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A Management Perspective

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LABOR LAW REFORM: A MANAGEMENT PERSPECTIVE

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The labor law reform bills which failed to pass in the last session of Congress did not address the issue of labor law reform in an objective and even-handed manner. Congress drafted its proposals to expand the Board's arsenal of weapons and to speed up the Board's representational process with little or no regard for their impact on important employee and employer rights. The bills were thus deserving of legislative defeat.

I simply cannot subscribe to Mr. Bredhoff's position that the protections afforded by the National Labor Relations Act are hollow ones and that employees have been thwarted in the exercise of their rights under the Act. In any event, Mr. Bredhoff fails to support his broad, sweeping statements with any specific proposals for change. Because our national labor laws represent a delicate balance between the rights of labor and management, talk of reform must be placed in proper perspective and must therefore focus on specific legislative proposals to alleviate any real or imagined weaknesses in the Act.

The issue of labor law reform, as noted by Mr. Bredhoff, is not dead. An understanding of the defeated legislation will therefore offer insights into future proposals. Mr. Bredhoff and I have chosen to address three issues—equal access, injunctive relief, and the make-whole remedy—which illustrate the conflicting views of management and labor. Through my discussion of these three areas I hope to highlight the difficulties with the proposed reforms and to provide a backdrop for future congressional debates on the need for labor law reform.

I. EQUAL ACCESS

One of the most controversial provisions of H.R. 8410 and its Senate counterpart was the proposal that the National Labor Relations Board promulgate a rule giving union organizers access to an employer's property during a representation campaign.¹ While there were some differences in the House and Senate versions, both bills proceeded on the general notion that if an employer chooses to address his employees on company property about union representation, a union should have equal access to the employer's property to convey its message to employees in an equivalent manner.² To understand

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¹ H.R. 8410, 95th Cong., 1st Sess. § 3, 123 CONG. REC. H10632-48 (daily ed. Oct. 5, 1977); S. 2467, 95th Cong., 2d Sess. § 4, 124 CONG. REC. S7526 (daily ed. May 16, 1978).

² Section 3 of H.R. 8410 required the Board to promulgate a rule:

(A) which shall, subject to reasonable conditions, including due regard for the needs of the employer to maintain the continuity of production,

the serious questions posed by the equal access provisions of the labor reform bills, it is necessary to examine the present law regarding campaigning by employee and nonemployee union organizers on an employer's property.

The right of employees to communicate in a meaningful and effective manner has long been recognized as within the ambit of section 7 of the National Labor Relations Act.³ Recognition of this right, however, does not

provide that if an employer or employer representative addresses the employees on its premises or during working time on issues relating to representation by a labor organization during a period of time that employees are seeking representation by a labor organization, the employees shall be assured an equal opportunity to obtain in an equivalent manner information concerning such issues from such labor organization, and, with due regard for the rights declared in section 7, the right of such labor organization to conduct meetings without undue interference, and the right of the employees to the privacy of their homes, provide also that the employees are assured an equal opportunity over-all to obtain such information from the employer and such labor organization: *Provided*, the rule shall apply to elections conducted pursuant to sections 9(c)(1) and 9(e).

H.R. 8410, 95th Cong., 1st Sess. § 3, 123 CONG. REC. H10632-48 (daily ed. Oct. 5, 1977).

Section 4 of S. 2467 required the Board to promulgate a rule:

(A) which shall, subject to reasonable conditions, including due regard for the needs of the employer to maintain the continuity of production, provide that if an employer or agent of the employer addresses the employees on its premises or during working time on issues relating to representation by a labor organization during a period of time that employees are seeking (i) representation by a labor organization, (ii) to decertify or deauthorize a labor organization as their representative defined in subsection (a) of section 9, or (iii) to rescind an agreement made pursuant to the first proviso to subsection (a)(3) of section 8, the employees shall be assured an equal opportunity to obtain in an equivalent manner information concerning such issues from such labor organization, and, with due regard for the rights declared in section 7, the right of such labor organization to conduct membership meetings without undue interference, and the right of the employees to the privacy of their homes, provide also in the circumstances described in clause (i), (ii), and (iii) that the employees are assured an equal opportunity overall to obtain such information from the employer and such labor organization. To obtain an opportunity to present information relating to representation pursuant to this paragraph, a labor organization shall notify the employer, in writing, that employees of that employer have demonstrated an interest in representation by that labor organization and from the time of receipt of such notice the labor organization is to be entitled to an equal opportunity to present such information in an equivalent manner;

S. 2467, 95th Cong., 2d Sess. § 4, 124 CONG. REC. S7526 (daily ed. May 16, 1978).

³ Section 7 of the Act provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1976).

mean that an employer must totally surrender his property rights once a union organization drive commences. Quite the contrary, both the Board and the Supreme Court have endeavored to carefully balance and to accommodate the competing labor and management interests involved. As the Supreme Court has stated, "[a]ccommodation between [employee-organizational rights and employer-property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other."⁴

In *Republic Aviation Corp. v. NLRB*,⁵ the Supreme Court considered the extent to which an employer's property rights must yield to permit his own employees to communicate with each other regarding union representation. The Court upheld the Board's decision that employees have the right to distribute campaign material and to solicit support for the union on their employer's property.⁶ Eleven years after *Republic Aviation*, the Supreme Court, in *NLRB v. Babcock & Wilcox Co.*,⁷ confronted the issue whether nonemployee union organizers also have the right to distribute union campaign material on an employer's property. Distinguishing between the rights of employees and nonemployees, the Court held that an employer is entitled to "post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message. . . ."⁸ Thus, the Court refused to extend the communication rights granted to employees in *Republic Aviation* to nonemployee union organizers.⁹

⁴ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

⁵ 324 U.S. 793 (1945).

⁶ *Id.* at 803-04. In *Republic Aviation*, the Court affirmed the approach previously adopted by the Board in *Peyton Packing Co.*, 49 N.L.R.B. 828, 843-44, 12 L.R.R.M. 183, 183 (1943), *enforced*, 142 F.2d 1009, 14 L.R.R.M. 792 (5th Cir.), *cert. denied*, 323 U.S. 730 (1944).

⁷ 351 U.S. 105 (1956).

⁸ *Id.* at 112.

⁹ *Id.* at 113. The task of reconciling property and free speech rights was addressed in a nonlabor context in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). *Lloyd* dealt with a ban on the distribution of antiwar handbills in a private shopping mall. The Court held that a private property owner's prohibition of handbilling is permissible unless those asserting the right to trespass for communication purposes can show that no adequate alternative avenues of communication exist. *Id.* at 567. The Court reasoned that:

It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.

Id. The decision in *Lloyd* does not turn on whether allowing trespass will promote more effective communication. Indeed, *Lloyd*, like *Babcock & Wilcox*, deemphasized the effectiveness issue and focused on the availability of alternative means of communication. See *Asociacion de Trabajadores Agricolas v. Green Giant Co.*, 518 F.2d 130, 138, 89 L.R.R.M. 2528, 2533 (3d Cir. 1975); Note, *First Amendment and the Problem of Access to Migrant Labor Camps After Lloyd Corporation v. Tanner*, 61 CORNELL L. REV. 560, 580-85 (1976).

The accommodation reached in *Babcock & Wilcox* between nonemployee organizational rights and employer property rights has been reaffirmed by the Supreme Court on several occasions.¹⁰ Most recently, in *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*,¹¹ the Court stated:

To gain access [to an employer's property], the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation. That the burden imposed on the Union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the [*Babcock & Wilcox*] accommodation principle has rarely been in favor of trespassory organizational activity.¹²

In two other recent cases, *Eastex, Inc. v. NLRB*¹³ and *Beth Israel Hospital v. NLRB*,¹⁴ the Court also reaffirmed the accommodation reached in *Republic Aviation* between employee organizational rights and employer property rights.¹⁵ Thus, the *Sears*, *Eastex*, and *Beth Israel* decisions clearly illustrate the Court's differentiation between employee organizational rights and the rights of nonemployee union organizers. While *Eastex* and *Beth Israel* afford expansive scope to employee section 7 communication rights,¹⁶ the *Sears* decision indicates that employer property rights take on much greater vitality in the context of a claim for access by outside organizers.¹⁷

This judicial protection of employer's property rights from intrusion by nonemployee union organizers does not mean, however, that unions are precluded from conveying their message to employees. A myriad of alternative avenues for communication exist. Employees can solicit union membership and distribute campaign material on an employer's property.¹⁸ Union officials, but not management representatives, are allowed to bring their campaign to the homes of employees.¹⁹ Moreover, once an election has been

¹⁰ *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-45 (1972); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978); see *Hudgens v. NLRB*, 424 U.S. 507, 521-22 (1976).

