal court could enjoin a strike by a railroad union over a dispute subject to mandatory arbitration under the Railway Labor Act. The Court suggested that the Norris-LaGuardia policy of non-intervention in the federal courts should yield to the promotion of an effective arbitration process. *See also* Virginian Ry. Co. v. System Federation No. 40, Railway Employees, 300 U.S. 515 (1937). *Accord,* Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952), Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232, 237-40 (1949).

62. *See* note 3 *supra.*

63. 428 U.S. at 419-23 (Stevens, J., dissenting). The dissent also suggested that the purpose of § 301(a) of the LMRA was to create an additional forum for the enforcement of contracts.

64. 428 U.S. at 426 (Stevens, J., dissenting).

Non-Removal Clauses

Employers who believe the *quid pro quo* is vitiated because their right to enjoin a sympathy strike in federal court is limited may, as the dissent in *Buffalo Forge* suggested, be reluctant to enter into collective bargaining agreements which have a mandatory arbitration clause. Should this prediction come true, the very foundation of the nation's pro-arbitration policy may be weakened.

One alternative currently being implemented by management is the inclusion of a non-removal clause in collective bargaining agreements.[65] By including such a provision in the contract, the employer effectively maintains the action in state court free from the threat of removal to federal district court. Thus, the decision is *Buffalo Forge* is avoided. No court has yet confronted the question of whether a non-removal clause in a collective bargaining agreement frustrates public policy. Arguably, a non-removal clause might be ignored if a court reaches such a conclusion.[66]

While the non-removal clause may appear to be an attractive solution, it must be carefully scrutinized and analyzed before each individual employer interjects the issue of non-removal into the negotiation process. Upon close examination, the non-removal clause fails to satisfy even the most rudimentary test of practicality. First, state courts generally are not as conversant with labor law issues as are the federal courts. Thus, they are not as well equipped to decide the complex issues inherent in labor law.[67] Second, the bargaining for a non-removal clause may insert an unnecessary issue into contract negotiations when there are more important matters that should be receiving the employer's attention. Finally, and perhaps most significant, the negotiation for a non-removal clause may in some instances tend to frustrate the achievement of the goal of our national labor policy—an equitable, peaceful accommodation of competing social and political interests of the employer and the

65. In Eckel v. Shell Eastern Petroleum Products, 167 A. 869 (Ch. N.J. 1933), a lower New Jersey court indicated that "[w]aiver of right of removal may be . . . by express agreement. . . ." *Id.* at 871.

66. *See* Hoh v. Pepsico, Inc., 491 F.2d 556 (2nd Cir. 1974), where there was a provision in the collective bargaining contract that neither the union nor management would seek removal. Here, the Court held that where the union's petition was to compel submission to arbitration, removal was proper notwithstanding the non-removal clause.

67. Parenthetically, a non-removal clause may backfire on an employer who finds himself in a state court in a rural community where the judge is a sympathetic "cousin to the employee." An employer may be better off were he to risk unfavorable disposition in federal court where he at least knows he will receive an impartial hearing on the merits of his case. Interview with Carl Warns, Professor of Law, University of Louisville School of Law and Member of the National Academy of Arbitrators, October 11, 1976.

employees. Negotiation for a non-removal clause might be viewed by employees with suspicion. Employers might obtain the same result if they follow the normal channels of arbitration and seek a cease and desist order. Such an order by the arbitrator does not usually generate the amount of emotion that normally ensues when an injunction is issued.

The ultimate question, therefore, is whether arbitration is the most expeditious, effective vehicle to settle a labor dispute. If it is, then an employer who attempts to circumvent the jurisdiction of federal courts by negotiating for a non-removal clause may be fostering an unnecessary confrontation rather than striving for an equitable accommodation.

