

STRIKES OVER NON-ARBITRABLE LABOR DISPUTES†

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In 1976, the Supreme Court significantly limited the availability of injunctions against strikes by unions in ostensible breach of contractual no-strike pledges. In the landmark decision, *Buffalo Forge Co. v. United Steelworkers*,¹ the Court held that section 4 of the Norris-LaGuardia Act² precluded an injunction against a union's sympathy strike, allegedly in violation of a no-strike clause, because the sympathy strike was not "over" an underlying arbitrable dispute.³ According to the Court, only where a union's strike evades the union's pledge to arbitrate a dispute will an injunction be permissible under the Norris-LaGuardia Act.⁴ In rendering its decision, the *Buffalo Forge* Court reasoned that

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¹ 428 U.S. 397(1976).

² 29 U.S.C. § 104 (1976); § 428 U.S. at 411-13 (1976).

³ In *Buffalo Forge*, the employer sought an injunction under § 301(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a) (1976), against a sympathy strike undertaken by locals of the United Steelworkers of America representing production and maintenance workers at three employer plants. 428 U.S. at 399-401. The sympathy strikers had honored picket lines established by sister Steelworkers' locals representing office and clerical-technical (O & T) workers at the three locations. *Id.* at 400-01. The O & T picket lines were clearly primary and lawful, as the picketing involved an economic dispute over the terms of a first contract. *Id.* at 403. The sympathy strikers, however, arguably were violating a no-strike clause in their contract. *Id.* at 405. The Court refused to allow an injunction against the alleged breach of the no-strike clause, ruling that such no-strike injunctions were appropriate only where the strike is over a specific issue which the union has agreed to resolve by arbitration. *Id.* at 411-12. In *Buffalo Forge*, the underlying dispute was an economic one between the employer and sister Steelworkers' locals. *Id.* at 399-402. Thus the dispute clearly was not subject to arbitration.

⁴ 428 U.S. at 408. *See, e.g.,* J.A. Jones Constr. Co. v. Plumbers and Pipefitters Local 598, 568 F.2d 1292, 1295 (9th Cir. 1978); National Rejectors' Indus. v. United Steelworkers, 562 F.2d 1069, 1075 (8th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); Latrobe Steel Co. v. Local 1537, United Steelworkers, 545 F.2d 1336, 1340-42 (3d Cir. 1976). For discussions of *Buffalo Forge*, see Ferguson & DiLorenzo, *Forging a Strategy to Combat Sympathy Strikes*, 29 SYRACUSE L. REV. 817 (1978); Freed, *Injunctions Against Sympathy Strikes: In Defense of Buffalo Forge*, 54 N.Y.U. L. REV. 289 (1979); Lowden & Flaherty, *Sympathy Strikes, Arbitration Policy, and the Enforceability of No-Strike Agreements — An Analysis of Buffalo Forge*, 45 GEO. WASH. L. REV. 633 (1977) [hereinafter cited as Lowden]; Shank, *Boys Markets Injunctions: the Continuing Clash between Norris-*

a strike "over" an arbitrable grievance would frustrate the arbitration process.⁵ If such strikes could not be enjoined, the underlying dispute likely would be resolved through economic coercion rather than by an arbitrator's determination. By contrast, in situations such as that in *Buffalo Forge*, where the underlying dispute was not arbitrable, a sympathy strike would not frustrate the arbitration process. The Court in *Buffalo Forge* reinforced its basic conclusion by emphasizing that if preliminary judicial relief were readily available to enforce contractual pledges, the respective roles of courts and arbitrators would be confused and arbitrators' functions eroded.⁶

The *Buffalo Forge* decision had broad implications. Its result suggested that union agreements not to engage in sympathy strikes would be specifically enforceable in court only after an arbitrator's ruling that the union indeed had breached its no-strike obligation.⁷ The rationale of the decision raised the possibility that numerous work stoppages over other kinds of non-arbitrable disputes also would be immune from preliminary injunctive relief. In addition, by emphasizing the undesirability of judicial interference with the functions of

LaGuardia and Taft Hartley, 35 SW. L. J. 899 (1981); Smith, *The Supreme Court, Boys Markets Labor Injunctions, and Sympathy Work Stoppages*, 44 U. CHI. L. REV. 321 (1977); Comment, *Labor Law: Buffalo Forge Co. v. United Steelworkers: The End to the Erosion of the Norris-LaGuardia Act*, 55 N.C.L. REV. 1247 (1977) [hereinafter cited as *Buffalo Forge Comment*]; Comment, *Boys Markets Injunctive Relief in the Sympathy Strike Context: Buffalo Forge From a Management Perspective*, 17 SANTA CLARA L. REV. 665 (1977); Comment, *Sympathy Strike May Not be Enjoined Pending Arbitration of its Legality Under No-Strike Clause of a Collective Bargaining Agreement*, 8 SETON HALL L. REV. 89 (1976) [hereinafter cited as *Seton Hall Comment*]; Note, *Implying a Right to Strike in Sympathy: In Support of Buffalo Forge*, 8 U.C.L.A. — ALASKA L. REV. 67 (1978); Note, *Striking a Balance Between the Norris-LaGuardia and the Labor Management Relations Acts: Is it Still Feasible After Buffalo Forge?*, 29 U. FLA. L. REV. 525 (1977).

For discussions of the relationship between *Buffalo Forge* and union efforts to enjoin employer breaches of labor contracts, see Cantor, *Buffalo Forge and Injunctions Against Employer Breaches of Collective Bargaining Agreements*, 1980 WIS. L. REV. 247; Gould, *On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge*, 30 STAN. L. REV. 533 (1978); Kratzke, *Enjoining Employer Pending Arbitration*, 24 ST. LOUIS L. J. 92 (1979); Comment, *Injunctions Restraining Employers Pending Arbitration: Equity and Labor Policy*, 82 DICK. L. REV. 487 (1978); Comment, *Boys Markets Injunctions Against Employers*, 91 HARV. L. REV. 715 (1978). See also Simon, *Injunctive Relief to Maintain the Status Quo Pending Arbitration: A Union Practitioner's View*, 29th N.Y.U. ANN. CONF. LAB. 317 (1976); Note, *Enjoining Employers Pending Arbitration*, 3 IND. REL. L. J. 169 (1979).

⁵ 428 U.S. at 413.

⁶ The Court feared intrusive judicial examination of "the merits of the factual and legal issues that are subjects for the arbitrator." *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. at 410-11.

⁷ This proposition applies to collective bargaining agreements under which employers can initiate arbitration proceedings. In response to a strike in alleged breach of a no-strike clause, an employer under such an agreement may seek both a cease and desist order and damages via arbitration. *Buffalo Forge*, however, operates to bar an injunction pending arbitration if the strike is not over an underlying grievance which is arbitrable. The Court in *Buffalo Forge* rejected the notion that a strike is "over" an arbitrable dispute merely because the issue of breach of the no-strike clause itself is arbitrable. 428 U.S. at 407-10. When the relevant collectively bargained agreement does not allow the employer to initiate arbitration, the employer can seek damages in court for the union's breach of a no-strike clause. As interpreted in *Buffalo Forge*, however, the Norris-LaGuardia Act still will bar an injunction pending arbitration if the strike is not over an underlying arbitrable grievance.

arbitrators, *Buffalo Forge* raised the specter that *Boys Markets*⁸ injunctions would be unavailable whenever a union made a colorable claim that the underlying dispute was not arbitrable. This result would be possible because two of the prerequisites to *Boys Markets* injunctions — arbitrability of the underlying dispute and breach of a no-strike pledge — are themselves issues ultimately subject to determination by an arbitrator.

This article will discuss *Buffalo Forge* and its progeny and will explore those circumstances in which preliminary injunctive relief might still be available against sympathy strikes and strikes over other non-arbitrable disputes. Several points will emerge in this examination. First, although *Buffalo Forge* will bar preliminary injunctions against sympathy strikes under conventional collective bargaining agreements, injunctive relief may be appropriate when a union strikes in violation of a status quo clause. Such clauses obligate unions to arbitrate the contractual legality of a sympathy strike before initiating the strike. Second, *Buffalo Forge* does bar injunctions against many strikes prompted by circumstances beyond the control of an employer, such as governmental policies. Some of these strikes, however, bear such an attenuated relation to the strikers' labor interests that they fall outside the Norris-LaGuardia Act's definition of a labor dispute. In such instances injunctions are not barred by that Act. Finally, in implementing the admonition of *Buffalo Forge* against usurping the role of arbitrators, the lower courts should not eviscerate the protection afforded by *Boys Markets* against the forced, strike-induced resolution of arbitrable disputes. Some judicial-arbitral overlap is inevitable, and by taking a more active role in addressing certain preliminary issues, such as the arbitrability of disputes and the scope of no-strike clauses, the lower courts would better effectuate the national labor policy in favor of arbitration as envisioned by *Boys Markets*.

I. ENJOINING SYMPATHY STRIKES

A. *Explicit Pledges Not to Engage in Sympathy Strikes*

The no-strike clause at issue in *Buffalo Forge* did not explicitly mention sympathy strikes. This omission made it possible to argue that an injunction should be available where the no-strike pledge explicitly includes sympathy strikes.⁹ Indeed, this position found some support in a passage of Justice

⁸ *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970), held that some no-strike injunctions could be issued pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1976), despite the broad ban in the Norris-LaGuardia Act on federal court injunctions in labor disputes. 398 U.S. at 253. The Court permitted the issuance of § 301 injunctions to prevent the breach of a no-strike clause in a collective bargaining agreement, so long as traditional equitable criteria, such as irreparable injury and a balance of equities favoring the plaintiff, were satisfied. *Id.* at 254.

⁹ There is a scintilla of authority for this position. Dictum in a footnote of a circuit court opinion and a few commentators have espoused the position. See *United States Steel v. U.M.W.*, 548 F.2d 67, 75 (3d Cir. 1976), *cert. denied*, 431 U.S. 968 (1977); Lowden, *supra* note 4, at 659; Bulzer, *Boys Markets, Injunctions: A Brief Overview*, 69 ILL. B. J. 94, 98-99 (1980); Seton Hall Comment, *supra* note 4, at 110.

White's majority opinion in *Buffalo Forge* which asserted that denying injunctive relief in that case did not deprive the employer of "its bargain."¹⁰

Both the letter and the spirit of *Buffalo Forge*, however, refute the notion that the explicit mention of sympathy strikes in a no-strike clause would support injunctive relief pending arbitration. Justice White indicated that the contract enforcement policy of section 301 would override the anti-injunction policy of the Norris-LaGuardia Act only when necessary to prevent a union from avoiding an underlying arbitration pledge. His opinion stated: "[T]he Court has never indicated that the courts may enjoin actual or threatened contract violations despite the Norris-LaGuardia Act The allegation . . . that the union was breaching its obligation not to strike did not in itself warrant an injunction."¹¹ Indeed, as the dissent correctly noted, the rule established by the majority was that strikes over non-arbitrable grievances are not enjoinable, no matter how blatant the breach of a no-strike clause.¹² The basic position of the *Buffalo Forge* majority was that *Boys Markets* injunctions are available only where necessary to prevent union avoidance of arbitration pledges. The bulk of commentary has endorsed this view of *Buffalo Forge*.¹³

B. Status Quo Pledges

Boys Markets, as construed in *Buffalo Forge*, authorizes the issuance of injunctions in order to prevent the circumvention of arbitration pledges.¹⁴ Where a sympathy strike is over an underlying dispute which is not arbitrable, as in the underlying economic dispute in *Buffalo Forge*, there is no danger of the strike resulting in the coerced settlement of an arbitrable dispute. Where this danger of circumventing arbitration through coercion is not present, *Buffalo Forge* requires the courts to refrain from enjoining sympathy strikes. A different result might obtain, however, if a union has explicitly pledged to arbitrate the issue of a sympathy strike's legality *before* instituting the strike.¹⁵ By staging a sympathy

A recent Ninth Circuit opinion has indicated that sympathy strikes might be enjoinable under the Railway Labor Act, 845 U.S.C. § 151 *et seq.*, because that Act is grounded on policies and dispute resolution machinery somewhat different from that of the NLRA. *Trans Int'l Airlines v. Teamsters*, 650 F.2d 949, 964-68 (9th Cir. 1980). The basis for the injunction in that case was a concern for maintaining the RLA's machinery for minor dispute resolution. *Id.* The court viewed the meaning of the no-strike clause (i.e., whether it encompassed sympathy strikes) as a minor dispute which should be submitted to that machinery before the sympathy strike was instituted. *Id.* See also *Summit Airlines v. Teamsters Local 295*, 628 F.2d 787, 795 (2d Cir. 1980).

¹⁰ Justice White stated that the sympathy strike in *Buffalo Forge* "had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of its bargain." 428 U.S. at 408 (emphasis added).

¹¹ *Id.* at 409.

¹² *Id.* at 413-14 (Stevens, J., dissenting).

