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Robert D. Rizzo

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stock or securities for all or part of another corporation's assets.⁰¹ With the latter type of reorganization, the shareholders of the acquiring corporation have no recourse to the appraisal remedy under the law of most jurisdictions; and, in one-quarter of the states, even the shareholders of the acquired corporation cannot invoke the appraisal remedy.⁰² Thus it appears that *Woodward* and *Hilton* could seriously impair the effectiveness of statutory appraisal remedies as protective devices for the interests of the minority shareholder.

E. CADER HOWARD

Labor Law—Issuance of Injunction to End Strike in Breach of Arbitration Agreement

Since the turn of this century, Congress and the United States Supreme Court have endeavored to balance the respective powers of labor and management. Whenever the scales tipped more favorably towards one group than the other, the reaction has been to establish equilibrium either legislatively or judicially. *Boys Markets, Inc. v. Retail Clerks Local 770*¹ is a striking example of this balancing process. The Supreme Court held that a federal district court could enjoin a strike in breach of a collective bargaining agreement despite section four of the Norris-LaGuardia Act, which prohibits the granting of federal injunctions in labor-management disputes. Significantly, the Court reversed *Sinclair Refining Co. v. Atkinson*,² in which it had held to the contrary. *Boys Markets* points up the unfortunate situation produced by the interaction of the Norris-LaGuardia³ and Taft-Hartley Acts.⁴

Norris-LaGuardia was occasioned by the massive intervention of the judiciary into labor-management relations.⁵ Prior to its enactment, a strike seemingly was labor's most potent weapon; however, management

⁰¹ INT. REV. CODE OF 1954, § 354(a)(1) provides: "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."

⁰² 13A B. FOX & E. FOX, BUSINESS ORGANIZATIONS: CORPORATE ACQUISITIONS AND MERGERS § 2501[2] (1970).

¹ 398 U.S. 235 (1970).

² 370 U.S. 195 (1962).

³ 29 U.S.C. §§ 101-15 (1964).

⁴ 29 U.S.C. §§ 141-97 (1964).

⁵ See generally F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1932).

easily countered any strike with an injunction, usually granted with little reluctance by federal courts not particularly disposed to labor's cause.⁶ Section four of the 1932 Norris-LaGuardia Act⁷ prohibited federal courts from enjoining strikes growing out of labor disputes.⁸ The 1935 Wagner Act⁹ also aided labor by including a federal guarantee of the right to self-organization and to engage in collective action—including the strike. In order to restore the balance lost and to place labor and management on a more equal footing, Congress enacted the Taft-Hartley Act.¹⁰ Section 301 of the Taft-Hartley Amendments opened "the federal courts to suits for violations of collective bargaining agreements and, thereby, facilitated enforcement of such contracts by removing some of the procedural disabilities blocking suits against unions in state courts."¹¹ Taft-Hartley reflected congressional desire to promote industrial peace and harmony through increased enforcement of collective bargaining agreements.¹² Accordingly, in *Textile Workers Union v. Lincoln Mills*¹³ the Supreme Court

⁶ State courts generally would not issue injunctions against peaceful picketing for economic gains. See, e.g., *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011 (1900); *Vegetahn v. Gunter*, 167 Mass. 92, 44 N.E. 1077 (1896). However, since the employer was usually a Delaware corporation, the federal courts would issue injunctions exercising their jurisdiction by diversity of citizenship. See generally F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1932).

⁷ 29 U.S.C. § 104 (1964), 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

⁸ Although Norris-LaGuardia reflected a *laissez-faire* policy on the part of government with regards to labor relations, it clearly served to give labor a larger arsenal in its struggle against management. Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547, 1555 (1963).

⁹ 29 U.S.C. §§ 151-68 (1964).

¹⁰ 29 U.S.C. §§ 141-97 (1964). Indeed, Taft-Hartley could be classified as pro-management in a number of ways: It guaranteed the right to the employee to refrain from union activity; it made it unlawful for a union to restrain or coerce employees who did not want to strike; it outlawed the closed-shop agreement; and it prohibited the secondary boycott.

