Cornell Law Review

Volume 63
Issue 3 *March 1978*

Article 7

Labor Law-Injuctions-Court May Enjoin Sympathy Strike Where Purpose and Effect Is to Compel Concession of Arbitrable Issue

Jonathan Craig Thau

Labor Law—Injunctions—COURT MAY ENJOIN SYMPATHY STRIKE WHERE PURPOSE AND EFFECT IS TO COMPEL CONCESSION OF ARBITRABLE ISSUE

Cedar Coal Co. v. UMW Local 1759,
560 F.2d 1153 (4th Cir. 1977), *cert. denied*,
46 U.S.L.W. 3467 (Jan. 23, 1978) (No. 77-796).

In *Cedar Coal Co. v. UMW Local 1759*,[1] the Fourth Circuit held that a court may enjoin a sympathy strike[2] the object of which is to compel an employer to concede an arbitrable issue to the primary strikers.[3] The decision is significant in two ways. First, *Cedar Coal* seemingly conflicts with the Supreme Court's recent rejection of a sympathy strike injunction in *Buffalo Forge Co. v. United Steelworkers*.[4] Careful analysis reveals, however, that *Cedar Coal* comports with the policy concerns underlying recent Supreme Court action in the labor injunction area. Second, and more important, the *Cedar Coal* standard for invoking injunctive relief differs markedly from that employed in earlier court of appeals decisions.[5] This fresh approach provides a useful and rationally supportable principle for courts to apply when asked to enjoin secondary work stoppages.

I

HISTORICAL PERSPECTIVE

Early in this century the federal judiciary's unrestrained use of anti-union injunctions threatened the existence of organized labor.[6] In 1932, Congress responded by enacting the Norris-LaGuardia Act,[7] prohibiting federal courts from granting injunc-

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[1] 560 F.2d 1153 (4th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3467 (Jan. 23, 1978) (No. 77-796).

[2] A sympathy strike occurs where one union honors picket lines established by another union, and stops work itself. *See, e.g.*, Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 399-405 (1976). Thus, a sympathy strike does not involve an independent dispute between the union honoring the picket line and the employer against whom the other union is striking. The sympathy strikers' work stoppage is based solely upon their desire to support the other union.

[3] 560 F.2d at 1168-71.

[4] 428 U.S. 397 (1976).

[5] *See* notes 19-24 and accompanying text *infra*.

[6] *See* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 66-133 (1930). Employers had little difficulty securing wide-ranging injunctive relief against strikes. *See id.* at 86-89.

[7] Pub. L. No. 65, 47 Stat. 70 (current version at 29 U.S.C. §§ 101-115 (1970)).

tive relief against strikes.[8] But, "[a]s labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes."[9] In 1947, Congress enacted the Taft-Hartley Act,[10] which amended the National Labor Relations Act of 1935[11] and granted federal district courts jurisdiction over suits arising from the violation of collective bargaining agreements.[12]

The Taft-Hartley Act created a fundamental conflict in federal

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[8] Section 4 of the Norris-LaGuardia Act provides in part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
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> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
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> . . . .
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> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> . . . .
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . .

29 U.S.C. § 104 (1970).

[9] Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 251 (1970).

[10] Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-187 (1970)). The Taft-Hartley Act sought to forestall the widespread economic disruption that accompanies long-term industrial strife. Section 1(b) of the Act provides in pertinent part:

> It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers . . . to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 141(b) (1970).

[11] Pub. L. No. 198, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-167 (1970 & Supp. V 1975)).

[12] Section 301(a) of the Taft-Hartley Act (29 U.S.C. § 185(a) (1970)) provides in part:

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

For a comprehensive discussion of the legislative history of § 301, see Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 485-546 (1957) (dissenting opinion, Frankfurter, J.) (app.).

labor policy: protecting collective bargaining agreements frequently necessitated the use of equitable remedies proscribed by the Norris-LaGuardia Act. In *Boys Markets, Inc. v. Retail Clerks Local 770*,[13] the Supreme Court sought to accommodate these conflicting goals. The collective bargaining agreement in *Boys Markets* contained a binding arbitration clause and an express no-strike provision. When the union refused to accept an arbitrated resolution of a dispute and went on strike, the employer sought an injunction. Overruling a decision in point,[14] *Boys Markets* held that section 4 of the Norris-LaGuardia Act was not an absolute bar to all injunctive relief.[15] Emphasizing the strong federal policy favoring arbitral resolution of labor disputes,[16] the Court stated that section 4's

[13] 398 U.S. 235 (1970).

[14] *Boys Markets* overruled Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962). *See* 398 U.S. at 238. In *Sinclair* an employer brought a § 301 suit to enjoin a strike that allegedly violated the compulsory arbitration provision of a collective bargaining agreement. Relying on § 4 of the Norris-LaGuardia Act (*see* note 8 *supra*), the Court denied injunctive relief. 370 U.S. at 203. The Court stressed that the enactment of § 301 did not restrict the applicability of the anti-injunction provisions of the Norris-LaGuardia Act, "[f]or the legislative history of § 301 shows that Congress actually considered the advisability of repealing the Norris-LaGuardia Act insofar as suits based upon breach of collective bargaining agreements are concerned and deliberately chose not to do so." *Id.* at 205. This congressional inaction, the Court concluded, compelled a strict application of the Norris-LaGuardia Act's prohibition against anti-strike injunctions. *Id.* at 209-10.