¹³ See, e.g., Ferguson & DiLorenzo, *supra* note 4, at 834; Rains, *Boys Markets Injunctions: Strict Scrutiny of The Presumption of Arbitrability*, 28 LAB. L.J. 30, 37, 43 (1977). See also *Design & Manufacturing Corp. v. UAW*, 608 F.2d 767, 769 (7th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980).

¹⁴ See *Campbell "66" Express v. Rundel*, 597 F.2d 125, 129-30 (8th Cir. 1979).

¹⁵ See Lowden, *supra* note 4, at 668. This kind of pledge will be referred to as a "status quo" pledge in this discussion.

strike in contravention of such a status quo pledge, a union arguably would evade its obligation to arbitrate in a manner similar to the way in which a strike over an underlying arbitrable grievance avoids arbitration. First, a union, if not enjoined, could use the coercive strike weapon to extract amnesty on the arbitrable issue of whether the sympathy strike violated the status quo pledge in the first instance.¹⁶ Second, damages for the union's violation of its status quo pledge would provide inadequate relief from the union's sympathy strike for the same reasons that *Boys Markets* found damage remedies to be inadequate substitutes for preliminary injunctions — namely, the difficulty of fixing dollar amounts of damages, the difficulty of collecting judgments, and employer reluctance to exacerbate labor tensions by seeking damages.¹⁷ Thus, the rationale for permitting initial injunctive enforcement of status quo pledges is the same as the rationale underlying *Boys Markets* injunctions: the preservation of effective arbitration machinery.

The analogy between the injunctive enforcement of a status quo pledge and injunctive relief in a *Boys Markets* context extends to the appropriate division of functions between the courts and arbitrators in such cases. In a *Boys Markets* situation, the arbitrability of the underlying dispute and the scope of the no-strike clause are preliminary questions for a court. The underlying arbitrable issue, usually the contractual permissibility of some conduct by the employer, remains for an arbitrator to decide. In the case of a status quo pledge, a court would merely decide whether the union had promised to arbitrate the legality of the proposed job action before initiating it. The underlying issue remaining for arbitration would be whether the job action violated the union's no-strike obligation. Sometimes the two issues would merge, as when the basic question is whether a proposed job action is a "strike" under the contract. The issues for resolution by the courts and by the arbitrators, however, generally would be separable under this approach.

Additional support for the availability of injunctive relief to enforce a union's status quo pledge can be found in Justice White's acknowledgement in *Buffalo Forge* that injunctions may be issued to enforce an arbitrator's post-arbitration cease and desist order against a union's sympathy strike.¹⁸ A continued sympathy strike in the face of an arbitrator's cease and desist order is similar to the violation of a prospective duty to arbitrate in that both actions attempt to usurp arbitration.¹⁹ Injunctive relief should be available in both instances. Indeed, an injunction has been allowed which enjoined a strike in pro-

¹⁶ In *Trans Int'l Airlines v. Teamsters*, 650 F.2d 949, 966 n.12 (9th Cir. 1981), the court recognized that the coercive effects of a sympathy strike may moot arbitration of the issue of the legality of the strike. See *Latas-Libby's, Inc. v. United Steelworkers*, 609 F.2d 25, 27 (1st Cir. 1979) for an illustration of a union's effort to secure amnesty for illegal strikers.

Of course, there was some risk in *Buffalo Forge* itself that the sympathy strikers might seek amnesty and thereby moot arbitration of their strike. But the risk was not severe, as the employer there had access to expedited arbitration. 428 U.S. at 400.

¹⁷ *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 248 (1970).

¹⁸ 428 U.S. at 405.

¹⁹ *Republic Steel Corp. v. UMW*, 570 F.2d 467, 476 (3d Cir. 1978); *New Orleans Steamship Assoc. v. Gen. Longshore Workers*, 389 F.2d 369, 371-72 (5th Cir. 1968).

test of an arbitrator's ruling even without an arbitrator's cease and desist order against the job action.²⁰ The court ruled that the post-arbitration protest was, in effect, an attempt to usurp the prior arbitration and that judicial intervention was appropriate.²¹ Injunctions to enforce a union's status quo pledge also would remedy attempts to usurp arbitration.

The current judicial attitude toward injunctive enforcement of status quo pledges by unions is difficult to determine. No court has considered an explicit union pledge to arbitrate the legality of a sympathy strike before initiating the strike. In a case decided just subsequent to *Buffalo Forge*, the Seventh Circuit found an *implied* status quo pledge by a union which was contemplating a sympathy strike.²² The court based its conclusion that such an obligation existed, however, on no more than a broad no-strike clause.²³ This judicial approach seems contrary to *Buffalo Forge*, which indicated that even a clear breach of a no-strike clause would not support preliminary judicial relief against a sympathy strike.

An explanation for the dearth of cases construing union status quo pledges is that such obligations are undertaken more commonly by employers than by unions. Post-*Buffalo Forge* cases involving employer status quo pledges offer mixed signals as to the availability of injunctive relief to enforce such promises. A number of cases have upheld the issuance of injunctive relief, at least where the "equitable considerations" test of *Boys Markets* is met.²⁴ A recent Seventh Circuit decision, however, reached a contrary result. In *Chicago Typographical Union v. Chicago Publishers' Association*,²⁵ a union sought a preliminary injunction pending the arbitration of a dispute over an employer's furlough of numerous workers.²⁶ Although the applicable collective bargaining agreement contained a status quo clause, the Seventh Circuit ruled that the district court's grant of an injunction against the employer was improper.²⁷ The court asserted that the proper forum in which to contest the violation of a status quo obligation was arbitration.²⁸ The court's conclusion was based in part on the premise that interpreting a status quo clause is a matter for an arbitrator rather than a court.²⁹

²⁰ Campbell's "66" Express v. Rundel, 597 F.2d 125, 130 (8th Cir. 1979).

²¹ *Id.*

²² NLRB v. Keller Crescent Co., 538 F.2d 1291, 1299-1300 (7th Cir. 1976).

²³ The finding in that case, which upheld employer discipline of sympathy strikers, was unnecessary. The same result could have been reached by simply concluding that the sympathy strike breached the no-strike clause without finding a precedent union obligation to arbitrate the legality of the sympathy strike.

²⁴ See, e.g., United Steelworkers v. Fort Pitt Steel Casting, 598 F.2d. 1273, 1279 (3d Cir. 1979); Columbia Typographical Union v. Evening Star Newspaper Co., 100 L.R.R.M. 2394, 2396 (D.D.C. 1978).

²⁵ 620 F.2d 602 (7th Cir. 1980).

²⁶ *Id.*

²⁷ *Id.* at 604.

²⁸ *Id.*

²⁹ *Id.* (citing Detroit Newspaper Publishers' Ass'n v. Detroit Typographical Union Local 18, 471 F.2d 872 (6th Cir. 1972), cert. denied, 411 U.S. 967 (1973)).

The Seventh Circuit position that the interpretation of a status quo clause is purely for arbitration should be rejected. A status quo pledge is, in effect, a promise to arbitrate the contractual permissibility of a proposed action before instituting such action. Refusing to specifically enforce such promises defeats the clause's purpose of maintaining the status quo pending arbitration. In the context of an employer's status quo pledge, allowing an employer to take unilateral action without judicial intervention risks the infliction of irreparable injury on workers' contractual rights and may provoke wildcat walkouts.³⁰ In the context of a union's status quo pledge, allowing a union to engage in a sympathy strike risks mooted the need for arbitration. Allowing such strikes to continue may result in the forced resolution of the question whether the status quo clause was breached, and whether the sympathy strike in fact violated the substantive terms of the agreement.³¹

Although in some instances the language of a collective bargaining agreement may show that the parties anticipated an arbitrator's interpretation of a status quo clause,³² the normal inference should be that a status quo promise is intended to be enforced judicially.³³ The very object of a status quo pledge is to prevent any action from being undertaken before its legality has been arbitrated. Accordingly, such pledges can be enforced effectively only by prompt judicial intervention. Such intervention does not improperly usurp the role of arbitrators. The breach of a status quo obligation may be viewed as a preliminary judicial issue in the same fashion that the arbitrability of the underlying dispute is viewed as a preliminary judicial issue in *Boys Markets* type cases.

³⁰ See generally Cantor, *supra* note 4 at 274-82.

³¹ Where an employer takes unilateral action despite a status quo clause, a forced resolution of the dispute is not as likely as when a union conducts a sympathy strike in violation of a status quo pledge. A union normally will press for damages through arbitration even when the employer's action is a *fait accompli*. Only when the employer's action is temporary and inflicts non-compensable harm will arbitration be rendered a futility. Nevertheless, a status quo clause deserves enforcement, in accordance with the expressed intent of the parties, whether a union or employer is enforcing it.

³² See *New York Times v. Newspaper and Mail Deliverer's Union*, 464 F. Supp. 1281, 1283 (S.D.N.Y. 1979).

³³ Emphasizing the forum contemplated by the parties is consistent with one view of *Buffalo Forge*. See Cantor, *supra* note 4, at 265-67. According to that view, the result in *Buffalo Forge* can best be justified as an effecutation of the contracting parties' intentions as to appropriate enforcement machinery. *Id.* Thus, contracting parties may intend that one party is to be entitled to implement its interpretation of certain contract language, subject to the opposing side's resort to enforcement machinery to contest the first party's "privilege of first interpretation." Thus, a contract may give an employer the prerogative of interpreting what constitutes "just cause" for employer discipline and the prerogative of implementing that interpretation, subject to the union's resort to grievance — arbitration machinery. Similarly, a contract may grant a union the prerogative of initiating a strike (for example, a strike to honor a "primary picket line"), subject only to an employer's recourse to whatever enforcement machinery is provided by the contract. In *Buffalo Forge*, the collective bargaining agreement provided the employer with recourse to arbitration. 428 U.S. at 405 (1976). See note 7 *supra*.

If the parties intend to accord one party the privilege of first interpretation of a disputed contract provision, subject to the other party's resort to arbitration, that format should be respected. Similarly, if the parties, through a status quo clause, contemplate judicial enforce-

C. *Sympathy Strikes "Over" Arbitrable Grievances of Roving Pickets*

Underlying the union's sympathy strike in *Buffalo Forge* was an economic dispute between the employer of the sympathy strikers and the union's sister local. In this circumstance, there was no danger that the sympathy strike would undermine the arbitration of the underlying dispute which was over prospective contract terms and non-arbitrable. In other situations, however, the underlying primary dispute may be arbitrable under a collective bargaining agreement between the sister union of the sympathy strikers and the sister union's employer.³⁴ Arguably, such sympathy strikes tend to impel a forced resolution of the underlying dispute, thereby defeating arbitration.³⁵ Thus, employers seeking to enjoin such sympathy strikes can invoke both the contract enforcement policy of section 301 (as the sympathy strike allegedly breaches the no-strike clause) and federal policy favoring the resolution of labor disputes by arbitration. An injunction against a sympathy strike in such circumstances would promote the arbitration process. Of course, the arbitration promoted would be pursuant to a collective bargaining agreement to which the sympathy strikers are not privy. The critical issue is whether this should be a dispositive factor in determining whether injunctive relief should be granted.

There is a threshold question as to why the employer of sympathy strikers would need to seek a section 301 injunction. In theory, the roving pickets do not pose grave threats to secondary employers whose employees may honor the picket line and become sympathy strikers. If the underlying dispute between the primary employer and the roving pickets is arbitrable, the roving pickets would be subject to a *Boys Markets* injunction sought by their primary employer.³⁶ Such a no-strike injunction ordinarily would force the roving

ment of a pledge not to take action on a disputed interpretation prior to arbitration, that framework also should be enforced. See *Buffalo Forge*, 428 U.S. at 409-11, where the Court emphasized the importance of implementing the remedial scheme contemplated by the parties.

³⁴ The possible scenarios vary widely. The "roving" pickets could be from a sister local of the sympathy striking union or they could be from an entirely separate union. Similarly, the roving pickets could be employed by an employer who also employs the sympathy strikers, or they could be employed by a separate employer. In addition, the work locus of the roving pickets could be distant from that of the sympathy strikers, or it could be close or even shared. In this discussion, the term "employer" is used loosely, without reference to the possibility that the same employer may be treated as separate "persons" for purposes of § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4). See generally Casenote, *Court May Enjoin Sympathy Strike Where Purpose and Effect is to Compel Concession of Arbitrable Issue*, 63 CORNELL L. REV. 507 (1978); Casenote, *Labor Management Relations Act — A Cause of Action Exists Under Section 301(A) Against a Sympathy Striking Union When the Underlying Dispute is Subject to Compulsory Arbitration Between the Parties to the Dispute, and When the Parties at Odds in the Action for Breach of an Implied No-Strike Obligation are the Same*, 48 GEO. WASH. L. REV. 124 (1979) [hereinafter cited as George Washington Casenote].

