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Labor Law—Buffalo Forge Co. v. United Steelworkers: The End to the Erosion of the Norris-LaGuardia Act

Section 4 of the Norris-LaGuardia Act[1] divests the federal courts of jurisdiction to issue injunctions in connection with labor disputes. This Act was passed in 1933 to foster the growth and viability of the then nascent labor movement.[2] It has been gradually eroded by the courts over the years, chiefly as a result of the Act's success in achieving its goals.[3] The enormous growth of organized labor following the passage of the Act has rendered the policies of the Act obsolete and out of step with modern conditions. The Supreme Court has reacted to this situation by "accommodating" the anti-injunction provision of the Norris-LaGuardia Act to allow an injunction to issue in certain situations. The most controversial of these accommodations has been the issuance of an injunction to force a union to honor its contractual obligation not to strike over an issue subject to mandatory arbitration.[4] The extent of this "accommodation" has produced considerable confusion in the circuit courts when applied to the sympathy strike,[5] where the arbitrable issue is not the cause of the strike but its legality.[6] In *Buffalo Forge Co. v. United Steelworkers,*[7] the Supreme Court reaffirmed the vitality of the Norris-LaGuardia Act in the sympathy strike

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

2. 29 U.S.C. § 102 (1970) declares the public policy of the United States in labor matters. Basically this section states that employees should be free from restraint in designating their representatives and in engaging in "concerted activities," *e.g.*, strikes.

3. Bureau of Labor Statistics figures show that the number of strikes doubled from 841 per year in 1932 to 1,695 in 1933, the year the Norris-LaGuardia Act became law. By 1944-1946, the average number of strikes per year was over 4,500. *Causes of Strikes in 1946*, 19 L.R.R.M. 49-50 (1946).

4. Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1970).

5. A sympathy strike involves two unions; one is striking to force some concession from the employer, the other strikes in sympathy with the first's objectives. Sympathy strikes are a common manifestation of traditional union solidarity. As stated by one commentator, "Observance of a picket line—any picket line—is venerated as a fundamental tenet of union morality." Haggard, *Picket Line Observance as a Protected Concerted Activity*, 53 N.C.L. REV. 43, 43 (1974).

6. See text accompanying note 84 *infra.*

7. 96 S. Ct. 3141 (1976).

situation, giving notice that the judiciary's forty-year erosion of the Act may be at an end.

I. THE POLICIES UNDERLYING THE NORRIS-LAGUARDIA ACT

Prior to the passage of the Norris-LaGuardia Act, the federal judiciary was often a willing tool of management in their battle against the rise of the labor union.[8] Injunctions were issued rather indiscriminately, usually at *ex parte* hearings, based solely on the judge's notions of the propriety of the strike's objectives and methods of achieving them.[9]

The Supreme Court endorsed the narrow view of permissible strike objectives in *Hitchman Coal & Coke Co. v. Mitchell*.[10] The United Mine Workers had organized the coal mines in Ohio and Pennsylvania, but not in West Virginia. Since labor costs were a large factor in coal prices, only by organizing the West Virginia mines could those mines be prevented from cutting wages below the union scale and thereby taking business from the unionized mines. Hitchman, however, had extracted a pledge from its employees not to join a union. In order to evade this pledge the UMW advised the Hitchman employees to join the union but to keep their membership secret. When enough employees had joined the union, a strike was called. The Supreme Court held that there was no justification for the UMW's activities because *that* union had no interest in the Hitchman employees' working conditions.[11] Without proper justification, the UMW support of the strike was held enjoinable.[12]

The use of the labor injunction in this manner effectively deprived the unions of the opportunity to organize the mines or other industries. So long as there was a competing non-union mine or factory the

8. *See generally* F. FRANKFURTER & N. GREEN, THE LABOR INJUNCTION (1930).

9. Strikes were usually enjoined as tortious if the union could not "justify" the strike. Justification was to be found in the purpose of the injury the strike inflicted upon the employer and the means by which it was inflicted. A proper purpose was the desire to achieve direct and obvious benefits such as higher wages and shorter hours. More remote purposes, such as strengthening the union or inducing another worker to strike, were prohibited. Peaceful picketing was a legitimate means to achieve a lawful purpose, but picketing could not be accompanied by even a taint of violence. Given the industrial climate of the early twentieth century and the presumption of many courts that picketing was always accompanied with violence, picketing as a legitimate means was hard to prove. Courts thus found it easy to characterize the purpose or the means of striking as illegal and therefore enjoinable. *See id.* at 24-46.

10. 245 U.S. 229 (1917).

11. *Id.* at 252-53.

12. *Id.* at 260.

rationale of *Hitchman* and the resulting availability of the injunction made it difficult to win wage increases. Consequently, at the depth of the Great Depression, Congress passed the Norris-LaGuardia Act to deprive management of the labor injunction.[13] Section 4 protected union organization, picketing, striking and boycotts from restraint by injunction regardless of objective.[14] Sections 7 and 8 required additional procedures[15] and the exhaustion of alternative remedies[16] before an injunction could issue even to protect an employer's property. The Norris-LaGuardia Act in effect allowed the free interplay of economic forces in labor disputes. It was hoped that this freedom would result in the improvement of the working man's earnings and working conditions.[17]

II. THE FIRST ACCOMMODATION: THE RAILWAY LABOR ACT

The denial of jurisdiction to issue injunctions did not last very long in its original form. In 1937, in *Virginian Railway v. System Federation No. 40*,[18] an injunction was issued to require a railroad company to "treat with" the authorized representative of its employees in accordance with the statutory requirements of the Railway Labor Act.[19] The

13. 29 U.S.C. §§ 101-115 (1970). The attitude of Congress in enacting this legislation is expressed in the following statement of Senator Norris: "It is because we have now on the bench some judges—and undoubtedly we will have others—who lack that judicial poise necessary in passing upon the disputes between labor and capital that [an anti-injunction law] is necessary." 75 CONG. REC. 4510 (1932). Such an opinion was well based. Out of 118 applications for federal labor injunctions between 1900 and 1927, 70 were issued *ex parte*, and only 12 of these were supported by affidavits; during this period only 9 injunctions were denied. F. FRANKFURTER & N. GREEN, *supra* note 8, at 64.

14. 29 U.S.C. § 104 (1970).

15. *Id.* § 107.

16. *Id.* § 108.

17. The Supreme Court has defined the central purpose of the Norris-LaGuardia Act to be the encouragement of the "growth and viability of labor organizations." Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 252 (1970).

18. 300 U.S. 515 (1937).

19. 45 U.S.C. §§ 151-163 (1970). The Railway Labor Act was passed in 1926 to regulate railway management-labor disputes with a minimum of government interference. Note, *Labor Law—Railway Labor Act—"Every Reasonable Effort" Requirement of Railway Labor Act, Section 2, First, Held to be Judicially Enforceable*, 17 VILL. L. REV. 766, 768 n.16 (1972). The Railway Labor Act created affirmative legal duties on the part of the carriers and the railway unions to "exert every reasonable effort to make and maintain agreements," 45 U.S.C. § 152, First (1970), and also established the mechanisms for dispute settlement through conferences, *id.*, Second & Sixth. If the conferences failed to achieve settlement, the Act provided for submission to boards of adjustment, *id.* § 153. Finally, the 1926 Act expanded the voluntary arbitration pro-

Court brushed aside the employer's contention that section 9 of the Norris-LaGuardia Act barred such an injunction[20] by emphasizing that the purpose of the Act was to protect the employee's right to organize and strike.[21] But the Court went further and added: "[The provisions of the Railway Labor Act] cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act."[22]

Twelve years later in *Graham v. Brotherhood of Firemen*,[23] the Supreme Court expanded *Virginian Railway*, declaring that an injunction could issue despite the Norris-LaGuardia Act in order to enforce the statutory duty that the Railway Labor Act imposed upon a railway labor union to represent all its members without discrimination. As justification for ignoring the Norris-LaGuardia Act, the *Graham* Court quoted language from an earlier railway labor opinion stating that without an injunction, the aggrieved union members would have a statutory right without a remedy.[24]

In *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad*,[25] the Court continued the process begun in *Virginian Railway* to almost totally negate the Norris-LaGuardia Act when it

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cedures already in existence. *Id.* §§ 157-159.