HINES V. ANCHOR MOTOR FREIGHT: FAIR REPRESENTATION AND ARBITRAL FINALITY

The two rudimentary principles of our national labor policy that were accommodated in *Buffalo Forge, i.e.*, the resolution of labor disputes via arbitration and the intervention by federal courts in labor relations conflicts, were also weighed in *Hines v. Anchor Motor Freight, Inc.*[68] In *Anchor Motor Freight* the Supreme Court held that a provision of the collective bargaining agreement which provided for finality of grievance-arbitration decisions with respect to the employer was without effect when the union did not fairly represent the grievant-employee. An understanding of the Court's treatment of fair representation cases prior to *Anchor Motor Freight* is helpful to evaluating the scope of this latter decision.

Finality and Fair Representation: From Steele to Vaca

1. Arbitration decisions are final and binding

A fundamental reason for the smooth functioning of the grievance-arbitration process is the fact that arbitration awards are generally considered "final and binding." Only in extreme instances will the decisions of arbitrators be upset. The *Steelworkers Trilogy* cases[69] indicated that "it is the arbitrator's construction [of the collective bargaining agreement] which was bargained for; and . . . the courts have no business overruling him. . . ."[70]

Congress approved the concept of arbitral finality with the enactment of the Labor Management Relations Act:

68. 424 U.S. 544 (1976).
69. *See* note 16 *supra*.
70. 363 U.S. at 599.

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . .[71]

Thus, the underlying premise of the arbitral process is that the arbitrator's decision will be the final[72] solution to a labor dispute. If a party in an arbitration proceeding is not satisfied with the outcome and asks a judicial tribunal to reverse the arbitrator's award, he challenges that fundamental premise.[73]

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71. 29 U.S.C. §173(d) (1970).

72. For an analysis of arbitral finality *see* Note, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 U.C.L.A.L. REV. 936 (1976). *See also* Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435 (1963); Ford v. General Elec. Co. 395 F.2d 157 (7th Cir. 1968); Haynes v. United States Pipe & Foundry Co., 362 F.2d 414 (5th Cir. 1966).

73. There are situations in which the assertion of arbitral finality will not preclude judicial review. If there has been fraud, corruption or partiality in the arbitration process, the arbitrator's award may be reviewed. *See, e.g.*, Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968). If the arbitrator has exceeded his power (if the award violates public policy or was based on factual error), the award will not be enforced. *See, e.g.*, Black v. Cutter Laboratories, 43 Cal. 2d 788, 278 P.2d 905 (1955), *appeal dismissed*, 351 U.S. 292 (1956). *See also* Torrington v. Metal Workers Local 1645, 362 F.2d 677 (2nd Cir. 1966). In *Torrington*, the Second Circuit observed that "the mandate that the arbitrator stay within the confines of the collective bargaining agreement . . . requires a reviewing court to pass upon whether the agreement authorizes the arbitrator to expand its express terms on the basis of the parties' prior practice." *Id.* at 680. For a discussion of the limitations of an arbitrator's power to modify a collective bargaining agreement *see* Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1490-98 (1959).

Despite the Supreme Court's holding in United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960), where the Court indicated that review of an error was limited solely to determining whether the parties had agreed to let the arbitrator decide the issue, several circuit courts have set their own standard for review of an arbitrator's award which was based on error. The First Circuit court overturned an arbitrator's decision when "the central fact underlying . . . [the] decision [was] concededly erroneous." Electronics Corp. of America v. Electrical Workers Local 272, 492 F.2d 1255 (1st Cir. 1974). The Fifth Circuit would overturn an arbitrator's award when "the reasoning . . . is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." Safeway Stores v. American Bakery Workers, Local 111, 390 F.2d 79, 82 (5th Cir. 1968). In 1968 the Third Circuit followed the Supreme Court mandate more closely:

> If the court is convinced both that the contract procedure was intended to cover the dispute and, in addition, that the intended procedure was adequate to provide a fair and informed decision, then review of the merits of any decision should be limited to cases of fraud, deceit, or instances of unions in breach of their duty of fair representation.

Bieski v. Eastern Auto. Forwarding Co., 396 F.2d 32, 38 (3rd Cir. 1968). However, less than a year later the Third Circuit abandoned their position in *Bieski* and opened up review on the rubric of error if the interpretation of the arbitrator was "unsupported by principles of contract construction." Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128. (3rd Cir. 1969).

