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I. INTRODUCTION

One union's refusal to cross the picket lines of another union—the sympathy strike—has been the cause of much litigation both in the courts and before the National Labor Relations Board. This term the United States Supreme Court has agreed to hear argument on such a case, *Buffalo Forge Co. v. United Steelworkers*.[1] The Court's decision in this case will determine whether a federal district court has authority under § 301(a) of the Labor-Management Relations Act of 1947 (LMRA)[2] to enjoin a strike where the contract contains both a no-strike clause and a mandatory arbitration procedure and the union strikes *solely* out of deference to a lawful picket line, or whether § 4 of the Norris-LaGuardia Act of 1932[3] precludes issuance of injunctive relief.

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1. 386 F. Supp. 405 (W.D.N.Y. 1974), *aff'd*, 517 F.2d 1207 (2d Cir. 1975), *cert. granted*, 44 U.S.L.W. 3238 (U.S. Oct. 20, 1975) (No. 75-339).

2. 29 U.S.C. § 185(a) (1970) provides:

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

3. 29 U.S.C. § 104 (1970) provides:

> No court of the United States shall have jurisdiction to issue any restraining order

This article will examine several aspects of the problem of sympathy strikes to determine the respective rights and obligations of employers and unions including:

(a) the right of an employer to obtain a *Boys Markets*[4] injunction in a sympathy strike situation;
(b) an employer's right to damages where the union with which he has a contract has refused to cross a picket line;
(c) a union's liability for any damages in such a situation;
(d) recovery of damages under §§ 301[5] and 303[6] of the LMRA; and
(e) the right of an employer to discipline or discharge employees who refuse to cross picket lines.

II. Background Relative to *Boys Markets* Injunctions

The most critical question in the sympathy strike area is the

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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 of employment;

(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;

(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;

(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;

(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;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(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.

4. Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970).
5. 29 U.S.C. § 185(e) (1970).
6. *Id.* § 187(b).

propriety of a district court injunction prohibiting a union and its members from honoring another union's picket line. Of central importance to such an inquiry is, of course, the Supreme Court's decision in *Boys Markets*. However, that decision cannot be read in a vacuum, divorced from the reasons behind it.

The primary thrust of *Boys Markets* was the accomodation of two fundamental principles of national labor policy: nonintervention by federal courts in labor disputes and resolution of such disputes through arbitration. The first of these is embodied in the Norris-LaGuardia Act[7] which resulted from abuses succinctly characterized by Mr. Justice Brennan as "the at-largeness of federal judges in enjoining activities thought to seek 'unlawful ends' or to constitute 'unlawful means' . . . ."[8] The second axiom of national labor policy, the resolution of industrial disputes through arbitration, was first articulated in *Textile Workers Union v. Lincoln Mills*.[9] Therein, the Supreme Court held that § 301 of the LMRA created federal substantive rights to secure enforcement of collective bargaining agreements and established that the law to be applied under § 301 was federal law to be fashioned from national labor policy.

The status of labor unions at the time Norris-LaGuardia was enacted and the status of labor unions today are quite different. Recognition of the difference in the labor movement of today and the labor movement of the late 1920's and the early 1930's is expressed in the Supreme Court's decision in *Boys Markets*:

> In 1932 Congress attempted to bring some order out of the industrial chaos that had developed and to correct the abuses that had resulted from the interjection of the federal judiciary into union-management disputes on the behalf of management.[10]

Considered in this perspective, and particularly in view of the accommodation reached between the nonintervention policy and that favoring arbitration,[11] the Supreme Court's decision in *Boys*

7. *Id.* §§ 101-15.

8. Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 219 (1962) (Brennan, J., dissenting). *See also* Milk Wagon Drivers' Local 753 v. Lake Valley Farm Products, Inc., 311 U.S. 91 (1940); F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930); Vladeck, *Boys Markets And National Labor Policy*, 24 VAND. L. REV. 93, 94 (1970).

9. 353 U.S. 448 (1957).

10. 398 U.S. at 251.

11. Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R., 353 U.S. 30 (1957).

Markets is hardly surprising. *Boys Markets* holds that federal courts can enjoin strikes arising over grievances which are subject to the grievance and arbitration provision of a collective bargaining agreement. The Court in *Boys Markets* recognized that the Norris-LaGuardia Act was directed "to a situation totally different from that which exists today" and that it was possible to accommodate the principles of Norris-LaGuardia with the emerging federal common law being developed under § 301. Prior case law was viewed by the Court as "seriously undermin[ing] the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices."[12] As the Court of Appeals for the Third Circuit has noted, *Boys Markets* evidences that the "policy in favor of enforcing the settlement of labor disputes through compulsory arbitration emerged dominant."[13]

The Supreme Court, beginning with the *Steelworkers Trilogy*,[14] has repeatedly viewed arbitration as "a kingpin of federal labor policy"[15] and the preferred mechanism for resolving disputes under collective bargaining agreements. The Court of Appeals for the Fifth Circuit noted[16] that "since *Lincoln Mills*, it has been increasingly clear that arbitration is the central institution for the administration of the collective bargaining contract."[17] Indeed, arbitration has come to be viewed as the terminal point for disputes arising in the collective bargaining process. Illustrative of this is the fact that an estimated 94% of all collective bargaining agreements contain arbitration procedures.[18] The policy is likewise in accord with congres-

12. 398 U.S. at 252. In *Boys Markets*, the Court specifically overruled Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).

13. Avco Corp. v. Local 787, UAW, 459 F.2d 968, 971 (3d Cir. 1972).

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

15. Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 226 (1962) (Brennan, J., dissenting). *See also* Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 105 (1962) (national labor policy is "to promote the arbitral process as a substitute for economic warfare").

16. Southwestern Bell Tel. Co. v. Communications Workers Local 6222, 454 F.2d 1333 (5th Cir. 1971).

17. *Id.* at 1336. *Compare* the statement of the Court in *Boys Markets*:

> Indeed, the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures.

398 U.S. at 249.

18. D. Bok & H. Dunlop, Labor and the American Community 220-21 (1970). *See also* H.

sional intentions expressed in the Labor-Management Relations Act.[19]

The goal of national labor policy to promote the peaceful resolution of disputes through arbitration is emphasized in *Boys Markets*' recognition that the sine qua non for injunctive relief is the existence of a strike caused by a dispute subject to resolution under grievance and arbitration procedures established in a collective bargaining agreement. Issuing an injunction and ordering arbitration in such a case works no injustice since both the employer and the union will have their claims determined by the tribunal which the parties have agreed was most competent and appropriate to interpret the provisions of the collective agreement.[20] Thus, in a *Boys Markets* case the court is simply enforcing the bargain struck between the parties.[21]

This foundation of *Boys Markets* was recently buttressed in *Gateway Coal Co. v. UMW*.[22] The Supreme Court, in upholding a district court injunction against a strike over a mine safety dispute, found that in the absence of an express contract exclusion, such a dispute was subject to arbitration under the principles of the *Steelworkers Trilogy*.[23] In light of this finding, the Court, relying on its decision in *Teamsters Local 174 v. Lucas Flour Co.*,[24] held an injunction was proper even in the absence of a contractual no-strike

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WELLINGTON, LABOR AND THE LEGAL PROCESS 94-95 (1968).

19. Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d) (1970), declares:

> 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.

20. 398 U.S. at 253 n.22.

21. Granting an injunction in such a case does not offend the policies of the Norris-LaGuardia Act since "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." ABA LABOR RELATIONS LAW SECTION 226, 242 (1963), REPORT OF SPECIAL *Atkinson-Sinclair* COMMITTEE, *cited with approval in* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 253 n.22 (1970). *See also* Milk Wagon Drivers Local 753 v. Lake Valley Farm Products, Inc., 311 U.S. 91, 101 (1940).

22. 414 U.S. 368 (1974).

23. In rejecting resort to economic warfare, the Court stated:

> We also disagree with the implicit assumption that the alternative to arbitration holds greater promise for the protection of employees. Relegating safety disputes to the arena of economic combat offers no greater assurance that the ultimate resolution will ensure employee safety. Indeed the safety of the workshop would then depend on the relative economic strength of the parties rather than on an informed and impartial assessment of the facts.

Id. at 379.

24. 369 U.S. 95 (1962).

clause—on the ground that an *implied* no-strike clause, coterminous with the parties' commitment to arbitrate, would support injunctive relief.[25] This broad affirmation of *Boys Markets* has great significance in the sympathy strike situation, as will be discussed below.

III. The Applicability of *Boys Markets* to Sympathy Strikes

In light of *Boys Markets*, one of the most vexing problems facing federal courts is whether injunctive relief should be granted in sympathy strike situations. Decisions on this issue show the problems faced by federal courts in interpreting the language of the Supreme Court's decision in *Boys Markets*, where injunctive relief is limited to cases where the strike is over a grievance both parties are contractually bound to resolve under procedures set forth in a collective bargaining agreement. Federal courts have taken diverse views as to whether a sympathy strike falls within the ambit of the Supreme Court's decision.[26] Two distinct lines of court of appeals cases have developed on this issue. One line[27] follows the proposition that the honoring of another union's picket line is not enjoinable since the strike is not "over a grievance." The other line[28] holds that the *Boys Markets* rationale is applicable to sympathy strikes. *Buffalo Forge*, the case in which the Supreme Court has granted certiorari this

25. 414 U.S. at 381.

26. Contradictory rulings persist although it is clear that the Supreme Court has found that a refusal to cross a stranger union's picket line constitutes a violation of a collective bargaining agreement's no-strike obligation. NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953).

27. Plain Dealer Publishing Co. v. Cleveland Typographical Union No. 53, 520 F.2d 1220 (6th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3239 (U.S. Oct. 2, 1975) (No. 75-565); Hyster Co. v. Independent Towing & Lifting Mach. Ass'n, 519 F.2d 89 (7th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3253 (U.S. Oct. 6, 1975) (No. 75-524); Buffalo Forge Co. v. United Steelworkers, 386 F. Supp. 405 (W.D.N.Y. 1974), *aff'd*, 517 F.2d 1207 (2d Cir. 1975), *cert. granted*, 44 U.S.L.W. 3238 (U.S. Oct. 20, 1975) (No. 75-339).

28. Associated Gen. Contractors v. Construction & Gen. Laborers Local 563, 519 F.2d 269 (8th Cir. 1975); Valmac Industries, Inc. v. Food Handlers Local 425, 519 F.2d 263 (8th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3280 (U.S. Oct. 31, 1975) (No. 75-647); Island Creek Coal Co. v. UMW, 507 F.2d 650 (3d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3206 (U.S. Oct. 6, 1975) (No. 74-1573); Armco Steel Corp. v. UMW, 505 F.2d 1129 (4th Cir. 1974), *cert. denied*, 44 U.S.L.W. 3206 (U.S. Oct. 6, 1975) (No. 74-1574); NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974); Wilmington Shipping Co. v. International Longshoremen's Ass'n, 86 L.R.R.M. 2846 (4th Cir.), *cert. denied*, 419 U.S. 1022 (1974); Pilot Freight Carriers, Inc. v. Teamsters Local 391, 497 F.2d 311 (4th Cir.), *cert. denied*, 419 U.S. 869 (1974); Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209 (4th Cir. 1973).

term, follows the former line of reasoning; but petitions for certiorari are currently pending in two other cases[29] which follow the latter line of reasoning.

A. *Decisions Which Have Denied Boys Markets Relief*

One of the earliest decisions in which *Boys Markets* relief was held inapplicable to a sympathy strike was *Amstar Corp. v. Amalgamated Meat Cutters & Butcher Workmen.*[30] There some of the company's refineries had collective bargaining agreements with the International Longshoremen's Association (ILA) and some had agreements with the Meat Cutters. The Meat Cutters and ILA agreements had different expiration dates. After the ILA began a strike against the company, ILA pickets appeared at the company's New Orleans refinery where the employees were represented by the Meat Cutters. The presence of these pickets precipitated a work stoppage by the Meat Cutters and the company sought injunctive relief, which the district court granted.[31]

On appeal,[32] the Court of Appeals for the Fifth Circuit reversed. The appellate court read *Boys Markets* to require a finding that the strike was directly caused by a grievance against the company. Applying this reasoning to the sympathy strike situation, the court held that injunctive relief was improper since the strike was not "over a grievance" but rather was caused by the presence of another union's picket line. Implicit in the Fifth Circuit's opinion was the concern that granting injunctive relief in the sympathy strike situation would open the door to injunctive relief in every situation where a no-strike clause was allegedly violated. Indeed, the court noted that if injunctive relief were granted in the context of a sympathy strike, it would be difficult to ascertain when such relief would be

29. Hyster Co. v. Independent Towing & Lifting Mach. Ass'n, 519 F.2d 89 (7th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3253 (U.S. Oct. 6, 1975) (No. 75-524); Plain Dealer Publishing Co. v. Cleveland Typographical Union No. 53, 520 F.2d 1220 (6th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3239 (U.S. Oct. 2, 1975) (No. 75-565).

