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Richard Steven Rosenberg

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BOYS MARKETS INJUNCTIVE RELIEF IN THE SYMPATHY STRIKE CONTEXT: BUFFALO FORGE FROM A MANAGEMENT PERSPECTIVE

INTRODUCTION

On the final day of its 1975-76 term, the United States Supreme Court struck a devastating blow to the delicate labor relations balance it had previously achieved in Boys Markets, Inc. v. Retail Clerks, Local 770. The Court made it clear in that case that where an employer agreed to arbitrate industrial disputes in exchange for a union's pledge both to participate in the arbitration and to refrain from striking over those disputes, that agreement will be strictly enforced. Hence, if a union chose to strike rather than arbitrate, that strike could be enjoined. More simply put, the court would enforce the bargain struck between the employer and the union.

In Buffalo Forge Co. v. United Steelworkers of America the Court destroyed this symmetry of obligation by holding that the existence of a mandatory arbitration procedure and a no-strike clause in a collective bargaining agreement did not preclude a union and its members from honoring another union's lawful picket line. In affirming the denial of a preliminary injunction, a majority of the Court, through Justice White, held that its earlier Boys Markets decision did not apply in this sympathy strike context because the dispute was not over a grievance which both parties were bound to arbitrate, but instead was simply a manifestation of the striking workers' deference to other employees' picket lines. The Boys Markets balance is disturbed because notwithstanding the union's express agreement to refrain from striking, sympathy strike activity cannot be enjoined and unions are free to continue striking. Thus, even though the union may freely disregard its express no-strike pledge, the employer is still bound to arbitrate the permissibility of the sympathy action under the agreement.

This comment examines the Buffalo Forge decision in an attempt to demonstrate that its result is unwarranted. In doing so, the author traces the theoretical underpinnings of the Boys Markets decision and the federal circuit courts' conflict in deal-

2. 96 S. Ct. 3141 (1976).
ing with that decision in the sympathy strike context. In addi-
tion, the author also points out some of the practical difficulties
Buffalo Forge has created for employers and how that holding
exacerbates an already existing strain on labor-management
relations.

**The Boys Markets Balance**

Because of the divergent interests of management and
labor, federal labor relations law and policy has developed as
a series of compromises. The Boys Markets decision evidences
one such compromise. On one side is the strong preference for
peaceful resolution of industrial disputes through the process
of arbitration.\(^3\) Juxtaposed to this preference is the Norris La-
Guardia Act's clear enunciation that injunctions in the labor
context are generally forbidden.\(^4\) Hence, without an injunction,
there is no effective enforcement mechanism for an employer
whose union chooses to strike rather than abide
by its contractual obligation to arbitrate.\(^5\) Here lies the tension. Public pol-
icy favors private dispute settlement through arbitration.
Practically speaking, however, public policy inhibits the vital-
ity of arbitration because it also denies a vehicle of enforcement
which will guarantee adherence to such agreements.

3. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), was the first of a series
of cases in which the Court sought to fashion a federal substantive labor law. There
the Court found a congressional policy favoring arbitration embodied in section 8 of
the Norris-LaGuardia Act, 29 U.S.C. § 108 (1970) (see note 4 infra) and in section
301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1970) (see note
10 infra). 353 U.S. at 455, 458. This case was the keystone for opening up the field of
1973) [hereinafter cited as Elkouri & Elkouri].

4. Section 8 of the Norris-LaGuardia Act provides:
   No restraining order or injunctive relief shall be granted to any complain-
   ant who has failed to comply with any obligation imposed by law which
   is involved in the labor dispute in question, or who has failed to make
every reasonable effort to settle such dispute either by negotiation or with
the aid of any available governmental machinery of mediation or volun-
tary arbitration.

5. Many states have arbitration statutes which provide for the enforcement of
However, such remedies are of course less effective for an employer in the midst of a
strike because the enforcement of the arbitration agreement does not put an end to
the strike.
Arbitration

Beginning with the Steelworkers Trilogy, the Supreme Court has repeatedly viewed arbitration as "a kingpin of federal labor policy," and the preferred mechanism for resolving disputes under collective bargaining agreements. That conclusion is in accord with congressional intentions expressed in the Labor Management Relations Act (LMRA).

