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THE APPLICATION OF THE BOYS MARKETS* DECISION IN THE FEDERAL COURTS

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

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I. INTRODUCTION

In 1970, the Supreme Court limited the key prohibition contained in the Norris-LaGuardia Act,¹ by holding that, under certain circumstances, federal district courts may enjoin strikes in breach of contract.² Twice subsequently, the Court felt the need to resolve controversies created by lower court attempts to fill the interstices of this *Boys Markets* decision.³ Yet many issues remain unresolved. The most pressing question concerns district court jurisdiction to issue an injunction requiring a union and its members to cross a picket line pending arbitration of either the status of the picket line or the members' right to respect the line. This term, the Court has granted certiorari to consider the Second Circuit's holding that an injunction may not issue to compel members to cross a picket line. This term, as in the past, the Court has also denied certiorari where courts have affirmed injunctions in similar circumstances. It therefore appears that the Court will adopt the position of the Third, Fourth, and Eighth Circuits.⁴ Other questions involve the relationship between bonding requirements and the restoration of the status quo, and the applicability of the procedural safeguards contained in the Norris-LaGuardia Act and the Federal Rules of Civil Procedure.⁵

The theoretical aspects of the *Boys Markets* decision have already been canvassed in a comprehensive fashion.⁶ The focus of this article, therefore, will be on what the courts and labor practitioners have, in fact, been doing. After summarizing the relevant legislative history, this article will consider the Supreme Court decisions which establish guidelines for the federal judiciary. Next, the approaches utilized by federal courts in applying the various requirements im-

¹ 29 U.S.C. §§ 101-15 (1970).

² *Boys Markets*, 398 U.S. at 253.

³ *Granny Goose Foods, Inc. v. Teamsters Local 70*, 415 U.S. 423 (1974); *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974).

⁴ See text at notes 206-44 *infra*.

⁵ See text at notes 333-64 *infra*.

⁶ See, e.g., Erdmann, *Federal Courts May Enjoin Strikes Which Violate No-Strike Clauses: Boys Markets vs. Retail Clerk's*, 60 Ill. B.J. 548 (1972); Gould, *On Labor Injunctions, Unions, and the Judges: The Boys Market Case*, 1970 Sup. Ct. Rev. 215; Note, 12 B.C. Ind. & Com. L. Rev. 295 (1970).

posed by the Supreme Court, the Norris-LaGuardia Act and the Federal Rules of Civil Procedure will be analyzed. The basic *Boys Markets* decision will be accepted as a given. Where appropriate, however, the article will evaluate subsequent decisions, emphasizing their conformity to, or divergence from the national labor policy underlying *Boys Markets*. The impact of these decisions upon the strategy and tactics of labor practitioners will also be surveyed. In sum, this article will explore the practical impact of the *Boys Markets* decisions.

II. THE HISTORICAL BACKDROP

By 1932, decades of judicial abuse of the equity power forced Congress to prohibit federal court issuance of injunctions in most labor disputes.⁷ Federal judges, sympathetic to management interests,⁸ had issued ex parte restraining orders based upon form complaints accompanied by form affidavits.⁹ Often, the injunctive writs were drafted in broad, vague terms, restricting the use of union strike funds¹⁰ and the enforcement of union by-laws,¹¹ and depriving employees of the benefits of state laws¹² and of free speech.¹³ These abuses could not be corrected at the permanent injunction hearing or on appeal, for the severe impact of the temporary order on union morale often made that order "all but decisive."¹⁴

To correct these abuses, Congress adopted the Norris-LaGuardia Act.¹⁵ The statute was strictly drawn, for Congress feared that judges would otherwise pervert the Act, as the courts had previously emasculated the Clayton Act.¹⁶ The Norris-

⁷ See, e.g., 75 Cong. Rec. 4505-06, 4509-10, 4620, 4624, 4689, 5478-81, 5490-98 (1932).

⁸ See, e.g., 75 Cong. Rec. 4509-10, 4624, 4774, 4930, 5466, 5478-79 (1932).

⁹ F. Frankfurter & N. Greene, *The Labor Injunction* 61-78, 200-03, 223 (1930) [hereinafter cited as Frankfurter & Greene].

¹⁰ S. Rep. No. 163-1, 72d Cong., 1st Sess. 16-17 (1932); 75 Cong. Rec. 4505-06, 5463, 5467, 5480-81 (1932); Frankfurter & Greene, *supra* note 9, at 103-04, 218.

¹¹ See, e.g., *Borderland Coal Corp. v. UMW*, 275 F. 871, 873 (D. Ind. 1921); 75 Cong. Rec. 4509-10, 5490 (1932).

¹² S. Rep. No. 163-1, 72d Cong., 1st Sess. 16-17 (1932); 75 Cong. Rec. 4624, 5467, 5481, 5513 (1932); Frankfurter & Greene, *supra* note 9, at 100-01.

¹³ See, e.g., *United States v. Taliaferro*, 290 F. 214, 216 (W.D. Va. 1922), *aff'd*, 290 F. 906 (4th Cir. 1923); S. Rep. No. 163-1, 72d Cong., 1st Sess. 17 (1932); Frankfurter & Greene, *supra* note 9, at 113.

¹⁴ 75 Cong. Rec. 4929, 4934 (1932); Witte, *The Federal Anti-Injunction Act*, 16 Minn. L. Rev. 638, 653 (1932).

¹⁵ 29 U.S.C. §§ 101-10, 113-15 (1970) [hereinafter cited as Norris-LaGuardia Act]; 75 Cong. Rec. 5462-63, 5478-80, 5492 (1970).

¹⁶ See *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 203 (1962); 29 U.S.C. § 105 (1970). Section 20 of the Clayton Act, 29 U.S.C. § 52 (1970), was the forerunner of the Norris-LaGuardia Act. In *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1921), the Supreme Court held that § 20 and its prohibition of injunctive relief in

LaGuardia Act prohibits federal courts from enjoining strikes or a wide variety of supporting activity in most labor disputes.¹⁷ In cases in which injunctive relief is permitted, the Act provides strict procedural safeguards.¹⁸ Congress also required jury trials in all contempt actions arising under injunctions permitted by the Act.¹⁹ Freed from judicial harassment, and later given affirmative support in the National Labor Relations Act,²⁰ unions matured and prospered.

As unions grew, so did criticism of unrestrained union power. Among the most serious of union abuses was the violation of labor agreements. In 1947, Congress amended the Labor Relations Act²¹ to proscribe union unfair labor practices.²² The Senate bill also declared unlawful any violation of "the terms of a collective bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration."²³ That proposal was deleted from the final version of the bill. The Conference Report stated that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual process of the law and not to the National Labor Relations Board."²⁴

Accordingly, section 301(a) of the Act provided that "[s]uits for violation of contracts . . . may be brought in any district court of the United States . . ."²⁵ In *Textile Workers v. Lincoln Mills*,²⁶ the Supreme Court held that section 301 authorized "federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements . . ."²⁷ The Court further held that the federal labor law permitted courts to compel the arbitration of grievance disputes, despite the Norris-LaGuardia Act, since "[t]he

any "dispute concerning terms or conditions of employment" between "employers and employees" only applied to lawful union activity concerning a dispute with its own employer. Id. at 202-03. The "lawfulness" of the activity was determined under pre-§ 20 standards, making that provision a nullity. Id. at 203.

¹⁷ 29 U.S.C. §§ 101, 104-05 (1970).

¹⁸ Id. §§ 107-10.

¹⁹ 18 U.S.C. § 3692 (1970).

²⁰ National Labor Relations Act, 49 Stat. 449 (1935), as amended 29 U.S.C. §§ 151-68 (1970) [hereinafter cited as Labor Relations Act].

²¹ Labor-Management Relations Act, 61 Stat. 136 (1947), as amended 29 U.S.C. §§ 141-87 (1970) [hereinafter cited as Labor-Management Relations Act or Taft-Hartley Act].

²² 29 U.S.C. § 158(b) (1970).

²³ S. 1126, 80th Cong., 1st Sess. §§ 8(a)(6), 8(b)(5) (1947). See S. Rep. No. 105, 80th Cong., 1st Sess. 20-21, 23 (1947). The House bill contained a similar provision. H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947). See H.R. Rep. No. 245, 80th Cong., 1st Sess. 21 (1947).

²⁴ H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947).

²⁵ 29 U.S.C. § 185(a) (1970) [hereinafter cited as § 301].

²⁶ 353 U.S. 448 (1957).

²⁷ Id. at 451. The majority opinion, id. at 452-56, and Justice Frankfurter's dissenting opinion, id. at 485-546, contain extensive analysis of § 301's legislative history.

failure to arbitrate was not a part and parcel of the abuses against which [that] Act was aimed."²⁸

Several years later, employers began to bring suit in federal courts to compel arbitration and, at the same time, enjoin strikes in derogation of contractual arbitration systems. In *Sinclair Refining Co. v. Atkinson*,²⁹ the Supreme Court held that the Norris-LaGuardia Act prohibited such anti-strike injunctions.³⁰ The Court found that in enacting the Taft-Hartley Act, Congress had explicitly declared the anti-injunction prohibitions of Norris-LaGuardia to be inapplicable in certain circumstances,³¹ and had rejected a proposal to allow injunctive relief against union strikes in section 301 cases.³² What Congress refused to do explicitly or by implication the Court refused to do by "accommodation."³³ Justice Brennan dissented, arguing that permitting the injunction would not unleash the judicial abuse which necessitated the Norris-LaGuardia Act.³⁴

Opposition to *Sinclair* surfaced immediately. Within two months, a resolution was introduced at the annual meeting of the American Bar Association Section on Labor Relations Law seeking the modification of Norris-LaGuardia in section 301 suits.³⁵ At the next meeting, the Section adopted the management resolution calling for legislation to permit injunctions whenever a union struck in breach of contract, after amending the management resolution to forbid ex parte orders.³⁶ The Section also rejected an amendment which would have permitted injunctive relief only if the strike occurred over an arbitrable grievance.³⁷ Academic criticism came more slowly, but no less vehemently.³⁸

Opposition to *Sinclair* produced no significant legislative response.³⁹ It was, however, instrumental in producing judicial recon-

²⁸ Id. at 458.

²⁹ 370 U.S. 195 (1962).

³⁰ Id. at 203.

³¹ Id. at 204-05. See, e.g., 29 U.S.C. §§ 160(h), 178(b) (1970).

³² 370 U.S. at 205-09.

³³ Id. at 209-10.

³⁴ Id. at 219.

³⁵ 1 ABA Labor Relations Section 11-12 (1962).

³⁶ 2 ABA Labor Relations Section 40-53, 226-44 (1963).

³⁷ Id. at 49-52.

³⁸ See, e.g., 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 & Albert, Statutory Interpretation and the Political Process: A Comment on *Sinclair v. Atkinson*, 72 Yale L.J. 1547 (1963).

³⁹ In 1965, identical bills were introduced in the House and Senate. Each would have amended section 301 to make the Norris-LaGuardia Act inapplicable in any proceeding to enjoin the violation of, or to enforce an arbitration award arising out of an alleged violation of, [a labor agreement], if the contract includes: (i) a provision for submission to binding arbitration of any claim asserted by such labor

sideration of the availability of injunctive relief against strikes in derogation of contractual arbitration agreements.⁴⁰

III. THE *Boys Markets* TRILOGY

A. *Boys Markets, Inc. v. Retail Clerks Local 770*⁴¹

Eight years later, with essentially the same facts before it, the Supreme Court overruled *Sinclair*. The dispute arose when Local 770 alleged that a Boys Markets supervisor had infringed upon the union's contractually preserved work jurisdiction. Local 770 threatened to strike unless the company used unit personnel to perform the disputed work.⁴² When the company refused to comply with the union's demands, Local 770 struck and established a picket line. The company then requested that the union comply with the contract's grievance and arbitration provisions and that it terminate the strike and picketing activities.⁴³ When the strike continued the next day, the company filed a complaint in California Superior Court seeking a temporary restraining order, a preliminary and a permanent injunction against the strike, and specific performance of the contractual agreement to arbitrate.⁴⁴ The superior court issued an ex parte temporary restraining order forbidding continuation of the strike, and ordered the union to show cause why a preliminary

organization alleging a violation of such contract by such employer, and (ii) a provision expressly stating that [the Norris-LaGuardia Act] shall be inapplicable in any such proceeding.

S. 2132, H.R. 9059, 89th Cong., 1st Sess. (1965). It is unlikely that the amendment would have had its intended effect, since few unions would waive the protection of the Act.

Subsequently, a bill was introduced to amend the Norris-LaGuardia Act to permit injunctions enforcing a no-strike/no-lockout clause, without reference to an arbitrable grievance. S. 2455, 90th Cong., 1st Sess. (1967).

⁴⁰ See *Boys Markets*, 398 U.S. at 249 n.18.

⁴¹ 398 U.S. 235 (1970).

⁴² *Id.* at 239. Specifically, the employer's frozen foods supervisor and several members of his crew, who were not members of the bargaining unit, rearranged merchandise in frozen food cases at one of the company's supermarkets. A union representative insisted that the company use unit personnel to remove all merchandise from the cases, return the merchandise to the main freezer in a storeroom, and then restock the cases. *Id.*

⁴³ *Id.* The "Adjustment and Arbitration" provision in their contract required either party to notify the other regarding any controversy concerning the interpretation or application of the agreement. If the parties failed to resolve a dispute, either party could submit the controversy to arbitration before a single neutral arbitrator or before a panel composed of equal numbers appointed by each party, with an impartial arbitrator as chairman. The resulting award was final and binding on the parties, subject only to their rights under law. During the period of adjustment or arbitration, the status quo was to be maintained pending the ultimate resolution of the dispute. The contract further specified that there should be no "cessation or stoppage of work, lockout, picketing or boycotts" over an arbitrable issue except when a party refused to comply with the grievance procedure or to comply with an arbitration award. *Boys Market, Inc. v. Retail Clerks Local 770*, 70 L.R.R.M. 3071, 3072-73 (C.D. Cal. 1969). See *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 238-39 nn.3-4 (1970).

⁴⁴ 398 U.S. at 239-40.

injunction should not issue.⁴⁵ Shortly thereafter, the union removed the case to federal district court and moved to quash the state court's temporary restraining order. The company again sought to enjoin the strike and to compel arbitration. Without an evidentiary hearing, the district court denied the union's motion and granted the company's applications for an injunction against the strike and for an order compelling arbitration of the dispute "with diligence."⁴⁶

The Ninth Circuit reversed, holding that "the clear language of section 4 of the Norris-LaGuardia Act," as interpreted in *Sinclair*, removes federal district court authority to enjoin strikes even though they constitute a breach of contract.⁴⁷ The Supreme Court granted certiorari⁴⁸ and reversed.

Writing for the Court, Justice Brennan concluded that "*Sinclair* stands as a significant departure from our otherwise consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration"⁴⁹ The majority concluded that *Sinclair* had undermined a cornerstone of the federal labor policy—mandatory arbitration of grievances—by dissipating employer incentive to accept arbitration clauses.⁵⁰ In

⁴⁵ *Boys Markets, Inc. v. Retail Clerks Local 770*, Civ. No. 948,323 (Los Angeles County Super. Ct., filed Feb. 19, 1969).

⁴⁶ *Boys Markets, Inc. v. Retail Clerks Local 770*, 70 L.R.R.M. 3071, 3075-76 (C.D. Cal. 1969). The district court found that (a) the contract required the submission of all disputes concerning its interpretation to arbitration; (b) the contract contained an express no-strike clause; (c) the Union breached the contract by striking over a dispute "of the type and character" required to be arbitrated; (d) the strike had caused, and would continue to cause, irreparable injury to the Company; (e) the Company would suffer more from the denial of an injunction than the Union would suffer from its issuance; (f) the Company had no adequate remedy at law because it was "impossible to ascertain the exact amount of damage"; and (g) the Company had sought to arbitrate the dispute. *Id.* at 3074-75. The injunction was to become effective when the Company filed a \$1000 corporate surety bond. *Id.* at 3076.

⁴⁷ *Boys Markets, Inc. v. Retail Clerks Local 770*, 416 F.2d 368, 369, 72 L.R.R.M. 2527, 2528 (9th Cir. 1969).

⁴⁸ 396 U.S. 1000 (1970).

⁴⁹ 398 U.S. at 241. Following the enactment of § 301, the Supreme Court had pointed to the "basic policy of national labor legislation to promote the arbitral process," *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962), and had uniformly required parties to adhere to the grievance and arbitration provisions of their agreements. See, e.g., *John Wiley & Sons v. Livingston*, 376 U.S. 543, 546-47 (1964); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957). In *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960), the Court, in holding that the parties were contractually bound to arbitrate a grievance which the lower court had found to be "frivolous" and "patently baseless" and therefore not subject to arbitration, pointed to § 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d) (1970), prohibiting the Federal Mediation and Conciliation Service from attempting to resolve an arbitrable dispute except as a "last resort" and in "exceptional circumstances," and stated that its policy "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." 363 U.S. at 566. Similarly, in *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), the Court lauded the arbitration process as "the very heart of the system of industrial self-government." *Id.* at 581.

⁵⁰ 398 U.S. at 248.

order to preserve the federal policy favoring arbitration of labor disputes, the contractual no-strike clauses which ordinarily accompany arbitration clauses must be effectively enforced.⁵¹ Although other remedies exist for enforcement of the no-strike obligation, the majority felt that injunctive relief was "the principal and most expeditious" enforcement mechanism.⁵²

The Court also concluded in *Boys Markets* that its decision in *Avco Corp. v. Machinists Aero Lodge 735*⁵³ necessitated a reconsideration of the practical effects of *Sinclair*.⁵⁴ In *Avco* the Court had held that section 301 actions are removable to federal courts.⁵⁵ In prior decisions, however, the Court had held that while section 301 envisioned a substantive federal labor law,⁵⁶ state courts would retain pre-existing jurisdiction,⁵⁷ applying the substantive federal law developed under section 301 in order to maintain a uniform system of labor law.⁵⁸ The result of *Avco*, when combined with the decision in *Sinclair* that section 4 of Norris-LaGuardia precluded federal courts from enjoining strikes in breach of contract,⁵⁹ was to insure that unions would remove most injunctive suits from state courts, where the Norris-LaGuardia Act does not apply,⁶⁰ to federal courts in order to obtain dismissal of the claim for injunctive relief. Faced with the dual objectives of preserving uniformity in the federal and state forums and of maintaining concurrent state and federal jurisdiction, the Court in *Boys Markets* found it necessary to "accommodate" the literal terms of section 4 of the Norris-LaGuardia Act with its interpretations of the subsequently enacted section 301.⁶¹ Justice Brennan also suggested that the judicial bias which

⁵¹ *Id.* at 249.

