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STUDENT NOTES

LABOR LAW—INJUNCTIONS—THE ROLE OF THE COURTS IN THE RESOLUTION OF LABOR DISPUTES

In the summer of 1976, the United States Supreme Court further defined the proper role of the federal courts in the resolution of industrial disputes. Specifically, the Court decided when injunctive relief is proper for the enforcement of no-strike promises in collective bargaining agreements. Buffalo Forge Co. v. United Steelworkers of America is an illustration of some of the basic principles of federal labor policy, and their application by the Court. After a brief discussion of the historical background of the role of federal injunctions in labor disputes, Buffalo Forge and its implications will be analyzed.

During the first thirty years of this century, struggles between organized labor and management frequently and decisively were settled in managements' favor by use of the labor injunction. At the request of management, federal courts consistently enjoined concerted activities of labor unions in a manner characterized by abuses which brought the federal judiciary into disrepute. Injunctions were often issued in ex parte proceedings on the basis of vague and generalized affidavits, and decrees were often sweeping in scope. The temporary or interlocutory injunction usually ended the union's activity permanently, with violations of the decrees.

1 96 S. Ct. 3141 (1976) [hereinafter cited as Buffalo Forge].
2 F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930).
3 Whether the federal judiciary was simply anti-union and pro-management, or whether the abuses resulted from lack of an established substantive policy concerning labor disputes, or an interplay of these factors, the result was the same; injunctions were consistently granted. Wellington & Albert, Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson, 72 Yale L.J. 1547, 1553 nn.15 & 16 (1963) [hereinafter cited as Wellington].
4 Id. at 1554 & n.17.
6 "[A]t this stage in history most concerted union activity was unable to survive an initial injunction." Wellington, supra note 3, at 1554-55. Furthermore, the judiciary exhibited a general unwillingness to reverse those temporary orders which did reach the permanent injunction stage. Gould, supra note 5, at 234.
being punished by contempt penalties issued against both individual employees and union representatives. This indiscriminate use of federal labor injunctions resulted in the passage of the Norris-LaGuardia Act in 1932, whose stated policy was to guarantee freedom of association of workers, protection from coercion by their employers, and protection of concerted activities. The policy was effected by provisions which removed the jurisdiction of federal courts to issue injunctions in many labor disputes, and which imposed strict procedural requirements in those cases where injunctions were permissible.

The enactment of the Norris-LaGuardia Act and the National Labor Relations Act, also known as the Wagner Act, significantly increased the power of unions, and Congress became concerned with controlling industrial strife which was hampering the nation's economy. This concern was manifested in the enactment of the Labor Management Relations Act of 1947, also known as the Taft-Hartley Act. The act blunted the force of unions by designating some union tactics as unfair labor practices. Section 301(a) of the

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7 Gould, supra note 5, at 234; Wellington, supra note 3, at 1554. Trial was summary, without benefit of jury, and frequently before the judge who issued the injunction.
10 29 U.S.C. § 104 (1970) provides:
   No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
   (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
   ...
   (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
   (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute; ...
13 Note, The Applicability of Boys Markets Injunctions to Refusals to Cross a Picket Line, 76 Col. L. Rev. 113 (1976) [hereinafter cited as Applicability of Injunctions]. This is an excellent and concise analysis of the problems leading up to Buffalo Forge. See also 19 L.R.R.M. 49 (1947).
LMRA\textsuperscript{16} opened the jurisdiction of federal courts to suits for violation of collective bargaining agreements, without respect to diversity of citizenship or amount in controversy, and thus served the purpose of providing a forum for the enforcement of collective bargaining agreements by supplementing state court jurisdiction.\textsuperscript{17}

Subsequent to the enactment of the LMRA, a split of authority developed among the circuit courts of appeals as to whether § 301(a) was merely a jurisdictional provision or a source of substantive law as well.\textsuperscript{18} The solution was provided in the landmark case of \textit{Textile Workers Union v. Lincoln Mills}\textsuperscript{19} in which a labor union brought suit under § 301(a) seeking specific performance of arbitration provisions contained in a collective bargaining agreement. The Court held that § 301(a) was substantive in nature and that "[t]he substantive law to [be applied] in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws."\textsuperscript{20} The Court determined that the policy of the LMRA was to foster peaceful industrial relations by making collective bargaining agreements enforceable by either party,\textsuperscript{21} that Congress favored no-strike agreements,\textsuperscript{22} and that an agreement to

\textsuperscript{16} 29 U.S.C. § 185(a) (1970) provides in part: Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce 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.