¹¹ Keene, *The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to Avco and Beyond*, 15 VILL. L. REV. 32, 34 (1969). For example, the common law rules of many states frustrated any and all attempts to serve process and execute judgment against unions, whereas employers were easily sued. *Id.*

¹² *Id.*

¹³ 353 U.S. 448 (1957). The Court ruled that the Norris-LaGuardia Act did not deprive a federal court of jurisdiction to compel an employer to arbitrate grievances in accordance with the arbitration clause of the agreement in question. Speaking

gave added significance to section 301 by directing the federal courts to fashion a body of federal common law to deal with subsequent suits.¹⁴ The Court was not only desirous of achieving effective enforcement of collective bargaining agreements, but also encouraged the development of a uniform system of labor law.¹⁵

Inevitably, the development of federal law under section 301 and the anti-injunction provisions of section four of Norris-LaGuardia were destined to clash. *Sinclair Refining Co. v. Atkinson*¹⁶ provided an appropriate field for the ensuing struggle. Section four emerged victorious; the Court held that federal courts were prohibited from enjoining labor strikes even though a collective bargaining agreement enforceable under section 301 had been violated. This decision seemed to fly in the face of the Court's pronouncement in *Lincoln Mills*; a remedy available in most state courts¹⁷ was denied a party in federal court.

The majority in *Sinclair* relied heavily on the legislative history of section 301 to demonstrate that the anti-injunction provision of Norris-LaGuardia was still viable and therefore controlled the disposition of the case. This legislative analysis, when combined with a literal reading of sec-

for the majority, Justice Douglas explained that "the kinds of acts which had given rise to abuse of the power to enjoin are listed in § 4 of [Norris-LaGuardia]. The failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed." *Id.* at 458. Many commentators suggest that Taft-Hartley impliedly repealed Norris-LaGuardia. Thus began what many regard as the encroachment of section 301 on the Norris-LaGuardia Act. Bartosic, *Injunctions and Section 301: The Patchwork of Auco and Philadelphia Marine on the Fabric of National Labor Policy*, 69 COLUM. L. REV. 980, 984-85 (1969).

¹⁴ The Court stated:

Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained in that way We would undercut the Act and defeat its policy if we read § 301 narrowly as only conferring jurisdiction over labor organizations.

353 U.S. at 455-56.

¹⁵ The development of federal substantive law under this mandate has been arduous for three reasons: (1) the power of the court to enjoin certain acts conflicted with the federal anti-injunction laws; (2) the scope of federal jurisdiction under section 301 was unclear; and (3) the courts were given insufficient procedural guidelines to develop effectively the federal law of labor arbitration. Note, *Federal Enforcement of Grievance Arbitration Provisions Under the Doctrine of Lincoln Mills*, 42 MINN. L. REV. 1139, 1145 (1958).

¹⁶ 370 U.S. 195 (1962).

¹⁷ Although twenty-four states do have "little Norris-LaGuardia Acts" on their books, ten do not apply their acts to strikes in breach of collective bargaining contracts. Keene, *supra* note 11, at 49.

tion four,¹⁸ enabled the Court to conclude that Congress did not want federal courts to interfere in labor disputes involving strikes that were in breach of collective bargaining agreements. However, Justice Brennan, dissenting, articulated the theory of judicial accommodation, which later proved more formidable than the majority's logic. While conceding that "[S]ection 301 of the Taft-Hartley Act did not, for purposes of actions brought under it, 'repeal' section four of the Norris-LaGuardia Act," Brennan recognized that "the two provisions do co-exist and that they apply . . . in apparently conflicting senses."¹⁹ He visualized the Court's duty as seeking out "that accommodation of the two which will give the fullest effect to the central purposes of both."²⁰ The result would be to place section 301 actions beyond the ambit of the anti-injunction provision of Norris-LaGuardia.²¹

Brennan's dissent in *Sinclair* ultimately became the *ratio decidendi* in *Boys Markets*, in which the employer and the union were parties to a collective bargaining agreement that provided that all disputes should be resolved by arbitration and that during the life of the agreement, there should be "no cessation or stoppage of work, lock-out, picketing or boycotts."²² A controversy arose when one of the employer's supervisors and several non-union employees began to rearrange products in the frozen food counter in one of the employer's supermarkets.²³ A union representative insisted that the counter be emptied and restocked by union personnel. When the employer did not yield to the union's demand, a strike was called and the union began picketing the employer's establishment. The employer immediately requested that the union terminate the picketing and resort to the arbitration procedures set forth in the agree-

¹⁸ See note 7 *supra*.

¹⁹ 370 U.S. at 215-16.

²⁰ *Id.* at 216.

²¹ Brennan apparently thought that reading the two acts together would do little damage to section four, whereas section 301 would be significantly harmed if accommodation was not allowed. Representative of the accommodation theory is *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 40 (1957), in which the Court concluded that there "must be an accommodation of the Norris-LaGuardia Act and the Railway Labor Act so that the obvious purposes in the enactment of each is preserved." A theory similar to accommodation is that even if Congress rejected express repeal of Norris-LaGuardia by Taft-Hartley, it did not mean that Congress intended to apply Norris-LaGuardia literally in derogation of the articulated policies of Taft-Hartley. Congress may have intended to leave to judicial interpretation the extent to which equitable remedies should be available in section 301 suits. Note, *Strikes and Boycotts: Section 4 of the Norris-LaGuardia Act Held to Prohibit Federal Court Injunction of Strike Over an Arbitrable Grievance*, 111 U. PA. L. REV. 247, 249-50 (1962).