⁵² *Id.* at 248.

⁵³ 390 U.S. 557 (1968).

⁵⁴ 398 U.S. at 244-45.

⁵⁵ 390 U.S. at 560.

⁵⁶ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957).

⁵⁷ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 511 (1962).

⁵⁸ *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 102-03 (1962).

⁵⁹ 370 U.S. at 209-10.

⁶⁰ See *American Dredging Co. v. Marine Operating Eng'rs Local 25*, 338 F.2d 837, 855, 57 L.R.R.M. 2407, 2420 (3d Cir. 1964), cert. denied, 380 U.S. 935 (1965); *McCarroll v. Council of Carpenters*, 49 Cal. 2d 45, 63, 315 P.2d 322, 332 (1957), cert. denied, 355 U.S. 932 (1958); *Shaw Elec. Co. v. Local 98, IBEW*, 418 Pa. 1, 13, 208 A.2d 769, 776 (1965). But see *Avco Corp. v. Aero Lodge 735*, 376 F.2d 337, 342-43, 65 L.R.R.M. 2193, 2196 (6th Cir. 1967), aff'd, 390 U.S. 557 (1968). The Supreme Court in *Avco* specifically reserved the question of the applicability of Norris-LaGuardia in state courts. 390 U.S. at 560 n.2.

⁶¹ 398 U.S. at 250. A similar conflict exists between § 4 of the Norris-LaGuardia Act and a provision in the Railway Labor Act allowing compulsory arbitration of certain minor disputes at the request of either party. 45 U.S.C. § 153 (First) (i), (m) (1970). In *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30 (1957), the Court accommodated those conflicting provisions by holding that the Norris-LaGuardia Act did not prohibit enjoining strikes over "minor disputes." *Id.* at 40. The Court concluded that minor disputes fall within the jurisdiction of the Railway Adjustment Board and that injunctive relief is

necessitated Norris-LaGuardia no longer existed.⁶² The Supreme Court held, therefore, that "the Norris-LaGuardia Act does not bar the granting of injunctive relief in the circumstances of the instant case."⁶³ In its "narrow"⁶⁴ holding, the Court specified several substantive prerequisites for the issuance of an injunction despite the proscription of section 4 of the Norris-LaGuardia Act:

1. The contract contains a no-strike clause;⁶⁵
2. A breach of the no-strike clause is occurring and will continue, or has been threatened and will be committed;⁶⁶
3. The collective bargaining agreement contains a "mandatory grievance adjustment or arbitration procedure;"⁶⁷
4. The strike is "over a grievance which both parties are contractually bound to arbitrate;"⁶⁸
5. The employer is "ready to proceed with arbitration at the time an injunction [is] . . . sought and obtained;"⁶⁹
6. The breach has caused or will cause irreparable injury to the employer;⁷⁰
7. "[T]he employer will suffer more from the denial of an injunction than will the union from its issuance;"⁷¹ and
8. The employer must be ordered to arbitrate "as a condition of his obtaining an injunction against the strike."⁷²

The Court explicitly overruled *Sinclair*⁷³ and, because the district court had made the necessary findings, ordered the Ninth Circuit to affirm the district court's issuance of an injunction.⁷⁴

B. *Gateway Coal Co. v. United Mine Workers*⁷⁵

Boys Markets presented a simple case involving an express no-strike clause and a strike over an indisputably arbitrable economic grievance.⁷⁶ None of these factors were present in *Gateway*, the next *Boys Markets* case to reach the Supreme Court.

necessary to protect the Board's jurisdiction. Id. at 39. "Major disputes" are not subject to compulsory arbitration, and strikes over such disputes cannot be enjoined. *Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 335, 341 (1960).

⁶² 398 U.S. at 250.

⁶³ Id. at 253.

⁶⁴ Id.

⁶⁵ Id. at 248 n.16, 254.

⁶⁶ Id. at 254.

⁶⁷ Id. at 253.

⁶⁸ Id. at 254.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

⁷³ Id. at 238.

⁷⁴ Id. at 254-55.

⁷⁵ 414 U.S. 368 (1974).

⁷⁶ 398 U.S. at 248 n.16, 254.

The dispute in *Gateway* arose following the discovery of a partial blockage in the ventilation system of an underground coal mine.⁷⁷ Federal and state investigators determined that three assistant foremen had falsified records to conceal the problem.⁷⁸ When miners refused to work with them, Gateway suspended the three.⁷⁹ Approximately six weeks later, the state Department of Mines notified the company that it could reinstate the assistant foremen despite pending criminal charges.⁸⁰ When Gateway reinstated two of the foremen, the miners struck.⁸¹ One week later, the union rejected Gateway's offer to arbitrate the dispute.⁸²

Gateway sought a restraining order and a preliminary injunction against the strike in federal district court. In its order, the district court instructed the parties to arbitrate whether the miners should work with the offending foremen; pending arbitration, the court ordered Gateway to suspend the assistant foremen.⁸³ The court rejected the union's argument that the dispute was not arbitrable.⁸⁴ The national agreement executed by the parties was interpreted as requiring that all non-national disputes be settled through a grievance system culminating in arbitration.⁸⁵ Since the contract established a local employee mine safety committee with authority to close the mine in immediately dangerous circumstances, since members of the committee could be removed for arbitrarily closing the mine, and since their removal would create a non-national arbitrable grievance, the district court concluded that the union had agreed to arbitrate safety disputes.⁸⁶

The United States Court of Appeals for the Third Circuit reversed that determination.⁸⁷ In vacating the district court's order, the court held that the contract did not unambiguously require mandatory arbitration of safety disputes.⁸⁸ The contract did not specify the arbitration of safety disputes and neither party could recall a prior instance in which a safety dispute had been arbi-

⁷⁷ 414 U.S. at 371.

⁷⁸ *Id.*

⁷⁹ *Id.* at 371-72.

⁸⁰ *Id.* at 372. The foremen subsequently pleaded nolo contendere to misdemeanor charges and were fined \$200 each. *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Gateway Coal Co. v. UMW*, 80 L.R.R.M. 2633, 2634 (W.D. Pa. 1971) (temporary restraining order). While the union's appeal was pending, the arbitrator rejected the union's contention that the retention of the foremen, with safety responsibilities, would be dangerous. *Gateway Coal Co. v. UMW*, 466 F.2d 1157, 1158, 80 L.R.R.M. 3153 (3d Cir. 1972).

⁸⁴ *Gateway Coal Co. v. UMW*, 80 L.R.R.M. 2634, 2635 (W.D. Pa. 1971) (preliminary injunction).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Gateway Coal Co. v. UMW*, 466 F.2d 1157, 80 L.R.R.M. 3153 (3d Cir. 1972).

⁸⁸ *Id.* at 1159, 80 L.R.R.M. at 3154.

trated.⁸⁹ The court refused to apply a presumption of arbitrability,⁹⁰ holding that disputes concerning health and safety were "sui generis," that is, qualitatively different from other types of local disputes, and that an ambiguous arbitration clause should not be construed to require mandatory arbitration of safety disputes.⁹¹ The court also suggested that *Boys Markets* was limited to cases involving economic disputes.⁹²

In reversing the Third Circuit's judgment, the Supreme Court refined three important aspects of the *Boys Markets* decision. First, the Court concluded that a "presumption of arbitrability"⁹³ would apply in *Boys Markets* cases, including cases involving safety disputes.⁹⁴ The Court then found that the mine safety committee

⁸⁹ Id.

⁹⁰ Id. In *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), the Supreme Court held that "[i]n the absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . ." Id. at 584-85. The applicability of the presumption of arbitrability announced in *Warrior & Gulf* to *Boys Markets* injunction cases has been a matter of much debate. See text at notes 168-204 *infra*.

⁹¹ 466 F.2d at 1159-60, 80 L.R.R.M. at 3154-55. Writing for the majority, Judge Hastie recognized that the duty to arbitrate and the obligation not to strike are interrelated and reasoned that § 502 of the Taft-Hartley Act, providing that "the quitting of labor by . . . employees in good faith because of abnormally dangerous conditions for work at . . . [their] place of employment . . . [shall not] be deemed a strike," 29 U.S.C. § 143 (1970), "should influence a court to reject any avoidable [contract] construction . . . requiring final disposition of safety disputes by arbitration." 466 F.2d at 1160, 80 L.R.R.M. at 3155. Significantly, the court appeared to apply a subjective test of employee "good faith." See *id.* The NLRB has also held that walkouts to protest unsafe working conditions are protected, notwithstanding contractual arbitration and no-strike clauses. *Philadelphia Marine Trade Ass'n*, 138 N.L.R.B. 737, 739, 51 L.R.R.M. 1130, 1131 (1962), enforced, 330 F.2d 492, 495, 497, 55 L.R.R.M. 2889, 2890, 2892 (3d Cir. 1964), cert. denied, 379 U.S. 833, 841; *Knight Morley Corp.*, 116 N.L.R.B. 140, 146-47, 38 L.R.R.M. 1194, 1195-96 (1956), enforced, 251 F.2d 753, 760, 41 L.R.R.M. 2242, 2247 (6th Cir. 1957), cert. denied, 357 U.S. 927 (1958). The Board, however, has adopted an objective test that the conditions must, in fact, be abnormally dangerous, *Redwing Carriers, Inc.*, 130 N.L.R.B. 1208, 1209, 47 L.R.R.M. 1470, 1471 (1961), as has the Eighth Circuit, *NLRB v. Fruin-Colnon Const. Co.*, 330 F.2d 885, 892, 56 L.R.R.M. 2048, 2054 (8th Cir. 1964).

In his dissent from the Third Circuit's decision in *Gateway*, Judge Rosenn pointed out that (1) the safety issue was not raised until the union struck over the company's refusal to pay employees who failed to work the day the dangerous conditions existed; (2) there was no objective evidence that abnormally dangerous conditions existed; and (3) the district court's injunction maintained safe conditions by suspending the supervisors pending arbitration to determine whether they could safely be reinstated. 466 F.2d at 1161-63, 80 L.R.R.M. at 3156-57 (dissenting opinion). The majority responded to Judge Rosenn's third argument by stating that employees should not be forced to risk their lives on the arbitrator's judgment. 466 F.2d at 1160, 80 L.R.R.M. at 3155.

⁹² 466 F.2d at 1160 n.1, 80 L.R.R.M. at 3155 n.1.

⁹³ See note 90 *supra*.

⁹⁴ *Gateway Coal Co. v. UMW*, 414 U.S. 368, 379-80 (1974). The Court reasoned that safety disputes may create industrial strife, that arbitrators have special expertise in the safety field, and that releasing safety disputes to the arena of economic combat would not ensure employee safety but would rather make safety dependent upon the union's economic strength. Id. at 379.

procedure present in *Gateway* did not constitute an express exception to the arbitration system.⁹⁵ The Court also held that federal courts had jurisdiction to grant an injunction on the basis of an implied no-strike clause and that a no-strike clause should be implied, coterminous with the arbitration clause, absent an express provision to the contrary.⁹⁶ Finally, the Court stated that "a work stoppage called solely to protect employees from immediate danger is authorized by § 502 and cannot be the basis for either a damages award or a *Boys Markets* injunction" despite the presence of an express or implied no-strike clause.⁹⁷ However, the Court concluded that this statutory exception was inapplicable where, as in *Gateway*, the union had failed to present "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists."⁹⁸ The Court emphasized that, in any event, the district court order suspending the foremen pending arbitration had obviated any immediate danger.⁹⁹

After *Gateway*, the substantive requirements imposed by *Boys Markets* were thus amended to permit an injunction where:

- 1.(a) The contract contains a no-strike clause, either express or implied;
- (b) The strike is not over an objectively ascertainable threat to employee safety;
4. The strike is over a grievance which is arguably arbitrable under the contract between the parties;

C. *Granny Goose Foods, Inc. v. Teamsters Local 70*¹⁰⁰

The third case in the Supreme Court *Boys Markets* trilogy involved the effect of removal to a federal court on an injunction issued in a state court. Although not directly a *Boys Markets* case, *Granny Goose* is significant because *Boys Markets* cases can originate in state courts.¹⁰¹ The Court's decision in *Granny Goose* may profoundly affect the choice of forum in *Boys Markets* situations.

⁹⁵ Id. at 380 n.10.

⁹⁶ Id. at 381-82. In *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), the Court held that a strike over a dispute subject to mandatory arbitration under a collective bargaining agreement constitutes a breach of that agreement, despite the absence of an express no-strike clause, and subjects the Union to liability for damages in a § 301 suit. Id. at 104-05. *Gateway* extended the *Lucas Flour* doctrine to suits for injunctive relief. 414 U.S. at 381.

⁹⁷ 414 U.S. at 385.

⁹⁸ Id. at 387.

⁹⁹ Id.

¹⁰⁰ 415 U.S. 423 (1974).

¹⁰¹ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506 (1962).

The dispute apparently involved the union's contention that its members were not covered by a multi-union, multi-employer collective bargaining agreement recently signed by the employer and that no binding labor agreement existed between the parties.¹⁰² When the union struck, the employer obtained an ex parte restraining order and a show cause order in state court on May 15, 1970.¹⁰³ Both orders were returnable on May 26, when each would expire.¹⁰⁴ On May 19, the union removed the case to federal court, where it moved to dissolve the order on the basis of the *Sinclair* decision.¹⁰⁵ On June 4, three days after the Supreme Court overruled *Sinclair* in *Boys Markets*, the court denied the union's motion to dissolve.¹⁰⁶ Neither the union nor the employer filed further motions in the case. Strike activity then ceased.¹⁰⁷

On November 30, 1970, the union resumed the strike.¹⁰⁸ Rejecting the union's contention that the order had expired, the district court held the union in contempt.¹⁰⁹ Since section 1450 of the Judicial Code provides that removed orders remain in force until dissolved or modified, the court reasoned that the state order remained in force in light of the district court's failure to dissolve the state court's order.¹¹⁰ The Ninth Circuit reversed, holding that the order issued by the state court and upheld by the district court had long since expired.¹¹¹ The court concluded that a district court must treat a removed order (1) as if it had issued the order at the time the state court acted, in which case the federal time limitation ex parte restraining orders contained in Federal Rule 65(a) would apply, or (2) as if state law governed.¹¹² In either case, the court seemed willing to allow the maximum extension provided by either body of law.¹¹³ However, section 1450, the court reasoned, merely insures

¹⁰² 415 U.S. at 427-28.

¹⁰³ Id. at 428.

¹⁰⁴ Id. California law provides that an ex parte restraining order must be returnable within 15 days, or within 20 days if good cause is shown. Unless the party obtaining the order then obtains a preliminary injunction, the restraining order is dissolved. Cal. Code Civ. Proc. § 527 (West Supp. 1975).

¹⁰⁵ 415 U.S. at 428.

¹⁰⁶ Id. at 429.

¹⁰⁷ Id.

¹⁰⁸ Id. at 430.

¹⁰⁹ *Granny Goose Foods, Inc. v. Teamsters Local 70*, 76 L.R.R.M. 2412, 2414 (N.D. Cal. 1970).

¹¹⁰ Id. at 2414. Section 1450 provides, in pertinent part, that "[a]ll injunctions, orders and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." 28 U.S.C. § 1450 (1970).

¹¹¹ *Granny Goose Foods, Inc. v. Teamsters Local 70*, 472 F.2d 764, 766-67, 82 L.R.R.M. 2545, 2546-47 (9th Cir. 1973).

¹¹² Id. at 765-67, 82 L.R.R.M. at 2546-47. Rule 65(b) permits an ex parte order to last 10 days, with an extension if good cause is shown or if the defendant consents. Fed. R. Civ. P. 65(b).

¹¹³ 472 F.2d at 765-66, 82 L.R.R.M. at 2546.

that a state order survives removal, and does not add to the duration of the order.¹¹⁴ Finally, the court held that the denial of a motion to dissolve a temporary order is not the functional equivalent of the issuance of a preliminary injunction.¹¹⁵

The Supreme Court affirmed, holding that

[a]n *ex parte* temporary restraining order issued by a state court prior to removal remains in force after removal no longer than it would have remained in effect under state law, but in no event does the order remain in force longer than the time limitations imposed by Rule 65(b) measured from the date of removal.¹¹⁶

Unlike the Ninth Circuit, however, the Court indicated that the district court must expressly extend a state order if it is to remain effective longer than 10 days.¹¹⁷ Similarly, the Court held that any grant of a preliminary injunction by a district court must be express and cannot be implied from the denial of a union's motion to dissolve a temporary order, thereby requiring the employer to prove its right to injunctive relief rather than forcing the union to disprove it.¹¹⁸

IV. THE APPLICATION OF *Boys Markets* IN THE FEDERAL COURTS

Federal courts have based innumerable decisions upon *Boys Markets*.¹¹⁹ The following analysis of the more than one hundred cases reported by April, 1975 is divided into three general categories: (a) the substantive requirements of *Boys Markets*; (b) the substantive requirements of the Norris-LaGuardia Act; and (c) the procedural framework of the injunction process.

¹¹⁴ Id. at 766-67, 82 L.R.R.M. at 2546-47.

¹¹⁵ Id. at 767, 82 L.R.R.M. at 2547. In a similar *Boys Markets* case, the Second Circuit had held that "the practical effect of the refusal to dissolve the temporary restraining order was the equivalent of a grant of preliminary injunctive relief." *Morning Tel. v. Powers*, 450 F.2d 97, 99, 78 L.R.R.M. 2710, 2712 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972). There the employer had obtained a state court *ex parte* restraining order on March 1 effective until a hearing scheduled on March 3. After removal, on March 9, the federal district court heard the union's motion to vacate and on March 23 denied the motion. Id. at 98-99, 78 L.R.R.M. at 2711.

¹¹⁶ *Granny Goose*, 415 U.S. at 439-40 (footnote omitted).

¹¹⁷ See id. at 440 n.15.

¹¹⁸ Id. at 442-43.

¹¹⁹ Of the 142 labor practitioners responding to a survey in September and December, 1973, several had participated in more than 100 *Boys Markets* cases.

A computer printout analyzing the survey responses is available at the offices of the Boston College Industrial and Commercial Law Review. Obviously, the reported cases represent merely the tip of the iceberg.

A. The Substantive Requirements of Boys Markets

1. An Actual or Threatened Strike in Breach of Contract

a. *A Labor Dispute.* The Norris-LaGuardia Act restricts the issuance of certain injunctions and restraining orders by federal courts in the broad class of cases "involving or growing out of a labor dispute."¹²⁰ Labor disputes are statutorily defined to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."¹²¹ In the overwhelming majority of cases, trial courts either failed to consider this threshold issue, the existence of a "labor dispute," or merely cited the broad statutory definition in the Act before proceeding into their analysis of the *Boys Markets* exception.¹²²

On the other hand, several employers have successfully argued that essentially "political" union activity, protesting governmental action or inaction and not intended to alter terms and conditions of employment, does not constitute a "labor dispute" and is thus unprotected by the Norris-LaGuardia Act.¹²³

b. *An Actual or Threatened Strike in Breach of Contract.* Section 4 of the Norris-LaGuardia Act proscribes the issuance of injunctions or restraining orders which prohibit any persons interested in a labor dispute, whether acting singly or in concert, from striking, peacefully picketing, or nonfraudulently publicizing a labor

¹²⁰ 29 U.S.C. §§ 101, 104, 107, 109-10 (1970).

