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Buffalo Forge Co. v. United Steelworkers: The Supreme Court Sanctions Sympathy Strikes

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NOTES

BUFFALO FORGE CO. v. UNITED STEELWORKERS: THE SUPREME COURT SANCTIONS SYMPATHY STRIKES

IN *Buffalo Forge Co. v. United Steelworkers*,[1] the Supreme Court held by a 5-4 majority that a sympathy strike, in alleged violation of a no-strike clause, could not be enjoined pending an arbitrator's determination of the strike's legality. Prior to this decision the circuits had been in conflict: some held that the strike could be enjoined[2] pursuant to section 301 of the Labor-Management Relations Act (LMRA) which provides federal jurisdiction for violations of collective bargaining agreements,[3] while others refused to enjoin the strike[4] because of the anti-injunction policy stated in section 4 of the Norris-LaGuardia Act (NLA).[5] In

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[1] 428 U.S. 397 (1976).

[2] *See* notes 95-112 *infra* and accompanying text.

[3] Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185 (1970) provides:

> (a) Suits for violation of contracts between 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.

[4] *See* notes 113-32 *infra* and accompanying text.

[5] Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1970) provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case *involving or growing out of any labor dispute* to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
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> (a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . .
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> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
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> (f) Assemblying peaceably to act or to organize to act in promotion of their interests in a labor dispute; . . . .

(Emphasis added.)

The injunction ban is not absolute. Section 7 of Norris-LaGuardia, 29 U.S.C. § 107 (1970), provides that an injunction may issue only after a hearing upon notice to the charged parties is held and certain findings of facts are made. The findings must generally state: that unlawful acts have or will be committed; that irreparable injury will result if the injunction is not issued; and, that there is no adequate remedy at law. A temporary restraining order, however, may be issued without notice or hearing if the court finds irreparable injury will be unavoidable if the strike is not immediately enjoined. The procedural requirements are strict. For example, since section 4 prohibits the issuance of an injunction, mere compliance with the procedures of section 7, 29 U.S.C. § 107 (1970), will not allow the injunction to issue. Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365 (1960). The mere compliance with some but not all of the criteria in section 8, 29 U.S.C. § 108 (1970), would be insufficient to have an injunction issued. The party must have pursued each channel of peaceful settlement (i.e., negotiation, mediation, and arbitration) before the injunction might issue, even though the section is phrased in the disjunctive. Brotherhood of R.R. Trainmen, Lodge 27 v. Toledo, P. & W. R.R., 321 U.S. 50, 60 (1944).

Buffalo Forge the Court followed the second line of cases and resolved the controversy in favor of the continued vitality of section 4 of the Norris-LaGuardia Act.

The Norris-LaGuardia Act[6] was enacted in 1932 to curb the unbridled use of the federal injunction as a remedy in labor-management disputes. Federal courts had in many instances, wantonly and unjustifiably enjoined even peaceful strike activity, and as a consequence had stifled the growth of labor organizations.[7] Because of the history of judicial abuse of the injunction, Congress sought to make this remedy a last resort[8] by encouraging the use of the nonjudicial processes of negotiation, mediation, and arbitration to settle labor disputes. The result was the enactment of section 4 of the NLA which prohibits federal injunctive relief "in any case involving or growing out of a labor dispute."[9]

The purpose underlying Norris-LaGuardia was to facilitate a productive climate for the organization of labor untions. After enactment of the Norris-LaGuardia Act, labor unions grew and gained substantial collective bargaining power. Congressional policy then shifted from promoting the organization of labor unions to encouraging the effective enforcement of collective bargaining agreements between employers and unions.[10]

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[6] 29 U.S.C. §§ 101-15 (1970).

[7] Congress intended to take the federal courts out of the "labor-injunction business." Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365, 369 (1960) (peaceful picketing not enjoinable); S. REP. No. 163, 72d Cong., 1st Sess. 7-8 (1932); H.R. REP. No. 669, 72d Cong., 1st Sess. 2-3 (1932); 75 CONG. REC. 5464, 5467, 5478 (1932). *See* F. FRANKFURTER & N. GREENE, THE LABOR-INJUNCTION 24-46, 131-33, 200-02 (1930). *See also* A. COX & D. BOK, CASES ON LABOR LAW 60 (8th ed. 1977); O. FISS, INJUNCTIONS 580-612 (1970); STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATIONS 161-247 (R. Korentz ed. 1970).

Congress promulgated the Norris-LaGuardia Act to restore the vitality of section 20 of the Clayton Act, which had been frustrated by unduly restrictive judicial interpretation. *See* United States v. Hutcheson, 312 U.S. 219, 234, 235-36 (1941). Section 20 of the Clayton Act, 29 U.S.C. § 1 (1970), tempered the Sherman Anti-Trust Act by exempting peaceful labor activities from the interdict against unlawful trusts or conspiracies in restraint of trade. Courts, had however, read into the Clayton Act that which the Act had intended to remove: the restriction of the scope of section 20 to trade union activities directed against an employer by his employees. The Norris-LaGuardia Act removed the employer-employee restriction and broadened the allowable scope of non-enjoinable union activity. *See* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 165-66 (1930).

[8] Brotherhood of R.R. Trainmen, Lodge 27 v. Toledo, P. & W. R.R., 321 U.S. 50, 58-59 (1944). The Act did not completely abolish the federal injunction, but provided that before a federal court could enter an injunction to restrain illegal acts, certain preliminary findings, based on evidence, had to be made. *See* note 5 *supra*.

[9] For relevant portions of the text of section 4, *see* note 5 *supra*. Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113 (1970), defines a labor dispute as: "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

[10] Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. § 173(d) (1970), illustrates this purpose: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ." *See* A.H. Bull S.S. Co. v. Seafarers, Int'l, 155 F. Supp. 739, 742 (E.D.N.Y. 1957) (specific performance of collective bargaining contract decreed). The Act not only imposed a responsibility on the labor organizations to bargain in good faith and to be ac-

Congress' primary motive for enacting the Labor-Management Relations Act[11] in 1947 was to promote collective bargaining between labor and management, a congressional purpose that had not been contemplated when the Norris-LaGuardia Act was written in 1932. The LMRA, for example, made it clear, to the extent that it was not already established, that labor unions were to be capable of suing and being sued in the name of the union.[12] This concept was important because unions are unincorporated associations and unincorporated associations are usually considered subject to suit only in the name of their individual members.[13]

The original House and Senate versions of the LMRA would have made collective bargaining agreements enforceable by the National Labor Relations Board in unfair labor practice proceedings.[14] This approach was abandoned in Conference, where it was decided to leave the enforcement of labor contracts "to the usual processes of law."[15] Thus, section 301(a) provided federal courts with jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization."[16]

Subsequent to enactment of the LMRA management and labor began to bargain for specific contract provisions to safeguard their rights and expectations. The employer often bargained for the inclusion of a no-strike clause to guarantee unimpeded production for the duration of the labor contract and as consideration for his concomitant agreement to peacefully arbitrate grievances with the union. The no-strike obligation and the arbitration procedures became standard bargained-for provi-

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countable for violations of the agreement, but also balanced labor's generous freedom from judicial restraint that had flowed from the Norris-LaGuardia Act. This Act, in effect, gave management a mandate to be free from coercive union conduct. It promoted the enforceability of collective bargaining agreements in much the same way that Norris-LaGuardia fostered the growth of labor unions by prohibiting sweeping, unjustified and many times ex parte injunctions. *See* Allis-Chalmers Mfg. Co. v. NLRB, 358 F.2d 656 (7th Cir. 1966) (union violated National Labor Relations Act by imposing fine on union members who refused to honor picket lines); S. REP. No. 105, 80th Cong., 1st Sess. 15, 17-18 (1947); 93 CONG. REC. 3656-57 (1947).

[11] 29 U.S.C. §§ 141-87 (1970).

[12] "The common law concept of an unincorporated labor organization as a group of individuals having no separate entity apart from its members has been discarded — to the extent that it was not already outmoded in modern jurisprudence — by the Labor-Management Relations Act, 1947. It is clear that the Act treats labor organizations, for all practical purposes, as juridical entities. . . ."
In re International Longshoremen's & Warehousemen's Union, 79 N.L.R.B. 1487, 1508 n.40 (1948).

[13] *See* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 82-83 (1930).

[14] The National Labor Relations Board, under section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1970), is empowered to issue an unfair labor practice complaint whenever it is charged that any person has engaged in or is engaging in an unfair labor practice. Unfair labor practice charges against employers are generally listed in section 8(a)(1)-(4) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1)-(4) (1970); unfair labor practice charges against employees are generally listed in section 8(b)(1)-(7) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)-(7) (1970).

Section 10(b) provides that whenever an unfair labor practice charge is made, the National Labor Relations Board "shall have power to issue" a complaint to the charged party, containing a notice of hearing. The hearing is then conducted before the Board.

[15] H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 42 (1947).

[16] The text of section 301(a) is set out in full at note 3 *supra*.

sions[17] with the no-strike commitment by the union generally regarded as the quid pro quo for the employer's obligation to submit to final and binding arbitration of labor disputes.[18]

Judicial deference to section 4 of the Norris-LaGuardia Act, however, soon qualified the no-strike guarantee. Judges refused to enjoin strikes in alleged violation of no-strike clauses, basing their decisions on the force of section 4.[19] Employers, who would not have acceded to mandatory arbitration but for the no-strike clause, contended that the more recent section 301 of the Labor-Management Relations Act qualified section 4's prohibition against injunctions. More specifically, they argued that the congressional policy favoring collective bargaining supported the issuance of an injunction when necessary to enforce the no-strike clause as well as other provisions of the labor contract. Hence, a conflict arose when a party sought an injunction in a situation that not only grew out of a labor dispute, rendering Norris-LaGuardia applicable, but also violated the parties' collective bargaining agreement, calling into play section 301 remedies.

Congress did not reconcile the disparate jurisdictional provisions of the NLA and the LMRA. The courts concluded they were duty-bound to follow both legislative acts and not to engage in "judicial legislation."[20] But, as the Supreme Court has noted, the congressional will is not always expressly stated and courts must occasionally "judicially invent" a treatment Congress would have followed had it realized the existence of a particular problem.[21] The courts, therefore, were left with the task of deciding the controlling statute when both section 4 of the Norris-LaGuardia Act and section 301 of the Labor-Management Relations Act provided contrary, but applicable solutions for a single factual situation.

The sympathy strike in alleged violation of a no-strike clause provided an arena for the Court's accommodation between the broad and competing provisions of the Norris-LaGuardia Act and the Labor-Management Relations Act. A sympathy strike originates after the establishment of a picket line when workers refuse to cross the picket lines out of "sympathy" with the picketers. The sympathy strike, therefore, develops out of a labor dispute between the picketers and the employer

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[17] United Steelworkers v. American Mfg. Co., 363 U.S. 564, 565 (1960). The Court noted that the grievance procedure culminating in arbitration became regarded as the "standard form."

[18] Textile Workers v. Lincoln Mills, 353 U.S. 448, 455 (1957). Congress has noted that arbitration is a more salutary method for the settlement of labor disputes than is economic warfare through strikes or lock-outs. This policy is stated in section 201 of the Labor-Management Relations Act, 29 U.S.C. § 171 (1970).

[19] *See* Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 200, 203, 209 (1962) (section 4 precluded injunctive relief even if alleged strikes constituted breach of collective bargaining agreement containing no-strike and grievance-arbitration clauses).

[20] Courts are obligated to follow the acts of Congress and neither be concerned with the wisdom nor the contemporary applicability of those acts. United States v. Hutcheson, 312 U.S. 219, 235 (1941) (in determining whether trade union conduct violated the Sherman Act, the Court held the Sherman Act had to be read in conjunction with section 20 of the Clayton Act and the Norris-LaGuardia Act) (quoting Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908)).

[21] Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1967).

and not from any underlying grievance between the employer and the sympathy strikers. The right to engage in a sympathy strike is statutorily protected, but such a right may be bargained away.[22] Because the strike "[grows] out of a labor dispute," section 4 of the Norris-LaGuardia Act operates to prohibit issuance of an injunction against the peaceful strike activity. On the other hand, the sympathy strike is arguably a violation of the no-strike clause contained in the parties' collective bargaining agreement, and therefore constitutes an arbitrable grievance permitting the issuance of a temporary injunction until the issue has been resolved. Section 301 of the LMRA affords federal courts jurisdiction over violations of labor contracts[23] and, more importantly, the section neither expressly nor impliedly restricts the federal court's equitable remedies to those other than the enjoining of strike activity determined to be in violation of the collective bargaining agreement.[24]

In *Buffalo Forge Co. v. United Steelworkers*,[25] locals 1974 and 3732 of the United Steelworkers, representing the company's production and maintenance employees, refused to cross the picket lines of sister unions[26] at the company's three facilities in the Buffalo, New York area. The locals' refusal to cross the picket lines resulted in a series of work stoppages at the company's plants.[27] The collective bargaining agree-

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[22] NLRB v. Rockaway News Supply Co., 345 U.S. 71, 80 (1953). A person who refuses to cross a picket line becomes a striker. Plain Dealer Publishing Co. v. Cleveland Typographical Union 53, 520 F.2d 1220, 1228 (6th Cir. 1975), *cert. denied*, 428 U.S. 909 (1976) (injunction denied). He is only entitled to the same statutory protection as the economic strikers he supports. NLRB v. Southern Greyhound Lines, Inc., 426 F.2d 1299, 1301 (5th Cir. 1970) (employee who honored picket lines retained employee status and was entitled to reinstatement at end of strike); NLRB v. Louisville Chair Co., 385 F.2d 922, 928 n.3 (6th Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968) (employers refusal to bargain in good faith gave rise to an unfair labor practice strike).

[23] Norris-LaGuardia's ban on injunctions only exists at the federal level. Congress did not intend to interfere with state court equity jurisdiction. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 509, 511 (1962). Moreover, the language of section 301 provides that suits for violation of contracts may be brought in federal district courts, but it does not require it. Removal jurisdiction, however, pursuant to 28 U.S.C. § 1441 (1970), could be obtained whereby the state court's injunction would be dissolved. The Court, in Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968), held that unions could remove state court suits brought under section 301 to federal court. This effectively destroyed state court equity jurisdiction to issue injunctions, since the state court injunction upon removal to federal court, could be dissolved in accordance with section 4.

