importance. However, the mention of such a factor is consistent with the view that, in looking at the application of a "neutral" state law, the Court would not inflexibly assume that federal policy does not preempt the state action.

CONCLUSION

Kearney has left open the question whether the Court will subsequently overrule the "primary jurisdiction of the NLRB" approach to preemption. For the present, state courts probably will continue to apply the primary jurisdiction approach because the Supreme Court has given them no express directive to the contrary; because the approach usually yields "correct" results;[153] and because the courts are accustomed to applying that approach. Nevertheless, it is clear that the *Kearney* rationale has put in question the doctrinal vitality of the *Garmon* primary jurisdiction inquiry. More generally, the Court has resolved the doubt left by *Briggs* as to the scope of the federally struck labor balance, and has indicated in effect that the federal balance includes all peaceful self-help which is not clearly peripheral to the concerns of the NLRA. In overruling *Briggs* the Court has expressly applied to preemption the comprehensive view of the federal labor scheme which was implicit in past "permitted activities" preemption cases.

MITCHELL S. PRESSMAN

Labor Law—*Boys Markets* Injunction—Sympathy Strike—Accommodation of the Norris-LaGuardia Act—*Buffalo Forge Co. v. United Steelworkers.*[1]

The United Steelworkers of America (the Union) and two of its locals were certified to represent office and clerical-technical employees in negotiating their first collective bargaining agreement with the Buffalo Forge Company. When negotiations broke down, these employees struck the company and established picket lines at three separate plant and office facilities in the Buffalo, New York area.[2] Two days later the production and maintenance employees, also represented by the United Steelworkers, refused to cross the office employees' picket lines at one of the company's plants.[3] Shortly thereafter,

[153] *See* Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1359 (1972). By "correct" results are meant results consistent with the view that the states may not regulate labor so as to disrupt the federally struck labor balance.

[1] — U.S. —, 96 S. Ct. 3141 (1976).

[2] *Id.* at 3143-44.

[3] *Id.* at 3144. Throughout this note the terms refusal to cross a picket line, sympathy strike, and honoring a sister union's picket line will be used interchangeably. A

and pursuant to the Union's direction, production and maintenance employees at the other two plants similarly refused to cross the picket lines.

When the strike continued, the company sought a preliminary injunction in United States district court pursuant to section 301(a) of the Labor Management Relations Act (LMRA),[4] claiming that the strike resulted from a dispute over truck driving assignments and should be arbitrated under the collective bargaining agreement's mandatory grievance procedure.[5] Alternatively, the company claimed that the work stoppages were sympathy strikes, and as such, violated the agreement's "no-strike" clause.[6] The district court found that the

sympathy strike may be defined as a work stoppage solely in deference to another union's picket line. *See* NLRB v. Rockaway News Supply Co., 345 U.S. 71, 81 (1953) (dissenting opinion).

It has been recognized that employees have the right to participate in sympathy strike activity. NLRB v. Difco Labs, Inc., 427 F.2d 170, 171-72, 74 L.R.R.M. 2273, 2274 (6th Cir. 1970); NLRB v. Southern Greyhound Lines, Inc., 426 F.2d 1299, 1301, 74 L.R.R.M. 2080, 2082 (5th Cir. 1970); NLRB v. John Stepp's Friendly Ford, Inc. 338 F.2d 833, 836, 57 L.R.R.M. 2442, 2444 (9th Cir. 1964). However, that right can be waived in lieu of other benefits. See note 142 *infra*.

[4] 29 U.S.C. 185(a) (1970). Section 301(a) provides:

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

[5] 96 S. Ct. at 3144. The clause outlining the mandatory grievance procedure provides:

> Should differences arise between the [employer] and any employee covered by this Agreement as to the meaning and application of the provisions of this Agreement, or should any trouble of any kind arise in the plant, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately [under the six step grievance and arbitration procedure provided in sections 27 through 32.]

Id. at 3143-44.

[6] *Id.* at 3144. The no-strike clause provides:

> There shall be no strikes, work stoppages or interruption or impeding of work. No Officers or representatives of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in any such activity. The Union recognizes its possible liabilities for violation of this provision and will use its influence to see that work stoppages are prevented. Unsuccessful efforts by Union officers or Union representatives to prevent and terminate conduct prohibited by this paragraph, will not be construed as 'aid' or 'condonation' of such conduct and shall not result in any disciplinary actions against the Officers, committeemen or stewards involved.

Id. at 3143 n.1.

It should be noted at the outset that though there seem to be no qualifications to this general no-strike clause, it has been recognized that a general no-strike clause does not necessarily cover strikes over unfair labor practices, Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 281-83 (1956), or strikes over safety disputes, 29 U.S.C. § 143 (1970); *cf.* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 385 (1974). Therefore, it is possible that a broad no-strike clause does not implicitly bar sympathy strikes.

activity was not a protest over truck driving assignments, but rather was a sympathy strike in support of the office and clerical-technical employees.[7] As such, the court concluded that "there [was] no arbitrable grievance between the parties"[8] and consequently, that the sympathy strike situation was not within the narrow exception to the Norris-LaGuardia Act[9] marked out by the Supreme Court in *Boys Markets, Inc. v. Retail Clerks Union.*[10] Thus, perceiving itself to be bound by the Norris-LaGuardia Act, the district court determined that it lacked the power to issue an injunction. On appeal, the Second Circuit affirmed.[11] The court of appeals held that the anti-injunction policies of section 4 of the Norris-LaGuardia Act[12] should be given ef-

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[7] Buffalo Forge Co. v. United Steelworkers, 386 F. Supp. 405, 408-09, 88 L.R.R.M. 2063, 2065-66 (W.D.N.Y. 1974).

[8] *Id.* at 409, 88 L.R.R.M. at 2066.

[9] 29 U.S.C. §§ 101 *et seq.* (1970). The Norris-LaGuardia Act was enacted in 1932 and was essentially designed to prohibit the federal judiciary from issuing injunctions in a broad range of labor activity. 29 U.S.C. § 104 (1970). In those areas where injunctions are not prohibited, the Act provides that strict procedural requirements be followed before an injunction can lawfully issue. 29 U.S.C. § 107 (1970).

[10] 398 U.S. 235 (1970). In *Boys Markets* the Supreme Court found that injunctive relief was necessary to effectuate the pro-arbitration policies of § 301 of the LMRA, notwithstanding the strict anti-injunction provisions of the Norris La-Guardia Act. See text at notes 45-62 *infra* for discussion of *Boys Markets*. See text at notes 22-26 *infra* for discussion of the Norris LaGuardia Act.

[11] Buffalo Forge Co. v. United Steelworkers, 517 F.2d 1207, 1211, 89 L.R.R.M. 2303, 2306 (2d Cir. 1975). The production and maintenance employees had returned to work on the next regular work day after the district court's decision. The court of appeals held, however, that this did not render the case moot since "the work stoppage under review may . . . 'be resumed at any time in the near future.'" *Id.* at 1210, 89 L.R.R.M. at 2305 *quoting* joint appendix at 2a. The Supreme Court agreed. 96 S. Ct. at 3145 n.8.

[12] Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1970), provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing whether singly or in concert, any of the following acts:
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> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
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> . . . .
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

tect where no disservice was done to the pro-arbitration policies of section 301(a) of the LMRA.[13]

The Supreme Court affirmed,[14] and in a 5-4 decision, HELD: In sympathy strike situations there is no necessity to accommodate the anti-injunction policies of the Norris-LaGuardia Act[15] to the pro-arbitration policies of section 301 of the LMRA.[16] Thus, the district court had correctly determined that the Norris-LaGuardia Act prohibited the issuance of an injunction in this situation.[17] The Court reasoned that in *Boys Markets*, the justification for accommodating the anti-injunction provision of section 4 of the Norris-LaGuardia Act to the pro-arbitration policies of the LMRA was to give effect to the congressional preference favoring private settlement of disputes through arbitration. This was to be accomplished by allowing injunctions to issue despite the anti-injunction provisions of Norris where a strike frustrated the arbitral process.[18] The Court suggested, however, that since a sympathy strike is not a strike over an arbitral grievance and has neither the purpose nor the effect of frustrating the arbitral process, the *Buffalo Forge* case was not controlled by *Boys Markets.*[19]

Literally interpreted, the Norris-LaGuardia Act would seem to prohibit an injunction from issuing in a sympathy strike situation.[20] However, the judiciary has long recognized that this Act does not exist in a vacuum and must co-exist with other legislative labor enactments.[21] Accordingly, the courts have sought to strike a balance between apparently conflicting statutory policies without disregarding the core purpose of either statute through the process of accommodation. This note will focus on the process of accommodation as it relates to the *Buffalo Forge* sympathy strike situation. The discussion will initially review the Court's landmark accommodation in *Boys Markets, Inc. v. Retail Clerks Union.* The manner in which the majority and dissent applied the *Boys Markets* accommodation to the *Buffalo Forge* facts will then be examined. Finally, this note will propose a possible basis for accommodating the Norris-La Guardia Act to the scheme of statutory labor policies to justify the issuance of an injunction in a sympathy strike situation, albeit in limited circumstances. Although the Court accurately concluded that the *Boys Markets* principles were

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[13] Buffalo Forge Co. v. United Steelworkers, 517 F.2d 1207, 1211, 89 L.R.R.M. 2303, 2306 (2d Cir. 1975).

[14] 96 S. Ct. 3141, 3150 (1976).

[15] See text and notes at notes 22-26 *infra*.

[16] The pro-arbitration policies of the LMRA are evidenced in various sections of the Act. *See, e.g.*, 29 U.S.C. § 171(b) ("the settlement of issues between employers and employees . . . may be advanced by making available full and adequate governmental facilities for . . . voluntary arbitration. . . .")

