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Striking a Balance Between the Norris-LaGuardia and the Labor Management Relations Act: Is It Still Feasible After Buffalo Forge?

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STRIKING A BALANCE BETWEEN THE NORRIS-LAGUARDIA AND THE LABOR MANAGEMENT RELATIONS ACTS: IS IT STILL FEASIBLE AFTER *BUFFALO FORGE?*

The availability of federal injunctive relief to prohibit labor strikes in violation of collective bargaining agreements has been a particularly volatile area of substantive labor law for the past forty years. The controversy is a product of the apparent conflict between section 301(a) of the Labor Management Relations Act,[1] which grants federal courts jurisdiction to hear suits for violations of collective bargaining agreements in industries affecting commerce, and section 4 of the Norris-LaGuardia Act,[2] which prohibits federal courts from issuing injunctions in cases involving labor disputes.

This note examines the courts' attempts to resolve the conflict produced by a literal reading of the two federal statutes. The conflict not only has caused confusion among most employers and unions about the availability of injunctive relief, but also has introduced three major substantive problems that affect all labor-management relations: the court's failure to enforce the union's promise not to strike may deprive the employer of his quid pro quo for agreeing to submit to arbitration;[3] the two Acts may combine to preempt state courts from issuing injunctions in labor disputes; and, finally, the Norris-LaGuardia Act may either be interpreted literally or be viewed as a product of its times.

After outlining the history and aims of each statute the note discusses the accommodation between the Acts reached by the Supreme Court in *Boys Markets, Inc. v. Retail Clerks Local 770.*[4] Although *Boys Markets* relieved the tension between the statutes, that decision introduced the additional problem of defining "arbitrable grievance,"[5] a requirement for a *Boys Markets* injunction. Finally, the note considers the Supreme Court's latest attempt to resolve

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1. Labor Management Relations (Taft-Hartley) Act, §301(a), 29 U.S.C. §185(a) (1970) [hereinafter cited as LMRA], which provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

2. Norris-LaGuardia Act, §4, 29 U.S.C. §104 (1970), which provides: "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment . . . ."

3. Many courts have held that the employer agrees to submit to arbitration in exchange for a promise by the union not to strike. *See, e.g.*, Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 247-48 (1970); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957).

4. 398 U.S. 235 (1970).

5. In *Boys Markets* the Supreme Court held injunctions could issue notwithstanding the Norris-LaGuardia Act if certain conditions were met. Primarily, the strike must be "over" an arbitrable grievance. *Id.* at 254. See notes 63-69 *infra* and accompanying text.

the conflict in *Buffalo Forge Co. v. United Steelworkers*,[6] in which the Court refused to extend the accommodation rationale to the sympathy strike situation.[7]

THE NORRIS-LAGUARDIA AND THE LABOR MANAGEMENT RELATIONS ACTS

In order to comprehend the interplay between these two statutes, one apparently giving the federal courts jurisdiction over labor disputes,[8] the other partially divesting the courts of this power,[9] the period in which each statute was passed, as well as the evils each law sought to correct, must be examined. In 1932, Congress passed the Norris-LaGuardia Act that was designed, except in delineated situations,[10] to deny the federal courts the power to issue injunctions halting labor strikes. The Act responded to a different situation from that which exists today; prior to 1932 labor and management were in unequal bargaining positions,[11] and federal courts generally allied with management in an attempt to thwart the growth of a nascent labor movement.[12] Because the strike was labor's most effective weapon against management, the partisan

6. 428 U.S. 397 (1976).

7. The Supreme Court in *Buffalo Forge* held that the anti-injunction provisions of the Norris-LaGuardia Act prohibited issuing an injunction to halt a sympathy strike. *Id.* See text accompanying notes 113-118 *infra*.

8. The LMRA gave federal courts jurisdiction to hear suits involving violations of collective bargaining agreements; however, Congress failed to define appropriate remedies. 29 U.S.C. §185(a) (1970).

9. The Norris-LaGuardia Act denies the federal courts the power to issue injunctions to halt labor disputes. *Id.* §104.

10. The Norris-LaGuardia Act provides, for example, that an injunction may issue if the strike involves fraud or violence. *Id.* §104(e). A federal district court can issue a labor injunction if it finds that: (1) unlawful acts have been threatened and will be committed unless restrained, or have been committed and will be continued unless restrained; (2) substantial and irreparable injury to complainant's property will follow; (3) greater injury will be inflicted upon the complainant by the denial of relief that will be inflicted upon the defendants by the granting of relief; (4) complainant has no adequate remedy at law; and (5) the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection. *Id.* §107(a)-(e).

The Act further provides that the hearing on the injunction shall be held after full and personal notice is given to all known persons against whom relief is sought, and that a bond must be filed in an amount fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the erroneous issuance of an injunction. *Id.* The Act also provides for certification to the circuit court of appeal for review, giving this matter precedence over all others to be heard. *Id.* §110.

11. Unlike today, in 1932 management had the upper hand both politically and economically. *See* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION, 89-103 (1930). In 1929 total union membership was only 3,500,000, and declined by 500,000 during the early 1930's. In 1970, over 20 million laborers belonged to unions. *See generally* R. SMITH, L. MERRIFIELD, & T. ST. ANTOINE, LABOR RELATIONS LAW 29-53 (5th ed. 1974).

12. There was widespread belief that the labor injunction was impairing public confidence in the judicial system because the weight of the law was being thrown on the side of management without contributing to the solution of the industrial relations problems that had caused the disputes. *See* R. SMITH, L. MERRIFIELD, & T. ST. ANTOINE, LABOR RELATIONS LAW, *supra* note 11, at 29-33.

position many federal courts took and the consequent, often rash, use of the injunction to prohibit these strikes seriously damaged the union's potency.[13] To remove this impediment blocking the development of the unions and to give them freedom to bargain collectively, Congress virtually eliminated the injunction as a tool of the employer by section 4 of the Norris-LaGuardia Act.[14]

As labor organizations grew in strength and achieved parity with management,[15] however, congressional emphasis shifted. The infant labor movement no longer needed protection nor did collective bargaining require encouragement. Legislation turned its focus to the enforcement of the agreed-upon bargain and administrative techniques for the peaceful resolution of industrial disputes.[16] To effectuate this policy, Congress passed the Labor Management

13. See F. FRANKFURTER & N. GREENE, *supra* note 11, at 200-01, which outlined the following criticisms of the use of the injunction in labor disputes prior to 1930: (1) Temporary restraining orders against union conduct in strikes and picketing were usually issued ex parte; (2) The orders were frequently based upon affidavits submitted on behalf of the employers by guards or private detectives; (3) The temporary restraining orders or temporary injunctions, while in theory providing merely interlocutory relief, were often used to break the union's strike; (4) The injunctions were often phrased in complex terminology, so that the ordinary workman would not be able to know clearly what conduct had been enjoined; (5) The armed guards supplied by private detective agencies, who had given the affidavits, were often sworn in as deputy marshals to enforce the decrees; and (6) If violence or breaches of the peace occurred, the unionists did not have the safeguards of ordinary criminal prosecutions before a jury, but were subject to contempt of court proceedings before the courts that had issued the injunctions. *See also* Great Northern Ry. v. Brosseau, 286 F. 414 (D.N.D. 1923) (similar discussion of the abuses of the labor injunction).

14. The purpose of the Norris-LaGuardia Act was to give the union opportunity to organize freely and to force the employer to bargain collectively with the union. Section 2 of the Act states: "[T]he public policy of the United States is declared as follows: Whereas under prevailing economic conditions, . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. §102 (1970).

15. The increase in union power can be demonstrated by comparing the period immediately following World War I with the period immediately following World War II. Unions had enjoyed favorable conditions during the first World War because a continuous and dependable work force was necessary. Following the war, though, many employers withdrew union recognition. The public was heavily anti-union and reacted hysterically to the steel and coal strikes of 1919. Injunctions broke the strikes and left the trade unions disorganized and discredited. Union membership dropped steadily during the 1920's and early 1930's.

The process of reconversion after World War II was accompanied by a wave of strikes in which the unions demonstrated their cohesiveness and strength of organization. The strikes resulted in a loss of 116,000,000 man-days, an awesome showing of union power. *See generally* R. SMITH, L. MERRIFIELD, & T. ST. ANTOINE, *supra* note 11, at 1-53.

16. The legislative history of the LMRA makes this change in emphasis clear: "The purpose of this amendment [§301] is simple: to make collective-bargaining contracts equally binding and enforceable on both parties to them. The courts have held that the purpose of the Wagner Act [the National Labor Relations Act of 1935] was—'to compel employers to bargain collectively with their employees to the end that an employment contract, binding

Relations Act in 1947, but failed to amend or modify the Norris-LaGuardia Act specifically.[17] Section 301(a) of the Labor Management Relations Act gives the federal courts jurisdiction to resolve contractual disputes between an employer and a labor organization in an industry affecting commerce, without regard to the citizenship of the parties or the amount in controversy. In addition, the Act provides that any labor organization may sue or be sued as an entity.[18] These provisions were designed to do away with the difficulty employers previously had encountered in attempting to enforce collective bargaining agreements; for example, in many states labor unions were immune from suit as entities,[19] and in other states unions were suable only under certain circumstances.[20] Moreover, relief against union members individually was

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on both parties should be made.' . . . President Truman, in opening the management-labor conference in November 1945, took cognizance of this condition. He said very plainly that collective agreements should be mutually binding on both parties to the contract: 'We shall have to find methods not only of peaceful negotiation of labor contracts, but also of insuring industrial peace for the lifetime of such contracts. Contracts once made must be lived up to and should be changed only in the manner agreed upon by the parties. If we expect confidence in agreements made, there must be responsibility and integrity on both sides in carrying them out.'" Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 496-97 (1957) (appendix).

17. Congress did not expressly repeal §4 of the Norris-LaGuardia Act, 29 U.S.C. §104 (1970); nor did Congress impliedly repeal §4 or limit the ban of §4 against the issuance of injunctions. A.H. Bull S.S. Co. v. National Marine Eng'rs Beneficial Ass'n, 250 F.2d 332 (2d Cir. 1957); Farand Optical Co. v. Local 475, Int'l Union of Elec., Radio & Mach. Workers, 143 F. Supp. 527 (S.D.N.Y. 1956); Alcoa S.S. Co. v. McMahon, 81 F. Supp. 541 (S.D.N.Y. 1948), *aff'd*, 173 F.2d 567 (2d Cir.), *cert. denied*, 338 U.S. 821 (1949).