\textsuperscript{17} It was difficult to serve process on unions in state courts governed by common law, as unions were unincorporated associations. Of course, it was no problem to serve process on a business corporation or other employer. Keene, \textit{The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to Avco and Beyond}, 15 \textit{Vill. L. Rev.} 32, 34 (1969).

\textsuperscript{18} See cases cited in \textit{Textile Workers Union v. Lincoln Mills}, 353 U.S. 446, nn.1 & 2 (1957). Writing a plurality opinion in \textit{Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.}, 348 U.S. 437 (1955), Justice Frankfurter expressed the opinion that § 301 was merely jurisdictional in nature.

\textsuperscript{19} 353 U.S. 446 (1957) [hereinafter cited as \textit{Lincoln Mills}].

\textsuperscript{20} Id. at 456. The mandate given federal courts to "fashion" the substantive law was followed by suggested guidelines: "The Labor Management Relations Act expressly furnishes some substantive law. . . . Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the problem." \textit{Id.} at 457.

\textsuperscript{21} Id. at 453-54.

\textsuperscript{22} Id. at 453.
arbitrate grievance disputes was the *quid pro quo* for an agreement not to strike.22 The Court noted that the procedural proscriptions on the issuance of injunctions in § 7 of the Norris-LaGuardia Act23 did not apply to an order to enforce an agreement to arbitrate, because “[t]he failure to arbitrate was not part and parcel of the abuses against which the Act was aimed.”24 It was also noted that § 8 of the act25 encouraged arbitration;26 specific performance of the agreement to arbitrate was thus ordered and became federal law.27 The great significance of *Lincoln Mills* is the authority which the Court assumed to “fashion” federal labor law.28

Arbitration was firmly established as the favored means for resolution of industrial disputes in the *Steelworkers Trilogy* of 1960.29 Both the *American Manufacturing* and *Warrior & Gulf* cases of the *Trilogy* involved § 301(a) suits brought by unions seeking enforcement of arbitration agreements provided in collective bargaining contracts, which also contained express no-strike clauses. The proper role of the courts was held to be “very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.”30 If the parties agreed to arbitrate, the court will not consider the merits of the grievance because it is the arbitrator’s judgement that was bargained for, not that of the court.31 And “[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”32 The federal judiciary was thus in-

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22 *Id.* at 455.
24 353 U.S. at 458.
26 353 U.S. at 458.
27 An order to enforce arbitration provisions is the counterpart to an order enjoining a work-stoppage.
30 363 U.S. 564, 567-68.
31 *Id.* at 568.
32 363 U.S. 574, 582-83 (footnote omitted).
structed to refrain from usurping the arbitrator’s function, and to apply a presumption of arbitrability in doubtful cases.\textsuperscript{24}

State courts were held to have concurrent jurisdiction over § 301(a) suits.\textsuperscript{25} In \textit{Teamsters Local 174 v. Lucas Flour Co.},\textsuperscript{26} the Court reviewed an award of damages made by a state court against a union for breach of a no-strike clause contained in a collective bargaining agreement. Because “[t]he ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace . . . ,” the Court held that state courts were to apply doctrines of substantive federal law in § 301(a) suits.\textsuperscript{27} Although the collective bargaining agreement at issue did not contain an express no-strike clause, the Court held as a matter of federal law that when the parties have agreed to final and binding arbitration there arises an implied duty not to strike over those matters subject to arbitration.\textsuperscript{28}

The federal labor policy articulated in § 301(a) cases was to foster peaceful industrial relations through enforcement of voluntary collective bargaining agreements, and to promote arbitration as an alternative to economic warfare. The question remained whether this policy was a basis upon which federal courts could enforce the preferred no-strike clause (express or implied) against a labor union by use of an injunction. The tension between this policy and the anti-injunction prohibitions of § 4 of the Norris-LaGuardia Act was resolved in \textit{Sinclair Refining Co. v. Atkinson},\textsuperscript{29} which involved a § 301(a) suit by an employer seeking to enjoin repeated work stoppages which were over grievances subject to the mandatory arbitration provisions of the collective bargaining agreement between the parties, and which were also in violation of an express no-strike clause. The Court held that although the strikes were a violation of the collective bargaining agreement, they involved a labor dispute within the meaning of § 4 of the Norris-LaGuardia Act, and therefore injunctive relief was prohib-

\textsuperscript{24} Id. In \textit{Enterprise Wheel & Car}, supra note 30, the Court held that questions of contract interpretation were for the arbitrator to decide, not the courts, and that even though an opinion accompanying an arbitrator’s award is ambiguous, the court will not overrule it. 363 U.S. 593, 597-98.