30. 468 F.2d 1372 (5th Cir.), *rev'g* 337 F. Supp. 810 (E.D. La. 1972).

31. 337 F. Supp. 810 (E.D. La. 1972). The district court found that a dispute existed between the company and union as to whether or not the honoring of the ILA picket line violated the no-strike clause in the collective bargaining agreement. Since the collective bargaining agreement contained broad grievance, arbitration, and no-strike clauses, under the view of the district court, the union was bound to arbitrate the issue of whether its members had the right to honor the picket line.

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

unavailable, citing for this proposition a decision of the Third Circuit[33] which held that a breach of a no-strike clause was not in and of itself grounds for injunctive relief.

A similar concern was expressed by the Court of Appeals for the Second Circuit in the *Buffalo Forge* case. In that case, the district court had denied an injunction against a work stoppage by production and maintenance employees who were honoring the picket lines of sister locals which represented office, clerical, and technical employees of the same employer at a common site. Placing heavy reliance upon the narrowness of the exception to § 4 of the Norris-LaGuardia Act established in *Boys Markets*, the Second Circuit concluded that "only strikes *over a grievance* which the union has agreed to arbitrate are within the scope of the exception."[34] After finding that the strike in question was not over a grievance but rather was merely deference to a lawful picket line by other union members, the court concluded that this distinction was crucial in light of the need, recognized in *Boys Markets*,[35] to reconcile the anti-injunction policy of Norris-LaGuardia with the pro-arbitration policy of the LMRA.[36] Thus, the Second Circuit affirmed the district court's denial of injunctive relief finding that the lower court's reconciliation of § 4 of Norris-LaGuardia with § 301(a) of the LMRA comported with the *Boys Markets* decision. To do otherwise, the court implied, would be to read into § 301(a) a repeal of § 4.[37]

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33. Parade Publications, Inc. v. Philadelphia Mailers Local 14, 459 F.2d 369 (3d Cir. 1972).

34. 517 F.2d at 1210 (emphasis in original).

35. This distinction was also recognized in Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 219 (1962) (Brennan, J., dissenting).

36. The court continued:

> If a strike not seeking redress of any grievance is enjoinable, then the policy of Norris-LaGuardia is virtually obliterated. For since a no-strike provision, if not in fact present in the employment contract, will be implied where the agreement sets up mandatory arbitration machinery . . . it is, as the Fifth Circuit has concluded, "difficult to conceive of any strike which could not be so enjoined." . . . Undue expansion of the "narrow" holding in *Boys Market* [*sic*] may be avoided, on the other hand, by proper attention to the actual threat posed by strikes not over grievances with the employer to the policies promoted by § 301(a). A strike not seeking to pressure the employer to yield on a disputed issue is not an attempt to circumvent arbitration machinery established by the collective bargaining agreement. Accordingly, it does no violence to the federal pro-arbitration policy to require federal courts to refrain from enjoining such strikes.

517 F.2d at 1211.

37. As noted earlier, the Supreme Court has granted certiorari in *Buffalo Forge*. There are two additional cases with similar factual patterns in which petitions for certiorari have

In *Plain Dealer Publishing Co. v. Cleveland Typographical Union No. 53*,[38] the Court of Appeals for the Sixth Circuit affirmed the district court's denial of an injunction against the refusal by three

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been filed but upon which the Court has not yet acted.

In the first case, Hyster Co. v. Independent Towing & Lifting Mach. Ass'n, 519 F.2d 89 (7th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3253 (U.S. Oct. 6, 1975) (No. 75-524), the plaintiff company had plants in three cities and the employees at each plant were represented by a different union. When the contract expired between the company and one of the unions, a strike ensued and the union picketed the plants in the other two cities. The employees at those locations honored the picket lines and the employer sought and was granted injunctions against the sympathy strikes at those two locations.

In reversing the district court, the Court of Appeals for the Seventh Circuit had to reconcile two conflicting earlier decisions of the same circuit involving sympathy strikes. In the first of these prior decisions, Inland Steel Co. v. Local 1545, UMW, 505 F.2d 293 (7th Cir. 1974), the issuance of an injunction against a sympathy strike was affirmed by a divided court on the basis that the dispute was within the scope of the "exceptionally broad" arbitration clause of the National Bituminous Coal Wage Agreement of 1971. Although that agreement did not contain a no-strike clause, the existence of such a clause was implied on the basis of the Supreme Court's decision in Gateway Coal Co. v. UMW, 414 U.S. 368, 380-84 (1974).

In the second prior decision, Gary Hobart Water Corp. v. NLRB, 511 F.2d 284 (7th Cir. 1975), the breadth of the arbitration clause again furnished the basis for the court's decision. Unlike the somewhat more restricted clause in *Inland Steel* which provided for arbitration of (1) "differences . . . as to the meaning and application of the provisions of this agreement," (2) "differences . . . about matters not specifically mentioned in this agreement" and (3) "any local trouble of any kind," 519 F.2d at 91, the clause in *Gary Hobart* applied to "any and all disputes and controversies arising under or in connection with the terms of provisions" of the contract. 511 F.2d at 288. While the no-strike provision of the agreement provided that there would be no lockouts by the company and that there would be "no strike, stoppages of work or any other form of interference with the production or other operations of the Company by the Union or its members," *id.* at 287, the court held that this did not constitute a waiver of the right to refuse to cross lawful picket lines and, therefore, concluded that engaging in a sympathy strike was not a dispute or controversy arising under or in connection with the first union's agreement and was, therefore, neither arbitrable nor subject to the no-strike provision. *Id.* at 288. Since the no-strike clause then before the Court of Appeals for the Seventh Circuit in the *Hyster* case did not contain a limitation similar to that in *Gary Hobart* nor was it as all-encompassing as *Inland Steel*'s provision covering "differences . . . about matters not specifically mentioned in this agreement," the court ruled that the *Hyster* provision was closest to that in *Gary Hobart* and found the dispute to be nonarbitrable. Although the court specifically recognized the presumption of arbitrability set forth in *Gateway Coal*, similar to that in *Buffalo Forge*, it found that *Boys Markets* established a narrow exception to § 4 of Norris-LaGuardia only where the work stoppage was " 'over a grievance' which the parties were contractually bound to arbitrate" and not, as here, where the work stoppage "itself precipitated the dispute."

It is noteworthy that in *Buffalo Forge*, the presumption in favor of arbitrability set forth in *Gateway Coal* was never addressed, whereas in *Hyster* it was specifically cited but rejected on the basis of the "very limited exception" to Norris-LaGuardia established by *Boys Markets*.

38. 520 F.2d 1220 (6th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3239 (U.S. Oct. 2, 1975) (No. 75-565). This is the second case in the line of *Buffalo Forge* cases in which petitions for certiorari are currently pending before the Supreme Court. *See* note 37 *supra*.

unions to cross the lawful picket lines of a fourth union engaged in a strike against their common employer. It did so "for the reasons set forth in the district court's opinion."[39] The district court had concluded that the *Amstar* rationale[40] was "the sounder view."[41] Injunctive relief was denied because the court viewed the situation as "a dispute which results from a work stoppage" rather than as "a work stoppage which is the result of a labor dispute arising from conditions of employment" that might be subject to *Boys Markets* relief. Moreover, the court found that the contracts in question did not contain express no-strike agreements "comparable to those contained in the collective bargaining agreements . . . in which mandatory orders were issued requiring the crossing of picket lines."[42] Therefore, the unions' obligation not to strike had to be implied from their contractual grievance-arbitration clause which the court found to be too narrow to imply a no-strike obligation in the circumstances presented.

The approach taken by these courts[43] can be characterized as reading *Boys Markets* to require two elements. First, there must be a dispute which is subject to the grievance and arbitration procedure of the collective bargaining agreement. Second, there must be a work stoppage caused by the dispute. The conceptual problem in applying this "causation" approach to the sympathy strike situation is that the two elements are coalesced; that is, the strike is the dispute. Certainly, in a sympathy strike situation there is a dispute between the company and the union as to the right of union members to honor a picket line. A union will contend that a no-strike clause in a contract does not waive the right of a union member to honor a picket line on grounds of individual conscience, while a company will argue that a typical no-strike clause waives any and all right to honor a picket line. This dispute, however, normally arises contemporaneously with the strike and therefore courts have a problem in finding the strike to be "over a grievance."

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39. 520 F.2d at 1222.

40. *See* note 30 and accompanying text *supra*.

41. 520 F.2d at 1227.

42. *Id.* at 1230.

43. *See also* 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).

B. *Decisions Which Have Allowed Boys Markets Relief*

Significant recent decisions indicate that the narrower view of *Boys Markets* reflected in cases such as *Amstar* and *Buffalo Forge* is indeed not shared by all federal courts.[44] In *Monongahela Power Co. v. Local 2332, IBEW*,[45] the Court of Appeals for the Fourth Circuit was presented with a situation virtually identical to that presented to the Fifth Circuit in *Amstar*. The employees at one of Monongahela's locations went on strike and pickets from that local went to another company location to publicize the strike. The employees working at that location were represented by a different local of the same union, which had a collective bargaining agreement with the company. This agreement, like the agreement in

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44. For example, in Northwest Air Lines, Inc. v. Air Line Pilots Ass'n, 325 F. Supp. 994 (D. Minn.), *rev'd*, 442 F.2d 246 (8th Cir. 1970), *on rehearing*, 442 F.2d 251 (8th Cir.), *cert. denied* 404 U.S. 871 (1971), an airline sought to enjoin its pilots from honoring a picket line established by another union. The carrier contended that the refusal of its pilots to cross the picket line constituted a violation of an implied no-strike clause and was therefore a "minor dispute" which was to be resolved pursuant to the arbitration procedures set forth in the Railway Labor Act. The district court denied injunctive relief and an order to arbitrate. 325 F. Supp. at 997. The Court of Appeals for the Eighth Circuit reversed, ordering arbitration and enjoining the work stoppage. 442 F.2d at 248. On rehearing, the court reiterated its earlier position that the standard of arbitrability is the same under both the Railway Labor Act and § 301 of the LMRA, and again ordered the dispute to arbitration. *Id.* at 254.

The fact that this decision arose under the Railway Labor Act does not impair its applicability to a § 301 action; the Supreme Court in *Boys Markets* had turned to its earlier decision in Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co., 353 U.S. 30 (1957), as direct support for its holding that the issuance of an injunction in cases such as this does not offend the policies of the Norris-LaGuardia Act.

As one observer, Gould, *On Labor Injunctions, Unions, and the Judges: The Boys Markets Case*, 1970 SUP. CT. REV. 215, 238-39, has noted:

> Thus, the *Chicago River* principle of accommodation governs § 301 as well. As noted above, the distinction between the RLA and NLRA articulated by *Sinclair* has always seemed strange. For, aside from the fact that resort to the NRAB is specifically provided by the statute, neither statutory procedure may be properly said to be more compulsory or exclusive than the other. Under the RLA—as is the case under the NLRA—one party must trigger machinery in order to have it utilized. Moreover, just as the Court in *Boys Market* [*sic*] has indicated that an employer unwilling to proceed to arbitration cannot obtain the fruits of the injunctive decree against a labor union, so also under the RLA there is doubt that the *Chicago River* doctrine is applicable where a submission has not been made to NRAB. Because *Boys Market* relied so heavily upon *Chicago River* as well as "ordinary principles of equity" in the issuance of injunctions, the attention of the courts confronted with requests for injunctive relief under § 301 will undoubtedly focus upon experience to date under the Railway Labor Act.

45. 484 F.2d 1209 (4th Cir. 1973). *See also* Armco Steel Corp. v. UMW, 505 F.2d 1129 (4th Cir. 1974), *cert. denied*, 44 U.S.L.W. 3206 (U.S. Oct. 6, 1975) (No. 74-1574).

Amstar, contained broad grievance, arbitration and no-strike clauses.

In addressing the issue of whether injunctive relief was appropriate, the Fourth Circuit first noted that in a *Boys Markets* case a court must follow the presumption that all disputes are arbitrable unless the parties have expressly excluded the matter. Finding no exclusion, the court held that the "dispute as to whether the refusal to cross the picket line and the resulting work stoppage violated Article X [no-strike clause] was clearly subject to mandatory adjustments under Article IX."[46] Thus, the court determined that the prerequisites of *Boys Markets* were met.