¹²¹ Id. § 113(c). The jurisdiction of the NLRB is similarly defined. Id. §§ 152(9), 160(a).

¹²² See, e.g., *Port of Houston Auth. v. Masters, Mates & Pilots*, 456 F.2d 50, 51, 79 L.R.R.M. 2789, 2790 (5th Cir. 1972) (statutory definition cited without discussion); *Harmony Dairy Co. v. Teamsters Local 205*, 82 L.R.R.M. 2773, 2778 (W.D. Pa. 1972) (Norris-LaGuardia and applicability of *Boys Markets* exception discussed without consideration of the presence of a labor dispute).

¹²³ See *United States Steel Corp. v. UMW*, 74 L.R.R.M. 2611, 2613 (3d Cir. 1970); *Harrington & Co. v. Local 1416, ILA*, 356 F. Supp. 1079, 1081-83, 84 L.R.R.M. 2821, 2825-26 (S.D. Fla. 1973) (motion to clarify); *Harrington & Co. v. Local 1416, ILA*, 84 L.R.R.M. 2821, 2822 (S.D. Fla. 1973) (preliminary injunction); *United States Steel Corp. v. UMW*, 77 L.R.R.M. 3134, 3135 (E.D. Ky. 1971). One district court found no "labor dispute" where a union struck to compel employer compliance with wage provisions not validated by the Construction Industry Stabilization Committee. *Colonial Sand & Stone Co. v. Geoghegan*, 367 F. Supp. 932, 935-36, 84 L.R.R.M. 2678, 2681 (S.D.N.Y. 1973). Under almost identical circumstances, an appellate court rejected that conclusion, despite the lack of real disagreement between the union and employer. *McGuire Shaft & Tunnel Corp. v. Local 1791, UMW*, 475 F.2d 1209, 1215 n.12 (Temp. Emer. Ct. App.), cert. denied, 412 U.S. 958 (1973).

An employer may also avoid the restrictions of the Act by demonstrating that the offending employees do not constitute a "labor organization." *Consolidation Coal Co. v. Disabled Miners*, 328 F. Supp. 1248, 1251-52, 77 L.R.R.M. 2948, 2950-51 (S.D.W. Va. 1970), aff'd, 442 F.2d 1261, 1265-66 (4th Cir. 1971).

dispute, or from promoting such activity.¹²⁴ *Boys Markets* creates an exception to the limitation imposed upon federal courts by section 4 only when there is an actual or threatened strike in breach of contract.¹²⁵ Approximately 99 percent of all collective bargaining agreements include express no-strike provisions of variable scope, or grievance or grievance-arbitration provisions creating implied no-strike clauses.¹²⁶

Courts have properly issued injunctions with scant reference to a no-strike clause.¹²⁷ Although *Boys Markets* itself dealt only with an express no-strike clause, the Court implied that an injunction would be appropriate where a strike breached an implied no-strike clause coextensive with the duty to arbitrate, since the focus of the *Boys Markets* injunction is on the agreement to arbitrate rather than on any agreement not to strike.¹²⁸ Three years later, in *Gateway*, the Court expressly held that no-strike clauses should be implied in injunction cases,¹²⁹ a result which district courts had accurately predicted even before *Gateway*.¹³⁰

¹²⁴ 29 U.S.C. §§ 104(a), (d)-(i) (1970).

¹²⁵ 398 U.S. at 254. The type of activity which constitutes a breach of a no-strike obligation has been broadly interpreted to include any "attempt by the Union to retard production or to interrupt or interfere with work." *Avco Corp. v. Local 787, UAW*, 459 F.2d 968, 974, 80 L.R.R.M. 2290, 2294 (3d Cir. 1972). Thus courts have enjoined total strikes, e.g., *Boys Markets*, 398 U.S. at 253-54, overtime boycotts where overtime is normally relied upon by management, *Avco Corp. v. Local 787, UAW*, 459 F.2d 968, 974, 80 L.R.R.M. 2290, 2294 (3d Cir. 1971); *Elevator Mfrs. Ass'n v. Elevator Constrs. Local 1*, 342 F. Supp. 372, 374, 80 L.R.R.M. 2165, 2166-67 (S.D.N.Y. 1972), and slowdowns, *Pittsburgh Press Co. v. Printing Pressmen Local 9*, 75 L.R.R.M. 2800 (W.D. Pa. 1970).

Once the court enjoins a strike, it may also enjoin a wide variety of collateral activity, including picketing, interference with the employer's operations and promoting of such activities. See *Boys Markets*, 398 U.S. at 240. However, where there is no strike or threatened strike, the court will not enjoin peaceful picketing by laid-off employees. *MacFadden-Bartell Corp. v. Teamsters Local 1034*, 345 F. Supp. 1286, 1289-90, 80 L.R.R.M. 3234, 3237 (S.D.N.Y. 1972). Cf. *Stereotypers' Union v. Long Island Daily Press Publishing Co.*, 79 L.R.R.M. 2284, 2291 (E.D.N.Y. 1971). It appears that no court has been asked to enjoin picketing by employees on their own time.

¹²⁶ U.S. Dept. of Labor, Bureau of Labor Statistics, Bulletin No. 1425-6, *Major Collective Bargaining Agreements: Arbitration Procedures* 86-89 (1966) [hereinafter cited as Bull. 1425-6]. Ninety percent of all labor agreements contained express no-strike clauses while 9% contained arbitration procedures giving rise to an implied no-strike clause. *Id.* at 86. See note 96 *supra* and accompanying text.

¹²⁷ Several courts did not discuss the no-strike obligation at all. See, e.g., *American Can Co. v. Steelworkers Local 7420*, 350 F. Supp. 810, 81 L.R.R.M. 2706 (E.D. Pa. 1972); *Pittsburgh Press Co. v. Printing Pressmen*, 78 L.R.R.M. 2528 (W.D. Pa. 1971); *Stearns-Roger Corp. v. Millwrights Local 1182*, 77 L.R.R.M. 2776 (D. Ariz. 1971); *American Can Co. v. International Bhd. of Pulp Workers*, 77 L.R.R.M. 2633 (D. Ore. 1971).

¹²⁸ See 398 U.S. at 248 n.16, 253-54.

¹²⁹ 414 U.S. 368, 381 (1974).

¹³⁰ See, e.g., *MacFadden-Bartell Corp. v. Teamsters Local 1034*, 345 F. Supp. 1286, 1289, 80 L.R.R.M. 3234, 3237 (S.D.N.Y. 1972); *Lanco Coal Co. v. Southern Coal Local 250*, 320 F. Supp. 273, 275 n.2, 76 L.R.R.M. 2249, 2250 n.2 (N.D. Ala. 1970). Cf. *NAPA Pittsburgh, Inc. v. Teamsters Local 926*, 502 F.2d 321, 335, 87 L.R.R.M. 2044, 2055 (3d Cir. 1974) (dissenting opinion).

No-strike clauses should not, however, be implied too readily. As Justice Black stated in his dissent in *Teamsters Local 174 v. Lucas Flour Co.*,¹³¹ since employers regularly bargain for express no-strike clauses, the absence of such an express clause may indicate that the parties have considered and rejected its inclusion.¹³² Courts should scrutinize the parties' real intent and not ignore the contractual bargaining obligation by applying a rigid rule of law.¹³³ The Court itself has subsequently lent credence to Justice Black's position by cautioning against an "inflexible rule rigidly linking no-strike and arbitration clauses of every collective bargaining contract in every situation."¹³⁴

Thus, in several instances, courts have paused to consider the parties' negotiating history. Where a union has expressly rejected an explicit no-strike clause, courts have refused "to hold that the Union unwittingly surrendered what it expressly showed that it intended to keep."¹³⁵ Conversely, some courts have read an express reservation of the right to strike as applying only to national disputes and have implied a no-strike clause for "non-national disputes," particularly in cases involving National Bituminous Coal Wage Agreements.¹³⁶

Similarly, where the parties have bargained for an express no-strike clause narrower than the arbitration provisions, a broader no-strike clause should not ordinarily be implied.¹³⁷ When, however, the parties have agreed to arbitrate all disputes, but have also agreed that the no-strike clause is inapplicable when the employer violates the collective bargaining agreement, some courts have been willing to issue injunctions, reasoning that such clauses undermine the arbitration system and requiring that the employers' alleged violation itself be arbitrated.¹³⁸ A more reasonable interpretation of

¹³¹ 369 U.S. 95 (1962).

¹³² *Id.* at 109-10.

¹³³ *See id.*

¹³⁴ *Drake Bakeries, Inc. v. Bakery Workers Local 50*, 370 U.S. 254, 261 (1962). The Court warned that previous decisions did not "enunciate a flat and general rule that the two clauses are properly to be regarded as exact counterweights in every industrial setting . . ." *Id.* at 261 n.7. *See Packinghouse Workers Local 721 v. Needham Packing Co.*, 376 U.S. 247, 251 (1964).

¹³⁵ *Rochester Tel. Corp. v. Communications Workers*, 78 L.R.R.M. 2213, 2214 (W.D.N.Y. 1971), *rev'd on other grounds per curiam*, 456 F.2d 1057, 1058, 79 L.R.R.M. 2770 (2d Cir. 1972); accord, *Martin Hageland, Inc. v. United States Dist. Ct.*, 460 F.2d 789, 791 (9th Cir. 1972).

¹³⁶ *See, e.g., Old Ben Coal Corp. v. Local 1487, UMW*, 457 F.2d 162, 163-64, 78 L.R.R.M. 2845, 2847 (7th Cir. 1972).

¹³⁷ *See NLRB v. State Elec. Serv., Inc.*, 477 F.2d 749, 751, 82 L.R.R.M. 3154, 3156 (5th Cir.), *cert. denied*, 414 U.S. 911 (1973).

¹³⁸ *Allied Div. of Del. Contractors Ass'n, Inc. v. Operating Engineers Local 542*, 351 F. Supp. 568, 571, 82 L.R.R.M. 2078, 2079-80 (D. Del. 1972); *Elevator Mfrs. Ass'n v. Elevator Constrs. Local 1*, 331 F. Supp. 165, 166, 78 L.R.R.M. 2215, 2216, (S.D.N.Y. 1971). One study revealed that 2.9 percent of contracts examined in 1961-1962 provided for a waiver of

these clauses would permit the union to strike only if the employer refuses to rectify a proven breach of contract.¹³⁹ That construction, while departing from the contract's literal language, is far more consistent with national labor policy and with the parties' presumed desire to arbitrate most disputes.

Finally, no injunction should issue, despite the presence of a broad no-strike clause, when the dispute underlying the strike is not arbitrable.¹⁴⁰

2. *A Mandatory Grievance or Arbitration Procedure*

Boys Markets applies only where the collective bargaining agreement contains a "mandatory grievance adjustment or arbitration procedure."¹⁴¹ In *Boys Markets*, while only the union could initiate grievances, either party could submit unresolved disputes to arbitration.¹⁴² The contract provided that "[a]ny and all matters of controversy . . . shall be settled and resolved" through the grievance procedure and expressly prohibited strikes over arbitrable disputes.¹⁴³ Where a similar combination exists—grievance initiation only by the union, arbitration submission by either party and an express no-strike clause—courts have routinely found the clauses to be mandatory.¹⁴⁴ Few agreements, however, contain such specific provisions.¹⁴⁵

Courts have unanimously held that provisions requiring mutual consent for the submission to arbitration are not mandatory, reason-

the no-strike clause if the employer breaches any provision of the contract. Bull. 1425-6, *supra* note 125, at 86-89.

¹³⁹ Cf. *McNally Bros. v. Teamsters Local 816*, 376 F. Supp. 612, 613, 85 L.R.R.M. 2897, 2898 (S.D.N.Y. 1974), where the contract expressly permitted a strike if the employer failed to comply with an arbitral award within 10 days. Approximately 13.5 percent of the contracts surveyed by BLS contained such exceptions. Bull. 1425-6, *supra* note 125, at 88.

¹⁴⁰ See text at notes 166-205 *infra*.

¹⁴¹ 398 U.S. at 253. See *Teamsters Local 795 v. Yellow Transit Freight Lines, Inc.*, 370 U.S. 711, 711-12 (1962) (*per curiam*) (Brennan, J., concurring). But see *L.A. Concrete Pumping, Inc. v. Majich*, 483 F.2d 524, 526 (9th Cir. 1973) (*per curiam*) (dissenting opinion).

¹⁴² *Boys Markets, Inc. v. Retail Clerks Local 770*, 70 L.R.R.M. 3071, 3073-74 (C.D. Cal. 1969).

¹⁴³ 398 U.S. at 238 n.3, 239 n.4.

¹⁴⁴ See, e.g., *Anheuser-Busch, Inc. v. Brewers and Maltsters Local 6*, 346 F. Supp. 239, 241-42, 80 L.R.R.M. 2915, 2917 (E.D. Mo. 1972).

¹⁴⁵ The BLS found that "some" contracts permit the employer to initiate grievances. U.S. Dept. of Labor, Bureau of Labor Statistics, Bulletin No. 1425-1, *Major Collective Bargaining Agreements: Grievance Procedures* 20 (1964) [hereinafter cited as Bull. 1425-1]. Fifteen percent of the contracts studied prohibited strikes over arbitrable grievances and contained arbitration clauses covering all disputes concerning the application and interpretation of the agreement, with or without specified exceptions. Bull. 1425-6, *supra* note 126, at 86. Either party may invoke the arbitration clause in 80.4 percent of the contracts studied and in 89.6 percent of the contracts containing arbitration clauses. *Id.* at 27.

ing that *Boys Markets* applies only to institutionalized arbitration procedures and not to such an ad hoc arrangement.¹⁴⁶

Several district courts have held that "employee-oriented" grievance-arbitration provisions under which the employer may neither initiate grievances nor refer unresolved disputes to arbitration, are not mandatory.¹⁴⁷ Thus, they have viewed such provisions as failing to satisfy the core requirement of *Boys Markets* and have refused to enjoin the union's decision to use economic coercion rather than invoke the grievance system. The Third Circuit, however, rejected that conclusion in *Avco Corp. v. Auto Workers Local 787*,¹⁴⁸ stating:

All that *Boys Markets* requires is that "both parties are contractually bound to arbitrate." It does not require that both parties be capable of initiating arbitration. In this case, the company is bound to arbitrate if the Union elects to pursue that remedy, and the Union is bound to arbitrate the disputes it desires to resolve rather than to resort to a strike. . . . To allow the Union to abandon its remedy of arbitration in order to disregard the "no-strike" clause would render the collective bargaining agreement illusory and would subvert the policy favoring the peaceful settlement of labor disputes by arbitration.¹⁴⁹

That reasoning is convincing where the contract states that all unresolved disputes "shall" be submitted to arbitration¹⁵⁰ or where the union "may" refer disputes to arbitration but has expressly

¹⁴⁶ *Womeldorf, Inc. v. Teamsters Local 110*, 369 F. Supp. 901, 904-05 (W.D. Pa. 1974). See *Associated Gen. Contractors v. Illinois Conf. of Teamsters*, 454 F.2d 1324, 1326, 1328-29, 79 L.R.R.M. 2555, 2556, 2558-59 (7th Cir. 1972); *Morning Tel. v. Powers*, 450 F.2d 97, 102, 103, 78 L.R.R.M. 2710, 2113-14 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972). Cf. *Tulsa-Whisenhunt Funeral Homes, Inc.*, 195 N.L.R.B. 106 n.1, 79 L.R.R.M. 1265, 1267 (1972), enforced, 84 L.R.R.M. 2300 (10th Cir. 1973). Approximately 2.7 percent of the contracts in the BLS sample require mutual consent to invoke arbitration. Bull. 1425-6, supra note 126, at 27.

¹⁴⁷ *Kable Printing Co. v. Machinists Lodge 101*, 359 F. Supp. 265, 267, 84 L.R.R.M. 2785, 2786 (N.D. Ill. 1973); *Avco Corp. v. Local 787, UAW*, 325 F. Supp. 588, 590-91, 595, 77 L.R.R.M. 2014, 2015-16, 2019 (M.D. Pa. 1971), rev'd, 459 F.2d 968, 972-73, 80 L.R.R.M. 2290, 2293-94 (3d Cir. 1972); *Stroehmann Bros. v. Confectionery Workers Local 427*, 315 F. Supp. 647, 650-51, 74 L.R.R.M. 2957, 2959-60 (M.D. Pa. 1970).

¹⁴⁸ 459 F.2d 968, 80 L.R.R.M. 2290 (3d Cir. 1972).

¹⁴⁹ *Id.* at 972, 80 L.R.R.M. at 2293 (citations omitted); accord, *Monongahela Power Co. v. Local 2332, IBEW*, 484 F.2d 1209, 1214, 84 L.R.R.M. 2481, 2484 (4th Cir. 1973); *Geo. A. Hormel & Co. v. Meat Cutters Local P-31*, 349 F. Supp. 785, 788-89, 81 L.R.R.M. 2500, 2502-03 (N.D. Iowa 1972); *Amstar Corp. v. Amalgamated Meat Cutters*, 337 F. Supp. 810, 813-14, 79 L.R.R.M. 2425, 2426-27 (E.D. La.), rev'd on other grounds, 468 F.2d 1372, 1373 (5th Cir. 1972).

¹⁵⁰ See *Stein Printing Co. v. Typographers Local 48*, 329 F. Supp. 754, 756 n.5, 758, 77 L.R.R.M. 3084, 3085 n.5, 3086 (N.D. Ga. 1971).

agreed not to strike.¹⁵¹ In the latter situation the union has discretion to pursue its claim to arbitration but has expressly waived the right to strike if it decides not to arbitrate. However, where the union "may" refer a dispute to arbitration, but has not expressly waived the right to strike, this logic is compelling only if the no-strike clause is implied.¹⁵² Thus, the existence of a no-strike obligation may be the key to finding a mandatory arbitration system.¹⁵³

The preceding analysis has assumed the existence of an arbitration provision. Some courts have seized upon the Court's disjunctive phrasing, "grievance adjustment *or* arbitration provision,"¹⁵⁴ to conclude that a mandatory grievance procedure alone is sufficient to warrant injunctive relief.¹⁵⁵ Once the union has exhausted its contractual grievance remedies, however, courts have refused to issue injunctions against strikes and have dissolved those previously issued.¹⁵⁶ These decisions to enjoin strikes pending exhaustion of the

¹⁵¹ *Amstar Corp. v. Amalgamated Meat Cutters*, 337 F. Supp. 810, 813-14, 79 L.R.R.M. 2425, 2426-27 (E.D. La.), rev'd on other grounds, 468 F.2d 1372, 1373 (5th Cir. 1972). See generally *Anheuser-Busch, Inc. v. Brewery Drivers Local 133*, 346 F. Supp. 702, 705-06, 81 L.R.R.M. 2673, 2674-75 (E.D. Mo. 1972); *Anheuser-Busch, Inc. v. Brewers and Maltsters Local 6*, 346 F. Supp. 239, 242, 80 L.R.R.M. 2915, 2917 (E.D. Mo. 1972).