In *Central Hardware*, the Supreme Court held that union organizers could not gain access to an employer's parking lot on the ground that the lot had acquired the characteristics of a public facility. 407 U.S. at 547.

¹¹ 436 U.S. 180 (1978).

¹² *Id.* at 205.

¹³ ___ U.S. ___, 98 S. Ct. 2505 (1978).

¹⁴ ___ U.S. ___, 98 S. Ct. 2463 (1978).

¹⁵ *Eastex*, 98 S. Ct. at 2516; *Beth Israel*, 98 S. Ct. at 2469-70.

¹⁶ *Id.*

¹⁷ *Sears*, 436 U.S. at 205.

¹⁸ *Eastex*, 98 S. Ct. at 2516; *Beth Israel*, 98 S. Ct. at 2469-70.

¹⁹ Compare *Peoria Plastics Co.*, 117 N.L.R.B. 545, 547-48, 39 L.R.R.M. 1281, 1281-82 (1957) (employer may not call upon employees at their homes to urge them to reject a union as their representative) with *Plant City Welding & Tank Co.*, 119 N.L.R.B. 131, 133-34, 41 L.R.R.M. 1014, 1015 (1957) (union may call upon employees at their homes to urge them to support the union).

ordered by the Board, unions receive the names and addresses of all eligible voters.²⁰ It is the very presence of these alternative communication channels which has caused both the Board and the courts to generally deny non-employee access for organizational purposes.²¹

Present law thus recognizes the strength of an employer's property rights in the context of a claim for access by outside organizers. In contrast to the present law, the labor reform bills proposed that unions be given an expansive right of access once an employer has addressed his employees concerning union representation.²² The reform bills' right of access was triggered when an employer receives written notice that his employees are interested in being represented by a labor organization.²³ If, after receiving such notice, the employer talks to his employees about unionization during working time or on company property, the employer must provide the union with an opportunity to speak to the employees on company property during company time.²⁴ Although the bills did not require a specific showing of employee interest before the equal access provisions became operative, the Senate Committee on Human Resources indicated there must first be a showing that at least ten percent of the employees are interested in unionization, or a minimum of three employees in small units.²⁵ The House bill was totally unclear as to what showing a union had to make in order to secure access rights.

Under the House and Senate bills, access rights were not confined to when an employer stops production to make a captive audience speech. Unions would have had the right to equal access if a supervisor merely discussed unionization with employees, whether on working or nonworking time.²⁶

²⁰ *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969); *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239-40, 61 L.R.R.M. 1217, 1218 (1966).

²¹ Access has been granted where employees cannot be reached by union organizers. *E.g.*, *Alaska Barite Co.*, 197 N.L.R.B. 1023, 1029-30, 80 L.R.R.M. 1765, 1765-66 (1970) (remote area); *NLRB v. S & H Grossinger's Inc.*, 372 F.2d 26, 29-30, 64 L.R.R.M. 2295, 2298 (2d Cir. 1967) (resort hotel); *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147, 152, 21 L.R.R.M. 2707, 2711 (6th Cir. 1948) (lumber camp). The heavy burden on securing access is illustrated in *NLRB v. Sioux City and New Orleans Barge Lines*, 472 F.2d 753, 82 L.R.R.M. 2488 (8th Cir. 1973). There the court refused to allow access to the company's barges even though the employees lived in fifteen different states and mailing had proved unsuccessful. The court held that the union had not made the "strong showing" that other alternative means of communication were unavailable during the organizing campaign. *Id.* at 756, 82 L.R.R.M. at 2491. *See also* *R. WILLIAMS, P. JANUS & K. HURN, NLRB REGULATION OF ELECTION CONDUCT* 287-90 (1974); *Falk Corp.*, 192 N.L.R.B. 716, 722-23, 77 L.R.R.M. 1916, 1922 (1971); *Monogram Models, Inc.*, 192 N.L.R.B. 705, 706-07, 77 L.R.R.M. 1913, 1914-15 (1971).

²² H.R. 8410, 95th Cong., 1st Sess. § 3, 123 CONG. REC. H10632-48 (daily ed. Oct. 5, 1977) S. 2467, 95th Cong., 2d Sess. § 4, 124 CONG. REC. S7526 (daily ed. May 16, 1978). For the complete text of the labor law reform bills' equal access provisions, see note 2 *supra*.

²³ S. REP. NO. 628, 95th Cong., 2d Sess. 26 (1978).

²⁴ *Id.*

²⁵ *Id.* at 26.

²⁶ *Id.* at 25.

All that was required for access to be granted was the requisite showing of interest and an employer's exercise of his right to contact his employees concerning unionization. Access was also not confined to any particular number of labor organizations. Thus, regardless of how many labor organizations are vying to represent an employer's workforce, under the reform bills they would have all enjoyed access rights if the showing of interest test was satisfied.

Affording access to unions whenever an employer communicates with his employees about unionization raises serious policy and constitutional questions. Access will give labor organizations substantial advantages they currently do not enjoy and will alter the careful balance which the Board and the courts have endeavored to preserve in the representational area.²⁷ Before analyzing the serious questions posed by the equal access provisions, it is instructive to look at Congress's reasons for the proposed change. Perhaps the primary motivation for including an equal access provision in the labor reform bills was Professors Getman and Goldberg's empirical study of thirty-one NLRB elections.²⁸ While the study showed that what is said or done in a representational campaign generally does not affect an employee's vote, the researchers concluded that unions should have the same opportunities as employers to hold campaign meetings on working time since an employee's vote might be affected by greater knowledge of the content of a union's campaign.²⁹

While the drafters of the labor reform bills relied on the Getman and Goldberg study, they failed to adopt the authors' recommendation that the Board cease its regulation of employers' election activity.³⁰ The proposed equal access provisions did not alter Board regulation of employers' election activity and in fact allowed unions access before a representation proceeding

²⁷ See, e.g., *NLRB v. United Steelworkers (Nutone, Inc.)*, 357 U.S. 357, 362-64 (1958); *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429-30, 33 L.R.R.M. 1151, 1152 (1953); *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 406, 33 L.R.R.M. 1156, 1158 (1953). See generally Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

²⁸ J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976) [hereinafter cited as GETMAN & GOLDBERG]. Legislative reliance on the study is indicated in H.R. REP. NO. 637, 95th Cong., 1st Sess. 38-39 (1977); S. REP. NO. 628, 95th Cong., 2d Sess. 23-25 (1978).

²⁹ GETMAN & GOLDBERG, *supra* note 28, at 156-57. One of the study's authors, Professor Stephen Goldberg, testified before both the House and Senate subcommittees on labor. *Hearings on H.R. 8410 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 367 (1977); *Hearings on S. 1883 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 1945 (1977) [hereinafter cited as *Hearings on S. 1883*]. Professor Goldberg testified that he supported access on the grounds that employees might become more familiar with the issue of unionization and might be influenced by such knowledge. *Id.* at 1851-52.

³⁰ GETMAN & GOLDBERG, *supra* note 28, at 159. In his testimony before the Senate Subcommittee on Labor, Professor Goldberg stated "that the Labor Board's regulation of speech [during a representational campaign] should be terminated and that the parties should be free to say what they wish during the pre-election campaign." *Hearings on S. 1883, supra* note 29, at 1852.

is even pending before the Board.³¹ Furthermore, the drafters failed to adopt the authors' suggestion that unions pay the wages of employees when access is granted.³² Thus, while the proposals greatly eased the restrictions on unions' campaign activity by giving liberal access rights to union organizers, they subjected employers to the same, or even greater, constraints on election activity, and thrust the additional burden of providing access upon them.