18. 29 U.S.C. §185(b) (1970) provides: "Any labor organization which represents employees in an industry affecting commerce as defined in this chapter . . . shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

19. The major difficulty in obtaining relief against labor unions lay in the fact that voluntary unincorporated associations, such as most labor unions, were not suable as an entity at common law. To sue a union each individual member of the union had to be named, made a party to the suit, and served with process. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 498-99 (1957) (appendix).

20. Some states had enacted statutes that subjected unincorporated associations to the jurisdiction of the law courts, but the statutes were not uniform since some pertained only to fraternal societies or associations doing business. In other states, the courts specifically excluded labor unions from the application of the statutes. *Id.* at 499-500.

On the other hand, some states attempted to bring unions under the jurisdiction of the courts by construing statutes permitting common name suits against associations doing business to apply to labor unions. *E.g.*, Armstrong v. Superior Court, 173 Cal. 341, 159 P. 1176 (1916); Vance v. McGinley, 39 Mont. 46, 101 P. 247 (1909). In many states the action was permitted against the union or its representatives in proceedings in which the plaintiff could have maintained an action against all the associates. Those states included Alabama, California, Connecticut, Delaware, Maryland, Montana, Nevada, New Jersey, New York, Rhode Island, South Carolina and Vermont. 353 U.S. at 499-500.

The District of Columbia held the liberal view that unincorporated labor unions might be sued as legal entities even in the absence of a statute. *See* Busby v. Electric Utilities Employees Union, 147 F.2d 865 (D.C. Cir. 1945).

generally impractical.[21] Through the Labor Management Relations Act, Congress sought to promote the use of private dispute settlement mechanisms, such as arbitration, by providing judicial means to enforce the promises of both sides to collective bargaining agreements. Congress hoped that the Act would motivate employers to agree to arbitration as the primary means of settling labor contract disputes, thereby relieving the courts of this burden.[22]

The dual purpose of encouraging arbitration and providing effective means of enforcement of the agreement is verified by the Senate Report:

> It is apparent that until all jurisdictions, and particularly the Federal Government, authorize actions against labor unions . . . there will not be the mutual responsibility necessary to vitalize collective-bargaining agreements. The Congress has protected the right of workers to organize. It has passed laws to encourage and promote collective bargaining.
>
> Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.[23]

Inevitably, this congressional commitment to enforce collective bargaining agreements would clash with the Norris-LaGuardia Act's denial of federal injunctive power.

Early Confrontation Between the Two Acts

The Supreme Court first interpreted the relationship between the statutes in *Textile Workers Union v. Lincoln Mills.*[24] In *Lincoln Mills,* the collective bargaining agreement required the employer to submit to arbitration after exhaustion of the grievance procedure. Because the employer refused to submit

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In the federal courts, whether an unincorporated union could be sued depended upon the procedural rules of the state in which the action was brought. 353 U.S. at 499-500.

21. Even if the unions were suable, the union funds often could not be reached for payment of damages, and any judgments or decrees rendered against the association as an entity were often unenforceable. *Id.* at 500-01.

Thus, if the employer breached a collective bargaining agreement, the union had no problem suing him in state court or enforcing a judgment. If the union breached the contract, however, the employer was often without effective remedy. The Senate report, pointing out this inequity, emphasized the goal of contract enforcement: "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract." S. Rep. No. 105, 80th Cong., 1st Sess. 16 (1947).

22. Section 203(d) of the LMRA provides: "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 . . . of an existing collective-bargaining agreement." 29 U.S.C. §173(d) (1970).

23. S. Rep. No. 105, 80th Cong., 1st Sess. 17-18 (1947).

24. 353 U.S. 448 (1957).

to arbitration, the union brought suit in federal court.[25] Thus, the question before the Court was whether the federal jurisdiction under the Labor Management Relations Act permitted not only damage suits but also actions seeking equitable relief.[26] The Court determined that section 301(a) was more than jurisdictional; that is, it empowered federal courts to fashion a body of federal law to enforce collective bargaining agreements. The act authorized the Court to order specific performance of a promise to arbitrate grievances arising under the collective bargaining agreements[27] because the agreement to arbitrate was the quid pro quo for an agreement by the union not to strike.[28] Therefore, the only way to obtain industrial peace was to grant federal courts the power to enforce the agreements.[29] The Court reasoned that since the purpose of the Labor Management Relations Act was to provide the federal courts with the

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25. The collective bargaining agreement between the parties provided that there would be no strikes or work stoppages and that grievances would be handled pursuant to a specified procedure. The last step in the grievance procedure, a step that could be taken by either party, was arbitration. *Id.* at 449.

Not all arbitration arrangements are available equally to both parties; some agreements provide that arbitration can be taken only by one side. One commentator has noted three types of arbitration clauses. In the first type of clause, arbitration is available exclusively for enforcement of employer promises. Arbitration is intended solely as a measure of union enforcement of employer promises; the employer cannot initiate arbitration and the union's breach of the promise not to strike is not an arbitrable issue.

In the second type of arbitration clause, the employer is treated as a limited partner. Both the union and the employer have the right to initiate arbitration of union grievances. However, a union breach of the no-strike promise is still not an arbitrable issue.

The third type of arbitration clause treats the employer as a full partner. The arbitration process is used as a means of remedying a breach of contract committed by either party, at the insistence of the party claiming to be injured. Thus, the employer can initiate arbitration of a union breach of the no strike clause. Anderson, *The Right to Strike and the Arbitration Clause,* N.Y.U. CONF. ON LAB. 225, 231-33 (1971).

26. Some courts had held that §301 was meant to encompass only damage suits. *See, e.g.,* International Longshoremen's Local 142 v. Libby, McNeill & Libby, 115 F. Supp. 123 (D. Haw. 1953); Wilson & Co. v. United Packinghouse Workers, 83 F. Supp. 162 (S.D.N.Y. 1949). The Court in *Lincoln Mills* compiled the cases that had held §301 to create substantive rights and concluded that the overwhelming majority of courts were of that opinion. 353 U.S. at 450-51.

27. The Court agreed with the majority of courts that had found §301 created substantive rights. 353 U.S. at 451.

28. "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." *Id.* at 455. Although the *Lincoln Mills* Court used the quid pro quo argument to hold the employer to his bargain, the argument was later used by employers seeking injunctions against strikes. *See, e.g.,* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970).

29. 353 U.S. at 455. The federal courts must have the power, because in many states the collective bargaining agreement was unenforceable against the union. See notes 19-21 *supra.*

Although the Court had before it a request by the union to enforce the contract, the Court stated broadly that the federal courts must have the power to enforce not only agreements on behalf of labor organizations but also agreements against unions. The Court was concerned with enforcement of the collective bargaining agreement as a contract: "Both the Senate Report and the House Report indicate a . . . broader concern . . . with a procedure for making such agreements enforceable in the courts by either party." *Id.* at 453.

power to enforce collective bargaining agreements, the arsenal of weapons to attain that goal necessarily must include more than legal remedies.[30]

Having concluded that the Labor Management Relations Act gave the federal courts power to invoke equitable remedies, the Court considered the compatibility of that decision with the Norris-LaGuardia Act. It thus established an important precedent by looking to the abuses the Act sought to eliminate and refusing to adhere to the literal meaning of section 4 of the Norris-LaGuardia Act.[31] Similarly, emphasizing the congressional policy of section 8 of the Norris-LaGuardia Act that favors settlement of labor disputes by arbitration,[32] the Supreme Court made a valiant effort to accommodate[33] the policy considerations of the two Acts:

> Though a literal reading might bring the dispute within the terms of the Act [Norris-LaGuardia Act] . . . we see no justification in policy for restricting §301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act.[34]

Unfortunately, the *Lincoln Mills* attempt to accommodate the competing principles of the Acts was shortlived. In *Sinclair Refining Co. v. Atkinson*,[35]

30. The Court quoted from the House debate on passage of the bill: "Mr. Bardin. Mr. Chairman, I take this time for the purpose of asking the Chairman a question, and in asking the question I want it understood that it is intended to make a part of the record that may hereafter be referred to as history of the legislation. It is my understanding that Section 302, the section dealing with equal responsibility under collective bargaining contracts in strike actions and proceedings in district courts contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could, for example, be brought by the employers, the labor organizations, or interested individual employees under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract. Mr. Hartley. The interpretation the gentleman has just given of that section is absolutely correct." *Id.* at 455-56 (quoting 93 CONG. REC. 3656-57 (1947)).

31. Section 4 of the Norris-LaGuardia Act lists the acts which had given rise to abuse of the power to enjoin. 29 U.S.C. §104 (1970). The Court pointed out that the failure to arbitrate was not one of the abuses at which the Act was aimed. 353 U.S. at 458.

32. Section 8 of the Norris-LaGuardia Act denies injunctive relief to any person who has failed to make "every reasonable effort to settle such dispute either by negotiation . . . mediation or voluntary arbitration." 29 U.S.C. §108 (1970).

33. *Lincoln Mills* was not the first case in which the Court "accommodated" the Norris-LaGuardia Act. The Court previously had considered the effect of the Norris-LaGuardia Act on the Railway Labor Act, 45 U.S.C. §§151-188 (1970). The Court, deciding that the Norris-LaGuardia Act did not deprive federal courts of jurisdiction to compel compliance with the Railway Labor Act, allowed injunctions prohibiting racial discrimination. Graham v. Brotherhood of Locomotive Fireman & Eng'rs, 338 U.S. 232 (1949); Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515 (1936). In Brotherhood of R.R. Trainmen v. Chicago River & I.R.R., 353 U.S. 30 (1957), a case decided just prior to *Lincoln Mills*, the Court held that federal courts could enjoin a strike by a railroad union over a dispute subject to mandatory arbitration under the Railway Labor Act. The *Trainmen* Court believed the Norris-LaGuardia Act was not intended to obstruct the statutory duty to arbitrate created by the Railway Labor Act; furthermore, there was a need to accommodate the two statutes, when both were adopted as part of a pattern of labor legislation. *Id.* at 42.

34. 353 U.S. at 458 (footnote omitted).