³⁵ A sympathy strike could create pressure to settle the underlying dispute outside arbitration where the primary employer and secondary employer are the same, as in *Buffalo Forge*, or where the employer of the sympathy strikers (the secondary employer) does a significant volume of business with the employer of the roving pickets (the primary employer). In the latter case, the secondary employer could exert economic pressure on the primary employer, forcing it to capitulate to the demands of the roving pickets.

³⁶ See *Jim Walter Resources v. UMW*, 609 F.2d 165 (5th Cir. 1980), where a mineowner obtained an injunction against picketing both at the primary situs where the underly-

pickets back to work at their primary place of employment pending arbitration of the underlying arbitrable dispute. Terminating the picketing at the secondary location usually would terminate the sympathy strike. Certain practical problems, however, tend to inhibit this easy solution. For example, where the primary strike is a wildcat, possibly employing hit and run picketing tactics and sometimes reaching widely disparate locations, problems arise with effective service of process, assertion of jurisdiction, and assemblage of evidence.³⁷ An additional problem is that an injunction may not be available against the roving pickets because the primary employer cannot satisfy the "equitable considerations" formula of *Boys Markets*. In all these circumstances where the primary employer cannot obtain an injunction against the roving pickets, the availability of an injunction against sympathy strikers honoring the "illegal" picket line becomes an important issue.³⁸

Most courts have refused to issue injunctions against sympathy strikers where the employer of the sympathy strikers asserts that the underlying dispute between the roving pickets and their employer is arbitrable.³⁹ An injunction has been refused even where the roving pickets were wildcatters defying the directions of their union, and the sympathy strikers had no particularized interest in the underlying dispute provoking the pickets.⁴⁰ These courts view *Buffalo Forge* as authorizing an injunction against sympathy strikers only where the strikers are avoiding their own contractual obligation to arbitrate a dispute.

ing dispute arose and at a second mine owned by the same employer, which the roving pickets sought to embroil in the dispute. *Id.* at 167.

³⁷ Such problems have occurred commonly in the coal industry. See, e.g., *Bituminous Coal Operators Ass'n v. UMW*, 585 F.2d 586 (3d Cir. 1978); *United States Steel Corp. v. UMW*, 418 F. Supp. 172 (W.D. Pa. 1976).

Strikes and their resolution pose particularly complex issues in the coal industry because the no-strike obligation typically is implied from the arbitration agreement rather than being expressly stated. Consequently, a sympathy strike almost by definition cannot violate a no-strike pledge by the sympathy strikers. Because such a strike is not generally considered to be over an arbitratable grievance, they have not violated the arbitration pledge which in turn determines the scope of their no-strike obligation. See *United States Steel v. UMW*, 548 F.2d 67, 73 (3d Cir. 1976) *cert. denied*, 431 U.S. 968 (1977); Note, *Damage Remedies for Sympathy Strikes after Buffalo Forge*, 78 COLUM. L. REV. 1664, 1671-73 (1978); George Washington Casenote, *supra* note 34.

³⁸ Seeking an injunction under § 301 is not the secondary employer's only option. Where the employer of the sympathy strikers is a separate "person" from the primary employer for purposes of § 8(b)(4), an unfair labor practice charge, and a temporary injunction under § 10(1), 29 U.S.C. § 160(1), is possible recourse. See *Buffalo Forge Comment, supra* note 4, at 1260 n.82. Cf. Perritt, *Am I My Brother's Keeper? Secondary Picketing Under the Norris-LaGuardia Act*, 68 GEO. L. J. 1191 (1980) (discussing injunctions against secondary strikes under the Railway Labor Act). A temporary injunction under § 10(1) is not available where the two employers involved are treated as a single person or employer under § 8(b)(4). See *Teamsters Local 560*, 248 N.L.R.B. 1212, 1214-15 (1980).

³⁹ See *Zeigler Coal Co. v. UMW*, 566 F.2d 582, 584-85 (7th Cir. 1977), *cert. denied*, 436 U.S. 912 (1978); *Southern Ohio Coal Co. v. UMW*, 551 F.2d 695, 702-05 (6th Cir.), *cert. denied*, 434 U.S. 876 (1977); *United States Steel Corp. v. UMW*, 418 F. Supp. 172, 174-75 (W.D. Pa. 1976).

⁴⁰ See *Zeigler Coal Co. v. UMW*, 566 F.2d 582 (7th Cir. 1977), *cert. denied*, 436 U.S. 912 (1978); *Southern Ohio Co. v. UMW*, 551 F.2d 695 (6th Cir.), *cert. denied*, 434 U.S. 876 (1977). Roving picket lines in the coal industry generally are honored because miners almost instinctively make common cause with their fellow miners. Occasionally, threats and intimidation by the roving pickets may contribute to such unanimity.

These courts deem the roving pickets' avoidance of their arbitration obligation under a separate collective bargaining agreement to be irrelevant.⁴¹

These courts' reliance on *Buffalo Forge* is unconvincing. *Buffalo Forge* did focus on the arbitrability of issues between the sympathy strikers and their employer. But in that case, the underlying dispute between the roving pickets and their employer was clearly non-arbitrable. Thus, the Supreme Court simply had no occasion to address the relevance or significance of an underlying arbitrable dispute between the roving pickets and their employer. *Buffalo Forge* does not, therefore, foreclose consideration of the nexus between a sympathy strike in breach of contract and the subversion of the arbitration process under a separate contract.

Other reasons have been advanced for not considering the possible connection between sympathy strikes and the evasion of arbitration by the roving pickets. The Sixth Circuit has asserted that such an inquiry "improperly shifts the focus . . . from the employees against whom the injunction is sought to the illegal pickets."⁴² As specific concerns, the court cited "problems of proof," and complex judgments about the legality of the picket line being "forced" on sympathy strikers honoring the line.⁴³ These concerns, however, seem more illusory than real. The burden of producing evidence in such cases on such questions as identification of the underlying dispute and arbitrability of that dispute

⁴¹ Supporting this view of *Buffalo Forge* are Freed, *supra* note 4, at 331, and Cohen, 30TH N.Y.U. ANN. CONF. LAB., at 187 (1977). In *Zeigler Coal Co. v. UMW*, 566 F.2d 582 (7th Cir. 1977), the court intimated that an injunction would be appropriate if the sympathy strikers were shown to have "a direct and beneficial interest" in the underlying arbitrable dispute between the roving pickets and their employer. 566 F.2d at 585. The reasoning of the *Zeigler* court appears to have been that sympathy strikers in some sense avoid their own arbitration pledge if they have "a beneficial interest" in the underlying arbitrable dispute of the roving pickets. Whatever the reasoning of *Zeigler* may have been, the "direct and beneficial interest" test proposed by the court would present a difficult standard for judicial intervention. Under this test, courts would have to determine whether sympathy strikers have a sufficiently direct interest in the underlying dispute to warrant injunctive relief. Several questions would arise in this regard. For example, would it be enough if both sets of workers operated under collective bargaining agreements which contained similar or identical provisions? The *Zeigler* court answered this question in the negative. 566 F.2d at 585. Would the sympathy strikers have a "direct and beneficial interest" in the underlying dispute if they hoped or expected their employer to follow any settlement reached between the roving pickets and their employer? How closely would the dispute between the roving pickets and their employer have to relate to the work conditions of the sympathy strikers? The *Zeigler* court left these questions unanswered. Moreover, sympathy strikers commonly are tied to roving pickets either on a "common cause" basis, or because the sympathy strikers have an interest in industry-wide work conditions. See *Western Md. R.R. Co. v. System Bd. of Adjustment*, 465 F. Supp. 963, 972 (D. Md. 1979). In this sense, sympathy strikers almost always adopt as their own the underlying arbitrable grievance of the roving pickets. In short, the "beneficial interest" or community of interest test would not appear to be a useful standard for measuring the appropriateness of injunctive relief. But see *Cedar Coal Co. v. UMW*, 560 F.2d 1153, 1171-72 (4th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978).

Similar issues concerning the proximity of the underlying dispute to the work conditions of strikers arise in efforts to define a "labor dispute" under the Norris-LaGuardia Act. See *Perritt*, *supra* note 38, at 1208; and discussion in text at notes 65-81 *infra*.

⁴² *Southern Ohio Coal v. UMW*, 551 F.2d 695, 704 (6th Cir. 1977), *cert. denied*, 434 U.S. 876 (1977). See also *George Washington Casenote*, *supra* note 34, at 135.

⁴³ *Southern Ohio Coal Co. v. UMW*, 551 F.2d 695, 704 (6th Cir. 1977).

— always will be on the employer seeking the injunction. If the employer succeeds in meeting this burden, the court should be responsive. Furthermore, the evidentiary problems which concerned the Sixth Circuit may not be so difficult, particularly where the “roving” pickets and the sympathy strikers have a common employer. The “complex judgment” which the sympathy strikers must make about the legality of a picket line is an equally unpersuasive argument against granting a sympathy strike injunction. At the point of judicial intervention, a court rather than the worker will be making the complex judgment in question. Moreover, the basic question for the prospective sympathy strikers and their union is whether the sympathy strike violates their own no-strike pledge. These workers must face that question — for purposes of risking discipline by their employer — even if an injunction against the sympathy strike is not being sought.⁴⁴ In short, the *determinative* question is whether there is a sufficient nexus between the sympathy strike and the avoidance of arbitration to justify the issuance of a *Boys Markets* injunction against the sympathy strikers.

Along these lines, the Fourth Circuit, in *Cedar Coal v. UMW*,⁴⁵ adopted an interpretation of *Buffalo Forge* which permits enjoining a sympathy strike where the strike’s purpose is to force a common employer to concede an arbitrable issue to roving pickets.⁴⁶ In *Cedar Coal*, one UMW local struck over an arbitrable grievance and picketed other mines which were owned by the same employer (Cedar) and manned by sister UMW locals. The UMW local also picketed a mine owned by another employer (Southern Ohio).⁴⁷ The Fourth Circuit upheld the grant of an injunction to Cedar against both the primary strikers (the roving pickets) and the sympathy strikers, since the basic object of each strike was to compel Cedar to concede the underlying arbitrable issue (to the primary strikers).⁴⁸ The court refused, however, to authorize an injunction on behalf of the outside employer (Southern Ohio) against its sympathy striking employees. The court reasoned that since Southern Ohio was not privy to the underlying dispute, it could not itself concede the underlying arbitrable issue.⁴⁹ Apparently, any pressure which Southern Ohio might place on Cedar to settle the dispute was regarded as being too attenuated a threat to arbitration to warrant injunctive relief.

The facts of *Cedar Coal* render the future application of the decision uncer-

⁴⁴ Employees may be disciplined for refusing to cross a secondary picket line, *Chevron USA*, 244 N.L.R.B. 1081, 1086-87 (1979), or for any sympathy strike which violates a no-strike pledge. See *W-I Canteen Serv. v. NLRB*, 606 F.2d 738, 744-47 (7th Cir. 1979); *Iowa Beef Processors v. Meat Cutters*, 597 F.2d 1138, 1144-45 (8th Cir.), cert. denied, 444 U.S. 840 (1979). Thus, workers may be better off if they are enjoined prospectively from sympathy striking than if they are disciplined after the fact.

⁴⁵ 560 F.2d 1153 (4th Cir. 1977), cert. denied, 434 U.S. 1047 (1978).

⁴⁶ 560 F.2d at 1171-72. The Third Circuit also appears to support this approach. See *United States Steel Corp. v. UMW*, 593 F.2d 201, 206-09 (3d Cir. 1979). Freed, *supra* note 4, at 328-34, however, criticizes the approach.

⁴⁷ 560 F.2d at 1160.

⁴⁸ *Id.* at 1171-72.

⁴⁹ *Id.* at 1172.

tain. The court in *Cedar Coal* noted that not only were the enjoined sympathy strikers employed by the same employer as were the roving pickets, but that both employee groups were governed by the same master collective bargaining agreement. This fact created a possibility, in the court's view, that the sympathy strikers might profit in some fashion from the resolution of the arbitrable grievance.⁵⁰ This factor was speculative,⁵¹ however, and should not prove critical for analytical purposes.⁵² *Cedar Coal* should be read as endorsing the broader principle that the presence of an arbitrable underlying dispute between a sister local and the employer who also employs the sympathy strikers may support an injunction against the sympathy strikers.

Where, as in *Cedar Coal*, a single employer employs both the roving pickets and the sympathy strikers, the primary recourse for that employer is to enjoin the primary strikers (roving pickets) and thereby squelch the roving picket line.⁵³ The sympathy strike would then dissolve by itself. Where the roving pickets are employed by a separate employer, however, the employer of the sympathy strikers must seek to enjoin the sympathy strike directly. The intriguing question then arises whether the employer may enjoin the sympathy strike on the basis that the roving pickets are seeking to apply indirect economic pressure to force the resolution of an arbitrable dispute between the roving pickets and their employer. The employer could forward the theory, rejected in *Cedar Coal*, that the sympathy strike undermines arbitration by pressuring it, a neutral employer, to coerce the roving pickets' employer to concede the arbitrable issue. If the facts support this theory, an injunction against the sympathy strike arguably would foster the policy in favor of arbitration expressed in *Boys Markets* and *Buffalo Forge*. This theory assumes a significant business relationship between the two employers involved, which creates the potential for real economic pressure on the roving pickets' employer to concede the underlying dispute to the prejudice of arbitration.⁵⁴ The problematical nature of such an inquiry into the economic relationship between the two employers

⁵⁰ *Id.*

⁵¹ The court suggested that an arbitration award favoring the roving pickets might have a limited precedential effect as to the sympathy strikers who were governed by the same master collective bargaining agreement. *Id.* Although legally correct, this position overlooks the practical fact that the strikes were aimed at avoiding arbitration through a forced resolution of the dispute. The precedential impact of such forced resolutions is at best uncertain. See Freed, *supra* note 4, at 332-34 n.190.