To insure maximum utilization of the arbitration process, the Supreme Court, in United Steelworkers v. Warrior & Gulf Navigation Co., held that when a party seeks to compel arbitration in a dispute under section 301 of the LMRA, courts

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6. 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. Corp., 363 U.S. 564 (1960). These cases are referred to as the Steelworkers Trilogy because they all involved the same plaintiff, were decided on the same day, and involved the issue of federal courts and arbitration. These cases established several principles to be applied to cases involving enforcement of promises to arbitrate. The courts must compel arbitration where the party seeking it makes a claim which on its face is governed by the contract. Doubts over arbitrability should be resolved in the affirmative. The question of interpretation of the agreement is for the arbitrator. However, an award may be upheld only so long as it draws its essence from the collective bargaining agreement. The courts should not reject an award unless it is clear that the arbitrator has exceeded his authority. Courts also should not decide the merits of the case. The merits are not subject to court inquiry in actions either to compel arbitration or to enforce arbitration awards. The Supreme Court also rejected the common law rule that a court action to enforce the award must be dismissed in its entirety if any deficiency exists in the award. Elkouri & Elkouri, supra note 3, at 29.


8. 29 U.S.C. § 173(d) (1970). Section 203(d) of the LMRA declares:
Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

In Southwestern Bell Tel. Co. v. Communications Workers, Local 6222, 454 F.2d 1333, 1336 (5th Cir. 1971), the Fifth Circuit noted that "[s]ince [the] Lincoln Mills case, it has become increasingly clear that arbitration is the central institution for the administration of the collective bargaining contract."


10. Section 301(a) of the LMRA provides:
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.

should resolve questions of interpretation of the arbitration clause by applying a strong presumption in favor of arbitrability. By making the presumption difficult to rebut,\(^{11}\) the Court insured that in virtually every case in which one party sought arbitration, the dispute would be settled by an arbitrator.\(^{12}\)

**Injunctions**

After the *Steelworkers Trilogy*, questions inevitably arose regarding which remedies an employer could obtain if a union went on strike rather than adhering to its agreement to arbitrate a particular dispute. While it was clear that an employer could bring a suit for damages, the damage award could not repair the harm done by a strike.\(^{13}\)

However, if courts awarded injunctive relief, a severe conflict with another major element of federal labor relations policy would be created. By its enactment of the Norris-LaGuardia Act in 1932, Congress stripped federal courts of their jurisdiction to issue injunctions in the labor-management context except in very limited circumstances.\(^{14}\) This policy

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1. In *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957), the Court found that section 301(a) was more than jurisdictional in nature. It relied heavily on legislative history indicating a congressional intent that the statute be used to enforce agreements to arbitrate. See *id.* at 451-55.

11. The Court ruled that a court may not declare an issue nonarbitrable "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." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

Similarly, courts have repeatedly indicated that the grievance and arbitration provisions are to be viewed expansively. In *Southwestern Bell Tel. Co. v. Communications Workers*, 454 F.2d 1333 (5th Cir. 1971), for example, the district court had denied injunctive relief under *Boys Markets* on the basis that the dispute in question was not one in which the parties were bound to arbitrate. In vacating this denial of injunctive relief, the Fifth Circuit held that in determining whether a dispute is arbitrable, a court is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract and which is "arguably arbitrable." *Id.* at 1336.

12. The presumption in favor of arbitration applies even to the interpretation of the contract provisions going to the scope of arbitrable authority, such as those providing for specific exclusions of the general arbitration provision. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960).

After *Warrior & Gulf* most courts required a very strong showing that a dispute came within a specific exclusion. See, e.g., *Proctor & Gamble Indep. Union v. Proctor & Gamble Mfg. Co.*, 298 F.2d 644, 645-46 (2d Cir. 1962) (arbitration will be required unless collective bargaining agreement contains "clear and unambiguous clause of exclusion").


originated as a congressional response to federal court abuse of its injunctive power to stifle union organization. Moreover, in 1962, the Supreme Court expressly stated that the Norris-LaGuardia Act prohibited the issuance of injunctions against strikes over arbitrable grievances.

The Balance

In *Boys Markets, Inc. v. Retail Clerks Local 770,* however, the Court directly overruled its previous holding and held that the Norris-LaGuardia's policy of prohibiting the issuance of injunctions in the labor context had to accommodate the conflicting Steelworkers Trilogy policy favoring arbitral resolution of industrial disputes. To do so, the Court created a "narrow exception" to the Norris-LaGuardia prohibitions and gave federal courts jurisdiction to issue injunctions to restrain strikes over arbitrable grievances. Thus, if a union struck in violation of its no-strike clause and its collective bargaining contract committed that issue to resolution through an arbitration procedure, then that strike could be enjoined.

The policy of promoting peaceful resolution of disputes through arbitration was repeatedly emphasized in *Boys Markets.* Under *Boys Markets*, the *sine qua non* for injunctive relief was the existence of a strike caused by a dispute subject to resolution under the grievance arbitration procedures established in the collective bargaining agreement. According to the Court, issuing an injunction and ordering arbitration would work no injustice, since both the employer and the union would have their claims determined by the tribunal which the parties had agreed was most competent and appropriate to interpret the provisions of their collective bargaining agreement. 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 . . ." Id. § 104. Section 7 provides that federal courts may enjoin "unlawful" activities in the context of labor disputes, but only after the employer makes certain specified showings and under strict procedural limitations. See id. § 107.