¹⁵² If the waiver is express, a mandatory arbitration system is readily found. *Amstar Corp. v. Amalgamated Meat Cutters*, 337 F. Supp. 810, 814, 79 L.R.R.M. 2425, 2427 (E.D. La.), rev'd on other grounds, 468 F.2d 1372, 1373 (5th Cir. 1972). If, however, there is no express no-strike clause, it may be more difficult to find a mandatory system. Some courts have been willing to infer a no-strike clause and find a mandatory system without hesitation. See *Geo. A. Hormel & Co. v. Meat Cutters Local P-31*, 349 F. Supp. 785, 788-89, 80 L.R.R.M. 2500, 2502-03 (N.D. Iowa 1972); *MacFadden-Bartell Corp. v. Teamsters Local 1034*, 345 F. Supp. 1286, 1289, 80 L.R.R.M. 3234, 3237 (S.D.N.Y. 1972). Others, however, have refused to infer a no-strike clause. See *Rochester Tel. Corp. v. Communications Workers*, 78 L.R.R.M. 2213, 2214 (W.D.N.Y. 1971), rev'd on other grounds per curiam, 456 F.2d 1057, 1058, 79 L.R.R.M. 2770 (2d Cir. 1972).

¹⁵³ To avoid injunctions, several unions have argued that their arbitration provisions are not mandatory. These unions risk pyrrhic victories: if the court finds that the clause is not mandatory, the union cannot subsequently compel the employer to arbitrate other, less important, disputes. This reduces the union to costly § 301 litigation, an unwanted and possible futile strike, or capitulation on a series of minor disputes. Unions which intentionally omit mandatory arbitration procedures fully understand the implications; unions which invalidate their agreements to win short-term litigation victories may later regret their tactics.

¹⁵⁴ *Boys Markets*, 398 U.S. at 253 (emphasis added).

¹⁵⁵ See, e.g., *Amstar Corp. v. Amalgamated Meat Cutters*, 337 F. Supp. 810, 814 n.5, 79 L.R.R.M. 2425, 2427 n.5 (E.D. La.), rev'd on other grounds, 468 F.2d 1372, 1373 (5th Cir. 1972).

¹⁵⁶ See, e.g., *Associated Gen. Contractors v. Illinois Conf. of Teamsters*, 454 F.2d 1324, 1329, 79 L.R.R.M. 2555, 2559 (7th Cir. 1972); *Pilot Freight Carriers v. Teamsters Union*, 353 F. Supp. 869, 872, 81 L.R.R.M. 2207, 2209 (M.D.N.C. 1972).

In *General Elec. Co. v. Electrical Workers Local 919*, 398 U.S. 436 (1970), however, decided two weeks after the *Boys Markets* decision, the Supreme Court remanded, without opinion, a Fifth Circuit decision affirming a district court decision to dissolve a state court injunction and deny a preliminary injunction, even though the parties had stipulated that the underlying dispute was not arbitrable and that the grievance procedure had been exhausted. *General Elec. Co. v. Electrical Workers Local 919*, 413 F.2d 964, 965-66, 79 L.R.R.M. 2903, 2903-04 (5th Cir. 1969). The reasoning suggested above would have required affirmance.

grievance procedure reflect the national labor policy of enforcing any method the parties have chosen to resolve their disputes.¹⁵⁷

Expiration of a contract does not necessarily preclude the issuance of an injunction. A valid contract containing a mandatory arbitration system is normally essential for a *Boys Markets* injunction.¹⁵⁸ Nevertheless, a court may order arbitration pursuant to an expired contract when the grievance concerns rights accruing under that agreement,¹⁵⁹ even though the strike may commence after expiration of the contract.¹⁶⁰ On the other hand, where the dispute itself arises after the expiration of the contract, no injunction should issue.¹⁶¹ Several courts have mistakenly denied injunctive relief because arbitration cannot be completed before the expiration of a contract¹⁶² or issued an injunction effective only until the expiration of a current agreement.¹⁶³ Courts should not assume that the ensuing agreement will resolve all unsettled grievances,¹⁶⁴ or conclude that the contract's expiration invalidates accrued rights. Rather, the injunction should extend until the grievance is arbitrated or abandoned.

Disputes involving the existence of a binding agreement pose a related problem. Where the existence of a binding agreement is the

¹⁵⁷ See *Truck Drivers Local 89 v. Riss & Co.*, 372 U.S. 517, 519 (1963).

¹⁵⁸ See *Boys Markets*, 398 U.S. at 253-54.

¹⁵⁹ See *John Wiley & Sons v. Livingston*, 376 U.S. 543, 548, 551 (1964); *Holly Sugar Corp. v. Distillery Workers Union*, 412 F.2d 899, 903-04, 71 L.R.R.M. 2841, 2844 (9th Cir. 1969); *Monroe Sander Corp. v. Livingston*, 377 F.2d 6, 10, 65 L.R.R.M. 2273, 2276-77 (2d Cir. 1967). Cf. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960), where the Court reversed an appellate court decision to deny enforcement of an arbitrator's award on the grounds that back pay beyond the expiration date of the contract had been awarded.

¹⁶⁰ *Kauai Elec. Co. v. Local 1260, IBEW*, 79 L.R.R.M. 2838, 2842-43 (D. Hawaii 1971); cf. *Southwestern Bell Tel. Co. v. Communications Workers*, 454 F.2d 1333, 1334, 78 L.R.R.M. 2833, 2833-34 (5th Cir. 1972). But see *Pullman, Inc. v. International Bhd. of Boilermakers*, 354 F. Supp. 496, 497-98, 82 L.R.R.M. 2638, 2639-40 (E.D. Pa. 1972). In *Pullman*, the court refused to enjoin a post-expiration strike over an apparently pre-expiration grievance; the court also dissolved a state court injunction issued five days before the contract's expiration. *Id.* at 498, 82 L.R.R.M. at 2640. Assuming that the strike did not involve the negotiation of the next agreement, the court erred.

¹⁶¹ See *Procter & Gamble Ind. Union v. Procter & Gamble Mfg. Co.*, 312 F.2d 181, 186 (2d Cir. 1962), cert. denied, 374 U.S. 830 (1963). *Herald Co. v. Hopkins*, 325 F. Supp. 1232, 1234, 77 L.R.R.M. 2199, 2200-01 (N.D.N.Y. 1971).

¹⁶² See *Southwestern Bell Tel. Co. v. Communications Workers*, 324 F. Supp. 830, 833, 76 L.R.R.M. 3032, 3034 (S.D. Tex.), rev'd, 454 F.2d 1333, 78 L.R.R.M. 2833 (5th Cir. 1971).

¹⁶³ See, e.g., *United States Steel Corp. v. UMW*, 77 L.R.R.M. 3134, 3136 (E.D. Ky. 1971); *Hilton Int'l Co. v. Asociacion de Empleados*, 324 F. Supp. 492, 494, 77 L.R.R.M. 2622, 2624 (D.P.R. 1971).

¹⁶⁴ See, e.g., *Bethlehem Mines Corp. v. UMW*, 340 F. Supp. 829, 834, 80 L.R.R.M. 2116, 2119-20 (W.D. Pa. 1972), vacated without published opinion, 480 F.2d 917 (3d Cir. 1973). Furthermore, a union does not waive a completed refusal to bargain by agreeing to the best contract it can obtain. *General Elec. Co. v. NLRB*, 400 F.2d 713, 727, 69 L.R.R.M. 2081, 2091 (5th Cir.), cert. denied, 394 U.S. 904 (1968).

primary dispute, courts have correctly found that the dispute is not arbitrable.¹⁶⁵ On the other hand, where the presence of an agreement is only a secondary issue, courts have first decided if a contract was present and then issued an injunction if the primary dispute was arbitrable under that contract.¹⁶⁶

3. *A Strike Over an Arbitrable Grievance*

In *Boys Markets*, the Supreme Court held that a district court must find that the strike "is over a grievance which both parties are contractually bound to arbitrate" before an injunction can be issued.¹⁶⁷ That core requirement has provoked serious controversies involving the standard of arbitrability and the nature of the arbitrable grievance.¹⁶⁸ Unlike many *Boys Markets* controversies, these issues present important theoretical and practical problems.

a. *The Standard of Arbitrability.* In *Gateway*, the Supreme Court sought to define the standard of arbitrability in strike injunction cases. The Court held that the presumption of arbitrability enunciated in *United Steelworkers v. Warrior & Gulf Navigation Co.*¹⁶⁹ should apply in cases in which an injunction against a strike is sought as well as in cases in which an order to arbitrate is requested.¹⁷⁰ The Court, however, reiterated the presumption's corollary: "[I]n the absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where . . . the exclusion clause is vague and the arbitration clause quite broad."¹⁷¹ In *Gateway*, the Court found no express contractual exception¹⁷² and held the safety dispute exception implied by law to be inapplicable.¹⁷³

¹⁶⁵ *Emery Air Freight Corp. v. Teamsters Local 295*, 449 F.2d 586, 591, 78 L.R.R.M. 2466, 2469-70 (2d Cir. 1971); *Pullman, Inc. v. International Bhd. of Boilermakers*, 354 F. Supp. 496, 499, 82 L.R.R.M. 2638, 2640 (E.D. Pa. 1972).

¹⁶⁶ See *New York News, Inc. v. Typographers Local 6*, 374 F. Supp. 121, 127-28 (S.D.N.Y. 1974); *Harmony Dairy Co. v. Teamsters Local 205*, 82 L.R.R.M. 2773, 2777 (W.D. Pa. 1972); *Amstar Corp. v. Sugar Workers Local 9*, 345 F. Supp. 331, 336-37, 80 L.R.R.M. 2987, 2989-90 (E.D.N.Y. 1972).

¹⁶⁷ 398 U.S. at 254.

¹⁶⁸ See, e.g., Comment, *The New Federal Law of Labor Injunctions*, 79 Yale L.J. 1593, 1602-08 (1970).

¹⁶⁹ 363 U.S. 574 (1960):

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.

Id. at 581-82.

¹⁷⁰ *Gateway*, 414 U.S. at 377-80.

¹⁷¹ *Id.* at 380 n.10, quoting *Warrior & Gulf*, 363 U.S. at 584-85.

¹⁷² 414 U.S. at 380 n.10.

¹⁷³ *Id.* at 385-87.

BOYS MARKETS DECISION

Gateway resolved a dispute more theoretical than practical. The *Boys Markets* decision implied that courts should determine arbitrability on a case-by-case basis.¹⁷⁴ The Court seemingly required more than an arguably arbitrable dispute, holding that a district court must find that "the contract *does*" require the parties to arbitrate the dispute.¹⁷⁵ In fact, however, the standard of arbitrability applied by the district court in *Boys Markets*¹⁷⁶ and implicitly approved by the Supreme Court is not significantly different from the application of the *Warrior & Gulf* presumption. Thus, even before *Gateway*, the presumption was applied in the predominant majority of arbitrability cases; district courts found disputes arbitrable in 75 percent of the reported decisions.¹⁷⁷

The significance of the use of a presumption of arbitrability is apparent, for, as a comparison of the two major pre-*Gateway* standards reveals, the choice of a standard may determine whether an injunction issues. In one case, *Southwestern Bell Tel. Co. v. Communications Workers*,¹⁷⁸ the contract between the Communications Workers and Southwestern Bell contained a seniority clause and a provision prohibiting strikes over "those employee grievances which are subject to arbitration," including disputes concerning the "true intent and meaning of any specific provision or provisions [of the various agreements] (except as such provision or provisions

¹⁷⁴ See 398 U.S. at 253-54.

¹⁷⁵ *Id.* at 254.

¹⁷⁶ The district court found that the dispute "was of a type and character required by the terms of the . . . contract to be submitted to arbitration . . ." *Boys Markets, Inc. v. Retail Clerks Local 770*, 70 L.R.R.M. 3071, 3074 (C.D. Cal. 1969).

¹⁷⁷ Analysis of the reported decisions reveals a strong consensus on the standard of arbitrability.

District Court Action

no finding on arbitrability	Pre-Gateway 33 ^a		Post-Gateway 6	
	arbitrable	not arbitrable	arbitrable	not arbitrable
no reported standard	5	5 ^b	0	0
uncontested	8	1	3	0
presumption	16 ^c	0	9	0
within express exception	0	3 ^b	0	0
"of type"	4	0	0	0
harsher standard	8 ^d	2	0	0
past actions	<u>1</u>	<u>0</u>	<u>0</u>	<u>0</u>
	42	11	12	0

^a Includes 2 cases remanded for application of presumption.

^b Includes 1 case remanded for application of presumption.

^c Includes 1 case remanded for further analysis.

^d Includes 1 case remanded under colorable claim standard.

¹⁷⁸ 454 F.2d 1333, 78 L.R.R.M. 2833 (5th Cir. 1971).

relate, either specifically or by effect, to prospective modifications or amendments of such agreements)."¹⁷⁹ The union objected to the company's proposed method of staffing a new facility, alleging that the plan would adversely affect employee seniority rights.¹⁸⁰ Refusing to enjoin the ensuing strike, the district court found that the employer's plan was a prospective modification of the contract and thus not a mandatory subject of arbitration under the contract.¹⁸¹

The Fifth Circuit held that a trial court's examination of the contract must be limited to "ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract and which is 'arguably arbitrable.'" ¹⁸² The court held that the trial court had improperly decided "the substance of the question for arbitration," rather than "whether or not the parties have bound themselves to arbitrate that subject matter."¹⁸³ The court held that the issue of whether the employer's proposal was a prospective modification involved the application of the seniority clause of the contract and should be decided by the arbitrator and not the court.¹⁸⁴ Thus, the grievance was governed by the contract, and was arbitrable.

The Second Circuit, on the other hand, has held that trial courts may not enjoin a strike where the union presents a "colorable claim" that the underlying dispute falls within a specific exception to the arbitration clause and where the union has retained the right to strike over nonarbitrable disputes.¹⁸⁵ Faced with the fact situation present in *Southwestern Bell*, the Second Circuit would probably have affirmed the district court's refusal to issue an injunction, for the Communications Workers had presented a colorable claim that

¹⁷⁹ Id. at 1334-35 n.1, 78 L.R.R.M. at 2834 n.1 (5th Cir. 1971).

¹⁸⁰ *Southwestern Bell Tel. Co. v. Communications Workers*, 324 F. Supp. 830, 832, 76 L.R.R.M. 3032, 3033 (S.D. Tex. 1971).

¹⁸¹ Id. at 832, 834, 76 L.R.R.M. at 3033-34, 3036.

¹⁸² 454 F.2d at 1336, 78 L.R.R.M. at 2835 (the language after "by the contract . . ." is omitted in the L.R.R.M. report). The Third Circuit has adopted a similar standard in applying a strong presumption in favor of arbitrability. *Avco Corp. v. Local 787, UAW*, 459 F.2d 968, 973, 80 L.R.R.M. 2290, 2293 (3d Cir. 1972); see *Parade Publications, Inc. v. Mailers Local 14*, 459 F.2d 369, 374, 80 L.R.R.M. 2264, 2267 (3d Cir. 1972).

¹⁸³ 454 F.2d at 1336, 78 L.R.R.M. at 2835. The trial court characterized the company's proposal as "a prospective modification" of the contract. 324 F. Supp. at 832, 834, 76 L.R.R.M. at 3033-34, 3036. Perhaps it should have merely characterized the dispute as one involving allegations of a prospective modification. In either case, the dispute would have fallen within the exception to the arbitration clause and the court would not have invaded the province of the arbitrator by refusing to enjoin the strike. On the other hand, the Fifth Circuit may have interpreted the exclusion to cover only alleged violations of contractual provisions dealing with modification of the contract, rather than alleged modifications of any provision of the contract. Even so, a unilateral change would violate those provisions. See 454 F.2d at 1334-35 n.1, 78 L.R.R.M. at 2834 n.1.

¹⁸⁴ 454 F.2d at 1337, 78 L.R.R.M. at 2835.

¹⁸⁵ *Standard Food Prods. Corp. v. Brandenburg*, 436 F.2d 964, 966, 76 L.R.R.M. 2367, 2368 (2d Cir.), rev'g 76 L.R.R.M. 2366, 2367 (E.D.N.Y. 1970). See also note 177 supra.

the company had unilaterally changed the contract.¹⁸⁶ The "colorable claim" approach is not inconsistent with the corollary to the presumption of arbitrability: where an express exclusionary clause exists, a union presumably need not, even under *Warrior & Gulf*, introduce "forceful evidence" that a dispute falls within the exception.¹⁸⁷ The Second Circuit's approach has merit where the dispute involved has allegedly been specifically excluded from the no-strike and arbitration obligations. In such cases, the parties have expressed their willingness to resolve specified disputes by economic force. It is unsatisfactory if extended to contracts containing broad exceptions to the arbitration/no-strike system.¹⁸⁸

The Supreme Court in *Gateway* never expressly considered the wisdom of adopting the presumption of arbitrability standard applicable in *Lincoln Mills* situations where specific performance of an arbitration clause is sought.¹⁸⁹ The premise of cases applying the presumption of arbitrability is that effectuation of the national labor policy favoring arbitration requires "that a uniform standard of arbitrability be applied, regardless of whether the suit asks for the injunction of a strike . . . or the specific performance of an arbitration clause. . . ." ¹⁹⁰ In their haste for uniform treatment of strike injunction and specific performance suits, however, the courts have failed to preserve a careful balance between the two important national labor policies accommodated in *Boys Markets*; arbitration is the favored method of dispute resolution, but courts must not freely enjoin labor strikes.

Accommodation of these two historic principles requires a more careful treatment of the arbitrability question than routine application of the presumption of arbitrability. Several considerations mandate this conclusion. First, the Norris-LaGuardia Act permits federal courts to issue injunctions only against "unlawful" acts,¹⁹¹ and eliminates court jurisdiction to enjoin strikes.¹⁹² *Boys Markets*

¹⁸⁶ In fact, the arbitrator later found that the dispute was arbitrable and that the company's plan would violate the agreement. See *Southwestern Bell Tel. Co.*, 212 N.L.R.B. No. 53, 86 L.R.R.M. 1655, 1655-56 (1974).