⁵² Reserving sympathy strike injunctions for situations where the sympathy strikers have some beneficial interest in the underlying dispute of the roving pickets probably is not a fruitful line of inquiry. See note 41 *supra*.

The *Cedar Coal* opinion also indicated at one point that both the pickets and sympathy strikers worked at the same location. 560 F.2d at 1172. The facts as related in an earlier portion of the opinion, however, seem to contradict this conclusion. *Id.* at 1156, 1159.

⁵³ See *Jim Walter Resources v. UMW*, 609 F.2d 165, 167-69 (5th Cir. 1980). Where the primary strikers are breaching their own pledge to arbitrate the underlying dispute, their strike normally can be enjoined under *Boys Markets*.

⁵⁴ See Casenote, *Court May Enjoin Sympathy Strike Where Purpose and Effect is to Compel Concession of Arbitrable Issue*, 63 CORNELL L. REV. 507, 523 (1978).

and the potential impact of the sympathy strike on arbitration, however, cautions against strict reliance on this theory as a means of enjoining sympathy strikes. A more workable approach to the problem would be to focus on the object or purpose of the roving pickets, rather than the likely impact of the sympathy strike on arbitration. Under this approach, if the roving pickets act with the purpose of forcing the neutral employer to pressure their employer to settle an arbitrable dispute, an injunction would be warranted. Focusing on the intention of the roving pickets admittedly strays from the underlying concern of preventing the disruption of arbitration machinery through forced concession. Yet the object of the roving pickets to circumvent arbitration arguably is more critical than the actual effect of their actions. The sympathy strikers are then violating a no-strike clause in an effort to assist an evasion of arbitration, and that should be sufficient to invoke *Boys Markets*. By analogy, in *Boys Markets* cases, no inquiry is necessary into whether an employer actually would capitulate on the arbitrable issue.

A complicating factor in the scenario posited is that it is the employer of the roving pickets, not the employer seeking the injunction against the sympathy strikers, who controls the arbitration of the underlying dispute. Normally, an employer seeking a *Boys Markets* injunction must agree to arbitrate as a prerequisite to obtaining injunctive relief. In the hypothetical case under consideration, however, the employer who must arbitrate the primary dispute may not even be a party before the court. This apparent bar to obtaining a sympathy strike injunction could be remedied by allowing the employer seeking the injunction to demonstrate that the employer of the roving pickets is willing to arbitrate the underlying dispute. If the neutral employer can establish this fact, a sympathy strike injunction should be available.

In sum, *Buffalo Forge* does not foreclose injunctive relief against sympathy strikers where the underlying dispute between the roving pickets and their employer is arbitrable. The objections formulated in the line of cases holding to the contrary are unpersuasive. The focus of inquiry should be whether the roving pickets' evasion of their arbitration obligation sufficiently implicates federal arbitration enforcement policy to permit a section 301 injunction against the sympathy strikers. Although *Buffalo Forge* does not resolve this delicate policy-balancing issue, permitting sympathy strike injunctions in such circumstances would be consistent with the pro-arbitration policy underlying that decision. There is no reason why that policy should not support injunctive relief where a union's sympathy strike in breach of a no-strike clause is aimed at assisting another union's efforts to evade an arbitration obligation.⁵⁵

⁵⁵ If *Cedar Coal* is followed, so that § 301 injunctions are not available against sympathy strikes where separate employers are involved, the employer facing roving pickets still may have some recourse against the pickets themselves. Section 8(b)(4)'s ban on secondary boycotts might provide grounds for injunctive relief, although the General Counsel and not the employer controls this channel. See note 38 *supra*.

Since an employer ordinarily has no contractual tie to roving pickets who work for

II. OTHER NON-ARBITRABLE DISPUTES

Buffalo Forge's restriction of no-strike injunctions to the enforcement of arbitration pledges left open several questions regarding the availability of injunctive relief under a broad no-strike clause. Certain issues may be explicitly or implicitly beyond the scope of a contract's arbitration clause. In addition, workers sometimes engage in work stoppages over matters which essentially are beyond the control of their employer. Such disputes generally are non-

another employer, no direct § 301 suit against the roving pickets would be available. See *Consolidation Coal Co. v. UMW*, 537 F.2d 1226, 1230 (4th Cir. 1976). Where the same parent union represents both the sympathy strikers and the roving pickets, however, some relief may be available to the employer. The interconnections between the unions, along with certain contractual language, may suggest some responsibility on the part of the union representing the sympathy strikers to control the roving pickets. The same factors may create liability running from the roving pickets to employers other than their own. Along these lines, a few cases suggest the possibility of attacking the parent union in order to preclude the extension or proliferation of a strike over one local's dispute to other employers. See *United States Steel Corp. v. UMW*, 593 F.2d 201 (3d Cir. 1979); *Republic Steel Corp. v. UMW*, 570 F.2d 467 (3d Cir. 1978); *Peabody Coal Co. v. UMW*, 430 F. Supp. 205 (E.D. Mo. 1977). This approach would apply where the international or parent local is a signatory to the collective bargaining agreement with the employer of the potential sympathy strikers, and where this same union signatory also has the authority under the union's structure to control or influence the roving pickets. This notion has arisen principally in UMW cases concerning the damage liability of the parent UMW union which had signed each collective bargaining agreement in the industry on behalf of its locals. *Peabody Coal Co. v. UMW*, 430 F. Supp. 205, 206 (E.D. Mo. 1977). In *Republic Steel Corp. v. UMW*, 570 F.2d 467 (3d Cir. 1978), the court found that the parent UMW potentially was liable to one mine owner for failing to take steps against the proliferation of work stoppages over an arbitrable dispute at another employer's mine. *Id.* at 478. This theory would seem potentially applicable to injunctive actions where the parent union is undermining arbitration by not fulfilling its contractual obligation to prevent the proliferation of a strike over an arbitrable grievance. It should be observed, however, that this theory is dependant entirely on extraordinary contractual language, and unusual divisions of union responsibility. Consequently, the theory would be limited in its application.

The extent of union liability for failing to avert a strike has been circumscribed by *Carbon Fuel Co. v. UMW*, 444 U.S. 212, 214-18 (1979). The Court in *Carbon Fuel* narrowly interpreted the UMW's responsibilities under the Bituminous Coal Agreements. Nevertheless, the principle of an international union's responsibility remains unaffected where appropriate contract language exists. In *United States Steel Corp. v. UMW*, 593 F.2d 201 (3d Cir. 1979), the court used the parent UMW's signatory status and internal union interconnections to find potential damage liability on the part of a mineworkers' local. *Id.* at 208-09. The local had honored a picket line set up by a sister local whose members worked for the same mineowner as did the sympathy strikers, and whose underlying dispute was arbitrable. *Id.* Ordinarily, a local's damage liability for a sympathy strike would depend simply on the scope of the local's no-strike pledge and not on the arbitrability of the dispute between the sister union and the employer. In the mining industry, however, strike liability becomes a particularly complex issue. Although the international may sign the collective bargaining agreements, jurisdiction to administer the agreements may be divided among the international, the union district, and the union local. More importantly, the no-strike obligation of mineworkers typically is not expressed, but is implied from the customary broad grievance-arbitration clause. See, e.g., *United States Steel Corp. v. UMW*, 598 F.2d 363, 364 (5th Cir. 1979); *United States Steel Corp. v. UMW*, 593 F.2d 201, 203-04 (3d Cir. 1978). The scope of the arbitration pledge, and the precise union entities bound by that pledge, shape the contours of liability for a strike. Without binding ties among the relevant union entities, a genuine sympathy strike never could breach an implied no-strike obligation on the part of the sympathy strikers. See also note 37 *supra*. Note, *Damage Remedies for Sympathy Strikes After Buffalo Forge*, 78 COLUM. L. REV. 1664, 1671-73 (1978); George Washington Casenote, *supra* note 34, at 1241.

arbitrable as between the striking workers and their employer. For example, workers may strike in protest of a governmental policy, their unions's alleged inadequacies, or a separate employer's conduct. *Buffalo Forge* made clear that a no-strike injunction is inappropriate if the particular underlying dispute is outside the scope of an arbitration clause, but the opinion did not establish judicial standards with respect to the initial determination of whether a dispute is in fact arbitrable. *Buffalo Forge* also did not address whether strikes over matters beyond an employer's control and only distantly related to work conditions qualify as "labor disputes" under the Norris-LaGuardia Act. This issue is important because the Act's broad ban on injunctive relief applies only to such disputes. Questions of enjoinability also arise when a union strikes in support of an alteration to an existing collective bargaining agreement. Prospective contract changes ordinarily are not arbitrable. The remainder of this article will address these issues arising in the wake of *Buffalo Forge*, and will offer some conclusions.

*A. Subjects Outside a Collective Bargaining Agreement,
and Matters Beyond an Employer's Control.*

A strike customarily is provoked by worker dissatisfaction over management action or inaction. During the course of a collective bargaining agreement, such management conduct ordinarily is subject to challenge as a violation of that agreement. The dispute generally can be resolved by the grievance-arbitration machinery established by the parties. Not every labor dispute, however, fits this neat framework.

It also may be possible for a parent union which represents multiple bargaining units to create no-strike obligations running from one unit's employees to a separate employer. An interesting example of the creation of such an obligation occurred in *Amalgamated Meat Cutters Local 195 v. Cross Bros. Meat Packers*, 518 F.2d 1113 (3d Cir. 1975). In that case, Local 195 represented two bargaining units who worked for separate employers located across the street from one another. *Id.* at 1115. Employees in one bargaining unit struck against their employer, and set up a picket line which members of the second bargaining unit honored. The sympathy strikers had made a no-strike pledge which their employer alleged had been breached. *Id.* The Third Circuit upheld an arbitrator's decision which awarded damages to the second employer based on the activities of both the sympathy strikers and the roving pickets. *Id.* at 1119-22. The finding of liability running from the roving pickets to a separate employer was grounded on Local 195's common representation of both bargaining units, and on contractual language binding the local and "its members." All cases which have found liability running from roving pickets to separate employers have arisen in the context of damage actions. The principle supporting liability for damages, however, would seem equally applicable to cases in which a separate employer seeks to enjoin roving pickets. *Cf. Western Md. R.R. Co. v. System Bd. of Adjustment*, 465 F. Supp. 963, 973-75 (D. Md. 1979) (Railway Labor Act case in which two railroads succeeded in obtaining limited injunctive relief against roving pickets who worked for a rival railroad).

Obtaining injunctive relief against roving pickets employed by a separate employer always will be dependent on contract language. The language must create special obligations running from workers in one bargaining unit to a separate employer with whom the union also has a contract. Such language is rare. Moreover, the workers must be represented by the same parent union, and internal disciplinary machinery must exist to implement the interconnected union obligations being alleged. *See Republic Steel Corp. v. UMW*, 570 F.2d 467, 478-79 (3d Cir. 1978). Thus, employers faced with roving pickets who work for a separate employer will be relegated primarily to § 8(b)(4) or § 301. Relief under those provisions must be grounded either on an explicit status quo pledge or on an extension of the *Cedar Coal* theory, as discussed above.

Labor disputes sometimes originate from matters beyond the jurisdictional scope of a particular collective bargaining agreement. In such cases, the underlying dispute may not be arbitrable and consequently an injunction may be barred under the Norris-LaGuardia Act. The Ninth Circuit case of *Alaska Pipeline Service Co. v. Teamsters*⁵⁶ presents an example of how a dispute outside the scope of the collective bargaining agreement may be unenjoinable. In that case, workers on the Alaska pipeline were employed under an agreement covering "new construction work" at the pipeline.⁵⁷ When a strike was precipitated by a dispute over certain "backhaul" work at a tanker loading facility, a no-strike injunction was denied because the dispute was considered to be outside the scope of the collective bargaining agreement.⁵⁸ The court denied the injunction even though the agreement contained a broad no-strike provision which an arbitrator later found had been breached by the walkout in question.⁵⁹

Another instance in which the underlying dispute may be non-arbitrable and therefore not enjoinable occurs when a strike is precipitated by worker discontent over matters entirely beyond the control of their employer. For example, workers may strike to protest governmental policies. The protest may be connected to work conditions, as when government wage controls or guidelines are in issue, or it may be essentially political, as when longshoremen refuse to load grain on ships bound for the Soviet Union. If the protested matter is beyond the employer's control,⁶⁰ and non-arbitrable, an injunction would appear to be barred by *Buffalo Forge*. This approach was followed by the Fifth Circuit in *U.S. Steel v. UMW*.⁶¹ In that case, a miner's union struck one coal mine operator to protest another employer's importation of South African coal.⁶² Despite a broad arbitration provision which covered "disagreements over any matter not mentioned" in the agreement and "local trouble of any kind," the court refused to authorize an injunction against the strikers.⁶³ The court reasoned that since the underlying dispute concerned a separate employer, it was not arbitrable as between the striking union and its immediate

⁵⁶ 557 F.2d 1263 (9th Cir. 1977).