[24] *See* note 3 *supra*. In Textile Workers v. Lincoln Mills, 353 U.S. 448, 456 (1957), the Supreme Court noted that section 301 is not merely a jurisdictional statute, but that it provides a grant of authority to apply substantive law which will be fashioned from the policy of existing national labor laws. For a discussion of *Lincoln Mills*, *see* notes 40-43 *infra* and accompanying text.

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

[26] The picket lines were bona fide, primary, and legal. Petitioner's Brief for Certiorari at 3-4. Primary strike activity is legal since it is only directed against the employer and his allies with whom the striking union has a dispute. Secondary strike activity, which is illegal, indirectly places pressure on the primary employer by acting against secondary or neutral employers that deal with the primary employer. *See* section 8(b)(4)(B) of the Labor-Management Relations Act, 29 U.S.C. § 158(b)(4)(B) (1970).

[27] The sister unions, representing the company's office and technical workers, went on strike and established picket lines on November 16, 1974, during negotiations for a collective bargaining contract. The Locals' first refusal to cross their lines occurred on November 18, 1974. This work stoppage lasted only for one day. Another work stoppage

ment between the company and the locals contained a no-strike clause and a six-step grievance procedure which culminated in final and binding arbitration.[28] The terms of the agreement provided that either party could summon arbitration, and this right extended to any dispute as to the "meaning and application of the provisions" of the agreement.[29]

The company filed suit under section 301 in district court, contending that the locals were obligated to cross the picket lines by virtue of their contractual no-strike obligation. The company further submitted that the dispute that arose over the legality of the sympathy strike was arbitrable under the agreement's grievance and arbitration provisions and that the strike should be enjoined pending the arbitrator's decision as to whether the no-strike clause had been violated.[30] The district court denied the prayer for injunctive relief and held that the strike did not constitute an arbitrable grievance.[31] The Second Circuit Court of Appeals affirmed the decision to deny the injunction.[32]

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commenced on November 21, 1974, at the defendant-International Union's direction. It ended on December 14, 1974, one day after a decision was rendered against the company's application for a preliminary injunction. The issue, however, did not become moot. The picket lines remained during the appeal, and a resumption of the strike was possible. Buffalo Forge Co. v. United Steelworkers, 517 F.2d 1207, 1209-10 (2d Cir. 1975).

[28] The no-strike obligation, Section 14b, provided: "There shall be no strikes, work stoppages or interruption or impeding of work. No officers or representatives of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in any such activity."

The adjustment of grievances provision, Section 26, provided: "Should differences arise between the Company and any employee covered by this Agreement as to the meaning and application of the provisions of this Agreement, or should any trouble of any kind arise in the plant, there shall be no suspension of work on account of such differences. . . ." *quoted in* Buffalo Forge Co. v. United Steelworkers, 386 F. Supp. 405, 407 (W.D.N.Y. 1974).

[29] Section 32 provided that "a question as to the meaning and application of the provision of th[e] Agreement . . ." could be submitted to arbitration by any party. Respondent's Brief for Certiorari at 2-3.

[30] 386 F. Supp. 405, 407, 408-09 (W.D.N.Y. 1974). The employer claimed, in the alternative, that the work stoppage did not occur merely from a refusal to cross the picket lines. The company claimed it occurred when one of the defendant union-members, a plant truck driver, was ordered to drive a non-company tractor trailer through the picket lines, but refused to do so. Both parties agreed that if the truck driver's refusal to drive the non-company truck had caused the sympathy strike, then the matter would be subject to grievance provisions. The unions, however, refuted this allegation and the court similarly found that the plaintiff had not sustained its burden of proof on this issue. The evidence supported the fact that the unions walked out in support of the sister union's picket lines. The issue therefore centered around whether the work stoppage was a violation of the no-strike clause in the collective bargaining agreement and whether the unions who refused to cross the picket lines were subject to the mandatory adjustment and grievance procedures of the agreement. 386 F. Supp. at 407, 408-09.

[31] 386 F. Supp. at 410. The court intimated that its holding might have been different had the grievance procedure contained "additional provisions," more broadly pertaining to "matters not specifically mentioned in the Agreement." The court noted that Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209 (4th Cir. 1973) and Barnard College v. Transport Workers, 372 F. Supp. 211 (S.D.N.Y. 1974) (wherein sympathy strikes were enjoined) appeared to support the company's position. The court, however, failed to explain the fact that the contracts in these cases did not contain "additional language."

Even though the agreement provided for arbitration to determine the meaning and application of the agreement, and specifically prohibited work stoppages, the court submitted that it could not be assumed that a sympathy strike would be covered by these provisions and refused to reach this result by implication.

Because of a conflict in the circuits, the Supreme Court granted certiorari and held by a 5-4 majority that a sympathy strike in alleged violation of a no-strike clause could not be enjoined pending an arbitrator's decision on the legality of the strike.[33] Furthermore, the Court held that the sympathy strike situation did not compel an accommodation between the NLA and the LMRA which would result in issuance of an injunction pending the arbitrator's determinations.[34] The purpose of this Note is to examine this Supreme Court decision in light of the concurrent federal policies that not only encourage the enforcement of collective bargaining agreements through the grievance-arbitration procedures, but also seek to protect a worker's statutory right to engage in sympathy strikes unless that right has been bargained away by the contractual no-strike clause.

I. The Supreme Court and the Development of the Accommodation Policy

The Supreme Court has been inconsistent both in formulating its accommodation policy between the NLA and LMRA and in developing an approach to federal labor contract law.

The Supreme Court made one of its first ventures into the area of accommodation in *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*,[35] in which it reconciled competing provisions of the Norris-LaGuardia and Railway Labor Acts. The Court noted that the accommodation, if possible, must be made in such a way "that the ob-

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The appellate court in Island Creek Coal Co. v. United Mine Workers, 507 F.2d 650, 653 (3d Cir. 1975), recognized that the National Bituminous Coal Wage Agreement of 1971, to which the parties were bound, did not contain an express no-strike clause. The agreement did, however, extend arbitration to "matters not specifically mentioned" in the contract. The court interpreted this to allow it to submit a dispute over the legality of a sympathy strike to arbitration. It enjoined the strike pending the arbitrator's determination on the legality of the strike. The court, however, noted the "unusually broad" scope of the arbitration clause. Therefore, it expressly cautioned against treating its decision as authority that employees could be automatically enjoined from sympathy striking when they were bound by more narrow grievance-arbitration clauses. *Id.* at 653-54.

The sympathy strike was also enjoined when the no-strike obligation was contained within the grievance-arbitration provisions. Amalgamated Meat Cutters, Local 195 v. Cross Bros. Meat Packers, Inc., 518 F.2d 1113 (3d Cir. 1975) (suit to enforce arbitrator's award; not to compel arbitration). The no-strike obligation provided that "[t]he Union further agrees not to call a sympathy strike for any reason whatsoever during the term of this agreement." *Id.* at 1116 n.2. The union had requested that its members respect the picket line of another union and this request was heeded. The appellate court granted the injunction since the grievance machinery was to become operative "[s]hould any difference arise between the parties . . . as to the interpretation or application of this agreement, [whereby] an earnest effort [would] be made to settle such difference. . . ." *Id.* The court stated that "[w]hile these clauses did not specifically refer to the disputes over the right of the employees to honor lawful picket lines, they were contained in the same articles that contained sweeping no-strike clauses." Hence, the court reasoned it was natural to infer that the scope of the no-strike clause was a proper subject for arbitration. *Id.* at 1117.

[32] 517 F.2d 1207 (2d Cir. 1975). The issue presented was one of first impression in the Second Circuit.

[33] Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976).

[34] *Id.* at 412.

[35] 353 U.S. 30 (1957).

vious purpose in the enactment of each is preserved."[36] The Court found that because the Norris-LaGuardia Act was the predecessor of the Railway Labor Act and more general in its import, the broader terminology of Norris-LaGuardia had to be tempered by the more specific language of the Railway Labor Act.[37] Therefore, it was held that pursuant to the terms of section 3 of the Railway Labor Act a labor union could be enjoined from striking the railroad. That statute authorized either party to submit a minor dispute[38] to the National Railroad Adjustment Board;[39] the decision would be final and binding on both parties.

The Court decided *Textile Workers v. Lincoln Mills*[40] in the same term as *Chicago River*. In *Lincoln Mills* the Court found in section 301(a) of the LMRA a mandate for the federal courts to develop a federal common law consistent with the national labor policy.[41] The Court further held that section 301 have federal courts jurisdiction to compel arbitration of a labor dispute since the Court noted that compulsory arbitration had not been an abuse which prompted the enactment of the Norris-LaGuardia Act.[42] Because federal jurisdiction to compel arbitration was not contrary to the legislative purpose of the Norris-LaGuardia Act, as the Act only prohibited injunctions against legitimate strike activity, and because that Act failed to provide effective remedies for violations of arbitration agreements, the Court concluded that agreements to arbitrate should not be subject to the inappropriate provisions of the Norris-LaGuardia Act.[43]

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[36] *Id.* at 40.

[37] The Court remarked that: "The Norris-LaGuardia Act [could] affect the present decree only so far as its provisions [were] found not to conflict with those of [section 3, first], of the Railway Labor Act, authorizing the [injunctive] relief which [had] been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act." *Id.* at 41 (footnotes omitted).

[38] Section 2, Sixth, 45 U.S.C. § 152 Sixth (1970), defines minor disputes as "disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

[39] Section 3, First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i) (1970), provides that minor disputes shall be submitted to the Adjustment Board if not resolved in conference by the railroad and its employees. The Adjustment Board has exclusive original jurisdiction to hear and resolve disputes arising out of labor agreements, thereby precluding a court's adjudication of the construction and application of a collective bargaining agreement. Walker v. Southern Ry. Co., 385 U.S. 196, 198 (1966); Transportation-Communication Employees Union v. Union Pac. R.R. Co., 385 U.S. 157, 162-66 (1966); Gunther v. San Diego & Ariz. E. Ry. Co., 382 U.S. 257, 263-64 (1965); Order of Ry. Conductors v. Southern Ry. Co., 339 U.S. 255, 256-57 (1950).

[40] 353 U.S. 448 (1957). Several grievances arose between the employer and union and were processed through the grievance procedures outlined in the parties' collective bargaining agreement. The union requested arbitration, the last step in the grievance procedure, but the employer declined to submit. The union brought an action in district court to compel arbitration, which was granted pursuant to section 301.

[41] *Id.* at 456.

[42] *Id.* at 458. The Court stated that "the failure to arbitrate was not part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed." Justice Brennan used this argument to bolster his dissent in Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 219-20 (1962). In *Sinclair* he advocated accommodation of the NLA and the LMRA to enjoin a strike over an arbitrable grievance.

[43] 353 U.S. at 458.

The Court bolstered the policy favoring the arbitration process in the *Steelworkers Trilogy*.[44] In this series of cases the Court noted that arbitration was such a critical element of national labor policy that a dispute should be "presumed"[45] to be arbitrable unless the contract expressly excluded the dispute from coverage.[46] All doubtful cases were to be resolved in favor of arbitration.[47] Moreover, under section 301(a), federal courts were constrained to look only to the face of the contract to determine whether the parties had provided for arbitration of the particular dispute.[48] Judges were warned against applying ordinary contract law principles to labor contracts because the collective bargaining agreement is not only a contract between labor and management but also a political system of governance of labor disputes. The arbitrator, a specialist in labor relations, was considered more competent in the interpretation of labor contracts than the courts.[49] The courts were instructed to determine only the arbitrability of the dispute and to respect the unique role of the arbitrator in the actual interpretation of the contract and to avoid the decision on the merits since the parties had bargained for arbitration rather than litigation.[50]

Although eager to facilitate the arbitrator's powers, in *Sinclair Re-*

[44] 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).

[45] *See* Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability*, 85 HARV. L. REV. 636, 637 (1972) (the presumption in favor of arbitration should be applied even to the interpretation of a contract's provisions regarding the scope of arbitral authority such as the provisions excluding certain matters from the scope of arbitration).

[46] Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

[47] The Court noted that: "[a]n 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." *Id.* at 582-83 (footnote omitted).

[48] "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960).

[49] The labor arbitrator is more attuned to the law of the shop and can more adequately interpret the labor contract. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960). Furthermore, if standard contract law were applicable, it would enable the courts to reach the merits of the dispute and thereby eliminate the need for arbitration. *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 569 (1960).

[50] The collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plant or industry the grievance may assume proportions of which judges are ignorant. Yet, the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious.

. . . .

The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims

fining Co. v. Atkinson[51] the Court retreated from a policy that would have had the effect of compelling specific performance of no-strike clauses. The Court instead adopted a literal and absolute reading of section 4 of Norris-LaGuardia and declined to accommodate section 4 and section 301. It ruled that an injunction could not be issued to enjoin a strike, even if the strike constituted a breach of a collective bargaining agreement.[52] The Court reasoned that an injunction to enforce a no-strike obligation was forbidden by the interdictions of section 4 of the Norris-LaGuardia Act and distinguished *Lincoln Mills*[53] on the grounds that an injunction to compel specific performance of an agreement to arbitrate was not an abuse which had prompted enactment of the Norris-LaGuardia Act.

Justice Brennan, writing for the dissent in *Sinclair*, contended that this decision was inconsistent with the congressional policy favoring the mutual enforceability of collective bargaining agreements since arbitration clauses could be enforced but no-strike clauses could not. Furtheremore, he noted that section 301 of the Labor Management Relations Act had not impliedly repealed section 4 of the Norris-LaGuardia Act,

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may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.

United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960) (footnotes omitted).

The Court granted the arbitrator a certain amount of immunity from judicial review. It stated:

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960).

Each of the collective bargaining agreements in the *Steelworkers* cases provided for the arbitration of all disputes "as to the meaning, interpretation and application of the provisions of the agreement." Noting the all-inclusive effect of these grievance-arbitration clauses, the Court, in dicta, stated that a similar effect should be given to a no-strike clause since one is the quid pro quo for the other. *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960).

[51] 370 U.S. 195 (1961). The unions had struck over a grievance they were contractually bound to arbitrate, and the employer sought to enjoin this activity. The district court dismissed the complaint. This action was affirmed by the Seventh Circuit Court of Appeals, because the controversy constituted a labor dispute within the purview of Norris-LaGuardia. The courts felt that section 4's general proscription against strike activity precluded them from enjoining the strike. *Id.* at 199-200.