The inequity resulting from increasing the freedom of unions during an election campaign without also increasing the freedom of employers to engage in election activity was only one of the serious problems with the proposed equal access provisions. Another fundamental defect in the proposals was their oversimplified and inflexible approach. Given the sensitive balance established by case law between employers' property rights and employees' section 7 rights, a generalized equal access rule is neither appropriate nor constitutionally permissible.³³ To justify an infringement of employer property rights, there must be a showing that such infringement is necessary. The assumption on which the defeated legislation was predicated, that unions do not have adequate alternative avenues of communication, is unsupportable in light of the various communication channels protected by the Board and the courts.³⁴ Any further encroachment on employers' property rights is unnecessary and, therefore, unconstitutional.

In *Agricultural Labor Relations Board v. Superior Court of Tulare County*,³⁵ the California Supreme Court, in a four to three decision, upheld an access rule promulgated by the California Agricultural Labor Relations Board.³⁶ The California Board promulgated its access rule on a generalized basis, but limited access to certain times and places and prohibited certain types of conduct on a grower's property.³⁷ Finding that the access regulation was reasonably

³¹ While section 6 of the Senate bill would in some ways extend employer free speech protection, it would also allow the Board to closely regulate speech within 48 hours of an election. S. REP. NO. 628, 95th Cong., 2d Sess. 26-28 (1978).

³² GETMAN & GOLDBERG, *supra* note 28, at 158. The study recommended that while a union should pay the wages of employees if it wants to talk to them during working hours, overhead costs should be borne by the employer. *Id.*

³³ The need for a case-by-case balancing of interests is particularly critical since the issue of access calls into play a host of factors which are not capable of resolution by a generalized or uniform rule-making approach. See *Beth Israel Hosp. v. NLRB*, 98 S. Ct. 2463, 2478-80 (1978) (Powell, J., concurring).

³⁴ See text at notes 18-21 *supra*.

³⁵ 16 Cal. 3d 392, 546 P.2d 687, 128 Cal. Rptr. 183, 91 L.R.R.M. 2657, *appeal dismissed*, 429 U.S. 802 (1976).

³⁶ *Id.* at 410, 546 P.2d at 698-99, 128 Cal. Rptr. at 194-95, 91 L.R.R.M. at 2664.

³⁷ The California access rule provides in relevant part:

5. Accordingly, the Board will consider the rights of employees under Labor Code Sec. 1152 . . . to include the right of access by union organizers to the premises of an agricultural employer for the purpose of organizing, subject to the following limitations:

a. Organizers may enter the property of an employer for a total period of 60 minutes before the start of work and 60 minutes after the completion of work to meet and talk with employees in areas in which employees congregate before and after working.

related to the goal of assisting self-organization and that it was grounded on the lack of meaningful alternative communication avenues, the *Tulare* court held the regulation constitutional. The court stated that,

[i]n the light of *Babcock & Wilcox*, it cannot be said that an access regulation designed to assist self-organization by workers lacks a reasonable relation to a valid public goal; and a careful examination of the various limitations as to time, place, purpose, and manner which are written into this regulation . . . demonstrates that it is neither arbitrary nor discriminatory within the meaning of the foregoing standards.³⁸

Serious problems, as noted by the dissent in *Tulare*,³⁹ are posed by the majority's construction of *Babcock & Wilcox* and its progeny. In *Babcock & Wilcox*, the Court established a balancing test to be employed when property rights are being infringed by an assertion of union organizational rights.⁴⁰ This balancing test does not turn on whether a rule permitting access comports with a statutory goal to foster self-organization, but turns on whether there is a need for access. The satisfaction of this test should therefore depend on whether there are reasonable alternatives to communicate and not on the assumption that it is more effective to communicate on the employer's premises.⁴¹ In any event, the equal access provisions of H.R. 8410 and S. 2467 were defective even under the analysis used by the majority in *Tulare*. None of the factual findings relied upon by the *Tulare* court are present to

b. In addition, organizers may enter the employer's property for a total period of one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one-hour period shall include such lunch break. If there is no established lunch break, the one-hour period may be at any time during the working day.

c. Access shall be limited to two organizers for each work crew on the property, provided that if there are more than 30 workers in a crew, there may be one additional organizer for every 15 additional workers.

d. Upon request, organizers shall identify themselves by name and labor organization to the employer or his agent. Organizers shall also wear a badge or other designation of affiliation.

e. The right of access shall not include conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery. Speech by itself shall not be considered disruptive conduct. Disruptive conduct by particular organizers shall not be grounds for expelling organizers not engaged in such conduct, nor for preventing future access.

f. Pending further regulation by the Board, this regulation shall not apply after the results of an election held pursuant to this act have been certified.

CALIF. ADMIN. CODE, tit. 8, §§ 20900-20901 (1975).

³⁸ 16 Cal. 3d at 410, 546 P.2d at 699, 128 Cal. Rptr. at 195, 91 L.R.R.M. at 2664.

³⁹ *Id.* at 421, 429-31, 546 P.2d at 706, 712-13, 128 Cal. Rptr. at 202, 208-09, 91 L.R.R.M. at 2670, 2674-75.

⁴⁰ 351 U.S. at 112.

⁴¹ *Id.*

justify a blanket access rule. Quite the contrary, the findings of the Board and the federal courts regarding the adequacy of alternative communication channels contradict the need for such an across-the-board approach.

In addition to the abridgement of employer property rights, the equal access provisions posed serious first amendment problems. By making an employer's right to address his employees on matters related to union organization contingent on his allowing union organizers to enter his property to solicit support from employees, the proposed equal access provisions infringed an employer's freedom of speech guaranteed in the first amendment. Employer speech concerning unionization "is firmly established and cannot be infringed by a union or the Board."⁴² In *NLRB v. Gissel Packing Co.*,⁴³ the Supreme Court noted that the so-called free speech provision of the Act, section 8(c),⁴⁴ "merely implements the First Amendment."⁴⁵ The equal access provisions of H.R. 8410 and S. 2467 required an employer to surrender his property rights, without a showing that alternative communication channels are absent, and forced him to financially support a union's proselytizing efforts when conducted on company time. Conditioning an employer's right to speak on the assumption of such a burden is the type of restriction which has invoked strict first amendment scrutiny.

*Miami Herald Publishing Co. v. Tornillo*⁴⁶ illustrates the Court's aversion to imposing conditions on the exercise of first amendment rights. In that case, the Court struck down a Florida statute requiring newspapers to provide political candidates with free space to reply to any newspaper attack on the candidate's character.⁴⁷ In so doing, the Court found that compelling editors to publish what they believe should not be published violates the first amendment's guarantee of a free press.⁴⁸ The Court regarded neither the severity of the restriction on the newspaper nor the burden of complying with the restriction as a relevant consideration.⁴⁹ Indeed, "even if the newspaper would face no additional costs" by giving candidates room for reply, the Court would have found a first amendment violation.⁵⁰

⁴² *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

⁴³ 395 U.S. 575 (1969).

⁴⁴ 29 U.S.C. § 158(c) (1976). Section 8(c) of the Act provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

⁴⁵ 395 U.S. at 617. Prior to the Supreme Court's decisions in *Bigelow v. Virginia*, 421 U.S. 809 (1975), and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), certain cases suggested that the first amendment does not protect speech motivated by purely financial concerns. *E.g.*, *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942). *Virginia State Bd.* clearly indicates, however, that the speech of parties in a labor contest has long been excepted from the now discredited "commercial speech" doctrine. 425 U.S. at 762.

⁴⁶ 418 U.S. 241 (1974).

⁴⁷ *Id.* at 258.

⁴⁸ *Id.* at 256.

⁴⁹ *Id.* at 258.

⁵⁰ *Id.*

Like the editors in *Miami Herald*, an employer, under the labor law reform bills, would have had to yield some of the control which he is otherwise entitled to exert over his property and business affairs. Also, like the editors, an employer would have had to foster points of view which he finds distasteful by surrendering his property to be used as a forum for their publication. Thus, the proposed equal access provisions unreasonably restricted employers' free speech rights and, therefore, ran afoul of the first amendment. The first amendment problems presented by the equal access provisions were compounded by the bills' requirement that if there was a showing of interest in more than one labor organization, the employer had to afford access to all of them.⁵¹ As the number of unions with potential access rights increased, the likelihood that an employer would communicate his views concerning unionization on company property would decrease. One half-hour talk by an employer could trigger equal time for a number of different labor organizations and an employer's exercise of his free speech rights would become a very costly activity.