Under a different type of concerted refusal to work, the Court of Appeals for the Third Circuit also found injunctive relief to be appropriate. In *Avco Corp. v. Local 787, UAW*,[47] the union took the position that its members were not required to work overtime and, accordingly, its members refused to work. The company sought injunctive relief, which was denied by the lower court.[48] On appeal, the Third Circuit reversed.[49] Emphasizing the strong federal policy in favor of arbitration[50] and the questions which an arbitrator could resolve in the case, the court concluded the dispute was arbitrable

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46. 484 F.2d at 1214.

Further support for the *Monongahela Power* rationale is found in General Cable Corp. v. IBEW Local 1798, 333 F. Supp. 331 (W.D. Tenn. 1971). In this case, the court was faced with a comparable sympathy strike situation. The court held that since the dispute between the parties over the question of whether a union's members could honor the picket line of another union was arbitrable, injunctive relief was proper under *Boys Markets*. Moreover, the company informed the union prior to the work stoppage that it considered a refusal by its employees to cross the picket line a breach of the no-strike clause. The court found that the grievance between the company and the union arose prior to the work stoppage when the pickets appeared, and, therefore, this case came within the narrow exception created by the rule in the *Boys Markets* case. 333 F. Supp. at 334. *See also* NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 363 F. Supp. 54 (W.D. Pa. 1973).

47. 459 F.2d 968 (3d Cir. 1972).

48. 325 F. Supp. 588 (M.D. Pa. 1971).

49. 459 F.2d at 974.

50. The court noted:

> There are strong reasons supporting the federal policy in favor of arbitration. First, arbitrators are more competent than courts to interpret labor contracts and to resolve the problems of labor-management relations. Second, the process of arbitration contributes to the maintenance of labor peace. Third, ordering arbitration is essential in effectuating the parties' contractual intent to settle disputes through arbitration. Fourth, a suit for damages rather than an injunction ordering arbitration "might not repair the harm done by the strike, and might exacerabate labor-management strife."

Id. at 973 (citations omitted).

and enjoined further refusals to perform overtime, pending arbitration.[51]

Avco is strong support for the awarding of an injunction when generically the dispute is one over the parties' rights under the collective bargaining agreement. In *Avco*, the employees refused to work overtime on the ground that the contract gave them the right to refuse such work, although nothing in the contract either specifically required or prohibited overtime. If the arbitrator held that the employees had the right to refuse overtime, there would be no violation of the no-strike clause since the employees were doing what the contract gave them the right to do—refuse overtime. If their interpretation were wrong, however, a breach of the no-strike clause plainly occurred. The arbitrator, reasoned the court, had the expertise and authority necessary to peacefully resolve the dispute.

Even more persuasive support for this reading of *Boys Markets* is found in the Supreme Court's decision in *Gateway Coal Co. v. UMW*.[52] In *Gateway Coal*, the bargaining agreement contained a provision which allowed the local mine safety committee to close down an operation and remove workers from a dangerous area. The union argued that this provision reserved the right to strike over safety disputes and was thus an exception to the implied no-strike obligation. Disagreeing with the Third Circuit, the Supreme Court found that this safety committee provision had not been properly invoked. The Court stated that whether the union properly invoked this provision was a question of contractual interpretation, and that the contract had explicitly committed to resolution by an impartial umpire all disagreements "as to the meaning and application . . . of this agreement."[53]

Gateway Coal is significant in the sympathy strike situation for two reasons. First, the Court found that a dispute over the scope of an exception to the no-strike clause—the very type of dispute involved in the sympathy strike situation—was arbitrable and, by implication, enjoinable.[54] Second, the Court indicated its unwilling-

51. *Accord*, Elevator Mfr.'s Ass'n v. Elevator Constructors Local 1, 342 F. Supp. 372 (S.D.N.Y. 1972).

52. 414 U.S. 368 (1974).

53. *Id.* at 384.

54. The result favoring arbitrability is hardly surprising when considering other aspects of the *Gateway* ruling. In overturning a union argument that § 502 of the LMRA, 29 U.S.C. § 143 (1970), allowed employees with a "good faith belief" in a dangerous condition to strike,

ness to allow a union to determine, in its own unreviewable discretion, whether it has complied with contractual or statutory requirements. In a sympathy strike situation, refusal of injunctive relief clearly allows the union to determine its compliance with the contract.

When looking at *Gateway Coal*, *Monongahela* and *Avco*, it must be understood that the test of arbitrability, as was held in *United Steelworkers v. Warrior & Gulf Navigation Co.*,[55] is one of express exclusion, not inclusion.[56] Thus, absent express specific exclusion from coverage of the arbitration clause, a dispute over the contractual legality of a refusal to cross a picket line is arbitrable under the terms of the typical collective bargaining agreement.[57] Indeed, the Court of Appeals for the Tenth Circuit, in a § 301 damage action has held arbitrable a dispute over the scope of a union's no-strike obligation arising out of its refusal to cross a stranger union's picket line.[58]

Other circuits, in several post-*Monongahela* cases, have supported the traditional national labor policy reflected in that case, namely a preference for resolution of disputes through arbitration, and in doing so have awarded *Boys Markets* injunctions in sympathy strike situations. For example, in *NAPA Pittsburgh, Inc. v.*

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the Court stated that absent the most explicit statutory command, it was unwilling "to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be." 414 U.S. at 386. *Accord*, Island Creek Coal Co. v. UMW, 507 F.2d 650 (3d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3206 (U.S. Oct. 6, 1975) (No. 74-1573).

55. 363 U.S. 574, 581 (1960). *Cf.* Plain Dealer Publishing Co. v. Cleveland Typographical Union No. 53, 520 F.2d 1220 (6th Cir. 1975), citing case law to the effect that the waiver of a collective bargaining right must be in "clear and unmistakable language."

56. Similarly, the Court of Appeals for the Second Circuit in Monroe Sander Corp. v. Livingston, 377 F.2d 6 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967), stated the rule to be that unless the parties expressly exclude a matter, the court will conclude that they intended to submit it to arbitration. 377 F.2d at 9-10. *Accord*, Lodge 12, IAM v. Cameron Iron Works, Inc., 292 F.2d 112 (5th Cir.), *cert. denied*, 368 U.S. 926 (1961).

57. Valmac Indus., Inc. v. Food Handlers Local 425, 519 F.2d 263 (8th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3280 (U.S. Oct. 31, 1975) (No. 75-647).

58. Johnson Builders, Inc. v. Carpenters Local 1095, 422 F.2d 137 (10th Cir. 1970). *See also* Howard Electric Co. v. IBEW Local 570, 423 F.2d 164 (9th Cir. 1970); ITT World Communications, Inc. v. Communications Workers of America, 422 F.2d 77 (2d Cir. 1970); Pietro Scalzitti Co. v. Operating Eng'rs Local 150, 351 F.2d 576 (7th Cir. 1965); Clothing Workers of America v. United Garment Mfg. Co., 338 F.2d 195 (8th Cir. 1964); Swartz & Funston, Inc. v. Bricklayers Local 7, 319 F.2d 116 (3d Cir. 1963); Yale & Towne Mfg. Co. v. Local 1717, IAM, 299 F.2d 882 (3d Cir. 1962).

Automotive Chauffeurs Local 926,[59] the Teamsters had a recognitional dispute with a company "substantially controlled" by NAPA and picketed NAPA's plant. NAPA's employees were represented by another union and the NAPA collective bargaining agreement gave an employee the right to refuse to cross or work behind "primary picket lines." Further, the contract provided for arbitration of "any and all grievances, complaints, or disputes arising between" the parties.[60] NAPA employees refused to cross the Teamsters' picket line and the president of the NAPA local indicated that the employees were protected by the terms of their contract. NAPA sought injunctive relief and an order directing arbitration. The district court issued an injunction and a divided Third Circuit affirmed.[61]

In doing so, the Third Circuit emphasized the frequently articulated federal policy favoring arbitration and delineated its view as to the standard of enjoinability under *Boys Markets*.[62] The court concluded that there was certainly an arbitrable "dispute" which was covered by the contractual requirement of arbitration.[63] The issue of whether the picket line was primary or secondary was arbitrable under the contract, and the local had properly been enjoined from picketing pending arbitration of that issue.

Like the Fourth Circuit in *Monongahela*, the Third Circuit's *NAPA* decision rejects the two-step process of the *Amstar* rationale. The court in *NAPA* correctly focused its inquiry on whether or not the dispute over the right to honor the picket line was arbitrable. Once answering this inquiry in the affirmative, the court properly

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59. 502 F.2d 321 (3d Cir. 1974), *cert. denied*, 419 U.S. 1049 (1974).

60. 502 F.2d at 323.

61. *Id.*

62. The court stated:

> In cases of this nature we start with the basic premise that the law favors arbitration of labor disputes. That there can be no doubt about this is clear from the pronouncements of the Supreme Court in the Steelworkers' Trilogy. . . . The most recent reaffirmation of the policy may be found in Gateway Coal Co. v. United Mine Workers of America . . . .
>
> Boys Markets . . . holds in essence that where a matter has been made arbitrable by the terms of a contract between the union and the company, an injunction may be issued to enforce this method of settling controversies between the parties. In determining whether a matter is arbitrable under the contract, any doubt should be resolved in favor of arbitration.

Id. (citations omitted).

63. *Id.*

granted injunctive relief. This approach is compatible with the policy favoring the substitution of arbitration for industrial warfare and, moreover, gives effect to the parties' underlying intent to submit *all* of their disputes to arbitration.

Perhaps the best analysis of the competing interests present in sympathy strike situations—the employer's desire to terminate the work stoppage versus the employee's right to refuse to cross a lawful picket line—is that of the Court of Appeals for the Eighth Circuit in *Valmac Industries, Inc. v. Food Handlers Local 425.*[64] In that case, the employer had separate contracts with the same local at its four plants. When the employees struck at two of the plants, they also picketed at the other two locations. The district court granted injunctive relief, but did not specifically provide in its order that the dispute be submitted to arbitration.

On appeal, the Eighth Circuit examined both the *Amstar-Buffalo Forge* line of cases denying injunctive relief and the *Monongahela* line of cases which relied heavily on the policy favoring dispute resolution through the arbitration process. Turning to the Supreme Court's *Gateway Coal* decision, the court reiterated the "presumption of arbitrability" set forth therein[65] and applied that presumption, finding that the work stoppage precipitated by the employees honoring the picket line constituted an arbitrable dispute over interpretation of the contract.[66] It then properly enjoined the union sub-

64. 519 F.2d 263 (8th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3280 (U.S. Oct. 31, 1975) (No. 75-647); *accord*, Associated Gen. Contractors v. Construction & Gen. Laborers Local 563, 519 F.2d 269 (8th Cir. 1975).

65. The court stated:

> The Supreme Court found a no-strike obligation to be implied by the arbitration provision and held that the safety dispute in issue presented a substantial question of contract construction. Concluding that such premises were sufficient to support the issuance of an injunction barring a work stoppage which had arisen over the safety dispute, the Court rejected any approach which would have allowed the union to make its own subjective evaluation of safety conditions in order to invoke a statutory exception to an implied no strike agreement, saying:
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> > * * * Absent the most explicit statutory command, we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be.

519 F.2d at 267 (citations omitted).

66. Focusing on the agreement provisions before it, the court noted that the binding arbitration provisions applied to any grievance "involving an interpretation, application or violation of [the] Agreement":

> There can be little doubt that had the company protested the picket line before the work stoppage occurred the resulting dispute would have been subject to binding

ject to prompt arbitration of the claim. *Valmac* stands as an example of a case—involving a situation where the collective bargaining agreement contained a provision for binding arbitration of disputes, a no-strike clause, and a provision protecting the employees' right to refuse to cross a picket line—which fully accomodates the national labor policies of promoting industrial peace through arbitration and preventing abusive use of injunctions against legal concerted activity.

Without even the specific command to prompt arbitration, the same considerations recognized in *Valmac* have induced other federal courts to enjoin sympathy strikes pending arbitration. In *Pilot Freight Carriers, Inc. v. Teamsters Local 728*,[67] the parties' contract provided that an employee who refused to cross or work behind a "primary" picket line would not be disciplined. The contract obligated two unions to refrain from calling, aiding or assisting in any unauthorized work stoppage or "cessation of work" and contained a broad and mandatory grievance-arbitration clause covering all disputes between the parties. The employees represented by those two unions honored the picket line of a third union which had been refused recognition at another location of the company. In granting an injunction, the court distinguished *Amstar* on the grounds that the grievance and arbitration clause here was broader and went on to follow the reasoning in *Monongahela Power*.