\textsuperscript{25} Charles Dowd Box Co. v. Courtney, 369 U.S. 502 (1962).

\textsuperscript{26} 369 U.S. 95 (1962).

\textsuperscript{27} Id. at 104.

\textsuperscript{28} Id. at 105-06.

\textsuperscript{29} 370 U.S. 195 (1962) [hereinafter cited as \textit{Sinclair}].
When the Court reasoned that the meaning of the Norris-LaGuardia Act was clear, that it was drafted with the broadest possible terms so as to avoid a restrictive judicial construction, and that the legislative history of § 301 showed that Congress considered repealing the Norris-LaGuardia Act "insofar as suits based upon breach of collective bargaining agreements are concerned and deliberately chose not to do so." 42

In a strong dissent, Justice Brennan argued that "Norris-LaGuardia does not invariably bar injunctive relief when necessary to achieve an important objective of some other statute in the pattern of labor laws." In light of the federal labor policy, Justice Brennan deemed it necessary to accommodate the underlying purposes of § 4 of the Norris-LaGuardia Act and § 301 of the LMRA. Accommodation of § 4 and § 301 would show that the availability of injunctive relief in this factual setting was more necessary to the purposes of § 301 than harmful to the purposes of § 4, and that simply to adhere to a literal interpretation of § 4 would disrupt the basic policies favoring arbitration and deny the employer his bargain. 47

Sinclair was overruled eight years later in Boys Markets, Inc. v. Retail Clerks Union, Local 770. The parties in Boys Markets entered a collective bargaining agreement which provided that all

40 Id. at 199, 203.
41 Id. at 203.
42 Id. at 205 (footnote omitted). The Court also distinguished Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., 353 U.S. 30 (1960) (injunction not barred by § 4 where the parties were bound to compulsory arbitration by the Railway Labor Act); and Lincoln Mills, supra note 19 (injunction held not to violate § 4 because the order issued did not violate one of the specific prohibitions of § 4). 370 U.S. at 211-12.
43 370 U.S. 195, 217 (Brennan, J., dissenting opinion).
44 Id. at 218.
45 Id. at 218-19.
46 Id. at 227.
47 Id. at 219. The result would be that an employer would be bound to the arbitration provisions in the collective-bargaining agreement under § 301, but he could not enforce the no-strike clause through an injunction. It was felt that this would discourage employers from entering agreements with arbitration provisions. Id. at 227.

Another problem raised by the dissent was the potentially harmful effect the Court's holding would have on the policy of maintaining state court jurisdiction while promoting uniformity of doctrine. Id. at 226.

disputes as to the application or interpretation of the contract should be resolved by binding arbitration and that there should be no work stoppages.\textsuperscript{49} When a dispute arose over a work assignment, the union refused to abide by the grievance and arbitration provisions and called a strike. This was the factual setting upon which the Court achieved the accommodation of § 4 of the Norris-LaGuardia Act and § 301 of the LMRA that was called for in Justice Brennan's \textit{Sinclair} dissent. The Court held that § 4 did not prohibit a federal court from enjoining a strike in breach of a collective bargaining agreement that contained provisions for binding arbitration of the dispute over which the strike was called.\textsuperscript{50} The Court reasoned that national labor policy favored peaceful, voluntary settlement of disputes, and that a central institution in maintenance of this policy was arbitration.\textsuperscript{51}