¹⁸⁷ See 363 U.S. at 584-85. See also text at note 170 *supra*.

¹⁸⁸ See notes 135-138 *supra* and accompanying text. See also *Warrior & Gulf*, 363 U.S. at 585. In 18.5% of 1961-62 contracts, the parties agreed that the no-strike clause would not apply when the employer commits specified contract violations. U.S. Dept. of Labor, Bureau of Labor Statistics, Bulletin No. 1425-6, Major Collective Bargaining Agreements: Arbitration Procedures 86, 88 (1966). In 20.2% of 1961-62 contracts, the arbitration clause excluded one or more specific types of disputes. *Id.* at 10. See also *Warrior & Gulf*, 363 U.S. at 579 n.5.

¹⁸⁹ In *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), the Court held that district courts had jurisdiction to compel a recalcitrant employer to arbitrate disputes as required by contract. *Id.* at 456, 458-59.

¹⁹⁰ *Southwestern Bell*, 454 F.2d at 1336, 78 L.R.R.M. at 2835; accord, *Avco Corp. v. Local 787, UAW*, 459 F.2d 968, 973, 80 L.R.R.M. 2290, 2293 (3d Cir. 1972).

¹⁹¹ 29 U.S.C. § 107(a) (1970).

¹⁹² *Id.* § 104(a).

accommodated this anti-injunction policy with the equally strong pro-arbitration policy, holding that a strike over an arbitrable dispute may be enjoined.¹⁹³ Nevertheless, the Court required a finding that "breaches are occurring."¹⁹⁴ Application of the presumption of arbitrability therefore creates two distinct classes of enjoinable acts. Under section 7 of the Act the burden is on the employer to prove that the union's activities are "unlawful" and hence enjoinable.¹⁹⁵ But courts applying the presumption of arbitrability assume that the activity is enjoinable where the employer alleges only a peaceful strike in breach of contract. Application of the presumption of arbitrability makes it easier to enjoin arguably protected peaceful picketing than to enjoin unprotected violence. As a result, the policies underlying Norris-LaGuardia may lose more vitality than the "narrow" *Boys Markets* decision contemplated.

Second, the significant differences between *Boys Markets* and *Lincoln Mills* situations justifies the application of a different presumption in each type of case. Application of the presumption assures that courts will order arbitration of some disputes which the arbitrator will later find not arbitrable.¹⁹⁶ If this happens in a *Lincoln Mills* situation, the parties may then resort to economic warfare, litigation or negotiation. In a *Collyer* situation, in which an unfair labor practice charge brought before the Board is stayed pending arbitration,¹⁹⁷ the parties return to the Labor Board. But in a *Boys Markets* situation, the union is permanently harmed, for it is well recognized that an aborted strike is rarely revived.¹⁹⁸ Thus, resort to a legitimate form of redress, the strike, may be permanently denied. Accommodation of the two national labor policies inherent in *Boys Markets* cases does not require so harsh a result.

Third, *Lucas Flour*, which set out the circumstances in which an obligation not to strike could be implied from the presence of an arbitration clause,¹⁹⁹ and not *Lincoln Mills*, is the proper starting point for determining the presence of the arbitrable dispute required by *Boys Markets*. A *Boys Markets* suit is not merely the converse of *Lincoln Mills*—an employer rather than union suit to compel

¹⁹³ 398 U.S. at 254.

¹⁹⁴ Id. (emphasis added).

¹⁹⁵ 29 U.S.C. § 107(a) (1970).

¹⁹⁶ See Note, 85 Harv. L. Rev. 636, 640-41 (1972).

¹⁹⁷ In *Collyer Insulated Wire*, 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1970), the NLRB announced its policy of deferring to the arbitration process where the resolution of an arbitrable dispute might also resolve a pending unfair labor practice charge. Id. at 842, 77 L.R.R.M. at 1936.

¹⁹⁸ F. Frankfurter & N. Greene, *The Labor Injunction*, 79-80, 200 (1930); 75 Cong. Rec. 4929 (remarks of Sen. Norris), 4934 (remarks of Sen. Bratton) (1932). See also Aaron, *Labor Injunctions in the State Courts—Part II; A Critique*, 50 Va. L. Rev. 1147, 1157-58 (1964).

¹⁹⁹ 369 U.S. at 105-06.

arbitration—for the suit also seeks to enjoin a strike. Nor does it merely involve a remedy for the breach of a contractual no-strike obligation, since the underlying dispute must also fall within the arbitration clause.²⁰⁰ *Lucas Flour*, on the other hand, approximates the *Boys Markets* requirements; under *Lucas Flour*, the court may not imply a no-strike clause without first determining whether the underlying grievance is arbitrable.²⁰¹ In applying this principle, courts cannot presume arbitrability; the court must determine whether a particular grievance actually is arbitrable. If uniformity is required, courts should follow *Lucas Flour* rather than *Warrior & Gulf*.

The formulation and application of the proper standard of arbitrability, like any evidentiary standard, is necessarily imprecise. However, courts need more flexibility than the presumption of arbitrability allows in order to protect the labor policy inherent in the Norris-LaGuardia Act. Rigorous judicial scrutiny of arbitrability would preclude the issuance of injunctions where the dispute is actually not arbitrable. The court should enjoin a strike where the union presents only a perfunctory or frivolous argument that the dispute is not arbitrable. But where the union presents a colorable claim that a dispute is not arbitrable, the court should exercise its authority to determine “substantive arbitrability,”²⁰⁴ conditioning the issuance of an injunction on its resolution of that threshold issue. To preclude union procrastination, the court could issue an injunction to take effect within two or three days unless the parties had begun to litigate the arbitrability of the dispute. Because the issuance of an injunction is discretionary, a district court could impose this additional step in borderline cases without violating the rules established in either *Boys Markets* or *Gateway*.

b. *Nature of the Underlying Grievance.* Where the underlying grievance involves an alleged employer breach of contract, the court need only determine what grievance precipitated the strike²⁰⁵

²⁰⁰ 398 U.S. at 254.

²⁰¹ 369 U.S. at 106; cf. *NLRB v. Deaton Truck Line, Inc.*, 389 F.2d 163, 169, 67 L.R.R.M. 2632, 2636 (5th Cir. 1968).

²⁰² See 369 U.S. at 106; cf. *Lewis v. Benedict Coal Corp.*, 259 F.2d 346, 351, 43 L.R.R.M. 2237, 2240 (6th Cir. 1958), aff'd by an evenly divided Court, 361 U.S. 459 (1960) (the issue of arbitrability was submitted to a jury in a pre-*Lucas Flour* case in which a no-strike clause was implied); *San Juan Lumber Co.*, 154 N.L.R.B. 1153, 1154, 60 L.R.R.M. 1102 (1965), enforced per curiam, 367 F.2d 397, 63 L.R.R.M. 2416 (9th Cir. 1966) (the Board analyzed the contract and determined that the dispute was not arbitrable and that a strike over it hence was protected concerted activity).

²⁰³ But see Comment, *The New Federal Law of Labor Injunctions*, 79 Yale L.J. 1593, 1602-03 (1970), urging courts to adopt the *Warrior & Gulf* presumption of arbitrability.

²⁰⁴ See *John Wiley & Sons v. Livingston*, 376 U.S. 543, 558 (1964); *Warrior & Gulf*, 363 U.S. at 582, 583 n.7.

²⁰⁵ The court must reject union attempts to mask its true grievance through assertion of

and apply the standard of arbitrability. In the more complex cases, however, courts must also consider the nature of the underlying grievance, and, in the most complex cases, the identity of the grievant. As might be expected, courts have not agreed on the treatment of the complex cases. The resolution of the dispute over the identification of certain grievances will determine the remaining vitality of the Norris-LaGuardia Act. Although the controversy is manifest in several areas, the picket line cases are most illustrative.

(1) *Refusal to cross a picket line.* The courts have divided in their treatment of requests to enjoin refusals to cross a picket line, or, as they are more popularly known, "sympathy strikes." The Third, Fourth and Eighth Circuits permit the issuance of an injunction.²⁰⁶ The Seventh Circuit initially permitted such injunctions,²⁰⁷ but has subsequently appeared to limit that decision to situations in which the arbitration clause is "exceptionally broad."²⁰⁸ The Fifth Circuit initially held that no injunction may issue,²⁰⁹ but there are indications that the court is reconsidering its position.²¹⁰ The Sec-

spurious, nonarbitrable issues. See, e.g., *Restaurant Associates Indus. Inc. v. Commissary Food Employees Local 71*, 78 L.R.R.M. 2559, 2560-61 n.6 (E.D.N.Y. 1971); *Hilton Int'l Co. v. Asociacion de Empleados*, 324 F. Supp. 492, 494, 77 L.R.R.M. 2622, 2623 (D.P.R. 1971).

²⁰⁶ *Valmac Indus., Inc. v. Meat Cutters Local 425*, 519 F.2d 263, 89 L.R.R.M. 3073 (8th Cir. 1975), *Associated Gen. Contractors v. Local 563, Laborers*, 519 F.2d 269, 89 L.R.R.M. 3077 (8th Cir. 1975). *NAPA Pittsburgh, Inc. v. Chauffeurs Local 926*, 502 F.2d 321, 324, 87 L.R.R.M. 2044, 2046 (3d Cir.) (en banc), cert. denied, 419 U.S. 1049 (1974); *Wilmington Shipping Co. v. Longshoremen Local 1426*, 86 L.R.R.M. 2846, 2847 (4th Cir.), cert. denied, 419 U.S. 1022 (1974); *Pilot Freight Carriers, Inc. v. Teamsters Local 391*, 497 F.2d 312, 313, 86 L.R.R.M. 2337, 2338 (4th Cir.), cert. denied, 419 U.S. 869 (1974); *Monongahela Power Co. v. Local 2332, IBEW*, 484 F.2d 1209, 1214, 84 L.R.R.M. 2481, 2484 (4th Cir. 1973).

The Supreme Court has denied certiorari as recently as the October Term, 1975 in three cases which upheld issuance of an injunction in the sympathy strike situation. *Philadelphia Food Drivers v. Fox Transport Sys.*, 511 F.2d 1393 (3d Cir.), cert. denied, 44 U.S.L.W. 3192 (U.S. Oct. 7, 1975); *Island Creek Coal Co. v. UMW*, 507 F.2d 650 (3d Cir.), cert. denied, 44 U.S.L.W. 3192 (U.S. Oct. 7, 1975); *Armco Steel Corp. v. UMW*, 505 F.2d 1129 (4th Cir. 1974), cert. denied, 44 U.S.L.W. 3192 (U.S. Oct. 7, 1975). At the same time, the Court has granted certiorari in a case which would not permit an injunction in these circumstances. *Buffalo Forge Co. v. United Steelworkers*, 517 F.2d 1207 (2d Cir.), cert. granted, 44 U.S.L.W. 3238 (U.S. Oct. 21, 1975). It would therefore appear that the Court will reverse the Second Circuit's decision and accept the reasoning of the Third, Fourth and Eighth Circuits.

²⁰⁷ *Inland Steel Co. v. Local 1545, UMW*, 505 F.2d 293, 298-99, 87 L.R.R.M. 2733, 2737 (7th Cir. 1974).

²⁰⁸ See *Hyster Co. v. Independent Machine Ass'n*, 519 F.2d 89, 90-91 n.3, 89 L.R.R.M. 2885, 2886-87 n.3 (7th Cir. 1975); cf. *Gary Hobart Water Corp. v. NLRB*, 511 F.2d 284, 288-89, 88 L.R.R.M. 2830, 2832-33 (7th Cir. 1975) (concurring opinion).

²⁰⁹ *Amstar Corp. v. Amalgamated Meat Cutters*, 468 F.2d 1372, 1373, 81 L.R.R.M. 2644, 2645 (5th Cir. 1972).

²¹⁰ In a recent case, a Florida District Court refused to issue an injunction, relying on *Amstar Corp. v. Amalgamated Meat Cutters*, 468 F.2d 1372, 81 L.R.R.M. 2644 (5th Cir. 1972). *Jos. Schlitz Brewing Co. v. National Conf. of Brewery Workers*, Civ. No. 75-319-T-H (M.D. Fla. filed May 15, 1975). The next evening, Judge Ainsworth granted an injunction

ond²¹¹ and Sixth Circuits²¹² have also prohibited such injunctions. The issue is now in flux but it appears that the Supreme Court will adopt the view of the Third, Fourth, and Eighth Circuits.

Two assumptions govern the position of the Third, Fourth and Eighth Circuits. It assumes, first, that the scope of the no-strike clause is an arbitrable issue. Second, and more significantly, it assumes that a union must arbitrate whether the no-strike clause permits employees to respect a given picket line before relying upon its own interpretation of the clause. Neither assumption is wholly true, nor necessary to promote the national labor policy favoring arbitration.

The arbitrability of the scope of the no-strike clause should depend entirely upon the wording of a particular contract. Where a contract contains a broad arbitration clause and permits the employer to file grievances, the existence of a strike in breach of contract and the assessment of damages for that strike may be arbitrable issues.²¹³ A strike alone, however, does not create an arbitrable issue unless the employer may file grievances. Most courts have refused to consider the effect of "employee-oriented" clauses.²¹⁴ One court employed spectacularly circular reasoning to find an arbitrable grievance, emphasizing that although the employer cannot grieve, it can trigger the grievance system by disciplining an employee for refusing to cross a picket line.²¹⁵ To protest the discipline, the union must argue that the employee's protected activity is not cause for discipline.²¹⁶ That claim would in turn force the arbitrator to consider the scope of the no-strike clause.²¹⁷ Thus, the

pending appeal. Civ. No. 75-319-T-H (5th Cir. filed May 16, 1975). But see *United States Steel Corp. v. UMW*, — F.2d —, 90 L.R.R.M. 2539, 2544 n.15 (5th Cir. 1975).

²¹¹ *Buffalo Forge Co. v. United Steelworkers*, 517 F.2d 1207, 1211, 89 L.R.R.M. 2303, 2305, 2306 (2d Cir.), cert. granted, 44 U.S.L.W. 3238 (U.S. Oct. 21, 1975).

²¹² *Plain Dealer Publishing Co. v. Typographers Local 53*, — F.2d —, 90 L.R.R.M. 2110 (6th Cir. 1975), affirming per curiam, 88 L.R.R.M. 2155, 2160 (N.D. Ohio 1974).

²¹³ Compare *Drake Bakeries, Inc. v. Bakery Workers Local 50*, 370 U.S. 254, 256-60 (1962), with *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241-43 (1962). While an "employee-oriented" grievance system should be considered mandatory for the purposes of that *Boys Markets* requirement, see notes 146-52 *supra* and accompanying text, it does preclude the arbitration of employer claims that the union has breached its no-strike obligation. *Atkinson*, 370 U.S. at 243; *Western Publishing Co. v. Graphic Arts Workers Local 254*, 381 F. Supp. 445, 446, 87 L.R.R.M. 2541, 2542 (E.D. Wisc. 1974); *Stroehmann Bros. v. Confectionery Workers Local 427*, 215 F. Supp. 647, 650-51, 74 L.R.R.M. 2957, 2959-60 (M.D. Pa. 1970).

²¹⁴ See, e.g., *Monongahela Power Co. v. Local 2332, IBEW*, 484 F.2d 1209, 1214, 84 L.R.R.M. 2481, 2484 (4th Cir. 1973).

²¹⁵ *Bethlehem Mines Corp. v. UMW*, 375 F. Supp. 980, 983, 86 L.R.R.M. 2398, 2400 (W.D. Pa. 1974).

²¹⁶ *Id.*

²¹⁷ *Id.* at 983, 86 L.R.R.M. at 2401.

court concluded that the scope of the no-strike clause is an arbitrable issue.²¹⁸ Under this reasoning, the scope of a no-strike clause would always be arbitrable.

The view of the Third, Fourth, and Eighth Circuits also holds that an injunction may issue whether or not a contract contains a provision reserving the right to respect a picket line.²¹⁹ In *Monongahela Power Co. v. Local 2332, IBEW*,²²⁰ the Fourth Circuit held that an arbitrator must determine "whether the refusal to cross the picket line and the resulting work stoppage" violated the agreement.²²¹ While a broad provision reserving the right to respect all picket lines might prevent the issuance of an injunction against a "sympathy strike,"²²² none of the clauses litigated thus far have been broad reservations. Instead, they have protected refusals to cross "bona fide," "primary," or "authorized" picket lines.²²³ In *NAPA Pittsburgh, Inc. v. Chauffeurs Local 926*,²²⁴ the Third Circuit held that the arbitrator must determine whether each particular picket line falls within the reservation.²²⁵ One court noted that unions could negotiate contracts expressly removing this issue from the scope of the arbitration provision if they wished to absolutely protect their right to respect picket lines.²²⁶ *NAPA* has been sharply criticized for misinterpreting the intent of the reservation clause.²²⁷

²¹⁸ *Id.*

²¹⁹ See, e.g., *NAPA Pittsburgh, Inc. v. Chauffeurs Local 926*, 502 F.2d 321, 323-24, 87 L.R.R.M. 2044, 2045-46 (3d Cir.) (en banc), cert. denied, 419 U.S. 1049 (1974).

²²⁰ 484 F.2d 1209, 84 L.R.R.M. 2481 (4th Cir. 1973).

²²¹ *Id.* at 1204, 84 L.R.R.M. at 2484; accord, *Barnard College v. Transport Workers Union*, 372 F. Supp. 211, 212-13, 85 L.R.R.M. 2392, 2393-94 (S.D.N.Y. 1974); *Southwestern Ill. Coal Corp. v. Local 1392, UMW*, 70 CCH Lab. Cas. ¶ 13531 at 26721, 26723 (E.D. Ill. 1972), aff'd on other grounds sub nom. *McGuire Shaft & Tunnel Corp. v. Local 1791, UMW*, 475 F.2d 1209, 1215 (Temp. Emer. Ct. App.), cert. denied, 412 U.S. 958 (1973); *Amstar Corp. v. Amalgamated Meat Cutters*, 337 F. Supp. 810, 815-16, 79 L.R.R.M. 2425, 2427-28 (E.D. La.), rev'd 468 F.2d 1372, 1373, 81 L.R.R.M. 2644, 2645 (5th Cir. 1972).

²²² See *NAPA Pittsburgh, Inc. v. Chauffeurs Local 926*, 502 F.2d 321, 323, 87 L.R.R.M. 2044, 2045 (3d Cir.) (en banc), cert. denied, 419 U.S. 1049 (1974).