The majority position in *Sinclair* drew a vigorous dissent from Justice Brennan. He warned that "[i]nsistence upon strict application of Norris-LaGuardia to a strike over a dispute which both parties are bound by contract to arbitrate threatens a leading policy of our labor relations law." *Id.* at 225. Taking a policy-oriented view of statutory interpretation, Justice Brennan stressed the need for an accommodation between the contradictory provisions of the Norris-LaGuardia and Taft-Hartley Acts. *Id.* at 215-25. When faced with a conflict between statutes, he reasoned, the Court should "so exercise its judgment as best to effect the most important purposes of each statute. It should not be bound by inscrutable congressional silence to a wooden preference for one statute over the other." *Id.* at 224. The Court split five to three, Justice Frankfurter taking no part in the decision. *Id.* at 215.

[15] *See* 398 U.S. at 240-55. Justice Brennan wrote the majority opinion, in which five other Justices joined. *Id.* at 237. Justice Stewart, who joined in the majority opinion, also filed a brief concurrence. *Id.* at 255. Justices Black and White each filed dissenting opinions (*id.*; *id.* at 261), and Justice Marshall took no part in the decision (*id.* at 255).

[16] *See id.* at 241-43. *See also* 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). These three decisions, popularly known as the *Steelworkers' Trilogy*, definitively established the primacy of arbitration as a dispute-resolution mechanism and de-emphasized the supervisory role of the federal judiciary. The Supreme Court stated:

> [T]o be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 [of the Taft-Hartley Act] 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

terms "must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law . . . ."[17] The Court stressed, however, that its holding was a "narrow one," confined to situations "in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure."[18]

The courts of appeals split sharply over the proper application of *Boys Markets* to sympathy strike cases. The Second, Fifth, and Sixth Circuits read the case narrowly. They refused to grant injunctive relief unless the strike was "over" an arbitrable dispute.[19] This narrow focus invariably presaged denial of injunctive relief in the sympathy strike context.[20] The Third,[21] Fourth,[22] and Eighth[23]

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the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

[17] 398 U.S. at 250.

[18] *Id.* at 253. The Court noted that the injunctive remedy would not be appropriate in every instance of a strike over an arbitrable grievance; the employer's willingness to arbitrate must coincide with the threat of irreparable injury traditionally required for equitable relief. *Id.* at 254. The *Boys Markets* majority adopted a passage from Justice Brennan's *Sinclair* dissent (*see* note 14 *supra*) as stating the test to be applied in determining the appropriateness of injunctive relief:

> 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. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.

398 U.S. at 254 (quoting Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 228 (1962) (dissenting opinion, Brennan, J.) (emphasis in original)).

[19] *See, e.g.*, Plain Dealer Pub. Co. v. Cleveland Typographical Union, 520 F.2d 1220, 1228 (6th Cir. 1975) (per curiam) (app.), *cert. denied*, 428 U.S. 909 (1976); Buffalo Forge Co. v. United Steelworkers, 517 F.2d 1207, 1210 (2d Cir. 1975), *aff'd*, 428 U.S. 397 (1976); Amstar Corp. v. Amalgamated Meat Cutters & Butcher Workmen, 468 F.2d 1372, 1373 (5th Cir. 1972). Justice Brennan coined the "over an arbitrable grievance" test in his *Sinclair* dissent. *See* 370 U.S. at 228. The test was adopted by the majority in *Boys Markets*. *See* 398 U.S. at 254.

[20] *See* notes 61-65 and accompanying text *infra*.

[21] *See, e.g.*, Island Creek Coal Co. v. UMW, 507 F.2d 650 (3d Cir.), *cert. denied*, 423

Circuits read *Boys Markets* more broadly; where comprehensive arbitration provisions applied, courts in these circuits were quick to enjoin sympathy strikes. The Seventh Circuit embraced an intermediate approach.[24]

Buffalo Forge Co. v. United Steelworkers[25] provided the Supreme Court with an opportunity to resolve this conflict among the circuits. The company's production and maintenance employees worked under a collective bargaining agreement that contained an express no-strike clause and mandatory arbitration provisions. The office and technical employees of the same company struck when negotiations leading toward their first collective bargaining agreement broke down. All parties agreed that this "strike and [accompanying] picket line were bona fide, primary, and legal."[26] When the production and maintenance workers honored the picket line, the company sued to enforce that union's no-strike obligation. Emphasizing the limited scope of *Boys Markets*, the five-man *Buffalo Forge* majority[27] held that the sympathy strike could not be enjoined pending the arbitrator's construction of the production and maintenance workers' no-strike clause:

U.S. 877 (1975); NAPA Pittsburgh, Inc. v. Automobile Chauffeurs Local 926, 502 F.2d 321 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1049 (1974). The *Island Creek* court emphasized the breadth of the compulsory arbitration provisions of the National Bituminous Coal Wage Agreement, the applicable collective bargaining accord. 507 F.2d at 653-54. The collective bargaining agreement in *NAPA* contained a provision that explicitly permitted the union to honor a "primary" picket line; the dispute there focused upon the proper construction of "primary." 502 F.2d at 322-24.

[22] *See, e.g.*, Armco Steel Corp. 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 (1974); Monongahela Power Co. v. Electrical Workers, 484 F.2d 1209 (4th Cir. 1973).

[23] *See, e.g.*, Valmac Indus. v. Food Handlers Local 425, 519 F.2d 263 (8th Cir. 1975), *vacated*, 428 U.S. 906 (1976).

[24] Noting that the collective bargaining agreement in question contained an "exceptionally broad" arbitration clause, the Seventh Circuit upheld the issuance of injunctive relief against a sympathy strike in Inland Steel Co. v. Local 1545, UMW, 505 F.2d 293, 298 (7th Cir. 1974). *But see* Hyster Co. v. Independent Towing Ass'n, 519 F.2d 89 (7th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976); Gary Hobart Water Corp. v. NLRB, 511 F.2d 284 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975). In *Hyster* and *Gary Hobart*, the court denied injunctive relief where the relevant arbitration clauses were narrowly drawn. This examination of the scope of the applicable arbitration clause was similar to the approach adopted by the Third, Fourth, and Eighth Circuits. It is important to note, however, that these circuits generally granted injunctions. In contrast, the Seventh Circuit's cautious review of the scope of the arbitration clause in *Hyster* and *Gary Hobart* produced results similar to those reached by the Second, Fifth, and Sixth Circuits.