The holding in \textit{Sinclair} undermined this policy because denial of injunctive relief often deprived employers of the only effective means to enforce a no-strike clause, and therefore discouraged employers from entering agreements with arbitration provisions which could be enforced against them.\textsuperscript{52} Alternatively, the major underlying purposes of § 4 of the Norris-LaGuardia Act were viewed as responsive to the situation labor organizations faced before the passage of that act.\textsuperscript{53} The Court concluded that limiting the use of the injunctive remedy to only when it is necessary to promote the policy favoring arbitration did not vitiate the core purposes of Norris-LaGuardia.\textsuperscript{54}

Characterizing the holding as "narrow,"\textsuperscript{55} the Court adopted a statement of principles from the \textit{Sinclair} dissent as to when injunctive relief would be appropriate:

"A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and

\begin{itemize}
\item \textsuperscript{49} 398 U.S. at 238-39.
\item \textsuperscript{50} Id. at 253.
\item \textsuperscript{51} Id. at 252.
\item \textsuperscript{52} Id. at 248, 252.
\item \textsuperscript{53} Id. at 250. See the text accompanying notes 2-11 supra.
\item \textsuperscript{54} Id. at 255. The Court based its holding on the additional line of reasoning that \textit{Sinclair} defeated the purpose of § 301(a) to supplement state court jurisdiction. \textit{See} note 44 supra. In \textit{Avco Corp. v. Aero Lodge} 735, 390 U.S. 557 (1968), the Court held that suits under § 301(a) could be removed to federal court. "The principal practical effect of \textit{Avco} and \textit{Sinclair} taken together is nothing less than to oust state courts of jurisdiction in § 301(a) suits where injunctive relief is sought for breach of a no-strike obligation." 398 U.S. at 244-45.
\item \textsuperscript{55} Id. at 253.
\end{itemize}
until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract does have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity . . . and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.\textsuperscript{54}

Federal courts were once again in the business of ending strikes by injunction.

The Court upheld the issuance of a Boys Markets injunction under the National Bituminous Coal Wage Agreement of 1968 in Gateway Coal Co. v. United Mine Workers,\textsuperscript{57} the first case subsequent to Boys Markets in which § 301 injunctions were considered. In Gateway Coal, the agreement contained a broad arbitration provision, but did not have a no-strike clause.\textsuperscript{55} The Court held that the Steelworkers Trilogy presumption of arbitrability applied to the safety dispute at issue in this case, and, therefore, that the dispute fell within the scope of the broad arbitration clause.\textsuperscript{59} This duty to arbitrate gave rise to a "coterminous" obligation not to strike,\textsuperscript{60} and since traditional equity requirements were satisfied, a Boys Markets injunction was proper.\textsuperscript{61} Gateway Coal illustrates how synthesis of prior § 301 holdings can result in issuance of an injunction based upon the presence of a broad arbitration provision alone.

\textsuperscript{54} Id. at 254, quoting 370 U.S. 195, 228 (Brennan, J., dissenting opinion). Justice Black, joined by Justice White, dissented on the grounds that Sinclair was correctly decided. Justice Stewart, who had been in the majority in Sinclair, switched positions and joined the majority in Boys Markets.
\textsuperscript{57} 414 U.S. 388 (1974) [hereinafter cited as Gateway Coal].
\textsuperscript{55} Id. at 375-76.
\textsuperscript{59} Id. at 377-79. But see Note, Labor Injunctions, Boys Markets, and the Presumption of Arbitrability, 85 Harv. L. Rev. 636 (1972), (arguing that the presumption of arbitrability should not apply in injunction cases); Comment, Labor Law-Arbitration of Safety Disputes, 76 W. Va. L. Rev. 249 (1974).
\textsuperscript{60} 414 U.S. at 382. The Court noted that a contract could have a broad arbitration provision while expressly negating any implied no-strike duty, if the parties so intended.
\textsuperscript{61} Id. at 387.
The most widely litigated issue to arise in the wake of *Boys Markets* was whether the holding in that case provided federal courts authority to enjoin a work-stoppage caused by the refusal of employees to cross the picket line of another union,\(^2\) and a conflict of authority soon developed in the circuit courts of appeals over this issue.\(^3\) *Amstar Corp. v. Amalgamated Meat Cutters*\(^4\) illustrates the typical fact situation involved in these cases, and it is representative of one approach taken. A work stoppage resulted when the union refused to cross a picket line set up by another union. The company sought a *Boys Markets* injunction, claiming that the work stoppage was a violation of the express no-strike promise in the collective bargaining contract to which the union was a party, and stated that it was willing to arbitrate the scope of the no-strike clause. The court denied the injunction because the work stoppage was not the result of a dispute "over an arbitrable grievance" and therefore the case was "entirely outside the scope of the exception to the Norris-LaGuardia Act delineated in *Boys Markets*.\(^5\)