18. Id. at 253-54.

19. "Indeed, the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self help measures." Id. at 249.

20. Id. at 253 n.22.
support of this notion, the Court expressly recognized the fact that a no-strike obligation is the employer's *quid pro quo* for an undertaking by him to submit grievance disputes to arbitration. Hence, "[a]ny incentive for employers to enter into such an agreement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated."21 Furthermore, "while it is true that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute is settled is no substitute for an immediate halt to an illegal strike."22 Thus, *Boys Markets* simply sought to enforce the bargain struck by the parties.23

Moreover, there is little justification for applying the Norris-LaGuardia anti-injunction provisions to this factual context. Historically, unions were viewed as criminal conspiracies and federal courts freely granted injunctions at the behest of employers to stem this tide of criminality.24 However, by 1932 the mood of the nation had changed. The Norris-La Guardia Act was Congress' response to this widespread misuse of the injunctive remedy in preventing the growth of the American trade union movement. Today, the growth and vitality of unions is not something which needs such drastic protection. In fact, the *Boys Markets* Court expressly recognized that the

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21. *Id.* at 248.
22. *Id.*
23. "We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure." *Id.* at 253.

The Court adopted the following principles for the guidance of the district courts in determining whether to grant injunctive relief:

A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract does have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.

*Id.* at 254, quoting *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 228 (1962) (dissenting opinion).

status of labor unions at the time Norris-LaGuardia was enacted was quite different from the status of labor unions today. Thus, notwithstanding the original policy which motivated the passage of the Norris-LaGuardia Act, a strict application of its injunctive prohibitions in this context would frustrate the arbitration process and have little utility.

While Boys Markets did settle the question of whether injunctive relief was ever available in the labor context, it left unresolved the question of whether the presumption of arbitrability should be applied in determining whether a grievance was arbitrable for the purpose of issuing a so-called Boys Markets injunction. The Supreme Court spoke to this issue in Gateway Coal v. United Mineworkers. The Gateway Court went even further than Boys Markets. There the Court held that in the absence of an express exclusion, disputes were presumed to have been included in the party’s agreed upon arbi-

25. 398 U.S. at 251. As the Court stated:

In 1932, Congress attempted to bring some order out of the industrial chaos that had developed and to correct the abuses that had resulted from the interjection of the federal judiciary into union-management disputes on behalf of management. See declaration of public policy, Norris-LaGuardia Act, Section 2, 47 Stat. 70.

As labor organizations grew in strength and developed towards maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunctive section of the Norris-LaGuardia Act. Id. Considered in this perspective, the Supreme Court’s reversal of its earlier Sinclair decision in Boys Markets was hardly surprising. Sinclair addressed itself to a situation totally different from that which exists today. Id. at 250-51. It was now possible to accommodate the principles of the Norris-LaGuardia Act with the emerging federal common law being developed under section 301.

Sinclair was viewed by the Boys Markets Court as “seriously undermin[ing] the effectiveness of the arbitration technique as a [peaceful method] to resolve industrial disputes without resort to strikes, lockouts, and similar devices.” Id. at 254. As the Third Circuit noted in Avco v. Local 287, 459 F.2d 968, 971 (3d Cir. 1972), the decision in Boys Markets was evidence of the fact that the “policy in favor of enforcing settlement of labor disputes through compulsory arbitration emerged dominant.”


27. Gateway Coal extended Boys Markets to an injunction enforcing an implied no-strike clause coextensive with the arbitration clause where the question of arbitrability was itself a “substantial question of contractual interpretation.” As the Court later explained, Gateway Coal did not alter the fundamental preconditions of a Boys Markets injunction: a contractual commitment to final and binding arbitration, a corresponding commitment to final and binding arbitration, a corresponding no-strike commitment, and satisfaction of the ordinary principles of equity. See Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141, 3155 n.15 (1976).
tration procedures and hence were subject to arbitration under the principles of the *Steelworkers Trilogy*. Further, a *Boys Markets* injunction was proper even in the absence of a contractual no-strike clause. Since *Gateway Coal* was a unanimous decision, it represented the Court's clear support for awarding injunctive relief where a contract fails to specifically address itself to whether or not a particular dispute is arbitrable. Moreover, the Supreme Court expressly recognized that even a dispute over the scope of an exception to a no-strike clause, in and of itself, was arbitrable. This broad analysis of arbitration necessarily supports *Boys Markets* injunctive relief for sympathy strike situations.

**Boys Markets in the Sympathy Strike Context**

*Conflict in the Circuits*

Subsequent to *Boys Markets*, federal courts were faced with the problem of having to interpret that decision in the context of a sympathy strike. Although the Court's broad affirmation of *Boys Markets* in *Gateway Coal* was significant in analyzing the sympathy strike situation, federal courts had diverse views as to its applicability.