[25] 428 U.S. 397 (1976).

[26] *Id.* at 403.

[27] Justice White, a dissenter in *Boys Markets*, wrote the majority opinion. *Id.* at 399.

> *Boys Markets* plainly does not control this case. The District Court found, and it is not now disputed, that the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract. The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; neither its causes nor the issue underlying it was subject to the settlement procedures provided by the contracts between the employer and respondents. The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain.[28]

The Court stressed that enjoining the sympathy strike would not further the federal policy favoring arbitration of labor-management conflicts. The sympathy strike involved only one arbitrable issue: the applicability of the no-strike clause in the sympathy strikers' contract. A work stoppage pending arbitration of this issue would not, in the Court's view, induce the employer to concede it.[29] Moreover, the Court feared that a broad reading of *Boys Markets* might embroil the federal judiciary

> in a wide range of arbitrable disputes under the many existing and future collective-bargaining contracts, not just for the purpose of enforcing promises to arbitrate, which was the limit of *Boys Markets*, but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator and of issuing injunctions that would otherwise be forbidden by the Norris-LaGuardia Act.[30]

Justice Stevens, joined by three of his colleagues, filed a vigorous dissent.[31]

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[28] *Id.* at 407-08 (emphasis in original).

[29] *Id.* at 410. The Court's conclusion is sound; a strike pending an arbitrator's determination of the scope of a no-strike clause does not force the employer to concede the merits of a dispute. With a typical primary strike, an employer is confronted with ongoing economic loss that threatens to exceed the cost of capitulation. Hence, it is in the employer's interest to concede the arbitrable issue. In contrast, with a sympathy strike where the only issue is the applicability of a no-strike clause, an employer has no incentive to concede that the clause is inapplicable. Capitulation will serve only to condone the sympathy strike; the primary strike will continue regardless of the relationship between the sympathy strikers and their employer. As long as the primary strike continues and the sympathy strikers honor the picket line, the employer's economic loss continues. Moreover, to concede could cost the employer the eventual right to recover damages against the sympathy strikers, assuming the employer was not already faced with the loss of this right through a "no-reprisal" strike, *i.e.*, a strike threatened to continue until the employer agrees not to seek damages stemming from the sympathy work stoppage.

[30] *Id.* at 410-11 (footnote omitted).

[31] *Id.* at 413. Noting that "[a] contractual undertaking not to strike is the union's nor-

In short, *Boys Markets* carved out a significant exception to the anti-injunction provisions of the Norris-LaGuardia Act: primary strikes are enjoinable if the underlying dispute is subject to a binding arbitration clause. *Buffalo Forge* dealt with a different situation, holding that a court may not enjoin a sympathy strike when the dispute underlying the primary strike is not subject to binding arbitration. *Cedar Coal* posed a related, but unresolved, question—whether a court can enjoin a sympathy strike where the dispute underlying the primary strike is arbitrable.

II

CEDAR COAL CO. v. UMW LOCAL 1759

In *Cedar Coal Co. v. UMW Local 1759*,[32] a consolidation of three appeals,[33] the Fourth Circuit attempted to clarify the effect of *Buffalo Forge* on *Boys Markets*. In each of the consolidated cases, a district court had denied a preliminary injunction against work stoppages precipitated by a job classification grievance[34] brought by

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mal *quid pro quo* for the employer's undertaking to submit grievances to binding arbitration," Justice Stevens saw no reason to divide the union's no-strike duty into two "severable" obligations, one enforceable by injunction, the other not. *Id.* Stressing that "the policy favoring arbitration equally favors the making of enforceable agreements to arbitrate" (*id.* at 423), Justice Stevens argued that preliminary injunctive relief should be granted whenever there is "convincing evidence that the strike is clearly within the no-strike clause." *Id.* at 431. Such a policy, he asserted, "will not critically impair the vital interests of the striking local even if the right to strike is upheld." *Id.* at 429.

This last assertion is subject to serious challenge. The efficacy of a strike may turn on its timing. For example, a union that finds itself in an unfavorable bargaining position may conclude that its only opportunity to exert pressure upon its employer will be to strike during the time of year that its services are most needed. Agricultural workers might strike during the harvest season; department store workers just before Christmas. Should strikes of this sort be temporarily enjoined, a subsequent ruling upholding the union's right to strike will do little to protect the workers' interest.

[32] 560 F.2d 1153 (4th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3467 (Jan. 23, 1978) (No. 77-796).

[33] Cedar Coal Co. v. UMW Local 1766, No. 76-1785 (4th Cir. July 6, 1977); Cedar Coal Co. v. UMW Local 1759, No. 76-1793 (4th Cir. July 6, 1977); Southern Ohio Coal Co. v. UMW Local 1949, No. 76-1846 (4th Cir. July 6, 1977).

Nos. 76-1793 and 76-1785 were appeals from the United States District Court for the Southern District of West Virginia. No. 76-1846 was an appeal from the United States District Court for the Northern District of West Virginia.