The other basic approach taken is exemplified by *Monongahela Power Co. v. IBEW Local 2332*.\(^6\) When the Clarksburg, West Virginia, division employees went on strike they established pickets at the Panhandle division in Weirton, West Virginia, and the picket line was honored by the Panhandle employees. The company sought to enjoin the work stoppage by the Panhandle employees alleging that the stoppage was a breach of the no-strike obligation in the contract, and that the dispute was subject to the broad grievance and arbitration provisions of the contract. The court held that the dispute as to whether the union had waived its right to honor the picket line by the no-strike clause was arbitrable and within the holding of *Boys Markets*.\(^7\)

As has been shown, most of the cases have been decided either by holding that a sympathy strike is not "over an arbitrable griev-

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\(^2\) A refusal to cross a picket line is a protected activity under the LMRA. 29 U.S.C. § 158(b)(4)(1970). This right may be bargained away by the union. NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953).

\(^3\) For a concise analysis of the treatment of this issue in the circuit courts, see *Applicability of Injunctions*, supra note 12.

\(^4\) 468 F.2d 1372 (5th Cir. 1972).

\(^5\) *Id.* at 1373. The Sixth Circuit has also followed this approach. Plain Dealer Pub. Co. v. Cleveland Typographical Union #53, 520 F.2d 1220 (6th Cir. 1975).

\(^6\) 484 F.2d 1209 (4th Cir. 1973).

\(^7\) *Id.* at 1213-14.
ance" and therefore not within the Boys Markets holding, or, that where the dispute is the legality of the sympathy strike itself, there is an arbitrable dispute and the Boys Markets rationale applies.\(^1\)

It has been suggested that the lack of rational analysis of the policies underlying the application of these phrases has contributed to confusion over when injunctive relief is appropriate.\(^2\) In any event, a solution to this puzzle was finally provided when the Supreme Court decided Buffalo Forge Co. v. United Steelworkers of America.\(^3\)

When the office-clerical and technical employees of the Buffalo Forge Company went on strike during contract negotiations, they set up picket lines which were honored by the company's production and maintenance employees, who were represented by the United Steelworkers of America. The company brought suit under § 301(a) of the LMRA, seeking to enjoin the work stoppage by the production and maintenance employees, alleging that the strike violated the no-strike clause of the contract between the parties, and that the dispute as to the legality of the contract was subject to the arbitration provisions in the contract.\(^4\) The district court found that the employees were engaged in a sympathy strike and held that the case did not fall within the holding of Boys Markets because the strike was not over an arbitrable grievance,\(^5\) and the court of appeals affirmed this result and rationale.\(^6\)

Writing for a Supreme Court majority of five, Justice White framed the issue as "whether a federal court may enjoin a sympathy strike pending the arbitrator's decision as to whether the strike is forbidden by the express no-strike clause contained in the collective bargaining contract to which the striking union is a party."\(^7\) The Court affirmed the decisions of the courts below,\(^8\) with both the

\(^1\) See cases cited in Buffalo Forge Co. v. United Steelworkers of America, 96 S. Ct. 3141 n.9 (1976).


\(^3\) 96 S. Ct. 3141 (1976).

\(^4\) Id. at 3143-44. Like most of the collective bargaining agreements in previous cases cited, the agreement at issue provided for arbitration of disputes as to the meaning and application of the terms of the agreement.


\(^6\) Buffalo Forge Co. v. United Steelworkers of America, 517 F.2d 1207, 1210 (2d Cir. 1975).

\(^7\) 96 S. Ct. at 3143.

\(^8\) Id. at 3146.
majority and dissenting opinions echoing the arguments of *Boys Markets*.