[17] 96 S. Ct. at 3149.

[18] *Id.* at 3147.

[19] *Id.*

[20] See text of § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104(a), at note 12 *supra*.

[21] See text and notes at notes 102-12 *infra*.

inapposite in a *Buffalo Forge* situation, it will be submitted that this conclusion was based on an unnecessarily narrow view of the accommodation process. It will be demonstrated that the accommodation process need not be undertaken solely in furtherance of arbitration; rather, the process, if broadly conceived, can accomplish other labor objectives embodied in various congressional enactments, while retaining the vitality of the Norris-LaGuardia Act in those situations for which it was originally intended.

I. HISTORICAL BACKGROUND OF *BOYS MARKETS*

The Norris-LaGuardia Act and the National Labor Relations Act (NLRA) were instrumental in giving unions the assistance necessary to organize and bargain collectively. For example, prior to Norris, the federal district court's broad use of the injunctive power severely restricted the use of the strike weapon by unions in their organizing efforts.[22] The Norris-LaGuardia Act curtailed this judicial abuse of the injunctive power by withdrawing from the federal courts the power to issue injunctions in most labor disputes.[23] These anti-injunction policies,[24] buttressed by the affirmative rights to organize and bargain collectively embodied in the NLRA,[25] gave unions the statutory assistance they needed to grow and mature.[26] While the statutory assistance had certain positive effects, not the least of which was the growth of unionism and the spread of collective bargaining, it also gave rise to certain negative consequences. For example, under the statutory scheme, unions found that they could breach collective bargaining agreements with relative impunity. Thus, an employer seeking to enforce a collective bargaining agreement in federal court faced difficulties in meeting the amount in controversy or the diversity of citizenship jurisdictional requirements.[27] Employer enforce-

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[22] J. Axelrod, *The Application Of the Boys Markets Decision in the Federal Courts*, 16 B.C. IND. & COM. L. REV. 893, 895 (1975) [hereinafter cited as Axelrod].

[23] *See Boys Markets*, 398 U.S. at 250; United States v. Hutcheson, 312 U.S. 219, 236 (1941); Milk Wagon Drivers' Local No. 753 v. Lake Valley Farm Products, Inc., 311 U.S. 91, 102 (1940). *See generally*, F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930).

Section 4 of Norris enumerates a number of situations in which the federal courts are specifically prohibited from issuing injunctions in "any case involving or growing out of any labor dispute." 29 U.S.C. § 104 (1970). See note 12 *supra* for the specific prohibitions relevant to this note.

[24] See the Declaration of Purpose to the Norris-LaGuardia Act, 29 U.S.C. § 102 (1970).

[25] 29 U.S.C. § 157 (1970). *See generally*, R. GORMAN, BASIC TEXT ON LABOR LAW 4-5 (1976).

[26] Axelrod, *supra* note 22, at 896. For example, from 1935 to 1947 union membership grew from 3 million to 15 million. A. COX & D. BOK, LABOR LAW 105 (7th Ed. 1969).

[27] *See* A. COX, D. BOK & R. GORMAN, LABOR LAW 646 (8th Ed. 1977); S. REP. NO. 105, 80th Cong., 1st Sess. 17 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 423 (1948). For example, unions abused their newfound power by, among other things, calling strikes that threatened injury to

ment of the collective bargaining agreement was equally difficult in state courts because of "rules of local law which made suits against labor organizations difficult or impossible, by reason of their status as unincorporated associations."[28] By contrast, unions had little difficulty calling an employer to task for virtually any breach of the collective bargaining agreement.[29]

Congress resolved these inequities by enacting the Labor Management Relations Act of 1947.[30] Whereas the NLRA as enacted in 1935 focused mainly on the problem of employer interference with union organizational activity, the LMRA emphasized the collective bargaining phase of industrial relations. Thus, section 301(a) of this Act allowed suits for violation of the collective bargaining agreement to be brought in the federal district court without regard to diversity of citizenship or amount in controversy.[31] While the courts readily ascertained that section 301(a) granted employers a basis for obtaining damages where the union was found to have violated the collective bargaining agreement,[32] the question of what impact, if any, the enactment of section 301(a) had on the anti-injunction mandates of the Norris-LaGuardia Act was not so easily resolved.[33]

the public health and safety and engaging in secondary boycotts that could severely debilitate a given industry. COX & BOK, *supra* note 26, at 107-08. *See* 93 CONG. REC. at 7690 (1947) (remarks of Sen. Taft), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1652-56 (1948).

[28] Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 510 (1962). For further discussion of the problem of suing unions in state courts, see Keene, *The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to Avco and Beyond*, 15 VILL. L. REV. 32, 33-34 (1969). *See generally*, Stewart, *No-Strike Clauses in the Federal Courts*, 59 MICH.L. REV. 673 (1961).

[29] Keene, *supra* note 28, at 34.

[30] 29 U.S.C. §§ 141 *et seq.* (1970).

[31] 29 U.S.C. § 185(a). See note 4 *supra* for text of § 301(a).

[32] *E.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-58 (1957). The Court in *Textile Workers* recognized that a possible construction of § 301(a) was that it was merely a grant of jurisdiction over labor unions. *Id.* at 450-51. However the Court stated that it seemed "clear . . . that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes," *id.* at 456, and, therefore, § 301 allowed the federal court to fashion substantive law and grant damages for breaches of collective bargaining agreements. *Id.* at 456, 459. The significant legislative history of § 301 is contained in an appendix to Mr. Justice Frankfurter's dissent in *Textile Workers*, 353 U.S. at 485-546.

[33] There was division among the circuit court of appeals as to whether § 301 implicitly granted federal courts the power to enjoin strikes in violation of the collective bargaining agreement. The First, Second and Seventh Circuits held that § 301 did not affect the Norris-LaGuardia Act's ban on injunctive relief. W.L. Mead, Inc. v. International Bhd. of Teamsters Local 25, 217 F.2d 6, 10, 35 L.R.R.M. 2148, 2151 (1st Cir. 1954); A.H. Bull Steamship Co. v. Seafarers' Int'l Union, 250 F.2d 326, 332, 41 L.R.R.M. 2121, 2126 (2d Cir. 1957); Sinclair Refining Co. v. Atkinson, 290 F.2d 312, 320, 48 L.R.R.M. 2045, 2052 (7th Cir. 1961), *aff'd* 370 U.S. 195 (1962). The Tenth Circuit, however, held that an injunction could issue under § 301 to enjoin a strike in violation of the collective bargaining agreement, notwithstanding the Norris-LaGuardia Act. International Bhd. of Teamsters Local 795 v. Yellow Trans. Frgt. Lines, 282 F.2d 345, 349-50, 46 L.R.R.M. 2915, 2918 (10th Cir. 1960).

Sinclair Refining Co. v. Atkinson[34] marked the Supreme Court's initial confrontation with the question of whether section 301(a) implicitly granted federal district courts the power to issue injunctions for violations of collective bargaining agreements notwithstanding the anti-injunction provisions of section 4 of the Norris-LaGuardia Act.[35] In *Sinclair* the employer sued to enforce a collective bargaining agreement, claiming that since the union had engaged in nine separate work stoppages over disputes that, according to the contract, should have been submitted to the grievance procedure, his contractual rights against further deliberate violations of the no-strike clause could only be protected by the issuance of an injunction.[36] The Supreme Court rejected these contentions and held that the Norris-LaGuardia Act expressly prohibited injunctions against this type of strike activity, regardless of whether the activity was a breach of the collective bargaining agreement remediable under section 301.[37] The Court based its holding on the conclusion that there was no real conflict between the LMRA's protection of the collective bargaining agreement and the Norris-LaGuardia Act's prohibition of injunctions. First, the Court noted that some provisions of the LMRA explicitly amended or repealed other provisions of both the National Labor Relations Act and the Norris-LaGuardia Act.[38] If Congress had intended section 301 to alter the anti-injunction provisions of section 4 of the Norris-LaGuardia Act then "it certainly seems likely that it would have made its intent known in the same express manner."[39] Second, the Court pointed to legislative history of the LMRA which revealed that Congress had considered whether to repeal the Norris-LaGuardia Act to the extent of allowing injunctions for breaches of collective bargaining agreements and had decided against it.[40] It seems, therefore, that the

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[34] 370 U.S. 195 (1962).

[35] The Court had previously held that Congress had not limited § 301 to damage suits but had additionally granted federal courts the power to issue injunctions specifically enforcing an agreement to arbitrate even though a literal reading of the Norris-LaGuardia Act might prohibit it. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 458-59. The Court held that the "failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed." *Id.* at 458.

[36] *Id.* at 197-98. The district court had dismissed Sinclair's complaint holding that the dispute between Sinclair and the union was a "labor dispute" and as such jurisdiction to issue injunctions had been withdrawn by § 4 of the Norris-LaGuardia Act; the court of appeals affirmed for the same reason. *Id.* at 198.

[37] *Id.* at 213-14. The Court stated that issuing an injunction against this strike activity would run counter to §§ 4(a),(e),(i) of the Norris-LaGuardia Act. *Id.* at 212. See note 12 *supra* for text of these sections.

[38] *Id.* at 204-05. Section 101 of the LMRA, 29 U.S.C. § 160(h), amended § 10(h) of the NLRA and § 208(b) of the Taft Hartley Act, 29 U.S.C. § 178(b), by permitting injunctions to be obtained by the NLRB and the Attorney General. Section 302(e), 29 U.S.C. § 186(e), amended the Norris-LaGuardia Act by permitting private litigants to obtain injunctions to protect the integrity of the employees' collective bargaining representatives in carrying out their responsibilities; and § 301(e) of the LMRA, 29 U.S.C. § 185(e), repealed § 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106.