35. 370 U.S. 195 (1962).

the Supreme Court held that the anti-injunction provisions of the Norris-LaGuardia Act precluded a federal district court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement, even though the agreement contained arbitration provisions enforceable under the Labor Management Relations Act.[36] In *Lincoln Mills*, the Court had enforced the collective bargaining agreement against the employer. In contrast, the *Sinclair* Court refused to enforce the contract against the union by holding that the Norris-LaGuardia Act prevented a federal court from issuing an injunction prohibiting a labor strike, even though the union had promised absolutely not to strike.[37] Thus, the Court in *Sinclair*, neglecting the accommodation approach that furthered the policy considerations of enforcement and arbitration,[38] subverted the aims of section 301(a) expressed in *Lincoln Mills* by adhering to the literal language of the Norris-LaGuardia Act.[39] Nor did the *Sinclair* majority seriously consider the effect of the decision on the employer's quid pro quo.[40] The minority opinion, authored by Justice Brennan, argued that the Court should attempt to alleviate the tension between the two Acts through accommodation, the method followed to reconcile the Railway Labor and Norris-LaGuardia Acts.[41]

Sinclair illustrated that if the literal interpretation of the Norris-LaGuardia Act were preferred to the accommodation theory of *Lincoln Mills*, the collective bargaining agreement would in reality be enforceable against only one party, the employer.[42] Some observers speculated that if this inequitable situa-

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36. The collective bargaining agreement between Sinclair and the Oil, Chemical, and Atomic Workers International Union Local 7-210 contained a provision for final compulsory and binding arbitration as well as a clause forbidding slowdowns, work stoppages or strikes "for any cause which is or may be the subject of a grievance." *Id.* at 197.

37. The *Sinclair* Court reasoned that the case involved a "labor dispute" within the meaning of the Norris-LaGuardia Act; because §301 of the LMRA did not expressly repeal the anti-injunction provisions of the Norris-LaGuardia Act, those provisions were still in force and controlled the instant case. *Id.* at 199.

38. "We cannot accept the startling argument made here that even though the Congress did not itself want to repeal the Norris-LaGuardia Act, it was willing to confer a power upon the courts to 'accommodate' that Act out of existence whenever they might find it expedient to do so in furtherance of some policy they had fashioned under §301." *Id.* at 209.

39. "Moreover, the language of the specific provisions of the Act is so broad and inclusive that it leaves not the slightest opening for reading in any exceptions beyond those clearly written into it by Congress itself. We cannot ignore the plain import of a congressional enactment, particularly one which, as we have repeatedly said, was deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction." *Id.* at 202-03.

40. The Court did state that the employer's right to sue under §301 would be worth more to employers if they could get federal court injunctions to halt the breach of the collective bargaining agreement. But the Court decided that it was up to Congress to repeal specifically the Norris-LaGuardia Act if it decided employers should be entitled to injunctive relief. *Id.* at 214-15.

41. *Id.* at 217-18 (Brennan, J., dissenting). Justice Brennan's dissent was later adopted, becoming the majority position in Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). See text accompanying notes 51-62 *infra*. See note 33 *supra* for a discussion of the accommodation between the Railway Labor and Norris-LaGuardia Acts.

42. If necessary, however, the employer probably can force the union to arbitrate as a

tion were allowed to continue, the entire thrust of federal labor policy, which favored arbitration by making the contract binding on both parties, would be subverted.[43]

Moreover, the *Sinclair* approach to the interpretation of the Acts generated an unexpected problem. The Supreme Court had previously held in *Charles Dowd Box v. Courtney*[44] that the purpose of section 301(a) was to supplement, not restrict, the jurisdiction of the state courts; that is, Congress had sought through the Labor Management Relations Act to increase the availability of forums in which either party could seek enforcement of the bargain.[45] Nevertheless, the Supreme Court held in *Avco Corp. v. Aero Lodge 735*,[46] that section 301(a) suits initially brought in state courts could be removed to the designated federal forum under federal question removal jurisdiction.[47] The Court did not decide if federal courts on removal were required to dissolve injunctive relief previously granted by state courts,[48] but lower courts subsequently answered in the affirmative.[49] Thus, *Avco* and *Sinclair* together frustrated the policy of section 301 by eliminating state court jurisdiction in section 301(a) suits in which injunctive relief was sought for breach of no-strike obligations.[50]

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result of *Lincoln Mills*. But the promise not to strike, the quid pro quo for the employer's promise, is completely unenforceable.

43. One observer who was concerned with the subversion of labor policy was Justice Brennan. Sinclair Ref. Co. v. Atkinson, 370 U.S. at 225-28 (Brennan, J., dissenting). *See also* Wellington, *The No-Strike Clause and the Labor Injunction: Time for a Reexamination*, 30 U. PITT. L. REV. 293 (1968).

44. 368 U.S. 502 (1962).

45. "The legislative history of the enactment nowhere suggests that, contrary to the clear import of the statutory language, Congress intended in enacting §301(a) to deprive a party to a collective bargaining contract of the right to seek redress for its violation in an appropriate state tribunal. . . . The legislative history makes clear that the basic purpose of §301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." 368 U.S. at 507-08. *See id.* at 512 (citing 92 CONG. REC. 5708 (1946)).

46. 390 U.S. 557 (1968).

47. Jurisdiction to remove suits from state to federal courts is provided in 28 U.S.C. §1441 (1970).

48. Nor did the Court determine whether state courts are bound by the anti-injunction proscriptions of the Norris-LaGuardia Act. *Lincoln Mills* had held that substantive federal labor law applied to §301(a) suits. 353 U.S. at 456. This was interpreted in Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962), to mean that federal, not state contract law applies to the interpretation of the collective bargaining agreement. Thus, whether the strike was in violation of the collective bargaining agreement is decided under federal law.

49. *See, e.g.*, General Elec. Co. v. Local 191, Int'l Union of Elec., Radio & Mach. Workers, 413 F.2d 964 (5th Cir. 1969).

50. Justice Brennan pointed out in his *Sinclair* dissent that the policy of §301 to supplement existing remedies would be frustrated in two ways. First, if the *Sinclair* decision prohibiting injunctive relief is applied to state courts as a part of the federal law governing collective bargaining agreements, then employers are deprived of a state remedy that existed prior to the enactment of §301. Second, if suits are removed to federal courts, then state court remedies become irrelevant and the employer is again deprived of a contract remedy previously available. 370 U.S. at 226-27 (Brennan, J., dissenting).

ASCENDANCY OF THE ACCOMMODATION THEORY

The widespread dissatisfaction wth *Sinclair,* initiated because of the Court's failure to effectuate the aims of the Labor Management Relations Act, led to the Court's reevaluation of that decision in *Boys Markets, Inc. v. Retail Clerks Local 770.*[51] In that case, the union violated an express no-strike clause in its collective bargaining agreement with a supermarket chain. The contract, which provided for grievance proceedings and arbitration,[52] required that all controversies concerning its interpretation or application be resolved by the adjustment and arbitration procedures set forth in the agreement.[53] The state court, relying on these facts, issued a temporary restraining order forbidding continuation of the strike; the employer removed the suit to the United States District Court for the Central District of California, which granted a preliminary injunction against the strike.[54] The Court of Appeals for the Ninth Circuit followed *Sinclair* and reversed,[55] reviving the state court preemption problem.

The Supreme Court reversed and overruled *Sinclair,* recognizing the unwanted ramifications of that decision. *Sinclair* and *Avco* had ousted state courts of their power to enter injunctive relief in section 301(a) suits.[56] The Court believed that using the removal device to thwart state court injunctions would produce rampant forum shopping and would frustrate uniformity in the enforcement of arbitration agreements.[57] The Court emphasized the contradic-

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51. 398 U.S. 235 (1970).

52. The collective bargaining agreement between Boys Markets and the Retail Clerks provided: "C. ARBITRATION. 1. Any matter not satisfactorily settled or resolved in Paragraph B hereinabove shall be submitted to arbitration for final determination upon written demand of either party. . . . 4. The arbitrator or board of arbitration shall be empowered to hear and determine the matter in question and the determination shall be final and binding upon the parties, subject only to their rights under the law. . . . D. POWERS, LIMITATIONS AND RESERVATIONS. . . . 2. *Work Stoppages.* Matters subject to the procedures of this Article shall be settled and resolved in the manner provided herein. During the term of this Agreement, there shall be no cessation or stoppage of work, lock-out, picketing or boycotts, except that this limitation shall not be binding upon either party hereto if the other party . . . refuses or fails to abide by, accept or perform a decision or award of an arbitrator or board." *Id.* at 238 n.3.

53. "A. CONTROVERSY, DISPUTE OR DISAGREEMENT. Any and all matters of controversy, dispute or disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of this Agreement . . . [with certain exceptions not relevant to the instant case] shall be settled and resolved by the procedures and in the manner hereinafter set forth." *Id.*

54. *Id.* at 240.

55. Boys Markets, Inc. v. Retail Clerks Local 770, 416 F.2d 368 (9th Cir. 1969).

56. 398 U.S. at 244-49. "The decision in *Avco,* viewed in the context of *Lincoln Mills* and its progeny, has produced an anomalous situation which, in our view, makes urgent the reconsideration of *Sinclair.* The principal practical effect of *Avco* and *Sinclair* taken together is nothing less than to oust state courts of jurisdiction in §301(a) suits where injunctive relief is sought for breach of a no-strike obligation." *Id.* at 244-45.

57. *Id.* at 245-46. The Court also pointed out that this result assigns to removal proceedings a totally unintended function, that of effecting a "wholesale dislocation in the allocation of judicial business between the state and federal courts." *Id.* at 247.

tion between the congressional intent and the courts' interpretation of section 301(a):

> It is ironic indeed that the very provision that Congress clearly intended to provide additional remedies for breach of collective bargaining agreements has been employed to displace previously existing state remedies. We are not at liberty thus to part from the clearly expressed congressional policy to the contrary.[58]

The *Boys Markets* Court considered two alternative methods to cure the state court injunction problem. The Court could either overrule *Sinclair* or extend that decision to the states, making injunctive relief totally unavailable to the employer.[59] Because the Court determined that *Sinclair* undercut the basic purpose of section 301(a) — the effective enforcement of arbitration agreements and their attendant no-strike obligations — by denying enforcement against one party to the agreement, it concluded that the only feasible solution was to overrule *Sinclair*.[60] Finally, the *Boys Markets* Court revived the *Lincoln Mills* accommodation approach, evaluating the policies of section 301(a) to ascertain if the overall goals of the Norris-LaGuardia Act would be undermined by the issuance of an injunction.[61] The revival of the *Lincoln Mills* approach represented a tacit disapproval of the *Sinclair* literal interpretation approach and was accompanied by an implicit preference for the more flexible and equitable accommodation theory. For example, the Court pronounced:

> We conclude, therefore, that the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy, and consequently that the Norris-LaGuardia Act does not bar the granting of injunctive relief in the circumstances of the instant case.[62]

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58. *Id.* at 245.