[52] *Id.* at 209. The Court did not consider whether the two sections could be accommodated, but only questioned whether section 301 impliedly repealed section 4. *Id.* at 196. *Compare* Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co., 353 U.S. 30 (1957) in which the Court held that the more specific provisions of the Railway Labor Act could not be overridden by the more general provisions of the Norris-LaGuardia Act. *See* notes 35-39 *supra* and accompanying text. The Court arrived at an opposite conclusion in *Sinclair*, in which it construed the Norris-LaGuardia and Labor-Management Relations Acts. Congressional inaction to accommodate the Acts was taken to be a clear indication of the predominance of the broad and inclusive provisions of Norris-LaGuardia. 370 U.S. at 202-03, 205, 215; *contra*, *id.* at 223 (Brennan, J., dissenting).

The *Sinclair* Court distinguished *Chicago River* on the basis that the Railway Labor Act compelled the union to resort to the Railroad Adjustment Board for the settlement of its "minor disputes," whereas no such procedure was provided for in the Labor-Management Relations Act. *Id.* at 211.

[53] *See* notes 40-43 *supra* and accompanying text.

but that these two sections coexisted and therefore had to be accommodated.[54] Justice Brennan also reasoned that enjoining strike activity might be the only way to compel the parties to submit an arbitrable grievance to arbitration.[55] Accordingly, he advocated accommodating section 4 and section 301 to gain a perspective that was representative of the contractual relationship between the parties.[56] To facilitate accommodation of the acts, Justice Brennan suggested that four conditions should be fulfilled before issuance of a labor injunction:[57] 1) the injunction must be appropriate notwithstanding Norris-LaGuardia; 2) the parties must be bound by a collective bargaining agreement and the strike must be over a grievance which the parties had agreed to arbitrate;[58] 3) the employer must be ordered to arbitrate as a condition precedent to issuance of the injunction; and 4) the injunction must be warranted under the ordinary principles of equity.[59]

The Court subsequently held, in *Boys Markets, Inc. v. Retail Clerk's, Local 770*,[60] that sections 4 and 301 could be accommodated through adoption of Justice Brennan's four-pronged formula. To foster the congressional policy favoring enforcement of collective bargaining agreements, the Court overruled *Sinclair* and held that a strike over an arbitrable grievance could be enjoined. *Sinclair* had frustrated rather than furthered congressional policy,[61] and the Court warned against viewing congressional inaction to legislate on the *Sinclair* decision as tantamount

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[54] 370 U.S. at 215-16.

[55] *Id.* at 216-17.

[56] Inability to enjoin a strike over an arbitrable grievance would demean the contractual relationship between the parties and create a double standard of enjoinability: the union would be able to obtain specific performance of the agreement to arbitrate while the employer would be unable to obtain specific performance of the agreement not to strike. The agreement not to strike over an arbitrable grievance has been equated with the employer's duty to submit to the final and binding arbitration of labor disputes. Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 413 (1976) (Stevens, Brennan, Marshall, Powell, JJ., dissenting).

[57] 370 U.S. at 228.

[58] The district court may only enjoin the strike pending arbitration when there is an agreement to arbitrate that is mutually binding between the parties. Absent a mutually binding obligation, a district court has no jurisdiction to enjoin acts involving or growing out of a labor dispute. Martin Hageland, Inc. v. United States Dist. Ct., Cent. Dist. of Cal., 460 F.2d 789, 791 (9th Cir. 1972) (injunction not issued).

[59] The ordinary equitable principles which were to be considered were "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." 370 U.S. at 228.

[60] 398 U.S. 235 (1970). The company and the striking union were bound by a collective bargaining agreement that contained a no-strike clause and a final and binding arbitration provision. The grievance arbitration procedure provided that "any . . . dispute between the parties . . . involving the interpretation or application" of the agreement would be settled by the grievance-arbitration procedures. The company and the union disputed the use of non-union personnel in stocking the company's frozen food shelves. The dispute was clearly arbitrable pursuant to the contract, but the union struck and refused to submit to the company's demand for arbitration. The Court held that where the strike was over a grievance the parties were contractually bound to arbitrate, the strike could be enjoined, notwithstanding Norris-LaGuardia.

[61] 398 U.S. at 241.

to acceptance of *Sinclair*.[62] The *Boys Markets* injunction was carefully limited by the Court's "narrow" language which permitted injunctions to issue only in situations which complied with the four conditions expressed in Justice Brennan's dissent in the *Sinclair* case.[63]

Additionally, *Sinclair* would have been applied only in the federal courts, since state court equity jurisdiction was unaffected by the Norris-LaGuardia Act. The expressed need for uniformity in the enforcement of collective bargaining agreements among state and federal courts would have thereby been thwarted.[64] Further, even if a state court injunction were issued, removal to federal district court could be easily obtained pursuant to 28 U.S.C. § 1441 (1970).[65] The state court injunction would then be vacated because of section 4's qualification on federal court equity jurisdiction.

II. Accommodation and the Sympathy Strike Situation

A. *Judge-Made Law*

Labor law is hampered by a "vocabulary so freighted with ambiguity [that it can easily lend itself] to a fictitious issue, by confounding assumed conduct with the real conduct whose justifiability is in question."[66] Congress perpetuated this problem by enacting statutes with specific intent but clouded by broad and inclusive terminology. The courts, charged with statutory application, framed labor law principles so as to clarify these ambiguities and essentially created "judge-made law."[67] The definition of statutory terms, such as "labor dispute," "terms and conditions of employment," and "promotion of industrial peace," necessitated judicial interpretation and, at times, "judicial invention."[68] This clarification process required that the courts recognize

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[62] The *Boys Markets* Court took judicial notice that Congress had still failed to take any action to accommodate the Norris-LaGuardia and Labor-Management Relations Acts, however, it rejected the supposition that congressional silence was indicative of congressional acceptance of the policies propounded in *Sinclair*. This was diametrically opposed to the approach taken by the *Sinclair* Court. *See* note 52 *supra*. The *Boys Markets* Court also rejected the argument that the doctrine of stare decisis compelled a holding in accordance with *Sinclair*. The Court noted that continuity and predictability in the law were essential to the proper maintenance of domestic labor policies. It warned, however, against mechanically adhering to the principles of the most recent case when those principles no longer represented sound judgment or promoted a healthy labor policy. 398 U.S. at 240-42; *contra*, *id.* at 256 (Black, J., dissenting).

Congress did attempt to codify the *Boys Markets* holding in the building and construction industry. *See* S. 924, 95th Cong., 1st Sess. (1977); H.R. 4250, 95th Cong., 1st Sess. (1977). The expressed effect would have been to enable any employer at a common situs (multiple employers at one site) to obtain injunctive relief against any strike or picketing in breach of a no-strike clause. Moreover, the strike had to be over an issue that was subject to final and binding arbitration. The bill was defeated in the House. 35 Conc. Q. 521 (Mar. 26, 1977).

[63] 398 U.S. at 253-54.

[64] *See* Textile Workers v. Lincoln Mills, 353 U.S. 448, 456-57 (1957).

[65] Avco Corp. v. Aero Lodge 735, 390 U.S. 557, 560 (1968). *See* note 23 *supra*.

[66] F. Frankfurter & N. Greene, The Labor Injunction 35 (1930).

[67] *Id.* at 203.

[68] *See* Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957).

the congressional policies and construe those policies in accordance with the specific facts of the case.[69]

The purpose of the Norris-LaGuardia Act was to alleviate the unfettered use of the federal injunction, for prior to enactment of the NLA, federal courts had wantonly abused the injunction. By 1947, however, congressional policy had shifted from the promotion of labor organizations to the enforcement of labor-management agreements. In so shifting national labor policy Congress sought to "promote a higher degree of responsibility [between] the parties . . . and . . . [to] promote industrial peace."[70] Congress decided to enforce labor contracts through the "usual processes of the law,"[71] and granted the federal courts broad equitable and legal jurisdiction over alleged violations of such contracts pursuant to section 301(a) of the Labor-Management Relations Act.

The scope of judicial inquiry was subsequently limited, however, in deference to the congressional policy which favored settlement through arbitration, preferring the arbitrator's decision on the merits to judical determinations based on ordinary contract principles.[72] Arbitration became recognized as the major motifin the settlement of labor-management disputes and thereby emerged as the principal method of interpreting and resolving ambiguities in the parties' collective bargaining agreement.

In *Drake Bakeries v. Local 50, Bakery Workers*,[73] the Supreme Court affirmed a Second Circuit decision to stay an action for damages resulting from an alleged breach of a no-strike clause, pending an arbitrator's decision whether the clause had been violated. The Court considered a dispute concerning an alleged breach of a no-strike clause, in a contract containing all-pervasive no-strike and arbitration provisions, so fundamental to the interpretation of the contract that arbitration was mandated. The alleged breach of the no-strike clause would not, in turn, relieve the employer of his duty to arbitrate under the contract. The questioned activity would have to be expressly excluded from arbitration coverage before such a conclusion could bereached.[74] Unless expressly excluded, it would be presumed that the parties intended that an arbitrator rather than a court decide whether the activity was in violation of the no-strike clause.

Analogizing to the sympathy strike situation, the decision in *Drake* implies that a striking union, if requested by the employer to submit to

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[69] *See* Drake Bakeries v. Local 50, Bakery Workers, 370 U.S. 254, 266 (1962) (each case must be handled on the basis of its own facts and not answered in the abstract or in general terms).

[70] S. REP. No. 105, 80th Cong., 1st Sess. 17 (1947).

[71] H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 42 (1947).

[72] *See* note 44-50 *supra* and accompanying text.

[73] 370 U.S. 254 (1962).

[74] *Id.* at 258-66. The parties had agreed to submit all disputes "involving questions of interpretation or application" of the agreement to the designated grievance-arbitration provisions. The company and the union disagreed on the question of whether the union had violated the no-strike clause. Because the alleged violation of the no-strike clause was an issue of contract interpretation, the dispute fell within the broad parameters of the arbitration provision, unless expressly excluded from coverage. The company, therefore,

arbitration under a final and binding arbitration clause, must arbitrate the question whether a contractual no-strike clause encompassed the otherwise protected right of union members to respect a picket line. The union may not, under this interpretation, continue the strike and rely on its own contractual interpretation. The *Drake* rationale would equally suffice to deny an employer's prayer for injunctive relief if the employer had not first agreed to arbitration concerning the alleged violation.

The sympathy strike situation, however, complicates the systematic application of *Drake*. The employer seeks to enforce the no-strike clause by asking the court to enjoin the sympathy strike pending arbitration of the question whether the sympathy strike, in fact, constitutes a violation of that no-strike clause. The situation is also complicated by the fact that sympathy strikes can create a need for immediate injunctive relief because of the potential for a chain reaction among related industries. The employer, rather than waiting for the strike to terminate and then estimating damages, seeks an immediate suspension of the strike activity through judicial enforcement of the no-strike clause and the parties' quid pro quo. Enforcement of the no-strike obligation also hampered by the conflict between the seemingly all-inclusive prohibition of injunctions in section 4, and the broad grant of federal equity jurisdiction in section 301(a). Although both statutes apply to a labor dispute arising out of an alleged breach of a collective bargaining agreement, the results reached under each approach may be diametrically opposed. While section 4 severely curtails a district court's jurisdiction to issue injunctions, section 301(a) provides a federal forum in which to enforce labor contracts without an express or implied limit on the use of the injunctive remedy.

B. *Application of* Boys Markets *to Sympathy Strikes*

Boys Markets was a landmark decision for several reasons. The decision balanced Norris-LaGuardia's anti-injunction policies with the Labor-Management Relations Act's policy of promoting the enforcement of collective bargaining agreements, and it demonstrated that the prohibition against injunctions was neither inveterate, nor inapposite to contemporary labor-management relations.[75] In order to effectuate the parties' quid pro quo and to promote the congressional policy favoring the arbitration of labor-management disputes, the Court held that the injunction ban of section 4 did not preclude the enjoining of a strike over an arbitrable grievance. The decision enumerated the requisite conditions for issuance of injunctions and thereby restrained federal

was required to submit its damage claims to the arbitrator since that was the forum the parties had agreed upon in their contract.

[75] The *Boys Markets* Court, 398 U.S. at 250-53, noted that the Norris-LaGuardia Act "was responsive to a situation totally different from that which exists today," but also stated that its holding was only applicable in situations in which a contract contained an express mandatory grivance-arbitration clause. Therefore, the Court emphasized that the decision was not to be construed as undermining the vitality of the Norris-LaGuardia Act. Several commentators, however, have suggested that there is a need to re-evaluate the contemporary utility of Norris-LaGuardia. *See, e.g.*, Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635, 645-46 n.39 (1959); Stewart, *No-Strike Clauses in the Federal Courts*, 59 MICH. L. REV. 673, 681-85 (1961).

courts from re-entering "the labor injunction business."[76] Finally, the holding limited the injunctive remedy to instances in which the parties were bound by a collective bargaining agreement containing a mandatory grievance adjustment or arbitration procedure.[77] The determination of the bounds of its directive that "injunctive relief would not be appropriate in every case of a strike over an arbitrable grievance,"[78] however, was resigned to subsequent interpretations.

In *Boys Markets*, the union had a clearly arbitrable grievance with the company. When the union struck over this grievance instead of submitting it to the mandatory grievance-arbitration procedure, the strike constituted an enjoinable contract violation. The facts of the sympathy strike case, however, are distinguishable from those in *Boys Markets* by virtue of the nature of the sympathy strike: the sympathy strike occurs after a picket line has been established, when strikers refuse to cross the line in deference to the picketers.[79] Hence, the sympathy strike situation lacks an underlying grievance between strikers and the employer seeking injunctive relief. The dispute arises after the strike has begun, when the strikers and the employer disagree with respect to the legality of the strike.[80] Therefore, even when the labor contract encompasses an all-inclusive arbitration provision, the dispute is only arguably arbitrable and not conclusively arbitrable as appears to be required by the *Boys Markets* command that to be enjoinable the strike must be "over a grievance the parties are contractually bound to arbitrate."[81]

The holding of *Boys Markets*, therefore, did not necessitate a finding that a sympathy strike was enjoinable prior to a determination by the arbitrator concerning the legality of the strike. District courts had to interpret the rule of *Boys Markets*, as well as the spirit and reasoning underlying its accommodation of the Norris-LaGuardia and the Labor-Management Relations Acts, to decide whether to permit an injunction pending an arbitrator's decision regarding the legality of the sympathy strike.

[76] *See* note 7 *supra*; F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 200 (1930).

[77] 398 U.S. at 253.

[78] *Id.* at 253-54.