In 1934 the Act was amended to impose a new duty on the employer to "treat with" the employees' certified representatives. *Id.* § 152, Ninth. The 1934 amendments also created the National Railroad Adjustment Board to settle disputes concerning the interpretation of collective bargaining contracts. *Id.* § 153. *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 756-760 (1961).

20. 29 U.S.C. § 109 (1970) provides in part:

> [E]very restraining order or injunction in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in . . . findings of fact made and filed by the court . . . .

The employer asserted that the decree in *Virginian Ry.* did not conform to these requirements. 300 U.S. at 562.

21. 300 U.S. at 563.

22. *Id.*

23. 338 U.S. 232 (1949).

24. *Id.* at 239. The Court's justification appears inadequate. The language quoted by the Court appeared in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944), which did not even mention the Norris-LaGuardia Act: The right of fair representation "would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have *jurisdiction*." *Id.* at 207 (emphasis added). The point apparently overlooked is that the Norris-LaGuardia Act divests the federal courts of injunctive jurisdiction.

Further, the *Graham* Court made the rather spurious remark that the Norris-LaGuardia Act does not "contain anything to suggest that it would deprive these Negro firemen of recourse to equitable relief." 338 U.S. at 239. Since the Court had just held the dispute in *Graham* was a "labor dispute" within the meaning of the Norris-LaGuardia Act, the plain language of that Act contradicts this statement.

25. 353 U.S. 30 (1957).

comes in conflict with the Railway Labor Act. In a carefully reasoned opinion, the Court held that the Norris-LaGuardia Act could not be read in isolation: "There must be an accommodation of [the Norris-LaGuardia Act] and the Railway Labor Act so that the obvious purpose of each is preserved."[26] The Court decided that section 4 of the Norris-LaGuardia Act was designed to "prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital," and that the Railway Labor Act was enacted to channel "these economic forces . . . into special processes intended to compromise them."[27] The Court, therefore, concluded that railway labor controversies "are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative."[28] Thus, in *Chicago River and Indiana Railroad* the Court declared an accommodation between these two statutes, reasoning that since arbitration is statutorily required in the railway labor context for certain disputes, an injunction does not foreclose a union victory on the issue that precipitated the strike and the Norris-LaGuardia Act does not apply. The Court seemed to imply that only if the union had a reasonable alternative to striking as a means to achieve its desired result could an injunction issue despite the Norris-LaGuardia Act.

If this was the implication intended by the Court, it was altered somewhat in *International Association of Machinists v. Street.*[29] There the Supreme Court considered whether the Norris-LaGuardia Act prohibited an injunction to force a union to cease expending union funds for political purposes in violation of the Railway Labor Act. Noting that the Norris-LaGuardia Act "does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act," the Court held that "the policy of the [Norris-LaGuardia] Act suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right."[30] *Street* did not involve an injunction to end a strike, but *Street* and *Chicago River and Indiana Railroad* taken together seem to produce the rule that an

26. *Id.* at 40.
27. *Id.* at 40, 41.
28. *Id.* at 41. The Norris-LaGuardia Act *does* apply to "major" railway labor disputes, because the Railway Labor Act provides a mechanism for the resolution of only "minor" disputes. *Id.* at 42 n.24.
29. 367 U.S. 740 (1961).
30. *Id.* at 772, 773.

injunction can issue to end a strike only if there is a reasonable alternative to striking *and* there is no other effective remedy.

This rule apparently met its demise in *Chicago & North Western Railway v. United Transportation Union*,[31] where the Court again constricted the Norris-LaGuardia Act in the railway labor context by enjoining a threatened strike which in effect forced the union to comply with its statutory duty under section 2, First, of the Railway Labor Act to "exert every reasonable effort to make and maintain agreements."[32] In this case there was no reasonable alternative (other than negotiation) to the "primary weapon" of the union to force concessions on the issue underlying its dispute with the employer. Despite this, the injunction was declared an appropriate remedy based on the need to accommodate the Railway Labor Act with the Norris-LaGuardia Act.

Thus, in the field of railway labor relations, if the union has violated a statutory duty and the injunction is the only effective remedy for that breach, an injunction may issue even though this may deprive the union of any method to achieve its result other than through negotiation. This deprivation seems to be squarely within the policies of the Norris-LaGuardia Act, and the Court appeared to recognize this by stating that "the vagueness of the obligation under § 2 First [of the Railway Labor Act] could provide a cover for freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place."[33] To minimize this danger, the Court counseled restraint in the issuance of such injunctions.[34]

III. A Shift in Emphasis: The Taft-Hartley Act

Until *Buffalo Forge*, with one exception[35] the Court had exercised little restraint in restricting the Norris-LaGuardia Act when it conflicted with another, more comprehensive labor statute, section 301(a) of the Taft-Hartley Act,[36] passed in 1947. Section 301(a) was passed partly as a result of the success of the Norris-LaGuardia Act and other statutes in fostering the growth of labor unions.[37] The rise of organized labor

31. 402 U.S. 570 (1970).

32. *Id.* at 583. The Court's action here was similar to that of the NLRB when it finds a violation of § 8(b)(3) of the National Labor Relations Act. 29 U.S.C. § 158(b)(3) (1970). Thus, *Chicago & North Western Ry.* was effectively the judicial creation of the § 8(b)(3) remedy in the railway labor context.

33. 402 U.S. at 583.

34. *Id.*

35. *See* text accompanying notes 48-53 *infra*.

36. 29 U.S.C. § 185(a) (1970).

37. Between 1935 and 1947 organized workers grew from four million to over fourteen million. A. Cox, Law and the National Labor Policy 12 (1960).

created a shift in Congressional emphasis away from the protection of labor to the encouragement of the peaceful settlement of labor disputes and the protection of contractual rights under collective bargaining agreements.[38]

Most labor contracts had provisions for the peaceful settlement of contractual disputes through the use of arbitration.[39] However, unions often failed to live up to their contractual obligations to submit disputes to arbitration rather than to strike over them. Due to the status of unions as unincorporated associations, employers in many states had difficulty suing the union for such breaches of contract. Some states required service of all members of the union, while in others the union was viewed as an agent acting for the benefit of the workers and thus did not possess any rights or obligations as an entity.[40] On the other hand, if the employer breached he normally could be easily sued.

To remedy this disparity,[41] Congress sought to make the obligations of the collective bargaining contract mutually binding and enforceable in the federal courts by enacting section 301(a) of the Taft-Hartley Act:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[42]

The avowed purpose of the statute was to "provide for suits by unions as legal entities and against unions as legal entities in the Federal Courts in disputes affecting commerce."[43]

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38. "The Taft-Hartley Act . . . was enacted in 1947 as the product of . . . an unhappy union between the opponents of all collective bargaining and the critics of the abuse of union power." *Id.* at 15 (footnote omitted). This rise in power produced a congressional emphasis on the resolution of labor disputes through arbitration. 29 U.S.C. § 173(d) (1970) declared the public policy of the United States to be the encouragement of arbitration.

39. *See* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 755-760 (1973).

40. *See generally* Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383 (1924); *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1080-87 (1963).

41. The legislative history of the Taft-Hartley Act and some of the reasons behind its passage are contained in the appendix to Justice Frankfurter's dissent in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 485 app. (1956) (Frankfurter, J., dissenting).

42. 29 U.S.C. § 185(a) (1970).