2. Fair representation since World War II

In *Steele v. Louisville R.R. Co.*,[74] a white employee's union, the Brotherhood of Locomotive Firemen and Engineers, was recognized as the exclusive bargaining representative for a craft of firemen employed by the Louisville and Nashville Railroad. The union amended its existing collective bargaining agreement to exclude black employees from jobs. The petitioner, a black fireman, demanded representation. His demand was based on the status of the union as the exclusive representative of the whole craft.

The Supreme Court indicated that certain inequities may result in the terms and benefits obtained for various employees because of the type of job classifications and seniority provisions. However, the Court labeled race-based discrimination "invidious." The Court stated that a union was obligated to "represent non-union or minority union members without . . . hostile discrimination, fairly, impartially, and in good faith."[75] Thus, the Court effectively imposed a duty on unions to fairly represent the interests of *all* employees in a bargaining unit regardless of whether they were union or non-union.

Ford Motor Co. v. Huffman[76] extended the *Steele* doctrine beyond racial discrimination. In *Huffman* the Supreme Court confronted a collective bargaining agreement clause whereby an employee received seniority credit for pre-employment military service. The Court believed that the Union had not exceeded its discretion in representing employees. The Court did state, however, that the *Steele* doctrine extended to any type of discrimination which violated the union's duty of "complete loyalty to . . . the interests of all whom it represents."[77]

In 1964, the Supreme Court in *Humphrey v. Moore*,[78] considered the question of whether a court has jurisdiction to hear a contract violation suit involving fair representation together with unfair labor practice issues. In *Humphrey*, the employees of two companies were represented by the same union. The Supreme Court found that the decision of a joint union-employer committee upholding the

74. 323 U.S. 192 (1944).

75. *Id.* at 204. *Steele* was decided under the Railway Labor Act, 45 U.S.C. §§ 151(a), 152 (1970). Section 9 of the National Labor Relations Act, 29 U.S.C. § 159(a) (1970) and the RLA grant representatives designated by the majority of the employees of an appropriate bargaining unit (craft in the RLA) the authority to serve as the exclusive bargaining agent for *all* employees.

76. 345 U.S. 330 (1953).

77. *Id.* at 338.

78. 375 U.S. 335 (1964).

consolidation of seniority rosters was made in good faith and posed an equitable solution to the problem of a merger absorption. The Court also held that the joint committee's decision, pursuant to the collective bargaining agreement, was final and binding on the parties. Such a decision must stand unless the court found: (1) that it lacked jurisdiction; (2) "fraud or breach of duty" by the union; or (3) that the employees did not receive a fair hearing.[79] Thus, the Court asserted its jurisdiction to hear both the fair representation and unfair labor practices issues.

Subsequently, the Supreme Court considered the case of *Republic Steel Corp. v. Maddox*,[80] wherein an employee had not used the grievance procedure before resorting to court action. The *Maddox* Court held that an employee could not bypass grievance procedures in the collective bargaining agreement by bringing an independent suit against the employer. It was necessary to first exhaust the grievance procedures. However, the Court commented that an employee did not have to utilize the grievance mechanism where "the union refuses to press or only perfunctorily presses the [employee's] claim."[81]

Vaca v. Sipes[82] is the culmination of the Supreme Court cases dealing with fair representation. In *Vaca*, an employee (Owens) brought suit in the Missouri courts against Local 12 of the National Brotherhood of Packinghouse Workers. Owens was allegedly discharged for bad health, and he sought a grievance against the employer. Instead of immediately proceeding to arbitration, the union commissioned a new physician to examine him. When the medical examination did not support Owens' claim that the company had improperly discharged him, the union refused to pursue the grievance any further. Owens alleged in his suit that the union had "arbitrarily, capriciously and without just or reasonable cause" refused to invoke arbitration.