[34] Subparagraph III, (a)(7) of the National Bituminous Coal Wage Agreement of 1974 provides: "The Employer shall station a responsible employee on the surface to communicate at all times with the employees when they are at work underground." 560 F.2d at 1156. The union contended that the "responsible employee" should be an individual hired for that specific purpose. The company maintained that the communications position "could be assigned as an additional duty to an employee holding an existing bargaining unit job." *Id.*

UMW Local 1759. The complex litigation began when an arbitrator rendered an incomplete decision that failed to fully define Cedar Coal's hiring obligations.[35] Rather than seek final resolution of the issue in arbitration,[36] the union struck in support of its view.[37] Alleging that Local 1759 had followed a "pattern and practice of refusing to submit . . . disputes . . . to peaceful settlement through grievance and arbitration procedures,"[38] Cedar Coal brought a section 301 suit seeking injunctive relief and damages.[39] The district court granted a temporary restraining order against the strike and set a date for a hearing on Cedar's application for a preliminary injunction.[40] The hearing, however, never occurred. Without explanation, the district court ordered an indefinite continuance[41] despite expiration of the temporary restraining order, effectively denying injunctive relief.

Soon after the primary strike began, pickets from Local 1759 appeared outside the entrance to two Cedar Coal mines under the jurisdiction of UMW Local 1766. Local 1766 honored the picket lines of its sister union, prompting Cedar Coal to seek injunctive relief against the sympathy strikers.[42] The district court dismissed

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[35] *Id.* at 1156-57. The arbitrator ruled that Cedar Coal was obligated to fill the communications job with a union member. He initially failed to decide, however, whether the surface position could be an "ancillary" assignment to an employee with other duties.

[36] Cedar Coal, Southern Ohio Coal, and the three striking UMW locals were all signatories to the National Bituminous Coal Wage Agreement of 1974 (*id.* at 1156, 1159, 1160), which includes the following broad dispute-resolution clause:

> ARTICLE XXVII—MAINTAIN INTEGRITY OF CONTRACT AND RESORT TO COURTS
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> The United Mine Workers of America and the employers agree and affirm that, except as provided herein, they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Disputes" Article of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract and by collective bargaining without recourse to the courts.

Id. at 1156.

[37] Local 1759 represented the employees working at five mines owned by Cedar Coal. At various times, the strike extended to certain mines without affecting others. Although the strikers returned to work on several occasions, hostilities intensified when Cedar Coal suspended two striking employees. *Id.* at 1156-57.

[38] *Id.* at 1157 (quoting Cedar Coal's complaint).

[39] *Id.* The text of § 301 is set out in part in note 12 *supra.*

[40] 560 F.2d at 1157.

[41] *Id.* at 1158.

[42] *Id.* at 1159.

the company's complaint on the pleadings.[43] While the litigation involving Locals 1759 and 1766 was proceeding, UMW pickets also appeared along the access road to a mine owned by Southern Ohio Coal Co.[44] Members of Local 1949, the UMW affiliate representing Southern's employees, honored the picket lines.[45] Southern brought suit against Local 1949, alleging that the union had "engaged in a willful and deliberate pattern of refusing and avoiding compliance with the arbitration and grievance procedures,"[46] resorting instead to frequent work stoppages. Motions for a temporary restraining order and a preliminary injunction accompanied Southern's complaint.[47] Relying on *Buffalo Forge*, the district court denied the motions.[48]

After rejecting two union challenges to its appellate jurisdiction,[49] the *Cedar Coal* court confronted the locals' contention that the injunctive aspects[50] of each case had become moot, as the strikes had ended during the pendency of the appeals.[51] Relying on the "capable of repetition, yet evading review" rule,[52] the court

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[43] *Id.* at 1160. Cedar's subsequent motion for an injunction pending appeal was denied. The company then appealed to Judge Widener for an injunction pending appeal. Judge Widener denied the motion, noting that *Buffalo Forge* left the outcome on appeal too uncertain to justify issuance of an injunction. *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* (quoting Southern's complaint).

[47] *Id.*

[48] *Id.* Southern appealed the district court decision and sought an injunction pending appeal. *Id.* at 1160-61.

[49] First, Local 1766 argued that the district court order dismissing Cedar Coal's complaint was not appealable under 28 U.S.C. § 1291 (1970). That statute provides in part: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." The union contended that the district court ruling was not a final decision because subsequent amendment of Cedar Coal's complaint might be permitted. 560 F.2d at 1161. Noting that the transcript indicated "that the order was intended to be in all respects final," the court quickly disposed of the union's contention. *Id.* Second, Local 1759 asserted that the indefinite continuance of Cedar Coal's motion for a preliminary injunction was not a denial of injunctive relief, and thus was not an appealable interlocutory decision under 28 U.S.C. § 1292(a)(1) (1970). The court rejected this argument. Under the given facts, the court observed, the indefinite continuance was tantamount to an outright refusal to grant injunctive relief. 560 F.2d at 1161-62.

[50] Local 1766 did not argue that Cedar Coal's claim for damages was moot. 560 F.2d at 1162.

[51] *Id.*

[52] Under the "capable of repetition, yet evading review" rule the temporary cessation of challenged conduct does not render a dispute moot. The Supreme Court formulated this principle in Southern Pac. Terminal Co. v. ICC, 219 U.S. 498 (1911), which held that the ICC could not evade appellate review by issuing a series of short-term orders. *Id.* at 515.

found appellate review appropriate: the work stoppages were recurrent, but always ended before the injunction issue could reach the appellate court.[53] This result reflected the court's conviction that short-term work stoppages subverted the pro-arbitration policy underlying *Boys Markets*.[54] The procedural ruling presaged the court's decision on the merits.