[39] 370 U.S. at 204.

[40] *Id.* at 205. Mr. Justice Black, writing for the majority, recognized the merits of allowing injunctions to issue in breaches of collective bargaining agreements. He agreed

majority in *Sinclair* was content to give a rigidly literal reading to section 301 and the legislative history of the LMRA and thereby leave intact the broad proscriptions of the Norris-LaGuardia Act. The Court simply refused to resolve the conflict between the LMRA's vigorous encouragement of the use of arbitration and the Norris-LaGuardia Act's prohibition of the one remedy necessary to give full effect to this process. The Court opted instead to let Congress clarify the meaning of section 301, possibly concluding that such a reconciliation of underlying policies of statutes was not an appropriate judicial function when it was directly contrary to the plain words of the statute.

Justice Brennan, in a vigorous dissent,[41] argued that since national labor policy clearly encouraged arbitration as the preferred method of settling labor disputes, the anti-injunction provisions of Norris should be accommodated and injunctive relief should be available against strikes over disputes that the union had promised to arbitrate.[42] Brennan stated that this result would be consistent with previous holdings[43] that the Norris-LaGuardia Act did not bar injunctive relief when it conflicted with labor policies embodied in subsequent Acts.[44]

Boys Markets, Inc. v. Retail Clerks Union[45] gave the Court an oppor-

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with the company that § 301 "would be worth more to [employers] if they could also get a federal court injunction to bar a breach of their collective bargaining agreements," *id.* at 214, but he felt that any change in the law "is one of legislative policy properly within the exclusive domain of Congress—it is a question for lawmakers, not law interpreters." *Id.* at 215. Moreover, Justice Black noted that Congress had opted to make violations of the collective bargaining agreement an unfair labor practice enjoinable on the instance of the NLRB. *Id.* at 206-07. However, Mr. Justice Black failed to point out that this proposal was deleted from the final version of the LMRA of 1947; instead the Conference Report stated that the enforcement of collective bargaining agreements should be left to the "usual processes of the law and not to the National Labor Relations Board." H. R. REP. NO. 510, 80th Cong., 1st Sess. 42 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 546 (1948).

[41] 370 U.S. at 215.

[42] *Id.* at 218, 225.

[43] *Id.* at 217-18. The Supreme Court had previously "accommodated" § 4 when the anti-injunction provisions conflicted with the policies of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1970). Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 40 (1957); Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232, 237-38 (1949); Virginian Ry. v. System Fed'n, 300 U.S. 515, 562-63 (1937). In *Chicago River*, the Court held that federal courts, notwithstanding Norris-LaGuardia, may enjoin strikes over disputes as to the interpretation of an existing collective bargaining agreement, 353 U.S. at 31-32, 40, since such strikes flout the duty imposed on the union by the Railway Labor Act to settle "minor disputes" by submission to the National Railroad Adjustment Board, rather than by resorting to economic pressure. *Id.* at 40.

[44] 370 U.S. at 216-18, 225. Mr. Justice Brennan answered the majority's argument that since Congress had decided not to repeal the Norris-LaGuardia Act the Court should be bound by their legislative intent. He stated: "[C]ongressional rejection of outright repeal certainly does not imply hostility to an attempt by the courts to accommodate all statutes pertinent to the decision of cases before them." *Id.* at 220.

[45] 398 U.S. 235 (1970).

tunity to reconsider its *Sinclair* decision.[46] In *Boys Markets,* a union involved in a dispute with the employer[47] chose to strike instead of submitting the grievance to arbitration as mandated by the collective bargaining agreement. The employer originally brought suit in the California Superior Court and was granted a temporary restraining order. The union then removed the case to federal district court and sought to quash the state court injunction. The district court found that the union was striking over an arbitrable grievance. Therefore, the court enjoined the strike and ordered the union to arbitrate the issue.[48] The Court of Appeals, considering itself bound by *Sinclair,* reversed.[49] The Supreme Court, in turn, reversed the judgment of the Court of Appeals,[50] and held that where the union breaches a collective bargaining agreement by striking over an arbitrable grievance, section 4 of the Norris-LaGuardia Act should be "accommodated" with section 301 of the LMRA so as to allow an injunction to issue.[51] The Court justified the accommodation of section 4 and the reversal of *Sinclair* on two grounds. First, the Court noted "the importance that Congress has attached generally to the voluntary settlement of labor disputes without resort to self-help and more particularly to ar-

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[46] For extensive criticism and commentary urging reconsideration of the *Sinclair* decision, see generally, *Report of Special Atkinson–Sinclair Committee, A.B.A. Labor Relations Law Section-Proceedings* 226 (1963); Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions,* 63 COLUM. L. REV. 1027 (1963); Aaron, *The Labor Injunction Reappraised,* 10 U.C.L.A. L. REV. 292 (1963); Bartosic, *Injunctions and Section 301: The Patchwork of Avco and Philadelphia Marine on the Fabric of National Labor Policy,* 69 COLUM. L. REV. 980 (1969); Danau, *Three Problems in Labor Arbitration,* 55 VA. L. REV. 427 (1969); Keene, *The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to Avco and Beyond,* 15 VILL. L. REV. 32 (1969); Kiernan, *Availability of Injunctions Against Breaches of No-Strike Agreements in Labor Contracts,* 32 ALBANY L. REV. 303 (1968); Wellington, *The No-Strike Clause and the Labor Injunction: Time for a Re-examination,* 30 U. PITT. L. REV. 293 (1968); Wellington and Albert, *Statutory Interpretation and The Political Process: A Comment on Sinclair v. Atkinson,* 72 YALE L. J. 1547 (1963).

[47] *Id.* at 238-39. The dispute in *Boys Markets* arose when a supervisor began to rearrange the merchandise in the frozen foods cases. A union representative insisted that the restocking be done by union personnel. When the company refused, the union struck. *Id.* at 239.

[48] *Id.* at 240.

[49] Boys Markets, Inc. v. Retail Clerks Union, 416 F.2d 368, 370, 72 L.R.R.M. 2527, 2528 (9th Cir. 1969).

[50] 398 U.S. at 255.

[51] 398 U.S. at 254, citing the dissent in *Sinclair.* Mr. Justice Black dissented essentially restating his majority opinion in *Sinclair. Id.* at 255. See discussion of *Sinclair* at notes 34-44 *supra.* He believed that if *Sinclair* was to be overruled, then Congress, and not the Court, should do so. *Id.* at 256. The Court advanced no cogent argument rebutting Mr. Justice Black's contention in *Sinclair,* that legislative history showed that Congress had considered, and rejected, the possibility of allowing injunctions for breaches of the collective bargaining agreement. In his *Boys Markets* dissent, Mr. Justice Black further argued that in the intervening years between *Sinclair* and *Boys Markets,* Congress had been urged to legislatively overrule the *Sinclair* decision, but did not. From this he concluded that the Court should accept this lack of action as an approval of the *Sinclair* decision. *Id.* at 256. The majority countered that argument by merely stating: "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Id.* at 241.

bitration as a means to this end."[52] The Court then reasoned that *Sinclair* frustrated this policy since the employer's incentive to include the arbitration clause as the *quid pro quo* for a no-strike clause was necessarily dissipated if the no-strike clause could not be specifically enforced.[53] Moreover, it was noted that under *Sinclair,* the arbitral process itself was obviated,[54] in that if the union's strike over an arbitral grievance could not be enjoined,[55] then the employer would be forced to forego the arbitration process altogether, and to concede the disputed issue to the union.[56]

The Court offered as its second reason for reversing *Sinclair* the conclusion that *Sinclair* in conjunction with *Avco Corp. v. Aero Lodge 735,*[57] had effectively displaced the jurisdiction of state courts to issue injunctions enforcing collective bargaining agreements:[58] While

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[52] *Id.* at 252. For previous judicial recognition of the congressional policy favoring arbitration see generally Local 174, Brotherhood of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). For a discussion of the "presumption of arbitrability" see note 67 *infra.*

[53] 398 U.S. at 248.

[54] *Id.* at 252.

[55] The majority recognized that the employer had other avenues available to redress a breach of the no-strike clause, however they considered these remedies distructive to harmonious Labor-Management relations. *Id.* at 248. On the issue of the effectiveness of alternate remedies, the Court adopted the position of the neutral members of the A.B.A. Sinclair Committee.

> Under existing laws, employers may maintain an action for damages resulting from a strike in breach of contract and may discipline the employees involved. In many cases, however, neither of these alternatives will be feasible. Discharge of the strikers is often inexpedient because of a lack of qualified replacements or because of the adverse effect on relationships within the plant. The damage remedy may also be unsatisfactory because the employer's losses are often hard to calculate and because the employer may hesitate to exacerbate relations with the union by bringing a damage action. Hence, injunctive relief will often be the only effective means by which to remedy the breach of the no-strike pledge and thus effectuate federal labor policy.

Id. at 248-49 n.17, *quoting from Report of Special Atkinson-Sinclair Committee, A.B.A. Labor Relations Law Section Proceedings* 226, 242 (1963) (footnotes omitted).

[56] *See* 398 U.S. at 248-49. In explaining how a strike over an arbitral grievance obviates the congressional policy favoring arbitration, one judge has stated:

> [T]he union's actions made it clear that they did not intend to return to work until the Company conceded that the tasks involved had to be performed by union men.
>
> Clearly, this strike had the effect of undermining the rule of law that favors the arbitration of labor disputes, since the strike was an attempt to force a union victory on the very issue that was made arbitrable not through the presentation of reasoned arguments to a neutral arbitrator, but rather through the use of sheer economic force. If the tactic had been successful, it would have settled the arbitrable dispute, making arbitration superfluous and thereby defeating the arbitrator's jurisdiction.