Another recent case exemplifying the trend of courts to find that sympathy strike disputes are encompassed by the contract arbitration clause is the Seventh Circuit's decision in *Inland Steel Co. v. Local 1545, UMW*.[68] In that case, two companies sought *Boys Markets* relief against employees who were honoring another union's picket line. The companies obtained their relief in district court, but the sympathy strike persisted. Contempt orders were entered

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arbitration. It makes little sense to argue that because the work stoppage precipitated the dispute it was not a work stoppage "over" a grievance which the parties were contractually bound to arbitrate. We think the holdings in *NAPA* and *Monongahela* and their progeny are consistent with a congressional purpose to encourage settlement of disputes by arbitration, including situations in which purported exceptions to a no-strike clause under the collective bargaining agreement are in dispute. Injunctive relief, conditioned upon prompt arbitration of the dispute, does not nullify the union's right to establish or honor a picket line; it "only suspends the exercise of the right until its existence is established by an arbitrator's decision."

Id. at 267-68 (footnote and citations omitted).

67. 86 L.R.R.M. 2419 (N.D. Ga. 1974).

68. 505 F.2d 293 (7th Cir. 1974).

against union officials. Both the injunctions and the contempt orders were appealed.

The Seventh Circuit noted that all parties before it were signatories of the National Bituminous Coal Wage Agreement of 1968. That contract did not have a no-strike clause but did contain a mandatory grievance procedure which covered disputes "not specifically mentioned in this agreement" and "any local trouble of any kind arising at the mine." Characterizing the issue as whether the unions had the right under the agreement to refuse to cross picket lines established by another union, the court considered the intent of the parties and the public policy favoring arbitration.[69] Given these policy considerations as announced in *Steelworkers Trilogy* and underscored in *Gateway Coal*, the court held that the dispute fell within the arbitration clause of the collective bargaining agreement in existence between the parties.[70] Having concluded that the unions were under a duty to arbitrate the issue of whether or not they could honor the stranger picket line, the court affirmed the district court's issuance of injunctive relief.

The decisions in *Monongahela*, *NAPA*, *Valmac*, *Pilot Freight Carriers* and *Inland* recognize the national labor policy of channeling disputes through agreed upon procedures and are in sharp contrast to the approaches in *Amstar* and *Buffalo Forge*. Moreover, they—especially *Valmac*—in no way remotely approach the abuses of 45 years ago which led Congress to pass the Norris-LaGuardia Act; rather, they reflect accommodation of the policy favoring arbitration with Norris-LaGuardia's nonintervention policy.

On the other hand, the *Amstar* and *Buffalo Forge* cases are particularly disconcerting in light of the fact that neither the Fifth Circuit nor the Second Circuit even mentioned the decade of case law development under the *Steelworkers Trilogy* establishing the presumption in favor of arbitrability, did not acknowledge the rulings deal-

69. The court stated:

> We further believe that this conclusion is enhanced by the strong public policy in favor of arbitration which was persuasively enunciated in the Steelworkers Trilogy. The often discussed presumption of arbitrability for labor disputes was recently reaffirmed by the Supreme Court in Gateway Coal Co. v. Mine Workers . . . . While the arbitrability of the disputes involved here may not be free from doubt, the Trilogy has instructed that all such doubts be resolved in favor of arbitration.

Id. at 298 (footnote and citations omitted).

70. *Id.* at 299.

ing with analogous factual and policy considerations under the Railway Labor Act[71] (which reached a conclusion directly contrary to the rulings in those cases), and did not deal with the opposing authority from the NLRB and labor arbitrators on the issue of arbitrability.

Amstar and *Buffalo Forge*—in requiring that first there be a dispute "over" a grievance subject to the grievance and arbitration procedures of the agreement and, second, that there be a work stoppage—deny injunctive relief in a situation where arbitration *can* resolve the dispute. Certainly if one takes the goal of industrial peace set forth in *Boys Markets* together with the presumption of arbitrability set forth in the *Steelworkers Trilogy*, it would seem that the relevant and critical inquiry in a § 301 injunction suit is whether the arbitration can resolve the strike. The shadowy argument of the *Amstar-Buffalo Forge* lineage that no dispute exists between the parties flies in the face of reality. In a sympathy strike situation clearly there exist disputed issues as to whether or not union members have a right to refuse to cross a picket line and, if so, whether that right has been waived in the collective bargaining agreement.

The argument that the disagreement over the scope of the no-strike obligation is not subject to an agreement's mandatory grievance-arbitration procedure is equally invalid and is in direct conflict with the presumption of arbitrability mandated by *Steelworkers Trilogy* and reaffirmed by *Gateway Coal.*[72] A union's contractual commitment to the grievance-arbitration procedure would be hollow, at best, if it or its members could simply ascertain their own rights under the agreement rather than seek an arbitrator's determination.[73] Similarly, courts have repeatedly indicated

71. Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co., 353 U.S. 30 (1957); Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 325 F. Supp. 994 (D. Minn. 1970).

72. In United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the Supreme Court ruled that a court cannot declare an issue non-arbitrable "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*" *Id.* at 582-83 (emphasis added).

73. For example, the Court in *Avco* said:

> The "no-strike" clause is the quid pro quo which Avco obtained for agreeing to submit to compulsory arbitration, and the Union agreed to forbear from striking in order to require such arbitration. To allow the Union to abandon its remedy of arbitration in order to disregard the 'no-strike' clause would render the collective bargaining agreement illusory and would subvert the policy favoring the peaceful settlement of labor disputes by arbitration.

459 F.2d at 972.

that grievance and arbitration provisions are to be viewed expansively.[74]

In the sympathy strike situation, an arbitrator can resolve the dispute by determining whether or not the union's members have a right under the collective bargaining agreement to honor a picket line. This area is not new to arbitrators[75] and the National Labor Relations Board has so recognized by deferring a case to arbitration where the issue was whether or not employees had a right to honor a picket line.[76] As such, this type of dispute, in the Supreme Court's words, "is grist in the mills of the arbitrators."[77]

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74. For example, in Southwestern Bell Tel. Co. v. Communications Workers of America, 454 F.2d 1333 (5th Cir. 1971), the district court had denied injunctive relief under *Boys Markets* on the basis that the dispute in question was not one which the parties were bound to arbitrate; in vacating this denial of injunctive relief, the Court of Appeals for the Fifth Circuit held that in determining whether a dispute is arbitrable, a court is "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract and which is 'arguably arbitrable.' " *Id.* at 1336. *See also* Lodge 15, Machinists v. Cameron Iron Works, 77 L.R.R.M. 2778 (S.D. Tex. 1970), *aff'd per curiam*, 444 F.2d 112 (5th Cir. 1971).

75. *See, e.g.*, Drake Bakeries, Inc. v. Bakery Workers Local 50, 370 U.S. 254 (1962); Howard Electric Co. v. IBEW Local 570, 423 F.2d 164 (9th Cir. 1970); ITT World Communications, Inc. v. Communications Workers of America, 422 F.2d 77 (2d Cir. 1970); H.K. Porter Co. v. Local 37, USW, 400 F.2d 691 (4th Cir. 1968). *See also* Shop Rite Foods, Inc., 58 Lab. Arb. 965 (1972) (Ray, Arbitrator); Amalgamated Lace Operative, 54 Lab. Arb. 140 (1969) (Frey, Arbitrator); General American Transp. Corp., 41 Lab. Arb. 214 (1963) (Abrahams, Arbitrator); Regent Quality Furniture, Inc., 32 Lab. Arb. 553 (1959) (Turkus, Arbitrator); New England Master Textile Engravers Guild, 9 Lab. Arb. 199 (1947) (Wallen, Arbitrator).

76. Gary-Hobart Water Corp., 200 N.L.R.B. 647 (1972), *aff'd*, 511 F.2d 284 (7th Cir.), *cert. denied*, 44 U.S.L.W. 3263 (U.S. Nov. 4, 1975) (No. 75-68). Prior to *Gary-Hobart*, the NLRB position with respect to the legality of refusals to cross picket lines was unclear. *See* Carney & Florsheim, *The Treatment of Refusals to Cross Picket Lines: "By-Paths and Indirect Crookt Ways,"* 55 CORNELL L. REV. 940 (1970); Note, *Respect for Picket Lines*, 42 IND. L. REV. 536 (1967); Note, *Picket Line Observance: The Board and The Balance of Interests*, 79 YALE L.J. 1369 (1970). *Compare* Redwing Carriers, Inc., 137 N.L.R.B. 1545 (1962), *enforced sub nom.*, Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964), *with* Redwing Carriers, Inc., 130 N.L.R.B. 1208 (1961).

77. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584 (1960).

Various commentators have also recognized that the question of whether the no-strike clause was breached is best left to an arbitrator's judgment. For example, Professor Edgar Jones, in *Power and Prudence in the Arbitration of Labor Disputes: A Venture in Some Hypotheses*, 11 U.C.L.A. L. REV. 675 (1964), has written:

> State judges (and, for that matter, federal judges whose removal or remanding powers are exercised so as to preserve jurisdiction in state judges to enjoin) should be required to refer no-strike contractual disputes immediately to arbitration. These matters are of paramount sensitivity in collective bargaining, and the judge who is not technically competent to displace the arbitrator's judgment in other less sensitive areas of collective bargaining certainly ought not to be deemed to be so here.

Id. at 780 (footnote omitted).

To the Supreme Court then, it is the expeditious settlement of industrial disputes through arbitration—without economic warfare—that is at the core of *Boys Markets*. Thus, it must be asked in each *Boys Markets* type of case whether arbitration of the dispute, in accordance with the parties' contract, would have obviated resort to violation of the no-strike clause or, to look at it another way, whether an arbitrator's award could have fully settled the contractual dispute. Obviously, where the parties themselves have specifically rejected arbitration as the means to settle such a dispute[78] or where the dispute is plainly not arbitrable under the contract,[79] no injunction would be appropriate.

The sympathy strike situation is simply another dispute which under the terms of most collective bargaining agreements can be resolved in its entirety through arbitration. If a union and its members have a right to honor a picket line, a company would be foreclosed from seeking injunctive relief. If an arbitrator finds that a union did not reserve to itself the right to honor a picket line, a company can secure enforcement of that award.[80] Most significantly, injunctive relief in the sympathy strike situation gives rise to none of the abuses Norris-LaGuardia was intended to prevent. Rather, the opposite is true, for requiring a union to channel a dispute through the grievance-arbitration procedure, rather than resorting to self-help, is entirely consistent not only with a union's contractual commitments, but with Norris-LaGuardia as well.[81]

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78. Martin Hageland, Inc. v. United States Dist. Court, 460 F.2d 789 (9th Cir. 1972); Associated Gen. Contractors v. Teamsters Union, 454 F.2d 1324 (7th Cir. 1972).

79. Emery Air Freight Corp. v. Local 295, Teamsters, 449 F.2d 586 (2d Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972).

80. *See, e.g.*, New Orleans Steamship Ass'n v. Longshore Workers Local 1418, 389 F.2d 369 (5th Cir.), *cert. denied*, 393 U.S. 828 (1968); Pacific Maritime Ass'n v. International Longshoremen's & Warehousemen's Union, 304 F. Supp. 1315 (N.D. Cal. 1969), *aff'd*, 454 F.2d 262 (9th Cir. 1971). The decision of the court in *New Orleans Steamship* is further support for the issuance of an injunction in a sympathy strike situation. There the court recognized that an arbitrator's award ordering a union not to engage in a work stoppage could be enforced despite the rule of *Sinclair*. Yet, ignoring its plea to pursue arbitration rather than striking a union would prevent a company from ever enforcing this very commitment.

81. As the Court emphasized in *Boys Markets*:

> We rejected [in *Lincoln Mills*] the contention that the anti-injunction proscriptions of the Norris-LaGuardia Act prohibited this type of relief [an order to arbitrate], noting that a refusal to arbitrate was not "part and parcel of the abuses against which the Act was aimed," . . . and that the Act itself manifests a policy determination that arbitration should be encouraged.
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> . . . .
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> . . . On the other hand, the central purpose of the Norris-LaGuardia Act to foster

C. *Conclusion*

The conflict between the policies relied upon in the *Amstar-Buffalo Forge* line of cases with those relied upon in the *Monongahela* line of cases may at first appear irreconcilable. However, the Eighth Circuit's *Valmac* decision may well provide the key to resolving the conflict. While *Buffalo Forge* relies heavily upon the "narrow exception" doctrine of *Boys Markets* to the exclusion of the national policy favoring resort to arbitration, and *Monongahela* relies on the same policies but in reverse order of importance, *Valmac* accommodates both with over-emphasis on neither.