One line of circuit court cases followed the proposition that the honoring of another union's picket line was not enjoinable since the strike was not "over a grievance." This reasoning was utilized by the Fifth Circuit in *Amstar Corp. v. Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO.*

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28. In *Gateway*, the contract granted the local mine safety committee authority to close down and remove workers from dangerous work areas. It was the union's position that this provision reserved for them the right to strike over safety disputes and was an express exception to any implied no-strike clause which may have existed due to the grievance mechanism. The Supreme Court held that the union did not properly invoke this contractual provision. Whether the union had properly invoked that provision was held to be a substantial question of contractual interpretation. And, the collective bargaining agreement explicitly committed to resolution by arbitration all disagreements as to the meaning and application of that agreement. 414 U.S. at 379-80.

29. *Id.* at 381-82. In reaching this conclusion, the Court relied upon its earlier decision in *Teamsters v. Lucas Flour Co.*, 369 (1962), where it had held that an implied no-strike clause, coterminous with the parties' commitment to arbitrate, would support injunctive relief. Thus, to the extent that a dispute is covered under the agreement's mandatory grievance procedure, there exists an obligation to submit the dispute to that procedure as opposed to striking. To the extent that a dispute is arbitrable, there exists an (implied) obligation to refrain from striking over that dispute.

30. 468 F.2d 1372 (5th Cir. 1972).
In *Amstar*, the court refused to provide the employer with *Boys Markets* injunctive relief because in its view the Supreme Court’s intent was to create a very narrow exception to the Norris-LaGuardia Act. The *Amstar* court found that there were three prerequisites to a federal court’s jurisdiction to enjoin a strike by a labor union. First, the strike must have been in breach of a no-strike obligation under an effective collective bargaining agreement. Second, the strike must have been over an arbitrable grievance. Third, the parties must have been contractually bound to arbitrate the underlying grievance which caused the strike. The *Amstar* court reasoned that a sympathy strike was not over a grievance which the parties were contractually bound to arbitrate; therefore, the district court lacked jurisdiction to enjoin the strike.

The Fifth Circuit interpreted *Boys Markets* to require a finding that the strike was directly caused by a grievance which the striking union had with the company. Thus, according to *Amstar*, the propriety of employees’ participation in a sympathy strike was not, in and of itself, a grievance which the parties were contractually bound to arbitrate. Given this determination, the sympathy strike was in no way prohibited by the implication of a no-strike clause.

*Monongahela Power Co. v. Local No. 232, IBEW* represents the split in authority. In *Monongahela*, the Fourth Circuit was presented with a situation virtually identical to that confronted by the Fifth Circuit in *Amstar* and held that sympathy strikes could be enjoined under *Boys Markets* if there existed between the parties a valid collective bargaining agreement which contained a broad grievance procedure. In addressing the issue of whether injunctive relief was appropriate, the Fourth Circuit first noted that in *Boys Markets* cases, the court must follow the presumption that all disputes were ar-

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31. *Id.* at 1373.
32. *Id.*
33. *Id.*
34. *Id.* at 1374. Implicit in the Fifth Circuit’s opinion was its fear that granting injunctive relief in the sympathy strike situation would expand *Boys Markets* beyond the “narrow exception” which it felt the Supreme Court intended. Indeed, the court noted that if injunctive relief were granted in the context of a sympathy strike it would be difficult to ascertain when such relief would be unavailable.
35. 484 F.2d 1209 (4th Cir. 1973).
36. *Id.* at 1209. The court utilized the rationale of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). See note 29 supra. The thrust of this line of cases was that the propriety of the sympathy strike, in and of itself, was an arbitrable issue.
bitrable unless the private parties have expressly excluded the matter. Finding no such exclusion, the court held that "disputes as to whether the refusal to cross the picket line and the resulting work stoppage violated Article X [the no-strike clause] were clearly subject to mandatory adjustment under Article IX [the arbitration clause]."

Monongahela and its progeny disputed the narrow scope given to Boys Markets in the Amstar cases. Under Monongahela, the propriety of the sympathy strike, in and of itself, was an arbitrable issue. The test of arbitrability used in Monongahela was one of express exclusion, not inclusion. Any dispute over the legality or propriety of a refusal to cross a picket line under a collective bargaining agreement was held to be arbitrable unless such a dispute was specifically excluded from arbitration. Moreover, even where an item had been explicitly excluded, the parties were nevertheless required to resort to arbitration to determine whether the action in question did in fact come with that express exclusion.