[79] Judge Hunter's dissenting opinion in NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Local 926, 502 F.2d 321, 326 n.6 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974), suggested a way in which the sympathy strike could fit within the *Boys Markets* situation. In addition to striking until the picketing terminated, the strikers would have to demand that the company recognize their right to honor a picket line. The recognition demand would constitute an economic means employed to compel settlement of an arbitrable issue, and therefore, if the labor contract contained a mandatory arbitration procedure, the sympathy strike would be enjoinable pursuant to *Boys Markets*.

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

[81] 398 U.S. 235, 254 (1970). A contrary point of view was expressed in Valmac Indus., Inc. v. Food Handlers, Local 425, 519 F.2d 267-68 (8th Cir. 1975), *vacated*, 428 U.S. 906 (1976). Judge Webster, writing for the Eighth Circuit, stated that "[i]t makes little sense to argue that because the work stoppage precipitated the dispute it was not a work stoppage 'over' a grievance which the parties were contractually bound to arbitrate." *Contra*, NAPA Pittsburgh, Inc. v. Automotive Chauffeaurs, Local 926, 502 F.2d 321, 330 (3d Cir.) (Hunter, J., dissenting), *cert. denied*, 419 U.S. 1049 (1974). Judge Hunter strenously argued against enjoining the strike based on the fact that a sympathy strike is not the cause of a dispute but rather, in the normal strike situation, the result of an underlying dispute.

C. *Development of Anti-Injunction and Pro-Injunction Philosophies*

Uncertainty in the judicial application of the *Boys Markets* standards to sympathy strikes led to inconsistent conclusions throughout the circuits. The problem concerned interpretation of the *Boys Markets* command that a strike could be enjoined only when it was "over a grievance the parties [were] contractually bound to arbitrate."[82] The Court did not specify whether the dispute must precipitate the work stoppage or whether the dispute could develop indirectly from the strike over a grievance that resulted from the work stoppage.

Several courts, including the Second Circuit in *Buffalo Forge Co. v. United Steelworkers*, denied district court jurisdiction to enjoin the strike on the ground that the strike was not over a grievance which the parties were contractually bound to arbitrate.[83] These courts interpreted the sympathy strike as merely being a response to another union's picket line, not caused by any "underlying" dispute between the employer and the striking employees.[84] Thus, their application of *Boys Markets* was strict and literal, denying the injunction in any case that failed to represent an exact replica of *Boys Markets*. Moreover, they held the injunction was inappropriate since the dispute with the sympathy strikers would ultimately be resolved by arbitration of the employer-picketer dispute; hence, accommodation was not necessary in this type of

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[82] 398 U.S. at 254.

[83] In the Second Circuit: Buffalo Forge Co. v. United Steelworkers, 517 F.2d 1207 (2d Cir. 1975), *aff'd* 428 U.S. 397 (1976) (preliminary injunction improper pending arbitration on the legality of the sympathy strike because the strike did not concern a grievance which the parties were contractually bound to arbitrate); *but see* Barnard College v. Transport Workers, 372 F. Supp. 211 (S.D.N.Y. 1974) (preliminary injunction against sympathy strikers proper, since the dispute over the legality of the strike entailed an "interpretation or application" of the collective bargaining agreement).

In the Fifth Circuit: Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972) (district court without jurisdiction to enjoin sympathy strike, since the strike was merely precipitated by the picket lines and, therefore, did not constitute a strike over a grievance that the parties were contractually bound to arbitrate; injunction permissible only if the dispute underlying the strike is arbitrable between the company and the sympathy strikers); *see also* United States Steel Corp. v. United Mine Workers, 519 F.2d 1236 (5th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976) (a "memorial" strike is not enjoinable pursuant to *Boys Markets* because the strike was not over an arbitrable grievance, and scope of the prospective injunction too closely resembled the result that Norris-LaGuardia had intended to alleviate).

In the Sixth Circuit: Plain Dealer Publishing Co. v. Cleveland Typographical Union 53, 520 F.2d 1220 (6th Cir. 1975), *cert. denied*, 428 U.S. 909 (1976) (*Boys Markets* injunction cannot be extended to include strikes which did not originate from an underlying grievance between the employer and the strikers. A sympathy strike did not arise from an underlying grievance and was not enjoinable. Moreover, the court found the strikers had proven their personal safety would be jeopardized if they attempted to cross the lines).

[84] This sentiment was aptly stated in Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372, 1373 (5th Cir. 1972):

> The strike by the Chalmette employees was not "over a grievance" which the parties were contractually bound to arbitrate. Rather, the strike itself precipitated the dispute — the validity under the Union's no-strike obligation of the member-employees honoring the ILA picket line. Were we to hold that the legality of the very strike sought to be enjoined in the present situation constituted a sufficiently arbitrable underlying dispute for a *Boys Markets* injunction to issue, it is difficult to conceive of any strike which could not be so enjoined.

strike.[85] Other courts[86] relied on the *Steelworkers Trilogy's* "presumption of arbitrability"[87] to construe the dispute over the legality of the strike as one which the parties were "contractually bound to arbitrate."[88]

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[85] For a detailed analysis of the practical considerations counteracting the use of the injunction as a remedy to halting sympathy strikes, see Note, *Federal Courts May Enjoin Work Stoppage When its Legality is an Arbitrable Issue*, 88 HARV. L. REV. 464 (1974). The author noted that in NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Local 926, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974), the unions had reserved the right to refuse to cross primary picket lines. The injunction of the work stoppage, pending an arbitrator's ruling on the status of the picket line, created a new obligation which undermined this right rather than enforced the union's promise not to respect secondary picket lines. 88 HARV. L. REV. at 467.

[86] In the Third Circuit: Island Creek Coal Co. v. United Mine Workers, 507 F.2d 650 (3d Cir. 1974), *cert. denied*, 423 U.S. 877 (1975) (preliminary injunction issued pending arbitration over whether the union had impliedly bargained away its right to honor stranger picket lines. The court enjoined the strike and held that the question whether the strike violated the contract was subject to the all-encompassing arbitration provisions which even extended to "matters not specifically mentioned" in the contract. The court stated that if an employee had been discharged for honoring the picket line, the union could have submitted this dispute to arbitration; thus the court avoided construction of a double standard of arbitrability); NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Local 926, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974) (preliminary injunction issued pending arbitrator's decision whether the picket line was primary or secondary).

In the Fourth Circuit: Windsor Power House Coal Co. v. District 6, UMW, 530 F.2d 312 (4th Cir. 1976) (preliminary injunction entered against union that refused to cross stranger picket line at petitioner-company); Armco Steel Corp. v. United Mine Workers, 505 F.2d 1129 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975) (refusal to cross picket lines held to be arbitrable issue and was properly enjoined); Pilot Freight Carriers, Inc. v. Teamsters, Local 391, 497 F.2d 311 (4th Cir.), *cert. denied*, 419 U.S. 869 (1974) (preliminary injunction issued and case remanded to district court to determine whether injunction should continue pending arbitrator's decision regarding the relationship between the no-strike clause and a contract clause affording union members the right to honor a primary picket line); Wilmington Shipping Co. v. International Longshoremen's Ass'n, 86 LRRM 2846 (4th Cir. 1973), *cert. denied*, 419 U.S. 1022 (1974) (injunction issued); Monongahela Power Co. v. Local No. 2332, IBEW, 484 F.2d 1209 (4th Cir. 1973) (dispute over legality of sympathy strikes was subject to mandatory arbitration; statutory right to strike was waived by union agreement to no-strike clause).

In the Seventh Circuit: Inland Steel Co. v. Local 1545, UMW, 505 F.2d 293 (7th Cir. 1974) (broad terms of arbitration provisions established union's duty to arbitrate whether its members could refuse to cross a picket line); *but see* Hyster Co. v. Independent Towing & Lifting Machine Ass'n, 519 F.2d 89 (7th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976) (refusal to cross picket lines not an arbitrable dispute; injunction denied); Gary Hobart Water Corp. v. NLRB, 511 F.2d 284 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975) (sympathy strikers were not bound to arbitrate the underlying issue of the picketer's grievance with the company, whereby the sympathy strike was not enjoinable).

In the Eighth Circuit: Associated Gen. Contractors v. International Union of Operating Eng'rs, Local 49, 519 F.2d 269 (8th Cir. 1975) (injunction issued); Valmac Indus. v. Food Handlers, Local 425, 519 F.2d 263 (8th Cir. 1975), *vacated*, 428 U.S. 906 (1976) (injunction issued, but conditioned on prompt arbitration); Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 442 F.2d 246 (8th Cir. 1970), *cert. denied*, 404 U.S. 871 (1971) (question of legality of sympathy strike constituted a "minor dispute" within Railway Labor Act and strike could be enjoined to preserve status quo pending arbitration); *but see* Stokely-Van Camp, Inc. v. Thacker, 394 F. Supp. 715 (W.D. Wash. 1975) (temporary restraining order denied because the refusal to cross was held to be only arguably illegal, whereas in *Boys Markets* the union action was a patent violation of the contract; however, work stoppage enjoinable where the strike clearly violated agreement and would cause irreparable injury, notwithstanding the "over a grievance" requirement).

[87] For a discussion on the *Steelworkers Trilogy* and the presumption of arbitrability, *see* notes 44-50 *supra* and accompany text.

[88] *See* Parade Publications, Inc. v. Philadelphia Mailers, No. 14, 459 F.2d 369 (3d Cir. 1972). In this case, plaintiff failed to allege a dispute which the parties were con-

These courts based their decisions upon the breadth of the mandatory arbitration provisions, and heeded the admonitions set forth in the *Steelworkers Trilogy*: to deny arbitration only upon positive assurance that the dispute was not arbitrable;[89] to solely look to the face of the contract to determine the arbitrability of the grievance;[90] and to resolve all doubts of arbitrability in favor of arbitration.[91] Because this narrow inquiry prevented the courts from positively concluding that sympathy strikes were excluded from arbitration, they enjoined the strike pending the arbitrator's decision reasoning that the right to strike would not be eradicated, but merely suspended.[92] Stressing the importance of the injunction as the only effective way to enforce an agreement to arbitrate,[93] these courts interpreted the "over a grievance" clause to meet the facts of the sympathy strike case.[94] More specifically, they avoided

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tractually bound to arbitrate, merely alleging the continuing work stoppage violated the no-strike clause. The court held that both an underlying arbitrable issue and a no-strike clause are prerequisite to issuance of a *Boys Markets* injunction. *Id.* at 373. In determining the arbitrability of the issue, however, especially where the arbitration clauses are broad in scope, the party seeking the injunction "is entitled to the benefit of the strong presumption in favor of arbitrability . . ." *Id.* at 374 (quoting AVCO Corp. v. Local 787, Int'l Union, 459 F.2d 968, 973 (3d Cir. 1972)).

[89] *See* note 46 *supra*.

[90] *See* note 48 *supra*.

[91] *See* note 47 *supra*.

[92] Valmac Indus., Inc. v. Food Handlers, Local 425, 519 F.2d 263, 267-78 (8th Cir. 1975); NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Local 926, 502 F.2d 321, 324 (3d Cir. 1974). The belief that the injunction would effectively terminate the strike was expounded in F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 201 (1930); Note, *Federal Courts May Enjoin Work Stoppage When its Legality is an Arbitrable Issue*, 88 HARV. L. REV. 464, 470 (1974).

The right to engage in a sympathy strike is statutorily protected but such a right may be bargained away. NLRB v. Rockaway News Supply Co., 345 U.S. 71, 80 (1953). In Gary Hobart Water Corp. v. NLRB, 511 F.2d 284, 287, 288-89 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975), the court required that the waiver be in "clear and unmistakable language;" *but see* Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209, 1214 (4th Cir. 1973) finding that the right to refuse to cross the picket line "was waived . . . by the . . . union in agreeing to a no-strike clause."

[93] *Boys Markets* noted that the injunction was the most expeditious means to end an illegal strike; whereas an action for damages after the dispute has been settled, or an action for the discharge of the striking employees would only exacerbate an already tense situation. 398 U.S. at 248-49. *See also* Textile Workers v. Lincoln Mills, 353 U.S. 448, 453-56 (1957).

[94] For the most part, these cases have avoided becoming enmeshed in the "over a grievance" interpetation and have rested their opinions on the all-inclusive breadth of the arbitration clauses. The Court in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) expressly stated that arbitration could only be denied if the particular dispute was excluded from mandatory arbitration but that all "doubts should be resolved in favor of coverage." *Id.* at 583.

Therefore, the district court in Barnard College v. Transport Workers, 372 F. Supp. 211, 212 (S.D.N.Y. 1974), held that it was impossible to positively determine whether the violation of a no-strike clause was arbitrable when the contract provided that "[g]rievances shall be deemed to consist only of disputes arising out of the interpretation or application of this agreement." *Id.* at 212.

The *Barnard* court, however, reinterpreted the "over a grievance" requirement by noting that the collective bargaining agreement contained a mandatory arbitration provision and that the "dispute [was] one that both parties [were] contractually bound to arbitrate." *Id.* at 213. The same result was reached in the Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209, 1214 (4th Cir. 1973).

an application of this clause which considered the requirement a fatal defect to the enjoining of sympathy strikes.

Thus, two schools of thought evolved, each propounding the limited scope of a district court's inquiry in a labor dispute. The anti-injunction school held that even broad and all-inclusive arbitration clauses would not obviate the fact that there was no underlying grievance between the parties; a condition precedent to issuance under a literal application of *Boys Markets*. The pro-injunction school, presumed coverage within all-encompassing arbitration provisions, and thus granted the injunction in accordance with the Supreme Court directives in the *Steelworkers Trilogy*.

1. *The Pro-Injunction School*

The pro-injunction school contended that issuance of the injunction would expedite mandatory arbitration and preserve the integrity and mutual enforceability of the contract. Moreover, the injunction would neither impinge upon nor judicially repeal the Norris-LaGuardia Act, which sought to promote labor organizations and collective bargaining; hence, enforcement of the contract would actually bolster the intent of that Act, by preserving the agreement into which the parties freely entered. Finally, they reasoned that the foundation of the Supreme Court's decision in *Boys Markets* rested upon preservation of the contractual relations between the parties.

The pro-injunction school's application of *Boys Markets* is exemplified by *Monongahela Power Co. v. Local 2392, IBEW*.[95] The parties had agreed to peaceably settle any dispute concerning "the interpretation, application, or claimed violation" of the contract through mandatory grievance-arbitration procedures. Local 2392 began a work stoppage to honor the picket lines of a sister local. After the employer unsuccessfully attempted to submit the dispute to the contractual grievance procedure,[96] the company instituted a section 301 action. The employer requested injunctive relief and damages on the grounds that the sympathy strike violated the no-strike clause[97] and constituted an arbitrable grievance. The union claimed that it had not authorized the strike but that individual employees were merely exercising their section 7 right to refuse to cross the picket line;[98] however, the union

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[95] 484 F.2d 1209 (4th Cir. 1973).