Boys Markets left vague what constitutes a dispute over a grievance subject to the contractual grievance and arbitration provisions. Indeed, the Court could have said little more in view of the plethora of contract provisions defining grievances subject to a particular grievance-arbitration procedure. All that it could do was establish the principle that, in such circumstances, a narrow exception to Norris-LaGuardia's nonintervention mandate exists.[82] *Monongahela* and its progeny apply this principle by first examining the contractual provisions of the parties in order to determine if arguably the dispute is subject to arbitral resolution. The conclusion reached in a particular case is based solely upon interpretation of the contractual provisions voluntarily agreed to by the parties. The focus of attention is thus directed toward the intent of the parties as established in their agreement, giving due regard to the policy of resolution of disputes through the machinery voluntarily established by the parties for that purpose. *Valmac*, moreover, considers the concern of the *Amstar* cases and does no violence to the "narrow exception" principle established by the *Boys Markets* Court. Under the *Valmac* rationale emphasizing the *Boys Markets* requirement that injunctive relief be conditioned on an order to arbitrate, the judiciary is not expanding the range of situations in which the *Boys Markets* exception to Norris-LaGuardia applies. Rather, the courts

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the growth and viability of labor organizations is hardly retarded—if anything, this goal is advanced—by a remedial device that merely enforces the obligation that the union freely undertook under a specifically enforceable agreement to submit disputes to arbitration.

398 U.S. at 242, 252-53 (footnotes and citations omitted).

82. In keeping with the holding of *Boys Markets*, that an order to arbitrate issue with the injunction, *Valmac* specifically conditions injunctive relief upon "prompt" submission of the dispute to arbitration.

are giving due regard to the traditional labor policy first established by the *Steelworkers Trilogy* disputes. *Boys Markets* continues to be applicable only where there is a dispute over a grievance subject to contractual grievance arbitration. The only difference now is that the parameters of the term "grievance" have been defined more clearly, *i.e.*, whatever matters the parties, by their collective bargaining agreement, have agreed to submit to, or have failed to clearly exclude from, the contractual dispute resolution mechanism.

IV. Lawsuits for Damages for a Union's Participation in a Sympathy Strike

No matter how the Supreme Court rules in *Buffalo Forge* on the issue of the availability of injunctive relief, an employer still has the statutory right to money damages for injury inflicted by an illegal sympathy strike. Sections 301 and 303 of the Labor-Management Relations Act allow an employer to recover money damages resulting from illegal strikes. These provisions are clearly applicable to the sympathy strike situation, once the illegality of a strike is shown. This section of the article discusses a variety of cases in which unions, to avoid liability under § 301, have attempted to establish the legality of their sympathy strike.

A. *The Basis of Illegality*

In a relatively old case, *NLRB v. Illinois Bell Telephone Co.*,[83] it was held that refusal to cross a lawful picket line,[84] established at the employees' regular work location by a union representing a different bargaining unit, was not protected by § 7 of the LMRA[85] as

83. 189 F.2d 124 (7th Cir.), *cert. denied*, 342 U.S. 885 (1951).

84. In the whole area of permissible employer treatment of refusals to cross picket lines the commentators have been unable to discern a coherent pattern. *See* Carney & Florsheim, *The Treatment of Refusals to Cross Picket Lines: "By-Paths and Indirect Crookt Ways,"* 55 Cornell L. Rev. 940 (1970); Getman, *The Protection of Economic Pressure By Section 7 of the National Labor Relations Act*, 115 U. Pa. L. Rev. 1195 (1967); O'Connor, *Respecting Picket Lines: A Union View*, 7 N.Y.U. Conf. on Labor 235 (1954); Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 Tex. L. Rev. 378 (1969); Note, *Respect for Picket Lines*, 42 Ind. L.J. 536 (1967); Note, *Picket Line Observance: The Board and the Balance of Interests*, 79 Yale L.J. 1369 (1970).

85. 29 U.S.C. § 157 (1970) provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all

such conduct was not for the "mutual aid or protection" of the refusing employees themselves,[86] as defined in § 7. Hence, reasoned the court, the employer's demotion of employees who refused to cross the picket line was permissible and, contrary to the Board's conclusion, the actions of the employer did not violate §§ 8(a)(1) and 8(a)(3) of the NLRA.[87] Similarly, the Eighth Circuit in *NLRB v. L.G. Everist, Inc.*,[88] specifically rejected the Board's position that employees who refused to cross a picket line at a job site were protected to the same extent as primary economic strikers. The court held such a refusal to be simply a refusal to work which subjected the employees to permanent discharge for cause. The court denied enforcement of that part of the Board's order which required the reinstatement of four employees who had been discharged for refusal to cross such a picket line.

Although the *Illinois Bell Telephone* and *Everist* decisions have not been expressly overruled, the Board has not acquiesced in their narrow interpretation of § 7 protection. More importantly, other appellate courts have recently adopted an expansive reading of § 7.[89] In *NLRB v. Union Carbide Corp.*,[90] the Fourth Circuit, after citing *Illinois Bell Telephone* and *Everist*, concluded:

> But it now seems to be fairly well established by the most recent authority that nonstriking employees who refuse as a matter of principle to cross a picket line maintained by their fellow employees have 'plighted [their] troth with the strikers, joined in their common cause, and [have] thus become . . . striker[s] [themselves].' . . . It cannot be denied that respect for the integrity of the picket line may well be the source of strength of the whole collective bargaining process in which every union member has a legitimate and protected economic interest. And any assistance by a union member to a labor organization in the collective bargaining process is for mutual

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of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

86. 189 F.2d at 127-28.

87. 29 U.S.C. §§ 158(a)(1), (3) (1970).

88. 334 F.2d 312 (8th Cir. 1964).

89. *See* Virginia Stage Lines, Inc. v. NLRB, 441 F.2d 499 (4th Cir.), *cert. denied*, 404 U.S. 856 (1971); NLRB v. Union Carbide Corp., 440 F.2d 54 (4th Cir.), *cert. denied*, 404 U.S. 826 (1971); NLRB v. Southern Greyhound Lines, 426 F.2d 1299 (5th Cir. 1970).

90. 440 F.2d 54 (4th Cir.), *cert. denied*, 404 U.S. 826 (1971).

aid or protection of the nonstriking unionist even though he has no immediate stake in the labor dispute.[91]

To this broad interpretation of the § 7 right of employees, the Court of Appeals for the Sixth Circuit in *NLRB v. Difco Laboratories, Inc.*[92] added yet another element by emphasizing that the § 7 right of an employee to refuse to cross a picket line was an individual right which did not depend on the wishes of the picketing union. Thus, in *Difco*, two employees, members of one union, were discharged for their refusal to cross a second union's picket line at their employer's plant. In enforcing the Board's order that the discharges violated § 7, the court adopted a broad reading of "concerted activity" for "mutual aid or protection" and stated that whether the second union did or did not want the two discharged employees to strike obviously had no bearing on their right to do so if they considered such action to be in their own best interest.[93]

The broad interpretation of § 7's protection to those employees who refuse to cross a picket line exemplified by the *Union Carbide*[94] decision has been expressly adopted by the First Circuit in *General Tire & Rubber Co. v. NLRB*,[95] and reiterated by the Sixth Circuit in *Kellogg Co. v. NLRB*.[96] In *Kellogg*, the court held that the right of employees who were members of the Millers Union to refuse to cross a picket line established by the Pressmen at their employer's plant depended upon the terms of the Millers' contract with Kel-

91. 440 F.2d at 55-56. It is noteworthy that the court went on to hold that such a refusal was activity protected by § 7 only when based on *principle*. The court enforced the Board's order of reinstatement with back pay for two employees whose refusal was found to be based on principle, but denied enforcement of a similar order as to a third employee whose refusal it found to be based "on fear and nothing else." *Id.* at 56. Thus the motivation of an employee in refusing to cross a picket line, which is a question of fact, is relevant in determining whether his conduct is protected by § 7 and, therefore, in deciding whether he can legally be subjected to discipline or discharge.

92. 427 F.2d 170 (6th Cir. 1970).

93. *Id.* at 172. Subsequently, in Kellogg Co. v. NLRB, 457 F.2d 519 (6th Cir.), *cert. denied*, 409 U.S. 850 (1972), the Sixth Circuit apparently extended this principle still further by ruling that the determination by officials of the employee's own union as to crossing a picket line is not determinative of the employee's rights. In *Kellogg*, the case was ultimately governed by the terms of a collective bargaining agreement rather than by § 7 alone, but the comment by the court is still significant as an indication of the basic § 7 rights of the individual employee.

94. *See also* Virginia Stage Lines, Inc. v. NLRB, 441 F.2d 499 (4th Cir.), *cert. denied*, 404 U.S. 856 (1971).

95. 451 F.2d 257 (1st Cir. 1971).

96. 457 F.2d 519 (6th Cir.), *cert. denied*, 409 U.S. 850 (1972).

logg.[97] To underscore its ruling that, considering § 7 alone, refusal to cross a picket line is protected activity, the court in *Kellogg* emphasized that the right to strike was protected by law, whether it was for economic reasons, for the purpose of improving working conditions, or for mutual aid or protection of employees who were members of another union.[98]

In light of the clear trend of recent appellate decisions, it appears unwise to rely on the older authority of the *Illinois Bell Telephone* and *Everist* cases which adopted a narrow interpretation of § 7 rights in the contest of a refusal to cross a picket line. Furthermore, while the United States Supreme Court has not ruled directly on this aspect of § 7, it implied in *NLRB v. Rockaway News Supply Co.*[99] that refusal to cross a picket line is protected activity unless this right has been waived in negotiations.

In *Rockaway News*, the Supreme Court was faced with the question of whether an employer could discharge an employee for failing to cross a picket line. The collective bargaining agreement covering the employees included a no-strike clause.[100] In interpreting the scope of that clause, the Court considered the fact that during negotiations the union had proposed a picket line clause (which proposal was rejected by the employer) and that the union had acquiesced in the rejection and consented to the no-strike clause. In light of this bargaining history, the Court found that the no-strike clause prohibited an employee's refusal to cross a picket line and, thus, the employer lawfully discharged the employee.[101]

The decision in *Rockaway News* was followed by the Court of Appeals for the Eighth Circuit in *Montana-Dakota Utilities Co. v. NLRB.*[102] In that case, the union agreed to refrain from striking "on

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97. The court stated:

> [W]e conclude that if the Millers' contract did not prohibit the sympathetic honoring of another Union's picket line then Putnam and Sutfin were engaging in protected concerted activity (as will be pointed out hereafter), and if the contract did prohibit such activity then they were properly discharged.

457 F.2d at 522.

98. *Id.* at 523.

99. 345 U.S. 71 (1953).

100. That clause read:

> No strikes, lockouts or other cessation of work or interference therewith shall be ordered or sanctioned by any party hereto during the term hereof except as against a party failing to comply with a decision, award, or order of the Adjustment Board.

Id. at 79.

101. *Id.* at 79-80.

102. 455 F.2d 1088 (8th Cir. 1972).

account of any controversy respecting the provisions of this Agreement," but argued that the no-strike clause[103] allowed its members to honor a peaceful informational picket line. The court pointed out that in negotiations the employer had indicated that it would not insist on a right to discharge employees who refused to cross a picket line, but that it did demand the right to discipline such employees. The union had agreed to this. On the basis of this history, the court held that the union bargained away its right to refuse to cross a picket line.[104]

Although these cases show that the pertinent collective bargaining history normally must be closely scrutinized to determine whether the parties have openly discussed the issue of refusal to cross picket lines, in *Gary Hobart Water Corp. v. NLRB*[105] the Seventh Circuit refused to consider the bargaining history of the parties when the clause before it was clear on its face. Relying upon its earlier decision in *Inland Steel Co. v. Local 1545, UMW*[106] in which it had interpreted the identical clause applying to "differences . . . as to the meaning and interpretation of [the] agreement," the court ruled that the provision did not affect the right to engage in a sympathy strike, since there was clear and unmistakable language waiving that right. Under these circumstances, the court concluded that the bargaining history between the company and the union need not be examined in order to interpret the language of the collective bargaining agreement.[107]

Consistent with *Gary Hobart* is the decision in *Kellogg Co. v. NLRB*,[108] where the Court of Appeals for the Sixth Circuit examined the specific terms of the applicable contract to determine whether

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103. That clause provided:

> It is recognized that the Company is engaged in public service requiring continuous operation, and it is agreed, in recognition of such obligation of continuous service that, during the term of this Agreement there shall be no collective cessation of work by members of the Union and that the Company will not lock out the employees covered by this Agreement on account of any controversy respecting the provisions of this Agreement. All such controversies shall be handled as provided for herein.

Id. at 1090.

104. *Id.* at 1093. *See also* News Union v. NLRB, 393 F.2d 673 (D.C. Cir. 1968); Firestone Tire & Rubber Co. v. United Rubber Workers, 82 L.R.R.M. 2830 (M.D. Ga. 1972), *aff'd*, 476 F.2d 603 (5th Cir. 1973); Kelley-Nelson Constr. Co. v. Laborers' Local 107, 80 L.R.R.M. 2334 (W.D. Ark. 1972).