43. SENATE REP. NO. 105, 80th Cong., 1st Sess. 16 (1947). The Taft-Hartley Act

In *Textile Workers Union v. Lincoln Mills*,[44] an action by a union seeking to enjoin an employer from refusing to submit a dispute to arbitration as required by their contract, the Supreme Court relied on the congressionally expressed policy of promoting the enforceability of labor contracts to interpret section 301(a) to be more than a mere jurisdictional statute. Reasoning that the employer's agreement to arbitrate is the *quid pro quo* of the union's agreement not to strike, the Court decided that Congress had adopted the policy of providing sanctions for the violation of an agreement to arbitrate disputes.[45] The Court further held that the sanctions to be imposed under section 301(a) were to be governed by the federal common law of labor relations, "which the courts must fashion from the policy of our national labor laws."[46] Clearly, by granting jurisdiction to the federal courts for suits on collective bargaining agreements, the anti-injunction provisions of the Norris-LaGuardia Act were brought into question. To avoid these provisions the Court relied on cases construing the Railway Labor Act, but not on the "peculiarities" of that Act, to find that the policies of Norris-LaGuardia did not support a literal reading of section 7 of the Norris-LaGuardia Act.[47] Thus an injunction could issue to force an *employer* to arbitrate in accordance with his contractual obligations.

The erosion of the Norris-LaGuardia Act was temporarily halted in *Sinclair Refining Co. v. Atkinson*.[48] In *Sinclair* the policies of the Taft-Hartley Act in favor of the enforcement of collective bargaining agreements met head-on with the anti-injunction provisions of the Norris-LaGuardia Act. *Sinclair* involved a collective bargaining agreement that included an arbitration agreement and an express no-strike clause. Ignoring this clause, the union had "over a period of some 19 months, engaged in work stoppages and strikes on nine separate occasions, each of which . . . grew out of a grievance which could have been submitted to arbitration under the contract . . . ."[49] Despite

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repealed parts of the Norris-LaGuardia Act by making certain strikes illegal, *i.e.*, secondary and national emergency strikes. 29 U.S.C. §§ 178(b), 160(h) (1970).

44. 353 U.S. 448 (1957).

45. *Id.* at 456.

46. *Id.*

47. *Id.* at 458. 29 U.S.C. § 107 (1970) requires that certain procedures be followed before *any* labor injunction may be issued, even against management.

48. 370 U.S. 195 (1962).

49. *Id.* at 197. The statutory protection afforded a worker who honors a picket line, 29 U.S.C. § 158(b)(4)(D) (1970), had previously been held waivable by union agreement to a no-strike clause. NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953).

statutes[50] and judicial decisions[51] which clearly expressed a preference for arbitration as the means to resolve industrial disputes, the Court in *Sinclair* found the language of section 4 of the Norris-LaGuardia Act "almost if not entirely conclusive"[52] and the congressional intent underlying it "crystal clear":[53] the federal courts do not have jurisdiction to enjoin a union from striking even if it had previously agreed to settle by binding arbitration the dispute which led to the strike.

Although the lower federal courts construed *Sinclair* rather narrowly,[54] the decision nonetheless made only one-half of the *quid pro quo* of the collective bargaining agreement specifically enforceable:[55] the employer could be ordered to arbitrate but the employees could not be ordered back to work. The immediate effect of this situation was that, when state law permitted, an employer who was struck in violation of his collective bargaining contract would seek an injunction in state court rather than in federal court.

This tactic was possible because it had previously been held in *Charles Dowd Box Co. v. Courtney*[56] that section 301(a) did not divest the state courts of jurisdiction to hear suits for violation of collective bargaining agreements. Even though the Supreme Court had also held in *Teamsters Local 174 v. Lucas Flour Co.*[57] that in such suits the law

50. *See, e.g.*, 29 U.S.C. §§ 108, 173(d) (1970).

51. Three cases known as the Steelworkers Trilogy express the Supreme Court's preference for arbitration. 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).

52. 370 U.S. at 204.

53. *Id.* at 215.

54. New Orleans Steamship Ass'n v. General Longshore Workers Local 1418, 389 F.2d 369 (5th Cir.), *cert. denied*, 393 U.S. 828 (1968), and Philadelphia Marine Trade Ass'n v. General Longshore Workers Local 1291, 365 F.2d 295 (3d Cir. 1966), *rev'd on other grounds*, 389 U.S. 64 (1967), both held that *Sinclair* did not prohibit an injunction to enforce an arbitrator's decision *after* it was entered. *See* Keene, *The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to Avco and Beyond*, 15 VILL. L. REV. 32 (1969). *Buffalo Forge* explicitly adopted this position: "[R]elevant federal statutes as construed in our cases would permit an injunction to enforce the arbitral decision." 96 S. Ct. at 3146.

55. One commentator has stated that the arbitration clause is truly the *quid pro quo* of the no-strike clause only in those agreements in which the union agrees not to strike over issues which are specifically included in the arbitration clause *and* the union has preserved the right to strike over issues which are not within the arbitrator's domain. Such contracts are rare. Since most collective bargaining contracts do not contain *all* the rules governing the employee-employer relationship, "the no-strike provisions of most collective agreements constitutes a *quo* considerably in excess of the *quid* of the agreement to arbitrate." Feller, *supra* note 39, at 760.

56. 368 U.S. 502 (1962).

57. 369 U.S. 95 (1962). *Lucas Flour* is also significant because the Court affirmed the award of damages to an employer based on a no-strike clause implied solely on the basis of a mandatory arbitration provision. *See id.* at 105.

to be applied was federal rather than state law, the *Dowd Box* Court had expressly left open the question whether the constraints of the Norris-LaGuardia Act applied to the state courts.[58] Thus it was natural for state judges to interpret the Norris-LaGuardia Act so as not to apply to them.[59] Once the state court issued the injunction, however, the union would attempt to remove the case to federal court,[60] where it would argue that injunctive relief was barred under *Sinclair* and request the district court to dissolve the injunction.[61] The employer's tactic, on the other hand, would be to seek *only* an injunction in state court, and attempt to defeat removal by asserting that section 4 of the Norris-LaGuardia Act removed federal *jurisdiction* for injunctive cases.[62]

The union's approach won express approval in *Avco Corp. v. Aero Lodge No. 735*.[63] The *Avco* decision epitomized the conflict that had been simmering in federal labor law since *Lincoln Mills*. In *Lincoln Mills* the Court had declared section 301(a) to have a substantive content which the lower federal courts were instructed to fashion from the policies of the national labor laws. These policies were: (1) to enhance the enforceability of collective bargaining contracts;[64] (2) to promote uniformity between state and federal courts;[65] and (3) to expand the number of courts available to hear collective bargaining contract

58. 368 U.S. at 514 n.8. Actually, the Court left two questions open in *Dowd Box*: "whether the Norris-LaGuardia Act might be applicable to suit brought in a state court for violation of contract made by a labor organization, and whether there might be impediments to the free removal to a federal court of such a suit." Both questions were answered in the negative, the first in William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12 (1974), and the second in Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968).

59. The leading state court case on the issue was McCarrol v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957). *McCarrol* was cited with approval in Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 247 (1970), and in William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12, 20 (1974). As stated by Justice Traynor: "[W]hether or not Congress could deprive state courts of the power to [grant injunctions] when enforcing collective bargaining agreements, it has not attempted to do so either in the Norris-LaGuardia Act or section 301." 49 Cal. 2d at 63, 315 P.2d at 332.

60. 28 U.S.C. § 1441(a), (b) (1970) allow removal.

61. *Id.* § 1450 authorizes the district court to dissolve state court injunctions after removal.

62. This argument was accepted in American Dredging Co. v. Operating Eng'rs Local 25, 338 F.2d 837 (3d Cir. 1964), *cert. denied*, 380 U.S. 935 (1965).

63. 390 U.S. 557 (1967).

64. The conclusion that § 301(a) was intended to encourage the enforcement of collective bargaining agreements is found in *Lincoln Mills* itself: "The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes [is] clear . . . ." 353 U.S. at 458-59.