NAPA Pittsburg, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 323, 87 L.R.R.M. 2044, 2047 (3d Cir.) (en banc) (dissenting opinion), *cert. denied,* 419 U.S. 1049 (1974).

[57] 390 U.S. 557 (1968).

[58] In *Avco,* the Tennessee state court granted an *ex parte* injunction against a strike in violation of the collective bargaining agreement. The union sought removal of

Sinclair made it clear that an employer seeking to enjoin a breach of the collective bargaining agreement's arbitration clause could not be helped by the federal courts, *Avco's* holding allowing removal of suits involving labor contract violations from state court to federal court effectively precluded the only avenue of relief available to the employer—suit for injunctive relief in the state court. Once such a suit was removed to federal court under *Avco*, *Sinclair* controlled and no injunctive relief was available.[59] The *Boys Markets* Court held that this result was unacceptable for two reasons. First, this result was found to be inconsistent with the purpose of section 301, which was to supplement, not diminish, state court jurisdiction.[60] Second, it was feared that this situation would inevitably lead to forum shopping and uneven enforcement of arbitration agreements.[61]

Implying from the policy of section 301 that injunctive relief was available, the Court then delineated the substantive prerequisites required before a *Boys Markets* injunction could issue.

> . . . When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a con-

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the case to the federal district court claiming that § 301 gave the court the necessary original jurisdiction over the dispute before removal can occur. The federal district court, after granting removal, also granted dissolution of the state court injunction. *Id.* at 558-59.

The removal was based on 28 U.S.C. § 1441 which provides in part:

> . . any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

It might be logically argued that the district court in *Avco* did not have original jurisdiction over a suit brought under § 301 and therefore the case should not have been removed. The reasoning would be that if the Norris-LaGuardia Act states that "[n]o court of the United States shall have *jurisdiction*" to issue an injunction, then the federal district court lacks the requisite "original jurisdiction" required by the removal statute. In *Avco* however, the Supreme Court did not accept this argument. "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy." 390 U.S. at 561.

[59] 398 U.S. at 244. The majority in *Boys Markets* considered remedying this anomaly by adopting the alternative proposed by some commentators: to extend the *Sinclair* decision to the states as well as the federal courts. *Id.* at 247. The Court rejected this alternative for two reasons. First, Congress did not intend to deprive state courts of the power to grant injunctive relief when enforcing collective bargaining agreements either in the Norris-LaGuardia Act or § 301. *Id.*, *accepting the reasoning of* McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P. 2d 322 (1957). The second reason "for not resolving the existing dilemma by extending *Sinclair* to the States [was] the devastating implications for the enforceability of arbitration agreements . . . ." 398 U.S. at 247.

[60] *Id.* at 245-46. *See also* Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), where the Court reached the same conclusion that the congressional purpose of § 301 was to supplement and not to encroach on state court jurisdiction. *Id.* at 511.

[61] 398 U.S. at 245-46.

> dition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity. . . .[62]

Boys Markets was, then, the culmination of a long history of judicial interpretation of section 301 from what objectively might have been characterized as a mere procedural grant of jurisdiction to a substantive vehicle for implementing the often conflicting aims of labor statutes. The Court in *Boys Markets* had thus authorized a narrow exception to the Norris-LaGuardia Act in the circumstance where a union strikes over a grievance that it had agreed to arbitrate. It thereby cemented into the developing labor law, in as bold a manner of judicial interpretation of section 301 as hitherto seen, the canon of statutory construction that when the aims of two statutes in the pattern of labor enactments are *apparently* conflicting, some attempt should be made to reconcile the conflict by looking to the underlying policies supporting the respective enactments.

II. THE SUPREME COURT'S ANALYSIS IN *BUFFALO FORGE*

The federal courts encountered little difficulty in applying the *Boys Markets* standard where a union responded to a grievance by striking rather than by submitting the grievance to arbitration as mandated by the collective bargaining agreement.[63] Within three years after the *Boys Markets* decision, however, the circuit courts were in conflict over the question of whether an injunction could issue to enjoin a sympathy strike where the collective bargaining agreement contained both a no-strike clause and a mandatory arbitration procedure. The Third,[64]

[62] *Id.* at 254, *quoted from* Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 228 (1962) (emphasis in original). For the delineation of the ordinary principals of equity required in *Boys Markets* see note 141 *infra*, and see generally WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 (1973).

[63] *See generally*, Axelrod, *supra* note 22, for a discussion of the application of the *Boys Markets* standards.

[64] Island Creek Coal Co. v. United Mine Workers Local 898, 507 F.2d 650, 653, 88 L.R.R.M. 2364, 2366 (3d Cir.), *cert. denied*, 423 U.S. 877 (1975) (Court implied a no-strike clause where mandatory arbitration procedure was present and then issued injunction); NAPA Pittsburg, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 322, 324, 87 L.R.R.M. 2044, 2045-46 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1049 (1974) (Union withheld the right to honor the picket lines of "primary" labor disputes; injunction issued since it was arbitrable whether the initial strike was primary or secondary).

The court in *NAPA* stated that "[r]equiring arbitration does not nullify the union's right to honor a primary picket line, but only suspends the exercise of the right until its existence is established by an arbitrator's decision." *Id.* at 324, 87 L.R.R.M. at 2046. Clearly this assumption is erroneous, since it has been recognized that strikes are dependent on timing for their success and are not easily reestablished once broken. *See* Danau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 466-67 (1969).

Fourth,[65] and Eighth[66] Circuits held that an injunction could issue in a sympathy strike situation. These courts generally reasoned that the presence of a mandatory arbitration clause in the collective bargaining agreement raised a presumption that any dispute was arbitrable unless it could be said with "positive assurance" that the dispute was not covered by the arbitration clause.[67] Since interpretations of the labor contract are generally left to the arbitrator, the scope of the no-strike clause was an arbitrable dispute and, as such, a *Boys Markets* injunction could then issue to enjoin the strike. The Second,[68] Fifth,[69] and Sixth[70] Circuits, on the other hand, held that no injunc-

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[65] Armco Steel Corp. v. United Mine Workers, 505 F.2d 1129, 1132, 87 L.R.R.M. 2974, 2976 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975) (Injunction issued on an implied no-strike clause); Willmington Shipping Co. v. Longshoremen's Local 1426, 86 L.R.R.M. 2846, 2847 (4th Cir.), *cert. denied*, 419 U.S. 1022 (1974) (Union reserved the right to honor "bona fide" picket lines, and employer contested whether picket line was bona fide thereby creating an arbitrable issue; injunction issued); Pilot Freight Carriers, Inc. v. Brotherhood of Teamsters Local 391, 497 F.2d 311, 312, 86 L.R.R.M. 2337, 2337 (4th Cir.), *cert. denied*, 419 U.S. 869 (1974) (Contract gave individual union members the right to refuse to cross a primary picket line, court vacated injunction against individual members but allowed an injunction against the union); Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209, 1213-14, 84 L.R.R.M. 2481, 2484 (4th Cir. 1973) (Issue of whether sympathetic strike is a violation of the contract is "clearly" arbitrable; injunction issued).

[66] Associated General Contractors v. International Union of Operating Engineers Local 49, 519 F.2d 269, 273,89 L.R.R.M. 3077, 3080 (8th Cir. 1975) (Held that a preliminary injunction was properly issued against a sympathy strike, where the contract "afforded individual employees the right to honor a union picket line"; the Eighth Circuit had the benefit of an arbitrator's decision holding that the employees' actions were individual action and not concerted union activity but since it was an arbitrable issue the injunction was properly issued); Valmac Indus., Inc. v. Food Handlers, Local 425, 519 F.2d 263, 268, 89 L.R.R.M. 3073, 3077 (8th Cir. 1975) *vacated and remanded*, 96 S. Ct. 3215 (1976) (Allowed issuance of injunction against sympathy strike where union had reserved the right of "employees to refuse to pass through a picket line authorized by the union"; a curious twist to this case is that the company originally demanded arbitration and then refused to go forward with arbitration after the strike was enjoined, claiming that the district judge had "already decided" the issue).

[67] The "presumption of arbitrability" is supported by the Supreme Court's decision in the *Steelworkers Trilogy*. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). Its genesis can be traced to the following statement: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 582-83. A more recent post-*Boys Markets* decision supporting the "presumption" in safety disputes is Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 379 (1974). The problem with applying this presumption in a sympathy strike situation is that it enjoins possibly legal strike activity. See text at notes 135-40 *infra*.

[68] Buffalo Forge Co. v. United Steelworkers, 517 F.2d 1207, 1211, 89 L.R.R.M. 2303, 2306 (2d Cir. 1975), *aff'd* 96 S.Ct..3141 (1976) (See text at notes 11-13 *supra*).

[69] Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372, 1373-74, 81 L.R.R.M. 2644, 2645-46 (5th Cir. 1972) (Strike was not "over" a grievance which the parties were contractually bound to arbitrate and, therefore, a *Boys Markets* injunction could not issue).