[96] The adjustment of grievance clause provided that "[a]ny dispute . . . with respect to the interpretation, application, or *claimed violation*" would be settled by the parties' grievance arbitration provisions. *Id.* at 1210 (emphasis in original).

[97] The no-strike clause broadly prohibited strikes, work stoppages, or any "interference with or impeding of work." It further prohibited union authorization of such activity and required that, upon company notification of a no-strike clause violation, the union should terminate all unauthorized activity by its members.

[98] 484 F.2d at 1211. Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1970), generally provides employees with the right to organize and join labor unions, to bargain collectively and to "engage in other concerted activites 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."

was unable to prove this assertion.[99] The Fourth Circuit Court of Appeals, in reversing the district court's denial of the injunction, found that the facts of the case "clearly [brought] it within the narrow *Boys Markets* exception" to the Norris-LaGuardia ban on the use of injunctions.[100]

The *Monongahela* court viewed the broad language of the contract as indicative of the parties' intention not to exclude this particular dispute from arbitration, and therefore held that the alleged violation of a no-strike clause was included within the scope of the arbitration provision. The court thus applied the "presumption of arbitrability" to the dispute over the legality of the sympathy strike and stated that the dispute was so clearly arbitrable that the strike would have been enjoined even had there been a presumption against arbitrability.[101] The court further emphasized that the quid pro quo doctrine necessitated that the union submit to the mandatory grievance procedures rather than strike.[102] Lastly, the court held that the injunction pending arbitration was founded upon ordinary principles of equity.[103] The *Monongahela* court concluded that the sympathy strike was enjoinable pursuant to the reasoning behind *Boys Markets* because even though the facts differed, there was nevertheless a grievance which both parties were contractually bound to arbitrate.[104]

The contract in *Monongahela* contained an express no-strike clause. Some courts, however, have issued the injunction notwithstanding the absence of such an express no-strike obligation. These courts maintained that an obligation to submit grievances to final and binding arbitration implied a concomitant obligation not to strike over an arbitrable dispute.[105]

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[99] *Id.* at 1214-15.

[100] *Id.* at 1213.

[101] *Id.* at 1214 n.13.

[102] *Id.* at 1214.

[103] *Boys Markets* noted that the following equitable principles should be considered in determining whether to issue an injunction to enforce an alleged no-strike clause violation: "whether breaches [of contract] 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. 235, 254 (1970) (quoting the dissent in Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 228 (1962)).

[104] 484 F.2d at 1214; *see* note 96 *supra*.

[105] Several Supreme Court policy considerations permitted this implication. The implication is primarily based on the equation, in *Textile Workers v. Lincoln Mills*, that an employer's agreement to submit disputes to mandatory grievance-arbitration procedures is the quid pro quo for the union's no-strike obligation. 353 U.S. 448, 455 (1957). Further support, however, is suggested by the holding in *Local 174, Teamsters v. Lucas Flour Co.*, where a contract containing a mandatory arbitration provision impliedly contained a no-strike pledge with respect to arbitrable disputes. 369 U.S. 95, 104-06 (1962) (the employer's breach of contract suit, brought under section 301, was upheld against the union for strike damages due to a walkout over an arbitrable dispute). And by the holding in *Gateway Coal Co. v. United Mine Workers*, which implied a no-strike clause as coexistent with a mandatory grievance-arbitration procedure in a *Boys Markets* injunction suit. 414 U.S. 368, 382-84 (1974). (In *Gateway*, the Court held that the federal policy favoring arbitration permitted an injunction in a dispute concerning safety conditions at the place of employment, as such questions were based upon contract interpretation.) *Id.* at 376-77.

In *Island Creek Coal Co. v. United Mine Workers*,[106] the district court implied a no-strike pledge as coexisting with the all-encompassing grievance-arbitration provisions of the National Bituminous Coal Wage Agreement of 1971.[107] The court enjoined a sympathy strike pending arbitration on the scope of the implied no-strike clause. The agreement provided for arbitration of any dispute "as to the meaning and application of the provisions of this agreement," or "matters not specifically mentioned in the agreement," as well as "any local trouble of any kind arising at the mine."[108] The *Island* court held that the contract was silent on the question whether the union had contracted away the rights of its members to honor a stranger picket line.[109] While there was no specific waiver of the right to honor a picket line in the agreement, the court ruled that an injunction should issue to force settlement of the dispute over the legality of the strike by arbitration rather than by economic warfare.[110] This decision was reached on the grounds that the scope of the implied no-strike clause should be equivalent to that of the express, all-encompassing grievance-arbitration provisions.[111]

The pro-injunction school concluded that the combined effect of the presumption of arbitrability and the quid pro quo underlying the *Boys Markets* decision furnished the courts with jurisdiction to enjoin the strike pending arbitration of its legality. Therefore, this school determined that it would not positively rule that the no-strike question was excluded from the scope of mandatory arbitration. In order to comply with its quid pro quo, the union could not legally strike prior to the arbitrator's determination that such activity was proper. Furthermore, noting that the injunction was an equitable remedy and that *Boys Markets* required consideration of equitable factors, the pro-injunction

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[106] 507 F.2d 650 (3d Cir.), *cert. denied*, 423 U.S. 877 (1975).

[107] The court noted the grievance-arbitration provisions were "virtually identical" to the provisions construed in *Gateway*, 507 F.2d at 651; *see* note 106 *supra*.

[108] *Id.* at 651.

[109] *Id.* at 653. Similarly, the court concluded the union could have arbitrated the discharge of a union member who honored the picket lines, pursuant to the adjustment of grievances provisions. The court reasoned that in either the discharge case or the injunction case, the arbitrator would have to determine whether the right to respect picket lines had been waived.

[110] The court qualified the injunctive powers it had assumed and concluded that its approach should not be applied in every case which implied a no-strike clause. It based its opinion on the all-encompassing arbitration provisions which permitted arbitration to resolve disputes over matters not mentioned in the agreement. *Id.* at 653-54.

Accord, Windsor Power House Coal Co. v. District 6, UMW, 530 F.2d 312 (4th Cir. 1976); Armco Steel Corp. v. United Mine Workers, 505 F.2d 1129, 1132-33 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975); Inland Steel Co. v. Local 1545, UMW, 505 F.2d 293, 299-300 (7th Cir. 1974); Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372, 1373 (5th Cir. 1972); Bethlehem Mines Corp. v. United Mine Workers, 375 F. Supp. 980, 981 (W.D. Pa. 1974). *Cf.* United States Steel v. United Mine Workers, 505 F.2d 1129, 1247 (5th Cir. 1974), *cert. denied*, 428 U.S. 910 (1976) (company remedy for a secondary boycott afforded in terms of a section 10(1) injunction or a section 303 damage suit); *see also* Ben Coal Corp. v. Local 1487, UMW, 457 F.2d 162, 164 (7th Cir. 1972) (broad mandatory arbitration provisions imply a pro tanto obligation not to strike).

[111] 507 F.2d at 654.

school issued the injunction only after finding the employer would suffer irreparable harm should the union's concerted activity continue.[112]

The pro-injunction school's use of the presumption of arbitrability, however, facilitated enjoining arguably protected union activity. In this sense, the pro-injunction school's approach somewhat frustrated the basic premise of the Norris-LaGuardia Act, which was to eliminate the unfettered use of the federal injunction. Moreover, this school's equation that a dispute "arising over a strike" was tantamount to a strike "over a grievance," strained the scope of *Boys Markets* "narrow holding." In effect, the equation was a justification for a result which could not have been reached through a literal interpretation of *Boys Markets*.

2. *The Anti-Injunction School*

By contrast, the yistrict court in *Buffalo Forge Co. v. United Steelworkers* held that *Boys Markets* did not apply to the sympathy strike situation since "there [was] no arbitrable grievance between the parties."[113] Depicting the actual dispute as the grievance between the company and the original picketers which precipitated the work stoppage, the court subordinated the dispute over the legality of the sympathy strike to that primary grievance.[114] The court, therefore, concluded that the strike was not "over a grievance" which the parties were contractually bound to arbitrate.[115] Adopting the viewpoint presented in *Amstar Corp. v. Amalgamated Meat Cutters*,[116] the district court in *Buffalo Forge* held that the *Boys Markets* injunction was inapplicable to sympathy strikes, since issuance of injunctions under those circumstances would undermine the viability of the Norris-LaGuardia Act and a wide panoply of strikes could become enjoinable should such precedent be established.[117]

The finding in *Buffalo Forge*, that the controversy entailed no arbitrable dispute displays the court's apparent confusion of the standards of arbitrability as enunciated in the *Steelworkers Trilogy* with the *Boys Markets* standards of enjoinability. *Boys Markets* might have indirectly bolstered the congressional policy favoring arbitration, but its holding related to the enjoining of strikes that thwart the arbitration process. The policy considerations concerning the arbitrability of disputes were outlined in the *Steelworkers Trilogy*.[118] If the court, in fact, ruled that

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[112] *See* Armco Steel Corp. v. United Mine Workers, 505 F.2d 1129, 1133-34 (4th Cir. 1974); Inland Steel Co. v. Local 1545, UMW, 505 F.2d 293, 300 (7th Cir. 1974); Bethlehem Mines Corp. v. United Mine Workers, 375 F. Supp. 980, 984 (W.D. Pa. 1974).

[113] 386 F. Supp. 405, 409 (1974).

[114] *Id.* at 410.

[115] *See* Plain Dealer Publishing Co. v. Cleveland Typographical Union 53, 520 F.2d 1220, 1227 (6th Cir. 1975), *cert. denied*, 428 U.S. 909 (1976) (the court stated that "there is a clear difference between a labor dispute which results from a work stoppage and a work stoppage which is the result of a labor dispute arising from conditions of employment").

[116] 468 F.2d 1372 (5th Cir. 1972); *see* note 84 *supra*.

[117] 386 F. Supp. at 410.

[118] *See* notes 44-50 *supra* and accompanying text.

the dispute over the legality of the strike was not arbitrable, this would constitute a restriction of the presumption of arbitrability, particularly since the labor contract provided for arbitration of questions involving the very "meaning and application" of the agreement. If the court merely concluded that the strike was not enjoinable because the dispute did not precipitate the strike, then it essentially made a pure application of *Boys Markets*.

The appellate court affirmed the district court decision, and held that the strike was not over a grievance with Buffalo Forge but was "simply a manifestation of the striking workers' deference to other employees' picket lines."[119] The court further surmised that if this type of strike were enjoined, pursuant to the *Boys Markets* formula, the issuance of the injunction would, in effect, repeal section 4 of the Norris-LaGuardia Act.[120] Moreover, the court did not consider its decision antithetical to the policies of the Labor-Management Relations Act.[121] Primarily focusing on the issues of law rather than the particular facts of the case, the court regarded *Boys Markets* as the seminal and terminal point of consideration. It denied the injunction even though the adjustment of grievances section in the parties' contract provided that "[s]hould differences arise . . . as to the interpretation and application of . . . this Agreement, or should any trouble of any kind arise in the plant, there shall be no suspension of work on account of such differences."[122]

Several other practical considerations, notwithstanding *Boys Markets*, shaped the court's decision. Notable was the dissenting opinion of Judge Hunter in *NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Local 926*.[123] Judge Hunter classified this type of strike as one that was not an attempt to compel the company to forego arbitration of an arbitrable dispute since the sympathy strike was the cause rather than the result of the dispute and thus determined that enjoining the strike would not affect the ultimate outcome of the dispute.[124] He noted that

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[119] 517 F.2d 1207, 1210 (2d Cir. 1975).

[120] *Id.* at 1211.

[121] *Accord*, Plain Dealer Publishing Co. v. Cleveland Typographical Union 53, 520 F.2d 1220, 1221-22 (6th Cir. 1975), *cert. denied*, 428 U.S. 909 (1976) (refusal to cross a picket line because of bona fide fear of physical harm is an exception to an express or implied no-strike obligation. *Id.* at 1228); *see* Inland Steel Co. v. Local 1545, UMW, 505 F.2d 293, 300-01 (7th Cir. 1974) (Fairfield, J., dissenting); NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Local 926, 502 F.2d 321, 325 (3d Cir.) (Hunter, J., dissenting), *cert. denied*, 419 U.S. 1049 (1974); *but see* Gateway Coal Co. v. United Mine Workers, 414 U.S. 386 (1974) (court enjoined a work stoppage over a safety dispute notwithstanding section 502 of the Labor-Management Relations Act, 29 U.S.C. § 143 (1970), which entitles an employee to refuse to work if abnormally dangerous conditions exist at his place of employment); Avco Corp. v. Local 787, UAW, 459 F.2d 968, 973 (3d Cir. 1972) (contract was silent as to whether employees were required to work overtime at the employer's request, but the strong presumption of arbitrability necessitated enjoining the employees from refusing to work overtime until the arbitrator interpreted the contract).

[122] 386 F. Supp. 405, 407 (W.D.N.Y. 1974).

[123] 502 F.2d 321, 325 (3d Cir.) (Hunter, J., dissenting), *cert. denied*, 419 U.S. 1049 (1974).

[124] 502 F.2d at 326.

even though the legality of the strike might be an arbitrable dispute, the "cause-effect" relationship between the dispute and the strike was lacking.[125] Hence, pursuant to a "mechanical" application of *Boys Markets*, the strike could not be enjoined.[126] In vigorously arguing against enjoining the sympathy strike, Judge Hunter further reasoned that an injunction would effectuate the tautology that arbitrability would be treated as tantamount to enjoinability.[127] This analysis inevitably led to the conclusion that any doubt concerning the legality of the sympathy strike should be resolved in favor of strict application of the Norris-LaGuardia Act.[128]

While the majority in *NAPA* decided to enjoin the strike and compel arbitration of the dispute, Judge Hunter theorized that the issuance of the injunction would actually discourage arbitration in that the employer having obtained the injunction and the end of the work stoppage, would have nothing more to gain from arbitration. Arbitration would only present the employer with the precarious possibility that he might eventually lose on the merits.[129] The statutory rights of employees to respect a picket line were regarded as more compelling than the employees' "arguable" contractual responsibility to cross the lines.[130]

The anti-injunction school, refusing to enjoin the strike because it was not "over a grievance the parties [were] contractually bound to arbitrate," defined the "dispute" as the grievance between the employer and the picketers, and thus relegated the sympathy strike dispute to a subordinate and incidental status.[131] The anti-injunction courts

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[125] *Id.* at 330-31.