105. 511 F.2d 284 (7th Cir. 1975).

106. 505 F.2d 293 (7th Cir. 1974).

107. 511 F.2d at 288.

108. 457 F.2d 519 (6th Cir.), *cert. denied*, 409 U.S. 850 (1972).

there had been a waiver of the employees' rights not to cross a picket line. Although the terms appeared broad enough to constitute a prohibition of picket line observance, the court in *Kellogg* adopted a strong position that the relinquishment of the right to refuse to cross a picket line must be evidenced by "clear and unmistakable language."[109] It observed that it was neither necessary nor appropriate to consider extrinsic evidence to interpret the contract, even though there was such evidence available showing that the involved union officials regarded the no-strike clause as prohibiting picket line observance. On this basis, the court concluded that it found nothing in the language of the contract which prohibited a member of the union from honoring the picket line of another union at the same plant.[110] This treatment of the case appears to be at least somewhat inconsistent with *Rockaway*, but since the Supreme Court has refused to review *Kellogg*, it must be respected as an authoritative opinion of at least one circuit.

There is also authority for the proposition that in the absence of a specific clause preserving the right to engage in sympathy strikes, a broad no-strike clause precludes a sympathy strike. The United States Court of Appeals for the District of Columbia has so stated in *News Union v. NLRB*.[111]

In summation, then, despite the difficulties an employer faces in showing that there has been a contractual waiver of the § 7 right to honor a stranger's picket line, once that waiver is established he may sue for damages for breach of contract under § 301. Only the employer's burden on "waiver" differs among the circuits.

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109. The relevant no-strike provisions of the agreement provided:

NO STRIKES-NO LOCKOUTS

Section 1101

(a) During the life of this Supplemental Agreement no strike or work stoppages in connection with disputes arising hereunder shall be caused or sanctioned by the Union, or by any member thereof, and no lockout shall be ordered by the Company in connection with such disputes.

. . . .

NO SYMPATHY STRIKE

Section 1102

During the life of this Supplemental Agreement, no sympathy strike shall be caused or sanctioned by the Union because of differences between the AFL-CIO or any of its affiliated Unions and any other local or national employers, except for differences between the AFL-CIO or any of its affiliated Unions involving other plants of the Company.

Id. at 520-21.

110. *Id.* at 525-26.

B. *Lawsuits for Damages v. Arbitration*

It should be noted that an employer's right to sue for damages, unlike his ability to secure injunctive relief, is not conditioned on his agreement to arbitrate. Two wrongs exist in every sympathy strike situation: the refusal to arbitrate the issue of whether or not employees have a right to refuse to cross a picket line under the collective bargaining agreement, and the strike itself in violation of the no-strike clause. Each affords the employer separate remedies which are not mutually exclusive. The latter wrong is not subject to the arbitration procedure but is the proper subject of a lawsuit for damages.

Where unions exchange a broad no-strike clause, waiving their right to strike, for a broad grievance and arbitration procedure designed to dispose of employee problems and resolve disputes, the unions become liable in damages for their actions and the actions of their members in breaching the no-strike clause. Under the broad language of *United Steelworkers v. American Manufacturing Co.*[112]

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111. 393 F.2d 673 (D.C. Cir. 1968). The court stated:

> [The unions] point out that there is no explicit reference to the crossing of picket lines [in the no-strike clause] and suggest initially that language which in terms inhibits only a strike is not to be read as restricting the observance of picket lines. But the practical relationship between work stoppages and the honoring of picket lines is so well understood in the industrial climate that we think that a clause of this kind using only the word "strike" includes plant suspensions resulting from refusals to report for work across picket lines.

Id. at 676-77. *See also* Alliance Mfg. Co., 200 N.L.R.B. 697 (1972). *Cf.* Kellogg Co. v. NLRB, 457 F.2d 519 (6th Cir.), *cert. denied*, 409 U.S. 850 (1972).

In both the *News Union* and *Montana-Dakota* cases, the collective bargaining agreement had a broad no-strike clause which referred only to "strikes" and had no specific clause relating to sympathy strikes. Both cases held that such strikes and refusals to cross picket lines were within the scope of the no-strike prohibition even though they were not specifically mentioned in the contract. In *Kellogg*, the collective bargaining agreement had not only a no-strike clause but also contained a specific clause dealing with sympathy strikes. The court in *Kellogg* noted that if the collective bargaining agreement had only contained the no-strike clause a sympathy strike might well have been barred. Since, however, the agreement did contain a specific clause dealing with sympathy strikes and since that specific clause was more narrowly drawn than was the no-strike clause, the court concluded that a sympathy strike by a union member was permissible. 457 F.2d at 526.

The *News Union* case is contrary to the union-advocated theory of "inclusion" where, despite a broad no-strike clause, the right to cross a picket line would be preserved unless specifically prohibited. That theory, however, renders the normal no-strike clause meaningless, as it would require an impossible chore of the bargainers, namely, advance enumeration of every potential reason for a strike. In contrast to *News Union*, the inclusion theory appears to have been adopted by the NLRB and affirmed by the Seventh Circuit in its recent decision in *Gary Hobart*.

112. 363 U.S. 564 (1960).

and *United Steelworkers v. Warrior & Gulf Navigation Co.*,[113] an employer is entitled to insist that the quid pro quo[114] be fulfilled and can sue for damages if this obligation is dishonored. A strike to settle a dispute which could go through the grievance and arbitration procedure violates the contract, and a strike which violates the contract entitles the employer to damages under § 301 of the LMRA.[115]

A company's primary argument in these situations is that arbitration provisions which are entirely employee oriented and only permit the submission of grievances by employees and not by the company clearly preclude arbitration of a violation of a no-strike clause. Courts have recognized that arbitration is a matter of contract and that, absent an agreement to arbitrate, a reluctant party normally cannot be compelled to do so.[116] The real question here, though, is whether the company may be compelled to arbitrate the issue of the union's alleged breach of the no-strike clause even though under the applicable arbitration provisions the company itself has no access to arbitration. The decided cases have uniformly answered this question in the negative.

In *Boeing Co. v. UAW*,[117] the Court of Appeals for the Third Circuit was presented with this very question in a sympathy strike situation. The employer alleged that a union had violated a no-strike clause in a collective bargaining agreement; the union denied that it had engaged in such a violation. The employer then brought suit against the union under § 301 of the LMRA and the union moved to stay the proceeding pending arbitration even though the arbitration provisions were entirely employee oriented. On these facts, the Third Circuit flatly held that the employer could not be compelled to arbitrate the alleged breach of the no-strike clause and affirmed a lower court's refusal to stay the proceedings.[118]

On identical facts, the Court of Appeals for the First Circuit, in *G.T. Schjeldahl Co. v. Local 1680, IAM*,[119] reached an identical

113. 363 U.S. 574 (1960).

114. *See* Iodice v. Calabrese, 345 F. Supp. 248 (S.D.N.Y. 1972).

115. Peggs Run Coal Co. v. District 5, UMW, 338 F. Supp. 1275 (W.D. Pa. 1972).

116. *See, e.g.*, Firestone Tire & Rubber Co. v. United Rubber Workers, 82 L.R.R.M. 2830 (M.D. Ga. 1972), *aff'd*, 476 F.2d 603 (5th Cir. 1973), *citing* Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962). *See also* Local 787, Elec. v. Collins Radio Co., 317 F.2d 214, 216 (5th Cir. 1963).

117. 370 F.2d 969 (3d Cir. 1967).

118. *Id.* at 971.

119. 393 F.2d 502 (1st Cir. 1968).

conclusion. And, indeed, the United States Supreme Court has indicated, in *Atkinson v. Sinclair Refining Co.*,[120] that an employer cannot be compelled to arbitrate an alleged violation of a no-strike clause under arbitration procedures which only permit employees and not the employer to submit grievances.

Some unions contend that the decision of the Court of Appeals for the Ninth Circuit in *Los Angeles Paper Bag Co. v. Printing Local 2*[121] is contrary to the above-cited cases. In *Los Angeles Paper Bag*, the employer discharged twelve employees for allegedly breaching a no-strike caluse. The employees denied that they had committed a breach and filed grievances. The employer refused to arbitrate, arguing that the grievances involved issues expressly excluded from the arbitration procedure under the collective bargaining agreement. The union then filed suit to compel arbitration and the only question before the court was whether the issues involved were within the scope of the pertinent arbitration provisions. The court did not consider the question of whether the latter provisions were entirely employee oriented but only concluded that the issues involved in the grievances fell within the scope of the arbitration provisions in question. The case, in short, did not reach the essential issue at stake here and, indeed, in a decision subsequent to *Los Angeles Paper Bag*, the Ninth Circuit expressly recognized that *Atkinson* was *not applicable* to a case which involved arbitration procedures limited to employee grievances.[122] Several recent decisions from other circuits have reached this same conclusion.[123] It is therefore clear that an employer's damage claim under § 301 may not be forced to arbitration where the arbitration procedures are wholly employee oriented.

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120. 370 U.S. 238, 241-43 (1962).

121. 345 F.2d 757 (9th Cir. 1965).

122. Howard Elec. Co. v. IBEW Local 570, 423 F.2d 164 (9th Cir. 1970). In *Howard Electric*, the Ninth Circuit compelled arbitration on the ground that where doubt exists as to the scope of a specific arbitration clause, that doubt should be resolved in favor of arbitration. In support of that conclusion, the Ninth Circuit cited, among others, its earlier decision in *Los Angeles Paper Bag*. The court then stated: "By way of comparison, we cite Atkinson . . . [as a case] holding that the employer was not required to arbitrate an alleged violation of a no-strike clause. In [*Atkinson*], the grievance procedure was limited to employee grievances . . . ." 423 F.2d at 167 (citations omitted).

123. *See, e.g.*, Friedrich v. Local 780, IUE, 515 F.2d 225 (5th Cir. 1975); Faultless Div., Bliss & Laughlin Indus., Inc. v. Local 2040, IAM, 513 F.2d 987 (7th Cir. 1975); Affiliated Food Distrib's Inc. v. Local 229, Teamsters, 483 F.2d 418 (3d Cir. 1973), *cert. denied*, 415 U.S. 916 (1974).

V. Union Responsibility

A. *Presumption of Union Leadership*

Given the right to sue for damages resulting from an illegal sympathy strike, the next problem confronting an employer is to determine who is responsible for the damages. There is in labor law a virtual presumption that mass illegal activity by union employees is concerted union activity. It has long been accepted that employees do not engage in illegal strikes without leadership. In *United States v. UMW*,[124] John L. Lewis, President of the United Mine Workers, attempted to disclaim union responsibility for a simultaneous nationwide work stoppage in the coal mines by declaring that the miners decided to strike "entirely of their own volition and without any instructions from the President, direct or indirect."[125] The district court, however, stated:

> [A]s long as the union is functioning as a union it must be held responsible for the mass action of its members. It is perfectly obvious not only in the objective reasoning but because of experience that men don't act collectively without leadership.[126]

Despite this time-honored presumption of union responsibility for illegal mass conduct of its members, the Fifth Circuit in a very

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124. 77 F. Supp. 563 (D.D.C. 1948), *aff'd*, 177 F.2d 29 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949).

125. 77 F. Supp. at 564.

126. *Id.* at 566. This presumption was followed in Textile Workers Local 120 v. Newberry Mills, Inc., 238 F. Supp. 366, 373 (W.D.S.C. 1965), where the court stated:

> The defendant has proved by the greater weight of the evidence that the plaintiff participated, condoned, authorized and supported the strike by overt actions of the Union in its official capacity.
>
> The plaintiff did not upon receipt of notice from the defendant of the strike endeavor to bring such strike to an end.
>
> As long as a union is functioning as a union it must be held responsible for the mass action of its members. It is perfectly obvious not only in objective reasoning but because of experience that men don't act collectively without leadership. The idea of suggesting that the number of people who went on strike would all get the same idea at once, independently of leadership, and walk out of defendant's mill "is of course simply ridiculous." A union that is functioning must be held responsible for the mass action of its members.