[70] Plain Dealer Publishing Co. v. Cleveland Typographical Union Local 53, 520

tion could issue in a sympathy strike situation.[71] These courts[72] generally reiterated the language of the *Boys Markets* holding that the strike is enjoinable only if "it is *over* a grievance which both parties are contractually bound to arbitrate. . . ."[73] In that a sympathy strike is not a response to a dispute with the employer, but rather is a work stoppage in deference to another union's picket line, this activity falls outside the rule of *Boys Markets.*[74]

In *Buffalo Forge,* the Supreme Court eliminated continued confusion over the issue of the enjoinability of sympathy strikes by adopting the Second Circuit's approach. The Court distinguished *Boys Markets* by pointing out that in that case, the union had chosen to strike instead of arbitrating—a direct violation of the collective bargaining agreement. According to the Court, injunctive relief was necessary in order to effectuate "the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties."[75] In

F.2d 1220, 1221-22, 90 L.R.R.M. 2110, 2110 (6th Cir. 1975) ("[T]he narrowly circumscribed injunctive relief authorized in *Boys Markets* did not extend to the prohibition of work stoppages generated by lawful labor disputes . . . ."; no injunction may issue).

[71] The Seventh Circuit has not formulated a clear sympathy strike policy. It originally sustained an *ex parte* temporary restraining order in a sympathy strike stating that the "exceptionally broad arbitration clause is itself expansive enough to encompass the present disputes." Inland Steel Co. v. Local 1545, United Mine Workers, 505 F.2d 293, 298, 87 L.R.R.M. 2733, 2736-37 (7th Cir. 1974). However in Hyster Co. v. Independent Towing & Lifting Machine Ass'n, 519 F.2d 89, 89 L.R.R.M. 2885 (7th Cir. 1975), the Seventh Circuit distinguished *Inland Steel* on the grounds that the language of the arbitration clause was not as encompassing as the clause in *Inland Steel.* The court also introduced the additional requirement that in sympathy strike situations the waiver of the right to honor picket lines must be "clear and unmistakable." *Id.* at 92, 89 L.R.R.M. at 2887. *Accord,* Gary Hobart Water Corp. v. NLRB, 511 F.2d 284, 287, 88 L.R.R.M. 2830, 2832 (7th Cir.), *cert. denied,* 423 U.S. 925 (1975).

[72] The best reasoned opinion arguing for denial of the injunction in a sympathy strike situation is the dissent of Judge Hunter in NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 324, 87 L.R.R.M. 2044, 2046 (3d Cir.) (en banc) (dissenting opinion), *cert. denied,* 419 U.S. 1049 (1974). Judge Hunter argued that the *raison d'etre* for issuing an injunction in *Boys Markets* was to prevent the union from undermining the arbitral process by forcing the employer to concede a dispute that should be decided by arbitration. However, in a sympathy strike situation the union is not attempting to defeat the arbitrator's jurisdiction; and therefore, the "narrow" exception to the Norris-La Guardia Act should not apply. *Id.* at 325-27, 87 L.R.R.M. at 2047-49. On the contrary, Judge Hunter argued that the denial of the injunction would support arbitration since the employers "will have every reason to seek arbitration since they will be able to end the work stoppage only by prevailing on the merits." *Id.* at 327, 87 L.R.R.M. at 2049.

[73] *Boys Markets,* 398 U.S. at 254 (emphasis added).

[74] These courts also emphasized the Supreme Court's characterization of the *Boys Markets* decision as "narrow," *id.* at 253, and expressed fear that if an injunction could issue where the strike is not over an arbitrable issue, then it would be "difficult to conceive of any strike which could not be so enjoined." Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372, 1373, 81 L.R.R.M. 2644, 2645 (5th Cir. 1972).

[75] 96 S. Ct. 3141, 3147. This policy is exemplified in 29 U.S.C. § 173(d) which provides: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

Buffalo Forge, however, the activity in question was a sympathy strike the purpose of which was neither to force a concession from the employer nor to avoid the obligation to arbitrate. As such, there was no need to accommodate the anti-injunction provisions of Norris to the pro-arbitration provisions of section 301, since the congressional preference for arbitration as the method of settling disputes was not jeopardized.[76]

The allegation by the employer that the strike was in itself a violation of the no-strike clause was also distinguished from the *Boys Markets* situation. In *Boys Markets,* the strike activity expressly violated the collective bargaining agreement. In *Buffalo Forge,* the issue of whether a violation had occurred was itself a question of contract interpretation. As such, this question was properly left to the arbitration process, and not to the courts.[77] Because the issue of whether the sympathy strike violated the no-strike clause was arbitrable, the district court could have ordered the union to arbitrate the issue. However, the district court could not have issued an injunction since "the Court has never indicated that the courts may enjoin actual or threatened contract violations despite the Norris-LaGuardia Act."[78] It was feared that if the district court could enjoin strikes simply because they are alleged to be violations of the collective bargaining agreement, then any breach of contract could be so enjoined. This result would not be desirable since it would not only involve the courts in litigation that properly belonged before an arbitrator, but it would also cut deeply into the mandates of the Norris-LaGuardia Act.[79] Similarly, the Court concluded that "the . . . agreement . . . to arbitrate . . . would be eviscerated if the courts for all practical purposes were to try and to decide contractual disputes at the preliminary injunction stage."[80] As a final note, the Court acknowledged that it had considered the alternative proposed by the dissent—that an injunction pending arbitration should issue against strikes that are in clear violation of the collective bargaining agreement. However, they rejected this as a viable solution, noting that, as a practical matter, arbitrators might be unduly influenced by a judicial finding, however preliminary, of illegality of the strike.[81]

The dissent argued that *Boys Markets* controlled this case. In its view, the same reasons compelling accommodation in *Boys Markets* were equally applicable to *Buffalo Forge*.[82] First, the Norris-LaGuardia Act was enacted to prevent "injunctions against strike activity in furtherance of union organization, recognition and collective bargain-

[76] *Id.*at 3149.
[77] *Id.*at 3148-49.
[78] *Id.* at 3148.
[79] *Id.* at 3148-49.
[80] *Id.* at 3149.
[81] *Id.*
[82] *Id.* at 3150 (Stevens, J., dissenting).

ing . . . ."[83] Thus, neither injunctions enforcing an agreement to arbitrate nor the enforceability of a union's promise not to strike was one of "the central concerns of the Norris-LaGuardia Act . . . ."[84] Therefore, according to the dissent, the Norris-LaGuardia Act should not bar injunctions where those concerns are not implicated. Second, the dissent pointed out that section 301's support for the collective bargaining process would be applicable if the employer could show that the arbitration agreement was the *quid pro quo* not only for a no-strike clause, but also for a no-sympathy strike clause.[85] Third, the dissent noted that accommodation of section 4 to section 301 is supported by precedent.[86] Thus, the Norris-LaGuardia Act should not present an "insuperable obstacle" to enforcement of a no-sympathy strike promise.[87] Fourth, the anomaly of displacing state court jurisdiction that existed after the *Sinclair* decision would again present itself in sympathy strike situations, since the union could remove section 301 suits from the state court to the federal court, and then, relying on *Buffalo Forge*, could request dissolution of any state court injunction.[88] Finally, the dissent argued that although the sympathy strike did not frustrate the arbitral process in the same way as did the strike in *Boys Markets*, it did frustrate the equally important policy of motivating employers to agree to arbitration clauses.[89]

Recognizing the force of the majority's argument that the *Boys Markets* decision was only justified as a means of preventing the union from frustrating the arbitral process, the dissent analyzed the function of that process. Submitting disputes to arbitration, the dissent stated, is not an end in itself; it is a means of clarifying the rights of the parties under the collective bargaining agreement and of providing a mechanism for resolving any unforseen contingencies leading to labor disputes.[90] As such, if the parties agreed to be bound by the decision of the arbitrator appointed to resolve such disputes, then an injunction should issue to enforce the arbitrator's decision;[91] otherwise, the process would be specious in that it would clarify the rights of the parties without allowing the winning party any means to realize his victory. In sharp contrast to the situation where arbitration is utilized as a means of providing for unforeseen contingencies is the situation where the parties have foreseen an area of potential conflict and have resolved it by incorporating a clause in the collective bargaining agreement. If the sympathy strike situation could be foreseen and resolved in the contract by a clause explicitly prohibiting such strikes,

[83] *Id.* at 3151.
[84] *Id.*
[85] *Id.* at 3152-53.
[86] *Id.* at 3153. See text at notes 96-101 *infra*.
[87] *Id.* at 3154.
[88] *Id.* at 3154-55.
[89] *Id.* at 3155.
[90] *Id.* at 3155-56.
[91] *Id.* at 3156.

then, the dissent concluded, the district judge should have the power to issue an injunction prior to an arbitrator's decision.[92]

In *Buffalo Forge*, then, the Supreme Court has definitively stated that even where there is a clear violation of the collective bargaining agreement, the Norris-LaGuardia Act precludes the federal judiciary from issuing injunctions in sympathy strike situations. The proper course of conduct for an employer faced with the above situation is to submit the issue to arbitration and then, upon a finding of illegality, to seek enforcement of the arbitrator's cease and desist order in the federal courts. The dissent, on the other hand, would allow injunctive relief in some situations, provided that there was convincing evidence that the strike was clearly illegal and that the union had a chance to vie for its interpretation of the collective bargaining agreement. The dissent however rather disappointingly refrained from deciding the issue of whether under the *Buffalo Forge* facts—that is, under a general no-strike clause—an injunction should issue.

III. THE PROCESS OF ACCOMMODATION AND THE SYMPATHY STRIKE

While it is clear that the dissent would, and the majority would not, accommodate in *Buffalo Forge*, neither opinion is wholly satisfactory. The majority analyzed *Buffalo Forge* solely in terms of the accommodation that took place in *Boys Markets*. Therefore, the Court may have focused too narrowly on the historical roots of the process of accommodation. The dissent, likewise focusing on *Boys Markets*, ignored important distinguishing factors that make the attempt to decide *Buffalo Forge* on the principles enunciated in *Boys Markets* hazardous. It is submitted that the accommodation process is better facilitated by analyzing the sympathy strike situation as one which necessitates a distinct and original policy balance rather than by determining that a possible accommodation must stand or fall within the balance struck by *Boys Markets*.