[126] *Id.* at 333.

[127] *Id.* at 325. *See* text at note 118 *supra*. Judge Hunter viewed the sympathy strike as arbitrable but expressly rejected enjoining the strike solely on the basis of its arbitrability. He further stated that,

> [T]his dispute was never an "underlying cause" of the Local 926 work stoppage since it arose after that work stoppage had begun and never became a basis for its continuation. As a result, the strike never deterred the arbitration of this issue and the existence of this dispute never provided a basis for the issuance of an injunction under the holding in *Boys Markets*.

Id. at 331 (footnote omitted).

[128] *See* Note, *The Applicability of Boys Markets Injunctions to Refusals to Cross a Picket Line*, 76 COLUM. L. REV. 113, 138 (1976); *see generally* Note, *Federal Courts May Enjoin Work Stoppage When its Legality is an Arbitrable Issue*, 88 HARV. L. REV. 464 (1974).

[129] 502 F.2d at 327-28. Judge Hunter's portentions were partially realized when an employer was granted an injunction pending arbitration but subsequently refused to arbitrate. The court thereupon ordered the employer to arbitrate within ten days, emphasizing that the purpose of the injunction was to compel the parties to submit the dispute to arbitration and avoid the economic consequences of a work stoppage. Valmac Indus., Inc. v. Food Handlers, Local 425, 519 F.2d 263, 268-69 (8th Cir. 1975), *vacated on other grounds*, 428 U.S. 906 (1976).

[130] The Supreme Court, in NLRB v. Rockaway News Supply Co., 345 U.S. 71, 80 (1953), held that a worker's statutory right to strike had been waived by a no-strike clause that did not specifically permit the employee to honor a picket line. The employee's breach of the clause was sufficient reason for his discharge. Justice Black dissented on the ground that the Labor-Management Relations Act had recognized the traditional right to respect picket lines and had statutorily sanctioned this activity. He argued the majority decision contravened that right. *Id.* at 81.

[131] The *Buffalo Forge* Court noted that:

sacrificed compelling immediate resolution of a continuing controversy through arbitration for a mechanical application of the *Boys Markets* requirements.[132] The strikers were assured of their statutory right to honor picket lines, notwithstanding their arguable violation of the no-strike clause.

The problem of accommodating the divergencies between the Norris-LaGuardia and the Labor-Management Relations Acts emerged as a matter for congressional attention, however, subsequent to the *Boys Markets* decision, Congress did not state its opinion on the accommodation. Cognizant of the resulting controversy among the circuits, the Supreme Court granted certiorari in the case of *Buffalo Forge Co. v. United Steelworkers*,[133] to determine whether the *Boys Markets* accommodation could be applied to sympathy strikes.

III. THE *Buffalo Forge* DECISION

Buffalo Forge afforded the Court the opportunity to reinterpret the contemporary utility of Norris-LaGuardia's injunction ban and to redefine the current availability of the injunction as a tool for enforcing collective bargaining agreements. The Court, however, refused to extend the area that it previously carved out of Norris-LaGuardia and thus concluded that the *Boys Markets* exception to section 4 did not apply to sympathy strikes. It held that Norris-LaGuardia's ban on injunctions was still responsive to a worker's right to honor a picket line, notwithstanding a labor contract's broad no-strike obligation.

In following the presumption in favor of arbitration, the Court noted that the alleged violation of the no-strike clause was arbitrable;[134] therefore, the arbitration process would have to be summoned to determine the legality of the strike before any injunction could issue.[135] Noting that the company did not refute the allegations that it had not requested arbitration, the Court held that the injunction could issue only after the employer submitted the question to arbitration and the strike had been found to be violative of the no-strike clause.[136]

This statement seems to be procedurally consistent with the Court's holding in *Drake Bakeries v. Local 50, Bakery Workers*, in which a

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> Boys Markets plainly does not control this case . . . . 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 were subject to the settlement procedures provided by the contract 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.

428 U.S. at 407-08.

[132] *See* NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Local 926, 502 F.2d 321, 333 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974).

[133] 423 U.S. 911 (1975).

[134] 428 U.S. 397, 405, 409-10 (1976).

[135] *Id.* at 411.

[136] *Id.* at 410. The Union argued that the employer failed to invoke the arbitration process and therefore should not be entitled to the injunction. 517 F.2d at 1209 n.4. The Supreme Court, in its affirmance of the appellate court's decision not to enjoin the strike, did not reach this issue. 428 U.S. at 401 n.3.

company's section 301 suit for damages was stayed pending an arbitrator's decision whether the no-strike clause had been violated.[137] *Drake* stated that when a contract provided for mandatory arbitration, the arbitration process was so fundamental that even an alleged "repudiation" of the agreement by the union would not eliminate the company's duty to arbitrate the dispute.[138] It is also consistent with the previous holding in *Textile Workers v. Lincoln Mills*[139] that a court order compelling specific performance of an agreement to arbitrate does not contravene section 4 of Norris-LaGuardia. Therefore, the Court agreed with the petitioner's contention that the alleged no-strike violation was arbitrable. The Court, however, refused to grant petitioner the injunctive relief sought pending the arbitrator's determination.

The Court submitted that the parties' quid pro quo was not hampered by allowing the sympathy strike to continue pending arbitration. Since the fact pattern in *Buffalo Forge* materially deviated from that in *Boys Markets*, the Court held that the rationale underlying *Boys Markets* was not applicable to sympathy strikes.[140] Accommodation was not mandated in *Buffalo Forge*, as it had been in *Boys Markets*, and the Court refused to expand the scope of *Boys Markets* to include sympathy strikes. The Court's primary concern was the continued vitality of Norris-LaGuardia, which would be unduly undermined if the sympathy strike was enjoined.[141]

The *Buffalo Forge* Court, impliedly adopting the considerations of Judge Hunter in his dissent in *NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Local 926*,[142] stated that "[t]he strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain."[143] Although the dispute was regarded as arbitrable, since it did not originate over a grievance, the union was not required to observe its concomitant no-strike obligation. Also, the Court noted that if the injunction were issued, Norris-LaGuardia's vitality would be severely curtailed[144] by the future ability to enjoin any strike concerning an alleged contractual violation regardless of the express prohibitions of section 4 of the Norris-LaGuardia Act. The Court reasoned that section 301 of the Labor-Management Relations Act was intended to enforce collective bargaining agreements including arbitration provisions, but that section 4 of Norris-LaGuardia does not permit injunctions before it has been determined that a violation of the contract has, in fact, occurred.[145]

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[137] For a discussion of *Drake*, *see* notes 73-74 *supra* and accompanying text.

[138] 370 U.S. at 262-63. The Court in *Drake* denied that the union's faithful performance of the no-strike obligation was a condition precedent to the company's duty to arbitrate the alleged violation of a no-strike clause. *Id.* at 261.

[139] *See* notes 40-43 *supra* and accompanying text.

[140] 428 U.S. at 407.

[141] *Id.* at 410-11.

[142] 502 F.2d 321, 326 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974).

[143] 428 U.S. at 408.

[144] 428 U.S. at 410-12. *See also* 468 F.2d 1372, 1373 (5th Cir. 1972).

[145] 428 U.S. at 410.

The Court interpreted *Boys Markets* as requiring an underlying dispute as well as an arbitrable dispute. Absent the underlying dispute, a strike could only be enjoined after an arbitrator's determination that the union activity violated the no-strike clause. Moreover, the Court determined that when the agreement lacked an express no-strike clause, an implied no-strike provision would be insufficient to allow the injunction to issue. To the extent that some courts had implied a no-strike clause and enjoined the sympathy strike pending arbitration, the Court noted that those courts were incorrect.[146]

Furthermore, the Court discredited the pro-injunction school for its inference that *Boys Markets* extended to any alleged breach of a labor contract. The Court was primarily concerned with the potential for increased district court activity at the preliminary injunction stage, simply because the dispute was found to be arbitrable. Not only would this extend the scope of court involvement beyond that prescribed in the *Steelworkers Trilogy*,[147] but it would also directly contravene section 4 of the Norris-LaGuardia Act. Under the guise of maintaining the status quo ante, upon a finding that the dispute was arbitrable, the courts could "hold hearings, make findings of fact, interpret the applicable provisions of the contract and issue injunctions."[148] If the federal courts had the power to determine factual and legal issues that emanated from an arbitrable dispute at the preliminary injunction stage, this activity would ultimately usurp the purpose of arbitration.[149] Hence a strike cannot be enjoined pending arbitration of its legality simply because a dispute over the scope of the no-strike clause has arisen from that strike. The *Boys Markets* accommodation was limited to its facts and to the requirements by which it accommodated section 4 and section 301.

Justice Stevens was joined in a vigorous dissent to *Buffalo Forge* by Justice Brennan, author of the *Boys Markets* requirements. Regarding the quid pro quo as a single entity, the dissent contended that the Court had severed that doctrine into two parts: one which was enjoinable; the other which was not.[150] *Boys Markets* narrow holding, the dissent argued, was not further constrained by the "over a grievance" requirement; but, extended to all suits "clearly within" the ambit of the no-strike obligation.[151] Therefore, the dissent reasoned, the policy underlying *Boys Markets* mandated a different conclusion.

The dissenting argument, which favored issuance of an injunction pending arbitration, evolved from two main sources: the reasoning underlying *Boys Markets* and the congressional policy favoring arbitration which was promoted by *Boys Markets*. The dissent listed five consid-

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[146] *Id.* at 408 n.10; *see* note 105 *supra* and accompanying text.

[147] 428 U.S. at 410-11. For a discussion of the *Steelworkers Trilogy see* notes 44-50 and accompanying text.

[148] *Id.*

[149] 428 U.S. 412. *See* note 49 *supra.*

[150] 428 U.S. at 413 & n.2.

[151] *Id.* at 424-26.

erations underlying *Boys Markets* that necessitated a different result in *Buffalo Forge*: the central policy of the Norris-LaGuardia Act was not retarded but enhanced by the enforcement of a labor contract the union had freely entered;[152] the quid pro quo doctrine was not limited to strikes "over an arbitrable grievance" but extended to "clear" violations of the no-strike obligation;[153] a literal reading of the Norris-LaGuardia Act did not complement contemporary labor policy, and section 4's injunction ban did not absolutely preclude federal enforcement of a no-strike clause;[154] uniformity between state and federal forums would be thwarted by barring federal use of the injunction remedy in sympathy strikes;[155] and the quid pro quo doctrine and the federal policy favoring binding arbitration must promote the employer's desire for uninterrupted operation during the term of the contract.[156] Thus, *Boys Markets* protected the integrity of the labor contract by compelling the arbitration process and the quid pro quo of that process.

In protecting the contract, the courts were bound by the scope of that document.[157] Therefore, the majority and the dissent agreed that an implied no-strike clause could not be extended to include an obligation to cross a picket line, regardless of the quid pro quo doctrine. Noting that the court's function was merely to apply the contract into which each party had freely entered, the quid pro quo would only be preserved when a strike violative of an express no-strike commitment was enjoined pending arbitration.[158] It would be pure speculation to conclude that sympathy strikes would be included in an implied no-strike clause. Presumably based on this reasoning, the dissent determined that some courts had incorrectly decided that an obligation not to respect picket lines could be implied from broad arbitration clauses.[159]

The dissent essentially argued that the majority merely stated broad considerations at the expense of the federal judiciary's ability to adjudicate in a specific situation. The dissent reasoned that to issue an injunction after the arbitrator has determined that the activity is a violation prior to arbitration was an unreasonable interpretation of the court's power. Justice Stevens noted:

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

[152] *Id.* at 417.

[153] *Id.* at 419.

[154] *Id.* at 422.

[155] *Id.* at 423. *See* notes 64, 65 *supra* and accompanying text.

[156] 428 U.S. at 424.

[157] *See* note 48 *supra* and accompanying text.

[158] 428 U.S. at 408 & n.10; *id.* at 4.5 & n.17.

[159] *Id.* at 425 & n.17. *See* notes 105-11, 146 *supra* and accompanying text.

> agreement were so plainly unambiguous that there could be no bona fide issue to submit to the arbitrator, there must be the same authority to enforce the parties' bargain pending the arbitrator's final decision.[160]

Other factors shaped the dissent's argument that the inability to enjoin this strike hampered effective arbitration. Since the injunction depended upon the particular facts of each case, a rule that subordinated consideration of the immediate situation, in order to perpetuate broad policy concerns, constituted an application of form over substance. Ultimately the congressional policy favoring arbitration would be thwarted, since the courts would be propounding broad policy at the expense of compelling immediate enforcement of the grievance settlement procedures which the parties freely undertook. Such a condition would not only hamper effectuating the quid pro quo, but also would endorse judicial interpretation of the merits of the case, thereby eliminating the need for arbitration. The dissent reasoned that precedent dictated that a "substantial question of contractual interpretation" warranted the use of the court's federal equity jurisdiction to compel arbitration,[161] and, therefore, also militated in favor of enjoining a strike clearly in violation of the quid pro quo, the no-strike clause.

Disputing the Court's reasoning that the injunction would constitute a decision of contractual disputes at the preliminary injunction stage,[162] the dissent argued that the preservation of the status quo ante pending arbitration on the merits, by definition, would not supplant the arbitrator's decision.[163] Moreover, even though the dissent conceded that an injunction improperly issued might terminate a legal strike, it urged that this fact merely compelled the need for expedited arbitration rather than an irrevocable denial of federal court jurisdiction. Furthermore, the dissent contended that denial of the injunction could produce effects equally as devastating to the employer, when the strike violated the contract, as the issuance of the injunction against the union when the strike was legal. Because the strike neither furthered any economic interest of the sympathy strikers nor attempted to resolve any dispute between the employer and the employees, the injunction would not frustrate any underlying policy of Norris-LaGuardia.

One of the grounds for denying the injunction in the Second Circuit was that the enjoining of a strike which did not seek to redress any grievance would virtually obliterate the policy of the Norris-LaGuardia

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[160] 428 U.S. at 426 (footnotes omitted).

[161] *Id.* at 414 (quoting Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 382-84 (1974)).

[162] *Id.*

[163] *Id.* at 428. By definition, the temporary restraining order and the preliminary injunction are issued to preserve the status quo ante the alleged violation and to prevent the petitioner from sustaining irreparable injury pending decision on the merits. Such equitable remedies, therefore, preserve the setting for effective arbitration and restrain conditions from degenerating to a degree where an arbitrator's decision that the contract had been violated would be insufficient to remedy the harm done.