65. The policy of uniformity is found in *Lucas Flour*: "[T]he subject matter of § 301(a) 'is peculiarly one that calls for uniform law.'" 369 U.S. at 103.

cases.[66] But *Avco* allowed removal to the federal courts, where even a state court injunction could not stand. Through this route of removal unions were effectively divesting state courts of jurisdiction to hear collective bargaining cases. On the other hand, if the state courts were found to be bound by the anti-injunction prohibitions of the Norris-LaGuardia Act, then the policies favoring uniformity and expanding the number of forums would be enhanced, but the conflicting policy of making collective bargaining contracts enforceable would be frustrated. There would be *no* forum in which an employer could get specific performance of his contract.

This conflict could be eliminated through the reversal of *Sinclair*. By allowing the federal courts to issue labor injunctions, federal and state courts would have the same arsenal of remedies. There would no longer be an incentive for the union to remove a case to federal court, and the employer could get his collective bargaining contract enforced. Justice Stewart indicated that the reversal of *Sinclair* was on his mind when he stated in his concurrence in *Avco* that on an appropriate occasion the Court would review the "scope and continuing validity of *Sinclair*."[67]

IV. THE SECOND ACCOMODATION: BOYS MARKETS, INC. V. RETAIL CLERKS UNION

The promised review of *Sinclair* resulted in its reversal in 1970, in *Boys Markets, Inc. v. Retail Clerks Union Local 770*.[68] *Boys Markets* involved a collective bargaining agreement that contained a provision for the compulsory arbitration of all disputes concerning the interpretation of the agreement and a clause specifying that there would be "no cessation or stoppage of work, lock-out, picketing or boycotts."[69] When a dispute arose concerning work assignments, the union called a strike despite its agreement to resolve such disputes by arbitration. The Supreme Court authorized the use of an injunction in this case, reasoning that an accommodation between the Norris-LaGuardia Act and section 301(a) was necessary to preserve the policies of each.[70]

66. In *Dowd Box*, the Court stated in regard to § 301: "Congress expressly intended not to encroach upon the existing jurisdiction of the state courts." 368 U.S. at 509.

67. 390 U.S. at 562 (Stewart, J., concurring).

68. 398 U.S. 235 (1970).

69. *Id.* at 239.

70. *Id.* at 250, 253.

In reaching this accommodation, the Court noted that two of the policies of federal labor law, uniformity between, and concurrent jurisdiction of, state and federal courts could be furthered by simply extending *Sinclair* to the state courts.[71] But extending *Sinclair* to the state courts, besides raising constitutional problems, would seriously undercut " 'the central institution in the administration of collective bargaining contracts' "—arbitration.[72] Without the injunctive remedy, reasoned the Court, employers would be reticent to enter into arbitration agreements.[73] But the Court did not rely exclusively on this argument: "Even if management is not encouraged by the unavailability of the injunction remedy to resist arbitration agreements, the fact remains that the effectiveness of such agreements would be greatly reduced if injunctive relief were withheld" because the "basic purpose" of arbitration agreements is to cut down on the use of economic force in labor disputes.[74]

The accommodation made in *Boys Markets* was permissible, said the Court, because of a congressional shift in emphasis between the passage of the Norris-LaGuardia Act and the enactment of the Taft-Hartley Act. This shift in emphasis from the "protection of the nascent labor movement to the encouragement of collective bargaining and [arbitration] . . . was accomplished . . . without extensive revision of . . . the Norris-LaGuardia Act. Thus it became the task of the courts to accomodate the older [statute] with the more recent [one]."[75] As a prior example of such an accommodation, the Court cited *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad.*[76] But the Court discounted the significance of the Railway Labor Act's *statutory* arbitration procedures, thereby raising the voluntary agreement to arbitrate to a level sufficient to invoke the accommodation process limiting specific statutory language.[77] As a final touch to the *Boys Markets* accommodation, the Court stated that "a remedial device

71. *Id.* at 247.

72. *Id.* at 252 (quoting Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547, 1557 (1963)).

73. *Id.* at 248.

74. *Id.* at 249.

75. *Id.* at 251.

76. 353 U.S. 30 (1957); *see* text accompanying notes 25-28 *supra.*

77. In *Boys Markets*, as in *Chicago River & Ind. R.R.*, there was a mandatory "reasonable alternative" to striking, *i.e.*, arbitration. Moreover, unlike International Ass'n of Machinists v. Street, 367 U.S. 740 (1961), there was no other reasonable alternative remedy available, since the Court decided that "an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike." 398 U.S. at 248.

The conclusion that damages are an inadequate remedy for a strike in violation of

that merely enforces the obligation that the union freely undertook" actually advances, rather than retards, the goal of the Norris-LaGuardia Act "to foster the growth and viability of labor organizations."[78]

After reciting these policy considerations, the Court specifically limited the *Boys Markets* holding. The accommodation was described as a "narrow" exception to the Norris-LaGuardia Act that did not affect the Act's "vitality."[79] Additionally, the opinion stated that a *Boys Markets* injunction could issue only when there is a mandatory arbitration provision within a valid collective bargaining contract.[80] "Principles of guidance" were then set out to be followed in determining when a *Boys Markets* injunction should issue: " 'When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect.' "[81]

V. BOYS MARKETS AND THE SYMPATHY STRIKE

Although these guidelines are fairly clear when applied to the situation present in *Boys Markets*—when the union strikes over an issue it had previously agreed to arbitrate—in another fairly common industrial fact situation, the sympathy strike, the result is not so clear.

In the typical sympathy strike, the union and the employer have a valid collective bargaining contract with the standard *quid pro quo*: the union has agreed to refrain from striking for the duration of the

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a collective bargaining agreement is a recurrent theme in cases and commentary concerning *Sinclair* and *Boys Markets*. *See, e.g.*, Avco Corp. v. Local 787, UAW, 459 F.2d 968, 973 (3d Cir. 1972); ABA LABOR RELATIONS LAW SECTION, REPORT OF SPECIAL ATKINSON-SINCLAIR COMM. 226, 242 (1963), *quoted in* Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 248 n. 17 (1970). However, at least one commentator questions this conclusion: "[T]hose who believe that exposure to a damage judgment does not operate as a significant deterrent have little experience with the decision-making process on the union side." Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 465 (1969). If one accepts this statement, then it arguably follows that "[i]t is . . . doubtful that relieving the vexation of the breach-of-contract strike in the individual case is worth the risk of even a limited intrusion of the strike injunction" in contravention of the Norris-LaGuardia Act. *Id.* Thus, if the damage remedy is adequate in the sense that its existence operates to induce unions to honor their contracts, then *Boys Markets* is wrongly decided, because the damage remedy alone is sufficient (so the argument goes) to uphold the policy of the federal labor law favoring arbitration.

78. 398 U.S. at 252.

79. *Id.* at 253.

80. *See id.* ("We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure.")

81. *Id.* at 254 (quoting Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting)) (emphasis in original).

agreement, while the employer has agreed to arbitrate any dispute concerning the application of the agreement. If the employer has a labor dispute with another union not a party to this agreement, the other union may place pickets at the gates used by the contractually bound union members.[82] In such a situation, the contractually bound union would usually claim that the no-strike clause was not applicable to the honoring of *another* union's picket line. The union would typically argue that since it was simply honoring a sister union's picket line, the strike was not "over" an arbitrable dispute, thus *Boys Markets* by its very language[83] does not apply, and no injunction could issue. To counter this argument, the employer commonly would emphasize that the question of the strike's legality was for the arbitrator, since it was his task to interpret the scope of the no-strike clause. Also, the employer would argue that given the strong preference for arbitration expressed in *Boys Markets*, an injunction should issue pending the arbitrator's decision. The basic distinction between the two positions is that the union argues that *Boys Markets* is applicable only when a strike *evolves* from an arbitrable dispute, while the employer argues that if the strike *produces* an arbitrable dispute a *Boys Markets* injunction can issue pending the arbitrator's decision.[84]

The Supreme Court gave solace to the employer's position in its first decision construing *Boys Markets*—*Gateway Coal Co. v. UMW*.[85] *Gateway Coal* involved an employer's request for an injunction to end a strike caused by a safety dispute. Whereas in *Boys Markets* there was only one real issue—the arbitrable question whether the employer's work assignment violated the contract—in *Gateway Coal* there were two. The first was similar to the one in *Boys Markets*: an arbitrable

82. To be legal, this picketing must not be "secondary" or it would be enjoinable under the Labor Management Relations Act §§ 8(b)(4)(B) and 10(*l*), 29 U.S.C. §§ 158(b)(4)(B), 160(*l*) (1970). If the employer has common control of both unions' working facilities, the picketing (that induces the contract-bound union not to go to work) is "primary" and is thus clearly within the protection of § 4 of the Norris-LaGuardia Act. Occasionally, the collective bargaining contract in question will have a no-strike clause that makes an express exception for the honoring of primary picket lines. In such a situation the arbitrable dispute is whether the picket line being honored is primary or secondary. As in the more typical situation, the sympathy strike produces the arbitrable issue rather than evolves from it. *See, e.g.*, NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1049 (1974).