In developing a unique accommodation for sympathy strike situations, important distinctions between the fact situations of *Boys Markets* and *Buffalo Forge* must be considered. In *Boys Markets*, once the principle of accommodation was recognized as an appropriate judicial function,[93] the balance was straightforward; the Norris-LaGuardia Act would not apply whenever a strike frustrated the congressional preference for arbitration as the voluntary mechanism for settling industrial disputes. However, the *Buffalo Forge* situation has

[92] Id. at 3158-59. It is important to point out that the dissent did not argue for issuance of an injunction in the *Buffalo Forge* case; in fact, the dissent carefully left this question open. *Id.* at 3159. The dissent merely argued that the injunctive power should be available to the district judge if certain other contingencies are present. *Id.*

[93] Note that Mr. Justice Black in dissent in *Boys Markets* found this to be a legislative and not a judicial function. 398 U.S. at 257-58. For a further discussion of Mr. Justice Black's position see his majority opinion in *Sinclair* discussed in text at notes 34-40 *supra*.

distinguishing factors that make the accommodation determination more complex. First, most accommodations have hitherto been based on the congressional preference for arbitration,[94] whereas in the sympathy strike situation it is at least ambiguous whether an accommodation would support this preference. Second, in *Boys Markets*, it was readily apparent that there was a violation of the collective bargaining agreement, whereas it is not usually clear that a sympathy strike is a breach of the collective bargaining agreement's no-strike clause.[95]

An accommodation which best reflects the issues at stake in a sympathy strike situation may be attained only if two distinct questions are answered. First, is the congressional preference for arbitration the only basis for accommodating the Norris-LaGuardia Act? In answering this question the following factors must be considered: the Court's previous accommodations, and the congressional policies furthered by accommodating in a sympathy strike situation. Secondly, if it is appropriate to accommodate in a sympathy strike situation, what are the *limitations* of such an accommodation? This question focuses on the determination of whether the sympathy strike is a violation of the collective bargaining agreement's no-strike clause.

A. *Arbitration as the Basis for Accommodation*

There are at least four distinct fact situations in which the scope of accommodation was limited to the congressional preference for arbitration. First, in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad*,[96] the Court authorized injunctive relief against a strike, when such a remedy was necessary to effectuate the duty imposed by the Railway Labor Act to arbitrate "minor" disputes. Second, in *Textile Workers Union v. Lincoln Mills*,[97] the Court held that a district court could order specific enforcement of an agreement to arbitrate where one of the parties refused to submit a dispute to the collective bargaining agreement's arbitration procedures. Third, in *Boys Markets*, the Court held that an injunction could issue to enjoin a strike which was in clear breach of an arbitration agreement.[98] Lastly, in *New Orleans Steamship Association v. General Longshore Workers Local 1418*,[99] the

[94] See text at notes 96-101 *infra*.

[95] See text at notes 135-40 *infra*.

[96] 353 U.S. 30, 40-42 (1957).

[97] 353 U.S. 448, 457-59 (1957).

[98] 398 U.S. at 248.

[99] 389 F.2d 369, 371-72, 67 L.R.R.M. 2430, 2432-33 (5th Cir.), *cert. denied*, 393 U.S. 828 (1968). *Accord*, General Dynamics Corp. v. Local 5, Industrial Union of Marine & Ship Building Workers, 469 F.2d 848, 851, 81 L.R.R.M. 2746, 2748 (1st Cir. 1972); Pacific Maritime Ass'n v. International Longshoremen's & Warehousemen's Union, 454 F.2d 262, 263-64, 79 L.R.R.M. 2116, 2116-17 (9th Cir. 1971). *But see*, Tanker Service Comm., Inc. v. International Organization of Masters Mates & Pilots, 269 F. Supp. 551, 552, 65 L.R.R.M. 2848, 2849 (E.D. Pa. 1967). The Supreme Court in *Buffalo Forge* implicitly recognized the soundness of this accommodation by stating that "were the issue arbitrated and the strike found illegal, the relevant federal statutes as construed in our cases would permit an injunction to enforce the arbitral decision." 96 S. Ct. at 3146. The

Fifth Circuit held that an injunction could issue to enforce an arbitrator's cease and desist order. Thus there exists ample authority for accommodating the Norris-LaGuardia Act in service to arbitration.

The Court in *Buffalo Forge*, apparently relying heavily on this precedent, limited the scope of accommodation by reading the *Boys Markets* decision as supporting the proposition that the Norris-LaGuardia Act should be accommodated *only* when the strike would frustrate the arbitral process. Given that limited scope, the Court accurately concluded that accommodation in the *Buffalo Forge* situation was not appropriate since it did not support the arbitration process. The union in a sympathy strike situation is not trying to avoid arbitration as a means of settling a dispute,[100] but rather is lending support to a sister union's strike by refusing to cross their picket line. As such the strike itself does not frustrate the arbitral process in the *Boys Markets* context, since the union does not seek to avoid the jurisdiction of the arbitrator by forcing a concession from the employer.[101]

While the Court's conclusion in *Buffalo Forge* seemingly followed from its enunciated premise, the Court may have focused too narrowly on the process of accommodation by limiting the scope of accommodation exclusively to the congressional preference for arbitration. Although it is true that accommodation has consistently been utilized to support this congressional preference, there has never been a pronouncement by the Court that the accommodation process is limited *solely* to this policy. Both in definition and application the Court has given the accommodation process a broader scope. Justice Brennan has characterized the purpose of the process by broadly stating:

> The Court has long acted upon the premise that the Norris-LaGuardia Act does not stand in isolation. It is one of several statutes which, taken together, shape the national labor policy. Accordingly, the Court has recognized that Norris-LaGuardia does not invariably bar injunctive relief when necessary to achieve an important objective of some other statute in the pattern of labor laws.[102]

Indeed, relying on this broader conception the Court has utilized the accommodation process to support congressional objectives other than the furtherance of arbitration. Two of these situations are illustrative.

In *Virginia Railway v. System Federation No. 40,*[103] the employer

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Court cited United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), as precedent for the proposition that an injunction can issue to enforce an arbitration award; however, that case merely held that the district court could order an employer to comply with an arbitrator's award of damages. *Id.* at 599. The Court in *Buffalo Forge* has significantly extended the holding of that case by allowing an injunction to issue against a strike once the arbitrator has declared the strike illegal.

[100] *Buffalo Forge*, 96 S. Ct. at 3147.

[101] See note 56 *supra*.

[102] *Sinclair*, 370 U.S. at 217 (dissenting opinion).

[103] 300 U.S. 515 (1937).

railroad refused to recognize a union which had been certified pursuant to the Railway Labor Act[104] to represent the employees in their negotiations.[105] The union sued for a mandatory injunction forcing the railroad to negotiate as was required by section 2, Ninth of the Railway Labor Act.[106] The Court held that the Norris-LaGuardia Act would not bar such an injunction since the provisions of the Railway Labor Act "cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act."[107] Hence, the Court accommodated the Norris-LaGuardia Act to give effect to the Railway Labor Act's policy of exclusive employee representation by mandating that the employer negotiate with the certified union.

More recently, in *Chicago & North Western Railway Co. v. United Transportation Union*,[108] negotiations between the employer and the union over work rules had broken down and the union threatened to strike.[109] When the employer sought an injunction against the threatened strike, the union defended by claiming that section 4 of the Norris-LaGuardia Act forbade the issuance of an injunction in this situation. The Supreme Court, in rejecting the union's defense, held that "strike injunctions may issue when such a remedy is the only practical, effective means of enforcing the duty to exert reasonable effort to make and maintain agreements . . . ."[110] The Court reasoned that it had "no choice but to trace out as best we may the uncertain line of appropriate accommodation of two statutes with purposes that lead in opposing directions."[111] This accommodation is certainly broader than even the *Boys Markets* accommodation, since it enjoins strikes even where the union has not agreed to a no-strike clause. Furthermore, the accommodation is not limited to strikes over arbitrable grievances, as was *Boys Markets*, but rather, extends to strikes that subvert the collective bargaining process in general.[112]

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[104] 45 U.S.C. §§ 151 *et seq.* (1970).

[105] 300 U.S. at 538.

[106] 45 U.S.C. § 152, Ninth (1970). Section 152, Ninth, provides in pertinent part:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter.

[107] 300 U.S. at 563.

[108] 402 U.S. 570 (1971).

[109] *Id.* at 571.

[110] *Id.* at 583.

[111] *Id.* at 582. There was, however, a disclaimer in the decision that if the Court had misinterpreted the ct then Congress should act to rectify this misinterpretation. *Id.*

[112] These cases may be distinguished by the fact that they involved direct statutory duties (Railway Labor Act), as opposed to contractual duties (*Buffalo Forge*) but as

Noting that the process of accommodation can be, and has been, broadly conceived to support congressional labor policies other than arbitration, it is submitted that there is a panoply of important labor policies that support an accommodation in a sympathy strike situation. Examples of such federal labor goals include providing employer incentive to consent to arbitration clauses;[113] supplementing rather than displacing state court jurisdiction;[114] and encouraging voluntary agreement to maintain the industrial peace.[115]

In focusing so narrowly on the *Boys Markets* concern with the frustration of the arbitral process, the Court failed to acknowledge the possible dissipation of any incentive the employer might have to enter into arbitration agreements in return for a no-strike clause, where that agreement can not be specifically enforced by an injunction.[116] Applying this concern to the sympathy strike situation, it is likely that the employer may be less inclined to grant the arbitration clause if he is not sure that it will prevent strikes generally—and sympathy strikes specifically. In fact, the Supreme Court in its *Buffalo Forge* decision has implicitly held that even if the employer extracts an *explicit no-sympathy strike clause* as the *quid pro quo* for his concession of an arbitration clause, it is not enforceable by injunction.[117] Thus, although the sympathy strike does not frustrate the arbitral process, it could well frustrate the motivation of an employer to agree initially to the arbitration clause.