The balance between employees' organizational rights and employers' property rights is a delicate one and is unsuited to the generalized assumptions underlying the reform proposals. Furthermore, as long as the present alternative channels of communication exist, there is no reason to impose on employers the burden of providing unions access to their property. Adoption of a mandatory access rule would distort the balance between the competing rights of unions and employers which the Board and the courts have endeavored carefully to preserve.

II. INJUNCTIVE RELIEF

The issue whether federal courts should be allowed to enjoin strikes which violate the terms of a collective bargaining agreement has spawned extensive debate.⁵² With the introduction of H.R. 8410⁵³ and S. 2467⁵⁴ this debate moved into Congress. Both of these legislative proposals, however, addressed this issue in a less than satisfactory manner. Before detailing the shortcomings of the injunctive relief provisions of H.R. 8410 and S. 2467, a

⁵¹ See text at note 26 *supra*.

⁵² This issue has also been the subject of voluminous commentary. See, e.g., Aaron, *The Labor Injunction Reappraised*, 10 U.C.L.A. L. REV. 292 (1963); Gould, *On Labor Injunctions, Unions and the Judges: The Boys Markets Case*, 1970 SUP. CT. REV. 215; Keene, *The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to Avco and Beyond*, 15 VILL. L. REV. 32 (1969); Smith, *The Supreme Court, Boys Markets Labor Injunctions and Sympathy Work Stoppages*, 44 U. CHI. L. REV. 321 (1977); Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547 (1963).

⁵³ H.R. 8410, 95th Cong., 1st Sess. § 12, 123 CONG. REC. H10710 (daily ed. Oct. 6, 1977). The full text of the injunctive relief provision of H.R. 8410 may be found at note 74 *infra*.

⁵⁴ S. 2467, 95th Cong., 2d Sess. § 13, 124 CONG. REC. S7528 (daily ed. May 16, 1978). The full text of the injunctive relief provision of S. 2467 may be found at note 75 *infra*.

brief review of the history behind the availability and utilization of injunctive relief under section 301 of the Labor Management Relations Act is in order.⁵⁵

Early in this century federal courts utilized their equity powers to intervene in labor disputes. Intervention typically consisted of the issuance of orders restraining union activity in broad and ill-defined terms.⁵⁶ Since the utilization of injunctive relief impeded employee organizational activity, and since procedural safeguards for issuing injunctions were few, Congress responded by enacting the Norris-LaGuardia Act.⁵⁷ Norris-LaGuardia greatly restricted the federal courts' use of injunctions in labor disputes.⁵⁸ The Act represented "the culmination of a bitter political, social and economic controversy extending over half a century"⁵⁹ and embodied a philosophy that labor disputes should be settled between private parties without judicial interference.⁶⁰

The controversy surrounding Norris-LaGuardia was far removed from the question of enforcing collective bargaining agreements through injunctive relief. In fact, at the time Congress enacted Norris-LaGuardia, courts treated collective bargaining agreements as unenforceable.⁶¹ It was not until 1947, when Congress enacted section 301 of the Labor Management Relations Act,⁶² that federal courts obtained jurisdiction over suits for breach of collective bargaining agreements. Section 301, however, did not expressly authorize injunctive relief and the question immediately arose whether federal courts could enjoin violations of collective bargaining agreements in light of the previous limitations imposed by Norris-LaGuardia.

The resolution of this question turned in part on the separate issue whether section 301 is merely jurisdictional or whether it gives courts the power to fashion federal common law with respect to the enforcement of collective bargaining agreements. In *Textile Workers v. Lincoln Mills*,⁶³ the Su-

⁵⁵ 29 U.S.C. § 185 (1976). See note 62 *infra*.

⁵⁶ See generally F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930).

⁵⁷ Ch. 90, 47 Stat. 70 (1932) (now codified at 29 U.S.C. §§ 101-115 (1976)).

⁵⁸ See NOTE, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 HARV. L. REV. 354, 356-57 (1958).

⁵⁹ *Milk Wagon Drivers Local 753 v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91, 102 (1940).

⁶⁰ H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 40-41 (1968).

⁶¹ J. COMMONS & J. ANDREWS, *LABOR LEGISLATION* 118 (1920); Rice, *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572, 572-75 (1931).

⁶² Ch. 120, title III, § 301, 61 Stat. 156 (now codified at 29 U.S.C. § 185 (1976)). Section 301(a) 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.

29 U.S.C. § 185(a) (1976). The legislative history of section 301 is summarized in H.R. REP. NO. 510, 80th Cong., 1st Sess. (1947), and abstracted as an appendix to Justice Frankfurter's dissenting opinion in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 485-546 (1957).

⁶³ 353 U.S. 448 (1957).

preme Court resolved this issue, holding that section 301 permits the creation of a substantive body of federal law.⁶⁴ The *Lincoln Mills* Court went on to hold that Norris-LaGuardia does not prohibit the specific enforcement of a contractual duty to arbitrate disputes arising under collective bargaining agreements.⁶⁵ The Court reasoned that the enforcement of a duty to arbitrate is not "part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed."⁶⁶ Three years after its decision in *Lincoln Mills*, the Supreme Court again exercised its newly found power to create a body of federal common law under section 301. In the *Steelworkers Trilogy*,⁶⁷ the Court established arbitration as "a kingpin of federal labor policy"⁶⁸ and created a strong presumption in favor of arbitration. Arbitration became, in the eyes of the Supreme Court, the primary vehicle to promote industrial peace, and federal courts were instructed not to thwart the utilization of this process by narrowly construing grievance and arbitration clauses.⁶⁹

Although the *Steelworkers Trilogy* established arbitration as an integral part of the federal common law of labor relations, it did not specify the remedies available to an employer if a union chooses to ignore the arbitral process and to engage in a strike over a matter subject to arbitration. Contract damages unquestionably are available under section 301.⁷⁰ However, since a damage action may exacerbate relations between an employer and a union, and since such actions do nothing to immediately end strike activity, the crucial question became whether injunctive relief is available under section 301 to enforce the arbitration provisions of a collective bargaining agreement. Prior to the *Steelworkers Trilogy*, the Supreme Court, in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co.*,⁷¹ had already approved the utilization of injunctive relief to enforce the arbitration provisions of the Railway Labor Act.⁷² The *Chicago River* Court rejected the argument that Norris-LaGuardia precludes the issuance of injunctive relief when a union strikes over a dispute subject to arbitration under the Railway Labor Act. As later noted by the Court, *Chicago River* turned on the perception that the important policy of

⁶⁴ *Id.* at 456-57.

⁶⁵ *Id.* at 457-59.

⁶⁶ *Id.* at 458.

⁶⁷ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

⁶⁸ *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 226 (1962) (Brennan, J., dissenting).

⁶⁹ In *Warrior & Gulf*, the Court stated that:

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.

⁷⁰ *Drake Bakeries, Inc. v. Local 50, American Bakery and Confectionary Workers*, 370 U.S. 254, 266 (1962).

⁷¹ 353 U.S. 30 (1957).

⁷² *Id.* at 40-42.

settling disputes through a statutorily-mandated arbitration procedure would be "imperiled if equitable remedies were not available to implement it . . ." ⁷³

Notwithstanding its decision in *Chicago River*, when the Supreme Court considered the availability of injunctive relief under section 301 to enforce the arbitration provisions of a collective bargaining agreement, it prohibited the issuance of such relief. In *Sinclair Refining Co. v. Atkinson*,⁷⁴ the Court held that Norris-LaGuardia does not allow the issuance of injunctions against strikes in breach of collective bargaining agreements, even if the strikes are over arbitrable grievances.⁷⁵ The *Sinclair* decision was immediately attacked as undermining the effectiveness of the arbitral process since it failed to ensure that labor disputes are channeled through the arbitration procedures agreed upon by the parties to a collective bargaining agreement.⁷⁶ Moreover, the *Sinclair* Court's refusal to accommodate Norris-LaGuardia with section 301 could not be reconciled with the approach adopted earlier in *Chicago River*.

⁷³ *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 252 (1970).

⁷⁴ 370 U.S. 195 (1962).