83. *See* text accompanying note 81 *supra*.

84. Note, *Labor Law—Injunctions—Boycotts and Strikes—Section 4 of the Norris-LaGuardia Act Bars Federal Court Injunction Against Strike Not Over an Arbitrable Grievance*, 44 U. CINN. L. REV. 836, 841 (1975).

85. 414 U.S. 368 (1974).

dispute concerning the contractual validity of the employer's decision to retain two foremen who had falsified safety records. Under *Boys Markets*, if this were the only issue, a strike to force the employer to dismiss the foremen would have clearly been enjoinable.[86] But in *Gateway Coal* there was a second dispute concerning the proper construction of another clause in the collective bargaining agreement that the union claimed gave it the right to close the mine despite its implied no-strike pledge.[87] Only by engaging in extensive contractual analysis concerning the applicability of an exception to the implied no-strike pledge could the Court find the strike illegal and thus enjoinable. Based on its finding that the exception's procedures had not been followed, the Court authorized the injunction pending the arbitrator's resolution of the same contractual issue.[88]

Thus, after *Gateway Coal* it was possible for the employer to argue that the "over" an arbitrable grievance language in *Boys Markets* was not an essential ingredient of a *Boys Markets* injunction. Since *Gateway Coal* had authorized an injunction pending the arbitrator's decision concerning the legality of the strike, it was arguable that a sympathy strike could be enjoined pending resolution of the arbitrable question of its legality. Indeed, the view that a sympathy strike could be enjoined pending the arbitrator's decision concerning its legality was

86. Safety disputes were not mentioned in the arbitration clause but the Court concluded that the "presumption of arbitrability" announced in the Steelworkers Trilogy, *supra* note 51, worked to include the safety dispute in the arbitration clause. 414 U.S. at 377-78.

In *Boys Markets* the no-strike clause was extremely clear and did not involve a real question of contractual interpretation. Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141, 3146 (1976).

87. The Court found an implied no-strike pledge based on the express arbitration clause in the collective bargaining contract. Although the Court recognized that a collective bargaining agreement could expressly negative a no-strike clause, it was held that "[a]bsent an explicit expression of such an intention . . . the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." 414 U.S. at 382. In addition to finding the implied no-strike duty, the Court went further and interpreted another clause that expressly provided for a procedure whereby the union could close the mine due to adverse safety conditions. The Court found that this clause did not limit the presumptive application of the arbitration clause and thus safety disputes were arbitrable. *Id.* at 380 n.10. The Court also found that the safety clause, as applied in this case, did not affect the implied no-strike clause. *Id.* at 383-84.

88. *Id.* at 387. The Court's entry into substantive contractual interpretation was questionable given the arbitrator's authority under the contract to answer such questions. The propriety of this invasion into the arbitrator's domain is rendered even more suspect in view of the fact that the arbitrator subsequently implied that the safety grievance *procedure* to close the mine had been properly invoked, even though he held that the *decision* to close the mine was arbitrary and capricious. Petitioner's Brief for Certiorari at 51a app. G, Gateway Coal Co. v. UMW, 414 U.S. 368 (1974).

adopted by the Third, Fourth and Eighth Circuits.[89] The view was typically stated in *Valmac Industries, Inc. v. Food Handlers Local 425*:[90] "It makes little sense to argue that because the work stoppage precipitated the dispute it was not a work stoppage 'over' a grievance which the parties were contractually bound to arbitrate."[91]

Notwithstanding this view, the Fifth and Sixth Circuits placed great emphasis on the "over a grievance" language.[92] The leading opinion of this school of thought was *Amstar Corp. v. Amalgamated Meat Cutters*.[93] There the Fifth Circuit held that when a strike is not over an arbitrable grievance (as in the sympathy strike context) no injunction could issue despite a violation of the clear language of the no-strike clause. The *Amstar* court reasoned that "[w]ere 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."[94] The Second Circuit adopted this position in *Buffalo Forge Co. v. United Steelworkers*,[95] and the Supreme Court affirmed in a landmark labor decision.[96]

VI. BUFFALO FORGE, CO. V. UNITED STEELWORKERS

The *Buffalo Forge* sympathy strike arose in the typical fashion. The employer, Buffalo Forge Co., operated three plants whose Production and Maintenance (P & M) employees were represented by two locals of the United Steelworkers. The P & M employees were bound under two contracts with identical no-strike and arbitration clauses.[97]

89. *See, e.g.*, Associated Gen. Contractors v. International Union of Operating Eng'rs, 519 F.2d 269 (8th Cir. 1975), *cert. denied*, 97 S. Ct. 72 (1976); Armco Steel Corp. v. UMW, 505 F.2d 1129 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975); NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3d Cir. 1974), *cert. denied*, 419 U.S. 1049 (1975).

90. 519 F.2d 263 (8th Cir. 1975), *vacated and remanded*, 96 S. Ct. 3215 (1976).

91. *Id.* at 267.

92. *See, e.g.*, Plain Dealer Publishing Co. v. Cleveland Typographical Union No. 53, 520 F.2d 1220 (6th Cir. 1975), *cert. denied*, 96 S. Ct. 3221 (1976) (cert. denied same day as *Buffalo Forge* announced); Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972).

93. 468 F.2d 1372 (5th Cir. 1972).

94. *Id.* at 1373.

95. 517 F.2d 1207 (2d Cir. 1975).

96. 96 S. Ct. 3141 (1976).

97. The no-strike clause of each agreement provided:

"There shall be no strikes, work stoppages or interruption or impeding of work. No Officers or representatives of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in any such activity. The Union recognizes its possible liabilities for violation of this pro-

Shortly before the dispute between the P & M workers and Buffalo Forge arose, the United Steelworkers were certified to represent Buffalo Forge's office clerical-technical (O & T) employees, who were not covered by the collective bargaining agreements already in force. Unable to reach an agreement with management, the O & T employees struck and established pickets at all three Buffalo Forge facilities. The P & M employees honored these lines and production halted. Buffalo Forge requested an injunction to force the P & M employees back to work.[98] The district court construed *Boys Markets* to be inapplicable to this situation and refused to issue the injunction.[99] The Second Circuit affirmed.[100]

Justice White, writing for the majority in this five to four decision,[101] began his analysis by noting that there was no dispute that the cause of the strike was not an arbitrable issue.[102] Further, the parties were in agreement that the employer could invoke the arbitration clause to submit the question of the strike's legality to the arbitrator, who would decide upon the appropriate remedy if the no-strike clause

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vision and will use its influence to see that work stoppages are prevented. Unsuccessful efforts by Union officers or Union representatives to prevent and terminate conduct prohibited by this paragraph, will not be construed as 'aid' or 'condonation' of such conduct and shall not result in any disciplinary actions against the Officer, committeemen or stewards involved."

Id. at 3143 n.1. The identical arbitration clauses provided:

"Should differences arise between the [employer] 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, but an earnest effort shall be made to settle such differences immediately [under the six-step grievance and arbitration procedure provided in [the Agreement]]."