⁵⁷ *Id.* at 1266 n.3.

⁵⁸ *Id.* at 1265-66. The court found that "backhaul" work was not "new construction work."

⁵⁹ *Id.* Once the arbitrator's ruling had been obtained, the district court specifically enforced the arbitration award. *Id.* The Ninth Circuit ruled only that the initial denial of an injunction had been correct. *Id.* at 1267-68.

⁶⁰ Of course, a court must determine what underlying dispute actually precipitated the work stoppage. For example, the UMW sometimes has contended that work stoppages were "over" previous judicial meddling in labor disputes, a contention which has been rejected. *See Cedar Coal v. UMW*, 560 F.2d at 1159, 1171.

⁶¹ 519 F.2d 1236 (5th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976).

⁶² *Id.* at 1238.

⁶³ *Id.* at 1239.

employer.⁶⁴ The Fourth and Fifth Circuits recently have taken a similar approach in refusing to enjoin longshoremen's work stoppages initiated in protest of the Soviet Union's invasion of Afghanistan.⁶⁵

Such disputes, where workers are protesting matters well beyond their employer's control, usually are not arbitrable. Even where the underlying dispute is non-arbitrable, however, *Buffalo Forge* does not bar a section 301 injunction unless the Norris-LaGuardia Act is applicable. That Act bans injunctions only in cases "involving or growing out of any labor dispute . . ."⁶⁶ Thus, the critical issue in this context is whether the particular strike sought to be enjoined falls within the Norris-LaGuardia Act's definition of "labor dispute."⁶⁷ The resolution of this issue in turn depends on whether the underlying dispute which triggered the particular strike bears a sufficient nexus to the terms and conditions of employment of the striking workers to qualify them as "interested" in that underlying dispute. This test for defining a labor dispute is suggested by Supreme Court precedent,⁶⁸ by the legislative history of the Norris-

⁶⁴ *Id.* at 1247-48. Some pre-*Buffalo Forge* cases enjoined "political strikes" partially on the basis that the contractual legality of the strike itself was arbitrable, and therefore the strike could be deemed to be "over" an arbitrable issue. See *United States Steel v. UMW*, 87 L.R.R.M. 2806, 2807-09 (4th Cir. 1974); *Armco Steel Corp. v. UMW*, 505 F.2d 1129, 1132-34 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975). This approach was repudiated in *Buffalo Forge*, 428 U.S. 397, 408 (1975).

⁶⁵ *Hampton Roads Shipping Ass'n v. ILA*, 631 F.2d 282, 285-86 (4th Cir. 1980); *New Orleans Steamship Ass'n v. ILA*, 626 F.2d 455, 467 (5th Cir. 1980), *cert. granted*, 450 U.S. 1029 (1981); see Note, *The Statutory Implications of Politically Motivated Work Stoppages*, 27 LOYOLA L. REV. 667 (1981).

⁶⁶ 29 U.S.C. § 104 (1976).

⁶⁷ 29 U.S.C. § 113:

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interest therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between . . . employers . . . and . . . employees; (2) between . . . employers . . . and . . . employers; or (3) between . . . employees and . . . employees; or when the case involves any conflicting or competing interests in a "labor dispute" . . . of "persons participating or interested" therein . . .

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein . . .

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee . . .

⁶⁸ See *Federation of Musicians v. Carroll*, 391 U.S. 99, 105-06 (1968); *Marine Cooks & Stewards v. Panama Steamship*, 362 U.S. 365, 370-71 (1960). *Brotherhood of Ry. Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649, 654-55 (5th Cir.), *aff'd*, 385 U.S. 20 (1966) represents a strong lower court adoption of the test.

LaGuardia Act,⁶⁹ and by a recent line of cases granting no-strike injunctions under the Railway Labor Act.⁷⁰

There is no simplistic formula for determining when a problem beyond the control of an employer is sufficiently unconnected to its striking employees' economic self-interest to disqualify the strike from protection under the Norris-LaGuardia Act. That the resolution of the underlying problem is beyond the struck employer's control, or that the strikers' employment conditions will not be affected directly by the dispute's resolution, are not dispositive. It is well established that workers may be "interested" in an underlying dispute involving a separate employer even if their own work conditions are not directly affected by the resolution of the dispute. When the Norris-LaGuardia Act was enacted, Congress accepted the principle that workers have a genuine "interest" in employment conditions within their industry or economic sector.⁷¹ When the underlying dispute concerns such conditions, striking employees are protected by the Norris-LaGuardia Act even if the dispute will have no immediate impact on their own work conditions.⁷² To some extent, *Buffalo Forge* illustrates this principle, as that decision insulated a sympathy strike against an injunction even though the strikers would not immediately benefit from a resolution of the underlying dispute.⁷³

⁶⁹ The legislative history of the Norris-LaGuardia Act concerning the scope of the term "labor dispute" as used in the Act is not conclusive. In hearings on the House bill, opponents of the Act argued that the bill's language would insulate labor activity from injunctions even where the underlying dispute bore only a remote relationship to employee work conditions. See, e.g., *Hearing before House Comm. on the Judiciary on H.R. 5315*, 72d Cong., 1st Sess. 13, 22 (1932) (remarks of a representative of the National Association of Manufacturers). Proponents of the Act stressed that the Act was only intended to insulate traditional, "legitimate" labor activity. *Id.* at 48, 67-68. In its form, the legislation appears to have embodied a limitation that labor activity must be related to employment conditions in order to be protected against injunctions. See S. REP. to accompany S. 935, 72d Cong., 1st Sess. 8-9, 25:

The main purpose of these definitions [in § 13 of the Act] is to provide for limiting the injunctive powers of the Federal courts only in the special type of cases, commonly called labor disputes, in which . . . the courts have been converted into policing agencies *** to the purpose of aiding employers to coerce employees into accepting terms and conditions of employment desired by employers.

⁷⁰ See *Asheley, Drew & Northern Ry. Co. v. UTU*, 625 F.2d 1357, 1363-66 (8th Cir. 1980); *Western Md. R.R. Co. v. System Bd. of Adjustment*, 465 F. Supp. 963, 970-72 (D. Md. 1979); *Terminal R.R. Ass'n v. BRAC*, 458 F. Supp. 100, 102 (E.D. Mo. 1978). But see *BRT v. Jacksonville Terminal Co.*, 394 U.S. 369, 392-93 (1969). See generally Perritt, *supra* note 38; Note, *Judicial Approaches to Secondary Boycotts Under the Railway Labor Act*, 42 N.Y.U. L. REV. 928 (1967).

⁷¹ Congress apparently determined that workers have a significant interest in any labor-management controversy within the same industry. "A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation . . ." 29 U.S.C. § 113(a) (1976). See *United Steelworkers v. Bishop*, 598 F.2d 408, 414-15 (5th Cir. 1979); 11 MEMPHIS ST. L. REV. 135 (1980).

⁷² See *Marine Cooks & Stewards v. Panama Steamship*, 362 U.S. 365, 370 (1960); *Brotherhood of Locomotive Firemen v. Florida East Ry.*, 346 F.2d 673, 675 (5th Cir. 1965); Note, *Declaratory Judgment is Appropriate Relief in a Non-Arbitrable § 301 Labor Dispute Concerning a Collective Bargaining Agreement with a No-Strike Clause*, 10 SETON HALL L. REV. 471 (1979).

⁷³ See also *NLRB v. Gould, Inc.*, 638 F.2d 159, 163-64 (10th Cir. 1980); *Eastex, Inc. v.*

Where the dispute does not concern employment conditions within the industry, courts have been more chary of protecting strikers against injunctions. A number of cases have held that when the underlying dispute is related in too attenuated a fashion to the strikers' labor conditions, the strike is not protected by the Norris-LaGuardia Act.⁷⁴ To the extent that an underlying dispute is purely political, with the strikers' "interest" being no more particularized than that of other citizens expressing a view on the subject, these cases seem correct.⁷⁵ Thus, a union's strike to protest a foreign country's policy would not constitute a "labor dispute," under the Norris-LaGuardia Act, unless the union could demonstrate some cognizable economic interest in the dispute.⁷⁶

The same economic self-interest test applies to purely domestic situations in which the underlying dispute involves governmental policy or the conduct of another employer which the struck employer cannot control. As discussed above, when the underlying dispute involves an employer in the same industry as the struck employer, the sympathy strike may not be enjoined. With respect to disputes arising outside the industry, however, striking workers presumably must demonstrate some economic interest in the underlying dispute in order to qualify for Norris-LaGuardia protection.⁷⁷ Demonstrating this interest requires more than the invocation of labor's "common cause" — the notion that concerted activity to benefit outside workers will eventually earn reciprocal support from those workers. That rationale for claiming economic self-interest

NLRB, 437 U.S. 556, 563-70 (1978) (discussing the scope of NLRA protection of workers' concerted activities).

⁷⁴ See *West Coast Gulf Maritime Ass'n v. ILA*, 413 F. Supp. 372, 374-75 (S.D. Tex. 1975), *aff'd without opinion*, 531 F.2d 574 (5th Cir. 1976); *Khedivial Line v. Seafarers' Union*, 278 F.2d 49, 51 (2d Cir. 1960); *United States Steel v. UMW*, 77 L.R.R.M. 3134, 3135 (E.D. Ky. 1971); *cf. Allied Int'l, Inc. v. ILA*, 492 F. Supp. 334, 338 (D. Mass. 1980); *Harrington & Co. v. ILA*, 356 F. Supp. 1079, 1081-83 (S.D. Fla. 1973); *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942). See also cases cited in notes 68 and 70 *supra*.

⁷⁵ *Contra*, *New Orleans Steamship Ass'n v. ILA*, 626 F.2d 455, 464-65 (5th Cir. 1980), *cert. granted*, 450 U.S. 1029 (1981). It is possible that a political strike might be deemed an illegal secondary boycott under § 8(b)(4) of the NLRA and thus be enjoinable under § 10(1). Such strikes are calculated to achieve union objectives beyond the workers' labor relations setting, and hence are "secondary" in a sense. The First Circuit has adopted this position. *Allied Int'l. v. ILA*, 640 F.2d 1368, 1377-79 (1st Cir. 1981). The Fifth Circuit, however, has ruled that such strikes do not violate § 8(b)(4), either because they are not aimed at affecting domestic labor conditions or because of the potential impact of judicial interference on foreign entities and foreign trade. See *ILA Local 799*, 257 N.L.R.B. No. 151, #1-CC-1753 (ALJ decision Mar. 16, 1981).

⁷⁶ Some "political" strikes protest matters having no connection to the strikers' working conditions. The refusal by longshoremen to handle Soviet cargo in protest of the Soviet invasion of Afghanistan provides an example. In that instance, the International Longshoremen's Association "sought no economic advantage or benefit for its member[s] . . . [Its boycotts were] wholly political in nature, and in fact detrimental to the immediate interests of longshoremen by causing a reduction in the work available to them." *ILA Local 799*, 257 N.L.R.B. No. 151, #1-CC-1753 (ALJ decision Mar. 16, 1981).

In other instances, an ostensibly political protest against a foreign government's policy may have a significant relation to the strikers' economic self interest. For example, longshoremen have boycotted Egyptian ships to protest an Egyptian governmental policy which affected the longshoremen's job opportunities. See *Khedivial Line v. Seafarers' Union*, 278 F.2d 49, 51 (2d Cir. 1960).

⁷⁷ See notes 68-70 *supra*.

might qualify strikers for section 7 protection,⁷⁸ but probably would fail for purposes of showing a Norris-LaGuardia "labor dispute."⁷⁹

An interesting category of strikes over matters beyond an employer's apparent control occurs when strikers are protesting the conduct of their own union. This kind of strike probably does not arise with great frequency. Most "wildcat" strikes are over arbitrable disputes with management concerning the workers' immediate work conditions. Such strikes clearly are enjoinable, as the employees are bound by the no-strike clause in their collectively bargained agreement.⁸⁰ Where the impetus for a wildcat strike is disgruntlement over a union's policy or performance, however, post-*Buffalo Forge* cases have denied requests for injunctive relief against the striking employees.⁸¹

These cases typically have arisen during negotiations over prospective contract terms. In this situation, even if the worker upset were directed at management, the dispute ordinarily would not be arbitrable. Where the dispute does not arise during contract negotiations, it is necessary to determine whether the walkout really is "over" an internal union problem, or instead is aimed at a goal or relief within management's control. Depending on the language of the applicable agreement, if the dispute concerns a matter within the employer's control, the grievance may be arbitrable.⁸² If a wildcat walkout merely protests a union's substantive position in a dispute with management over work conditions, however, the underlying worker dispute is with the union and is non-arbitrable.⁸³ Because the dispute is not arbitrable, the strike is not enjoinable under section 301, even though concerted employee activity inconsistent with the position of its union generally is unprotected and is subject

⁷⁸ See, e.g., *NLRB v. Gould*, 638 F.2d 159, 163 (10th Cir. 1980).