In addressing the substantive issues, the *Cedar Coal* court carefully distinguished among the three groups of strikers. Considering first the primary strikers, the court quickly concluded that Local 1759's actions satisfied the *Boys Markets* test for injunctive relief.[55] Given the unquestioned arbitrability of the underlying dispute and

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The employers in *Cedar Coal* argued that the "capable of repetition, yet evading review" rule should apply because the union members had repeatedly engaged in strikes and work stoppages in derogation of their contractual obligations to arbitrate grievances and because this conduct was likely to recur. 560 F.2d at 1165-66. The *Cedar Coal* court accepted the substance of this argument. Since the employers' complaints had been dismissed without adjudication on the merits, the court accepted their allegations regarding repeated union strikes and work stoppages as true. *See id.* at 1165. The court then relied upon Sosna v. Iowa, 419 U.S. 393 (1975), and Weinstein v. Bradford, 423 U.S. 147 (1975), for a current formulation of the "capable of repetition, yet evading review" doctrine. According to the *Weinstein* Court:

> *Sosna* decided that in the absence of a class action, the "capable of repetition, yet evading review" doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

Id. at 149. The *Cedar Coal* court concluded that both requisites were satisfied. *See* 560 F.2d at 1165-66.

The unions in *Cedar Coal* had maintained that their employers' reliance on the "capable of repetition, yet evading review" rule was misplaced. Their view was that this doctrine only applied where a governmental interest was involved. *Id.* at 1167. The court rejected this contention. "As a matter of principle, we doubt that a court is any less obliged to do justice between man and man than between citizen and sovereign." *Id.* Moreover, the court noted that the result would be the same under the narrow construction advanced by the unions:

> [I]f the public interest is a *sine qua non* in determining whether or not the capable of repetition, yet evading review doctrine is to be applied, and we doubt that it is, we think the public has an interest in having decided the questions which have arisen again and again between the parties here and which in the strike involved in these cases directly affected almost the entire bituminous coal industry of the nation.

Id. at 1168.

[53] *Id.* at 1165.

[54] The court stated: "We may not close our eyes to the fact freely argued by the parties that the strike which commenced with the grievance of Local 1759 spread to affect at least a substantial part of the bituminous coal industry." *Id.* at 1161. The court's recognition of the UMW's economic power suggested that it would look unfavorably upon technical objections designed to avoid the legal consequences of arguably proscribed work stoppages.

[55] *See id.* at 1168; note 18 *supra*.

the local's short-tempered reaction to less than complete arbitral victory, *Boys Markets* clearly controlled.

Having concluded that the primary strike should have been enjoined, the court turned to the "principal problem": the proper application of *Buffalo Forge* to the sympathy strikes of Locals 1766 and 1949.[56] After reviewing the factual background of *Buffalo Forge*, the court discussed the case's import:

> We think the [*Buffalo Forge*] Court meant to tie together the non-arbitrability of the underlying cause with the cause of the strike at issue so that, when the underlying cause is not subject to arbitration, a refusal to cross a picket line, generated by a strike over the underlying cause, is not a violation of a no-strike clause which is enforceable by injunction against the strike although it may be by arbitration. In our opinion, the Court meant thus to restrict the holding of *Boys Markets*, which many cases had taken to be that if an issue were arbitrable, assuming other conditions were met, an injunction might issue to prevent a strike pending arbitration of the arbitrable issue. Following *Buffalo Forge*, it seems that where the underlying issue is not arbitrable, then a refusal to cross a picket line set up on account of that underlying issue, although the refusal may be arbitrable, may not be prevented by injunction pending arbitration.[57]

The court found support for its analysis in the *Buffalo Forge* Court's treatment of the conflicting court of appeals decisions following *Boys Markets*.[58] *Buffalo Forge*, the court suggested, vindicated the cautious approach adopted earlier by the Second, Fifth, and Sixth Circuits.[59] The *Cedar Coal* court, however, did not embrace the "over an arbitrable grievance" test[60] that had been employed by these circuits. The court apparently recognized that this test provides no real guidance in the sympathy strike context.[61] Sympathy

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[56] 560 F.2d at 1168.

[57] *Id.* at 1169 (footnote omitted).

[58] *See id.* For the relevant discussion in *Buffalo Forge*, see 428 U.S. at 404 n.9.

[59] 560 F.2d at 1170. *See* note 19 and accompanying text *supra*.

[60] *See* notes 19-20 and accompanying text *supra*.

[61] The confusion stemming from use of the "over an arbitrable grievance" language is well illustrated by Southern Ohio Coal Co. v. UMW Local 1957, 551 F.2d 695 (1977), *cert. denied*, 98 S. Ct. 227 (1977). In that case, two UMW locals representing the plaintiff's employees engaged in sympathy strikes in support of a sister local that had struck rather than submit several grievances to arbitration. Concluding that the sympathy strikes were "over" arbitrable issues, and that the sympathy strikers "will continue such work stoppages whenever they again become dissatisfied over some conditions of work at the mine," the district court issued preliminary injunctions against the sympathy strikers identical to the

strikes, by definition,[62] are never "over an arbitrable grievance." Rather, such strikes are over a sister union's grievance. If sympathy strikers were bound to arbitrate the dispute underlying the primary strike, they would be primary strikers themselves.[63] Thus, mechanical application of this test to sympathy strikes[64] inexorably leads to denial of injunctive relief.[65] This result runs counter to the *Boys Markets* policy of preventing the evasion of agreements to arbitrate. *Cedar Coal*'s rejection of the "over an arbitrable grievance" test, however, did not signal a return to the Fourth Circuit's earlier view that injunctive relief, even against sympathy strikes, was appropriate whenever an employer could point to a broad compulsory arbitration clause.[66] *Buffalo Forge* precluded such a simple analysis.[67] Accordingly, the *Cedar Coal* court struck a new balance: where the object and potential effect of a sympathy strike are to compel the primary strikers' employer to concede an arbitrable

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prospective injunction imposed upon the primary union. *Id.* at 700. The next year the three locals refused to cross "stranger" picket lines at the three sites. In response, the plaintiff sought orders to show cause why the local unions should not be held in contempt. Relying on *Buffalo Forge* (decided in the interim), the district court denied the motions. *Id.*