The Court recognized that the dispute as to the legality of the sympathy strike was an arbitrable issue, and that a court could enjoin the strike had an arbitrator previously ruled that the strike was in breach of the contract.\(^7\) The Court then distinguished *Boys Markets* and thus illuminated the meaning of that case, particularly the "over an arbitrable grievance" rationale. The "driving force" behind *Boys Markets* was the promotion of the preferred methods of private, voluntary dispute settlement. It was deemed necessary to accommodate the anti-injunction provisions of § 4 of the Norris-LaGuardia Act to § 301 of the LMRA only to the extent necessary to implement the preferred policy. This meant that the *quid pro quo* for the arbitration provisions was the union's promise not to strike over any dispute subject to settlement by arbitration.\(^7\) Where the alleged violation of the no-strike clause was a sympathy strike, then "the strike was not over any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract. . . . The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain."\(^7\) Because the strike did not have the purpose or effect of undermining the arbitration process, there was no need to accommodate § 4 to § 301.\(^7\)

The Court also stated that the strike was not enjoinable merely because it was an alleged violation of the express no-strike clause in the contract.\(^9\) The Court incorporated the *Sinclair* dissent's position that:

'[T]here is no general federal anti-strike policy; and although a suit may be brought under § 301 against strikes which, while they are breaches of private contracts, do not threaten any additional public policy, in such cases the anti-injunction policy of Norris-LaGuardia should prevail.'\(^8\)

Although the legality of the sympathy strike was arbitrable, it did not follow that a court could enjoin the strike pending the

\(^7\) Id.
\(^7\) Id. at 3147.
\(^7\) Id.
\(^7\) Id. at 3147-49.
\(^9\) Id. at 3148.
\(^8\) Id., quoting 370 U.S. 195, 225 (1962) (Brennan, J., dissenting opinion).
arbitrator's decision. The Court reasoned that to allow an injunction to issue on the facts of this case would mean that a court could "enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions. . . ." even though to do so would violate express terms of § 4 of the Norris-LaGuardia Act. This would have the practical effect of making

the courts potential participants in a wide range of arbitrable disputes . . . not just for the purpose of enforcing promises to arbitrate . . . but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator and of issuing injunctions that would otherwise be forbidden by the Norris-LaGuardia Act. This would cut deeply into the policy of the Norris-LaGuardia Act, and would go far beyond the scope of the accommodation required by Boys Markets. Such preliminary judicial determinations would usurp the arbitrator's function, or at least inhibit his independence in making a subsequent decision on the same issues. Further, the Court recognized that injunctions against strikes, even temporary injunctions, often have the effect of permanently settling the issue.

Justice Stevens wrote the dissenting opinion, joined by Justices Brennan, Marshall, and Powell. Emphasizing that the promise not to strike is the *quid pro quo* for the employer's agreement to contractual arbitration provisions, the dissent phrased the issue as "whether that *quid pro quo* is severable into two parts—one which a federal court may enforce by injunction and another which it may not." The dissent viewed the majority opinion as based upon a literal interpretation of the Norris-LaGuardia Act, and fear that federal courts could be brought into a great deal of injunction litigation and a consequent usurpation of the arbitrator's functions. It was contended that a proper application of the policies underlying Boys Markets would require enforcement of the promise not to strike, as the *quid pro quo*, and it was also believed that

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82 Id. at 3148.
83 Id. at 3149.
84 Id. at 3148-49.
85 Id. at 3149.
86 Id.
87 Id. at 3150 (Stevens, J., dissenting opinion).
88 Id.
89 Id.
Buffalo Forge did not raise the central concerns of the Norris-LaGuardia Act, as that act was primarily concerned with the processes by which collective bargaining agreements are formed rather than the means by which they are enforced.80 Boys Markets was perceived by the dissent as emphasizing the no-strike promise as the quid pro quo for arbitration agreements, which, when rendered enforceable in federal courts, would greatly further the federal labor policy of peaceful settlement of industrial disputes.81 It followed that the dissent believed the Court was wrong in stating that the strike in this case could not have had the effect of denying the employer his bargain. Whether the employer was deprived of his bargain depended upon “the extent of the certainty that the sympathy strike [fell] within the no-strike clause.”82