⁷⁵ *Id.* at 213-15. Prior to *Sinclair*, federal courts had concluded that Norris-LaGuardia did not prohibit the issuance of injunctions to enforce agreements not to strike. The courts' reasoning is exemplified by *Chauffeurs Local 795 v. Yellow Transit Freight Lines, Inc.*, 282 F.2d 345, 46 L.R.R.M. 2915 (10th Cir. 1960), *rev'd mem.*, 370 U.S. 711 (1962), where the Tenth Circuit stated:

Surely no one would seriously contend that Section 301 was intended to open the gates to the abuses of judicial injunctive power which Norris-LaGuardia was designed to curb. We ought always to be mindful of the very limited function the courts play in the collective bargaining process. Yet it seems reasonable to say that if the courts are to exercise jurisdiction for the redress of violations of collective bargaining agreements according to notions of federal common law, they are empowered to vouchsafe the integrity of a bargaining contract to the end that neither party shall be deprived of the fruits of their bargain. . . . And this is so, we think, whether the claimed violation is a refusal to arbitrate according to the terms of the contract, or the violation of an agreement not to strike or tie up the employer's business without first resorting to the grievance procedure prescribed in the contract. It is one thing to utilize an injunctive decree for the negative purpose of interfering with full freedom of association, self-organization and designation of representatives to negotiate the terms and conditions of employment. It is quite another to utilize the judicial processes to preserve and vouchsafe the fruits of a bargain which the parties have freely arrived at through the exercise of collective bargaining rights.

Id. at 349-50, 46 L.R.R.M. at 2918 (citation of cases omitted).

⁷⁶ See, e.g., Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 COLUM. L. REV. 1027 (1963); Keene, *The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to Avco and Beyond*, 15 VILL. L. REV. 32 (1969); Report of Special Atkinson-Sinclair Committee, ABA LABOR RELATIONS LAW SECTION 226, 226-44(1963).

In an effort to afford some relief to employers, lower courts held that *Sinclair* did not preclude the enforcement of an arbitrator's award directing a union to cease striking in violation of a no-strike clause. E.g., *New Orleans S.S. Ass'n v. General Longshore Workers Local 1418*, 389 F.2d 369, 372, 67 L.R.R.M. 2430, 2433 (5th Cir.), *cert. denied*, 393 U.S. 828 (1968).

Certainly the fact that the arbitration procedures in *Chicago River* were statutory while in *Sinclair* they were contractual did not change the already established national labor policy of having disputes settled through arbitration.

The appropriate occasion to reconsider *Sinclair* came in *Boys Markets, Inc. v. Retail Clerks Local 770*.⁷⁷ Following the approach taken in *Chicago River*, the Court accommodated Norris-LaGuardia with section 301 and held that Norris-LaGuardia does not bar injunctive relief when a union strikes in violation of a no-strike agreement and when the strike concerns a matter subject to arbitration under the collective bargaining agreement.⁷⁸ At its core, *Boys Markets* represented another victory for the arbitral process.⁷⁹

Perhaps the most controversial question after *Boys Markets* was whether injunctive relief is available when employees engage in a sympathy strike in violation of a collectively bargained no-strike clause.⁸⁰ This question was resolved by a sharply divided court in *Buffalo Forge Co. v. United Steelworkers*.⁸¹ In that case, a group of employees who were members of one union honored a picket line established by another local of that union.⁸² The employer

⁷⁷ 398 U.S. 235 (1970).

⁷⁸ *Id.* at 252-53. Justice Brennan, writing for the majority, recognized that employers would have little, if any, incentive to agree to submit contractual disputes to arbitration if the courts were unwilling to enforce, by way of injunctive relief, the obligation of unions not to strike over such disputes. *Id.* at 248. The holding in *Boys Markets* followed Justice Brennan's dissent in *Sinclair*:

A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike.

Id. at 259 (quoting *Sinclair*, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting)).

⁷⁹ The *Boys Markets* Court emphasized that the holding in *Sinclair* "undermined the effectiveness of the arbitration technique" and "frustrate[d] realization of an important goal of our national labor policy." 398 U.S. at 252, 241.

⁸⁰ After *Boys Markets*, some courts held that the issue whether employees can honor another union's picket line is an arbitrable dispute and, therefore, *Boys Markets* injunctive relief is available. *E.g.*, Valmac Indus., Inc. v. Food Handlers Local 425, 519 F.2d 263, 267-68, 89 L.R.R.M. 3073, 3076 (8th Cir. 1975), *vacated and remanded for further consideration in light of Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 906 (1976); NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 324, 87 L.R.R.M. 2044, 2046 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1049 (1974); Monogahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209, 1215, 84 L.R.R.M. 2481, 2485 (4th Cir. 1973). Other courts held that sympathy strikes are not over arbitrable grievances and that injunctive relief is therefore inappropriate. *E.g.*, Plain Dealer Publishing Co. v. Cleveland Typographical Union No. 53, 520 F.2d 1220, 1221-22, 90 L.R.R.M. 2110, 2110 (6th Cir. 1975) (per curiam), *cert. denied*, 428 U.S. 909-10 (1976); Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372, 1373-74, 81 L.R.R.M. 2644, 2645-46 (5th Cir. 1972). For a full discussion of the sympathy strike cases, see Smith, *supra* note 52, at 331-40.

⁸¹ 428 U.S. 397 (1976).

⁸² *Id.* at 400-01.

claimed that the sympathy strike violated a no-strike clause in its collective bargaining agreement with the sympathetic union and requested an injunction to stop the strike.⁸³ Justice White, writing for the majority, concluded that injunctive relief was not appropriate and that *Boys Markets* plainly did not control⁸⁴ since the sympathy strike "had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain."⁸⁵ In the majority's view, to grant injunctions in such cases would thrust federal courts into the arena of contract interpretation—a role reserved to arbitrators.⁸⁶ Thus, the majority in *Buffalo Forge* concluded that the availability of arbitration was a sufficient remedy to the employer.⁸⁷

Justice Stevens, in a dissenting opinion, attacked the majority's conclusion that the sympathy strike did not deprive the employer of the benefit of his bargain.⁸⁸ Quite the contrary, Justice Stevens concluded, if the strike violates the no-strike clause in the collective bargaining agreement the employer's agreement to arbitrate is being undermined.⁸⁹ Furthermore, the dissent rejected the majority's literal interpretation of *Norris-LaGuardia*.⁹⁰ Justice Stevens reasoned that the concerns which prompted passage of *Norris-LaGuardia* were not applicable to a situation where a court was dealing with the enforceability of a collective bargaining agreement:

Like the decision in *Boys Markets*, this opinion reflects, on the one hand, my confidence that experience during the decades since the *Norris-LaGuardia* Act was passed has dissipated any legitimate concern about the impartiality of federal judges in disputes between labor and management, and on the other, my continued recognition of the fact that judges have less familiarity and expertise than arbitrators and administrators who regularly work in this specialized area. The decision in *Boys Markets* requires an accommodation between the *Norris-LaGuardia* Act and the Labor Management Relations Act. I would hold only that the terms of that accommodation do not entirely deprive the federal courts of all power to grant any relief to an employer, threatened with irreparable injury from a sympathy strike clearly in violation of a collective bargaining agreement, regardless of the equities of his claim for injunctive relief pending arbitration.⁹¹

The views of Justice Stevens are well-founded. The question whether employees can honor a picket line is clearly, as the majority in *Buffalo Forge* recognized, a subject for arbitral determination.⁹² Requiring an employer to

⁸³ *Id.* at 401-02.

⁸⁴ *Id.* at 407.

⁸⁵ *Id.* at 408.

⁸⁶ *Id.* at 411-12.

⁸⁷ *Id.* at 412.

⁸⁸ *Id.* at 419 (Stevens, J., dissenting).

⁸⁹ *Id.*

⁹⁰ *Id.* at 417, 422.

⁹¹ *Id.* at 432.