59. *Id.* at 247. The Court cited several commentators who favored the second approach: Bartosic, *Injunctions and §301: The Patchwork of* Avco *and* Philadelphia Marine *on the Fabric of National Labor Policy*, 69 COLUM. L. REV. 980 (1969); Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427 (1969). *Id.* at 247-48. The Court, however, recognized the deeper problem presented by *Sinclair*, the abrogation of the employer's consideration for entering into the collective bargaining agreement. Although the employer could still bring an action for damages in either state or federal court, commentators argued that damages cannot fully compensate the employer and are often hard to calculate. In addition, a damage suit may tend to exacerbate relations with the union. The incentive for employers to enter into collective bargaining agreements with arbitration provisions is dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated. *See* ABA SINCLAIR REPORT 242 (1963).

60. The Court concluded that even if employers are not discouraged from agreeing to arbitration, the effectiveness of the agreement is greatly reduced if injunctive relief is withheld. 398 U.S. at 249.

61. See text accompanying notes 31-34 *supra.*

62. 398 U.S. at 253.

Requirements for a Boys Markets *Injunction*

As a result of *Boys Markets*, an injunction would be proper in limited situations in spite of section 4 of the Norris-LaGuardia Act. The Court adopted as prerequisites to an injunction halting a labor strike the principles originally expounded by Justice Brennan in his *Sinclair* dissent.[63] If these conditions are met, the issuance of an injunction is thought not to sacrifice the goals of the Norris-LaGuardia Act, but rather to aid unions by encouraging private dispute settlements.[64]

First, the strike must be in breach of a no-strike obligation under an effective collective bargaining agreement.[65] Because *Boys Markets* was in part a response to the employer's inability to obtain enforcement of the union's no-strike promise, the quid pro quo for the employer's agreement to arbitrate, the Court logically required an actual promise by the union not to strike as grounds for relief. Furthermore, if an injunction is to further private dispute settlement, then the parties must have agreed to mandatory grievance and arbitration procedures in the collective bargaining agreement.[66]

The strike sought to be enjoined must be "over" a grievance that both parties are bound contractually to arbitrate.[67] The arbitrability requirement, like the mandatory grievance procedure requirement, reflects the rationale of encouraging private dispute settlements. If the parties had previously agreed that a dispute would be settled through arbitration, then neither party is allowed to thwart the agreement by striking or refusing to arbitrate. Thus, to obtain an injunction, the employer must be ordered by the district court to submit to arbitration.[68]

In addition, the district court must consider ordinary principles of equity. The court must inquire if the strike has caused or will cause the employer irreparable harm as well as if the employer will suffer more from the denial of an injunction than will the union from its issuance.[69]

Although the accommodation between the Norris-LaGuardia and Labor Management Relations Acts reached by the Supreme Court in *Boys Markets*

63. *Id.* at 254. *See* Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 228-29 (1962) (Brennan, J. dissenting).

64. See Comment, *Federal Labor Policy and the Scope of the Prerequisites for a* Boys Markets *Injunction*, 19 ST. LOUIS U.L.J. 328 (1975), for a detailed analysis of the requirements for a *Boys Markets* injunction.

65. 398 U.S. at 253. It is not essential that the no-strike obligation be express. In Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962), the Court found that a contractual commitment to submit disagreements to final and binding arbitration gives rise to an implied obligation not to strike over disputes. This result was approved in Gateway Coal Co. v. UMW, 414 U.S. 368 (1974), in which the Court held that injunctive relief may be granted on the basis of an implied undertaking not to strike.

66. 398 U.S. at 252-53.

67. *Id.* at 253. This requirement has been called the "underlying cause requirement." *See generally* Note, Boys Markets *Injunctions in Sympathy Strike Situations: A Return to Pre-Norris-LaGuardia Days*, 6 LOY. U.L.J. 644 (1975).

68. 398 U.S. at 253. This requirement is necessary to preserve the integrity of the arbitral process and to prevent judicial intrusion into the province of the arbitrator. *Id.*

69. The Norris-LaGuardia Act provides guidelines for determining the equities of the situation. 29 U.S.C. §107(a)-(e) (1970). See note 10 *supra*.

placed labor and management on an almost equal footing to enforce contractual promises,[70] the balance struck between the Acts was precarious at best. If all the requirements for a *Boys Markets* injunction were satisfied and an injunction were allowed to issue, then the problems generated by the competing statutory language would not arise. But if a dispute arose that lay outside the apparent scope of *Boys Markets*,[71] the employer again would be threatened with deprivation of his right to a continuous work force and the courts would be confronted with the interplay between the two Acts.[72]

THE CONFLICT BETWEEN THE ACTS AS DEMONSTRATED BY THE SYMPATHY STRIKE

The *Boys Markets* Court only resolved the conflict between the two statutes as it existed at that time; that dispute was clearly covered by the contract in which both parties had agreed to submit disputes to the grievance procedures and, if necessary, to binding arbitration.[73] When the conflict emerged in a different context, the sympathy strike, the harmony reached in *Boys Markets* was threatened. In the sympathy strike situation, a valid collective bargaining agreement exists between the union and an employer, but the employer confronts labor difficulties with that union at another plant or with a different union at the same plant. The striking union sets up picket lines, which the first union, though contractually bound to continue work, honors in sympathy for its sister union. Usually the employer goes to court to enforce the no-strike obligation of the union striking in sympathy. The Courts of Appeal have disagreed concerning whether a *Boys Markets* injunction may issue in the sympathy strike situation.[74] The primary differences among the circuits concern

70. As a result of *Boys Markets*, the union was no longer the only party that could obtain enforcement of the contract. Although the employer could obtain enforcement of the union's no-strike promise, his position still was not equivalent to that of the union because he was required to meet the *Boys Markets* requirements. See note 15 *supra* for a discussion of the relative strengths of the parties at the time the LMRA was passed.

71. *See* Anderson, *supra* note 25, at 247-49. In this article, written while the Court was hearing oral arguments in *Boys Markets* and amended after the decision, the author foresaw three situations in which a strike may be over a dispute that is not arbitrable and thus outside the apparent scope of *Boys Markets*: (1) a strike to change the contract before the term of the existing contract is over; (2) a strike in support of a demand dealing with a subject not covered in the bargaining or by the contract presently in effect, for example, a demand for a pension; and (3) a strike over a subject expressly excluded from arbitration, for example, discharge of an employee on probation. In the third situation the no-strike clause is absolute, although the dispute is not subject to arbitration. *Id.*

72. *See* S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947) (noting the advantage of the employer's assurance of an uninterrupted work force).

73. The dispute in *Boys Markets* concerned who should restock the frozen food cases; the dispute clearly was covered by the collective bargaining agreement. 398 U.S. at 239. In contrast, the striking local has no quarrel with management in the sympathy strike situation.

74. Sympathy strike cases allowing a *Boys Markets* injunction include, *e.g.*, Valmac Indus. v. Food Handlers Local 425, 519 F.2d 263 (8th Cir. 1975); Island Creek Coal Co. v. UMW, 507 F.2d 650 (3d Cir.), *cert. denied*, 423 U.S. 877 (1975); NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974); Armco Steel Co. v. UMW, 505 F.2d 1129 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975); Pilot Freight Carriers, Inc. v. Teamsters, 497 F.2d 311 (4th Cir.), *cert. denied*, 419 U.S. 869

the applicability of the *Boys Markets* requirement that the strike be over an arbitrable grievance.[75] In reality, arbitrability is only a superficial issue; if an arbitrable grievance exists and an injunction issues, then the accord reached between the statutes in *Boys Markets* is undisturbed.[76] By contrast, if no arbitrable grievance is found and an injunction is denied, the underlying problems created by the statutory contradiction remain a threat to industrial peace.[77]

The seminal decision supporting the issuance of an injunction temporarily to halt sympathy work stoppages in violation of a no-strike clause, conditioned upon an order to arbitrate, was *Monongahela Power Co. v. Local 2332, International Brotherhood of Electrical Workers.*[78] In *Monongahela Power,* the parties had agreed to a broad collective bargaining agreement that included a clause requiring mandatory adjustment of unresolved grievances involving "the interpretation, application or *claimed violation* of any express provision of this Agreement."[79] Focusing on the language of the agreement, the court found that an arbitrable dispute existed following the union's refusal to cross the picket line of its sister local in spite of the express no-strike clause.[80]

(1974); Wilmington Shipping Co. v. International Longshoremen's Local 1426, 86 L.R.R.M. 2846 (4th Cir.), *cert. denied,* 419 U.S. 1022 (1974); Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209 (4th Cir. 1973); Barnard College v. Transport Workers Union, 372 F. Supp. 211 (S.D.N.Y. 1974).

Cases denying injunctions include, *e.g.,* Plain Dealer Publishing Co. v. Cleveland Typographical Union No. 53, 520 F.2d 1220 (6th Cir. 1975), *cert. pending,* No. 75-565 (1975 Term); Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972); *see* United States Steel Corp. v. UMW, 519 F.2d 1236 (5th Cir. 1975), *cert. pending,* No. 75-1562 (1975 Term); General Cable Corp. v. IBEW Local 1644, 331 F. Supp. 478 (D. Md. 1971); Simplex Wire & Cable Co. v. Local 2208, IBEW, 314 F. Supp. 885 (D.N.H. 1970); Carnation Co. v. Teamsters, 86 L.R.R.M. 3012 (S.D. Tex. 1974); *cf.,* Parade Publications, Inc. v. Philadelphia Mailers Union No. 14, 459 F.2d 369 (3d Cir. 1972).

75. *See* Note, *Labor Law — The Fruits of a* Boys Markets *Injunction: Federal Injunction of Work Stoppage Pending Arbitration of Union Members' Right to Honor Sister Union's Picket Lines,* 53 TEX. L. REV. 1086, 1089 (1975). *See also* Note, *Labor Law: The Availability of Federal Injunctive Relief to Halt Sympathy Strikes,* 9 CREIGHTON L. REV. 613 (1976). For a discussion of the other *Boys Markets* requirements, see text accompanying notes 63-72 *supra.* The other requirements usually have presented no problems, especially in light of Gateway Coal Co. v. UMW, 414 U.S. 368 (1974) (holding that a no-strike obligation implied from the existence of the arbitration agreement was sufficient for a *Boys Markets* injunction).

76. If *Boys Markets* applies, there is no need to go beyond the Supreme Court's accommodation and inquire into the core concerns of the Norris-LaGuardia Act.

77. Thus, a mere resort to the *Boys Markets* requirements is insufficient; the court should go further and accommodate the two statutes to define when an injunction is appropriate.