Accord, Foam & Plastics Div., Tenneco Chemicals, Inc. v. Local 401, Teamsters, 90 L.R.R.M. 2147 (3d Cir. 1975); Eazor Express v. International Bhd. of Teamsters, 520 F.2d 951 (3d Cir. 1975); Wagner Elec. Corp. v. Local 1104, Elec. Workers, 496 F.2d 954 (8th Cir. 1974).

recent case, *United States Steel Corp. v. UMW*,[127] found no union liability for a thirty hour illegal strike, stating that "it becomes the burden of the Company in . . . an action for damages . . . to reasonably satisfy the Court . . . that the Union has in some active way made itself a party to the strike . . . ."[128] It should be noted that the *United States Steel* case differs factually from the precedent cases in that the court might have been examining a true wildcat situation.[129] Additionally, the stoppage itself was covered only by an implied contractual no-strike provision, not an express one. For those reasons the court appeared to proceed even further in the face of precedent concerning a union's responsibility to discipline its members and lead by example. Although stating that the "union must effectively renounce its agents' actions if they participated in an unauthorized strike," the *United States Steel* court held that absent a contractual obligation to discipline it could not as a matter of law impose such a duty upon the union.[130] This case is contrary to the weight of authority in this area as established by other circuits,[131] district courts,[132] and the National Labor Relations Board.[133]

The obligation of unions to discipline their agents and members for unlawful acts arises from their authority to do so under their own laws. The constitutions of most international unions and the bylaws of most local unions clearly provide that the unions have the power to discipline recalcitrant striking employees, discipline and remove officers of the local, try or fine members, and revoke the membership of members engaging in unauthorized strike activity. The courts reason that with authority comes the responsibility to exercise it. The unions must strongly and affirmatively disavow illegal strikes. A union's passive, do-nothing approach clearly implies that it either acquiesced in or condoned the illegal activity of the striking members or local.[134]

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127. 519 F.2d 1249 (5th Cir. 1975).

128. *Id.* at 1251, *quoting* the unreported opinion of the United States District Court for the Northern District of Alabama.

129. Some local union officers participated in the strike but others did not.

130. 519 F.2d at 1255.

131. Riverton Coal Co. v. UMW, 453 F.2d 1035 (6th Cir.), *cert. denied*, 407 U.S. 915 (1972); NLRB v. Bulletin Co., 443 F.2d 863 (3d Cir. 1971); Teamsters Local 984 v. Humko Co., 287 F.2d 231 (6th Cir. 1961).

132. *See* General Cable Corp. v. IBEW Local 1798, 333 F. Supp. 331 (W.D. Tenn. 1971); Union Tank Car Co. v. Truck Drivers Local 5, 309 F. Supp. 1162 (E.D. La. 1970).

133. *See* Laborers Local 245, 219 N.L.R.B. No. 23, 90 L.R.R.M. 1126 (July 16, 1975).

134. Local 984, Teamsters v. Humko Co., 287 F.2d 231, 242 (6th Cir. 1961).

In addition to the union's responsibility to discipline the striking employees,[135] or repudiate the action of the strikers by telegram, radio announcement, or otherwise, the officers of the local union must take action to go to work themselves and thus lead by example.[136]

B. *General Basis of Liability of the International Union*

As a general legal principle, a union is responsible for the acts of its officers and members under the doctrine of agency.[137] A union is accordingly liable for an agent's conduct within the scope of his authority, express or implied.[138] Through the law of agency an international union becomes liable for an unlawful strike called and carried out by a local union if (1) some of the strike organizers or participants as international affiliates were acting in their individual capacities as agents for the international, or (2) the local union itself was acting as an agent for the international union. Even unauthorized acts can form the basis of liability if ratified by the international union.[139]

The National Labor Relations Board, in interpreting § 2(13) of the NLRA,[140] reaffirmed, in *Carpenters Local 2067*,[141] its approval of the common law rules of agency. In the *Carpenters* case, the Board held the union liable for the actions of its leaders who went through the technical motions of disavowing the strike, including sending a letter to the membership suggesting they return to work, but, most significantly, did not order the strikers to return to work, made no effort to discipline the strikers, and did not strongly and affirmatively disavow the strike. The apparent theory of the *Carpenters*

135. Union Tank Car Co. v. Truck Drivers Local 5, 309 F. Supp. 1162 (E.D. La. 1970).

136. General Cable Corp. v. IBEW Local 1798, 333 F. Supp. 331 (W.D. Tenn. 1971).

137. Mason-Rust v. Laborers Local 42, 435 F.2d 939 (8th Cir. 1970).

138. American Zinc Co. v. Vecera, 338 Ill. App. 523, 531, 88 N.E.2d 116, 120 (1949): "A union acts through its officers and agents; obviously, that is the only way it can act. It is responsible for those acts even if not expressly authorized."

139. Carpenters Local 2067, 166 N.L.R.B. 532 (1967). *See also* Eazor Express, Inc. v. International Bhd. of Teamsters, 520 F.2d 951 (3d Cir. 1975); Celotex Corp. v. United Steelworkers, 388 F. Supp. 1132 (E.D. Pa. 1974).

140. 29 U.S.C. § 152 (13) (1970) provides:

> In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

141. 166 N.L.R.B. 532 (1967).

case is that an international's reluctance to take disciplinary action against either its local or the strike leaders and its failure to strongly and affirmatively disavow the strike will lead the tribunal to conclude that the international attempted to, and did, benefit by its agent's strike and is therefore responsible for the damages. An employer seeking to hold an international for the illegal acts of its local or members thus must show the international's authority to control that local or its members. This is usually done through an analysis of the international's constitution and bylaws.[142]

VI. Recovery of Damages Under §§ 301 and 303

After ascertaining that a § 301 or § 303[143] action will lie and determining who would be the party or parties to respond in damages, the case must then be proven and the elements of damage established. The first issue becomes whether one must meet the clear proof standard, set forth in § 6 of the Norris-LaGuardia Act, or the preponderance of evidence standard applicable to other civil actions.

A. *Burden of Proof*

Although the standard of the burden of proof in § 301 and § 303 damage actions has been repeatedly litigated, courts have consistently recognized that the preponderance of evidence standard, the usual civil standard, is the one applicable.[144] Nothing in the legislative history of § 301 supports an argument that Congress intended to apply a higher burden of proof. Conversely, the Supreme Court's decision in *UMW v. Gibbs*[145] recognizes that the clear proof standard is not applicable to a § 301 or § 303 suit.[146] Indeed, in *Ritchie v.*

142. Local 984, Teamsters v. Humko Co., 287 F.2d 231 (6th Cir. 1961); New England Tel. & Tel. Co. v. IBEW, 384 F. Supp. 752 (D. Mass. 1974); International Woodworkers, 140 N.L.R.B. 602 (1963).

143. 29 U.S.C. § 187 (1970). Damages relative to a § 303 action are included herein to emphasize the situation that existed in Firestone Tire & Rubber Co. v. United Rubber Workers, 82 L.R.R.M. 2830 (M.D. Ga. 1972), *aff'd*, 476 F.2d 603 (5th Cir. 1973), wherein the same union had a contract with two different employers and engaged in a violation of both § 303 relative to a breach of the no-strike clause and § 303 relative to a secondary boycott.

144. *See, e.g.*, Local 743, IAM v. United Aircraft Corp., 299 F. Supp. 877 (D. Conn. 1969); IAM, Local 37 v. Higgins, Inc., 239 F. Supp. 252 (E.D. La. 1965); Textile Workers Local 120 v. Newberry Mills, Inc., 238 F. Supp. 366 (W.D.S.C. 1965).

145. 383 U.S. 715, 736-37 (1966).

146. Ritchie v. UMW, 410 F.2d 827, 833 (6th Cir. 1969); Riverside Coal Co. v. UMW, 410

UMW,[147] the Court of Appeals for the Sixth Circuit re-emphasized that the clear proof standard of § 6 of the Norris-LaGuardia Act does not apply to a finding of secondary boycott under § 303 of the LMRA and that the employer was only "required to prove by a preponderance of the evidence that the UMW was responsible . . . ."[148]

B. *Elements of Damages Recoverable in a § 301 or § 303 Suit*

Since the primary consideration in a § 301 or § 303 suit is the recovery of actual compensatory damages, it is necessary to analyze in some detail those specific types of losses which have been held directly attributable to the activities proscribed by § 303, or losses resulting from a strike in breach of contract. In most of the reported decisions, broad statements of general principles suffice to justify components of the recovery. Such general principles, while a necessary and convenient starting point, provide little guidance in deciding upon the proper remedy in each individual case. In light of such uncertainty, there can be no harm in asserting various elements of damages even without actual case support, so long as factual causation can be reasonably established. The keystone is the broad standard stemming from the language of § 303 providing recovery for "the damages by him sustained" and Senator Taft's statement that this provision of the law was intended to "provide for the amount of the actual damages."[149]

The measure of damages is the actual loss sustained by a company.[150] The items which can compose the "actual loss" are:

F.2d 267, 270 (6th Cir.), *cert. denied*, 396 U.S. 846 (1969).

147. 410 F.2d 827 (6th Cir. 1969).

148. *Id.* at 836.

149. 93 CONG. REC. 4872-73 (1947).

150. "Measure of loss," as stated in Wilson & Co. v. United Packinghouse Workers, 181 F. Supp. 809 (N.D. Iowa 1960), is:

> In an action against a union under Section 301 for damages caused by a breach of a no-strike provision in a contract, the measure of damages recoverable is the actual loss sustained by the plaintiff as a direct result of the breach. . . . Such loss would be that which may reasonably and fairly be considered as arising naturally from the particular breach of contract involved and which may reasonably be supposed to have been in the contemplation of the parties at the time the agreement was entered into in the event of such violation.

Id. at 820-21 (citation omitted). *Accord*, Eazor Express, Inc. v. International Bhd. of Teamsters, 520 F.2d 951 (3d Cir. 1975).

(1) overhead expenses[151] (standby) not compensated by productivity (including overtime and excessive labor costs);
(2) loss of profits arising out of the breach;
(3) contract bonuses and penalties; and
(4) reasonable compensation for items of which the owner has lost use due to the breach.

The same standard is applied in a § 303 suit. In *Sheet Metal Workers Local 223 v. Atlas Sheet Metal Co.*,[152] the Fifth Circuit held that overhead expenses are recoverable under § 303. That court allowed recovery for:

(1) fixed overhead (especially utility bills) allocable to lost income;
(2) costs of subcontracting;
(3) overtime for catching up to project schedules which was not recouped in contract price;
(4) long distance telephone calls necessitated by picketing; and
(5) salaries of employees who did not refuse to work to extent rendered unproductive.[153]

The courts have held that the term "overhead" included payments to state workmen's compensation plans and straight line depreciation on trucks and equipment;[154] have allowed recovery for fair rental value of machinery on a loss of use theory;[155] and have allowed

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151. In United Elec. Workers v. Oliver Corp., 205 F.2d 376 (8th Cir. 1953), the court defined overhead expense in the following fashion:

> Overhead expense is the necessary cost incurred by a company in its operations which can not be easily identified with any individual product and which by accepted cost accounting procedure is spread over or allocated to the productive labor, which is labor performed in the processing of the company's products. Such expenses do not fluctuate directly with plant operations. They are expenses necessary to keep the company on a going concern basis and are based upon the company's production which is planned for a year in advance. They are constant regardless of fluctuations in plant operations. When productive labor in a plant is reduced for any period to less than the normal, the company sustains a loss in the expenditure of necessary overhead for which it receives no production.

Id. at 387. *See also* United Steelworkers v. CCI Corp., 395 F.2d 529 (10th Cir. 1968), *cert. denied*, 393 U.S. 1019 (1969) (standby overhead expenses, even though having speculative elements, recoverable when such elements proved by competent evidence).

152. 384 F.2d 101 (5th Cir. 1967).

153. *Id.* at 110.

154. W.L. Mead, Inc. v. Teamsters Local 25, 129 F. Supp. 313 (D. Mass. 1955), *aff'd*, 230 F.2d 576 (1st Cir.), *appeal dismissed*, 352 U.S. 802 (1956).

155. Denver Bldg. & Constr. Trades Council v. Shore, 132 Colo. 187, 287 P.2d 267 (1955); *accord*, Wells v. Operating Eng'rs Local 181, 206 F. Supp. 414 (W.D. Ky. 1962).

recovery of machine equipment rental necessitated by a strike as well as the cost of extra business insurance.[156] The courts have also allowed recovery, as overhead, of "hospital supplies, doctor services, postage . . . and commissions."[157] The courts have further awarded an employer, who was unable to fill orders for coal it would have purchased for resale, the administrative expenses it would have incurred in purchasing and reselling the coal.[158]

While loss of profits is an element of recoverable damages,[159] there is a special problem in seeking recovery of such losses. Most employers are reluctant to open themselves to discovery procedures in the profits area, and the failure to provide sufficient documentation of loss has led courts to refuse to find any damages caused by an illegal strike.

In *Textile Workers Local 120 v. Newberry Mills, Inc.*,[160] the court held that the company was not entitled to damages since it failed to present sufficient evidence. In *Eazor Express, Inc. v. International Brotherhood of Teamsters*,[161] a case involving a sympathy strike, the court rejected a claim for lost profits on the basis of insufficient evidence.[162] An interesting aspect of the court's decision was its review of the company's shareholder reports with respect to

156. American Potash & Chemical Corp. v. Pipefitting Local 714, 304 F. Supp. 1144 (N.D. Miss. 1969).

157. Wagner Electric Co. v. Local 1104, IUE, 361 F. Supp. 647, 652 (E.D. Mo. 1973), *aff'd*, 496 F.2d 954 (8th Cir. 1974).