The anomaly of displacing state court jurisdiction which resulted from a refusal to accommodate the Norris-LaGuardia Act and section 301 in *Sinclair*, could be reestablished[118] by a failure to accommodate in a sympathy strike situation. Employers, faced with sympathy strikes in violation of the collective bargaining agreement but realizing that temporary relief is not available in the federal courts, will surely seek

Mr. Justice Brennan stated, there is one factor that made accommodation more favorable in the *Sinclair* case than in the Railway cases, that is "the express contractual commitment of the union to refrain from striking, viewed in light of the overriding purpose of section 301 to assist the enforcement of collective agreements." 370 U.S. at 219. *See also* Muniz v. Hoffman, 422 U.S. 454 (1975) (accommodation of Norris-LaGuardia Act's procedural protection of a jury trial in cases of criminal contempt to permit summary contempt in order to buttress the enforcement power of an NLRA injunction); Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232 (1949) (accommodation of Norris-LaGuardia Act to support policy of non-discrimination).

[113] *See, e.g., Boys Markets*, 398 U.S. at 248.

[114] *See, e.g.*, Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507, 511 (1962).

[115] *See, e.g.*, Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 453-54 (1957).

[116] *Boys Markets*, 398 U.S. at 248.

[117] *See* 96 S. Ct. at 3148. The Court made it clear that *Boys Markets* had not authorized the district courts to issue injunctions against strikes merely because those strikes were actual violations of the labor contract. The Court read *Boys Markets* to authorize injunctions against strikes that not only violated the labor contract but also frustrated the congressional preference for arbitration. *Id.* at 3147-48. Thus, since sympathy strikes do not frustrate that congressional objective, they will never be enjoinable merely because they are violations of an express no-sympathy strike clause.

[118] *Boys Markets*, 398 U.S. at 244-46.

such relief in the state courts.[119] The union, however, may then attempt to remove the action to federal courts to prevent injunctive relief.[120] In that case, the same policies that were frustrated after *Sinclair*, such as, elimination of forum shopping, maintenance of state court jurisdiction, 301's grant of additional employer remedies and uniform administration of collective bargaining agreements, will be frustrated after *Buffalo Forge*.[121]

The third labor policy that can be factored into the process of accommodating in the sympathy strike situation is the congressional policy favoring maintenance of the industrial peace[122] through the use of the collective bargaining process.[123] In general, labor legislation in

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[119] The state courts are not bound by the Norris-LaGuardia Act and *Boys Markets* expressly refused to so extend it. 398 U.S. at 247-48. In 1969, when the anomaly of displacing state court jurisdiction emerged, a vast majority of the state courts had, likewise, held that the federal Norris-LaGuardia Act does not affect their right to issue injunctions against strikes that are breaches of collective bargaining agreements. In fact, seven states that enacted state acts similar to Norris-LaGuardia held that even these state acts do not bar issuance of an injunction under such circumstances. Indeed, only one state, New Jersey, has refused to issue an injunction against a strike in violation of the collective bargaining agreement basing its holding, though, on the state anti-injunction statute. See cases and statutes cited in Bartosic, note 46 *supra*, at 1001-06, notes 135-36. Thus, it seems clear that employers in attempting to obtain injunctions against sympathy strikes in violation of the collective bargaining agreement will find a receptive forum in the state courts.

[120] Courts have held that when a federal injunction could not have issued under Boys Markets, the state court injunction must be dissolved, since failing to do so would be tantamount to issuing an injunction. Pullman, Inc. v. International Bhd. of Boilermakers, 354 F. Supp. 496, 498-99, 82 L.R.R.M. 2638, 2640 (E.D. Pa. 1972). *See also* General Electric Co. v. Local 191, Int'l Union of Electrical Radio and Machine Workers, 413 F.2d 964, 966, 71 L.R.R.M. 2903, 2904 (5th Cir. 1969), *vacated on other grounds*, 398 U.S. 436 (1970).

[121] *Buffalo Forge*, 96 S. Ct. at 3154-55 (dissenting opinion). See text and notes at notes 57-61 *supra*, for a more complete discussion of this problem.

[122] It should be noted that the concern of *Boys Markets* was not the deification of the arbitration process as the end result, but rather was the degree to which arbitration promoted the peaceful settlement of labor disputes. "[W]e have frequently noted . . . the importance that Congress has attached generally to the voluntary settlement of labor disputes *without resort to self-help* and more particularly to arbitration as a means to this end." 398 U.S. at 252 (emphasis added).

[123] It was originally the goal of Congress to promote industrial peace through elimination of employer interference with organization and representation. Section 1 of the NLRA, 29 U.S.C. § 151 (1970), provides:

> The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such material or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

the United States does not attempt to control the results of collective bargaining negotiations by dictating the terms and conditions of employment.[124] Rather, these terms and conditions are ultimately left to the parties in the industrial relationship to resolve through the collective bargaining process.[125] Similarly, labor legislation does not mandate that the parties agree to maintain the industrial peace; indeed, section 13 of the NLRA explicitly recognizes that the Act does not affect the fundamental right of employees to participate in concerted activity.[126] However, the Act does recognize that "sound and stable industrial peace . . . and . . . the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees."[127] Thus the Act evinces a policy favoring the collective bargaining process as an "effective instrument [for] stabilizing labor relations and preventing . . . strikes and industrial strife."[128]

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

In 1947, Congress evidencing its concern over union abuse of their newfound power, added the following paragraph to the 1935 Declaration of Policy of the National Labor Relations Act, thereby making the policy of avoidance of industrial strife two-sided:

> Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

[124] H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99, 103 (1970); NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 488, 490 (1960). *See, e.g.*, 29 U.S.C. § 158(d) (1970) (the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession").

[125] H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99, 103 (1970).

[126] 29 U.S.C. § 163 (1970).

[127] 29 U.S.C. § 171(a) (1970).

[128] H.J. Heinz Co. v. NLRB, 311 U.S. 514, 524 (1941). *See also* Carey v. Westinghouse Electric Corp., 375 U.S. 261, 265 (1964).

Industrial peace is secured through the collective bargaining process by first, using the bargaining table as a forum where the parties can "promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation;"[129] second, the parties can agree to utilize arbitration machinery to resolve unforseen disputes that might arise in the future; and third, the parties can, through the give and take of negotiations, resolve ongoing disputes and embody that resolution in the labor contract.[130] The LMRA, recognizing that industrial peace is thus secured, provides certain mechanisms that are designed to promote these phases of collective bargaining. First, it requires the parties "to meet at reasonable times and confer in good faith."[131] Second, it makes available "full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration."[132] Finally, the LMRA, in section 301, allows suits for breach of the labor agreement to be brought in the federal courts.[133]

The application of this policy objective to sympathy strike situations is obvious. There is no *per se* requirement that a union refrain from participating in sympathy strikes; indeed, if the union chooses to retain its statutory right to so participate, it may. But on the other hand, if the union voluntarily gives up the right to participate in sympathy strikes, then the federal policy favoring voluntary agreements to maintain the industrial peace should operate to bind them to their agreement.

Thus, there exist clear congressional labor policies that would be

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[129] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 211 (1964).

[130] H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99, 103 (1970).

[131] 29 U.S.C. § 158(d) (1970).

[132] 29 U.S.C. § 171 (1970). *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957).

[133] 29 U.S.C. § 185(a) (1970). *See generally* Drake Bakeries Inc. v. Local 50, American Bakery & Confectionary Workers Int'l, 370 U.S. 254, 263 (1962). See note 4 *supra* for text of § 301(a). The Senate Report on § 301(a) stated:

> If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts . . . .
>
> Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.

S. Rep. No. 105, 80th Cong., 1st Sess. 16-17 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 422-23 (1948).

furthered by reaching an accommodation in a situation in which the union clearly agreed not to participate in sympathy strikes. As such, it is possible to reanalyze the sympathy strike situation and arrive at an analytically justifiable accommodation of section 301 and section 4. It is submitted that such an accommodation in the *Buffalo Forge* situation would support a panoply of important federal labor policies, including the strong congressional preference for arbitration, uniformity of labor law, and peaceful settlement of labor disputes. Therefore, an accommodation under these circumstances would seem to fall within the ambit of the Supreme Court's policy that the Norris-LaGuardia Act "does not invariably bar injunctive relief when necessary to achieve an important objective of some other statute in the pattern of labor laws."[134]

B. *Limitations on the Proposed Accommodation*

The proposed accommodation assumes that the union has bargained away its right to participate in sympathy strikes and that the strike is therefore illegal. While in a *Boys Markets* situation there is no doubt as to the strike's illegality prior to the issuing of an injunction,[135] in a typical sympathy strike situation the legality of the strike is an issue. This issue arises because it is uncommon in a collective bargaining agreement for either the union to waive completely the right to participate in sympathy strikes or for the employer to let the union retain that right without some qualifications.[136] Accordingly, there is usually a qualification in the collective bargaining agreement that provides the union with the right to honor only "primary,"[137] "authorized"[138] or "bona fide"[139] picket lines. Thus,

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[134] *Sinclair*, 370 U.S. at 217. Some commentators have persuasively argued that the Norris-LaGuardia Act should not apply to situations involving breach of a collective bargaining agreement since "[b]reach of a collective agreement, as such, is clearly not a section 13 labor dispute. Nor is it section 4 conduct to which the anti-injunction strictures attach." Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635, 645 (1959). *See* Rice, *Paradox of our National Labor Law*, 34 MARQ. L. REV. 233, 250 (1951); Stewart, *No-Strike Clauses in the Federal Courts*, 59 MICH. L. REV. 674, 683 (1961).