78. 484 F.2d 1209 (4th Cir. 1973).

79. *Id.* at 1210.

80. The no-strike clause provided: "ARTICLE X *No-Strike — No Lockout* Section 1. During the term of this Agreement, there shall be no strike, work stoppage, slowdown or other interference with or impeding of work. Section 2. No employee shall participate in any such strike, *work stoppage,* slowdown or any other interference with or impeding of work and the Union will not authorize, instigate, aid or condone any such activity. Upon notification by the Company that a violation of this Article exists or is threatened, the Union shall immediately take all steps within its power to prevent or terminate any action or conduct in violation of this Article." *Id.* at 1210-11.

Furthermore, the dispute was clearly subject to mandatory adjustment and arbitration through the interpretation clause.[81] Relying on the *Steel Workers Trilogy*,[82] in which the Supreme Court had declared a presumption of arbitrability,[83] the court found the disagreement sufficient to meet the *Boys Markets* requirement that the dispute be one that can be resolved by arbitration.

Many collective bargaining agreements contain a reservation of rights clause that gives the employee the individual right not to cross a bona fide picket line, but usually forbids the union from directing or influencing the employee's decision.[84] If a reservation of rights clause existed, it was easy for the pro-injunction courts to find an arbitrable issue, *i.e.*, if the picket line were bona fide. For example, in *Wilmington Shipping Co. v. Local 1402, International Longshoreman's Association*[85] the Fourth Circuit issued an injunction pending arbitration of the issue of the bona fides of the picket line. Similarly, the parties may disagree about the exercise of the union's influence upon the members' refusal to cross a primary picket line.[86] In *NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926*,[87] the Court found an arbitrable grievance existed because it was necessary to determine if the picket line honored were primary, a requirement of the agreement's reservation of rights clause.[88] Therefore, the court ordered arbitration and an injunction until the arbitrator could resolve the dispute.[89]

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81. *Id.* at 1214. The interpretation clause provided: "ARTICLE IX *Adjustment of Grievance* Section 1. Any dispute between the Company or employees covered by this Agreement with respect to the interpretation, application, or *claimed violation* of any express provision of this Agreement shall constitute a grievance which shall be settled in accordance with the provisions of this Article." *Id.* at 1210.

82. The Steelworkers Trilogy refers to three cases, arising out of the same factual setting, decided on the same day by the Supreme Court: 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).

83. In the second Trilogy case, *Warrior & Gulf Navigation*, the Court noted that the role of the courts under §301(a) must be "strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 582-83.

84. For example, in Valmac Indus., Inc. v. Food Handlers Local 425, 519 F.2d 263 (8th Cir. 1975), vacated, 428 U.S. 906 (1976) the clause provided: "It shall not be a violation of this Agreement for any employee to refuse to pass through a picket line authorized by this Union." 519 F.2d at 265 n.4.

85. 86 L.R.R.M. 2846 (4th Cir.), *cert. denied*, 419 U.S. 1022 (1974).

86. Pilot Freight Carriers, Inc. v. Local 391, Int'l Bhd. of Teamsters, 497 F.2d 311 (4th Cir.), *cert. denied*, 419 U.S. 869 (1974). In *Pilot Freight*, the collective bargaining agreement forbade the union from directing or influencing concerted activity not to cross the picket line.

87. 502 F.2d 321 (3d Cir. 1974).

88. *Id.* at 323.

89. Although the Supreme Court has criticized the issuance of an injunction pending arbitration as a preemption of the arbitrator's function, in fact, the injunction aids the arbitral process by preserving the status quo. *See* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 412 (1976). See text accompanying notes 113-160 *infra*.

The pro-injunction school of thought looks primarily to those portions of *Boys Markets* emphasizing the policy of arbitration and those provisions of the contract[90] forbidding the union from engaging in work stoppages over disputes that involve questions of contract interpretation.[91] Once the court ascertains the existence of a dispute concerning the interpretation of the no-strike clause and, thus, the invalidity of the work stoppage, the court invokes the presumption of arbitrability.[92] From there, it is a small step to issue a *Boys Markets* injunction, upholding the employer's quid pro quo as well as effectuating the policy of section 301(a).

Although most courts that oppose injunctive relief in the sympathy strike situation attempt to distinguish the contractual language in the pro-injunction cases, the courts basically disagree with the criteria used by the pro-injunction school to determine what constitutes an arbitrable grievance.[93] Even when the language of the collective bargaining agreement in *United States Steel Corp. v. United Mine Workers*[94] was as broad as that in the cases allowing injunctions, the Court of Appeals for the Fifth Circuit denied equitable relief. The contract provided for arbitration of "any disagreement about the interpretation or application of the collective bargaining agreement between the parties or any disagreement over any matter not mentioned in said agreement, or over local trouble of any kind."[95] Nevertheless, the court did not look to the language of the broad agreement, but determined that an injunction was inappropriate because the strike was not over an arbitrable grievance.[96]

While the pro-injunction courts often hold that the legality of the strike itself is an arbitrable grievance,[97] the anti-injunction school argues that those courts misinterpret the *Boys Markets* requirement that the strike be over a dispute that both sides are bound to arbitrate. By contrast, the anti-injunction authorities require the underlying cause of the strike to be arbitrable, a condition that the sympathy strike clearly fails to meet because the union striking in sympathy has no quarrel with management; the strike itself constitutes their clash with the employer.[98] For example, in *Amstar Corp. v. Amalgamated Meat Cutters*,[99] the Fifth Circuit held the district court was without jurisdiction to

90. One commentator has suggested that the courts use one of two tests to determine the availability of injunctive relief. The courts of the anti-injunction school employ the "limited jurisdiction test," whereas the pro-injunction courts use the "contract language" test. Under the latter test, the language of the collective bargaining agreement is controlling. Dawson, *The Scope of the* Boys Markets *Rule*, 28 OKLA. L. REV. 794, 797-807 (1975).

91. *See generally* Comment, Valmac Industries: *The Eighth Circuit Adopts* Boys Markets *Injunctions in Sympathy Strikes*, 21 S.D.L. REV. 194 (1976).

92. See text accompanying note 82 *supra*.

93. *See* Plain Dealer Publishing Co. v. Cleveland Typographical Union No. 53, 520 F.2d 1220 (6th Cir. 1975) (per curiam) (adopting opinion of District Judge Ben C. Green), *cert. pending*, No. 75-565 (1975 Term).

94. 519 F.2d 1236 (5th Cir. 1975), *cert. pending*, No. 75-1562 (1975 Term).

95. *Id.* at 1239.

96. *Id.*

97. For example, the dispute in *Monongahela Power* essentially was whether the no-strike clause had been violated. 484 F.2d at 1211.

98. For a discussion of the underlying cause requirement, see Note, *supra* note 67.

99. 468 F.2d 1372 (5th Cir. 1972).

order an injunction; the court reasoned that the strike could not be over an arbitrable grievance since the only dispute concerned the validity of the strike itself.[100]

The *NAPA Pittsburgh* dissent,[101] explicating the policy considerations of *Boys Markets,* presents the most cogent argument[102] for the denial of injunctive relief in the sympathy strike situation. In the opinion of Judge Hunter, the "raison d'être" of *Boys Markets* is protection of the arbitral process; thus, an injunction should issue only when the union's work stoppage is an attempt to defeat the arbitrator's jurisdiction.[103] With a sympathy strike, resolution of an arbitrable issue, such as the bona fides of the picket line[104] or the nature of the picket line,[105] does not end the work stoppage.[106] It only determines if the strike is illegal. Furthermore, because there is no pressure on the employer to give up his arbitrable issue to force the union to return to work, the arbitral process is not undermined.[107] Thus, an injunction would only frustrate the policies of the Norris-LaGuardia Act without promoting arbitration of labor disputes.[108]

As a group, the cases denying injunctive relief look to the narrow holding of the *Boys Markets* decision.[109] Indeed, one commentator has called the reasoning employed by the anti-injunction courts the "limited jurisdiction" test.[110] For example, the *Amstar* court reasoned:

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100. *Id.* at 1373.

101. 502 F.2d at 324 (Hunter, J., dissenting).

102. The argument was ultimately successful in *Buffalo Forge.* See text accompanying notes 113-160 *infra.*

103. 502 F.2d at 325-29.

104. *See, e.g.,* Wilmington Shipping Co. v. Local 1426, Int'l Longshoremen's Ass'n, 86 L.R.R.M. 2846 (4th Cir.), *cert. denied,* 419 U.S. 1022 (1974).

105. *See, e.g.,* NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3d Cir. 1974).

106. *Id.* at 326.

107. *Id.* According to Judge Hunter, the difference between *Boys Markets* and *NAPA Pittsburgh* is that the union's work stoppage in a sympathy strike is not designed to force settlement of an arbitrable dispute before arbitration can take place. The sympathy strike is not an attempt to defeat the arbitrator's jurisdiction. *Id.*

108. This argument ignores other policy considerations of *Boys Markets,* such as enforcement of the collective bargaining agreement. Furthermore, it fails to consider that the desired result may discourage employers from entering arbitration agreements.

109. In *Boys Markets* the Court characterized its holding as a "narrow one." 398 U.S. at 253. One commentator suggested that the accommodation rationale employed by the Court is inconsistent with its caveat that the decision is of limited application. He explained the Court's use of the term "narrow": "When one considers the vast number of different situations that could arise from which a court might wish to grant injunctive relief, an understanding of the broad coverage of the Norris-LaGuardia Act develops. Hence, when one area that was previously included in the Act's coverage is removed, this could be characterized as a narrow exception to the Act's coverage." Dawson, *supra* note 90, at 806.

110. The commentator stated that the courts that follow the limited jurisdiction test strictly adhere to the *Boys Markets* requirements; thus, the courts are without jurisdiction to enter an injunction unless all the requirements of *Boys Markets* are met. Dawson, *supra* note 90, at 797-802.