The Buffalo Forge Decision

It was against this backdrop that the Supreme Court decided Buffalo Forge Co. v. United Steelworkers of America. By its precise holding, Buffalo Forge says that employers may appropriately invoke the arbitration process for a determination of the legality of the sympathy action under the existing agreement and may compel arbitration where the union refuses to participate. Further, following an arbitral determination

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37. 484 F.2d at 1213-14.
38. Id. at 1214.
39. Napa, Pittsburgh, Inc. v. Chauffeurs Local 926, 520 F.2d 321 (3d Cir. 1975); Island Creek Coal Co. v. United Mineworkers, 507 F.2d 656 (3d Cir. 1975); Inland Steel Co. v. United Mineworkers, 505 F.2d 293 (7th Cir. 1974); Northwest Airlines, Inc. v. Airline Pilot's Ass'n, 325 F. Supp. 994 (D. Minn. 1970), rev'd 442 F.2d 446, reversal aff'd on rehearing, 442 F.2d 251 (8th Cir.), cert. denied, 404 U.S. 871 (1971).
40. Plain Dealer Publishing Co. v. Cleveland Typographical Union, 520 F.2d 1220 (6th Cir. 1975); Buffalo Forge Co. v. United Steelworkers, 517 F.2d 1207 (2d Cir. 1975). In addition to the Second, Fifth, and Sixth Circuit's decisions, several federal district courts have also held that injunctive relief in the sympathy strike context was inappropriate. Among them are Carnation Co. v. Teamsters, 86 L.R.R.M. 3012 (S.D. Tex. 1974) and General Cable v. IBEW, 331 F. Supp. 478 (D. Md. 1971).
41. 96 S. Ct. 3141 (1976).
42. Id. at 3150.
that the strike was illegal, the employer is entitled to an injunction to enforce that decision.\textsuperscript{43} Pending arbitration, however, the employer and the public are forced to endure the economic consequences of a strike.

The majority's rationale. Relying first on section four of the Norris-LaGuardia Act, the Buffalo Forge Court reaffirmed its holding in Boys Markets;\textsuperscript{44} federal courts are without jurisdiction to enjoin a strike which is not "over an arbitrable grievance" because doing so would extend Boys Markets beyond the narrow exception to the Norris-LaGuardia Act which it was meant to create.\textsuperscript{45} The Court then found that the parties were bound by a contract containing a no-strike clause\textsuperscript{46} and an arbitration clause\textsuperscript{47} "broad enough to reach not only the disputes between the union and employer about other provisions in the contract, but also as to the meaning and application of

\textsuperscript{43} The question arises, however, whether an arbitral determination that an existing sympathy strike violates the collective bargaining agreement would be res judicata on that issue or whether a subsequent arbitral determination would be required to determine the permissibility of each sympathy action taken by the signatory to the contract. On the precedential value of prior arbitration awards, see generally Elkouri & Elkouri, supra note 3, at 251-65.

\textsuperscript{44} 96 S. Ct. at 3147.

\textsuperscript{45} Id.

\textsuperscript{46} Section 14.b of the 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 provision 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 Officers, committeemen or stewards involved.

\textit{Id.} at 3143 n.1.

\textsuperscript{47} The relevant grievance and arbitration procedure before the Court provided:

26. 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 sections 27 through 32).

The final step in the six-part grievance procedure is provided for in section 32:

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 adjusted, it may be submitted to arbitration upon written notice of the Union or the Company.

\textit{Id.} at 3143-44 & n.2.
the no-strike clause itself." Thus, the Court ruled that the propriety of the sympathy strike was an arbitrable issue under the existing agreement over which the employer was entitled to compel arbitration.48

It was at this point in the decision, however, that the Court departed from the logic which had heretofore compelled it to issue injunctions in *Boys Markets* and *Gateway Coal*. Although the Court reaffirmed its earlier *Boys Markets* holding *in toto*, it clearly disclaimed that decision's applicability in the sympathy strike context. The Court hinged its analysis on language in *Boys Markets* requiring, as a precondition to granting injunctive relief, that the strike be "over a grievance" which both parties were bound to arbitrate. Despite its previous statement that the strike was an arbitrable issue, the Court made the determination that the sympathy strike was not within the contemplation of the grievance and arbitration procedure to which the employer had bound itself in exchange for the union's no-strike pledge.50 Instead, the majority characterized the sympathy strike as having "neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain."51 Furthermore, the Court concluded that "to the extent that courts of appeals and other courts have assumed that a mandatory arbitration clause implies a commitment not to engage in sympathy strikes, they are wrong."52 Nor, noted the Court, was an injunction authorized solely because it was alleged that the sympathy strike called by the union violated the express no-strike provision of the contract.53

The Court expressed its fear that federal courts would become embroiled in massive preliminary injunction litigation, not only for the purpose of enforcing promises to arbitrate, which was the limit of *Boys Markets*, but also for the purpose of preliminarily dealing with the merits of the factual and legal issues that were subjects for the arbitrator and of issuing in-