The dissenters argued that because a court could enforce an arbitrator’s ruling that a sympathy strike was in violation of a contractual no-strike obligation, a court should have the authority to enjoin a strike, pending the arbitrator’s decision, when the agreement is “so plainly unambiguous that there could be no bona fide issue to submit to the arbitrator. . . .”83 It was argued that, by definition, an interim determination of the scope of the no-strike clause “neither usurps nor precludes a decision by the arbitrator.”84 The dissent noted that the damage remedy was often a worthless substitute for injunctive relief,85 and that denial of the injunction pending arbitration, when the strike does violate the contract, can be as detrimental to the interests of the employer as erroneous issuance of the injunction when the strike is not a violation of the agreement. The dissent saw this as true because “postponement of a sympathy strike pending an arbitrator’s clarification of the no-strike clause [would] not critically impair the vital interests of the striking local even if the right to strike [was] upheld, and [would] avoid the costs of interrupted production if the arbitrator [concluded] that the no-strike clause [applied].”86

80 Id. at 3151-52.
81 Id. at 3152, 3155.
82 Id. at 3152-53. The dissent noted that an employer will often agree to mandatory arbitration provisions only in exchange for a no-strike commitment which extends beyond the strikes over arbitrable grievances. See Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L. Rev. 663, 757-60 (1973).
83 96 S. Ct. 3141, 3156 (Stevens, J., dissenting opinion).
84 Id. at 3157.
85 Id. at 3182, n.8.
86 Id. at 3157-58. “A sympathy strike does not directly further the economic interests of the members of the striking local or contribute to the resolution of any
While recognizing that the Norris-LaGuardia Act "cannot be interpreted to immunize the union from all risk of an erroneously issued injunction," the dissent believed that the proper procedure would be for district courts to issue injunctions only after presentation of "convincing evidence that the strike is clearly within the no-strike clause."\footnote{Id. at 3153 (footnote omitted).}

The great importance of the holding in Buffalo Forge is that it defines the extent of the exception to the anti-injunction provision of the Norris-LaGuardia Act established in Boys Markets, and it thereby clarifies what role the federal courts are to play in the enforcement of collective bargaining agreements. It appears certain that the holding of Boys Markets is to be narrowly construed. The only time an injunction is authorized\footnote{See text accompanying note 54, supra.} is when there is a collective bargaining agreement which contains a no-strike clause,\footnote{The no-strike clause may be either express or implied, but in the event of a sympathy strike situation, there will be no implied no-strike clause upon which to issue an injunction. See 96 S. Ct. at 3155 & n.17 (Stevens, J., dissenting opinion).} the dispute leading to the work stoppage is over an arbitrable grievance, and the normal principles of equity are applicable. This formula must be read to mean that not only must the work stoppage be a breach of the contract, but the work stoppage also must have the effect of subverting the arbitration process. This is just another way of stating the requirement of "over an arbitrable grievance." The arbitrable grievance must be the cause of the strike, not merely a result of it.

These criteria can be applied to varying situations to determine if a Boys Markets injunction is authorized. A Boys Markets injunction is clearly inappropriate in a "political strike" situation in which employees refuse to work, in violation of a no-strike clause, in order to express political sentiments. This situation is illustrated by examples from the coal industry in which miners have struck in order to exert influence for passage of black-lung legislation, protest state law banning use of studded tires, and protest a state governor's order regulating distribution of gasoline.\footnote{E.g., Armco Steel Corp. v. United Mine Workers, 505 F.2d 1129 (4th Cir. 1974), cert. denied, 423 U.S. 877 (1975). There is a potential problem lurking in a strict definitional application of the term "political strike." It is possible that what dispute between that local, or its members, and the employer." Id. at 3157 (footnote omitted).} There is no subversion of the arbitration process in these
fact situations, because the strike is not caused by an arbitrable grievance; it is not a dispute between employer and employees which could be resolved by arbitration.

Buffalo Forge teaches that a Boys Markets injunction is improper in the typical sympathy strike situation in which there is a collective bargaining agreement which contains a general no-strike clause. This is true even if the agreement also contains a general provision that any disputes as to the interpretation and application of the contract terms are to be resolved by arbitration. This was the exact situation in Buffalo Forge, and as indicated in that case, an injunction was improper because the underlying dispute was not subject to resolution by arbitration. Therefore, although the work stoppage resulted in an arbitrable grievance, i.e., whether a sympathy strike was a violation of the no-strike agreement, it was not the underlying cause of the strike. The underlying cause of the strike was not any dispute which the employees had with their employer; the cause of the stoppage was the employees' decision to honor the picket line of another union. This situation may be contrasted with a sympathy strike in violation of a no-strike clause which expressly waives the right of employees to honor a picket line of another union. Such an express waiver in a collective bargaining agreement could serve to bring the strike activity within the scope of Boys Markets by immediately rendering any sympathy strike also a dispute with the employer which would clearly be arbitrable. If the contract language was properly phrased to express that the right to engage in sympathy strikes, or any other sort of work stoppage, was clearly waived, or waived pending prior decision of an arbitrator, then the effect of such a strike would be to evade and subvert the arbitration process. The effect would be to color the underlying dispute as one over contract terms subject to arbitration, and so Boys Markets would apply.