> Were we to hold that the legality of the very strike sought to be enjoined in the present situation constituted a sufficiently arbitrable underlying dispute for a *Boys Markets* injunction to issue, it is difficult to conceive of any strike which could not be so enjoined. The *Boys Markets* holding was a "narrow" one, not intended to undermine the vitality of the anti-injunction provision of the Norris-LaGuardia Act. Indeed the Supreme Court specifically stated that is [*sic*] decision did not mean that "injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance."[111]

THE *Buffalo Forge* ATTEMPT AT RESOLUTION

Because the *Boys Markets* requirements for injunctive relief were not applied with unanimity to the sympathy strike situation, the Supreme Court was forced to reconcile anew the conflicting provisions of the Norris-LaGuardia and Labor Management Relations Acts in *Buffalo Forge Co. v. United Steelworkers.*[112] The employer, Buffalo Forge Company, operated three separate plant and office facilities in the Buffalo, New York area. The production and maintenance (P & M) employees were represented by the United Steelworkers of America. The Steelworkers were also certified to represent the employer's office-clerical and technical (O & T) employees at the same locations. The contracts between the union and Buffalo Forge contained no-strike clauses[113] and grievance and arbitration provisions[114] for settling disputes over the interpretation and application of each contract. After several months of negotiations toward their first collective bargaining agreement, the O & T employees struck and established picket lines at all three locations. When the P & M employees honored the picket lines at the specific behest of the union, the employer filed a complaint in district court under section 301(a) claiming the work stoppage was in violation of the no-strike clause.[115] The district court, finding that the P & M employees were involved in a sympathy strike, refused to issue an injunction because the strike was not over an arbitrable issue and, thus, did not fall within the narrow scope of *Boys Markets.*[116] The Court of Appeals for the Second Circuit affirmed,[117] aligning itself with the *Amstar* anti-injunction courts.

By a narrow margin the Supreme Court agreed that an injunction was impermissible.[118] The apparent justification comes from a rigid application of

111. 468 F.2d at 1373-74 (footnotes omitted).

112. 428 U.S. 397 (1976).

113. Section 14(b) of each agreement provided: "There shall be no strikes, work stoppages or interruption or impeding of work. No Officers or representatives of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in any such activity. The Union recognizes its possible liabilities for violation of this provision and will use its influence to see that work stoppages are prevented." *Id.* at 399 n.1.

114. The final step in the six-part grievance procedure was provided for in §32: "In the event the grievance involves a question as to the meaning and application of the provisions of this agreement, and has not been previously satisfactorily adjusted, it may be submitted to arbitration upon written notice of the union or the company." *Id.* at 400 n.2.

115. Buffalo Forge Co. v. United Steelworkers, 386 F. Supp. 405 (W.D.N.Y. 1974).

116. *Id.* at 409-10.

117. Buffalo Forge Co. v. United Steelworkers, 517 F.2d 1207 (2d Cir. 1975).

118. The vote was five to four. Justice White wrote the majority opinion, joined by

the prerequisites outlined for a *Boys Markets* injunction.[119] The Court adopted the more restrictive *Amstar* approach to the arbitrable grievance requirement,[120] holding that the strike must have been precipitated by a dispute between union and management that was subject to binding arbitration under the provisions of the contract.[121] The Court found that the sympathy strike of the P & M employees was not over any dispute between the union and the employer that was even remotely subject to the arbitration provisions of the contract; moreover, neither the causes nor the issues underlying the strike were subject to the settlement procedures of the collective bargaining agreement.[122] Thus, *Boys Markets* was not controlling.

If the only question presented to the Court in *Buffalo Forge* was the applicability of the *Boys Markets* requirements to the sympathy strike,[123] then *Buffalo Forge* was decided correctly.[124] One of the guidelines established in *Boys Markets* was that the strike be over some arbitrable dispute. The arbitrability requirement is not satisfied in the sympathy strike because the validity of the strike itself is usually the only arbitrable issue; the underlying cause of the strike is generally not subject to arbitration between the union striking in sympathy and the employer. *Buffalo Forge* involved more than mere interpretation of procedural requirements, however, since fundamental aspects of national labor policy are brought into focus whenever a case implicates the conflict between the Norris-LaGuardia Act and the Labor Management Relations Act.[125]

As if the Court recognized that a mechanical application of the criteria for a *Boys Markets* injunction would be too simplistic an answer, the Court attempted to provide policy justifications for its holding. First, the Court found that the employer was not deprived of his bargain because the Court defined his quid pro quo to be the "union's obligation not to strike over issues

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Justices Rehnquist, Blackmun, Stewart, and Chief Justice Burger. Justice Stevens authored the dissent, joined by Justices Marshall, Brennan, and Powell.

119. See text accompanying notes 63-72 *supra.*

120. In *Amstar,* the Fifth Circuit held that the underlying cause and not the strike itself must be capable of arbitration under the collective bargaining agreement. See text accompanying notes 99-111 *supra.*

121. 428 U.S. at 406.

122. *Id.* at 407-08.

123. Because it is impossible to divorce the *Boys Markets* procedure from the reasoning process that produced that procedure, the *Buffalo Forge* approach emphasizes form over substance.

124. The logic of the anti-injunction school of thought is compelling. If only the interpretation of the requirements is involved, it is difficult to counter the reasoning of District Judge Ben C. Green adopted by the Sixth Circuit in Plain Dealer Publishing Co. v. Cleveland Typographical Union No. 53, 520 F.2d 1220 (6th Cir. 1975) (per curiam) (Judge Green reasoned that there is a clear difference between a labor dispute resulting from a work stoppage and a work stoppage that is the result of a labor dispute arising from employment conditions. While the latter is enjoinable under *Boys Markets,* to allow an injunction in the first situation ignores the Supreme Court's admonition that the *Boys Markets* holding was a "narrow one.").

125. Otherwise, the enforcement of the collective bargaining agreement would have been left to state contract law. It is of national concern that labor-management relations function smoothly.

that were subject to the arbitration machinery."[126] In effect, the Court rewrote the contract for the parties, adding to the union's promise not to strike the qualification that it would not strike over an arbitrable dispute.[127] The Court's reconstruction of the employer's quid pro quo disregards the unqualified pronouncement in *Lincoln Mills* that "plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike."[128] Nor did the Court recall its words in *Boys Markets* that "a no-strike obligation, express or implied, is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration."[129] The *Buffalo Forge* limitation on the employer's quid pro quo is unrealistic because it does not accurately reflect the intent of the contracting parties. The employer has agreed to submit to arbitration in return for a guarantee of an uninterrupted work force for the entire term of the contract;[130] he seldom would agree to arbitrate if he intended the no-strike obligation to cover only strikes over arbitrable issues. Thus, in reality, the employer will be denied the benefit of his bargain whenever the union is allowed to strike in violation of its express or implied promise not to strike.

The minority opinion objected that the majority's analysis unrealistically split the employer's quid pro quo into two parts.[131] According to the majority, only that portion of the no-strike agreement relating to an arbitrable issue is enforceable.[132] The dissent, however, noted that the employer usually bargains for an unlimited no-strike obligation; to the extent that the promise exceeds an agreement relating to an arbitrable issue, it is unenforceable as a result of *Buffalo Forge*.[133]

Additionally, the majority concluded that the aims of section 301(a) were not thwarted in the instant case because the integrity of the arbitral process was not at stake when the strike was not over an arbitrable dispute.[134] The Court indicated that the sole purpose for congressional enactment of section 301(a) was to encourage private dispute settlement.[135] Indeed, private settle-

126. 428 U.S. at 407.

127. Some collective bargaining agreements actually contain this qualification. For example, the collective bargaining agreement in *Sinclair* contained a no-strike clause forbidding any slowdowns, work stoppages, or strikes "for any cause which is or may be the subject of a grievance." 370 U.S. at 197. In contrast, the collective bargaining agreement between Buffalo Forge and the Steelworkers stated absolutely that "there shall be no strikes, work stoppages or impeding of work." 428 U.S. at 399.

128. Textile Workers Union v. Lincoln Mills, 353 U.S. at 455.

129. Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. at 248.

130. *See* S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947).

131. 428 U.S. at 413 (Stevens, J., dissenting).

132. *Id.* n.2.

133. *Id.* at 413-15 (Stevens, J., dissenting).

134. *Id.* at 407.

135. "The driving force behind *Boys Markets* was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties. *Only to that extent* was it held necessary to accommodate §4 of the Norris-LaGuardia Act to §301 of the Labor Management Relations Act. . . ." *Id.* (emphasis added).

The Court also stated: "Surely, it cannot be concluded here, as it was in *Boys Markets*, that such injunctions pending arbitration are essential to carry out promises to arbitrate and to implement the private arrangements for the administration of the contract." *Id* at 411.

ment was one of the major goals of the Labor Management Relations Act; nevertheless Congress also intended to provide the means to enforce collective bargaining agreements on behalf of or against labor organizations.[136] Simply declaring that the policy of section 301(a) was not sacrificed by the decision in *Buffalo Forge*, the Court failed to assess the effect of the decision upon the equally important goal of enforcement, especially enforcement of the no-strike promise. Moreover, *Buffalo Forge* may eviscerate the goal of encouraging arbitration since the Court frustrated the more basic policy of motivating employers to agree to binding arbitration by refusing to give them an effective "assurance of uninterrupted operating during the term of the agreement."[137]

The *Buffalo Forge* Court did recognize that private dispute settlement mechanisms may be ineffective if they are not binding on the parties. The Court, however, placed primary emphasis on the promise to arbitrate.[138] For instance, the majority stated that the issuance of an injunction pending arbitration in *Boys Markets* was essential to carry out promises to arbitrate.[139] In *Boys Markets*, however, the Court also was enforcing the union's promise not to strike. Similarly, the *Buffalo Forge* Court stated that the union did not deny its duty to arbitrate,[140] yet the Court neglected to mention the union's duty not to strike.

It is consistent with the Court's unilateral enforcement of only the promise to arbitrate that the majority also insists that mere contract violations – that is, breaches of the no-strike obligation – are not enjoinable in federal courts.[141] For example, the Court stated that:

Additionally, the Court stated: "[W]e are far from concluding that the arbitration process will be frustrated unless the courts have the power to issue interlocutory injunctions pending arbitration in cases such as this or in others in which an arbitrable dispute awaits decision." *Id.* at 412.

The Court apparently was not concerned with enforcement of the promise by the union not to strike. Consequently, the Court ignored the goal of mutual enforcement in its expression of the "unmistakable policy of Congress": "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." *Id.* at 411-12 (quoting 29 U.S.C. §173(d) (1970)). See note 16 *supra*.

136. The *Lincoln Mills* Court stated: "But there was also a broader concern – a concern with a procedure for making such agreements enforceable in the courts by either party." 353 U.S. at 453. See note 29 *supra*.

Similarly, the Court in *Boys Markets* reasoned: "Any incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated." 398 U.S. at 248.

137. S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947).

138. 428 U.S. at 410-11. The Court stated that the parties have agreed to grieve and arbitrate, not to litigate. *Id.* In United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 578 (1960), however, the Court stated that in the commercial field arbitration is the substitute for litigation; but in the labor area, arbitration is the substitute for industrial strife. *Id.* at 577.