⁷⁹ See cases cited in note 70 *supra*; *Allied Int'l v. ILA*, 492 F. Supp. 334, 337-38 (D. Mass. 1980), 640 F.2d 1368 (1st Cir. 1981).

⁸⁰ *International Detective Serv. v. Local 251 Teamsters*, 614 F.2d 29, 31-32 (1st Cir. 1980); *F.J. Schindler v. Local 274*, 93 L.R.R.M. 3085, 3085-86 (E.D. Pa. 1976). Damages against individual strikers have not been allowed. See *Complete Auto Transit v. Reis*, 451 U.S. 401, 405-17 (1981); *Westinghouse Elec. v. IUE*, 470 F. Supp. 1298, 1299 (W.D. Pa. 1979), *appeal dismissed*, 614 F.2d 772 (3d Cir. 1980).

⁸¹ See *Complete Auto Transit v. Reis*, 614 F.2d 1110, 1114 (6th Cir. 1980), *aff'd*, 451 U.S. 401 (1981) ("so long as the employees refused to work because of dissatisfaction with the representation given by their union, the strike was not enjoinable"); *Automobile Transport, Inc. v. Ferdnance*, 420 F. Supp. 75 (E.D. Mich. 1976).

In *Complete Auto Transit*, the court enjoined the strike when it determined that the purpose of the strike was to settle the arbitrable issue of amnesty for the wildcat strikers. 614 F.2d at 1114. All parties there agreed that the amnesty issue was arbitrable. The Supreme Court, in addressing the issue of damages in *Complete Auto Transit*, did not express any opinion on the appropriateness of the injunctive relief. 451 U.S. at 416-17 n.18.

⁸² See *Suburban Transit v. NLRB*, 536 F.2d 1018, 1019 (3d Cir. 1976), where dissident employees objected to the employer's signing of a contract with one of two competing unions. The underlying dispute was deemed to be arbitrable even though the striking workers were objecting to representation by the union then in control of the grievance-arbitration machinery. *Id.* at 1022. See also *Bethlehem Mines v. UMW*, 340 F. Supp. 829, 834 (W.D. Pa. 1972).

⁸³ See cases cited in note 81 *supra*.

to both union and employer discipline.⁸⁴ The strike is a "labor dispute" under the Norris-LaGuardia Act because the economic self-interest of the strikers is implicated even if the union's position is beyond the employer's control.⁸⁵ If the object of the strike is to extract a concession from management concerning a matter that is arbitrable, however, the walkout subverts arbitration and should be enjoinable. Subtle questions of fact are likely to be presented in this context, as courts try to discern whether a strike is prompted merely by worker dissatisfaction with their union, or is an attempt to extract management concessions on an arbitrable issue.

It is arguable that employee wildcat strikes, especially those in support of a position antithetical to that of the union's, generally ought to be enjoinable. By undermining the authority of the union, such strikes tend to undermine the whole collective bargaining structure on which arbitration is based.⁸⁶ The question is whether such wildcat strikes in breach of a no-strike clause sufficiently erode the federal pro-arbitration policy as to be enjoinable under *Buffalo Forge's* accommodation of section 301 and the Norris-LaGuardia Act. Under current authority, a section 301 injunction may issue only when the wildcat strike is precipitated by an arbitrable dispute with management, or when the underlying dispute is so unrelated to the strikers' interests that no "labor dispute" is presented.⁸⁷

B. Exclusions from Arbitration and/or No-Strike Clauses

Boys Markets established two threshold requirements for a section 301 injunction to issue: the breach of a no-strike clause and the presence of an arbitrable underlying grievance.⁸⁸ Many collective bargaining agreements, however, either exclude certain matters from arbitration, or create exceptions to a union's no-strike obligation.⁸⁹ Where the underlying dispute has been ex-

⁸⁴ That the strike is unprotected under § 7 of the NLRA does not mean that it is unprotected under Norris-LaGuardia Act. See *Scott v. Moore*, 640 F.2d 708, 713-14 (5th Cir. 1981).

Concerning the § 7 status of wildcat activity, see generally Cantor, *Dissident Worker Action after the Emporium*, 29 RUTGERS L. REV. 35 (1975). One of the ironies of *Buffalo Forge* is that it creates an incentive for an employer to use self-help discipline against striking workers where injunctive relief is not available. But cf. *United Steelworkers v. NLRB*, 530 F.2d 266 (3d Cir.), cert. denied, 429 U.S. 834 (1976) (circuit court criticized use of self-help as alternative to arbitration).

⁸⁵ See *Barnes & Tucker Co. v. UMW*, 338 F. Supp. 924, 926-27 (W.D. Pa. 1972); cf. *Bodecker v. Local P-46*, 640 F.2d 182, 185 (8th Cir. 1981).

⁸⁶ Contra, Axelrod, *The Application of the Boys Markets Decision in the Federal Courts*, 16 B.C. IND. & COM. L. REV. 893, 928-29 (1975).

⁸⁷ See cases cited in note 81 *supra*.

⁸⁸ *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 253-55. See *Mohawk Rubber Co. v. United Rubber Workers*, 462 F. Supp. 993, 995 (N.D. Ohio 1978). A no-strike obligation sometimes may be implied from a broad arbitration clause. *Gateway Coal Co. v. UMW*, 414 U.S. 368, 381-82 (1974).

⁸⁹ See generally Axelrod, *supra* note 86. An agreement might provide that a union's no-strike pledge does not apply where: employees are confronted with a primary picket line; the

cluded from arbitration or is not subject to the no-strike pledge, the resultant strike may not be enjoined under section 301. Although this principle is easily stated, the Court's admonition in *Buffalo Forge* that the lower courts should not usurp the functions of arbitrators has created difficulty in its application. Important questions have arisen concerning the proper role of the court where a union defends a suit for injunctive relief by arguing that the underlying dispute really is not arbitrable, or that the particular job action falls within a contractual exception to the no-strike clause. The scope of a no-strike clause and even the scope of an arbitration clause ultimately may be arbitrable issues.⁹⁰ The question is whether a court must defer to an arbitrator on these issues and withhold injunctive relief pending arbitration.

Prior to *Buffalo Forge*, courts assumed that the broad presumption of arbitrability first articulated in the *Steelworker's* trilogy extended to section 301 injunction cases.⁹¹ Indeed, the Supreme Court appeared to endorse this assumption in *Gateway Coal Co. v. UMW*.⁹² In *Gateway Coal*, the Court upheld a section 301 injunction against striking coal miners despite the union's contention that the strike was permissible under an arbitration clause exception.⁹³ After *Buffalo Forge*, however, the broad presumption of arbitrability would not appear applicable to actions to enjoin strikes in alleged violation of a no-strike pledge. This conclusion finds support in the *Buffalo Forge* Court's insistence that the underlying dispute must in fact be arbitrable in order for a *Boys Markets* injunction to issue.⁹⁴ Faithfulness to *Buffalo Forge* would appear to require the courts themselves to make a careful inquiry into the arbitrability of a dispute, as well as into whether a no-strike clause has been breached.

Courts have not universally subscribed to this view, however. Cases decided under section 301 since *Buffalo Forge* have exhibited divergent responses where unions have claimed either that the underlying dispute was within an exclusion to an arbitration clause or that the job action was within an exception to a no-strike clause. A few courts have seemed willing to make a fairly searching examination of the merits of the union's asserted defense.⁹⁵

employer does not cooperate in arbitration proceedings; the employer does not comply with an arbitration award; or the employer does not adhere to "wage rate" strikes over "local" as opposed to national issues under an industry-wide agreement. See, e.g., *Aluminum Co. v. UAW*, 630 F.2d 1340, 1342 (9th Cir. 1980); *Automobile Transport, Inc. v. Ferdnance*, 420 F. Supp. 75, 77 (E.D. Mich. 1976). Sometimes a contract will exclude a particular matter from both an arbitration obligation and a no-strike obligation. See *Waller Brothers Stone Co. v. United Steelworkers*, Dist. 23, 620 F.2d 132, 134 (6th Cir. 1980).

⁹⁰ See *Long-Airdox Co. v. UAW Local 772*, 622 F.2d 70, 71 (4th Cir. 1980).

⁹¹ See, e.g., *Southwestern Bell Telephone Co. v. CWA*, 454 F.2d 1333, 1336-37 (5th Cir. 1971). See also *Standard Food Prods. Corp. v. Brandenburg*, 436 F.2d 964, 966 (2d Cir. 1970). But see Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability*, 85 HARV. L. REV. 636 (1972) (criticizing the extension of the presumption of arbitrability to § 301 injunction cases).

⁹² 414 U.S. 368 (1974).

⁹³ *Id.* at 385. *Gateway Coal's* endorsement of a presumption of arbitrability appears to have been dictum, however, as the opinion also approved a lower court finding that the safety exception to an arbitration clause had not been properly invoked by the union. See *Cantor*, *supra* note 4, at 258, 276-78.

⁹⁴ 428 U.S. at 410 (1975).

⁹⁵ See *Trans Int'l Airlines v. Teamsters*, 650 F.2d 949, 959-61 (9th Cir. 1980); *Burke v.*

These courts reject any presumption that the underlying dispute is arbitrable and make a preliminary assessment of the issue themselves. Other courts have reacted to the admonition in *Buffalo Forge* not to usurp the function of arbitrators by declining to issue a no-strike injunction where the union has raised a colorable defense to its ostensible breach of arbitration and no-strike pledges.⁹⁶

A recent Sixth Circuit case, *Waller Brothers Stone Co. v. United Steelworkers District 23*,⁹⁷ illustrates this approach. In that case, the collective bargaining agreement provided that the union could strike over, and was not required to arbitrate, disputes concerning certain "wages rates."⁹⁸ When the employer installed a new machine to assist employees classified as "craters," the union insisted on an adjustment to the craters' wages.⁹⁹ The union struck over the issue when their demands were not met.¹⁰⁰ In seeking an injunction against the strike, the employer maintained that the craters' job classification included the operation of the new machine, and that the "wage rates" exception to the no-strike clause applied only to certain unsettled job classifications.¹⁰¹ If the underlying dispute were thus characterized as one over the scope of a job classification, the dispute would be arbitrable and an injunction normally would be available. Conversely, if the dispute was considered one over "wage rates" within the meaning of the no-strike exclusion, an injunction would be barred. The court declined to determine which of these competing interpretations of the underlying dispute was correct, treating the issue as one principally for an arbitrator.¹⁰² Based on this reasoning, the court refused to authorize an injunction against the strike pending arbitration.¹⁰³ In support of its holding, the court cited the passage in *Buffalo Forge* which discussed the importance of not usurping the functions of arbitrators.¹⁰⁴

The *Waller Brothers* approach apparently would require a no-strike injunc-

Nasland Eng'g, 95 L.R.R.M. 2606 (C.D. Calif. 1977). Cf. *Local 13, Professional & Technical Eng'rs v. General Elec. Co.*, 531 F.2d 1178, 1184-85 (3d Cir. 1976) (where court carefully considered a contractual exclusion from arbitration in context of a union suit to enjoin employer conduct).

⁹⁶ *Layne-Wester Co. v. IVOE Local 513*, 650 F.2d 155, 159 (8th Cir. 1981); *Matson Plastering v. Operative Plasterers*, 633 F.2d 1307, 1309 (9th Cir. 1980); *Waller Brothers Stone Co. v. United Steelworkers Dist. 23*, 620 F.2d 132, 135-37 (6th Cir. 1980); see *Design & Manufacturing Corp. v. UAW*, 608 F.2d 767, 769-70 (7th Cir. 1979), cert. denied, 446 U.S. 938 (1980); *Coordinating Committee Steel Cos. v. United Steelworkers*, 436 F. Supp. 208, 213-17 (W.D. Pa. 1977).

⁹⁷ 620 F.2d 132 (6th Cir. 1980).

⁹⁸ *Id.* at 134.

⁹⁹ *Id.* at 133.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 134.

¹⁰² *Id.* at 137.

¹⁰³ *Id.* at 137. The *Waller Brothers* court admonished that an injunction "should not issue unless it clearly appears to the trial judge that the dispute which underlies the strike is subject to a no-strike obligation." *Id.* Similarly, the Ninth Circuit recently has ruled: "where it is not clear that the strike is over an arbitrable issue and is in violation of a no-strike clause, the district court has no jurisdiction to enjoin strike activity pending the arbitrator's decision." *Matson Plastering Co. v. Operative Plasterers*, 633 F.2d 1307, 1309 (9th Cir. 1980).