The Court held that before a wrongfully discharged employee can bring an action directly against his employer he must prove that the union as bargaining agent breached its duty of fair representation in handling his grievance.[83] However, the Court further held that the union in *Vaca* did not necessarily breach its duty of fair representation just because it "settled the grievance short of arbitration."[84] It

79. *Id.* at 351.
80. 379 U.S. 650 (1965).
81. *Id.* at 652.
82. 386 U.S. 171 (1967).
83. *Id.* at 186.
84. *Id.* at 192.

proclaimed that a union does not breach its duty of fair representation when it decides "in good faith and in a non-arbitrary manner"[85] that an employee's grievance lacks merit. The Court concluded that because the union did not act in bad faith nor demonstrate any hostility there was no breach of the duty of fair representation.[86]

In *Vaca,* however, the Court did not elaborate on the kinds of conduct which would constitute a breach of fair representation. Consequently, confusion resulted in the lower courts regarding the meaning of a breach of the duty of fair representation. Moreover, *Vaca* and its predecessors raised the question of whether an employee whose grievance was denied in the arbitration process could subsequently retry the grievance in a judicial tribunal by alleging breach of contract against the employer and breach of the duty of fair representation against the union. A similar issue arose as to how the duty of fair representation could be reconciled with the long standing principle of arbitral finality.

Anchor Motor Freight: The Fate of Arbitral Finality

1. Background

Anchor Motor Freight involved the claims of eight truck drivers employed by Anchor Motor Freight who were discharged for alleged dishonesty. The employment relationship between the employees and Anchor was governed by a collective bargaining agreement which prohibited discharges without just cause.[87]

Anchor had a practice of reimbursing its drivers for travel expenses, including lodging, incurred when the drivers were out of town. On May 31, 1967 the company learned that some of its drivers were reporting expenses for reimbursement in amounts in excess of the expenses actually incurred. The company conducted an extensive

85. *Id.* at 194.

86. Following *Vaca* the Supreme Court held that Republic Steel Corp. v. Maddox, 379 U.S. 650 (1964) was not applicable in a suit for wages by a seaman in federal court and allowed the seaman to choose arbitration or court action.

For three differing views of representation *compare* Summers, *Individual Rights in Collective Agreements and Arbitration,* 37 N.Y.U.L. REV. 362 (1962), *with* Cox, *Rights Under a Labor Agreement,* 69 HARV. L. REV. 601 (1956) *[and]* Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy,* 13 RUTGERS L. REV. 631 (1959).

87. For a discussion on the confusion which was precipitated by *Vaca, see* Lehmann, *The Union's Duty of Fair Representation—Steele and Its Successors,* 30 FED. B.J. 280, 283-85 (1971); Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee,* 8 SUFFOLK L. REV. 1096 (1974); Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by his Union,* 41 U. CINN. L. REV. 55 (1972); Tobias, *Individual Employee Suits for Breach of the Labor Agreement and the Union's Duty of Fair Representation,* 5 TOLEDO L. REV. 514 (1974).

investigation. At a subsequent meeting between the company and the union, the company produced motel receipts previously submitted by the eight drivers. All of the receipts were in excess of the charges listed on the motel's registration cards. The company also presented a notarized statement of the motel clerk and an affidavit of the motel owner verifying the accuracy of the registration cards.

Notwithstanding the evidence which was presented by the company, the union opposed the discharges. The meeting between the company and the union culminated in an agreement that the drivers would be reinstated pending the submission of the dispute to the Joint Arbitration Committee which was scheduled for late July. When the employees asked the union to investigate the motel, the union advised the employees that "they had nothing to worry about . . . that there was no way the company could fire them . . . that there was no need to investigate or do anything."[88] The union assured the employees that they would handle the defense.

In the period between the first company-union meeting and convening of the Joint Arbitration Committee, the union conducted no investigation, gathered no evidence, and did not advise the drivers of their procedural rights. The union's only preparation was to inform the petitioners to attend the meeting and present their case.

At the Joint Arbitration Committee hearing[89] the union and the drivers did not present any additional evidence. When the committee sustained the discharges, the petitioners retained counsel and requested a rehearing. They alleged that the motel owner's statement concerning the discrepancy on the motel receipts might have been caused by a dishonest clerk who could have pocketed the difference between the amount received and the amount actually recorded. The request for a rehearing was denied.