On appeal, the Sixth Circuit affirmed the district court's issuance of preliminary injunctions, noting that the work stoppages "centered around issues that the unions were contractually bound to arbitrate . . . ." *Id.* at 701. Although upholding the theoretical validity of the preliminary injunctions, the court vacated them on the grounds of vagueness and overbreadth. *Id.* at 710. Significantly, the court also affirmed the district court's refusal to hold the sympathy strikers in contempt. According to the Sixth Circuit, the "central inquiry in *Boys Markets* cases . . . [is] whether the employees sought to be enjoined are striking *over* issues which they have agreed to arbitrate." *Id.* at 703 (emphasis added). On the given facts, the court concluded that the locals' refusal to cross the "stranger" picket lines did not amount to "active participation in an illegal strike." *Id.* (footnote omitted). Thus, despite its shortcomings, the "over an arbitrable grievance" test remains an integral component of Sixth Circuit labor policy. *Cf.* Kentucky W. Va. Gas Co. v. Oil, Chem. & Atomic Workers, 549 F.2d 407, 412 (6th Cir. 1977) (citing *Buffalo Forge* without explanation of its sympathy strike context, as primary authority for the "over an arbitrable grievance" standard).

[62] For a brief discussion of sympathy strikes, see note 2 *supra*.

[63] This statement is tautological. Nevertheless, a surprising number of courts have failed to grasp the distinction between primary and sympathy strikes. *See* notes 19-20 and accompanying text *supra*.

[64] Regardless of the merits of the *Cedar Coal* decision, repudiation of the *Boys Markets* "over an arbitrable grievance" test is overdue. Courts applying the test often placed semantics over substance in determining which disputes were "over" arbitrable grievances. *See, e.g.*, Amstar Corp. v. Amalgamated Meat Cutters & Butcher Workmen, 468 F.2d 1372 (5th Cir. 1972); Plain Dealer Pub. Co. v. Cleveland Typographical Union #53, 520 F.2d 1220 (6th Cir. 1975), *cert. denied*, 428 U.S. 909 (1976).

[65] The "over an arbitrable grievance" test thus fosters result-oriented jurisprudence. Courts taking a benign view of union work-stoppages in the sympathy strike context need only invoke the test to justify a refusal of injunctive relief.

[66] *See* note 22 and accompanying text *supra*.

[67] *See* notes 25-31 and accompanying text *supra*.

issue to the primary striking union, injunctive relief is appropriate.[68]

The contours of this new test took shape as the court dealt with each group of sympathy strikers. On its face, Local 1766's strike resembled the production and maintenance workers' sympathy strike in *Buffalo Forge*. In each case, the primary and sympathy strikers worked for the same employer. In each case, the sympathy strikers' collective bargaining accord was silent regarding the applicability of the compulsory arbitration provisions to sympathy strike situations. In *Buffalo Forge*, however, the underlying dispute was not arbitrable; the office and technical employees had no collective bargaining agreement. In contrast, all parties in *Cedar Coal* agreed that the underlying dispute was arbitrable. The *Cedar Coal* court initially admitted that Local 1766's strike was not "over a grievance which both parties are contractually bound to arbitrate,"[69] as it was "at least arguable that Cedar could not have conceded the arbitrable issue to Local 1766, it rather being engaged in arbitration with Local 1759."[70] Relying upon the newly adopted "object of the strike" test, however, the court was able to surmount this problem:

> Here, the employer is the same as to both Locals; the collective bargaining agreement is the same; the bargaining unit is the same; the locality of employment is the same; and, most importantly, the purpose of 1766's refusal to cross the 1759 picket lines was not to coerce Cedar into conceding an issue to local 1759 which was not arbitrable; rather, the purpose of the 1766 strike was to coerce Cedar into conceding an issue to Local 1759 which was admittedly arbitrable.[71]

Accordingly, the court ruled that "the *Buffalo Forge* exception to *Boys Markets* should not apply,"[72] and that the district court should have enjoined the sympathy strike.

Analysis of the Local 1949 strike, however, led to the opposite conclusion. Like Local 1766, Local 1949 engaged in a sympathy strike in support of Local 1759. Unlike Local 1766, however, members of Local 1949 were not employed by the same company as Local 1759. After noting that Southern and Local 1949 had no

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[68] 560 F.2d at 1170.
[69] *Id.* at 1171 (quoting Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. at 254).
[70] 560 F.2d at 1171.
[71] *Id.* at 1171-72.
[72] *Id.* at 1172.

dispute prior to the appearance of the UMW picket line, the court stated:

> Even considering that the underlying purpose of 1949's strike may have been to put indirect pressure on Cedar to concede an arbitrable issue to Local 1759, Southern could concede nothing to Local 1759 because it was not bound to it by a collective bargaining agreement, and there was no dispute between Southern and Local 1759.[73]

This language suggests that the "object of the strike" test contains an "ability" component. Since Local 1949—unlike Local 1766—was not employed by the same company as the primary strikers, it could not exert effective pressure upon Cedar Coal, regardless of its intentions. Thus, according to the court, Local 1949 could not undermine arbitration by forcing Cedar Coal to concede an arbitrable issue to Local 1759. Although a union may intend to force the concession of an arbitrable issue, injunctive relief is not appropriate unless a sympathy strike realistically threatens the integrity of the arbitration process. Applying this test to the activity of Local 1949, *Cedar Coal* affirmed the district court's denial of preliminary injunctive relief.

III

THE "OBJECT OF THE STRIKE" TEST: A RATIONAL REFINEMENT

The *Boys Markets* "over an arbitrable grievance" test provided little guidance to courts assessing the legality of sympathy strikes.[74] The Fourth Circuit's "object of the strike" test represents a long-needed refinement. Ironically, however, *Cedar Coal*'s more careful articulation of the principles underlying *Buffalo Forge* creates a split over the proper standards for enjoining sympathy strikes—the very split *Buffalo Forge* was intended to remedy.