²² 398 U.S. at 239.

²³ *Id.*

ment. Met with refusal, the employer obtained a temporary restraining order in state court forbidding continuation of the strike. The union removed the entire matter to a federal district court and requested that the restraining order be dissolved. Concluding that the dispute was subject to arbitration under the collective bargaining agreement, the district court denied the union's request, held that the strike was in violation of the agreement, and ordered the parties to arbitrate.²⁴ The Supreme Court, reversing the Court of Appeals for the Ninth Circuit, affirmed the district court order and overruled *Sinclair*.

Boys Markets will no doubt be applauded as one of the most beneficent labor decisions bestowed upon management in recent years. For one thing, the questionable result yielded by the interaction of *Sinclair* with *Avco Corp. v. Aero Lodge No. 735, I.A.M. & A.W.*²⁵ will no longer plague management. In *Avco* the Court allowed a union to remove to federal court²⁶ a state court action brought by the employer to enjoin the union from striking. Upon removal, the federal court typically denied the injunction in keeping with section four of the Norris-LaGuardia Act even though the state court, from which the action was removed, could have issued the injunction.²⁷ Thus, state court jurisdiction was effectively eliminated where management sought an injunction to end a strike in breach of a collective bargaining agreement. After *Boys Markets* if the union removes to federal court, management will be able to obtain an injunction in a federal court. Moreover, the negative effect that *Sinclair* had upon arbitration will no longer be present.²⁸ The employer was with-

²⁴ *Id.* at 240.

²⁵ 390 U.S. 557 (1968).

²⁶ 28 U.S.C. § 1441(c) (1964), provides:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

²⁷ There is a split of authority in this area. Some courts have said the language of section four means there is no jurisdiction in the federal courts if only an injunction was sought and therefore have remanded the case to the state court. Others have held to the contrary. Compare *In re New York Shipping Ass'n, Inc. v. International Longshoremen's Ass'n*, 276 F. Supp. 51 (S.D.N.Y. 1967) with *Sealtest Foods-Branch 443 v. Conrad*, 262 F. Supp. 623 (N.D.N.Y. 1966). See also *General Elec. Co. v. Local 191*, 413 F.2d 964 (1969); *Day-Brite Lighting Div. v. I.B.E.W.*, 303 F. Supp. 1086 (N.D. Miss. 1969).

²⁸ *Sinclair's* negative effect upon arbitration defeated the policy underlying the Court's opinions in the *Steelworkers Trilogy*. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car*

out remedy in federal court when the union refused to comply with their contractual agreements, thereby generating little incentive for the employer to agree to arbitrate.

The Court in *Boys Markets* could have chosen to extend *Sinclair* to the states²⁹ consistent with the establishment of a national system of labor law.³⁰ By precluding federal courts from issuing injunctions for breach of contracts not to strike, the Court in *Sinclair* made state courts the preferred forum by employers, and thus seriously impaired the volume of federal court suits and the opportunity for federal development of a uniform interpretation of labor-management contracts. However, the Court realized that extending *Sinclair* to the states would hamper the effectiveness of section 301 in promoting the speedy enforcement of collective bargaining agreements. Moreover, such an extension, while establishing uniformity, would unnecessarily give labor the upper hand over management. Stressing the importance of arbitration³¹ as the overriding consideration in labor-management disputes, the Court chose another, less absolute method of achieving uniformity—federal courts should be able to issue injunctions as well as state courts. Logically, the decision is appealing; concurrent jurisdiction in the area of labor law is preserved, and the necessity for forum shopping is obviated.³² Furthermore, a certain symmetry in the law is maintained, which serves to foster federal-state relations in an area of national concern.

Although *Boys Markets* may herald a new era in labor-management relations, a caveat is appropriate for those who would read the decision broadly. The case does not stand for the proposition that access to the federal courts will now be allowed to any employer seeking to enjoin a union from striking in breach of a collective bargaining agreement. The Court made explicit the limited nature of its holding:

Corp., 363 U.S. 593 (1960). In these cases, the Court held that where the issue constitutes an arbitrable grievance, federal court authority did not extend beyond determining the existence of a collective bargaining agreement with an arbitration clause and determining whether there was an allegation that a provision of that agreement had been violated. The courts may not replace the judgment of the arbitrator with their own, nor may they refuse to act, because, in their opinion, a claim is frivolous or unwarranted. Aaron, *The Labor Injunction Reappraised*, 10 U.C.L.A.L. REV. 292, 337 (1963).