Act.[164] Utilizing this frustration of policy approach, the dissent classified a strike which clearly violated the contract but which did not seek to redress grievances, as hindering the congressional policy supporting the enforcement of collective bargaining agreements.

To promote the contemporary utility of the Norris-LaGuardia Act and to effectuate the congressional concern for the enforcement of collective bargaining agreements, Justice Stevens suggested four conditions precedent, the fulfillment of which would enable the sympathy strike to be enjoined: the union, prior to injunction, should be permitted to present its argument for contractual justification for honoring picket lines; the strike must be "clearly within the no-strike clause;" the injunction must be conditioned upon immediate submission to the grievance-arbitration procedures or upon submission to arbitration upon an expedited schedule; and the traditional equitable requirements must be met.[165]

Rather than relying on the rule of *Boys Markets*, which would irrevocably deny enjoining sympathy strikes, Justice Stevens interpreted the spirit of that case as allowing injunctive relief when the sympathy strike constituted a clear violation of the collective bargaining agreement.

IV. Arguments in Favor of Preliminary Injunctive Relief in *Buffalo Forge*

Three major policy concerns were reflected in the *Buffalo Forge* decision: proper enforcement of the collective bargaining agreement; preservation of the arbitrator's function to render a determination on the merits of the labor dispute; and preservation of a union member's statutory right to honor a picket line. The majority opinion held that in order to preserve the right to honor a picket line, such union activity may not be enjoined unless that right has been expressly waived, and waiver cannot be inferred from a broad no-strike clause. The arbitrator must be the first to decide that the strike is a contract violation to assure the district court that an injunction would not threaten protected union activity. Thus, the majority reasoned, the arbitrator's function will be preserved without influence from the district court, and the collective bargaining agreement will be protected by compelling the parties to resort to the grievance settlement procedures for which they bargained.[166]

[164] Buffalo Forge Co. v. United Steelworkers, 517 F.2d 1207, 1211 (2d Cir. 1975).

[165] 428 U.S. at 431-32. These conditions precedent are essentially those propounded in the *Boys Markets* case.

[166] Justice White noted:

> As is typical, the agreement in this case outlines the pre-arbitration settlement procedures and provides that if the grievance "has not been . . . satisfactorily adjusted," arbitration may be had. Nowhere does it provide for coercive action of any kind, let alone judicial injunctions, short of the terminal decision of the arbitrator. The parties have agreed to grieve and arbitrate, not to litigate. They have not contracted for a judicial preview of the facts and the law. Had they anticipated additional regulation of their relationships pending arbitration, it seems very doubtful that they would have resorted to litigation rather than to private arrangements.

428 U.S. at 411 (citation omitted).

Thus, the majority adopted a policy of strict construction regarding the interpretation

The majority holding, however, raises serious doubts about the future enforceability of the quid pro quo doctrine and the prospective use of arbitration as a forum for settling grievances. An employer will certainly hesitate to be bound by a broad mandatory arbitration procedure if the union's concomitant no-strike obligation is only partially enforceable. Accordingly, if the employer is aware that sympathy strikes shall not be within the ambit of a clause prohibiting "strikes, work stoppages or impeding of work,"[167] he will surely bargain for a limited arbitration clause. The effectiveness of arbitration as a peaceful means of settling labor-management disputes could be eliminated, with economic warfare emerging as a more compelling alternative.[168] Thus, the majority opinion hinders, rather than promotes, the congressional policy favoring arbitration; in effect, it sanctions a quid pro quo that is only partially enforceable.[169]

of the collective bargaining agreement. *See* Gary Hobart Water Corp. v. NLRB, 511 F.2d 284 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975), in which a National Labor Relations Board decision that an explicit waiver was required to suspend an employee's section 7 rights to honor a picket line, was enforced by the Eighth Circuit Court of Appeals. The NLRB held that the broad no-strike pledge only applied to matters that the employer agreed to arbitrate, and that a fellow union's complaint was not arbitrable under the first union's contract. Therefore, the no-strike provision did not cover the sympathy strike activity, and the employer violated section 7 rights by discharging employees who observed the line. *See also* Kellogg Co. v. NLRB, 457 F.2d 519 (6th Cir.), *cert. denied*, 409 U.S. 850 (1972), in which the circuit court upheld the Board's decision that discharge of sympathy striking employees, pursuant to the collective bargaining agreement, was an unfair labor practice. The court distinguished between the language of a no-strike provision and a no sympathy strike provision and concluded that individual employees were not denied the privilege of honoring a picket line.

The reasoning behind the *Kellogg* decision, however, is questionable since it related union culpability to agency considerations. *See* Edwards & Gergmann, *The Legal and Practical Remedies Available to Employers to Enforce a Contractual "No-Strike" Commitment*, 21 LAB. L. J. 3, 5 & n.9 (1970); *see also* United Steelworkers v. CCI Corp., 395 F.2d 529, 532-33 (10th Cir. 1968) (union held liable, after the court pierced the subterfuge of "individual" activity).

[167] Buffalo Forge Co. v. United Steelworkers, 386 F. Supp. 405, 407 (W.D.N.Y. 1974).

[168] Buffalo Forge Co. v. United Steelworkers, 428 U.S. at 421 (Stevens, J., dissenting) (quoting Textile Workers v. Lincoln Mills, 353 U.S. 448, 453-55). A possible solution to the *Buffalo Forge* problem is the incorporation of an expedited arbitration provision in the collective bargaining agreement whereby an arbitrator's cease and desist order against an illegal strike could be rendered in a predetermined number of hours. *See* Buffalo Forge Co. v. United Steelworkers, 428 U.S. at 428-29.

In the interim between the *Sinclair* decision, *see* notes 51-59 *supra* and accompanying text, and the *Boys Markets* decision, *see* notes 60-63 *supra* and accompanying text, the only way to secure injunctive relief, notwithstanding Norris-LaGuardia's interdictions, was through the enforcement of an arbitral award. Philadelphia Marine Trade Ass'n v. ILA, Local 1291, 368 F.2d 932, 934 (3d Cir. 1966), *rev'd on other grounds*, 389 U.S. 64 (1967); New Orleans I.I. Ass'n v. ILA, Local 1418, 389 F.2d 369 (5th Cir.), *cert. denied*, 393 U.S. 828 (1968). This approach warrants that the parties honor their contractual obligations, allows injunctive relief only after an arbitrator's award, and minimizes an employer's damages as a result of an interruption in work production.

Under an expedited arbitration provision, the sole question which should be presented to the arbitrator is whether the employees are engaging in an illegal work stoppage. The presentation before the arbitrator should also be in lieu of any other "in-house" arbitration procedures in the interest of time and minimization of injury. Under traditional methods of arbitration, when an arbitrator's decision would be the last step in the arbitration procedure, enforcement of the arbitrator's award could be delayed for an indeterminate amount of time if recalcitrant parties decided to engage in dilatory tactics. *See* Bakaly & Pepe, *And After Avco*, 20 LAB. L.J. 67, 73-78 (1969).

[169] Buffalo Forge Co. v. United Steelworkers, 428 U.S. at 413 & n.2. The same

Justice White's majority opinion centered around restraining undue judicial interference with the merits of the grievance during the court's hearing on whether the preliminary injunction should issue.[170] Even if the equities weigh in favor of an injunction, however, the *Buffalo Forge* decision restrains courts from enjoining the strike pending arbitration. In effect, this result employs the Norris-LaGuardia Act to shield striking unions from liability, regardless of the legal status of the strike.[171]

The Court has justified this result on two grounds: first, that this strike is not "over a grievance" that is contractually arbitrable; and, that an injunction pending arbitration, in such cases would be a decision on the merits since issuance of the preliminary injunction pending arbitration of the dispute would terminate the strike and effectively create a permanent injunction.

The Court has disregarded the fact that an injunction is an equitable remedy used to preserve the status quo ante[172] and to prohibit acts which would give the injured party a cause of action for which the law affords no adequate or complete relief. The majority decision thwarts this purpose based on the supposition that the district court's inquiry, upon a finding that the dispute is arbitrable, even though the dispute is not an underlying cause of the strike, will eventually extend to the merits of the dispute and will "cut deeply into the policy of the Norris-LaGuardia Act."[173]

To pursue effective arbitration, and promote the quid pro quo between the parties, the situation compels a restoration as nearly as pos-

conclusion was reached by commentators even before the *Boys Markets* decision. *See* Bakaly & Pepe, *And After Avco*, 20 LAB. L.J. 67, 69, 73 (1969).

[170] Permanent injunctions are issued as complete injunctive relief after a full hearing on the merits of the dispute. Preliminary injunctions are issued for short-term purposes, generally to prevent irreparable injury to the petitioner pending a disposition on the merits.

The preliminary injunction is one of two categories of interlocutory injunctions. It may issue only after the respondent has been given notice and an opportunity to be heard on the applicability of the injunction. The other is a temporary restraining order, which may be issued ex parte, without notice or an opportunity to be heard. *See* section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107 (1970).

The fact that a temporary restraining order may be issued ex parte, on affidavits alleging that unavoidable injury will otherwise occur, substantially increases the chances for abuse. The unbridled issuance of ex parte restraining orders was one of the abuses that prompted the enactment of the Norris-LaGuardia Act. *See* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 60 (1930). At least two commentators have, therefore, recommended that the ex parte restraining order be abolished. *Id.* at 200-02, 224.

For a discussion of the practical considerations underlying all injunctive relief, *see* Axelrod, *The Application of the Boys Markets Decision In the Federal Courts*, 16 B.C. IND. & COM. L. REV. 893, 950-57 (1975).

[171] 428 U.S. at 430.

[172] The court invoking its equity powers may be given jurisdiction to decide its own jurisdiction. It may also have the additional power to preserve the status quo by injunction, so that its jurisdiction to decide its own jurisdiction is preserved. United States v. United Mine Workers, 330 U.S. 258, 290, 292-93 & n.57 (1947) (nation-wide coal strike prevented by injunction).

The court would not usurp its jurisdiction in determining the adequacy of proof of irreparable injury, for this allegation is the keystone upon which the forum of a court of equity rests. Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union 18, 471 F.2d 872, 875 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1975).

[173] 428 U.S. at 410. It has been noted that reliance upon the status quo approach is an

sible to the status quo ante the alleged violation.[174] This does no harm to the policies underlying Norris-LaGuardia. Section 4 of the Norris-LaGuardia Act was not intended to apply to injunctions for maintaining the status quo while the parties to a labor dispute pursued negotiation, mediation, or arbitration.[175] In the long run, the status quo ante approach prevents the situation from degenerating beyond repair and permits a party who has alleged a contract violation and has met his burden of proving irreparable injury the opportunity to pursue arbitration in a less complicated and pressured setting.[176]

The applicability of the injunction pending arbitration was illustrated by the recent work stoppages in the West Virginia coal mines. Local 1759 of the United Mine Workers struck a West Virginia coal mine and other locals soon began striking in sympathy. The strike stretched to seven states, included 90,000 coal miners, and threatened to disrupt all industries that rely on coal.[177] Thus, a strike at one plant of a major industry can mushroom into an industry-wide strike, and have a serious effect on the economy.[178] While the sympathy strikers may not be seeking redress of any grievance with the employer, the propensities for causing injury, and bringing pressure on the employer to resolve arbitrable disputes prior to arbitration,[179] require a more flexible alternative than an absolute injunction ban pending arbitration.[180]

The majority's viewpoint that the dispute will ultimately be resolved

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illusion, for the "situation does not remain in equilibrium awaiting judgment upon full knowledge." F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 201 (1930).

[174] *See* Trinity Valley Iron & Steel Co. v. NLRB, 410 F.2d 1161, 1167-68 (5th Cir. 1969); Gould, *On Labor Injunctions, Unions, and the Judges: The Boys Markets Case*, 1970 SUP. CT. REV. 215, 242.

[175] *See* Manning v. American Airlines, Inc., 329 F.2d 32, 34 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964). The court held that section 4's prohibition does not apply to the Railway Labor Act's status quo provisions pending arbitration, negotiation, or mediation. *Cf.* Association of Gen. Contractors v. Illinois Conference of Teamsters, 454 F.2d 1324 (7th Cir. 1972) (Norris-LaGuardia Act does not permit a preliminary injunction against a union to preserve the status quo pending arbitration on the merits).

[176] *See* Pittsburgh Newspaper Printing, No. 9 v. Pittsburgh Press Co., 479 F.2d 607, 609-10 (3d Cir. 1973) (action by unions to enjoin employer from reducing number of work shifts pending arbitration of the dispute. Showing of irreparable injury is a condition precedent to issuance of injunction); *but see* Southern Ry. Co. v. Brotherhood of Locomotive Fireman, 337 F.2d 127, 133-34 (D.C. Cir. 1964) (injunction compelling railroad to employ firemen in all locomotives until decision was rendered by National Railway Adjustment Board. When public, not just private interests are involved, proof of irreparable injury is not requisite to injunctive relief).

[177] Wall St. J., Aug. 6, 1976, at 1, col. 4; Wall St. J., July 23, 1976, at 2, col. 3.

[178] *See* Wall St. J., July 30, 1976, at 6, col. 4. It was reported that during April through June 1976, 1.4 million workers were involved in work stoppages, resulting in 13.3 million lost work days. This resulted in one of the highest amount of days lost in two years; surpassed only by the third quarter of 1974, when 17.9 million work days were lost. Approximately 5.5 million working days were lost in June alone, averaging out to 3.1 working days per thousand workers, up from 2.9 in May and 1.8 in April. The June level was the highest for any month since August 1974.

[179] Even when the unions have reserved the right to respect lawful primary picket lines it may be found that their refusal to cross the lines was an attempt to bring pressure on the employer to resolve arbitrable disputes prior to arbitration. *See* Food Fair Stores, Inc. v. Food Drivers, Local 500, 363 F. Supp. 1255, 1256-58 (W.D. Pa. 1973).

[180] Expedited arbitration might be an alternative to this situation. *See* note 168 *supra*.

by the arbitrator simply avoids consideration of the immediacy that a particular situation may warrant. Even a court order compelling arbitration, with the availability of a contempt order to back it up, does not provide the most adequate remedy for a strike that is clearly within the scope of a no-strike clause. There are no guarantees that the union will abide by the court's order, or ultimately, the arbitrator's ruling. Additionally, valuable time and needless expense are required to effect that which the parties' quid pro quo was intended to control.[181] Therefore, the courts, after a hearing and a finding that the issue of the scope of the no-strike clause is clearly an arbitrable dispute, will most successfully avoid the merits of the dispute by immediately compelling arbitration,[182] and by preserving the status quo ante pending the arbitrator's decision. This approach respects both the broadness and ambiguity of the labor contract's terms.