¹⁰⁴ *Waller Brothers Stone Co. v. United Steelworkers Dist. 23*, 620 F.2d at 137. See also

tion to be denied whenever a union raised a colorable claim that the underlying dispute was excluded from arbitration, or that an exception to a no-strike obligation was present. Under this approach, courts would eschew a full-blown examination of the merits of a union's defense, in order to avoid invading the domain of arbitrators. It is submitted, however, that although this approach is consistent with one theme of *Boys Markets* and *Buffalo Forge*, it fails to effectuate the dominant purposes of those decisions. Under the *Waller Brothers* approach, the refusal to enjoin a strike pending an arbitrator's ruling on arbitrability and/or the scope of a no-strike exception might have the ironic effect of mooted or undermining arbitration. The continued pressure of the strike could extract employer concessions on issues which may be within the scope of the arbitration clause and the no-strike pledge. Such coerced resolution of arbitrable disputes was the very evil which *Boys Markets* sought to remedy by authorizing section 301 injunctions.¹⁰⁵

More importantly, a preliminary judicial assessment of arbitrability, or of the scope of a no-strike pledge, is not inconsistent with the Supreme Court's apparent view of the proper judicial-arbitral division of responsibility in interpreting labor contracts. The *Boys Markets* Court, in establishing requirements for a section 301 injunction — including breach of a no-strike clause and presence of an arbitrable underlying grievance — must have anticipated some judicial role in these determinations despite potential overlap with arbitral functions.¹⁰⁶ Indeed, if injunctions ever are to issue under section 301, the courts must take an active role in interpreting the scope of no-strike pledges. Colorable defenses can be constructed in almost any no-strike injunction proceeding. For example, even in the absence of contractual language creating exceptions to an arbitration clause or a no-strike pledge, a union might maintain that its job action really is not a "strike,"¹⁰⁷ or that the strike actually is "over" a dispute other than the arbitrable one ostensibly at hand.¹⁰⁸ These

Mohawk Rubber Co. v. United Rubber Workers, 462 F. Supp. at 1001 (emphasizing judicial respect for the arbitrator's role in assessing the scope of an exception to a no-strike obligation).

¹⁰⁵ See text and note at note 8 *supra*.

¹⁰⁶ Some judicial-arbitral duplication of effort is inevitable. Cf. *Trans. Int'l Airlines v. Teamsters*, 650 F.2d 949, 966 n. 12 (9th Cir. 1981) (a case arising under the Railway Labor Act). Even after a *Boys Markets* injunction has been issued, an arbitrator still could find that the underlying dispute was not arbitrable, or that the strike did not violate a no-strike clause. See note 109 *infra*.

¹⁰⁷ In *Jacksonville Maritime Ass'n v. ILA*, 571 F.2d 319, 323-24 (5th Cir. 1978), the court considered whether a concerted refusal to obey certain management instructions constituted a strike within the meaning of a no-strike clause. Even though this issue was arbitrable, the court made a preliminary assessment for purposes of ruling on a request for a § 301 injunction. The court noted that its independent findings on the issue inevitably would result in some overlap with the roles of arbitrators. *Id.* at 325. In *American Ship Building Co. v. Local 358, Bhd. of Boilermakers*, 459 F. Supp. 491, 494 (N.D. Ohio 1978), the court also determined whether a refusal to work overtime constituted a strike under the contract. See also *Foam & Plastics Div., Tenneco Chemicals, Inc. v. Teamsters*, 520 F.2d 945, 947-48 (3d Cir. 1975). But see *Molded Materials Co. v. IUE*, 418 F. Supp. 548, 550 (W.D. Pa. 1976).

¹⁰⁸ Striking miners, for example, sometimes have asserted that a particular walkout really is over prior judicial meddling in labor affairs, not over management conduct. See *Cedar Coal*

defenses ought to be judicially assessed at the outset even though they ultimately may constitute arbitrable issues. Under the scheme contemplated by *Boys Markets*, the court should make preliminary findings on issues prerequisite to an injunction, even though the arbitrator may subsequently reconsider these issues.¹⁰⁹ Under this procedure, the merits of the underlying arbitrable dispute ultimately will be determined by the arbitrator. This approach is superior to the *Waller Brothers* approach because it better effectuates the congressional policy of encouraging arbitration, without flouting the division of functions between courts and arbitrators contemplated by *Boys Markets* and *Buffalo Forge*.

Contract rights would be more fully and accurately enforced if courts were to make the preliminary determination whether the underlying dispute is arbitrable and whether the no-strike clause has been breached. This procedure would avoid the hazard encountered in pre-*Buffalo Forge* cases of employing a broad presumption of arbitrability to issue preliminary injunctions, while effectively relegating union defenses to arbitration.¹¹⁰ Active judicial determination of preliminary issues would also avoid the *Waller Brothers* hazard of permitting strikes to continue despite the apparent violation of a no-strike clause. Under the proposed procedure, union contentions that a dispute is non-arbitrable, or that an exception to the no-strike obligation applies, would be evaluated by the court before an injunction would issue. If an injunction were to issue, an arbitrator could reconsider these preliminary questions before addressing the merits of the underlying dispute. For example, in a hypothetical situation with facts like those in *Waller Brothers*, an arbitrator would consider first whether a court had found correctly that the underlying dispute was over job classification and therefore was arbitrable. If the arbitrator concurred with the finding of the court, he or she then would consider whether the employer had correctly defined the job classification in issue.

This division of responsibilities between arbitrators and the courts is entirely consistent with the thrust of *Boys Markets* and *Buffalo Forge*: encouraging the peaceful resolution of labor disputes through arbitration. The *Buffalo Forge* Court's warning not to usurp the functions of arbitrators came in a context in

Co. v. UMW, 560 F.2d 1153, 1159, 1171 (4th Cir. 1977), cert. denied, 434 U.S. 1047 (1978); Peabody Coal Co. v. UMW, 430 F. Supp. 205, 207 n.4 (E.D. Mo. 1977). See also National Rejectors Indus. v. United Steelworkers, 562 F.2d 1069, 1076-77 (8th Cir. 1977), cert. denied, 435 U.S. 923 (1978); Long-Airdox Co. v. UAW Local 772, 622 F.2d 70, 71-72 (4th Cir. 1980); American Ship Building Co. v. Local 358, Bhd. of Boilermakers, 459 F. Supp. 491, 495 (N.D. Ohio 1978) for other examples of union claims that a strike really was over a dispute other than the one which had appeared to have precipitated the walkout.

¹⁰⁹ It has long been understood that arbitrability is a threshold determination for a court even though the issue may be reexamined by an arbitrator. See, e.g., *New Orleans Steamship Ass'n v. ILA*, 626 F.2d 455, 467 (5th Cir. 1980), cert. granted, 450 U.S. 1029 (1981).

¹¹⁰ See Axelrod, *supra* note 86 at 914-32 and cases cited therein. Before *Buffalo Forge*, many courts issued § 301 injunctions without carefully considering a union's defense that its strike fell under an exception to an arbitration or no-strike clause. The defense was left to an arbitrator's subsequent determination. This approach created the potential for "erroneous" interim injunctions where an arbitrator subsequently sustained the union's defense. Yet the Court in *Gateway Coal Co.* arguably provided some support for this position by applying the presumption of arbitrability in a no-strike injunction context. See text and notes at notes 92-93 *supra*.

which a single issue, the naked contractual breach of a no-strike clause, confronted both the court and an arbitrator.¹¹¹ The issue facing the court was congruent with the issue to be submitted to an arbitrator. This left the arbitrator with no completely independent task. The *Buffalo Forge* facts were unlike the more customary *Boys Markets* situation involving a strike over an arbitrable grievance. In this more typical case, certain preliminary issues, such as arbitrability, may be subject to both judicial and arbitral scrutiny, but the underlying grievance is reserved for determination by an arbitrator.¹¹² Thus, as long as there is an underlying arbitrable dispute, the court considering an injunction will be leaving an arbitrator an opportunity to function independently.

Moreover, the language in *Buffalo Forge* concerning the danger of court usurping the functions of arbitrators merely reinforced the Court's basic position that a section 301 no-strike injunction should issue only in order to enforce a union's arbitration pledge. Thus, the admonition in *Buffalo Forge* to preserve arbitrators' roles cannot be considered in isolation. To do so risks eviscerating *Boys Markets* by deferring preliminary judicial determinations to arbitration and forestalling all interim injunctive relief. The *Buffalo Forge* Court feared wholesale judicial involvement in the interpretation of labor contracts if every allegation of a naked breach of contract were subject to judicial resolution via suit for an injunction.¹¹³ By noting this danger, however, the Court did not direct courts to avoid all preliminary issues merely because such issues might be subject to reconsideration by an arbitrator. The thrust of *Boys Markets* — which survives *Buffalo Forge* — was to allow labor injunctions in order to prevent preemption of arbitration through strike-induced settlements of arbitrable disputes.

The approach advocated here — careful judicial assessment of preliminary issues such as arbitrability of the underlying dispute — will sometimes result in withholding injunctive relief pending arbitration. This result obtains both because some underlying disputes will be found to be non-arbitrable, and because judicial non-intervention pending arbitration may sometimes be found to be part of the remedial scheme for contract breach as contemplated by the parties to the collective bargaining agreement.¹¹⁴ The par-

¹¹¹ 428 U.S. at 410-11.

¹¹² Sometimes the preliminary issues in an injunction proceeding will be closely related to the underlying arbitrable issues, as in *Waller Brothers*, 620 F.2d 132 (6th Cir. 1980), where an exception to a no-strike clause was tied to a substantive violation of the contract. And an arbitrator will inevitably be influenced to some degree by the prior judicial expressions in the court proceeding. Nonetheless, an arbitrator is clearly not bound by the preliminary judicial findings either in reassessing the preliminary question such as arbitrability, or in deciding the underlying issues of substantive contract violations. See notes 106, 107 and 109 *supra*. As noted, some degree of judicial-arbitral overlap was inevitable under the *Boys Markets* framework, and simply cannot be avoided if § 301 injunctions are to continue to be available. The approach suggested here does no more than to allow an injunction where a court determines that a no-strike clause was violated in a dispute over an arbitrable grievance — a result consistent with that in *Boys Markets*.

¹¹³ 428 U.S. at 410-11.

¹¹⁴ See note 33 *supra* for elaboration of this contractual intent approach.

ties may *intend* to forego resort to injunctive relief pending an arbitrator's determination of whether a no-strike clause has been breached. For example, the parties may intend a right of first interpretation, or a privilege of first breach, in one party subject to the other party's recourse to arbitral relief as provided in the collective bargaining agreement.¹¹⁵ This intent may be evidenced by the terms of the agreement or by the parties' understandings about their customary prerogatives. In *Waller Brothers*, the agreement explicitly provided an exception to a no-strike pledge. Such a provision might indicate an intent to give the union a privilege of first interpretation of this language within the no-strike clause. Where the union has been granted a privilege of first interpretation, and the bargaining agreement requires the arbitration of disputes, the employer must acquiesce in the union's interpretation of the exception to the no-strike clause pending arbitration of the issue.¹¹⁶ This analysis does not suggest that employers always would be barred from preliminary injunctive relief if an agreement contains an exception to a no-strike pledge. The issue is one of contractual intent. Contractual language or bargaining history may demonstrate that the exception to the no-strike pledge was not intended to confer upon the union a privilege of first interpretation.

One way for employers to avoid confusion over whether a union has been granted a right of first interpretation is to bargain for an explicit status quo pledge by the union. A status quo pledge is a promise to maintain the status quo pending arbitral resolution of whether the conditions to the exception in the no-strike clause have been met.¹¹⁷ Such a promise would demonstrate that the union had not reserved any prerogative of first interpretation of the scope of a no-strike pledge.

¹¹⁵ This analysis would most commonly apply where an employer invoked its traditional prerogative to manage its enterprise, subject to union recourse to contract enforcement machinery. See Cantor, *supra* note 4, at 266-68. The analysis is equally applicable, however, to a union's initiation of a strike pursuant to an explicit contractual exception to the no-strike clause.

¹¹⁶ In *Design & Mfg. Corp. v. UAW*, 608 F.2d 767, 768 (7th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980), the union had reserved the right to engage in a sympathy strike if the company shifted production from a strikebound unit within the company and that unit's employees were picketing to protest the performance of struck work. The union contended that a shift in production had in fact occurred and that its sympathy strike was permitted under the contract. The employer contended that the alleged shift in production constituted an underlying arbitrable dispute warranting a no-strike injunction pending arbitration. The court denied the employer's application for an injunction, finding simply that the sympathy strike was not over an arbitrable grievance, and that whether a shift in production had occurred was an issue which would be resolved by arbitration of whether the no-strike clause had been breached.