²⁹ The Court raised this possibility: "[i]t is undoubtedly true that each of the foregoing objections to *Sinclair-Avco* could be remedied either by overruling *Sinclair* or by extending that decision to the States." 398 U.S. at 247.

³⁰ See note 37 *infra*.

³¹ 398 U.S. at 243, 252.

³² The result would also have been obtained if *Sinclair* had been extended to the states.

Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act. We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure. Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance³³

Several principles were adopted to determine the appropriateness of relief: the injunction must be appropriate in spite of the Norris-LaGuardia Act; both parties must be contractually bound to arbitrate the grievance and the contract must so state;³⁴ the employer should be ordered to arbitrate as a condition precedent to his obtaining injunctive relief against the strike;³⁵ the injunction must be warranted under ordinary principles of equity, *i.e.*, whether the employer has been or will be caused irreparable injury by the breaches.³⁶

Although *Boys Markets* may have favorably restored the balance of power between labor and management, one issue remains unresolved: whether state courts must now apply the same principles as federal courts in granting equitable relief? This issue will arise when management obtains an injunction in a state court that would not have been issued in federal court under the standards set down in *Boys Markets*. The union will contend that the requirements for an injunction established by *Boys Markets* should be made applicable to the states. The Supreme Court will ultimately be called upon to resolve the issue. If the Court decides that *Boys Markets* is inapplicable, uniformity in labor law will suffer due to the different standards that state courts will inevitably establish.³⁷ How-

³³ 398 U.S. at 253-54.

³⁴ That this principle must be met before injunctive relief will be granted in a federal court is evidenced by the recent decision of *Stroehmann Bros. Co. v. Local 427, Confectionary Workers*, 74 LAB. REL. REP. 2957, 2960 (M.D. Pa. July 25, 1970), in which injunctive relief was denied to an employer because he and the union were not contractually bound to arbitrate grievances.

³⁵ In *Holland Constr. Co. v. Operating Eng'rs*, 74 LAB. REL. REP. 3087, 3088 (D. Kan. July 27, 1970), the court referred to the requirements of *Boys Markets*, and stated that "the employer should be ordered to arbitrate as a condition of obtaining an injunction assuming the other criteria favoring an injunction are also present."

³⁶ 370 U.S. at 228.

³⁷ The doctrine of federal preemption does not necessarily arise in this context. Although preemption usually applies when a state court attempts to resolve an issue governed by a federal statute, the National Labor Relations Board, not a state court, has authority to initially rule on a particular labor activity. Disputes over labor agreements are usually left for judicial resolution, whereas, labor practices are ruled upon by the Board. Breach of a labor contract is not considered an unfair labor practice and is therefore left to the usual processes of the law. Stewart,

ever, the Court, in the interest of uniformity, should hold that *Boys Markets* is applicable to the states. *Teamsters Local 174 v. Lucas Flour Co.*³⁸ emphasized that national labor policy could not tolerate inconsistent state and federal court enforcement and interpretation of labor contracts:

Incompatible doctrines of local law must give way to principles of federal labor law The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy [T]he subject matter of § 301 (a) "is peculiarly one that calls for uniform law."³⁹

The field of labor law stands on the threshold of a new era that promises consistent development on both state and federal levels. Broad policies of national interest will be the predominant concern in any labor-management controversy. Past errors and incompatible doctrines should be cast aside and resurrected only in historical comment. The judiciary should not take umbrage at emerging concepts alien to past interpretations. As Justice Stewart noted, concurring in *Boys Markets*, "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late."⁴⁰

ROBERT D. RIZZO

Restraints on Trade—Covenants in Employment Contracts not to Compete within the Entire United States

The North Carolina Supreme Court has now put to rest the notion that nationwide restraints on trade were per se illegal in North Carolina. In *Harwell Enterprises, Inc. v. Heim*,¹ the supreme court upheld a re-

No-Strike Clauses in the Federal Courts, 59 MICH. L. REV. 673, 675-76 (1961); H.R. REP. No. 510, 80th Cong., 1st Sess. 42 (1947); 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 546 (1948). The NLRB honors this distinction. Repeatedly it has said it will not adjudicate contract violations. At least one commentator disagrees. Kiernan, *Availability of Injunctions Against Breaches of No-Strike Agreements in Labor Contracts*, 32 ALBANY L. REV. 303, 316 (1968).

³⁸ 369 U.S. 95 (1962).

³⁹ *Id.* at 102-03.

⁴⁰ Justice Stewart borrowed this quote from Justice Frankfurter. 398 U.S. at 255.

¹ 276 N.C. 475, 173 S.E.2d 316 (1970).