Subsequently, new evidence which revealed that the motel clerk had collected more than the price listed on the registration cards was discovered. Petitioners thereupon initiated an action in the Northern District Court of Ohio. The district court granted summary judgment to the union and the company, holding that the decision of the Joint Arbitration Committee was final and binding in the absence of a breach of the duty of fair representation.[90] The

88. The clause read: "[t]he employer shall not discharge or suspend any employees without just cause. . . ." (Art. 32, National Master Automobile Transporters Agreement).

89. Brief for Petitioners at 7.

90. Article 7 of the Central Conference Area Supplement to the National Master Automobile Transporters Agreement set out this grievance procedure. If a dispute was still unsettled after a meeting with the local union's business agent and company representative either party could present the case to the area's joint arbitration committee. Cases which remained dead-

court conceded that while the union may have been guilty of bad judgment, that alone was not sufficient to prove a breach of the duty to fairly represent the employee. Thus, the district court concluded that there was insufficient evidence to warrant a trial.[91]

The Sixth Circuit Court of Appeals unanimously reversed as to the local union.[92] The court concluded that there was sufficient evidence of a breach of the duty of fair representation, *i.e.*, bad faith or arbitrary conduct. However, the court refused to set aside the judgment in favor of the employers. This refusal was premised on the conclusion that the finality provision of the collective bargaining agreement applied absent evidence of employer misconduct or conspiracy with the local union.[93]

2. No Fair Representation—No Arbitral Finality

On review before the Supreme Court, the petitioners first argued that the Sixth Circuit and district court decisions concerning the employer contravened the letter and spirit of *Vaca v. Sipes*.[94] *Vaca* stated that "a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."[95] Second, the petitioners contended that it was unjust to bind an employee to an adjudication

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locked before the joint arbitration committee could be appealed to a National Joint Arbitration Committee. Only after a grievance was unresolved at this level would it be considered by an impartial arbitrator. 424 U.S. at 557 n.2.

An *amici curiae* brief was filed on behalf of PROD (Professional Drivers Council for Safety and Health) by James Banyard, a member of Local 407 whose grievance was processed by the Teamsters Union through the hierarchy of its joint committee system, and George Kiss, a driver for the Service Transport Company. Mr. Kiss was a union steward and handled grievances via the joint committee system.

The *amici* contended that the Teamster joint labor-management grievance committee was unworthy of judicial deference. Brief for the *Amici Curiae* at 7. Further they emphasized the need for a revised judicial approach for the consideration of individual teamster's alleged breaches of contract. They argued that "the Teamster Joint Committee system is so lacking in procedural safeguards for individual employees that its decisions disposing of their individual grievances should not be entitled to a judicial presumption of regularity and fairness." Brief for the *Amici Curiae* at 19-20. The petitioners and respondent also presented arguments on this issue. *See* notes 99 and 103 and accompanying text *infra*. The Supreme Court, however, did not discuss the issue when they considered the case. For a discussion of the problem, *see* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973). Professor Feller supports the development of principles of law that will be applied in courts when parties allege malfunctions of their grievance procedures. The principles of law, he states, should conform with the norms of the grievance procedure unless it is necessary to safeguard unprotected interests. *Id.* at 772-73. *See* note 95 *infra*.

91. *Hines v. Teamsters*, 72 CCH Lab. Cas. ¶ 13,987, p.28, 131 (N.D. Ohio 1973).

92. 506 F.2d 1153 (6th Cir. 1974).

93. *Id.* at 1158. The court affirmed the judgment in the favor of the International Union, implying that the International was not liable for the actions of the local.

94. 386 U.S. 171 (1967).

95. *Id.* at 191. *See* notes 80-85 *supra* and accompanying text.

of a grievance proceeding in which he was not fairly represented.[96] In supporting this contention, the petitioners emphasized that relief against the union was insufficient because they could not be awarded reinstatement nor damages for loss of employment.[97] Third, the petitioners argued that national labor policy, which had enhanced the collective power of employees to counteract the power of the employer, demanded the application of *Vaca* to the present case where the grievance was unfairly processed by the union.[98] The petitioners insisted that reversal was essential to the integrity of the industrial grievance mechanism.[99] Finally, the petitioners contended that an "analysis of the relevant labor policy interests involved . . . dictated reversal of the summary judgment awarded to the employer."[100] The employee-petitioners emphasized that the evidence demonstrated that they were wrongfully discharged for an alleged dishonesty which they had denied. Further, they insisted that the Joint Grievance Arbitration Committee proceedings[101] should not be accorded as great a presumption of finality as is traditional arbitration.