158. Riverton Coal Co. v. UMW, 453 F.2d 1035 (6th Cir.), *cert. denied*, 407 U.S. 915 (1972).

159. *See, e.g.*, United Steelworkers v. CCI Corp., 395 F.2d 529 (10th Cir. 1968), *cert. denied*, 393 U.S. 1019 (1969); United Elec. Workers v. Oliver Corp., 205 F.2d 376 (8th Cir. 1953); Roadway Express, Inc. v. Teamsters Local 107, 299 F. Supp. 1058 (E.D. Pa. 1969).

160. 238 F. Supp. 366, 372 (W.D.S.C. 1965).

161. 520 F.2d 951 (3d Cir. 1975).

162. The district court had stated:

> Here, as in the second example, plaintiff has failed to demonstrate that it would have made a profit during the relevant period and this Court finds that it would not have. Without such conclusive proof, lost profits are not compensable. In addition, plaintiff seeks to recover what it terms 'consequential losses.' The company seeks to recover for these consequential losses both as a separate item of damages and as an aspect of its lost profits claim. That is, plaintiff contends that the consequential losses primarily took the form of lost business and asks the Court to infer that had that business 'lost' been regained, the company would have made a profit. This Court finds that neither aspect of the consequential losses claim is compensable in this case. Plaintiff has failed to carry his burden of proof that (a) the consequential losses for the years 1969 and 1970 were proximately caused by the August/September 1968 work stoppage or (b) that the company would have made a profit, absent the strike, in 1968, 1969 or 1970.

376 F. Supp. 841, 846 (W.D. Pa. 1974) (footnote omitted).

the lost profit issue. The court found significant the virtual absence of any reference to the strike as a cause of the company's losses in the shareholder reports. The court of appeals likewise referred to these reports in affirming the district court's findings concerning lost profits.[163] This problem—the need for actual proof of damages coupled with a desire to foreclose extensive discovery—requires great care in drafting a lawsuit for damages. Within these guidelines, then, the elements of damages recoverable must be viewed on a case by case basis.[164]

VII. Employer's Right to Discipline or Discharge Employees for Refusal to Cross a Picket Line

A question independent of an employer's entitlement to relief from or for damage caused by a sympathy strike is what he may do to discipline strikers and maintain production. The legal principles involved in answering this question are similar to those previously discussed but as a practical matter are usually litigated before the National Labor Relations Board as the result of a union-filed unfair labor practice charge.

Although the general policy of the Act, as interpreted by the National Labor Relations Board and the courts, is an important factor in an evaluation of the legal status of an employee who refuses to cross a picket line, most frequently the terms of the particular labor agreement are decisive in establishing the relative rights of the parties in such situations.[165] The Board takes the position that in the absence of specific provisions of a labor agreement prohibiting such conduct, or in the absence of collective bargaining history wherein an employer rejected a clause legitimatizing such activity, an employee's principled refusal[166] to cross a lawful picket line will be held

163. 520 F.2d at 967-68. The court of appeals likewise referred to these reports in affirming the district court's findings concerning lost profits. *Id.* However, the international and the local were held jointly responsible for over $665,000 in other compensatory damages occasioned by the sympathy strike.

164. Although there is authority both supporting and denying the recovery of attorneys' fees and punitive damages in § 301 and § 303 cases, treatment of that area of the law is beyond the relevant scope of this article.

165. For a full analysis of § 7 rights of an employee to refuse to cross a picket line and waiver of such rights, see Connolly, *Section 7 and Sympathy Strikes: The Respective Rights of Employers and Employees*, 25 Lab. L.J. 760 (1974).

166. On the distinction between a "principled" refusal and one which is not, see NLRB v. Union Carbide Corp., 440 F.2d 54 (4th Cir.), *cert. denied*, 404 U.S. 826 (1971).

to be protected activity under § 7, and the disciplining or discharging of an employee on the basis of such a refusal will be held to constitute an unfair labor practice.

A recent National Labor Relations Board case, *Alliance Manufacturing Co.*,[167] dealt with the employer's right to discipline sympathy strikers. The Board affirmed the decision of an administrative law judge who had found that the employer did not violate the Act by "issuing disciplinary notices, warnings, reprimands, suspensions, terminations and/or layoffs to employees [members of Local 750] who were absent from work because they chose to honor Local 174's picket line."[168] The decision of the administrative law judge was based on a determination that the conduct of the employees violated their collective bargaining agreement, which included, in addition to mandatory grievance and arbitration provisions, both a clause expressly stating that the agreement had been written to eliminate lock-outs, strikes, slowdowns, and work stoppages of all kinds, and a no-strike provision.[169] On the basis of these two contract provisions and a bargaining history which suggested that the union regarded the no-strike prohibition as a very broad one,[170] it was held that the no-strike clause covered all work stoppages, even those having to do with issues that were not subject to the grievance and arbitration procedure of the agreement. Therefore, it was concluded, the conduct of the employees was in violation of the agreement and the disciplinary action of the employer was permissible.[171] *Alliance*, however, must be balanced with the Board's split decision in *Mosler*[172] where, over one member's strong dissent, the Board found that a union's unsuccessful attempt to negotiate an expansion of its right not to cross another union's picket line did not constitute a waiver of a statutory right to engage in a sympathy strike.[173]

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167. 200 N.L.R.B. 697, 82 L.R.R.M. 1260 (1972).

168. *Id.* at 697, 82 L.R.R.M. at 1260. Local 174, a sister local of Local 750, consisted of employees from another plant operated by the same employer.

169. *Id.* at 700, 82 L.R.R.M. at 1261.

170. The union had attempted to add some exceptions to the no-strike clause, but the attempt was unsuccessful.

171. 200 N.L.R.B. at 700, 82 L.R.R.M. at 1261.

172. 217 N.L.R.B. No. 100, 89 L.R.R.M. 1201 (May 2, 1975).

173. *Id.* If the Second Circuit's decision in *Buffalo Forge* is reversed by the United States Supreme Court, the National Labor Relations Board's rule of specific "inclusion" (*see* note 111 *supra*) as propounded in *Gary Hobart* and as applied in *Mosler* will of necessity have to be reviewed and will most likely be rejected by the Board. Retention of such a rule would be inconsistent with the Court's reversal of *Buffalo Forge*.

There are, however, situations in which replacement of an employee striking in sympathy with others is permissible even though his activity is protected. Considerations of these situations are therefore essential to defining an employer's rights to fully respond to a sympathy strike. The current position of the Board and most courts has been to accord employees who refuse to cross a picket line the same protection under § 7 of the Act as is available to primary economic strikers. The results which flow from this conclusion have been articulated in appellate court cases[174] and the operative principle is stated quite clearly:

> [U]nless the employer who refuses to reinstate [economic] strikers can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice. . . . The burden of proving justification is on the employer.[175]

The Board's policy implementing this "legitimate and substantial business justifications" test was expressly set forth in *Redwing Carriers, Inc.*[176] In that case, the employer discharged several employees for refusing to cross a picket line, reassigned other employees to perform their work, and hired some new employees. The employer claimed that such conduct on its part did not constitute an unfair labor practice because the action was necessary for the continued operation of its business. The Board, although ruling that the activity of the employees was protected concerted activity, adopted the employer's contention that the discharges were not in violation of the Act.[177] However, it must be observed that the *Redwing* exception to the principle that an employer may not discharge an employee for engaging in activity protected by the Act is quite a narrow one. To illustrate, in *Redwing* the Board specifically found:

> [I]t is clear from the record that the employer acted only to preserve efficient operation of his business, and terminated the services of the employees only so it could immediately or within

174. *See* note 89 and text following *supra*.

175. NLRB v. Southern Greyhound Lines, 426 F.2d 1299, 1302 (5th Cir. 1970), *quoting* NLRB v. Fleetwood Trailer Co., Inc., 389 U.S. 375, 378 (1967) (citation omitted).

176. 137 N.L.R.B. 1545 (1962), *enforced sub nom.*, Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964).

177. 137 N.L.R.B. at 1548.

> a short period thereafter replace them with others willing to perform the scheduled work . . . .[178]

Although in subsequent cases the Board has purported to examine substance rather than form in applying its discharge-replacement distinction as developed in *Redwing*, it is clear that in the absence of prompt actual replacement of the discharged employee it is extremely difficult for an employer to establish the necessary "legitimate and substantial business justifications."[179] Indeed, most opinions citing the *Redwing* doctrine have done so for the purpose of showing that the particular cases involved did not come within the *Redwing* exception. *NLRB v. Alamo Express, Inc.*,[180] and *NLRB v. Swain & Morris Construction Co.*[181] are examples of this, and the courts in these cases also articulated particular factors which are to be weighed in applying the "legitimate and substantial business justifications" test in the context of a discharge for refusal to cross a picket line. In *Swain & Morris*, for example, the court said:

> The primary motivation for a discharge in a context such as this is to be inferred from the totality of circumstances; the declarations of the parties are not necessarily to be taken at face value. . . . Among circumstances to be considered are evidences of union animus on the part of those concerned, the relative importance to the employer of the job which his employees have refused to do, the availability of alternate work for the employees who find themselves faced with a picket line, the ability of the employer to obtain other workers willing to cross the line, etc.[182]

The court in *Alamo Express*,[183] in applying the type of analysis outlined in *Swain & Morris*, concluded that anti-union hostility existed on the part of the employer.

These cases, and the references to the *Redwing* doctrine and the "legitimate and substantial business justifications" test in many of

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178. 137 N.L.R.B. at 1547 (footnote omitted).

179. *See* NLRB v. Union Carbide Corp., 440 F.2d 54, 57 (4th Cir.) (Bryan, J., dissenting), *cert. denied*, 404 U.S. 826 (1971).

180. 430 F.2d 1032 (5th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971).

181. 431 F.2d 861 (9th Cir. 1970).

182. *Id.* at 862 (citation omitted).

183. 430 F.2d at 1036.

the cases discussed earlier[184] indicate the obstacles an employer must overcome in order to establish that the discharge of employees who refused to cross a picket line was not in violation of the Act.[185] As a result of these formidable barriers, the *Redwing* exception cannot be relied upon with any assurance except in those situations where actual replacements for the discharged employees will be promptly hired to perform basically the same work which the discharged employees refused to do.

VIII. Summary

This article has attempted to outline as a practical matter the current state of the law of sympathy strikes and the attendant rights and obligations of both employers and unions. The dispute among the circuits as to the breadth of the applicability of the "*Boys Markets* injunction" will soon be resolved by the Supreme Court in the *Buffalo Forge* case. The line of cases finding that sympathy strikes are encompassed by the arbitration clause appears to be the better reasoned opinion. These decisions not only avoid the abuses of Norris-LaGuardia but also foster the national policy in favor of arbitration. These cases, moreover, more clearly reflect the reality of the situation in recognizing that, in fact, there is a disputed issue as to whether or not union members have a right to refuse to cross a picket line. Finally, these cases recognize that *Boys Markets* remains applicable only where there is a dispute over a "grievance" subject to a contractual grievance arbitration.

The unavailability of injunctive relief notwithstanding, an employer is entitled to damages for any injury resulting from an illegal sympathy strike. However, the trend of the case law indicates that refusal to cross a picket line will be considered a protected activity unless this right has been "waived" in negotiations. The requisite evidence to establish this waiver varies among the circuits. Once the waiver has been found, liability can be placed on the union generally

184. *See* note 89 and text following *supra*.

185. The *Redwing*, *Alamo Express* and *Swain & Morris* cases lend further support to the conclusion that the location of the picket line and relationship of the picketers to the employer are not determinative factors affecting the right to refuse to cross a picket line. Both *Redwing* and *Alamo Express* involved refusals to cross to make pickups or deliveries at another employer's premises, and *Swain & Morris* involved a refusal to cross to do work at a remote job site.

if it has not taken sufficient action to stop the illegal activities, including disciplining its members. Further, the international may be held liable for the illegal acts of its local, or members, through the doctrine of agency. The company, in order to recover damages, must meet the preponderance of evidence standard. However, the matter of proof of the actual damages suffered may require the company to bare more than it wishes and thus militate against seeking recovery or, in fact, bar recovery.

Lastly, the employer does have the right to discharge the employee; however, this right is strewn with obstacles since legal sympathy strikes are a protected activity. The National Labor Relations Board will permit the replacement of sympathy strikers only on the very limited basis of a showing of "legitimate and substantial business justification."