This proposed analysis of the varying applications of the Boys Markets rule to sympathy strike situations may appear to be overly semantic, but the distinction is a function of, and required by certain basic principles of federal labor policy. One of these principles is that the anti-injunction provision of the Norris-LaGuardia

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101 This is assuming that the collective bargaining agreements do not expressly address the right to engage in this nature of strike.
Act is not merely an historical anomaly, but a vital law which will be abrogated only when necessary to vindicate some other policy in the scheme of federal labor law. The policy favoring voluntary collective bargaining and resolution of industrial disputes through arbitration is the one policy of sufficient importance to require an accommodation of § 4 of the Norris-LaGuardia Act. Another such policy, implicit in Buffalo Forge, is a recognition of the importance to workers of the right to strike and, while this right may be waived, such waiver should be explicitly stated. Accommodation of the policies favoring arbitration and inhibiting federal injunctive relief in labor disputes, most clearly illustrated in Boys Markets, was consistently and appropriately applied in Buffalo Forge.

An employer's need and desire for a contract which provides for uninterrupted production is a worthy and understandable objective. What the Court has done in Buffalo Forge is not to

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104 This is not to say that unresolved problems do not remain. There may be particular problems in the bituminous coal industry where there is an ironclad tradition among miners of refusing to cross picket lines in virtually any circumstance. See Consol. Coal v. International Union, United Mine Workers, 537 F.2d 1226, 1230 (4th Cir. 1976). This tradition, coupled with a propensity for local unions which strike (whether or not over an arbitrable grievance) to send out "roving pickets" can lead to the situation where a local union striking over an arbitrable grievance sends out roving pickets to neighboring mines. The workers at the non-striking mines will invariably observe the picket line. The same situation could possibly come about even where the workers at the mine do not strike their own employer over a grievance dispute, but instead send pickets to neighboring mines, thus forcing a sympathy strike on the other miners.

In Consol. Coal v. International Union, United Mine Workers, supra, stranger pickets appeared at the employer's mine and the picket line was observed by Con- sol's employees. Recognizing that they had no dispute with their own employees, Consol attempted, inter alia, to enjoin the activities of the stranger pickets (it was not clear to the Court just whom the stranger pickets represented). The court of appeals held that the employer in this situation could not enjoin the stranger pickets because the employer had no such right based in contract with the stranger pickets, no grievance mechanism with them, and therefore a Boys Markets injunction was not applicable. Id. at 1230. This case interpreted the National Bituminous Coal Wage Agreement of 1974.

See also United States Steel Corp. v. United Mine Workers, 418 F. Supp. 174 (W.D. Pa. 1976); Brief for Bituminous Coal Operators' Ass'n., Inc. as Amicus Curiae at 5, 6, Buffalo Forge Co. v. United Steelworkers of America, 96 S. Ct. 3141 (1976).

105 96 S. Ct., at 3187 (Stevens, J., dissenting opinion). See Brief for Petitioner at 20, Buffalo Forge Co. v. United Steelworkers of America, 96 S. Ct. 3141 (1976);
deprive employers of this goal, but to put parties to collective bargaining agreements on notice that they should strive for clarity of intent and expression in contract terms. They are free to bargain for whatever terms they may be able to agree upon. In a society in which political and economic freedom are basic values, the Supreme Court has decided that the courts should attempt to limit their role in resolution of industrial disputes to ascertaining and enforcing the clearly expressed agreement of the parties.

S. Benjamin Bryant

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Brief for Bituminous Coal Operators' Ass'n, Inc. as Amicus Curiae at 2, Buffalo Forge Co. v. United Steelworkers of America, 96 S. Ct. 3141 (1976).