Anchor answered the petitioners assertions with a six-tiered argument. First, the company argued that "contractual arbitration of labor disputes is a part of congressional and judicial policy which must be supported . . . unless a statutory prohibition or joint viola-

96. Brief for the Petitioners at 17, *quoting* Vaca v. Sipes, 386 U.S. at 191. The petitioner indicated that only the Sixth Circuit Court of Appeals had decided that a grievance procedure in which an employee has been deprived of fair representation would preclude a section 301 suit against the employer. Brief for the Petitioners at 17-18. The Second, Eight and Ninth Circuits have held otherwise. *See* Steinman v. Spector Freight System, Inc., 441 F.2d 599 (2nd Cir. 1971); Butler v. Local Union 823, International Brotherhood of Teamsters, 514 F.2d 442 (8th Cir. 1975), *cert. denied*, 423 U.S. 924 (1976); Margetta v. Pam Pam Corporation, 501 F.2d 179 (9th Cir. 1974). The Third, Fourth, Fifth and Seventh Circuits have indicated in dicta that such a section 301 action against the employer would not be barred. *See* Bieski v. Eastern Automobile Forwarding Co., 396 F.2d 32 (3rd Cir. 1968); Lusk v. Eastern Products Corp. 427 F.2d 705 (4th Cir. 1970); Harris v. Chemical Leaman Tank Lines, Inc., 437 F.2d 167 (5th Cir. 1971); Szczesny v. Montgomery Ward & Co., 83 L.R.R.M. 2041 (7th Cir. 1973).

97. Brief for Petitioners at 21. The Supreme Court in Czosek v. O'Mara, 397 U.S. 25 (1970), precluded recovery of damages for loss of employment from the union except to the extent that it added to the difficulty and expense of collecting from the employer. *Id.* at 29.

98. *See* Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA*, 47 TUL. L. REV. 325 (1973) for a discussion of abuses of power by unions. *See also* Report of Select Committee on Improper Activities in the Labor or Management Field, 86th Cong., 1st Sess., 105 CONG. REC. 6281 (1959).

99. Brief for Petitioner at 25. They argued that if the *Steelworkers Trilogy* doctrine of reliance on contractual grievance proceedings as the primary means of resolving industrial disputes was to be preserved, the Court must reverse the Sixth Circuit.

100. Brief for the Petitioners at 28.

101. *Id.* at 32. *See* note 88 *supra*.

tions of law or contract dictate otherwise."[102] Second, the company argued that unfair representation is exclusively a union duty and not dependent on employer conduct.[103] Third, the company contended that they were vindicated contractually, administratively and judicially, thus barring the petitioners' action. Fourth, the company argued that judicial tribunals should not review the merits of arbitration decisions where a failure to represent an employee does not affect the fairness of the arbitration proceeding. Fifth, the company insisted that a recantation by a witness after an arbitral award should not abrogate the arbitration award.[104] Finally, the company contended that the same degree of finality should be accorded the Joint Grievance Arbitration Committee as is accorded any other method of arbitration.[105]

After reviewing prior Supreme Court cases dealing with fair representation and arbitral finality issues, the Supreme Court specifically rejected the company's contention that the employer "must be protected from relitigation by the express contractual provision declaring a decision to be final and binding."[106] The Court stated that a breach of the duty of fair representation overrides the requirement that labor relation disputes be resolved via the grievance mechanism. Expressing concern over the effectiveness of the arbitration mechanism, the Court declared that a breach of fair representation by the union will remove the "bar of finality" if it seriously undermines the integrity of the arbitral process.[107]

The Supreme Court discussed whether the arbitral finality provision could be set aside by employees who assert that the grievance

102. Brief for the Respondents at 10.

103. *Id.* at 20.