²²³ *Id.* at 322-24, 87 L.R.R.M. at 2044-46 (primary); *Pilot Freight Carriers v. Teamsters Local 391*, 497 F.2d 311, 312, 86 L.R.R.M. 2337, 2338 (4th Cir.), cert. denied, 419 U.S. 869 (1974) (primary); *Wilmington Shipping Co. v. Longshoremen Local 1426*, 86 L.R.R.M. 2846, 2847 (4th Cir.), cert. denied, 419 U.S. 1022 (1974) (bona fide); *Food Fair Stores, Inc. v. Food Drivers Local 500*, 363 F. Supp. 1254, 1255, 84 L.R.R.M. 2509, 2510 (E.D. Pa. 1973) (bona fide authorized).

²²⁴ 502 F.2d 321, 87 L.R.R.M. 2044 (3d Cir.) (en banc), cert. denied, 419 U.S. 1049 (1974).

²²⁵ *Id.* at 323-24, 87 L.R.R.M. at 2045-46; accord, *Pilot Freight Carriers v. Teamsters Local 391*, 497 F.2d 311, 313, 86 L.R.R.M. 2337, 2339 (4th Cir.), cert. denied, 419 U.S. 869 (1974); *Wilmington Shipping Co. v. Longshoremen Local 1426*, 86 L.R.R.M. 2846, 2847 (4th Cir.), cert. denied, 419 U.S. 1022 (1974); cf. *Western Publishing Co. v. Graphic Arts Workers Local 254*, 381 F. Supp. 445, 446, 87 L.R.R.M. 2541 (E.D. Wisc. 1974) (dictum).

²²⁶ *Pilot Freight Carriers, Inc. v. Teamsters Local 391*, 375 F. Supp. 1254, 1264 (M.D.N.C.), vacated in part on other grounds, 497 F.2d 311, 313 (4th Cir.), cert. denied, 419 U.S. 869 (1974).

²²⁷ *NAPA*, 502 F.2d at 331 n.14, 87 L.R.R.M. at 2052 n.14 (dissenting opinion).

The *NAPA-Monongahela* holdings that the scope of a "sympathy strike" reservation is an arbitrable issue cannot be accommodated with two significant principles of national labor policy. First, a waiver of the right must be clear and unmistakable.²²⁸ The Labor Board has held that a broad no-strike clause does not waive the right to respect a picket line, but that a limited reservation of the right to honor such a line may waive that right under circumstances in which the right has not been reserved.²²⁹ *Monongahela* conflicts with that principle by implying the waiver of a statutory right.²³⁰ On the other hand, *NAPA* is consistent, holding that an arbitrator must determine whether an express waiver applies to a particular situation.²³¹ Second, courts must require all grievances covered by the contract to be arbitrated, even if they feel that the grievance is frivolous, under the rule in *United Steelworkers v. American Manufacturing Co.*²³² The cumulative effect of *NAPA* and *United Steelworkers* is to allow an employer to frustrate a limited reservation by alleging, however frivolously, that a particular picket line is secondary, unauthorized or established in bad faith. That claim alone requires courts to order arbitration and enjoin activity which in fact may be protected under the contract and the National Labor Relations Act.

The most severe impact of the *NAPA-Monongahela* position results from its second major assumption—that a union may not rely upon its interpretation of the scope of the no-strike clause or reservation provision, but must await the arbitrator's approval before advising members to respect a specific picket line. That assumption is inconsistent with *Boys Markets* and with the Norris-LaGuardia Act, and is not necessary to promote the national policy favoring arbitration of labor disputes.

In *Boys Markets*, the Court held that before granting an injunction, the district court must find that "breaches are occurring . . . or

²²⁸ E.g., *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); see *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 283 (1956).

²²⁹ *Gary-Hobart Water Corp.*, 210 N.L.R.B. No. 87, 86 L.R.R.M. 1210, 1214-15 (1974), enforced, 511 F.2d 284, 289, 88 L.R.R.M. 2030, 2033 (7th Cir. 1975). The Board reasoned that the right to strike, fundamental under the National Labor Relations Act, see 29 U.S.C. § 157 (1970), includes the right to respect a picket line. That right may be waived, in whole or in part, only by clear and unmistakable language. 86 L.R.R.M. at 1213. Extrinsic evidence concerning the scope of the waiver may be considered only where the express waiver is ambiguous. *Id.* at 1215. A broad no-strike clause does not specifically waive the right to respect a picket line. An employer must obtain an express waiver but the union need not obtain an express reservation. *Id.* at 1214.

²³⁰ *Monongahela*, 484 F.2d at 1213-14, 84 L.R.R.M. at 2484.

²³¹ 502 F.2d at 323-24, 87 L.R.R.M. at 245-46.

²³² 363 U.S. 564, 568-69 (1960).

... will be committed" and that the strike is "over" an arbitrable grievance.²³³ Similarly, Norris-LaGuardia requires a finding that "unlawful acts" have been or will be committed.²³⁴ Thus, before a court may enjoin a strike, it must find that the strike itself is a breach of contract. A determination that the grievance which precipitated the dispute was arbitrable means that the union has breached its no-strike obligation by striking rather than resorting to the grievance-arbitration mechanism, even if it wins the eventual arbitration of the underlying grievance. In the *NAPA-Monongahela* line of cases, the *Boys Markets* principle was extended to permit courts to restrain unions from encouraging their members to respect a picket line.²³⁵ There, however, the only arbitrable issue is whether the union's actions violated the no-strike provisions. If the union wins the eventual arbitration, the award essentially establishes that there never was a breach of contract. Neither *Boys Markets* nor the Norris-LaGuardia Act contemplated restraint of arguably legal strike activity.

More importantly, that view effectively eliminates the *Boys Markets* requirements that there be "binding arbitration of the grievance dispute concerning which the strike was called" and that the strike be "over" an arbitrable dispute.²³⁶ As these requirements emphasize, *Boys Markets* merely was intended to provide a mechanism for enforcing a union's agreement to arbitrate certain grievances. The decision was not intended to provide a broad mechanism for enforcing a union's agreement not to strike. It logically follows that a court should not enjoin action taken to support a sister union since the sympathetic union has no underlying grievance against its employer and merely supports another union, whose dispute may or may not be arbitrable under another agreement. Unlike most strike activity covered by *Boys Markets*, a sympathy strike is not designed to circumvent the grievance system. As the Fifth Circuit held in *Amstar Corp. v. Amalgamated Meat Cutters*,²³⁷ a sympathy strike is "not 'over a grievance' which the parties were contractually bound to arbitrate. Rather, the strike itself precipi-

²³³ *Boys Markets*, 398 U.S. at 254 (emphasis added).

²³⁴ 29 U.S.C. § 107(a) (1970).

²³⁵ In *Pilot Freight Carriers, Inc. v. Teamsters Local 391*, 497 F.2d 311, 86 L.R.R.M. 2337 (4th Cir.), cert. denied, 419 U.S. 869 (1974), the Fourth Circuit held that even though a district court could not enjoin individual employees from refusing to cross a picket line because the contract clearly reserved the right to engage in sympathy strikes, it could enjoin the Union from encouraging its members to respect the picket line pending arbitration of whether the Union was also protected by the reservation. *Id.* at 312, 86 L.R.R.M. at 2338-39.

²³⁶ *Boys Markets*, 398 U.S. at 238, 254; Cf. *Gary-Hobart Water Corp.*, 210 N.L.R.B. No. 87, 86 L.R.R.M. 1210, 1213-14 (1974), enforced, 511 F.2d 284, 289, 88 L.R.R.M. 2830, 2833 (7th Cir. 1975).

²³⁷ 468 F.2d 1372, 81 L.R.R.M. 2644 (5th Cir. 1972).

tated the dispute—the validity under the Union's no-strike obligation of the member-employees honoring the . . . picket line."²³⁸ The Second and Fifth Circuit position thus is consistent with the "narrow" holding of *Boys Markets*.

The view expounded by the Third, Fourth and Eighth Circuits significantly expands the *Boys Markets* decision. *Monongahela* found that the union had an affirmative obligation to terminate unauthorized strikes which, in the opinion of the court, constituted breaches of the obligation to arbitrate rather than strike.²³⁹ Other courts, following *Monongahela*, have held that the refusal to cross a picket line is a strike "over" an arbitrable grievance.²⁴⁰ In *NAPA*, the Third Circuit failed even to consider whether the underlying grievance was arbitrable.²⁴¹ Indeed, *NAPA* represents the abandonment of the Third Circuit's previous position that *Boys Markets* does not support the issuance of an injunction when the only arbitrable issue advanced by the employer is whether the no-strike clause has been breached.²⁴²

Elimination of the distinction between the union's underlying grievance and the employer's dispute caused by the strike transforms *Boys Markets* from a pro-arbitration mechanism into an anti-strike procedure. Without that distinction, a court could enjoin a strike whenever the resolution of an arbitrable issue might end the strike.²⁴³ Whenever the employer could allege that the strike was a breach of contract for any reason, the court could issue an injunction and order arbitration, since the arbitrator might sustain the employer's position. Yet, resolution of the employer's grievance would not eliminate the basis of the employees' dissatisfaction: the

²³⁸ *Id.* at 1373, 81 L.R.R.M. at 2644; accord, *Pilot Freight Carriers, Inc. v. Teamsters Local 560*, 373 F. Supp. 19, 24, 86 L.R.R.M. 2324, 2327-28 (D.N.J. 1974) (permanent injunction); *Pilot Freight Carriers v. Teamsters Local 560*, 86 L.R.R.M. 2322, 2322-23 (D.N.J. 1974) (temporary restraining order); *General Cable Corp. v. Local 1644, IBEW*, 331 F. Supp. 478, 482, 77 L.R.R.M. 3053, 3055-56 (D. Md. 1971).

²³⁹ 484 F.2d at 1213-14, 84 L.R.R.M. at 2484.

²⁴⁰ See, e.g., *Wilmington Shipping Co. v. Longshoremen Local 1426*, 86 L.R.R.M. 2845, 2846 (E.D.N.C. 1973), *aff'd*, 86 L.R.R.M. 2846, 2847 (4th Cir.), cert. denied, 419 U.S. 1022 (1974).

²⁴¹ 502 F.2d at 324 n.1, 87 L.R.R.M. at 2046 n.1 (dissenting opinion). See also *Barnard College v. Transport Workers Union*, 372 F. Supp. 211, 212-13, 85 L.R.R.M. 2393-94 (S.D.N.Y. 1974); *Southwestern Ill. Coal Corp. v. Local 1392, UMW*, 70 CCH Lab. Cas. ¶ 13531 at 26721, 26723 (E.D. Ill. 1972), *aff'd* on other grounds sub nom. *McGuire Shaft & Tunnel Corp. v. Local 1791, UMW*, 475 F.2d 1209, 1215 (Temp. Emer. Ct. App.), cert. denied, 412 U.S. 958 (1973).

²⁴² *Parade Publications, Inc. v. Mailers Local 14*, 459 F.2d 369, 374, 80 L.R.R.M. 2264, 2267 (3d Cir. 1974).

²⁴³ See, e.g., *NAPA*, 502 F.2d at 330, 87 L.R.R.M. at 2051 (dissenting opinion). *Carnation Co. v. Teamsters Local 949*, 86 L.R.R.M. 3012, 3013-14 (S.D. Tex. 1974); *Amstar Corp. v. Amalgamated Meat Cutters*, 468 F.2d 1372, 1373, 81 L.R.R.M. 2644, 2645 (3d Cir. 1972).

employer's treatment of fellow unionists. Moreover, sympathy strikes do not frustrate the arbitration process. Sympathetic action may affect the resolution of the primary grievance by increasing the primary union's economic leverage. But if the primary grievance is arbitrable, a limited *Boys Markets* injunction will end the primary strike, and with it all sympathetic action. On the other hand, if the primary grievance is not arbitrable, the primary union is free to use economic coercion under *Boys Markets*. When the employer can eliminate sympathetic pressure by merely alleging that the use of such pressure violates the sympathetic union's contractual obligations and is causing irreparable injury, the courts are intervening in legitimate primary economic warfare. The Norris-LaGuardia Act and the National Labor Relations Act were designed to preclude just such judicial interference.²⁴⁴

(2) *Wildcat strikes*. Unions have argued that strikes not authorized by the union itself are outside the scope of section 301 and that, therefore, no injunction may issue.²⁴⁵ Section 301, however, expands the common law definition of agency by eliminating prior authorization or subsequent ratification as prerequisites for a union's responsibility for contractual violations by its agents.²⁴⁶ Thus, the relevant question is whether the union "adopted, encouraged or prolonged" the strike, not whether the union did its best to end the strike.²⁴⁷ Courts have rejected union arguments that unauthorized strikes have occurred which are not contractual breaches under section 301, on both legal and evidentiary grounds. Often they have scrutinized the record for subtle evidence that the union has implicitly sanctioned the strike²⁴⁸ or inferred union authorization from its failure to exert substantial pressure to curtail the strike.²⁴⁹ The

²⁴⁴ See *Associated Gen. Contractors v. Illinois Conf. of Teamsters*, 454 F.2d 1324, 1328, 89 L.R.R.M. 2555, 2558 (7th Cir. 1972); *Meekins, Inc. v. Boire*, 320 F.2d 445, 450, 53 L.R.R.M. 2732, 2735-36 (5th Cir. 1963).

²⁴⁵ See, e.g., *General Cable Corp. v. Local 1798, IBEW*, 333 F. Supp. 331, 331-32, 77 L.R.R.M. 3123, 3124 (W.D. Tenn. 1971); *General Cable Corp. v. Local 1644, IBEW*, 331 F. Supp. 478, 481, 77 L.R.R.M. 3053, 3055 (D. Md. 1971).

²⁴⁶ 29 U.S.C. § 185(e) (1970).

²⁴⁷ *United Constr. Workers v. Haislip Baking Co.*, 223 F.2d 872, 877-78, 36 L.R.R.M. 2315, 2318 (4th Cir.), cert. denied, 350 U.S. 847 (1955). See also *Garmead Coal Co. v. UMW*, 230 F.2d 945 (6th Cir. 1956); *Textile Workers Union v. Alco Mfg. Co.*, 94 F. Supp. 626, 628-29, 27 L.R.R.M. 2164, 2166-67 (M.D.N.C. 1950).

²⁴⁸ See *Amstar Corp. v. Amalgamated Meat Cutters*, 337 F. Supp. 810, 815, 79 L.R.R.M. 2425, 2428 (E.D. La.), rev'd on other grounds, 468 F.2d 1372, 81 L.R.R.M. 2644 (5th Cir. 1972) (only 3.5% of employees worked; no union officers worked); *General Cable Corp. v. Local 1798, IBEW*, 333 F. Supp. 331, 332-33, 77 L.R.R.M. 3123, 3124-25 (W.D. Tenn. 1971) (while union officers advised employees to return to work, no officer or member of the union returned); *General Cable Corp. v. Local 1644, IBEW*, 331 F. Supp. 478, 480-81, 77 L.R.R.M. 3053, 3054-55 (D. Md. 1971) (while union officers admitted obligation to work, they encouraged employees to refuse to cross picket line, and refused to cross themselves).

²⁴⁹ See, e.g., *Monongahela*, 484 F.2d at 1214-15, 84 L.R.R.M. at 2485; *United States*

Eighth Circuit directed a district court to issue an injunction requiring the union to order its members back to work, even though twice noting that the union was wholly uninvolved in calling the strike.²⁵⁰ Despite a finding that wildcat strikers cannot be held financially liable under section 301 for the breach of a no-strike clause, the Seventh Circuit refused to decide whether wildcat strikers might be enjoined under *Boys Markets*.²⁵¹

Courts issuing injunctions against wildcat strikers misconstrue the nature of the collective bargaining agreement and the thrust of the *Boys Markets* decision. Three conceptions of the labor agreement might support the issuance of an injunction against an unauthorized strike. Under those views, a labor agreement is either: (1) a contract of employment executed by a union as agent for its members; (2) an offer by the employer incorporated in individual employment contracts; or (3) a third-party beneficiary agreement between the union and the employer enforceable by and against the employee beneficiaries.²⁵² Those conceptions are inconsistent with the prevalent view that the collective bargaining agreement represents a set of "working rules"²⁵³ applicable only after the employer and individual employees execute an employment contract.²⁵⁴ Thus, as one commentator has argued, "[t]he usual no-strike provision . . . is a promissory one, but the promise is the union's, not the employee's. As to employees, the provision is a rule of conduct for violation of which the expected consequence, as with any other rule governing employee conduct, is the possible imposition of disci-

Steel Corp. v. UMW, 77 L.R.R.M. 3134, 3134-35 (E.D. Ky. 1971); *Malone & Hyde, Inc. v. Teamsters Local 327*, 76 L.R.R.M. 2379 (M.D. Tenn. 1971). See also *Eazor Express, Inc. v. Teamsters*, — F.2d —, 89 L.R.R.M. 3177 (3d Cir. 1975). But see *North Am. Coal Corp. v. Local 2262, UMW*, 497 F.2d 459, 465-66, 86 L.R.R.M. 2339, 2343-44 (6th Cir. 1974) (no criminal contempt liability of union officials for continuation of enjoined strike without actual proof of authorization or encouragement).

²⁵⁰ *Hanna Mining Co. v. United Steelworkers*, 464 F.2d 565, 567, 569 n.4, 80 L.R.R.M. 3268, 3269, 3270 n.4 (8th Cir. 1972) (per curiam).

²⁵¹ *Sinclair Oil Corp. v. Oil Workers Union*, 452 F.2d 49, 54 n.10, 78 L.R.R.M. 2603, 2606 n.10 (7th Cir. 1971).

²⁵² Cf. *Association of Salaried Employees v. Westinghouse Elec. Corp.*, 210 F.2d 623, 626, 33 L.R.R.M. 2462, 2464 (3d Cir. 1954) (en banc), aff'd on other grounds, 348 U.S. 437, 459-61 (1955). In *Westinghouse*, all three conceptions were advanced by the union as grounds for federal court jurisdiction over a suit for past wages allegedly due union members. *Id.* at 625, 33 L.R.R.M. at 2624. The Third Circuit rejected all three and held that it had no jurisdiction under § 301, since only the rights of the individual employee and not those of the union were involved. *Id.* at 630, 33 L.R.R.M. at 2467-68.

²⁵³ See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), in which the Court viewed the collective agreement as codifying "the common law of a particular industry or of a particular plant." *Id.* at 578-80.