48. *Id.* at 3148.
49. *Id.*
50. *Id.* at 3147.
51. *Id.*
52. *Id.* at 3147 n.10.
53. Authorization of injunctive power would extend *Boys Markets* beyond the narrow exception to the Norris-LaGuardia Act which it was meant to create and put the Court in a position expressly antagonistic to the congressional intent evinced by the passage of the Norris-LaGuardia Act. *Id.* at 3147.
junctions that would otherwise be forbidden by the Norris-LaGuardia Act.\textsuperscript{54}

\textit{Defects in the majority's rationale.} While Justice White's characterization of the sympathy strike may be appealing, it is not compelling. The Court's denial of injunctive relief was entirely inconsistent both with their factual conclusion that the propriety of the sympathy strike was an arbitrable issue under the contract in question, and with the federal labor policy of promoting arbitration, a policy the Court reiterated throughout its opinion.\textsuperscript{55}

In a stinging dissent, Justice Stevens accused the majority of holding "only part of the union's \textit{quid pro quo} enforceable by injunction."\textsuperscript{56} The dissent quickly disposed of the majority's judicial economy argument as being "wholly unrealistic."\textsuperscript{57}

\textsuperscript{54} If an injunction could issue against the strike in this case, so in proper circumstances could a court enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions even though the injunction would otherwise violate one of the express prohibitions of § 104 . . . . This would cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes under the many existing and future collective bargaining contracts, not just for the purpose of enforcing promises to arbitrate, which was the limit of \textit{Boys Markets}, but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator and of issuing injunctions that would otherwise be forbidden by the Norris-LaGuardia Act. \textit{Id.} at 3148-49.

\textsuperscript{55} The majority recognized:

The driving force behind \textit{Boys Markets} was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties. . . . Striking over an arbitrable dispute would interfere with and frustrate the arbitral processes by which the parties had chosen to settle a dispute. The \textit{quid pro quo} for the employer's promise to arbitrate was the union's obligation not to strike over issues that were subject to the arbitration machinery. Even in the absence of an express no-strike clause, an undertaking not to strike would be implied where the strike was over an otherwise arbitrable dispute. . . . Otherwise, the employer would be deprived of his bargain and the policy of the labor statutes to implement private resolution of disputes in a manner agreed upon would seriously suffer. \textit{Id.} at 3147.

It concluded that "[c]oncededly, that issue was arbitrable [and] the employer was entitled to an order requiring the Union to arbitrate if it refused to do so." \textit{Id.} at 3148.

\textsuperscript{56} \textit{Id.} at 3150 (Stevens, J., dissenting).

\textsuperscript{57} \textit{Id.} at 3150. The majority's expressed concern was that enforcing an unambiguous no-strike clause by enjoining a sympathy strike might embroil the district courts in massive preliminary injunction litigation. \textit{Id.} at 3149 n.12. Justice Stevens replied:

[This concern] is supposedly supported by the fact that 21 million American workers were covered by over 150,000 collective bargaining
Then, Justice Stevens cited several reasons why the majority's focus upon the "over a grievance" language from Boys Markets was inapposite. His analysis convincingly establishes that Boys Markets injunctions could be appropriate in the sympathy strike context.

First, injunctions enforcing a contractual commitment to arbitrate a dispute were not among the abuses against which the Norris-LaGuardia Act was aimed. It was clear from the declaration of policy in the Norris-LaGuardia Act itself that it was the history of injunctions against strike activity in furtherance of union organization that led to its enactment in 1932. According to the dissent, it is equally clear that injunctions in the sympathy strike context do not compromise the central concerns of the Norris-LaGuardia Act. Such injunctions concern only the enforceability of collective bargaining agreements and not the process by which such agreements were negotiated.

Second, the enactment of section 301(a) of the LMRA, enlarging the jurisdiction of federal courts to grant relief in labor disputes, was viewed by the Boys Markets Court as evincing a strong public policy which favored the enforceability of labor agreements. "[T]he same public interest in an enforce-

agreements in 1972. These figures give some idea of the potential number of grievances that may arise, each of which could lead to a strike which is plainly enjoicable under Boys Markets. These figures do not shed any light on the number of sympathy strikes which may violate an express no-strike commitment. In the past several years over a dozen such cases have arisen.

Id. at 3150 n.3.

58. Justice Stevens noted:
   Referring to the holding in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 [(1957)] . . . the [Boys Markets] Court stated that it had "rejected the contention that the anti-injunction proscriptions of the Norris-LaGuardia Act prohibited this type of relief, noting that a refusal to arbitrate was not 'part and parcel of the abuses against which the Act was aimed' . . . and that the Act itself manifests a policy determination that arbitration should be encouraged."

Id. at 3151 n.5.