104. *Id.* at 28. The company cited several cases for the proposition that newly discovered evidence "should not cause an arbitration award to be upset. *See* Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Post Company, 442 F.2d 1234 (D.C. Cir. 1971); Bridgeport Boiling Mills Co. v. Brown, 314 F.2d 885 (2nd Cir. 1963). Kirschner v. West Company, 247 F. Supp. 550 (E.D. Pa. 1965), was also cited by the company. In this case the court cited language from Karppinen v. Karl Keifer Mach. Co., 187 F.2d 32, 35, (2nd Cir. 1951) that held that "since it necessarily raises issues of credibility which have already been before the arbitrators once, the party relying on it must first show that he could not have discovered it during the arbitration." 247 F. Supp. at 553.

The *Anchor Motor Freight* case, however, is not similar to the *Kirschner* case because the employers could not disprove the witness' veracity as the union, for all practical purposes, prevented such an investigation. *See* note 87 and accompanying text *supra*.

105. Brief for the Respondents at 31. *See* note 88 *supra*.

106. 424 U.S. at 570. The majority consisted of Justices White, Brennan, Marshall, Stewart, and Blackmum. Mr. Justice Stewart agreed that proof of breach of the duty of fair representation would remove the bar of finality, but would not award back pay to the employees.

107. *Id.*

process has malfunctioned because of a bad faith performance of the union. The Court disagreed with the employer's contention that the company was faultless. It was the company, the Court indicated, that originated the discharges for alleged dishonesty. Whereas the Sixth Circuit would not upset the arbitral finality provision absent employer implication in the union's malfeasance, the Supreme Court did not view actual employer misconduct or conspiracy with the union as determinative. The fact that the employer had precipitated the dispute by discharging the petitioners was enough for the Court to set aside the arbitral finality provision. The Court stated:

> [W]e cannot believe that Congress intended to foreclose the employee from his §301 remedy otherwise available against the employer if the contractual processes have been seriously flawed by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct.[108]

Further, the Court did not believe that its holding would undermine the collective bargaining process. The majority emphasized that they did not intend to fashion a requirement that the grievance mechanism be error free. Thus, under the Court's holding in *Anchor Motor Freight,* an employee does not (ostensibly) have a right to relitigate his discharge merely because of recently discovered evidence or errors in judgment. Something more is required. Just what the boundaries are, and what is and is not a breach of the duty of fair representation, however, remains unsettled. The Court stated:

> [I]n our view, enforcement of the finality provision where the arbitrator has erred is conditioned upon the union's having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceeding. . . . [I]t makes little difference whether the union subverts the arbitration process by refusing to proceed as in *Vaca,* or follows the arbitration trail to the end, but in doing so subverts the arbitration by failing to fairly represent the employee. In neither case, does the employee receive fair representation.[109]

In a vigorous dissent, Justice Rehnquist insisted that while the Court's holding in *Vaca* would encourage labor and management to pursue arbitration, *Anchor Motor Freight* would produce the opposite effect. He believed that the majority ignored the policy of finality of arbitration and "established a new policy of encouraging

108. *Id.* at 574.
109. *Id.* at 575.

challenges to arbitration decrees by the losing party on the ground that he was not properly represented."[110] Justice Rehnquist challenged the majority's assertion that there was no difference in whether a union had "refused to proceed as in *Vaca*" or had negligently proceeded with the "arbitration trail to the end."[111] He viewed the existence of a final arbitration award as a "crucial difference" between *Anchor Motor Freight* and *Vaca*. He expressly rejected the notion that "one may vacate an otherwise valid arbitration award because his 'counsel' was ineffective."[112]

Beyond Anchor Motor Freight

Anchor Motor Freight's substantial impact on the arbitral mechanism is unquestionable; the scope of the holding, however, is unclear. One commentator suggests that the decision in *Anchor Motor Freight* can be narrowly restricted to cases in which there was a preliminary grievance procedure involving an area-wide joint arbitration committee.[113] This view accords with Justice Rehnquist's dissenting opinion which viewed the majority decision as being widely applicable to situations in which an impartial, neutral arbitrator renders a "final arbitration decision."