²⁵⁴ *Association of Salaried Employees v. Westinghouse Elec. Corp.*, 210 F.2d 623, 627, 33 L.R.R.M. 2462, 2465-66. See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944).

pline."²⁵⁵ Under that view, suits seeking injunctive relief against wildcat strikers are outside the scope of section 301.²⁵⁶

Strikes over internal union disputes require a careful balancing of competing legitimate interests. On the one hand, the employer has executed a contract in good faith and can legitimately expect compliance with its no-strike clause. On the other hand, employees should remain free to challenge the legitimacy of their representative's actions. The problem is most acute where a local union questions the desirability of contract provisions negotiated by the national union. In one such case, a strike over a dispute between "union locals and the higher echelons of the union hierarchy" was held to be not arbitrable, and thus beyond the reach of a *Boys Markets* injunction.²⁵⁷ Shortly thereafter, another judge on the same court enjoined a strike partially caused by employee dissatisfaction with the terms of a collective bargaining agreement, ruling that employees were bound by the agreement negotiated by the national union and that employee dissatisfaction with their bargaining agent could not be expressed by a strike against the employer.²⁵⁸ The latter court justified its decision by noting that the union and the employer had submitted the contractual issue which precipitated the strike to arbitration under the expired contract, and that the employer had prevailed.²⁵⁹ Nevertheless, by finding that dissatisfaction with the union may have caused the strike, the court refuted its own argument that the injunction was necessary to enforce the arbitration system, since internal union disputes clearly could not be arbitrable. While the sanctity of the labor agreement and of a stable bargaining relationship might merit enforcement, the Supreme Court emphasized in *Gateway* that the "linchpin" of *Boys Markets*

²⁵⁵ Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L. Rev. 663, 777 (1973).

²⁵⁶ Of course, this would not affect the employer's right to enforce in a damage action a union's express contractual agreement to use its best efforts to terminate a wildcat strike. Compare *Eazor Express, Inc. v. Teamsters Union*, 357 F. Supp. 158, 163-67, 169, 82 L.R.R.M. 3025, 3028-32, 3033 (W.D. Pa. 1973), aff'd, — F.2d —, 89 L.R.R.M. 3177 (3d Cir. 1975), with *Penn Packing Co. v. Meat Cutters Local 195*, 497 F.2d 888, 891, 86 L.R.R.M. 2657, 2658 (3d Cir. 1974).

Some courts have also allowed the issuance of an injunction requiring the union to meet its contractual obligation to take steps to end a wildcat strike. *Hanna Mining Co. v. United Steelworkers*, 464 F.2d 565, 569, 80 L.R.R.M. 3268, 3271 (8th Cir. 1972) (per curiam); See *Monongahela*, 484 F.2d at 1214-15, 84 L.R.R.M. at 2485. At any rate, any injunction issued should not require employees to cease striking, but should at most require that union officers do their best to terminate the strike.

²⁵⁷ *Barnes & Tucker Co. v. UMW*, 338 F. Supp. 924, 927, 80 L.R.R.M. 2316, 2319 (W.D. Pa. 1972).

²⁵⁸ *Bethlehem Mines Corp. v. UMW*, 340 F. Supp. 829, 834, 80 L.R.R.M. 2116, 2119-20 (W.D. Pa. 1972), vacated without opinion, 480 F.2d 917 (3d Cir. 1973).

²⁵⁹ *Id.*, 80 L.R.R.M. at 2119.

was "the strong federal policy favoring arbitration of labor disputes."²⁶⁰

Even if section 301 would permit injunctive relief against individual employees, *Boys Markets* imposes substantial restrictions upon the issuance of any anti-strike injunction. While individual employees may file a grievance under most labor agreements, the union assumes full control over the grievance at some stage in the grievance-arbitration mechanism.²⁶¹ If employees wildcat because their union has refused to process a grievance, an injunction ordering arbitration may not resolve the underlying grievance. The court must consider whether the union will fairly represent wildcat strikers in the ensuing grievance-arbitration process.²⁶² Under similar circumstances, the Labor Board has refused to defer to the arbitration process and to the resulting award where the interest of the employee grievant and the union are not in "substantial harmony."²⁶³ Courts should adopt a similar approach in *Boys Markets* cases.²⁶⁴

(3) *Health and safety disputes.* In *Gateway*, the Supreme Court held that the presumption of arbitrability applies to safety disputes and that strikes over arbitrable safety disputes may be enjoined.²⁶⁵ However, under *Gateway*, "a work stoppage called

²⁶⁰ 414 U.S. at 381-82.

²⁶¹ See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 175 n.3 (1967).

²⁶² In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Supreme Court held that an individual employee may bring suit under section 301, 29 U.S.C. § 185 (1970), against his employer for breach of the collective bargaining agreement, despite the fact that the employee has not exhausted his grievance remedies, if the union has wrongfully refused to process his grievance. 386 U.S. at 186. As such, the wildcat striker might still have a remedy against the employer if he loses in arbitration because of the union's failure to represent him fairly.

²⁶³ *Kansas City Meat Packers*, 198 N.L.R.B. No. 2, 80 L.R.R.M. 1743, 1746-47 n.5 (1972). See also *NLRB v. Auburn Rubber Co.*, 384 F.2d 1, 4, 66 L.R.R.M. 2129, 2131 (10th Cir. 1967); *Roadway Express, Inc.*, 145 N.L.R.B. 513, 515, 50 L.R.R.M. 1419, 1421 (1963).

²⁶⁴ The courts may be forced to consider the possibility of employee-union disagreement *sua sponte*, since neither the employer nor the union, the normal parties to a *Boys Markets* injunction case, are likely to raise that issue voluntarily.

Although accepting the premise that *Boys Markets* is designed to protect the arbitration system, one commentator nonetheless argued that only a "wooden application of *Boys Markets*" would require the denial of an injunction against a wildcat strike since denying injunction relief "would substantially undermine the union structure and impair the entire concept of an orderly administration of the collective bargain." Isaacson, *A Fresh Look at the Labor Injunction*, Proceedings of the Southwestern Legal Foundation 17th Annual Institute on Labor Law 231, 245-46 (1971). A second commentator argued that injunctions against individual employees were permissible, but relied upon state court decisions enforcing no-strike clauses. Spelfogel, *Wildcat Strikes and Minority Concerted Activity—Discipline, Damage Suits, and Injunctions*, Proceedings of the Southwestern Legal Foundation 19th Annual Institute on Labor Law 157, 192 (1973). The values which these authors emphasize go beyond the promotion of the grievance-arbitration mechanism which was the limited goal of *Boys Markets*.

²⁶⁵ 414 U.S. at 379-80, 387.

solely to protect employees from immediate danger" is protected by section 502²⁶⁶ and may not be enjoined.²⁶⁷ A union claiming this legal exception to the *Boys Markets* doctrine "must present 'ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.'"²⁶⁸ The Court also implied that injunctions could issue against strikes protected under section 502 if the district court conditions injunctive relief on the temporary abatement of the allegedly dangerous condition pending the arbitrator's decision.²⁶⁹

Those requirements suggest that a district court may not issue an ex parte order in a safety case. Unless the union has an opportunity to argue the applicability of section 502, its protection will be meaningless.

(4) *Negotiation disputes.* Provisions for the arbitration of entire labor agreements are rare, but are apparently becoming more frequent.²⁷⁰ Clauses requiring the arbitration of impasses arising from mid-term reopenings are far more common.²⁷¹ Thus, even after the technical expiration of a contract, a court may enjoin a strike in derogation of an interest arbitration provision requiring that the parties arbitrate disputes over the terms of the new contract.²⁷² Where, however, the parties have not provided for interest arbitration, a court should not issue an injunction depriving a union of "its most important weapon, the right to strike at the table where

²⁶⁶ 29 U.S.C. § 143 (1970).

²⁶⁷ 414 U.S. at 385; see note 90 supra.

²⁶⁸ 414 U.S. at 387, quoting *Gateway Coal Co. v. UMW*, 466 F.2d 1157, 1162, 80 L.R.R.M. 3153, 3156 (3d Cir. 1972) (dissenting opinion). For an application of this exception, see *Jones & Laughlin Steel Corp. v. UMW*, 519 F.2d 1154, 89 L.R.R.M. 3118 (3d Cir. 1975).

²⁶⁹ See 414 U.S. at 387.

²⁷⁰ See *Arbitration of Interest Disputes, Proceedings*, 26th Annual Meeting of National Academy of Arbitrators (1973); *Feller, The Impetus to Contract Arbitration, Proceedings*, New York Univ. Twenty-Fourth Annual Conference on Labor 79 (1972); *Comment, Voluntary Arbitration of New Contract Terms—A Forum in Search of a Dispute*, 16 Lab. L.J. 765, 768, 776 (1965).

²⁷¹ A study of 400 contracts effective in 1971 found that 11 percent contained reopening provisions with special impasse procedures. "Of these, slightly more than a third provide for cancellation of the no strike pledges [in the event of an impasse] while a third cancel or suspend the contract. These percentages correspond closely to those of 1965. Provisions for arbitration of impasses arising from reopenings, however, are now found in 42 percent, compared to 25 percent in the preceding study." 2 BNA Collective Bargaining Negotiations and Contracts 36:3 (1971).

²⁷² See *Favino Mechanical Constr., Ltd. v. Plumbers and Pipefitters Local 269*, 78 L.R.R.M. 2389, 2391, 2392-93 (S.D.N.Y. 1971). The NLRB subsequently held that the employer association representing Favino did not violate §§ 8(a)(1) and (5) of the NLRA, 29 U.S.C. §§ 158(a)(1), (5) (1970), by presenting impasse issues to a bipartisan panel, pursuant to an expiring contract, including the question of whether the panel's authority to settle the terms of a new contract should be continued under the new agreement. *Mechanical Contractors' Ass'n*, 202 N.L.R.B. 1, 3, 82 L.R.R.M. 1438, 1440 (1973). The Board, however, rested its holding on the characterization of the panel as a second-stage negotiating team and not as a standard arbitration panel. *Id.* at 2, 82 L.R.R.M. at 1440.

a new contract is being discussed"²⁷³ A damage award or injunctive relief may be appropriate, however, where a union strikes during mid-term negotiations without an express reservation.

(5) *Representational/jurisdictional disputes.* Despite the Supreme Court's endorsement of the "therapy of arbitration" in representational or jurisdictional disputes,²⁷⁴ courts have denied injunctive relief under *Boys Markets* in such cases to avoid fragmented remedies and multiple litigation.²⁷⁵ Thus, where one employer sought to enjoin a strike in support of a non-incumbent union, the district court suggested that the employer could initiate unfair labor practice proceedings, noting that the Labor Board would seek injunctive relief against the strike.²⁷⁶

In another suit for injunctive relief against a representational strike, the Second Circuit indicated that it would deny relief because the dispute could be characterized as a jurisdictional controversy specifically excluded from arbitration by the contract,²⁷⁷ suggesting that the employer could resolve the dispute by filing a request for a unit clarification to the Labor Board.²⁷⁸ Furthermore, the court noted, the Labor Board may seek temporary injunctive relief

²⁷³ *Herald Co. v. Hopkins*, 325 F. Supp. 1232, 1234-35, 77 L.R.R.M. 2199, 2201 (N.D.N.Y. 1971). Nevertheless, a union may not strike in support of its bargaining demands until either the expiration date of its contract, or until 60 days after informing the employer of its desire to terminate or modify the contract, whichever occurs later. 29 U.S.C. §§ 158(b)(3), (d) (1970). See *NLRB v. Lion Oil Co.*, 352 U.S. 282, 285 (1957); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285-86 (1956). This statutory prohibition should be enforceable only through a damage action, through employer-imposed discipline, or by the NLRB in an unfair labor practice proceeding. Although the Board has authority, after issuance of a complaint, to seek to enjoin such a strike, 29 U.S.C. § 160(j) (1970), it rarely chooses to exercise that power. In the 27 years during which the Board has had such authority, it has sought to enjoin only 15 such strikes. The Board's reluctance to utilize the power granted in Section 10(j) has frequently been criticized. See, e.g., Comment, *The Role of the Temporary Injunction in Reforming Labor Law Administration*, 8 Colum. J. L. & Soc. Prob. 553, 563-74 (1972).

²⁷⁴ *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964).

²⁷⁵ See, e.g., *Lanco Coal Co. v. Local 250, SLU*, 320 F. Supp. 273, 275, 76 L.R.R.M. 2249, 2251 (N.D. Ala. 1970).

²⁷⁶ *Id.* Where the Board has reasonable cause to believe that an uncertified union has unlawfully picketed to secure recognition, the Board must seek to enjoin the picketing. 29 U.S.C. §§ 160(l), 158(b)(7) (1970). A strike to defeat a unit certified by the NLRB may also violate § 8(b)(3) of the NLRA, 29 U.S.C. § 158(b)(3), even if an arbitrator has upheld the union's requested unit, and the Board seeks to enjoin the strike. See *Sperry Sys. Management Div. v. NLRB*, 492 F.2d 63, 67-69, 85 L.R.R.M. 2521, 2523-25 (2d Cir.), cert. denied, 419 U.S. 831 (1974); *Morning Tel. v. Powers*, 450 F.2d 97, 102 n.5, 78 L.R.R.M. 2710, 2714 n.5 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972).

The impact of the Board's *Collyer* doctrine, see note 196 *supra*, on that possibility is unclear. See *Pacific N.W. Bell Tel. Co.*, 207 N.L.R.B. 1, 84 L.R.R.M. 1398 (1973).

²⁷⁷ *Morning Tel. v. Powers*, 450 F.2d 97, 103, 78 L.R.R.M. 2710, 2714 (2d Cir. 1971) (dictum), cert. denied, 405 U.S. 954 (1972).

²⁷⁸ See *id.* at 102 n.5, 78 L.R.R.M. at 2714 n.5; 29 U.S.C. § 159(c)(1) (1970). See also NLRB Rules and Regulations § 102.60(h), 29 CFR § 102.60(b) (1975). The Board has refused to defer to arbitration in unit issues involving more than one union. *Pacific N.W. Bell Tel. Co.*, 207 N.L.R.B. No. 9, 84 L.R.R.M. 1398 (1973).

against such jurisdictional strikes.²⁷⁹ The court failed to note, however, that the Labor Board cannot seek such relief if the parties to a jurisdictional dispute submit evidence that they have provided for the voluntary adjustment of the dispute.²⁸⁰ At any rate, no court should issue an injunction compelling the arbitration of the jurisdictional disputes pursuant to a labor agreement unless all competing unions and the employer have access to the arbitration process.²⁸¹

(6) *Employer unfair labor practice disputes.* Courts may even enjoin strikes caused by alleged employer unfair labor practices.²⁸² The Supreme Court held in *Mastro Plastics Corp. v. NLRB*²⁸³ that a broad no-strike clause does not "waive the employees' right to strike solely against the unfair labor practices of their employers,"²⁸⁴ absent an express waiver. The Labor Board, however, has interpreted *Mastro* as leaving an unfair labor practice strike over an arbitrable dispute unprotected unless the unfair labor practice is "destructive of the foundation upon which collective bargaining must rest," and has deferred to arbitration under *Collyer Insulated Wire*.²⁸⁵ Applying the principles adopted by the Board, a court may enjoin alleged unfair labor practice strikes unless the employer has committed fundamentally unfair practices which effectively repudiate the contract or withdraw recognition from the certified union.

²⁷⁹ *Morning Tel. v. Powers*, 450 F.2d 97, 102 n.5, 78 L.R.R.M. 2710, 2714 n.5 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972). See 29 U.S.C. §§ 158(b)(4)(D), 160(k)(1) (1970).

²⁸⁰ 29 U.S.C. § 160(k) (1970).

²⁸¹ In *NLRB v. Plasterers' Local 79*, 404 U.S. 116 (1971), the Supreme Court held that "absent private agreement, [employers] must be deemed parties to the adjustment or agreement to settle [jurisdictional disputes] that will abort the § 10(k) proceedings." *Id.* at 131. The Labor Board has refused to give deference to an arbitration award whenever parties affected by the award were not parties in the proceeding. *Retail Clerks Local 1100*, 203 N.L.R.B. 548, 549 n.2, 83 L.R.R.M. 1145, 1146 n.2 (1973); see *Machinists District 10*, 200 N.L.R.B. 1159, 1160 n.4, 82 L.R.R.M. 1081, 1081-82 n.4 (1972).

²⁸² E.g., *Southwestern Bell Tel. Co. v. Communications Workers*, 343 F. Supp. 1165, 1172, 80 L.R.R.M. 2513, 2517-18 (S.D. Tex. 1972); *Southwestern Bell Tel. Co. v. Communications Workers*, 324 F. Supp. 830, 833, 76 L.R.R.M. 3032, 3035 (S.D. Tex. 1971).

²⁸³ 350 U.S. 270 (1956).

²⁸⁴ *Id.* at 281, 284.

²⁸⁵ 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971); *Arlan's Dep't Store Inc.*, 133 N.L.R.B. 802, 807-08, 48 L.R.R.M. 1731, 1734-35 (1961), quoting *Mastro*, 350 U.S. at 281. See *Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97, 104-05, 77 L.R.R.M. 2710-11 (7th Cir. 1971), enforcing 183 N.L.R.B. 82, 91, 76 L.R.R.M. 1474, 1475 (1970); *Atlantic Richfield Co.*, 199 N.L.R.B. 1224, 1225 n.1, 81 L.R.R.M. 1412, 1414 n.1 (1972); cf. *Communications Workers (Western Elec. Co.)*, 204 N.L.R.B. 782, 784, 83 L.R.R.M. 1583, 1585 (1973).

In one case the Board indicated that the failure to pay wages when due was the type of fundamental breach which would provide protection to an unfair labor practice strike under *Mastro*. *San Juan Lumber Co.*, 154 N.L.R.B. 1153, 1155, 60 L.R.R.M. 1102, 1103 (1965) (*dictum*), enforced on other grounds *per curiam*, 367 F.2d 397, 63 L.R.R.M. 2416 (9th Cir. 1966).

4. *Exhaustion of Remedies*—"Clean Hands"

In *Boys Markets*, the Supreme Court briefly mentioned that the employer has prepared to proceed with arbitration when it sought an injunction against the union's strike activity.²⁸⁶ Section 8 of the Norris-LaGuardia Act, however, restricts a federal court's equity powers in labor disputes to situations where the complaining party has met his legal obligations with respect to the dispute and has made "every reasonable effort to settle such dispute either by negotiation . . . or voluntary arbitration."²⁸⁷ The restrictions of section 8 must be applied in *Boys Markets* cases.²⁸⁸

Although section 8 seemingly codifies the equitable "clean hands" doctrine and denies relief to an employer who "has not complied with any contract or obligation on his part,"²⁸⁹ the cases interpreting *Boys Markets* appear instead to treat the section as an exhaustion of remedies requirement.²⁹⁰ This is highly appropriate. Construction of section 8 as a "clean hands" requirement might deny equitable relief to any employer whose alleged breach of contract provoked a strike, and would require the court to consider the merits of the dispute before ordering arbitration.²⁹¹ The functional vitality of arbitration as the preferred method of alleviating the causes and consequences of industrial discord requires that employers be allowed access to the courts to force arbitration regardless of whether they have actually breached their contracts.²⁹²

²⁸⁶ 398 U.S. at 254. The district court had found that the employer had demanded that the dispute be submitted to arbitration and that the union had refused. *Boys Markets, Inc. v. Retail Clerks Local 770*, 70 L.R.R.M. 3071, 3074 (C.D. Cal. 1969). Under the contract, only the union could file a grievance and trigger the arbitration mechanism. *Id.* at 3073-74.