59. As the Court observed in Boys Markets, the climate of labor relations has been transformed since the passage of the Norris-LaGuardia Act . . . . "[T]he central purpose of the Norris-LaGuardia Act to foster the growth and viability of labor organizations is hardly retarded—if anything, this goal is advanced—by a remedial device that merely enforces the obligation that the union freely undertook under a specifically enforceable agreement to submit disputes to arbitration."

Id. at 3151-52.

60. Id. at 3152.

61. With specific reference to the value of an enforceable commit-
able *quid pro quo* [was] present here [in the sympathy strike context] as in *Boys Markets,*" noted Justice Stevens. Hence, it was "simply wrong to argue," as the Court did, "that the strike in this case could not have had the purpose or the effect of depriving the employer of his bargain."\

Next, the literal wording of the Norris-LaGuardia Act was not an insuperable obstacle to specific enforcement of a no-strike commitment. The *Boys Markets* Court itself relied upon a line of cases in which the language of the Norris-LaGuardia Act had not been given controlling effect, and which held that federal courts could issue injunctions in labor disputes to compel fulfillment of the party's Railway Labor Act obligations. Quoting from *Brotherhood of Railway Trainmen v. Chicago River & Indiana Railroad Co.*, Justice Stevens noted that in that case the Court held the Norris-LaGuardia Act not to be a bar to injunctive relief because of the "need to accommodate two statutes, when both were adopted as part of a pattern of labor legislation." In *Textile Workers v. Lincoln Mills,* the Court relied upon the same rationale to hold that

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62. *Id.* at 3152. See *A General Theory of Collective Bargaining Agreements*, 61 CALIF. L. REV. 653, 657-66 (1966). In light of this fact the dissent also noted that [a]ny incentive for employers to enter into such agreement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated. While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union.

63. *Id.* at 3153. Justice Stevens cautioned, however, that "this portion of the rationale of *Boys Markets* applies only to the extent of the certainty that the sympathy strike falls within the no-strike clause." *Id.*

64. *Id.*


67. 96 S. Ct. at 3153.

68. 353 U.S. 448 (1957).
section 301(a) of the LMRA conferred jurisdiction upon the district courts to grant the union specific enforcement of their agreed upon arbitration clause.

Fourth, not only did Boys Markets emphasize a strong federal policy favoring the settlement of labor disputes, but also it expressed a policy preference for the settlement of labor disputes by arbitration. Since this method of dispute settlement is available only by agreement between the parties, this pro-arbitration policy equally favors the making of enforceable agreements to arbitrate.69

Thus, concluded Justice Stevens, the thrust of Boys Markets was to protect the integrity of the arbitration process. Therefore, a court faced with a breach of a no-strike clause should be empowered to enjoin that strike if it concerned an arbitrable issue under the contract.70

The minority then addressed what it perceived to be the union’s fears in being subjected to a Boys Markets injunction in the sympathy strike context. The union advanced concern that interpretation of the collective bargaining agreement was in the exclusive province of the arbitrator and that courts were without the necessary expertise to properly interpret those agreements. To this argument the dissent responded that “an interim court determination of the no-strike question by the court neither usurps nor precludes a decision by the arbitrator.”71 Issuance of an injunction pending arbitration does not supplant the decision that the arbitrator otherwise would have made.

Another of the union’s concerns was that erroneously enjoining a sympathy strike pending arbitration would effectively deprive union members of their right to strike before an arbitrator could render his decision. While the dissent was sympathetic to this concern, the minority noted that denial of an

69. A sympathy strike in violation of a no-strike clause does not directly frustrate the arbitration process, but if the clause is not enforceable against such a strike, it does frustrate the more basic policy of motivating employers to agree to binding arbitration by giving them an effective “assurance of uninterrupted operation during the term of the agreement.”

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

70. Id. at 3155. However, the court’s power is limited by the contours of the agreement between the parties. In this case, the question of whether a sympathy strike violates the no-strike clause was found by the majority to be an arbitrable issue. See notes 42-47 and accompanying text supra.

71. 96 S. Ct. at 3157.
injunction where it was appropriate had an equally devastating economic effect on the employer. Furthermore, since a sympathy strike does not directly further the economic interests of the members of the striking local, but rather is a new dispute which will impose costs on the strikers, the employer and the public, it is in the public's interest to be assured that the strike was permitted by the parties' agreement.

Finally, the union contended that granting an injunction pending resolution by an arbitrator was antagonistic to the implicit policy in the Norris-LaGuardia Act of eliminating the risk of injunctions for lawful strikes. The dissent found this argument devoid of any merit. 

Boys Markets itself subjected the union to the risk of an injunction entered upon a judge's erroneous conclusion that the dispute was arbitrable and that the strike was in violation of the no-strike clause. Furthermore, Gateway Coal subjected the union to still a greater risk by approving an injunction to enforce an implied no-strike obligation.