Until the Supreme Court clarifies its holding in *Anchor Motor Freight*, any conclusion about its scope is purely speculative. The Supreme Court did not address the issue of according a lesser or higher standard of finality to area joint arbitration committees, although both sides argued that point in their briefs. The majority in *Anchor Motor Freight* did not distinguish the case in which a final decision had been rendered by an impartial arbitrator from the situation where there was an intermediate decision rendered by an area joint arbitration committee. Contrarily, the language employed by the majority impels one to believe that the holding was intended to be given a broad interpretation.[114]

The question remains, however, whether Justice Rehnquist's warning that *Anchor Motor Freight* will defeat the foundations of the collective bargaining process, *i.e.*, arbitral finality, will ultimately prove prophetic. Perhaps Justice Rehnquist can take com-

110. *Id.* (Rehnquist, J., dissenting).

111. *Id.* at 575.

112. *Id.*

113. Coulson, *Vaca v. Sipes' Illegitimate Child: The Impact of Anchor Motor Freight on the Finality Doctrine in Grievance Arbitration*, 10 GEO. L. REV. 693 (1976).

114. The majority stated that "enforcement of the finality provision where the arbitrator has erred is conditioned on the union's having satisfied its statutory duty fairly to represent the employees . . . ." 424 U.S. at 571.

fort in the majority's indication that the duty of fair representation in *Anchor Motor Freight* does not create a blanket right of an employee to overturn an arbitration award solely because of new evidence or union misjudgment. Further, he may look upon the majority's words in a more favorable light if *Anchor Motor Freight* results in more careful preparation of arbitration cases. Thus, Justice Rehnquist's generalization of the facts which in effect place the two forms of arbitration in the same basket may prove unjustified by subsequent applications of the *Anchor Motor Freight* case.[115]

CONCLUSION

In *Buffalo Forge,* the 1975-76 Supreme Court held that notwithstanding a no-strike clause in a collective bargaining agreement, federal courts do not have the power to enjoin sympathy strikes. The analytical methodology utilized by the Court was an equitable accommodation of the two philosophies of our national labor policy—private settlement of labor disputes by means of arbitration and court intervention. The Court effectively held that arbitration was the most appropriate vehicle for the resolution of the conflict and would promote an expeditious settlement of the industrial dispute.

The *Buffalo Forge* Court, concerned about the preservation of the viability and utility of the arbitration process, therefore decided that an injunction could not be used to enjoin a sympathy strike. By so holding, the Court reasserted its proclamation in the *Steelworkers Trilogy* that arbitration is the preferred mechanism for settlement of labor relation disputes. While employers may be tempted to press for non-removal clauses in collective bargaining agreements in order to circumvent the jurisdiction of federal courts and avoid the effect of *Buffalo Forge,* such a tactic would only serve to undermine our national labor policy.

In the 1975-76 term the Court also decided *Anchor Motor Freight.* The Court held that notwithstanding the policy of arbitral finality, it was not proper to dismiss a discharged employee's suit against his former employer if the employee could demonstrate: (1) erroneous discharge; and, (2) breach of the union's duty of fair representation during the grievance arbitration process.[116]

The *Anchor Motor Freight* Court expressed concern about maintaining the integrity of the collective bargaining process. Although it recognized the longstanding fundamental principle of arbitral fi-

115. See notes 101 and 105 *supra.*
116. 424 U.S. at 570-71.

nality, the Court concluded that it should not be invoked when it would undermine the requirement of fair representation.

Both *Buffalo Forge* and *Anchor Motor Freight* represent attempts by the Supreme Court to further define the arbitration process. *Buffalo Forge* will more than likely compel employers to pursue arbitration rather than run the risk of intensified judicial involvement in labor relations. Similarly, *Anchor Motor Freight* should stimulate an examination and improvement of current grievance-arbitration mechanisms in order to afford greater safeguards for grievants.[117] The cumulative effect should strengthen the grievance-arbitration process.

117. *See* note 98 *supra.*