139. 428 U.S. at 411.

140. *Id.* at 410.

141. If the contract violation is the breach of the promise to arbitrate, then the contract violation is enjoinable in federal courts. If the contract violation is the breach of the no-strike clause, however, there is a "mere" violation that does not warrant an injunction.

> Section 301 of the Act assigns a major role to the courts in enforcing collective bargaining agreements, *but aside from the enforcement of the arbitration provisions of such contracts,* within the limits permitted by *Boys Markets* the Court has never indicated that the courts may enjoin actual or threatened contract violations despite the Norris-LaGuardia Act.[142]

Thus, the Court rejected the remedy of specific performance of the contract as a means to halt violation of the no-strike clause. The mere fact that the union may breach its obligation not to strike does not, in itself, give the employer the right to injunctive relief. The Court quoted *Sinclair*:

> [T]here is no general federal anti-strike policy; and although a suit may be brought under Section 301 against strikes which, while they are breaches of private contracts, do not threaten any additional public policy, in such cases the anti-injunction policy of Norris-LaGuardia should prevail.[143]

The Norris-LaGuardia Act, if not mitigated by the tempering effect of the Labor Management Relations Act as attempted in *Boys Markets,* denies the employer the right to enforcement of the union's no-strike obligation except if special requirements are met; the union, however, may have specific enforcement of the employer's promise to arbitrate.

Finally, the Court argued that an injunction was improper because the judiciary was infringing upon the role of the arbitrator; the Court feared that the arbitrator often would be preempted by judicial interpretation of the collective bargaining contracts.[144] The majority suggested that a temporary injunction would permanently settle the issue, or at the very least, that time and expense would discourage the losing party from relitigating the issue before the arbitrator.[145] This argument, however, is flawed. A court-ordered injunction does not destroy or lessen the function of the arbitrator because he is not bound by any judicial decision. The injunction merely gives him a chance to assess the dispute without fearing that management will first capitulate because of the economically coercive effect of the strike.[146] The court merely serves to restore the parties to nearly equal positions while the arbitrator considers his decision. If a strike is plainly disallowed by the terms of the contract, an injunction upholds the integrity of both the contract and the arbitration process; if the arbitrator finally decides that the strike is legal, the injunction does not subject labor to any greater inequity than management is subjected to when a clearly illegal strike is allowed to continue. While the delay of a legal strike for a few days seldom will destroy the efficacy of the

142. *Id.* at 409 (emphasis added).

143. *Id.* (quoting Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 225 (1962)).

144. *Id.* at 412. The Court stated that "it is difficult to believe that the arbitrator would not be heavily influenced or wholly preempted by judicial views of the facts and the meaning of contracts if this procedure is to be permitted." *Id.*

145. *Id.*

146. Indeed, an injunction is necessary to retain the status quo and to give effect to the arbitrator's final decision.

strike,[147] it is nearly impossible to compensate an employer for the injury caused by an illegal strike.[148]

The dissent refuted the majority's contention that the role of the arbitrator and the arbitral process are harmed by an injunction pending arbitration. According to Justice Stevens, the argument demonstrates only that "arbitration, to be effective, must be prompt, not that federal courts must be deprived entirely of jurisdiction to grant equitable relief."[149] Moreover, the interest in protecting the arbitral process is not an end in itself that exists apart from other fundamental aspects of national labor policy.[150] Justice Stevens reasoned that the net effect of the arbitration process serves to remove all ambiguity in the agreement as it applies to an unforeseen or undescribed set of facts: "But if the specific situation is foreseen and described in the contract itself with such precision that there is no need for interpretation by an arbitrator, it would be reasonable to give the same legal effect to such an agreement prior to the arbitrator's decision."[151] Thus, the dissent would allow an injunction when the strike was clearly in violation of a no-strike clause and certain other conditions were met.

Recognizing that not all sympathy strikes should be temporarily enjoinable,[152] Justice Stevens established five principles for a federal court to consider before enjoining a sympathy strike: (1) The strike must clearly violate a no-strike clause;[153] (2) The collective bargaining agreement must provide mandatory arbitration and grievance procedures; (3) The granting of injunctive relief must be conditioned upon immediate submission to grievance procedures and, if necessary, to arbitration on an expedited schedule; (4) No ex parte injunction can be issued, and the union must be allowed to sumbmit evidence on the correct interpretation of the collective bargaining agreement; and (5) Normal conditions of equitable relief must be met.[154] Thus Justice Stevens in his dissent accommodated the two statutes not only by employing the *Boys*

147. *Id.* at 429 (Stevens, J., dissenting).

148. See note 59 *supra.*

149. 428 U.S. at 428-29 (Stevens, J., dissenting).

150. The nation has a strong interest in having its labor force at work. A sympathy strike seldom furthers the economic interests of members of the striking local; on the other hand, there is a great need for continued industrial peace. Thus, the courts must sometimes step in to help fulfill the aims of the arbitration process. *See id.* at 427-32 (Stevens, J. dissenting).

151. *Id.* at 426.

152. "These considerations, however, do not support the conclusion that a sympathy strike should be temporarily enjoined whenever a collective-bargaining agreement contains a no-strike clause and an arbitration clause." *Id.*

153. The no-strike clause probably will have to be express because, although *Gateway Coal* implied a no-strike clause from the existence of an arbitration provision, the implied no-strike clause will not extend to sympathy strikes. For the sympathy strike to be clearly in violation of the no-strike clause, the promise not to strike must be express. *See id.* at 408 & n.10; United States Steel Corp. v. UMW, 548 F.2d 67 (3d Cir. 1976) (refusing to allow a damage suit against a union for an illegal sympathy strike because there was no express no-strike clause; the implied no-strike clause would not extend to sympathy strikes).

154. 428 U.S. at 431-32. Justice Stevens' second, third, and fifth criteria are similar to the *Boys Markets* requirements.

Markets procedures but also by considering the majority's argument that the success of the arbitration process would be diminished by court interference.[155] An extension of the *Boys Markets* rationale to the instant case, based on the dissent's criteria, may have resulted in the issuance of an injunction.

The reasoning used by the majority in *Buffalo Forge* is deficient because the Court failed to extend the accommodation rationale used by the Court in *Boys Markets*. The accommodation approach consisted of asking two questions: will the core concerns of the Norris-LaGuardia Act be harmed by the issuance of an injunction, and, will the goals of the Labor Management Relations Act be furthered by the issuance of an injunction?[156] The *Boys Markets* Court, viewing the Norris-LaGuardia prohibition as a product of its times, concluded:

> [T]he central purpose of the Norris-LaGuardia Act to foster 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.[157]

As clearly as in *Boys Markets*, the situation presented in *Buffalo Forge* did not thwart the goals of the Norris-LaGuardia Act for it also dealt with the enforceability of the agreement rather than with the process by which such agreements are negotiated and formed.[158]

In *Boys Markets* the Court concluded that the dual purposes of encouraging arbitration and enforcing the bargain would be thwarted if no injunction were issued because the employer would lose his incentive for submission to arbitration if the agreement were not enforced.[159] Examining the state court preemption problem, the Court determined that an injunction was necessary to preserve the goal of increasing the availability of forums in which to enforce collective bargaining agreements.[160] These arguments apply with no less force to *Buffalo Forge*.

Impact of *Buffalo Forge* on the Employer

A narrow reading of *Buffalo Forge* would require courts to refuse to issue a pre-arbitration injunction to halt a sympathy strike even if the strike violated the collective bargaining agreement.[161] Nevertheless, *Buffalo Forge* is not the

155. *Id.* at 424-32.

156. It is helpful to view this second question in the negative: Will the goals of the Labor Management Relations Act be thwarted if no injunction is allowed?

157. Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. at 252-53.

158. Justice Stevens agreed with this conclusion that the Norris-LaGuardia Act is not implicated by the situation in *Buffalo Forge*. 428 U.S. at 416-17 (Stevens, J., dissenting).

159. 398 U.S. at 248-49. The Court stated that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further the voluntary establishment of mechanisms for the peaceful resolution of labor disputes. *Id.* at 253.

160. *Id.* at 244-46.

161. Indeed, courts following *Buffalo Forge* have interpreted the holding of the case narrowly. United States Steel Corp. v. UMW, 548 F.2d 67 (3rd Cir. 1976); United States Steel Corp. v. UMW, 418 F. Supp. 172 (W.D. Pa. 1976).

albatross around the employer's neck that it may initially appear to be.[162] Even though *Buffalo Forge* rejected the accommodation theory of *Lincoln Mills* and *Boys Markets*, the decision reaffirmed the holdings of both *Boys Markets* and *Gateway Coal*.[163] Therefore, it is still possible after *Buffalo Forge* for an employer to get an injunction in a *Boys Markets* situation; a mandatory arbitration clause may still give rise to an implied no-strike obligation. Thus, although *Buffalo Forge* does to some extent resurrect the preferred status of the Norris-LaGuardia Act, it is not a return to the inequitable result of *Sinclair*.[164]

Furthermore, *Buffalo Forge* made two positive assertions that aid the employer. Because the contract between the parties included an arbitration clause broad enough to cover the meaning and application of the no-strike clause, the employer was entitled to invoke the arbitral process to determine the legality of the strike and to obtain a court order requiring the union to arbitrate.[165] The Court also stated that if the arbitrator found the strike illegal, then the employer could obtain an injunction to enforce the arbitral decision.[166]

These two powers provide the fuel necessary to make an expedited arbitration plan work to benefit the employer. By incorporating an expedited arbitration plan into the collective bargaining agreement, an employer can eliminate the devastating effects of *Buffalo Forge* on the uninterrupted operation of his business. The procedure provides for a hearing by the arbitrator within a short period of time following the breach of the no-strike clause, possibly as soon as twenty-four hours after the notice of arbitration is given.[167]

The expedited arbitration plan, coupled with a no-strike clause expressly providing that a work stoppage occasioned by honoring another union's picket line shall constitute a forbidden work stoppage,[168] effectively protects the employer from an extended strike period. When a union strikes in sym-

162. Speech by W. Curten, Buffalo Forge *and the Union's No-Strike Commitment: A Management Perspective* (1976) (address before the Southwest Conference on Labor, discussing the use of status quo ante injunctions and the use of the employee discipline as a deterrent to no-strike clause violations) (copy on file at the University of Florida Law Review).

163. See notes 65, 75 *supra*.

164. The *Buffalo Forge* majority, favoring a literal interpretation of the Norris-LaGuardia Act, cited the *Sinclair* Court's argument that Congress considered repealing the Norris-LaGuardia Act vis-à-vis a breach of collective bargaining agreements but deliberately chose not to do so. 428 U.S. at 409 (citing Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 205-08 (1962)).