[135] In a *Boys Markets* situation there is no doubt that the strike is illegal because the union has agreed not to strike over an arbitrable dispute. When the union *does* strike over an arbitrable dispute, it is in violation of the collective bargaining agreement. The requirement in *Boys Markets* that the district court find that the agreement requires the union to arbitrate the particular dispute over which the union struck adequately protects unions from injunctions against legal strikes, since a strike over an arbitrable grievance is illegal according to the collective bargaining agreement.

[136] *See, eg.*, cases cited at notes 137-39 *infra*.

[137] NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 322, 87 L.R.R.M. 2044, 2045 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1049 (1974). For a discussion of *NAPA* see note 64 *supra*.

[138] Valmac Indus., Inc. v. Food Handlers Local 425, 519 F.2d 263, 265 n.4, 89 L.R.R.M. 3073, 3074 n.4 (8th Cir. 1975). For a discussion of *Valmac* see note 66 *supra*.

[139] Willmington Shipping, Co. v. Longshoremen Local 1426, 86 L.R.R.M. 2846, 2847 (4th Cir.), *cert. denied*, 419 U.S. 1022 (1974). For a discussion of *Willmington* see note 65 *supra*.

when such a provision in the collective bargaining agreement is at issue, the illegality of the sympathy strike may not be clear. Consequently, an accommodation in such a situation must adequately protect the union's right to engage in legal sympathy activity, yet at the same time must recognize the problems of the employer who has bargained for continued productivity but has no recourse[140] when the union participates in a strike that is an apparent violation of the collective bargaining agreement.

Recognizing the union's legitimate fear that the district court might enjoin legitimate strike activity if an injunction could issue under the *Boys Markets* standards, the dissent in *Buffalo Forge* proposed two additional safeguards for a *Buffalo Forge* situation.[141] First, the dissent suggested that there should be no *ex parte* restraining orders. Such a rule would give the union an opportunity to present evidence as to the proper interpretation of the collective bargaining agreement. Second, the dissent maintained that an injunction should not issue unless there is convincing evidence that the sympathy strike is clearly within the no-strike clause.[142] The first requirement—that

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[140] The employer's recourse is limited by the fact that actions for damages and attempts to discipline striking employees *after* a labor dispute only serve to exacerbate industrial strife and delay early resolution of the difficulties between employer and union. See note 55, *supra*.

[141] The dissent would additionally require that the traditional equitable requirements necessary for injunctive relief be met. The equitable showings previously required in *Boys Markets* were the following: breaches are occurring and will continue, or have been threatened and will be committed; irreparable injury to the employer must exist; and the employer will suffer more from the denial of the injunction than the union will suffer from its issuance. 398 U.S. at 254. The requirement of demonstrating probable success on the merits was not necessary in the typical *Boys Markets* situation; the only necessary showing in *Boys Markets* was the probability that the dispute was arbitrable. This requirement followed from the *Steelworkers* presumption of arbitrability. If the dispute was arbitrable, the employer had already won on the merits; the merits being that the strike was in violation of the contract. However, as previously noted this presumption would be impermissible in a sympathy strike situation since it could result in enjoining legal strikes. It is therefore necessary to revive the equitable requirement of probability of success on the merits as yet another safeguard against the enjoinability of legal sympathy strikes. *See* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 (1973).

[142] 96 S. Ct. 3158-59.

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

Id. (footnotes omitted).

The dissent's formulation that the sympathy strike must be clearly within the no-strike clause implicitly recognizes that the doctrine of waiver provides appropriate safeguards to the employees. It has been recognized that employees may waive the right there should be no *ex parte* injunctions—is more stringent than both Rule 65 of the Federal Rules of Civil Procedure and the already strict procedural requirements of section 7 of the Norris-LaGuardia Act, since both allow temporary restraining orders to be issued *ex parte* in very limited circumstances.[143] Stringent though it may be, it is suggested that it is essential to give the union an opportunity to present its interpretation of a no-strike clause, given the consequences that flow from an improvidently granted injunction. The dissent's second requirement can be viewed as encompassing two separate safeguards: first, that there should be an initial presumption that the sympathy strike is legal;[144] and second, that the employer must satisfy the burden of proving illegality by convincing evidence.[145] While the second safeguard is obvious from the language of the dissent's requirement, the first safeguard follows from the fact that the dissent states the requirement in terms of an injunction not issuing *unless* the strike is

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to engage in sympathy activity in lieu of other benefits. NLRB v. Rockaway News Supply Co., 345 U.S. 71, 79-81 (1953); *see also* Gary-Hobart Water Corp., 210 N.L.R.B. 742, 744, 86 L.R.R.M. 1210, 1213 (1974). However the waiver of a collective bargaining right must be clear and unmistakable. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 283 (1956); NLRB v. Wisconsin Aluminum Foundry Co., 440 F.2d 393, 399, 76 L.R.R.M. 2576, 2581 (7th Cir. 1971); Timken Roller Bearing Co. v. NLRB, 325 F.2d 746, 751, 54 L.R.R.M. 2785, 2789 (6th Cir.), *cert. denied*, 376 U.S. 971 (1963).

However, the dissent's result is not free from criticism. First it would require the district court judge, at least preliminarily, to interpret the collective bargaining agreement's no-strike clause, whereas this interpretation is usually left to the informed judgment of the arbitrator. This usurpation of the arbitrators function would be inconsistent with the holding in United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). In that case the court stated that "the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contrct, the courts have no business overruling him because their interpretation of the contract is different from his." *Id.* at 599.

Secondly, there is the possibility that the arbitrator may give undue deference to the district court's finding of illegality. As the majority in *Buffalo Forge* stated: "It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and it is difficult to believe that the arbitrator would not be heavily influenced or wholly pre-empted by judicial views of the facts and the meaning of contracts if this procedure is to be permitted." 96 S. Ct. at 3149.

[143] *See* FED. R. CIV. PRO. 65(B) and 29 U.S.C. § 107 (1970).

[144] While the "presumption of the legality" of a sympathy strike may seem incongruous to the "presumption of arbitrability" in the Steelworkers Trilogy, see note 67 *supra*, this incongruity can be quickly dispelled. The presumption of arbitrability merely forces the district court to submit the dispute to the arbitrator; while the presumption of legality compels hesitation before the court enjoins the strike and sends it to the arbitrator. It is conceivable, in fact probable, that the judge could refuse to issue an injunction since the legality of the strike is not "clear," while saving the ultimate resolution of the dispute for the arbitrator.

[145] The requirement that the employer have the burden of proof before obtaining an injunction is consistent with both Rule 65 of FED. R. CIV. PRO. and with the case law interpreting that rule. For example, in Granny Goose Foods, Inc. v. International Bhd. of Teamsters Local 70, 415 U.S. 423 (1974), the Supreme Court stated: "The burden was on the employers to show that they were entitled to a preliminary injunction, not on the Union to show that they were not." *Id.* at 443.

clearly within the no-strike clause. The presumption of legality requirement is wholly appropriate in order to protect legal strikes from injunctions since the burden of clear draftsmanship should fall on the employer given the absolute provisions of the Norris-LaGuardia Act. Similarly, although only a preponderance standard is necessary in suits filed under section 301,[146] the requirement that the employer prove illegality by convincing evidence also seems appropriate given the possibility of ambiguous no-strike clauses.[147]

If conscientiously applied by the district courts, these stringent safeguards should represent a significant obstacle to an employer seeking to obtain injunctive relief in a sympathy strike situation. Accordingly, the proposed accommodation, buttressed by these safeguards, could both provide an employer with the opportunity to guard against sympathy strikes by unambiguously making that intention manifest in the collective bargaining agreement, and could protect legitimate union activity from injunctions.

CONCLUSION

While the refusal to accommodate in the *Buffalo Forge* decision can be analyzed as consistent with the landmark accommodation in *Boys Markets, Inc. v. Retail Clerks Union*, it remains possible to justify an independent accommodation in a sympathy strike situation. It has been noted that if the process of accommodation is "broadly" conceived as a means of reconciling apparently inconsistent statutory aims, rather than "narrowly" relegated to reconciling the Norris-LaGuardia Act to the congressional preference for arbitration, then an accommodation in a sympathy strike situation can be reached which would support a panoply of congressional objectives while still retaining the core purpose of the Norris-LaGuardia Act.

KENNETH J. MALLOY

Constitutional Law—Due Process—the Interests in Reputation and Employment—*Paul v. Davis*[1] and *Bishop v. Wood*[2]—In two recent cases, the Supreme Court has had occasion to reconsider the extent to

[146] *See, e.g.*, Bartels v. Lithographers' & Photo-Engravers' Union No. One-P, 306 F. Supp. 1266, 1272, 73 L.R.R.M. 2154, 2158 (S.D.N.Y. 1969), *aff'd per curiam* 431 F.2d 1205, 75 L.R.R.M. 2400 (2d Cir. 1970).

[147] There is some support for a higher standard of proof in § 6 of the Norris-LaGuardia Act since it requires "clear proof" of participation or ratification of unlawful acts before a member of a union can be held liable. *See, e.g.*, Ramsey v. United Mine Workers, 401 U.S. 302, 307-10 (1971).

[1] 424 U.S. 693 (1976).

[2] 426 U.S. 341 (1976). Both cases are noted in *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 86-104 (1976).