In terms of precedent and policy, *Cedar Coal*'s treatment of a sympathy strike against a primary striker's employer is sound. Reading *Buffalo Forge* as an absolute bar to sympathy strike injunctions would undercut the accommodation of the Norris-LaGuardia and Taft-Hartley Acts established in *Boys Markets*; such an ap-

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[73] *Id.* (footnote omitted).

[74] *See* notes 60-65 and accompanying text *supra*.

proach would permit sympathy strikers to ignore their own no-strike obligations with impunity,[75] while pressuring employers to concede the primary dispute and forgo the arbitral remedy for which they contracted. The strong pro-arbitration language of *Boys Markets* precludes such a repudiation of the doctrine that Norris-LaGuardia must at times give way to concerns of federal labor policy.[76] There is no reason why the accommodation developed in *Boys Markets* should not apply to sympathy strike injunctions, since a sympathy strike may be just as effective as a primary strike in forcing an employer to concede an arbitrable issue. Nor do the policies underlying *Boys Markets* require a judicial retreat in the area of sympathy strikes. Regardless of the proper interpretation of the Taft-Hartley Act,[77] section 4 of the Norris-LaGuardia Act does not stand in isolated supremacy.[78] Indeed, the Norris-LaGuardia Act itself encourages "voluntary arbitration."[79] In addition, the public policy concerns that in another era might have justified a literal application of Norris-LaGuardia are no longer compelling. The federal judiciary of the 1970's no longer manifests

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[75] Sympathy strikers' immunity from injunction is lost when an arbitrator orders them back to work. Only during the period preceding arbitration of the applicability of a no-strike clause is a striking union protected by Norris-LaGuardia. *See, e.g.*, Pacific Maritime Ass'n v. International Longshoremen's & Warehousemen's Union, 517 F.2d 1158 (9th Cir. 1975); General Dynamics Corp. v. Local 5, Indus. Union of Marine & Shipbuilding Workers, 469 F.2d 848 (1st Cir. 1972); Pacific Maritime Ass'n v. International Longshoremen's & Warehousemen's Union, 454 F.2d 262 (9th Cir. 1971).

[76] The Supreme Court stressed that "[s]tatutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." 398 U.S. at 250. It went on to note "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 . . . ." *Id.* at 253.

[77] For a comprehensive discussion of the legislative history of the Taft-Hartley Act, see Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 485-546 (1957) (dissenting opinion, Frankfurter, J.) (app.).

[78] *See* note 16 and accompanying text *supra*. *See also* Gould, *On Labor Injunctions, Unions, and the Judges: The Boys Markets Case*, 1970 SUP. CT. REV. 215, 235; Smith, *The Supreme Court, Boys Markets Labor Injunctions, and Sympathy Work Stoppages*, 44 U. CHI. L. REV. 321, 341-42 (1977); Comment, *The Return of the Strike Injunction*, 51 B.U. L. REV. 665, 675-76 (1971); Note, *The Applicability of Boys Markets Injunctions to Refusals To Cross a Picket Line*, 76 COLUM. L. REV. 113, 135-36 (1976).

[79] 29 U.S.C. § 108 (1970) provides:

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

the anti-union bias that prompted passage of the Norris-LaGuardia Act,[80] and organized labor wields far more political power today than it did in the early decades of this century.[81] Indeed, the UMW's actions in *Cedar Coal* suggest that unions aggrieved by the results of injunctive proceedings have sufficient political and economic vitality to violate a federal court order without fear of jeopardizing their continued existence.[82] Thus, if a sympathy strike severely threatens an employer's ability to vindicate his contractual rights in the arbitral forum, both precedent and policy support an injunction against that strike. A sympathy strike—like the primary strike enjoined in *Boys Markets*—may effectively foreclose the employer from relying on the contractually mandated arbitration mechanism. Such a strike should be enjoined.

The preceding discussion illustrates the fundamental improvement wrought by the *Cedar Coal* test for injunctive relief. Courts applying the "over an arbitrable grievance" test prior to *Buffalo Forge* either applied the test so narrowly as to preclude by definition all sympathy strikes,[83] or deemed any sympathy strike by a union subject to a broad arbitration provision and a no-strike

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[80] *See, e.g.*, Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976). In his *Buffalo Forge* dissent, Justice Stevens noted 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 . . . ." *Id.* at 432.

Even if a particular judge does possess an anti-union bias, it is at least arguable that it is not in management's interest to take advantage of it. The employer-employee relationship is a continuing one; cordial relations between the parties may be of mutual benefit long after litigation ceases. The acrimony engendered by hard-fought litigation may reduce the employee's willingness to satisfactorily perform current obligations and to engage in future good faith negotiations. Hence, there may be a significant incentive for management to resolve disputes amicably at the pre-litigation stage. *Cf.* Macneil, *The Many Futures of Contracts*, 47 S. CALIF. L. REV. 691, 781-82 (1974) (mutual cooperation in contract planning and performance benefits both employers and employees).

[81] One commentator has noted the

> improved position in which labor unions now find themselves in the United States. The relationship between organized labor and capital can no longer be generalized into one involving unequal parties in an atmosphere of bitter social strife. Indeed, in some instances, it is the unions which now hold the cards of power.

Gould, *supra* note 78, at 236 (footnotes omitted). The economic power wielded by unions is well illustrated by the fact that in one two-year period wildcat strikes alone accounted for 23,000,000 tons in lost coal production. Note, *Prospective Boys Markets Injunctions*, 90 HARV. L. REV. 790, 798 (1977). Given this state of affairs, it is safe to say that judicial supervision of labor disputes to the extent necessary to protect the arbitration process will not severely injure the labor movement.