Id. at 3143-44. The final step of the six-step grievance procedure provided for a *bilateral* arbitration clause:

"In the event the grievance involves a question as to the meaning and application of the provisions of this Agreement, and has not been previously satisfactorily resolved, it may be submitted to arbitration upon written notice of the Union or the Company."

Id. at 3144 n.2. At least one district court sought to limit the applicability of *Boys Markets* if the arbitration clause could be invoked by only the union. Stroehmann Bros. Co. v. Local 427, Confectioners Workers, 315 F. Supp. 647 (M.D. Pa. 1970). This case was "disapproved" in Avco Corp. v. Local 787, UAW, 459 F.2d 968, 972 (3d Cir. 1972). In view of *Buffalo Forge*'s rejection of the Third Circuit's application of *Boys Markets*, the *Stroehmann* doctrine may be revived. *See* Note, *The Applicability of Boys Markets Injunctions to Refusals to Cross a Picket Line*, 76 COLUM. L. REV. 113, 122 n.73 (1976).

98. 96 S. Ct. at 3143-44.

99. 386 F. Supp. 405 (W.D.N.Y. 1974).

100. 517 F.2d 1207 (2nd Cir. 1975).

101. Justice White was joined in his decision by Chief Justice Burger and Justices Stewart, Blackmun and Rehnquist.

102. 96 S. Ct. at 3146.

were found to be violated.[103] The only question for resolution by the Court was whether an injunction could issue pending the arbitrator's decision on the right of the union to honor its sister union's picket line.[104]

This question obviously turns upon the applicability of *Boys Markets* and the policies underlying it. The *Buffalo Forge* majority found

> [t]he driving force behind *Boys Markets* [to be the implementation of] the strong congressional preference for the private dispute settlement *mechanisms* agreed upon by the parties. *Only to that extent* was it held necessary to accommodate section 4 of the Norris-LaGuardia Act to section 301 of the Labor Management Relations Act . . . .[105]

Since a sympathy strike did not interfere with the *mechanism* of arbitration, the Court reasoned that *Boys Markets* did not apply.[106]

Thus the Court limited the "narrow" *Boys Markets* exception to the Norris-LaGuardia Act to situations in which the injunction was necessary to protect the function of the arbitrator. Even if the sympathy strike is in clear contravention of a no-strike clause, no injunction could issue solely for that reason because to do so would be a circumvention of congressional intent: "In the course of enacting the Taft-Hartley Act, Congress rejected the proposal that the Norris-LaGuardia Act's prohibition . . . be lifted to the extent necessary to make injunctive remedies available in federal courts for the purpose of enforcing collective bargaining agreements."[107] *Only* the effectuation of the congressional preference for the process of arbitration justified negating this legislative rejection of the injunctive remedy. The requirement of *Boys Markets* that the strike be *over* an arbitrable dispute is thus the outer limit to the erosion of the Norris-LaGuardia Act, absent further congressional action. Implicitly adopting the *Amstar* argument,[108] the Court stated that *Boys Markets* must be the limit to the accommodation of the Norris-LaGuardia Act, because otherwise "a court [could] enjoin any . . . alleged breach of contract pending the exhaustion of applicable grievance and arbitration provisions even

103. *Id.* at 3148.
104. *Id.* at 3146.
105. *Id.* at 3147 (emphasis added).
106. *Id.*
107. *Id.* at 3148.
108. See text accompanying notes 93 & 94 *supra.*

though the injunction would otherwise violate one of the express prohibitions of § 104."[109]

As a further basis for its decision, the *Buffalo Forge* Court noted that if the district courts were to get into the business of issuing preliminary injunctions for no-strike clause violations, such action, besides contravening congressional will, could place an intolerable burden upon the district courts. This "floodgates" argument was buttressed by the statement that "[t]he parties have agreed to grieve and arbitrate, not to litigate . . . they have not contracted for a judicial preview of the facts and the law."[110] The agreement to arbitrate would be frustrated if the courts could decide contractual questions in preliminary injunction litigation because the arbitrator would probably

> be heavily influenced or wholly preempted by judicial views of the facts and the meaning of contracts if this procedure is permitted. Injunctions against strikes, even temporary injunctions, very often permanently settle the issue; and in other contexts time and expense would be discouraging factors to the losing party in court in considering whether to relitigate the issue before the arbitrator.[111]

The Court neglected to mention that in *Gateway Coal* the agreement to arbitrate was frustrated in just this manner. The majority, however, distinguished *Gateway Coal* by stating that the Court's entry into the area of contractual interpretation was "only preparatory to finding an implied duty not to strike."[112] Further, the Court emphasized that the *Gateway Coal* strike was "enjoined only because it was over an arbitrable dispute."[113]

In short, the Court held in *Buffalo Forge* that only the congressional preference for the arbitration device as a *method* for resolving industrial disputes justifies an injunction in contravention of the Norris-LaGuardia Act. If the arbitration process is not threatened by the

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109. 96 S. Ct. at 3148.

110. *Id.* at 3149 (footnote omitted). The Court went further and held as a matter of law that a no-strike clause, standing alone, does not imply that the union has agreed not to go out on a sympathy strike: "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.*" *Id.* at 3147 (emphasis added). Only by defining the no-strike clause so as not to cover the sympathy strike can the Court make such a statement.

The Court also held that while a mandatory arbitration clause may imply a coextensive no-strike pledge under the doctrine of *Gateway Coal*, it does not imply a duty not to engage in sympathy strikes. *Id.* at 3147 n.10. The dissent concurred in this holding. *Id.* at 3155 n.17 (Stevens, J., dissenting).

111. *Id.* at 3149.

112. *Id.* at 3147 n.10.

113. *Id.*

strike and the strike is not an attempt by the union to pressure the employer for concessions on the arbitrable issue itself, then this preference is not violated. The *Boys Markets* requirement that the strike be "over" an arbitrable grievance is thus unquestionably reaffirmed, for without this essential ingredient, no matter how clearly the strike violates the union's freely bargained for obligation not to strike, the strike will not interfere with the arbitrator's function in deciding its legality.[114]

VII. THE BUFFALO FORGE DISSENT

In a vigorous dissent, Justice Stevens questioned the majority's result by interpreting the interests protected by *Boys Markets* in a fundamentally different way. Rather than focusing on the protection of the arbitration *process*, Justice Stevens stressed the importance of an injunction's effect on the expected *result* of arbitration when a clear violation of a no-strike clause occurs.[115] The end as well as the means were to be protected by *Boys Markets*. The dissent reasoned that only by giving an employer " 'assurance of uninterrupted operation during the term of the agreement' "[116] could the "more basic policy of motivating employers to agree to binding arbitration" be achieved.[117]

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114. In one of the first circuit court cases to construe *Buffalo Forge*, a judge apparently misconstrued its requirements. Judge Garth's concurring opinion in United States Steel Corp. v. UMW, 548 F.2d 67 (3d Cir. 1976) (Garth, J., concurring), contains this statement: "When a contract [which expressly forbids sympathy strikes] is in force, the reasoning of *Buffalo Forge* clearly suggests that the legality of a sympathy strike would be immediately arbitrable and that such a strike could be enjoined pending the outcome of the arbitration." *Id.* at 75. Such an interpretation cannot stand in view of the Court's statement in *Buffalo Forge* that "aside from the enforcement of the arbitration provisions of [collective bargaining] contracts, within the limits permitted by *Boys Markets*, the Court has never indicated that the courts may enjoin *actual* or threatened contract violations despite the Norris-LaGuardia Act." 96 S. Ct. at 3148 (emphasis added). In the situation described by Judge Garth, the sympathy strike is no more "over" an arbitrable issue than in *Buffalo Forge*, and thus no injunction may issue.