⁹² *Id.* at 405. *Howard Electric Co. v. IBEW Local 570*, 423 F.2d 164, 166-67, 73 L.R.R.M. 2785, 2786 (9th Cir. 1970); *New England Master Textile Engravers*

go first to arbitration while allowing the work stoppage to continue not only frustrates the arbitral process, but also deprives the employer of the benefit of his bargain by making virtually meaningless the union's agreement not to strike. Granting injunctive relief, along the lines suggested in Justice Stevens' dissent, promotes the very policies which led the Court in *Boys Markets* to accommodate Norris-LaGuardia with section 301.⁹³

It is precisely this difference between the majority and the dissent in *Buffalo Forge* over the appropriateness of granting injunctive relief in sympathy strike situations that spawned the injunctive relief provisions of the labor law reform bills. H.R. 8410 and S. 2467 took different approaches to the problem of sympathy strikes. Under H.R. 8410, the Board would have had authority to seek injunctive relief, when it is in the "public interest," against strikes that violate express or implied no-strike clauses and that are not authorized or ratified by the labor organization representing the striking employees.⁹⁴ S. 2467 would have allowed an employer, not the Board, to secure injunctive relief when his employees, in violation of a no-strike agreement, refuse to cross a picket line not maintained by a labor organization in connection with a labor dispute, or engage in a strike which is not authorized, initiated, or ratified by a labor organization.⁹⁵

Guild, 9 Lab. Arb. 199, 201 (1947) (Wallen, Arb.); Amalgamated Lace Operative, 54 Lab. Arb. 140, 144 (1969) (Frey, Arb.).

⁹³ See *Buffalo Forge*, 428 U.S. at 415-24 (Stevens, J., dissenting).

⁹⁴ H.R. 8410 would have enabled the Board to seek injunctive relief in the following situations:

Sec. 12.

.....
(n) Where there exists an agreement between an employer and a labor organization, whether express or implied, not to strike, picket or lockout, the Board, if it finds that the public interest would be served thereby, shall have the power to petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where either or both of the parties reside or transact business, for such temporary injunctive relief or restraining order as is necessary to prevent any person not authorized by a representative of employees of the employer being struck or picketed within the meaning of subsection (a) of section 9 from engaging in, or inducing or encouraging any employee of the employer to engage in, conduct in breach of such agreement, irrespective of the nature of the dispute underlying such strike, picket or lockout, and such court shall have jurisdiction to grant to such party or the Board such temporary injunctive relief or restraining order as it deems just and proper.

H.R. 8410, 95th Cong., 1st Sess. § 12, 123 CONG. REC. H10710 (daily ed. Oct. 6, 1977).

⁹⁵ S. 2467 would have enabled employers to secure injunctive relief in the following situations:

Sec. 13.

.....
(f) (1) Where there is in effect a collective-bargaining contract between an employer and a labor organization which is the representative of employees under section 9(a) of this Act, the courts of the United States shall, notwithstanding the limitations stated in the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (29

Although the injunctive relief provisions of the House and Senate bills were satisfactory to the extent they went, they fell far short of granting employers effective enforcement of a union's agreement not to strike during the term of a collective bargaining agreement. Both bills were drafted to essentially deal with the problem of wildcat strikes and stranger picketing, rather than the broader issue of enforcing no-strike agreements regardless of the nature or cause of the dispute.⁹⁶ While it is clear that the final decision whether a strike violates a no-strike agreement is for an arbitrator to make, it is equally clear that an employer needs a preliminary decision and relief from a court pending an arbitrator's decision. Unless an employer can secure preliminary relief, he is deprived of the benefit of his bargain.

There are at least four reasons for authorizing the courts to give preliminary injunctive relief for all strikes in violation of no-strike agreements.⁹⁷ First, to allow a work stoppage to continue until arbitration is complete renders meaningless the union's agreement not to strike. An arbitrator's award generally cannot compensate an employer for the harm inflicted by a strike which may last weeks pending the arbitrator's decision. Second, early enforcement of a union's agreement not to strike promotes the national labor policy of preserving labor peace.⁹⁸ Third, as Justice Stevens noted in his dissent in *Buffalo Forge*,⁹⁹ the experience since the passage of Norris-LaGuardia has dispelled any concern about the impartiality of federal judges in labor disputes and disproved the notion that judges are less capable than arbitrators of preliminarily interpreting collective bargaining agreements.¹⁰⁰

U.S.C. 101-115), but subject to the limitations stated herein, have the authority in a civil action brought by that employer to restrain (A) a concerted refusal in breach of that contract to cross a picket line not maintained by a labor organization in connection with a labor dispute; or (B) a concerted refusal to work in a breach of that contract (and concerted activity in furtherance thereof) that is neither initiated, authorized, nor ratified by the labor organization, where a refusal to cross a picket line maintained by a labor organization in connection with a labor dispute is not involved. S. 2467, 95th Cong., 2d Sess. § 13, 124 CONG. REC. S7528 (daily ed. May 16, 1978). The Senate Human Resources Committee Report indicated that employees could also secure injunctive relief in accordance with existing judicial precedents. S. REP. NO. 628, 95th Cong., 2d Sess. 33 (1978). While the Committee Report made this assertion, the language of S. 2467 was far from clear on this point. Rather, the language suggested that if a union authorized a strike, regardless of the nature of the dispute, injunctive relief was unavailable.

⁹⁶ 124 CONG. REC. H10709 (daily ed. Oct. 6, 1977) (remarks of Rep. Erlenborn); S. REP. NO. 628, 95th Cong., 2d Sess. 33 (1978).

⁹⁷ One bill introduced in Congress this year would have allowed direct enforcement of express or implied no-strike clauses, regardless of the nature of the dispute giving rise to the strike. S. 1983, 95th Cong., 1st Sess., 123 CONG. REC. S13300-06 (1977).

⁹⁸ 29 U.S.C. § 151 (1976).

⁹⁹ 428 U.S. 397, 432 (1976) (Stevens, J., dissenting).

¹⁰⁰ *Id.* To protect the rights of striking unions, federal judges routinely apply some of the procedural provisions of the Norris-LaGuardia Act, as well as traditional equitable principles, in section 301 injunctive actions. *United States Steel Corp. v. UMW*, 519 F.2d 1236, 1245-46, 90 L.R.R.M. 2539, 2544-45 (5th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976); *United States Steel Corp. v. UMW*, 456 F.2d 483, 487-89, 79

Finally, many collective bargaining agreements specify that only an employee may invoke the grievance procedure. Under such an agreement, an employer may not be able to secure a court order compelling a striking union to arbitrate the issue whether its strike violates a no-strike provision. Hence, unless a union itself chooses to invoke the grievance procedure—an unlikely event—an employer may be unable to obtain an arbitrator's decision which he can subsequently enforce by court-ordered injunction. To ensure that the availability of injunctive relief to enforce no-strike clauses is not dependent on whether the employer can invoke the grievance process,¹⁰¹ preliminary injunctive relief must be available whenever there is a strike in violation of a no-strike clause.

In addition to the strong legal arguments, there are practical reasons for authorizing preliminary injunctive relief for all strikes in violation of no-strike clauses. Contrary to the Court's assertion in *Buffalo Forge*, an authorization to bring such suits will not affect the courts' caseload.¹⁰² At present, courts often must conduct two proceedings when a union strikes in violation of a no-strike clause: one to compel a reluctant union to invoke the arbitral process to determine the applicability of the no-strike clause, and another to enforce the arbitrator's decision.¹⁰³ A proceeding to consider a request for preliminary injunctive relief simply would replace the proceeding to compel arbitration since the imposition of an injunction alone would compel most unions to invoke arbitration.

The effective enforcement of collective bargaining agreements which are freely struck—including the enforcement of no-strike clauses—should be a major goal of labor legislation. As I demonstrated above, preliminary injunctive relief for violations of no-strike clauses is essential to ensure that an employer gets the benefit of his bargain, something which neither H.R. 8410 or S. 2467 accomplished. To ensure that an employer gets the full benefit of his bargain, future legislative proposals must provide employers preliminary injunctive relief for all strikes in violation of collective bargaining agreements.

L.R.R.M. 2518, 2520-22 (3d Cir.), *cert. denied*, 408 U.S. 923 (1972); *New York Telephone Co. v. Communication Workers*, 445 F.2d 39, 49-50, 77 L.R.R.M. 2785, 2792 (2d Cir. 1971).