¹¹⁷ Cf. *Coordinating Committee Steel Cos. v. United Steelworkers*, 436 F. Supp. 208, 216 (W.D. Pa. 1977) (court commented on the absence of contractual language providing responsibility for arbitration of the no-strike clause's exception for "local issues." In other words, the court sought guidance whether the union had been given a privilege to interpret "local issues," subject only to arbitration, or whether the court could interpret the language itself in the context of an employer request of a no-strike injunction. Of course, a mere statement that the meaning of the no-strike clause's exception is subject to arbitration would not permit injunctive relief. As *Buffalo Forge* illustrated, the scope of a no-strike clause is not an underlying arbitrable grievance for purposes of a *Boys Markets* injunction. See also *Design & Mfg. Corp. v. UAW*, *supra* note 116. Consequently, before issuing an injunction, a court must find that the

C. *Changes in Contract Terms*

Generally, the establishment of new, prospective terms to a collective bargaining agreement is not an arbitrable matter.¹¹⁸ Consequently, a union which is intent on avoiding an injunction, but which is willing to risk disciplinary action against its members or damages against itself, might admit that its strike object is inconsistent with current contract terms and that a change in terms is being sought. Although the union's strike may violate its no-strike pledge,¹¹⁹ may be unprotected against employer discipline,¹²⁰ and may even be an unfair labor practice,¹²¹ it arguably is not "over" an arbitrable grievance. Therefore, under *Buffalo Forge*, the strike might be immune from a section 301 injunction. Some courts have adopted this line of reasoning.¹²²

Although this reasoning is technically consistent with *Buffalo Forge*, it nevertheless would result in unwarranted restrictions on the availability of *Boys Markets* injunctions. In order to avoid an injunction, a union would need only to assert that its substantive goal was inconsistent with current contract terms. This result elevates form over substance. Under a better approach, such self-serving declarations should not be accepted at face value. If there is a colorable claim that the contract already grants the asserted object to the union, then the dispute concerns the meaning of the existing collective bargaining agreement.¹²³ Such disputes clearly are arbitrable. When the dispute may

union agreed not to strike pending arbitration of the scope of the exception, or that the union has not reserved a privilege of first interpretation and that the particular dispute does not fall within the exception to the no-strike pledge.

¹¹⁸ Most collective bargaining agreements confine arbitration to disputes over the contractual obligations currently in force and do not include an "interest arbitration" provision. Many agreements, however, do purport to apply to all disputes between the parties which arise during the term of the agreement. Under such broad arbitration clauses, a dispute over an attempt to alter an existing contract term should be arbitrable.

¹¹⁹ Depending on how the contractual language is construed, a no-strike pledge may be deemed to include strikes over non-arbitrable grievances. Compare *New Orleans Steamship Ass'n v. ILA*, 626 F.2d 455, 468 (5th Cir. 1980), cert. granted, 450 U.S. 1029 (1981), and cases cited in note 44 *supra*, with *Delaware Coca-Cola Bottling Co. v. Teamsters, Local 326*, 624 F.2d 1182, 1185-86 (8th Cir. 1980).

¹²⁰ See *Automobile Transport, Inc. v. Ferdnace*, 420 F. Supp. 75, 78 (E.D. Mich. 1976).

¹²¹ See *Le Roy Machinery*, 147 N.L.R.B. 1431 (1964). A union may not unilaterally seek to alter a contract provision during the term of the agreement where the reopening of a bargained issue is not permitted by the agreement. *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 1220 (1951), *aff'd* 196 F.2d 680 (2d Cir. 1952). Such action is a § 8(b)(3) unfair labor practice and is potentially enjoined under § 10(j).

¹²² For lower court decisions supporting this position, see *Automobile Transport, Inc. v. Ferdnace*, 420 F. Supp. 75, 77 (E.D. Mich. 1976); *Coordinating Committee Steel Cos. v. United Steelworkers*, 436 F. Supp. 208, 215 (W.D. Pa. 1977). In *Coordinating Committee*, the local workers had struck over certain incentive pay provisions which the court found had not yet been incorporated into the collective bargaining agreement. Because the court regarded the strike as one over "new rights in future contracts," it refused to issue an injunction despite finding a clear breach of the no-strike clause and irreparable injury to the employer. *Id.* at 214-16.

¹²³ See *Mohawk Rubber Co. v. United Rubber Workers*, 462 F. Supp. 993, 999-1000 (N.D. Ohio 1978).

properly be characterized in this fashion, a no-strike injunction pending arbitration would be within *Boys Markets*.¹²⁴

In cases where the union's object clearly is inconsistent with the existing contract, injunctive relief still may be available to prevent a breach of the no-strike clause. Some arbitration clauses cover "all disputes between the parties," and not merely disputes over the interpretation of the collective bargaining agreement. Where the agreement contains this kind of clause, an injunction against a strike seeking contract modification would seem permissible.¹²⁵ Even under the more typical arbitration clause covering "all disputes over the meaning or application of" the agreement, strikes in pursuit of a purported contract change usually should be treated as arbitrable matters for purposes of section 301. If a union strikes for \$5.10 per hour and the wage clause in its contract calls for \$5.00 per hour, the union should not be able to avoid an injunction by the expediency of admitting that it has no contractual entitlement to the extra 10 cents per hour. The union in this circumstance has effectively obligated itself to use grievance-arbitration to resolve all possible disputes over the subject of wages for the term of the collective bargaining agreement.¹²⁶ It would be anomalous if a union was immune from a no-strike injunction when its claim clearly was incompatible with the current contract, but the union could be enjoined when it had a colorable contract claim, or even a frivolous claim which it had pressed to arbitration and lost.¹²⁷ While not every substantive objective of the union is arbitrable, a court should be reluctant to treat a substantive claim as being beyond an arbitrator's domain where the union is

¹²⁴ If an arbitrator then ruled that the union's substantive goal was indeed inconsistent with the contract, this ruling would not permit the union to assert that similar claims in the future were non-arbitrable and hence non-enjoinable. A subsequent strike to secure the same union goal might well be enjoinable in furtherance of the initial arbitration award. See *Campbell's '66 Express v. Rundel*, 597 F.2d 125, 128-30 (8th Cir. 1979).

¹²⁵ If this analysis is correct, employers will have a strong incentive to bargain for the broadest possible arbitration provision.

¹²⁶ Unless the union can establish that the subject matter of its claim has been excluded from arbitration, the union can be deemed to have submitted all disputes about contractually covered matters to an arbitrator — no matter how frivolous the union's claim may seem under the current contract language. A vast array of superficially wrong or worthless claims are subject to arbitration. Indeed, some seemingly farfetched claims will be upheld in arbitration, as contractual language is customarily broad and flexible, subject to arbitral interpretation. For example, even without explicit contractual language constraining an employer's proposed action, a union can oppose the proposed action by contending that the action is inconsistent with general contractual provisions such as seniority or job classification clauses, or with implied terms flowing from past practices or bargaining history, or with implied requirements of "fair dealing" and the like. See *Aluminum Co. v. UAW*, 630 F.2d 1340, 1343-44 (9th Cir. 1980); *Meat Cutters' Local 494 v. Rosauer's Super Markets*, 29 Wash. App. 150, 627 F.2d 1330, petition for review denied, 96 Wash. 2d 1002, (1981). Arbitrators are expected to use the "common law of the shop" to fill the gaps left by vague and incomplete contract language. *Id.*; *United Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. 574 (1960). In short, a strike in pursuit of a purported contract change should ordinarily be treated as an avoidance of arbitration for purposes of § 301 policy.

¹²⁷ *But see Trans Int'l Airlines, Inc. v. Teamsters*, 650 F.2d 949, 964 (9th Cir. 1981) (expressing a willingness to accept such an anomaly).

seeking to evade both its no-strike pledge and the substantive terms of the existing agreements.

There is an additional reason why a strike avowedly seeking a contract change during the course of a collective bargaining agreement may be enjoinable. In many instances, management may have retained control of a disputed matter pursuant to a broad management prerogative clause in the collective bargaining agreement. By agreeing to such a clause, the union may waive its right to bargain over the matter during the term of the collective bargaining agreement. To use economic action to try and compel bargaining on such a matter is inconsistent with the bargained waiver. Thus, a strike to extract a contract change concerning the matter in question is not only a likely breach of the union's no-strike clause, but also might constitute an unfair labor practice under section 8(b)(3) of the NLRA governing union collective bargaining obligations.¹²⁸ Accordingly, the strike could be enjoined pursuant to section 10(j) of the NLRA. If the strike is an unfair labor practice, then arguably it is also "unlawful" within the meaning of the Norris-LaGuardia Act. This would mean that a section 301 injunction to prevent the breach of a no-strike clause would not be barred by the Norris-LaGuardia Act¹²⁹ even if the contract change were deemed non-arbitrable.

Although this line of analysis is plausible, it may not guarantee injunctive relief. A union's job action is not necessarily unlawful under the Norris-LaGuardia Act merely because it violates some statutory provision.¹³⁰ Moreover, a claim under section 8(b)(3) may be subject to the exclusive primary jurisdiction of the NLRB and its enforcement machinery.¹³¹ Therefore, a preferable analytic framework would be to treat a strike seeking a change in the terms of a collective bargaining agreement as an arbitrable matter under the customary clause requiring arbitration of any dispute over the "meaning or application" of the agreement.

¹²⁸ See cases cited in note 121 *supra*.

¹²⁹ Section 7 of Norris-LaGuardia authorizes an injunction in a labor dispute where "unlawful" conduct is threatened. *Scott v. Moore*, 640 F.2d 708, 713-14 (6th Cir. 1981). Cf. *Orders of R.R. Telegraphers v. Chicago & N.W. Ry. Co.*, 362 U.S. 330, 360-62 (Whittaker, J., dissenting) (a Railway Labor Act case). The presence of statutory violations has been used, in other instances, to support a finding of unlawfulness under Norris-LaGuardia and thus to permit injunctive relief. See *Summit Airlines v. Teamsters Local 295*, 628 F.2d 787, 795 (2d Cir. 1980); *McGuire Shaft v. Tunnel Corp. Local 1791, UMW*, 475 F.2d 1209, 1214-15 (Emerg. Ct.), *cert. denied*, 412 U.S. 958 (1973). This is so even though the unlawfulness exception to Norris-LaGuardia might well have been intended to apply only to labor violence.

¹³⁰ See *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365, 370-71 (1960); *BRT v. Atlantic Coast Line R.R.*, 362 F.2d 649, 655 (5th Cir.), *aff'd*, 385 U.S. 20 (1966).

¹³¹ But see *Mullins v. Kaiser Steel*, 642 F.2d 1302, 1316 (D.C. Cir. 1980), *cert. granted*, 101 S. Ct. 2044 (1981), *rev'd*, 50 U.S.L.W. 4152 (Jan. 13, 1982) ("[W]here a § 8(e) defense is raised by a party which § 8(e) was designed to protect and where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court must entertain the defense. While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e)."), 50 U.S.L.W. at 4156. It is noteworthy that a district court would be considering the § 8(b)(3) contention anyway

CONCLUSION

Although *Buffalo Forge* established that a no-strike injunction is barred by the Norris-LaGuardia Act unless the strike is over an arbitrable underlying grievance, the decision left unresolved basic issues about the continued role of the courts in section 301 cases. This article has argued that an active judicial role is consistent with the Supreme Court's directions. Injunctions against sympathy strikes should be available if a collective bargaining agreement contains a union status quo pledge — a union's promise not to strike pending arbitration of the legality of proposed sympathy strikes. Such clauses should be enforceable in court. With regard to other strikes over non-arbitrable grievances, as where the dispute is beyond the scope of the collective bargaining agreement or is excluded by the agreement from arbitration, an injunction is precluded if the underlying dispute is in fact non-arbitrable. Similarly, an underlying dispute may fall within an explicit exception to a no-strike clause and hence be non-enjoinable. However, courts must initially decide whether the underlying dispute falls within one of these non-enjoinable categories. In doing so, judges contemplating no-strike injunctions must make initial determinations of some ultimately arbitrable issues. Such initial judicial determinations are not inconsistent with *Buffalo Forge*'s emphasis on preserving the roles of arbitrators. To the contrary, by enjoining strikes over disputes found to be arbitrable, courts will promote the peaceful and uncoerced settlement of labor disputes through arbitration, as favored by both *Boys Markets* and *Buffalo Forge*.¹³²

if the general counsel sought a § 10(j) injunction in federal district court. Consequently, the claim that a particular no-strike injunction is outside the Norris-LaGuardia Act because the strike is violative of § 8(b)(3) and hence unlawful, is not clearly preempted in a § 301 suit.

¹³² This article went to press before the decision in *Jacksonville Bulk Terminals v. I.L.A.*, 50 U.S.L.W. 4789 (June 22, 1982). That case should be consulted particularly with respect to the Norris-LaGuardia definition of a "labor dispute" discussed *supra* in text and notes at notes 65-75.