The only possible basis for Judge Garth's conclusions lies in the Court's statement in *Buffalo Forge* that the sympathy strike does not deprive the employer "of his bargain." *Id.* at 3147. If the bargain between the parties clearly and unequivocally contains the obligation not to go out on sympathy strike, then such a strike would deprive management of its bargain. Assuming, however, the employer is aware of national labor law and the absence of the injunctive remedy for violations of contract that are not "over" an arbitrable grievance, a violation of a pledge that specifically contains sympathy strikes would not deprive him of his bargain. He knows beforehand that he can get damages but no injunction. The state of the law after *Buffalo Forge* is simply that an employer *cannot* assure continued production through an injunction.

115. 96 S. Ct. at 3158 (Stevens, J., dissenting).

116. *Id.* at 3155 (quoting Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 454 (1957)).

117. *Id.* There is some support for the minority characterization of the policy of inducing employers to sign arbitration agreements as "more basic" than the policy of

In so identifying the "basic policy" to be effectuated, the dissent has rendered its opinion superficially consistent in internal reasoning. Since the dissent sees the basic policy of the federal common law of labor to be the encouragement of arbitration as a means to the desired *end* of reducing industrial strife, it follows that the sympathy strike should be enjoined. The problem with this position is that Congress has yet to adopt it, and in fact seems to have expressly negated it in section 4 of the Norris-LaGuardia Act.[118] However desirable the dissent feels it is to minimize industrial strife and hold unions to their bargains, the Norris-LaGuardia Act remains on the books, and it specifically prohibits injunctions in labor disputes to force employees back to work.

In dealing with the issue of congressional intent, the dissent reached a result contrary to that of the majority through another difference in emphasis. While the majority stressed the legislative history of the Taft-Hartley Act to negate any implied rejection of the Norris-LaGuardia Act's anti-injunction provisions,[119] the dissent keyed on the *purpose* of the Norris-LaGuardia Act—to foster the growth and viability of labor organizations.[120] The dissent argued that since *Buffalo Forge* "deals with the enforceability of a collective-bargaining agreement rather than with the process by which such agreements are negotiated and formed," the "central concerns" of the Act are not implicated and thus the anti-injunction prohibition is inapplicable.[121] Therefore, in this situation there was "no policy justification for restricting § 301(a) to damage suits."[122] To effectuate the basic policy of the federal common law of labor, the dissent would allow an injunction to issue to end a sympathy strike "if the agreement were so plainly unambiguous that there could be no bona fide issue to submit to the arbitrator."[123]

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protecting the arbitral process. *See* text accompanying notes 72 & 73 *supra*. However, as noted in the text accompanying notes 137-144 *infra*, this "more basic" policy conflicts with the presumption in favor of the "central institution in the administration of collective bargaining contracts"—arbitration. Wellington & Albert, *supra* note 72, at 1557, *quoted with approval in* Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 252 (1970).

118. *See* 29 U.S.C. § 104(a) (1970) which provides in part: "No court of the United States shall have jurisdiction to issue any . . . injunction in any case involving or growing out of any labor dispute to prohibit any person . . . interested in such dispute . . . from . . . [c]easing or refusing to perform any work . . . ."

119. 96 S. Ct. at 3148.

120. *Id.* at 3152 (Stevens, J., dissenting).

121. *Id.*

122. *Id.* at 3154.

123. *Id.* at 3156.

In approving the injunctive remedy in *Buffalo Forge* the dissent was mindful of some restraint imposed by the Norris-LaGuardia Act, and therefore proposed stringent conditions:

> [N]o injunction or temporary restraining order should issue without first giving the union an adequate opportunity to present evidence and argument, particularly upon the proper interpretation of the collective-bargaining agreement; the judge should not issue an injunction without convincing evidence that the strike is clearly within the no-strike clause. Furthermore, to protect the efficacy of arbitration, any such injunction should require the parties to submit the issue immediately to the contractual grievance procedure, and if the union so requests, at the last stage and upon an expedited schedule that assures a decision by the arbitrator as soon as practicable.[124]

There are several problems with the analysis used by the dissent. The most important and the most difficult to overcome is the manner in which it dealt with the majority's congressional intent argument. In *Boys Markets*, the Court arguably took its "most ambitious foray into an area seemingly pre-empted by statute."[125] For the dissent to dispose of the majority's congressional intent argument against the extension of *Boys Markets* by merely noting that the majority cited the reasoning of an overruled opinion[126] seems to sidestep the issue. *Sinclair* was indeed overruled in *Boys Markets*, but on narrow grounds.[127] The core purpose of the Norris-LaGuardia Act—to foster the growth and viability of organized labor[128]—was not implicated in *Boys Markets* because the union there was already established and under contract. The union's viability was not in doubt, and thus the Act was ripe for accommodation.

In *Buffalo Forge*, on the other hand, the policy of the Act was indeed involved. The O & T employees were picketing in an attempt to use traditional union solidarity in their struggle with their em-

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124. *Id.* at 3158-59. Justice Stevens also added:

> Such stringent conditions would insure that only strikes in violation of the agreement would be enjoined and that the union's access to the arbitration process would not be foreclosed by the combined effect of a temporary injunction and protected [*sic*] grievance procedures. Finally, as in *Boys Mark·ts*, the normal conditions of equitable relief would have to be met.

Id. at 3159.

125. NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 334 (3d Cir.) (Adams, J., dissenting), *cert. denied*, 419 U.S. 1049 (1974).

126. 96 S. Ct. at 3154 n.11 (Stevens, J., dissenting) (citing Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 209-10 (1962)).

127. *See* text accompanying notes 79-81 *supra*.

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

ployer.[129] The O & T picket line was protected by statute and no injunction could issue against *their* strike because of the Norris-LaGuardia Act.[130] To force the P & M employees back to work impinges upon the "growth and viability" of the O & T employees' union because it removes part of their leverage against management. Thus the policies underlying the Norris-LaGuardia Act are implicated, albeit indirectly.

The dissent completely ignored the interests of the O & T employees when it discounted the significance of an erroneously issued injunction ending a legal sympathy strike. Justice Stevens merely noted that the sympathy strike did nothing to further the economic interests of the P & M employees.[131] Since the P & M employees' economic interests were not at stake, the minority implied that it was more important to the public interest to erroneously enjoin the sympathy strike than to erroneously allow them to strike.[132] This position completely ignores the preference expressed by Congress that unions be protected. The Norris-LaGuardia Act does not by its terms seek to protect *only* the union against which the injunction is sought. Thus, in the sympathy strike context, the political preference for unions expressed in the Norris-LaGuardia Act comes into play, and the rationale of *Boys Markets* for dispensing with that preference when the union is established and under contract does not apply.

Although the dissent's treatment of the congressional intent argument seems inadequate when viewed in light of the limited accommodation made in *Boys Markets*, the more extensive accommodation made in the Railway Labor Act cases offers some support for the position that a further erosion of the Norris-LaGuardia Act is permissible even when the latter Act's policies are implicated. As previously noted, the Court progressed in the Railway Labor cases from allowing a district court to enjoin a strike only when a reasonable alternative to that strike was available to allowing such an injunction to issue solely because there was no other adequate means of enforcing a statutory duty. The *Chicago and North Western Railway* decision[133] provides support for

129. "It is almost a rule of trade union ethics for one labor union to respect a picket line established by another." L.A. Young Spring & Wire Corp., 70 N.L.R.B. 868, 874 (1946).

130. *See* note 82 *supra*.

131. 96 S. Ct. at 3157 (Stevens, J., dissenting).

132. *Id.* at 3158.

133. 402 U.S. 570 (1971).

the dissent's insistence upon the injunctive remedy as the only practical, efficient means of enforcing the no-strike duty, even if the very purpose of the Norris-LaGuardia Act is involved.[134] The contrary argument that the accommodation made under the Railway Labor Act was made to enforce a statutory rather than a contractual duty is amply dealt with by citing the equivalence made in *Boys Markets* between the statutory duty to arbitrate under the Railway Labor Act and the contractual duty to arbitrate involved in that case.[135] Since damages have been held to be an inadequate remedy for a breach of a no-strike clause,[136] the dissent's conclusion that the Norris-LaGuardia Act should be accommodated follows logically from the Railway Labor Act cases.