¹⁰¹ In *Boys Markets* cases, an employer's right to injunctive relief does not depend on whether he can invoke the grievance procedures. *Avco Corp. v. Local 787, UAW*, 459 F.2d 968, 972-73, 80 L.R.R.M. 2290, 2292-93 (3d Cir. 1972). See Smith, *The Supreme Court, Boys Markets Labor Injunctions and Sympathy Work Stoppages*, 44 U. CHI. L. REV. 321, 349-51 (1977).

¹⁰² The majority in *Buffalo Forge* expressed concern over the number of cases that would be filed if it granted injunctive relief. 428 U.S. 397, 411 n.12 (1976). While the Court cited the large number of workers covered by collective bargaining agreements, this figure is not relevant from the standpoint of estimating how many new cases would arise if the Court had sanctioned injunctive relief in *Buffalo Forge*. *Id.* at 414 n.3 (Stevens, J., dissenting). For a discussion of other statistics bearing on this issue, see Smith, *The Supreme Court, Boys Markets Labor Injunctions and Sympathy Work Stoppages*, 44 U. CHI. L. REV. 321, 348-49 (1977).

¹⁰³ See, e.g., *Buffalo Forge*, 428 U.S. 397, 405 (1976).

III. MAKE-WHOLE REMEDY

One of the fundamental principles on which the National Labor Relations Act is based is that of free collective bargaining.¹⁰⁴ The principle of free collective bargaining requires recognition of the corollary principle that government intervention in the collective bargaining process is prohibited. Employers and unions should be free "to establish, through collective negotiations, their own charter for the ordering of industrial relations . . ." ¹⁰⁵ The principle of free collective bargaining led the Supreme Court to conclude in *H.K. Porter Co. v. NLRB*¹⁰⁶ that the Board is powerless to impose contractual provisions or wage increases on employers who unlawfully refuse to bargain with a union. The Court held that although the Board can require employers and employees to bargain, it cannot compel either party to agree to a substantive contractual provision.¹⁰⁷

The Board took the principles established in *H.K. Porter* one step further in *Ex-Cell-O Corp.*¹⁰⁸ The Board held that despite section 10(c) of the National Labor Relations Act, which directs the Board "to take such affirmative action . . . as will effectuate the policies of this [Act],"¹⁰⁹ it could not order an employer to compensate his employees for the financial losses they suffered as a result of his refusal to bargain.¹¹⁰ The Board concluded that the imposition of a make-whole remedy was essentially "a form of punishment for [an employer] having elected to pursue a representation question beyond the Board and to the courts."¹¹¹ Moreover, the Board reasoned that an award of make-whole relief would require it to speculate as to what the parties would have agreed upon had they engaged in bargaining, and would thereby cause the Board to violate the principle established in *H.K. Porter* against determining substantive contract terms.¹¹² The Board thus found itself powerless to award a make-whole remedy.¹¹³

Just prior to the Board's decision in *Ex-Cell-O*, the United States Court of Appeals for the District of Columbia held in *NLRB v. Tiidee Products, Inc.*¹¹⁴ that a make-whole remedy is appropriate in situations where an employer's refusal to bargain rests on "patently frivolous"—as opposed to

¹⁰⁴ *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970); *NLRB v. American National Insurance Co.*, 343 U.S. 395, 401-04 (1952). See generally Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA. L. REV. 467 (1964).

¹⁰⁵ *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959).

¹⁰⁶ 397 U.S. 99 (1970).

¹⁰⁷ *Id.* at 102.

¹⁰⁸ 185 N.L.R.B. 107, 74 L.R.R.M. 1740 (1970), *enforced*, 449 F.2d 1058, 77 L.R.R.M. 2547 (D.C. Cir. 1971).

¹⁰⁹ 29 U.S.C. § 160(c) (1976).

¹¹⁰ 185 N.L.R.B. at 108, 74 L.R.R.M. at 1741.

¹¹¹ *Id.* at 109, 74 L.R.R.M. at 1742.

¹¹² *Id.* at 109-10, 74 L.R.R.M. at 1743.

¹¹³ *Id.* at 110, 74 L.R.R.M. at 1743.

¹¹⁴ 426 F.2d 1243, 73 L.R.R.M. 2870 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970), *on remand*, 194 N.L.R.B. 1234, 79 L.R.R.M. 1175 (1972), *modified and rehearing denied*, 502 F.2d 349, 86 L.R.R.M. 2093 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 991 (1975).

"debatable"—objections to a representation election.¹¹⁵ The *Ex-Cell-O* Board, however, refused to adopt the *Tüdee* court's distinction between "frivolous" and "debatable" as a reasoned standard for determining when make-whole relief is warranted.¹¹⁶

Labor law reform bills H.R. 8410 and S. 2467 would have altered the Board's remedial role in the area of collective bargaining by enabling it to award, in cases where there has been an unlawful refusal to bargain in a first contract situation, compensation to bargaining unit employees for the delay caused by the unfair labor practice.¹¹⁷ The make-whole remedy provisions of

¹¹⁵ 426 F.2d at 1248, 73 L.R.R.M. at 2873.

¹¹⁶ 185 N.L.R.B. at 109, 74 L.R.R.M. at 1742. On petition for review by the UAW, the District of Columbia Circuit reproached the Board for disregarding the court's earlier decision in *Tüdee*. *Auto Workers v. NLRB*, 449 F.2d 1046, 1049, 76 L.R.R.M. 2753, 2755 (D.C. Cir. 1971). The court remanded the case to the Board for a determination whether the employer's refusal to bargain was caused by a "frivolous" or a "debatable" objection to certification. *Id.* at 1050, 76 L.R.R.M. at 2755. However, before the Board had a chance to decide the case on remand, the District of Columbia Circuit enforced the Board's previous order on a separate petition for review by the employer. *Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1048, 77 L.R.R.M. 2547 (D.C. Cir. 1971). The court of appeals made an independent examination of the record, and concluded that make-whole relief was inappropriate since the employer's claims were "fairly debatable." *Id.* at 1064-65, 77 L.R.R.M. at 2551-52.

¹¹⁷ The make-whole provision of H.R. 8410 provided:

In a case in which the Board determines that an unlawful refusal to bargain prior to the entry into the first collective-bargaining contract between the employer and the representative selected or designated by a majority of the employees in the bargaining unit has taken place, the Board may award to the employees in that unit compensation for the delay in bargaining caused by the unfair labor practice which shall be measured by the difference between (i) the wages and other benefits received by such employees during the period of delay, and (ii) the wages and fringe benefits such employees were receiving at the time of the unfair labor practice multiplied by the percentage change in wages and other benefits stated in the Bureau of Labor Statistics' average wage and benefit settlements, quarterly report of major collective-bargaining settlements, for the quarter in which the delay began. If the Secretary of Labor certifies to the Board that the Bureau has, subsequent to the effective date of the Labor Reform Act of 1977, instituted regular issuance of a statistical compilation of bargaining settlements which the Secretary determines would better effectuate the purposes of this subsection than the compilation specified herein, the Board shall, in administering this subsection, use the compilation certified by the Secretary.

H.R. 8410, 95th Cong., 1st Sess. § 8, 123 CONG. REC. H10676-77, H10702-06 (daily eds. Oct. 5-6, 1977).