Notwithstanding the traditional requirements for an injunction, *Boys Markets* and the labor policy enunciated in the *Steelworkers Trilogy* did somewhat modify the criteria whereby an injunction may be issued. Traditionally, a motion for a preliminary injunction required the court to find that the petitioner had shown probable success on the merits.[183] Literally, *Boys Markets* does not require a finding as to the probable success on the merits, and judicial deference to arbitration suggests that federal courts should avoid any such requirement. It would require additional testimony as to the contracting intent of the parties, it would be speculative, and the decision would threaten to ultimately

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[181] *See* United States v. United Mine Workers, 330 U.S. 258, 303 (1947) (district court not deprived of jurisdiction to issue a temporary restraining order and preliminary injunction to prevent a nation-wide coal strike, pending judicial interpretation of a labor contract between the Government and the union). The union refused to heed a back to work order and was found guilty of criminal and civil contempt. Nonetheless the union still did not heed the court's order. The strike had the potential of affecting many other industries, and creating a nation-wide coal strike.

[182] The issuance of the injunction because of the immediacy of the situation has caused dispute among commentators. One argued that such an approach would do indirectly what *Sinclair* prohibited directly. Gould, *On Labor Injunctions, Unions, and the Judges: The Boys Markets Case,* 1970 SUP. CT. REV. 215, 244; another noted that the employer highly values the injunction since it is fast and decisive. These are the same reasons why the union deplores it; the union is necessarily interested in maintaining the procedural safeguards, particularly notice and hearing, to ensure that a legitimate union activity will not be enjoined. Note, *The New Federal Law of Labor Injunctions,* 79 YALE L. REV. 1593, 1601 (1970). The author recommended that the court resolve procedural questions in the union's favor to ensure that injunctions or temporary restraining orders will be issued only in instances when union activities are clearly in violation of the no-strike clause.

[183] A decision on the merits will not be made when a preliminary injunction has been prayed for, however, in exercising its discretion on the suitability of a preliminary injunction, a court would normally take ultimate success or failure on the merits into consideration. A Quaker Action Group v. Hickel, 421 F.2d 1111, 1115-16 (D.C. Cir. 1969); Societe Comptoir de l'Industrie Cotonniere Etablissements Bouseac v. Alexander's Dep't Stores, Inc., 299 F.2d 33, 35 (2d Cir. 1962); Perry v. Perry, 190 F.2d 601, 602 (D.C. Cir. 1951).

FED. R. CIV. P. 65(a)(2) provides also that before or after the commencement of the hearing on a preliminary injunction, the court may accelerate the trial on the merits and consolidate it with the hearing on the injunction. Even if the consolidation is not ordered, any evidence received on the hearing for the injunction would be admissable at the trial on the merits, and would become part of the record at the trial and therefore need not be repeated at trial.

replace the arbitrator's function.[184] The modification requires only that the federal courts base their inquiry on the parties' collective bargaining agreement and that the courts utilize their equity jurisdiction to prevent a contract violation from creating irreparable injury. *Boys Markets* never suggested that equitable considerations were to be waived.[185]

The injunction pending arbitration of the labor dispute is further justified by the fact that damages or discharge of employees after arbitration are not as effective as an immediate halt to the alleged contract violation. A damage or discharge action prosecuted after the termination of the strike may exacerbate rather than remedy the situation.[186] If the employer requests arbitration but the union refuses, and a court compels arbitration, the order may be totally ineffective without the injunction.[187]

Congress authorized a broad grant of federal jurisdiction for violations of labor contracts in section 301(a), eliminating the dollar amount and diversity requirements.[188] The mere fact that Congress did not qualify section 4's broad restriction on federal equity jurisdiction is not to say that Congress specifically rejected such a qualification.[189]

The Supreme Court recognized the need to accommodate section 4 and section 301(a) in *Boys Markets*. The Court thus developed a "test" through which district courts could determine whether they had jurisdiction to enjoin a strike over an arbitrable grievance, thereby furthering the arbitration process. The need to accommodate section 4 and section 301(a) did not culminate with the facts of *Boys Markets*. The *Boys Markets* test cannot be strictly and literally applied since that case represented a need to accommodate the competing considerations of two legislative enactments to the particular facts of one case. Previous Supreme Court decisions also manifested the need for case-by-case accommodation.[190]

[184] *Cf.* Plain Dealer Publishing Co. v. Cleveland Typographical Union 53, 520 F.2d 1220, 1223-27 (6th Cir. 1975), *cert. denied*, 428 U.S. 909 (1976) (the Court applied the "success on the merits" test to the *Boys Markets* criteria and held the sympathy strike could not be enjoined pending arbitration). The petitioner need not, however, prove his case on the merits to obtain an interlocutory injunction. B.W. Photo Util. v. Republic Molding Corp., 280 F.2d 806, 807 (9th Cir. 1960).

[185] The Court based its decision on the fact that the underlying dispute was not an arbitrable grievance, it never reached a decision on equitable considerations.

[186] Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235, 248 (1970); ABA Section of Labor Relations Law — 1963 Proceedings, Special Atkinson-Sinclair Committee (Report of Neutral Members) 241, 242 (1964).

[187] Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 216-17 (1962) (Brennan, J., dissenting).

[188] The text of section 301(a) is set out in full at note 3 *supra*.

[189] Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 216-17 & n.2 (1962) (Brennan, J., dissenting).

[190] *See* notes 35-39 *supra* and accompanying text. The Court held in *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.* that section 4 could be qualified to the extent of compelling enforcement with section 3, First, of the Railway Labor Act. That section authorized either party to submit a minor dispute to the National Railroad Adjustment Board, whose decision would be final and binding upon both parties. The fact that section 2, Sixth, of the Railway Labor Act defines a minor dispute as a "controversy over the meaning of an existing collective bargaining agreement" suggests that the Court, following a pattern of consistency and predictability, should have regarded the more specific

The parties in *Buffalo Forge* had provided for the arbitration of any dispute as to the "meaning and application of the . . . agreement."[191] The Court noted that the breadth of this clause and the other grievance procedure clauses did not include injunctive relief as a means for resolving grievances. The fact is that the preliminary injunction in this case would not have effected a settlement, but would only have been the means to the most expeditious and equitable settlement.

The *Buffalo Forge* Court noted that the timing of the strike was essential to the overall effect of that activity, and that a strike importuneously enjoined would be effectively terminated.[192] The timing of the strike is, however, not as important to the sympathy strikers, who are not striking because of any underlying grievance, as the immediacy of the injunction is to the employer who has shown a contract violation and has proven irreparable injury due to a work stoppage. Damages may be impossible to calculate,[193] customers may be lost, and the employer will not be receiving redress for the alleged breach of the quid pro quo.[194] Hence, application of an inapposite "judicially invented" test relegates the parties to a strike situation that was arguably eliminated by virtue of their contract. In the situation in which the strike clearly comes within the ambit of the no-strike restriction, and is contractually arbitrable, it is the proper functioning of the quid pro quo to submit the dispute to arbitration as expeditiously as possible.[195]

When the parties are bound by the broad and all-encompassing provisions of no-strike and arbitration provisions, the real issue centers around whether the union has waived its members' statutory right to strike, including their right to respect a picket line. Such an issue has no relevance to the core purpose of Norris-LaGuardia, which was intended to promote the growth of labor organizations.[196] Notwithstanding the accommodation between section 4 and section 301(a), the quid pro quo requires an immediate interpretation of the collective bargaining agreement by an arbitrator, for whose interpretation the parties had bargained. Whether section 4 will be violated is inapposite to this consideration. Therefore, we should not construct a "fictitious issue [at the expense of] the real conduct whose justifiability is in question."[197]

This is not to suggest that every alleged no-strike breach will compel

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language of section 301(a) as tempering the ubiquitous and all-inclusive language of section 4, to the extent that a clear violation of the contract could be enjoined.

[191] *See* note 29 *supra* and accompanying text.

[192] 428 U.S. at 412 (1976).

[193] *See* notes 93, 186 *supra* and accompanying text. *See also* Fairweather, *Employer Actions and Options in Response to Strikes in Breach of Contract*, 18 N.Y.U. ANN. CONF. LAB. 129, 149-58 (1966).

[194] *See* Bakaly & Pepe, *And After Avco*, 20 LAB. L.J. 67 (1969).

[195] *Cf.* United States Steel Corp. v. United Mine Workers, 519 F.2d 1236, 1245, 1248-49 (5th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976) (the "state of the law" prohibited the injunction even though the union was in contempt of one injunction, and had been in contempt of others, and when the court found that the employer would be helpless without the issuance of a prospective injunction).

[196] Section 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102 (1970).

[197] F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 35 (1930).

the functioning of the quid pro quo. But, when the broad scope of the no-strike clause leaves no other conclusion than that the statutory right to respect picket lines has been bargained away, the district court's proper function is to respect the scope of the clause and enjoin the strike pending an arbitrator's decision.[198]

The complexity of labor disputes, the complications in the law surrounding such disputes, the animosities and mutual distrust between labor and management, and the goal of promoting peaceful and unimpeded production, require a flexible approach to each particular situation. One test cannot be devised that will meet every injunction situation. The preservation of the quid pro quo is dependant upon judicial freedom to deal with the particular facts of each case. The majority decision, however, has relegated federal equity jurisdiction in sympathy strike situations to the arbitrator's decision.

The same reasons that led the *Boys Markets* Court to reject a mechanical application of the doctrine of stare decisis[199] were equally applicable in *Buffalo Forge*. The divergent fact pattern required a new understanding of the interplay between section 4 and section 301 rather than a blanket denial of the need to accommodate these sections. Hence, the Court has, seven years after overruling *Sinclair Refining Co. v. Atkinson*,[200] again reverted to a literal interpretation of section 4. The Court in *Buffalo Forge*, as in *Sinclair*, relied upon the historical significance of the Norris-LaGuardia Act, rather than its contemporary utility.

The *Buffalo Forge* decision has also hampered uniformity between state and federal jurisdictions to issue equitable remedies. Since Norris-LaGuardia applies only to federal courts, a state court remains free to enjoin a sympathy strike. The injunction, however, will be dissolved if the case is removed to federal court.[201]

Justice Stevens' dissenting opinion reflects the flexibility with which labor law cases must be judged. Without this approach, the collective bargaining agreement would be an ephemeral document to which the parties would only pay lip service. The dissent suggested that the *Boys Markets* doctrine promoting accommodation should be applied to meet the expectations of the parties in a particular situation. The fact that Justice Brennan, author of the *Boys Markets* requirements, joined in the *Buffalo Forge* dissent, is some indication that *Boys Markets* was not intended to be limited to its facts but, to the contrary, advocated a much broader policy of accommodation.[202] Furthermore, the underlying *Boys Markets* rationale of effectuating the parties' quid pro quo

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[198] Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 432 (1976) (Stevens, J., dissenting); *contra*, Latrobe Steel Co. v. United Steelworkers, Local 1537, 545 F.2d 1336, 1341 (3d Cir. 1976).

[199] Boys Markets v. Retail Clerk's Union, Local 770, 398 U.S. 235, 240-41 (1970).

[200] For a discussion of the *Sinclair* decision and its effects, *see* notes 51-59 *supra* and accompanying text.

[201] *See* notes 64, 65 *supra* and accompanying text.

[202] As a historical note, Justice White dissented in *Boys Markets* based upon "the reasons stated in the majority opinion in *Sinclair*." 398 U.S. at 261.

and furthering the arbitration process, permits an injunction to issue when the parties are bound by a mandatory arbitration procedure and the sympathy strike is clearly in violation of the no-strike clause.[203]

The conditions precedent for the issuance of an injunction, which Justice Stevens suggested, are not novel criteria to be considered, but are a restatement of the underlying rationale of *Boys Markets*. The "test" in *Boys Markets* is relevant only to the fact after which it was patterned. The majority correctly determined that the test had no relevance to *Buffalo Forge*, however, the majority misconceived the test as representing *Boys Markets* substantive import. The test merely represented how one factual pattern would fit within the accommodation. It was not intended to irrevocably preclude an injunction when all conditions, but for the "over a grievance" requirement, were met. Therefore, although the test in *Boys Markets* will always be distinguishable from a *Buffalo Forge* situation, the reasoning underlying the rule compels a holding that when a strike is clearly in violation of a no-strike clause, a district court should have the power to issue a preliminary injunction pending an arbitrator's decision on the merits. Conditioning the strike on an immediate submission to arbitration will protect the parties quid pro quo by setting the arbitration process in motion, and will only briefly postpone the right to honor a picket line. This is what was bargained for by the parties.

V. Conclusion

The *Buffalo Forge* decision heralded a new era for a literal reading of section 4. Although the majority holding is not as sweeping as the decision in *Sinclair Refining Co. v. Atkinson*, in that at some point in time an injunction may be issued, still, the opinion resurrects the strict adherence to section 4 that *Boys Markets* had tempered. Overdependence on the broad language of section 4 is misplaced when it is recognized that the Norris-LaGuardia Act was not meant to immunize the union from all injunctions. The fact that section 7 of that Act allows a temporary restraining order to be issued ex parte reflects congressional authorization of the federal judiciary to have more than an incidental role in the enforcement of collective bargaining agreements. It manifests congressional acknowledgement that the federal judiciary is an able interpreter of the immediacy needed to remedy a particular situation. It contravenes the majority's determination that an injunction may issue only after an arbitrator has decided it may.

Justice Stevens' dissenting opinion allows a more flexible approach in studying the legality of the right to honor a picket line. His opinion more closely follows the reasoning behind *Boys Markets*, for the focal point in that case was not that the strike was "over a grievance;" but that the strike "clearly" violated the no-strike agreement.[204] The proper enforcement of the quid pro quo and the congressional policy favor-

[203] 428 U.S. at 432.

[204] *Id.*

ing arbitration are dependent upon recognition of this fact. Thus, upon a finding of a clear violation of the collective bargaining agreement, an injunction should issue conditioned upon an immediate submission of the issue to arbitration.

The core purpose of the Norris-LaGuardia Act was to promote the growth of labor organizations and their ability to bargain collectively.[205] In preserving the literal language of section 4, the Court in *Buffalo Forge* has diminished the salutary effects of that bargain.

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[205] *See* section 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102 (1970).