Even conceding the dissent's consistency with the Railway Labor Act cases does not save its analysis, because it conflicts with a fundamental policy of the federal common law of labor—the presumption in favor of arbitrability.[137] Justice Stevens would allow an injunction only if the scope of the no-strike clause is *clearly* an arbitrable issue.[138] This restriction was imposed to promote the "basic policy" of inducing employers to sign arbitration clauses. If an employer could obtain an injunction to halt a sympathy strike *only* if the arbitration clause "clearly" governed the applicability of the no-strike clause, then he would be encouraged to sign a broad clause. Conversely, if an injunction could be obtained even if the arbitration clause were narrowly drawn or absent, this "basic policy" would not be furthered.[139] Thus, to effectuate the "basic policy" of encouraging broad arbitration clauses, the minority would limit the injunction to those situations in which the arbitration clause "clearly" covers the issue of the sympathy strike's

134. *Id.* at 583.

135. 398 U.S. at 252.

136. *Id.* at 253; *accord*, William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12, 19 (1974); Gateway Coal Co. v. UMW, 414 U.S. 368, 381 n.14 (1974). *But see* note 77 *supra*.

137. *See* notes 50 & 51 and accompanying text *supra*.

138. It is not necessary to hold that an injunction may issue if the scope of the no-strike clause is not a clearly arbitrable issue. If the agreement contains no arbitration clause whatsoever, enforcement of the no-strike clause would not promote arbitration by encouraging employers to agree to an arbitration clause in exchange for a no-strike clause. Furthermore, even if the agreement contains an arbitration clause, but the clause does not clearly extend to the question whether a strike violates the agreement, then the parties' commitment to enforcement of the no-strike clause through enforcement of the arbitrator's final decision also remains unclear.

96 S. Ct. at 3156 n.20 (Stevens, J., dissenting).

139. In fact, to grant an injunction when there is no arbitration clause, or when the scope of the clause is unclear would induce employers to sign narrow clauses, or induce them to sign no arbitration clauses at all.

legality. Such a limitation necessitates a presumption *against* the arbitrability of the scope of the no-strike clause. Under such reasoning the dissent should find that the injunction in *Gateway Coal* was improvidently granted, for in that case it was far from "clear" that the union had agreed to arbitrate the safety dispute.[140] However, instead of rejecting *Gateway Coal*, the dissent relied upon it to justify an injunction in *Buffalo Forge*. Indeed, the dissent cited with approval the extension of *Boys Markets* made in *Gateway Coal* to authorize an injunction enforcing a no-strike clause "in a case in which the question of arbitrability was itself a 'substantial question of contractual interpretation.' "[141] Obviously, there is an inconsistency in relying on a case in which the presumption in favor of arbitrability was applied with a vengeance while at the same time developing what amounts to a presumption against arbitrability in order to effectuate the basic policy of inducing employers to agree to broad arbitration clauses.[142]

This inconsistency cuts to the heart of the dissent's position. If enjoining sympathy strikes is to be justified in spite of the Norris-LaGuardia Act on the basis of motivating employers to agree to binding arbitration, then it is *necessary* to apply a presumption against arbitrability in order to encourage expansive arbitration clauses. To give the employer the assurance of a continuous work force when the arbitration clause does not cover the issue of the strike's legality would do nothing to motivate employers to sign expansive clauses. Therefore, if the presumption of arbitrability were to apply here as in other cases, the dissent's position would fail to accomplish its desired result, and there would be no justification for an accommodation of the Norris-LaGuardia Act. Since there is no indication that the strong reaffirmation given the presumption of arbitrability in *Gateway Coal*[143] is questioned by the dissent (indeed, *Buffalo Forge* dissenter Justice Powell authored *Gateway Coal*)[144] the implied presumption against arbitrability cannot stand, and thus the analysis fails.

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140. *See* note 86 *supra*.

141. 96 S. Ct. at 3155 n.15 (Stevens, J., dissenting).

142. *See generally* Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability*, 85 HARV. L. REV. 636 (1972), for a good discussion of the presumption of arbitrability as applied to the *Boys Markets* injunction.

143. *See* note 86 *supra*.

144. In *Gateway Coal*, Justice Powell stated that "[t]he strong federal policy favoring arbitration of labor disputes was the lynchpin of this Court's reasoning in *Boys Markets*." 414 U.S. at 381-382. Although the minority still ostensibly favors arbitration, its limitation on the scope of the arbitration clause concerning no-strike clauses cuts against this preference.

Although the dissenting opinion is logically inconsistent, it validly highlights an undesirable effect of the majority's opinion. *Boys Markets* was at least partly predicated on the desire to produce a uniformity of result in the state and federal systems and to cut down on removal from the former to the latter.[145] To effectuate this result, the Norris-LaGuardia Act was accommodated to provide federal judges with the same remedies as state judges. Now, in *Buffalo Forge*, the same problem that was solved in *Boys Markets* will be revived—state courts and federal courts will have different remedies for sympathy strikes in violation of contract.[146] Although the scope of the problem probably will not be as great as the one remedied in *Boys Markets*,[147] it remains as a blemish upon a decision that is otherwise consistent with national labor law policy.

In addition, the *Buffalo Forge* decision has the anomalous consequence of providing injunctive relief to an employer who violates the collective bargaining agreement while denying an injunction to the contract abiding employer.[148] When a union strikes because of a determination that its employer has violated the agreement, *Boys Markets* authorizes an injunction if there is an arbitration clause which governs the legality of the employer's actions. Thus the employer who anticipates a sympathy strike will have an incentive to breach the contract shortly before the first pickets are set up, and thereby create the impression that the strike is not really for reasons of union solidarity, but rather in response to the employer's illegal action. On the other hand, if the employer honors his contract even though he expects to be shut down by a sympathy strike, *Buffalo Forge* prohibits an injunction. Of course, the district court can make a factual determination of the true cause of the strike, but the mere possibility that a court would find the cause to be "over" an arbitrable dispute may induce some employers to breach.[149]

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145. *See* text accompanying notes 63-68 *supra*.

146. Of course, to the extent that *Buffalo Forge* changes the substantive law of contract interpretation, see note 110 *supra*, the state courts are bound. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962).

147. One third of all strikes annually are breach of contract strikes. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR BULL. NO. 1777, ANALYSIS OF WORK STOPPAGES 1971, at 5, 23-24 (1974).

148. Brief for NAM as Amicus Curiae at 3, Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141 (1976).

149. The employer tried this very tactic unsuccessfully in Latrobe Steel Co. v. United Steelworkers, 545 F.2d 1336, 1341 n.22 (3d Cir. 1976).

Finally, if there is more than one local at a plant, as was the situation at Buffalo Forge, the international could whipsaw an employer through the use of staggered termination dates and shut down the entire plant when either local bargains to impasse with the employer.[150] Obviously, the employer should strive for contracts with coterminus termination dates.

VIII. CONCLUSION

The *Buffalo Forge* decision is an exercise in judicial restraint. Although the competing policy considerations weigh heavily in favor of enjoining strikes that violate collective bargaining contracts, the Court has refrained from acting upon these considerations in deference to the expressed will of Congress. Fashioning its decision within the congressional policy against labor injunctions, the Court attempted to justify its result by defining the union's no-strike pledge not to include the duty to cross another union's picket line. However inadequate this rationale may be, it is not the task of the Court to justify the acts of Congress, but merely to implement them.

The Court has given the signal to Congress that the accommodation of the anti-injunction provisions of the national labor law is at an end. Congress should, and may yet, decide that a union should be required to honor its commitment not to strike. But until Congress does so, under *Buffalo Forge* the Norris-LaGuardia Act will retain at least some of its vitality.

PHILIP P. W. YATES

150. Brief for Associated Industries of New York as Amicus Curiae at 11, Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141 (1976).