165. While the *Lincoln Mills* Court had granted the union an injunction to force the employer to arbitrate, the *Buffalo Forge* Court gave the employer the concomitant right to force the union to arbitrate. *Id.* at 405.

166. *See also* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (The Court held an injunction would be permitted to enforce the arbitral decision); New Orleans S.S. Ass'n v. Longshore Workers Local 1418, 389 F.2d 369 (5th Cir. 1968). The *Buffalo Forge* dissent criticized the majority's inconsistency. Like a sympathy strike, a strike in defiance of an arbitrator's award is not over an arbitrable dispute; yet the majority recognized the propriety of an injunction only against strikes in defiance of arbitral awards. 428 U.S. at 413 n.2 (Stevens, J., dissenting).

167. See Appendix §D, ¶2.

168. The clause is crucial because it makes a sympathy strike illegal per se, assuring the employer of a favorable decision by the arbitrator. See Appendix §A.

pathy, the employer invokes the expedited arbitration procedure; also, he can get an injunction to force the union to arbitrate.[169] Once the arbitrator determines that the work stoppage violates the contract, a foregone conclusion, the employer can obtain an injunction as soon as forty-eight hours after the illegal strike to enforce the arbitrator's decision.[170]

Several other provisions should be included in the arbitration plan to make the procedure as effective as possible. For example, the agreement should provide that the hearing be completed within one session.[171] To prevent the union's attempt to delay arbitration, the employer should provide that the failure of any party to attend the hearing shall not delay the hearing of evidence or issuance of an award by the arbitrator.[172] Finally, to avoid a protracted procedure, the arbitration plan should forbid the union from introducing extraneous issues. The plan should allow the hearing to determine if a violation of the no-strike clause occurred, but deny the arbitrator the power to consider any matter in justification, explanation, or mitigation.[173]

Although the employer still cannot obtain specific performance of a collective bargaining agreement, he can achieve the same result with the expedited arbitration plan. Nevertheless, the need for specific performance remedies remains because not all employers will be able to get unions to agree to the plan, without which the no-strike clause is meaningless in the context of a sympathy strike.

CONCLUSION

Employers will continue to be confronted with sympathy strikes after *Buffalo Forge*. Because *Buffalo Forge* did not adequately resolve the conflict between the Norris-LaGuardia and Labor Management Relations Acts, the courts must still rectify the loss of the employer's consideration and preemption of state courts' jurisdiction to grant injunctive relief. One case subsequent to *Buffalo Forge*, however, has shown that the prohibition of injunctive relief may disadvantage union members as well as the employer. In *United States Steel v. United Mine Workers*,[174] a federal district court concluded that the employer was not allowed to obtain an injunction under either *Buffalo Forge* or *Boys Markets*,[175] although the union members might have benefited from the injunction. The court feared that because United States Steel is a large, integrated operation, a shortage of its coal supply would harm many nonmining employees who would be laid off. In addition, members of the striking local, who are not furthering their own interests by striking when there is no dispute with the company, are deprived of earning a wage. The judge stated:

169. 428 U.S. at 405.

170. This key to the success of the expedited plan has been supplied by *Buffalo Forge*. See note 166 *supra*.

171. See Appendix §D, ¶3.

172. *Id.*

173. See Appendix §D, ¶4.

174. 418 F. Supp. 172 (W.D. Pa. 1976) (The local voted to cease work until stranger pickets who had threatened bodily harm and personal property damage were prevented from harrassing the local.).

175. *Id.* at 175.

> The irony of all this is that our hands being tied so to speak, we cannot grant the injunction to *help the unions* combat the dissident few who apparently are on the threshold of making a mockery of our time-tested system of laws.[176]

Consequently, the judge considered legislative action essential to alleviate the problem.

The status of the law may be clouded by the very real possibility that the *Buffalo Forge* proscription of injunctive relief will be misapplied to a strike that is actually enjoinable under *Boys Markets*. For example, although an arbitrable grievance[177] existed in *Molded Materials Co. v. International Union of Electrical Workers*,[178] a federal district court, citing *Buffalo Forge*, denied a prayer for injunctive relief:

> Both under the specific language of the current collective bargaining agreement and under the national labor policy, we find this an arbitrable dispute. The decisive factual issues are whether a slowdown has occurred and whether this slowdown violates the collective bargaining agreement. Pending an arbitrator's decision on these questions, this court has no power to grant the injunctive relief sought by the Plaintiff [employer].[179]

The court clearly misinterpreted *Buffalo Forge*, denying an injunction even though a *Boys Markets* injunction would have been proper.

The plight of the labor unions in 1932 demanded strong congressional action to strengthen labor's collective bargaining position. In 1947, Congress felt compelled to set forth a policy favoring private dispute settlement mechanisms, providing the courts with the muscle needed to enforce them. In 1977, congressional action is again needed. Only because there was a great need to reconcile the conflicting policies of the Labor Management Relations Act and the Norris-LaGuardia Act did the Supreme Court enter the labor field. The spider's web has a stranglehold on the Court and only congressional action can save it.

This note has examined the grave ramifications resulting from the increasing involvement of the Court in labor law. Since its decision in *Lincoln Mills*, the Supreme Court has been forced to legislate federal labor policy rather than enforce congressional pronouncements of that policy. Although the *Boys Markets* Court attempted to establish guidelines for the resolution of the controversy between the two Acts, within six years the Court had to review those guidelines in a situation not encompassed by *Boys Markets*. Undoubtedly,

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176. *Id.*

177. The dispute concerned the employer's failure to readjust the incentive pay rates of certain employees. Molded Materials Co. v. International Union of Elec. Workers, 418 F. Supp. 548, 549 (W.D. Pa. 1976).

178. 418 F. Supp. 548 (W.D. Pa. 1976).

179. *Id.* at 550 (citing Buffalo Forge Co. v. United Steel Workers, 428 U.S. 397 (1976)).

180. Labor is now strong enough that it no longer needs the help of the federal government to bargain with management. Furthermore, once a valid collective bargaining agreement exists, should the Norris-LaGuardia Act be operative at all?

Buffalo Forge is not the last word. The underlying reason for the Court's excessive involvement in labor policy decisionmaking is that the Norris-LaGuardia Act is an anachronism; it has served its purpose well, but it is no longer needed. The battle between the Acts will continue until the employer gets what he needs, parity with the union.

LAUREN YOUNG DETZEL

APPENDIX

WORK STOPPAGES AND LOCKOUTS

Section A. No-Strike — No Lockout. During the existence of this Agreement, there shall be no strikes, picketing, work stoppages or disruptive activity by the Union or by any employee and there shall be no lockout by the Company. It is specifically understood and agreed that a work stoppage occasioned by the honoring of another union's picket line shall constitute a forbidden work stoppage under this Article.

Section B. Crossing Picket Lines. The Union agrees to give the Company a twenty-four (24) hours advance notice of any instance in which it will not direct the employees to cross a lawfully established picket line at any secondary employer's place of business. The Union is aware of and appreciates the extraordinary demands placed upon the Company under its Certificates of Public Convenience and Necessity and contractual obligation with airports and aviation authorities to provide uninterrupted transportation services to the traveling public. Accordingly, the Union agrees to cooperate in all respects with the Company and to render all possible support and assistance which shall insure the continuation of the Company's services to and from various points in the State of Florida, which may come within the jurisdiction of the Company's Certificates and its contractual obligations.

Section C. Union's Responsibility to Prevent Work Stoppage, Strike or Disruptive Activity. The Union shall not sanction, aid or abet, encourage or condone a work stoppage, strike or disruptive activity at any of the Company's facilities and shall undertake all possible steps to prevent or to terminate any strike, work stoppage or disruptive activity. No employee shall engage in activities that violate this Article. Any employee who participates in or encourages any activities which interfere with the normal operation of the Company, shall be subject to disciplinary action including discharge. The Union shall not be liable for action of employees for which it has no responsibility. The failure of the Company to exercise this right in any instance shall not be deemed a waiver of this right in any other instances nor shall the Company's right to discipline all employees for any other cause be in anyway affected by this Section.

Section D. Expedited Arbitration for this Article. Any party to this Agreement may institute the following procedure in lieu of or in addition to any other action at law or equity, when a breach of this Article is alleged.

1. The party invoking this procedure shall notify ..... whom the parties agree shall be the permanent Arbitrator under this proceeding. In the event the permanent Arbitrator is unavailable, he shall appoint his alternate. Notice to the Arbitrator shall be by the most expeditious means available, with a notice by telegram to the Business Manager of the union.

2. Upon receipt of said notice, the Arbitrator named above or his alternate shall set and hold a hearing within twenty-four (24) hours.

3. The Arbitrator shall notify the parties by telegram of the place and time he has chosen for this hearing. Said hearing shall be completed in one session, with appropriate recesses at the Arbitrator's discretion. A failure of any party or parties to attend said hearing shall not delay the hearing of evidence or issuance of an Award by the Arbitrator.

4. The sole issue at the hearing shall be whether or not a violation of this Article has in fact occurred and the Arbitrator shall have no authority to consider any matter in justification, explanation or mitigation of such violation or to award damages, which issue is reserved

for court proceedings, if any. The Award will be issued in writing within three (3) hours after the close of the hearing, and may be issued without an Opinion. If any party desires an Opinion, one shall be issued within fifteen (15) days, but its issuance shall not delay compliance with, or enforcement of the Award. The Arbitrator may order cessation of the violation of this Article and other appropriate relief, and such Award shall be served on all parties by hand or registered mail upon issuance.

5. Such award may be enforced by any court of competent jurisdiction upon filing of this Agreement and all other relevant documents referred to hereinabove, in the following manner. Telegraphic notice of the filing of such enforcement proceedings shall be given to the other party. In the proceeding to obtain a temporary order enforcing the Arbitrator's Award as issued under Section D(4) of this Article, all parties waive the right to a hearing and agree that such proceeding may be ex parte. Such Agreement does not waive any party's rights to participate in a hearing for a final Order of Enforcement. The Court's Order or Orders enforcing the Arbitrator's Award shall be served on all parties by hand or by delivery to their last known address or by registered mail.

6. Any rights created by Statute or Law governing arbitration proceeding inconsistent with the above procedure, or which interfere with compliance thereof, are hereby waived by the parties to whom they accrue.

7. The fees and expenses of the Arbitrator shall be divided equally between the moving party or parties and the party or parties respondent.