The make-whole provision of S. 2467 provided:

(3)(A) In a case in which the Board determines that an unlawful refusal to bargain prior to the entry into the first collective-bargaining contract between the employer and the representative selected or designated by a majority of the employees in the bargaining unit has taken place, the Board may enter an order pursuant to paragraph (1) of this subsection which includes an award to the employees in that unit of compensation for the delay in bargaining caused by the unfair labor practice in an amount equal to the difference per hour during the period of delay between

the House and Senate bills proceeded on the notion that the Board's remedial authority is not effective in refusal to bargain cases.¹¹⁸ Critics of the present legislative scheme have argued that an employer can evade his legal obligation to bargain in good faith with little or no risk and, therefore, that a compensatory remedy is necessary.¹¹⁹

The make-whole provisions of H.R. 8410 and S. 2467 were seriously flawed. One problem raised by the bills was that they ignored the distinction recognized by the *Tiidee* court between a refusal to bargain to secure judicial review of an NLRB decision and a refusal to bargain for illicit or frivolous reasons.¹²⁰ The bills failed to specify the types of conduct which warranted make-whole relief.¹²¹ At best, this lack of guidance would have forced the Board to speculate as to the legitimacy of an employer's reason for refusing to bargain. At worst, it would have permitted the Board to impose make-whole relief even where an employer's motives were justifiable. As a result of the bills' failure to provide guidelines for the imposition of make-whole relief, employers with legitimate claims would have been discouraged from refusing to bargain in order to secure judicial review of a Board decision. The problem is particularly acute because a refusal to bargain is the only method by which an employer can challenge an NLRB representation decision.¹²²

There were also a number of practical problems with the make-whole remedy proposals. One problem was that the House and Senate bills determined the make-whole remedy by reference to the Bureau of Labor Statistics' average wage and benefit settlements index.¹²³ This index covers only wage

(i) the wages and other benefits such employees were receiving at the time of the unfair labor practice increased by a percentage equal to the change in wages and other benefits stated in the Bureau of Labor Statistics' average wage and benefits settlements, quarterly report of major collective-bargaining settlements, for the quarter in which the delay began and (ii) the wages and other benefits actually received by such employees during that period. If the Secretary of Labor certifies to the Board that the Bureau has, subsequent to the effective date of the Labor Law Reform Act of 1978, instituted regular issuance of a statistical compilation of bargaining settlements which the Secretary determines would better effectuate the purposes of this subsection than the compilation specified herein, the Board shall, in administering this subsection, use the compilation certified by the Secretary.

S. 2467, 95th Cong., 2d Sess. § 9, 124 CONG. REC. S7527 (daily ed. May 16, 1978).

¹¹⁸ See H.R. REP. NO. 637, 95th Cong., 1st Sess. 39-42 (1977). See generally Schlossberg & Silard, *The Need For a Compensatory Remedy in Refusal-to-Bargain Cases*, 14 WAYNE L. REV. 1059 (1968); Note, *An Assessment of the Proposed "Make-Whole" Remedy in Refusal to Bargain Cases*, 67 MICH. L. REV. 374 (1968).

¹¹⁹ See, e.g., Morris, *The Role of the NLRB and the Courts in the Collective Bargaining Process: A Fresh Look at Conventional Wisdom and Unconventional Remedies*, 30 VAND. L. REV. 661, 677-83 (1977).

¹²⁰ See text at notes 114-16 *supra*.

¹²¹ See note 117 *supra*.

¹²² See *Boire v. Greyhound Corp.*, 376 U.S. 473, 478-79 (1964).

¹²³ See note 117 *supra*. The Bureau of Labor Statistics' (BLS) report used in calculating the make-whole remedies in S. 2467 and H.R. 8410 was developed in 1966. BLS measures the effect of collective bargaining decisions on hourly labor costs based

and benefit settlements for bargaining units containing over five thousand employees.¹²⁴ Since most Board bargaining units contain fewer than sixty employees,¹²⁵ H.R. 8410 and S. 2467 would have imposed on an employer a make-whole remedy which probably has no relevance to his particular bargaining situation.¹²⁶ Moreover, the make-whole award would set the floor for wage demands in the next round of bargaining even though it might be more than the employer would agree to otherwise and more than he could afford.¹²⁷

The difficulties associated with a standardized wage index illustrate a more fundamental problem with the make-whole relief proposals: bargaining agreements cannot be cast in a generalized mold. Bargaining agreements reflect a myriad of circumstances and conditions which vary from negotiation to negotiation. In first contract situations, the agreement often reflects trading in such non-economic areas as seniority, grievance handling and arbitration, union security, and dues checkoff, and in such economic areas as pensions, holidays, vacations, shift differentials, and cost of living increases. The vice of make-whole remedies is that they either require the Board to speculate *post hoc* on what wage and benefit package would have been agreed upon, or, as in H.R. 8410 and S. 2467, impose a standardized wage which is irrelevant to the situation at hand.

Remedies, short of make-whole relief, can be imposed on employers who flaunt their obligation to bargain in good faith. For example, the Board can order recalcitrant employers to pay a union's attorney's fees, litigation expenses, and bargaining expenses.¹²⁸ Federal courts can also use their contempt powers for willful and repeated violations of Board orders.¹²⁹ Alternatively, Congress could provide for direct review of Board representation deci-

on certain assumptions and estimates. Factors which may limit the preciseness of the estimates are forecasts of employee response to contract changes; assumptions about amortization of liberalized pension benefits for prior service; and estimates in the cost of changes in vacation and other benefit provisions based on workers' length of service. For a discussion of how BLS estimates settlement costs, see David and Sheifer, *Estimating the Cost of Collective Bargaining Settlements*, 92 MONTHLY LAB. REV. 16 (June, 1969).

¹²⁴ S. REP. NO. 628, 95th Cong., 2d Sess. 17 (1978).

¹²⁵ See 42 NLRB ANN. REP. 306-07 (1977).

¹²⁶ Senator Byrd recognized this problem and introduced a substitute bill to correct it. See 124 CONG. REC. S8814-18 (daily ed. June 8, 1978). This bill utilized the Bureau of Labor Statistics' employment cost index (ECI) for occupations covered by collective bargaining agreements. The ECI is based on a sample of collective bargaining agreements in units of all sizes and is weighted to reflect the proportionate number of units in which collective bargaining occurs by size.

¹²⁷ See NOTE, *An Assessment of the Proposed "Make-Whole" Remedy in Refusal-to-Bargain Cases*, 67 MICH. L. REV. 374, 388-89 (1968); *The Supreme Court, 1969 Term—NLRB Remedial Power to Impose Contract Terms*, 84 HARV. L. REV. 202, 210-11 (1970).

¹²⁸ See generally MORRIS, *The Role of the NLRB and the Courts in the Collective Bargaining Process: A Fresh Look at Conventional Wisdom and Unconventional Remedies*, 30 VAND. L. REV. 661, 678-87 (1977).

¹²⁹ See *NLRB v. J.P. Stevens & Co.*, 563 F.2d 8, 25, 96 L.R.R.M. 2150, 2162 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978).

sions, thereby eliminating the problem of employers refusing to bargain to obtain judicial review. Congress also could authorize the Board to impose fines on employers and unions who repeatedly evade their bargaining obligations.

The National Labor Relations Procedures and Remedies Act¹³⁰ contained another, although wholly unsatisfactory, alternative to make-whole relief. The Chairman of the Senate Human Resources Committee introduced the legislation after it became apparent that S. 2467 was doomed. Under this proposal, the Board would have been authorized to seek a district court injunction if there is reasonable cause to believe that an employer or a union is refusing to bargain prior to execution of its first collective bargaining agreement.¹³¹ This alternative proposal was defective primarily because it, like the make-whole remedy proposal, drew no distinction between employers who refuse to bargain for illicit reasons and those who refuse to bargain to obtain judicial review of Board representation decisions. Under the alternative proposal, employers might have had to argue their objections to a representation decision in two tribunals—the district court in defense to the action for an injunction, and the court of appeals in defense to an unfair labor practice charge. A district court order to bargain would certainly have rendered hollow a later appellate court decision setting aside a union certification. Furthermore, by giving district courts the authority to order an employer to bargain over a particular subject, the alternative proposal would have thrust the courts directly into the bargaining arena. Hence, both the injunctive relief proposal of the Procedures and Remedies Act and the make-whole relief provisions of H.R. 8410 and S. 2467 intruded impermissibly on the collective bargaining process and thereby violated one of the fundamental principles on which the National Labor Relations Act is based—free collective bargaining.

CONCLUSION

The recent congressional efforts at labor reform were totally unsatisfactory from a management perspective. It is evident that the suggested reforms stemmed from a narrow congressional bias in favor of the interests of labor. If the proposals had passed, they would have dislocated the careful balance between the rights of labor and those of management which our national labor laws have attempted thus far to preserve. I am not implying by my criticism of the recent efforts at reform that Congress should forego all labor law revision. Future pursuit of reform, however, must entail more than recitation of alleged management abuses and the proposal of a series of major changes responsive primarily to labor's interests.

I began this article with the hope that it would highlight some of the problems that exist with selected provisions of the recent labor reform proposals. I end this article with the hope that Congress, too, will examine critically all future labor reform proposals and ensure that the proposals it adopts protect the important rights of both labor and management.

¹³⁰ [1978] DAILY LAB. REP. (BNA) E-1 (Sept. 25, 1978).

¹³¹ *Id.*