PROSPECTS FOR THE FUTURE

Prior to Buffalo Forge an employer could be reasonably assured that a no-strike pledge meant the union would refrain from resorting to strike activity under any circumstances (or be enjoined). This is certainly no longer true. By qualifying the meaning of the union's no-strike obligation, the Court necessarily weakened the integrity of the agreements reached between union and management. Now the parameters of a union's no-strike obligation are left to the union's discretion because it is free to decide whether its members shall honor another union's picket line. And, where a union does decide to participate in the strike, then, notwithstanding its express no-strike pledge, its action is protected pending arbitration.

Undoubtedly, unions are fully aware of their new found power. This situation places an employer who is attempting to negotiate a contract in a substantially weaker bargaining position. In an attempt to unqualify the no-strike pledge, an employer will now insist upon a clause which clearly indicates either that sympathy strikes are per se violations of the contract or that such disputes will be subject to a summary arbi-

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72. Id.
73. Id. at 3157-58.
74. Id. at 3158.
tration procedure. However, since sympathy strikes are protected activity under section 7 of the LMRA and now are not subject to the injunctive sanction, only the weakest unions will expressly waive this right. Necessarily, agreements will be more difficult to reach.

Moreover, an employer's desire to commit resolution of all industrial disputes to the arbitration process may be greatly reduced in that the newly qualified no-strike obligation which he receives is less reliable. Thus, the employer may have to endure a strike without adequate remedial relief. The result may be an exacerbation of an already difficult negotiation process and heightened labor strife.

Buffalo Forge ignored the reality that a sympathy strike is nonetheless a strike. As such, it is a union's most potent economic weapon. Organized labor may now freely utilize this weapon without apprehension that its motives will be scrutinized. As long as the striking union contends that its work stoppage was motivated by some force outside the employment relationship, it will proceed judicially uninhibited. This result runs contra to the Supreme Court's pronounced preference for arbitration.76

More significantly, injunctive relief in the sympathy strike context gives rise to none of the abuses Norris-LaGuardia was intended to prevent. Requiring a union to channel a dispute through the grievance arbitration procedure, rather than through self help, is entirely consistent not only with the union's contractual commitments, but with the Norris-LaGuardia Act as well. As the minority vividly evinced, the result which the majority reached is clearly antagonistic to the policies reflected in the Boys Markets and Gateway Coal cases and tends only to belittle the credibility of both the bargaining

75. See note 6 supra.
76. In a sympathy strike, an arbitrator can resolve the dispute by determining whether or not the union's members have a right, under the collective bargaining agreement to honor the picket line. Drake Bakeries v. Local 50, American Bakery & Confectionery Workers, 370 U.S. 254 (1952); RTT World Communications, Inc. v. Communications Workers of America, 422 F.2d 77 (2d Cir. 1970). This area is not new to arbitrators, and the National Labor Relations Board has recognized this fact by referring a case to arbitration where the issue was whether or not the employees had a right to honor picket lines. Gray-Hobart Water Co. v. NLRB, 511 F.2d 284 (7th Cir. 1975). As such, this type of dispute, in the Supreme Court's words, "is grist in the mills of the arbitrators." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584 (1960). See also Jones, Power and Prudence in the Arbitration of Labor Disputes: A Venture in Some Hypotheses, 11 U.C.L.A. L. Rev. 675, 780 (1964).
process as a whole and the agreement which the parties ultimately reach.\textsuperscript{77}

\section*{Conclusion}

\textit{Boys Markets} unequivocally chose arbitration in accordance with the parties' contract as the terminal point for contractual disputes. Any union which voluntarily bound itself and its members to a no-strike clause and a mandatory grievance arbitration procedure must be prevented from bypassing those commitments. Even where there is a negotiated picket line clause in the contract, that exception to arbitrability is still, in and of itself, an arbitrable issue under \textit{Gateway Coal}.

The \textit{Buffalo Forge} Court's refusal to grant an injunction pending arbitration can only exacerbate existing labor-management strife. Destroying the symmetry of obligation created earlier can only provide employers with less motivation to negotiate grievance arbitration procedures since they know that the no-strike pledge they receive from the union is qualified by the holding in \textit{Buffalo Forge}. The obvious result is that agreements will become more difficult to reach and both sides may be motivated to resort to economic weapons in an attempt to achieve a satisfactory agreement. Thus, \textit{Buffalo Forge} will burden not only employers, but also the public which must endure the hardship and inconvenience of every strike.

Richard Steven Rosenberg

\textsuperscript{77} Since the central purpose of the Norris-LaGuardia Act was to foster the growth and vitality of labor organizations, this goal can be advanced by a remedial device which enforces the obligations which a union freely undertook.