[82] For example, in *Cedar Coal*, Local 1759 ignored the temporary restraining order issued against it. 560 F.2d at 1157.

[83] *See* notes 60-65 and accompanying text *supra*.

clause to be "over" the applicability of that clause and therefore enjoinable.[84] Neither approach addressed the central reason for the *Boys Markets* exception to the Norris-LaGuardia Act: the need for equitable relief to preclude economic arm-twisting pending arbitration.[85] The "object of the strike" test requires a court to focus on this central issue.

The most serious difficulty with this new standard is the flexibility it gives reviewing courts. The facts of *Cedar Coal* suggest that the requisite purpose can be inferred only if the sympathy strike will exert pressure on the primary employer[86] to concede an issue subject to binding arbitration. Thus, the crucial element of the test is a finding of sufficient coercive power. In *Cedar Coal* the difference in employers served to distinguish Locals 1766 and 1949. Since Local 1949 had no contractual relationship with Cedar Coal, the court presumed that it lacked the ability to force the company to concede an arbitrable issue to Local 1759.[87] The common-employer distinction, however, will not suffice in many instances. Where the economic vitality of one company is strongly dependent upon its relationship with another, a primary strike against the dependent employer accompanied by a sympathy strike against the other company may force a rapid settlement of the underlying dispute on the union's terms. The dependent company may conclude that even an unsatisfactory resolution of its labor disputes is preferable to jeopardizing a crucial economic relationship.[88]

Given the different attitudes evidenced by the circuits prior to *Buffalo Forge*[89] and the potential flexibility of the economic effect standard, even universal adoption of the *Cedar Coal* test may lead to

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[84] *See* notes 21-23 and accompanying text *supra*.

[85] In *Boys Markets* the Court found "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 . . . ." 398 U.S. at 253.

[86] The Fourth Circuit mentioned no specific evidence of Local 1766's "purpose." Tbe economic pressure of their sympathy strike made their motives sufficiently culpable.

[87] *See* 560 F.2d at 1172.

[88] A simple hypothetical illustrates tbe limited utility of the common/separate employer distinction. Assume that UAW Local *A* represents the employees of an automobile component manufacturer that sells all its products to General Motors, and that UAW Local *B* represents the production employees of General Motors. Assume that after Local *A* goes on strike against the component manufacturer and establishes picket lines outside the General Motors plant, Local *B* engages in a sympathy strike. Under such circumstances, GM would pressure the component manufacturer into conceding the disputed issues to Local *A*, since a prolonged strike would seriously interfere with GM's production.

[89] *See* notes 19-24 and accompanying text *supra*.

inconsistent results. Universal adoption, however, is unlikely. Although *Cedar Coal* provides a new rationale enabling the Third, Fourth, and Eighth Circuits to continue to enjoin sympathy strikes, the Supreme Court's effusive use of the "over an arbitrable grievance" language in *Buffalo Forge*[90] allows the Second, Fifth, and Sixth Circuits to continue to use the "over" language in a semantic fashion.[91] Thus, *Cedar Coal* suggests, if nothing else, that *Buffalo Forge*'s effort to eliminate the post-*Boys Markets* split among the circuits has failed.

CONCLUSION

Based upon its construction of the Supreme Court's decisions in *Boys Markets, Inc. v. Retail Clerks Local 770* and *Buffalo Forge Co. v. United Steelworkers*, the Court of Appeals for the Fourth Circuit, in *Cedar Coal Co. v. UMW Local 1759*, held that an injunction may issue against sympathy strikers whenever the "object" of the strike is to compel an employer to concede an arbitrable issue. Under the "object of the strike" test there are two requirements for injunctive relief. First, the striking union must intend to force the concession of an arbitrable issue. Second, the union must actually have the ability to compel this result. The *Cedar Coal* test is consistent with recent judicial efforts to accommodate the conflicting provisions of the Norris-LaGuardia and Taft-Hartley Acts. The Fourth Circuit's pragmatic approach directs analysis toward consideration of the

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[90] *See* text accompanying note 28 *supra*.

[91] The ambiguous language chosen by the *Buffalo Forge* Court permits two equally plausible constructions of its holding. The Court noted "that the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract." 428 U.S. at 407 (emphasis in original). This language will permit the Second, Fifth, and Sixth Circuits to read *Buffalo Forge* as a reaffirmation of the "over an arbitrable grievance" test, and to continue to deny injunctive relief. The Seventh Circuit, which prior to *Buffalo Forge* had taken a somewhat different approach (*see* note 24 and accompanying text *supra*), may now tend toward this view. *See* Zeigler Coal Co. v. Local 1870, UMW, 566 F.2d 582 (7th Cir. 1977).

The *Buffalo Forge* Court also stressed, however, that 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." *Id.* at 408 (emphasis added). This language provides direct support for the purpose and ability components of the *Cedar Coal* test. *See* text accompanying notes 71-73 *supra*. The length of the *Buffalo Forge* opinion further supports the Fourth Circuit's view that *Buffalo Forge* did not simply reaffirm the "over an arbitrable grievance" test; had the Court intended to do so, it easily could have done so on the basis of the Second Circuit's opinion. In short, *Buffalo Forge* will not absolutely bar the Third, Fourth, and Eighth Circuits from enjoining sympathy strikes.

actual effects of union activity and away from the semantic debate that frequently obscured the crucial issues in earlier cases. Although its inherent flexibility may produce the same split of authority that existed prior to *Buffalo Forge*, the "object of the strike" test represents a logical outgrowth of Supreme Court doctrine on strike injunctions. Other courts should adopt and apply it.

Jonathan Craig Thau