²⁸⁷ 29 U.S.C. § 108 (1970).

²⁸⁸ See, e.g., *Food Fair Stores, Inc. v. Food Drivers Local 500*, 363 F. Supp. 1254, 1257-58, 84 L.R.R.M. 2509, 2512-13 (E.D. Pa. 1973).

²⁸⁹ 75 Cong. Rec. 5464 (1932) (Remarks of Rep. O'Connor), quoted in *Railroad Trainmen Lodge 27 v. Toledo, P. & W.R.R.*, 321 U.S. 50, 60 (1944). See 29 U.S.C. § 108 (1970).

²⁹⁰ See *Southwestern Bell Tel. Co. v. Communications Workers*, 324 F. Supp. 830, 833-34, 76 L.R.R.M. 3022, 3035 (S.D. Tex. 1971), vacated and remanded on other grounds, 454 F.2d 1333, 1335-36, 78 L.R.R.M. 2833, 2885 (5th Cir. 1971).

²⁹¹ Cf. *Southwestern Bell Tel. Co. v. Communications Workers*, 454 F.2d 1333, 1335, 78 L.R.R.M. 2833, 2835 (5th Cir. 1971).

²⁹² Judicial treatment of disputes arising under the Railway Labor Act, 45 U.S.C. § 151-88 (1970), indicates the importance of retaining employer access. Unless the employer has precipitated the strike by refusing to arbitrate, courts will enjoin strikes over "minor disputes." See *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 39-40, 42 (1957); *Railroad Trainmen Lodge 27 v. Toledo, P. & W.R.R.*, 321 U.S. 50, 60-65 (1944). "Minor disputes" relate to the "meaning or proper application of a particular [contract] provision with reference to a specific situation or to an omitted case. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future." *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 722-24 (1945). "Major disputes" involve "the formation of collective agreements or efforts to secure them." *Id.*; *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 33 (1957).

Courts have developed three prerequisites to meeting the exhaustion of remedies requirement. The employer (1) must express his willingness to arbitrate the dispute; (2) must attempt to utilize the grievance-arbitration procedure where the contract provides for employer access; and (3) must not abuse the grievance mechanism.²⁹³ Judicial application of these criteria has been inconsistent.

Courts have issued injunctions regardless of whether the employer expressed his willingness to arbitrate at the time that the dispute arose or at the time of his request for injunctive relief.²⁹⁴ Unless an employer's timely expression of his willingness to arbitrate is necessary to demonstrate his good faith, the point at which he seeks arbitration is irrelevant. If good faith is a necessary element, the employer should be required to offer to arbitrate when the dispute arises. On the other hand, if good faith is irrelevant, an employer's willingness to arbitrate should be presumed once he files for injunctive relief under *Boys Markets*.²⁹⁵ Good faith should be relevant only if the employer has attempted to frustrate the grievance-arbitration mechanism by rejecting the union's offer to arbitrate the underlying dispute.

The requirement that any employer with contractual authority to file a grievance exhausts his grievance remedies before seeking an injunction²⁹⁶ misconstrues the *Boys Markets* decision. An employer's grievance necessarily involves alleged union misconduct. Normally, this will be the union's strike in breach of contract in the *Boys Markets* situation; yet arbitration of the union's right to strike will do nothing to settle the dispute which precipitated the strike. Thus, *Boys Markets* was intended to vindicate only the union's promise to utilize the grievance-arbitration process, rather than economic coercion, to resolve substantive grievances. An employer's failure to file an available grievance should be irrelevant.

Judicial concern about employer abuse of the arbitration process has been inconsistent. The Eighth Circuit enjoined a union strike

Unless the contract contains an interest arbitration clause, any dispute to which *Boys Markets* might apply is by definition a "minor dispute."

²⁹³ See, e.g., *MacFadden-Bartell Corp. v. Teamsters Local 1034*, 1045, 345 F. Supp. 1286, 1289-90, 80 L.R.R.M. 3234, 3237 (S.D.N.Y. 1972); *Transamerican Trailer Trans., Inc. v. Seafarers Int'l*, 336 F. Supp. 1052, 1057, 80 L.R.R.M. 2965, 2969 (D.P.R. 1971); *Elevator Mfgs. Ass'n v. Elevator Constructors Local 1*, 331 F. Supp. 165, 167, 78 L.R.R.M. 2215, 2216 (S.D.N.Y. 1971).

²⁹⁴ See, e.g., *Inland Steel Co. v. Local 1545, UMW*, 505 F.2d 293, 300, 87 L.R.R.M. 2733, 2738 (7th Cir. 1974).

²⁹⁵ *Id.*

²⁹⁶ See, e.g., *Transamerican Trailer Trans., Inc. v. Seafarers Int'l*, 336 F. Supp. 1052, 1057, 80 L.R.R.M. 2965, 2969 (D.P.R. 1971); *Elevator Mfg's. Ass'n v. Elevator Constructors Local 1*, 331 F. Supp. 165, 167, 78 L.R.R.M. 2215, 2216 (S.D.N.Y. 1971).

despite a finding that the employer had interfered with the grievance system by (1) immediately suspending employees who protested unsafe conditions without allowing them to file grievances, (2) refusing to process safety grievances promptly and (3) refusing to attend conciliation meetings called by the Federal Mediation and Conciliation Service.²⁹⁷ On the other hand, one district court refused to enjoin peaceful picketing by employees laid off, without notice, in a change of operations, because their union had submitted the legitimacy of the proposed layoff to arbitration, and because the employer had acted unilaterally rather than submit to arbitration.²⁹⁸ Since *Boys Markets* is intended to remedy union abuse of the arbitration system, relief should be denied to any employer who has abused it. A union faced with an injunction should demand, in open court, immediate arbitration, waiving all preliminary stages of the grievance system. If the employer refuses, the court may deny the injunction because of the employer's bad faith.

5. *Equitable Requirements*

After considering the underlying dispute and the parties' contract, the court under *Boys Markets* must further consider the impact of the strike upon the parties. The court must determine "whether an injunction would be warranted under ordinary principles of equity," including "whether [contract violations] have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance."²⁹⁹ However, the Supreme Court in *Boys Markets* minimized the impact of the requirement that equitable considerations tip in the favor of the employer, by finding that:

an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial

²⁹⁷ *Hanna Mining Co. v. United Steelworkers*, 464 F.2d 565, 568-69, 80 L.R.R.M. 3268, 3270-71 (8th Cir. 1972) (per curiam). The court did, however, order the reinstatement of the employees and the temporary abatement of the unsafe conditions which they had protested, pending arbitration. *Id.* at 569, 80 L.R.R.M. at 3271.

²⁹⁸ *McFadden-Bartell Corp. v. Teamsters Local 1034*, 345 F. Supp. 1286, 1289-90, 80 L.R.R.M. 3234, 3237 (S.D.N.Y. 1972).

²⁹⁹ *Boys Markets*, 398 U.S. at 254. Similar requirements are imposed by the Norris-LaGuardia Act. See 29 U.S.C. §§ 107(b)-(d) (1970). The District Court in *Boys Markets* found that "[i]t is impossible for plaintiff to ascertain the exact amount of damage and injury which plaintiff will sustain if defendant and its members are not enjoined from committing such acts, and plaintiff has no adequate remedy at law." *Boys Markets, Inc. v. Retail Clerks Local 770*, 70 L.R.R.M. 3071, 3074 (C.D. Cal. 1969).

strife and delay an early resolution of the difficulties between employer and union.³⁰⁰

Faced with the Court's suggestion that there is no adequate legal remedy to enforce the arbitration and no-strike clauses, it is hardly surprising that the lower courts have ignored equitable considerations in *Boys Markets* injunction cases.

In theory, equitable considerations weigh heavily in favor of the employer. His damages are often impossible to calculate accurately. In addition to lost profits, he may be subject to many breach of contract suits by his customers. Other customers may be permanently lost. Even if a damage action might provide an adequate remedy, the employer often cannot adamantly pursue an adequate award, since he may aggravate industrial strife by seeking large damages.³⁰¹ Furthermore, the union may be financially incapable of compensating the employer for his provable losses.³⁰² Discharge or discipline of the strikers does not remedy the employer's financial loss, and may in fact be counter-productive if the employer has a skilled work force. Only an injunction can secure the uninterrupted service contemplated by the contract.³⁰³

On the other hand, a union suffers no cognizable injury from the enjoining of an unlawful strike.³⁰⁴ Employees suffer no monetary loss by working, since if the arbitrator finds against the employer, he will have to compensate them for all losses suffered because of the breach of contract.³⁰⁵ The union will not suffer because it can always arbitrate the dispute.³⁰⁶ Moreover, the injunction will limit the union's financial liability for its breach of contract.³⁰⁷

³⁰⁰ 398 U.S. at 248. The Court quoted the report filed by neutral members of the American Bar Association's Special *Atkinson-Sinclair* Committee, 2 ABA Labor Relations Section 241, 242 (1963).

³⁰¹ See, e.g., *Avco Corp. v. Local 787, UAW*, 459 F.2d 968, 973, 80 L.R.R.M. 2290, 2293 (3d Cir. 1972).

³⁰² *Stearns-Roger Corp. v. Millwrights Local 1182*, 77 L.R.R.M. 2776 (D. Ariz. 1971).

³⁰³ *Boys Markets*, 398 U.S. at 248-49 n.17; *Avco*, 454 F.2d at 973, 80 L.R.R.M. at 2293.

³⁰⁴ See, e.g., *Kauai Elec. Co. v. Local 1260, IBEW*, 79 L.R.R.M. 2838, 2842 (D. Hawaii 1971); *Restaurant Associates Indus., Inc. v. Restaurant Workers Local 71*, 78 L.R.R.M. 2559, 2561 (E.D.N.Y. 1971). But see *Southwestern Bell Tel. Co. v. Communications Workers*, 324 F. Supp. 830, 834, 76 L.R.R.M. 3032, 3035 (S.D. Tex. 1971), rev'd on other grounds, 454 F.2d 1333, 1337, 79 L.R.R.M. 2480 (5th Cir. 1972) (an injunction would "seriously damage the Union in the eyes of the employees" by demonstrating the union's impotence when faced with an employer breach of contract).

³⁰⁵ *Restaurant Associates Indus., Inc. v. Restaurant Workers Local 71*, 78 L.R.R.M. 2559, 2561 (E.D.N.Y. 1971).

³⁰⁶ *Favino Mechanical Constr. Ltd. v. Plumbers Local 269*, 78 L.R.R.M. 2389, 2393 (S.D.N.Y. 1971).

³⁰⁷ *Southwestern Bell Tel. Co. v. Communications Workers*, 343 F. Supp. 1165, 1171, 80 L.R.R.M. 2513, 2517 (S.D. Tex. 1972).

In practice, the equitable considerations have little impact. Failure to consider those issues may be reversible error,³⁰⁸ but purely perfunctory analysis goes unremedied. Many courts have failed even to consider the relative equities and most have simply stated, without discussion, that the employer would suffer more from the denial of an injunction than the unions would from the grant of relief.³⁰⁹ The courts have also taken a broad view of the employer's losses in order to find irreparable injury, looking far beyond the employer's immediate financial injury. Courts have considered injuries suffered by non-striking employees,³¹⁰ by the employer's customers,³¹¹ or by the general public³¹² as part of the employer's irreparable injury.

Furthermore, on at least two occasions, courts have found irreparable injury to the employer despite the introduction of considerable evidence to the contrary at the hearing. In *Gateway*, the courts ignored evidence negating the employer's claims of irreparable injury, and based relief on injury to third parties. When employees struck the Gateway Coal Co., the employer had a forty day stockpile of coal; a twenty day supply remained when the court issued a temporary restraining order.³¹³ The trial court found injury to Gateway; to Jones & Laughlin Steel Corp., a part owner and customer of Gateway; to non-striking employees and to the general public.³¹⁴ However, neither Jones & Laughlin nor the general public would themselves suffer until the stockpile was exhausted. Nor was it likely that Jones & Laughlin would find permanent alternate sources and cease purchasing from Gateway even if the strike lasted more than forty days. Only non-striking employees might have suffered immediate irreparable injury. In any event, neither Jones & Laughlin, nor the general public nor non-striking employees falls within the category of a "complainant" or "employer" whose injuries are part of the equitable considerations which must be weighed

³⁰⁸ *North Am. Coal Corp. v. Local 2262, UMW*, 497 F.2d 459, 464, 86 L.R.R.M. 2339, 2342 (6th Cir. 1974).

³⁰⁹ See, e.g., *Edward L. Nezelek, Inc. v. Teamsters Local 294*, 342 F. Supp. 507, 510, 80 L.R.R.M. 3459, 3461 (N.D.N.Y. 1972); *Holland Constr. Co. v. Operating Eng'rs Local 101*, 315 F. Supp. 791, 792, 74 L.R.R.M. 3087, 3088 (D. Kan. 1970).

³¹⁰ *Great Lakes Dredge & Dock Co. v. Dredge Section*, 78 L.R.R.M. 2192 (N.D. Ohio 1971).

³¹¹ E.g., *Central Appalachian Coal Co. v. UMW*, 376 F. Supp. 914, 924, 86 L.R.R.M. 2277, 2285 (S.D.W. Va. 1974).

³¹² E.g., *General Bldg. Contractors Ass'n v. Operating Eng'rs Local 542*, 371 F. Supp. 1130, 1136, 86 L.R.R.M. 2677, 2681 (E.D. Pa. 1974).

³¹³ Brief for AFL-CIO and UAW as Amicus Curiae at 28-29, *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974). The courts implicitly rejected the argument that the presence of a stockpile negated the employer's claim of irreparable harm. See *Gateway Coal Co. v. UMW*, 80 L.R.R.M. 2633 (W.D. Pa. 1971) (temporary restraining order).

³¹⁴ *Gateway Coal Co. v. UMW*, 80 L.R.R.M. 2633 (W.D. Pa. 1970).

before an injunction can be granted under the Norris-LaGuardia Act³¹⁵ or *Boys Markets*.³¹⁶

More seriously, in *Hanna Mining Co. v. United Steelworkers*,³¹⁷ the Eighth Circuit ignored the district court's findings that Hanna had an ample stockpile "for an indefinite period of time," and that the employer had failed to demonstrate "irreparable injury outweighing the injury to the defendants and their members if the injunction was granted."³¹⁸ Noting only that "the equities are not all on the side of Hanna,"³¹⁹ the Eighth Circuit issued an injunction.³²⁰ Where a district court has concluded that the evidence supporting a finding of irreparable harm is insufficient, a reviewing court must consider only whether the trial court abused its discretion, committed a legal error, or clearly erred in its consideration of the evidence.³²¹ Thus, the Eighth Circuit should not have issued an injunction without a reasoned analysis justifying its reversal of the district court's factual findings on the harm suffered by Hanna.

By allowing courts to assume that any strike in breach of contract may be enjoined, the Supreme Court undermined the restraining influence of the equitable requirements.³²² Superficial analysis of the equitable considerations may result in unwarranted injunctions where the court's assumptions are unsupported by the evidence.

6. *Judicial Enforcement of the Duty to Arbitrate, Restoration of the Status Quo, and Injunction Bonds*

Boys Markets requires essentially three injunctions: the union is ordered to terminate its strike and the employer is ordered to arbitrate the underlying dispute and to restore the status quo. This section will examine judicial compliance with the latter two requirements, and their interaction with the bond requirements imposed by the Norris-LaGuardia Act and the Federal Rules of Civil Procedure.

a. *The Duty to Arbitrate.* *Boys Markets* sought to vindicate the arbitration process by ordering the employer, as well as the union, to arbitrate the dispute underlying the union's strike.³²³

³¹⁵ 29 U.S.C. § 107(b) (1970) ("That substantial and irreparable injury to complainant's property will follow . . .").

³¹⁶ *Boys Markets*, 398 U.S. at 254 ("irreparable injury to the employer").

³¹⁷ 464 F.2d 565, 80 L.R.R.M. 3268 (8th Cir. 1972) (per curiam).

³¹⁸ *Hanna Mining Co. v. United Steelworkers*, Civ. No. 72-59 at 6, 12 (D. Minn. 1972).

³¹⁹ 464 F.2d at 568, 80 L.R.R.M. at 3270.

³²⁰ *Id.* at 569, 80 L.R.R.M. at 3271.

³²¹ E.g., *Pressmen Local 9 v. Pittsburgh Press Co.*, 479 F.2d 607, 610, 83 L.R.R.M. 2349, 2350 (3d Cir. 1973).

³²² See text at note 300 *supra*.

³²³ 398 U.S. at 254.

Some courts have explicitly ordered the employer to arbitrate.³²⁴ Most courts, however, have merely ordered arbitration, leaving unclear which party must initiate the process.³²⁵ Others have enjoined strikes without an explicit order to arbitrate.³²⁶ The Second Circuit has stated that the failure to order arbitration is reversible error.³²⁷ On the other hand, the Seventh Circuit has held that an order to arbitrate must be implied in every *Boys Markets* injunction.³²⁸

Actual arbitration of the underlying dispute is not necessary to vindicate the arbitration process. *Boys Markets* requires unions to terminate strikes and utilize the grievance procedure as the exclusive means of challenging employer conduct. If the union does file a grievance, the employer's procedural defenses under the grievance-arbitration provisions (e.g., that the grievance is contractually barred as untimely) should be waived. If the union does not file a grievance, it should waive its right to contest the employer's action.³²⁹

If an order to arbitrate is not implied in any restraining order or injunction granted under *Boys Markets*, the timing of the actual order to arbitrate may be crucial to a union's ability to resolve its dispute with management. In almost one-third of the cases, the court did not order arbitration when the strike was originally enjoined; in two-thirds of these cases, the courts subsequently ordered the parties to arbitrate.³³⁰ Yet the omission of an order to arbitrate

³²⁴ See, e.g., *Holland Constr. Co. v. Operating Eng'rs Local 101*, 315 F. Supp. 791, 793, 74 L.R.R.M. 3087, 3088 (D. Kan. 1970).

³²⁵ See, e.g., *Amstar Corp. v. Sugar Workers Local 9*, 345 F. Supp. 331, 338-39, 80 L.R.R.M. 2987, 2992 (E.D.N.Y. 1972).

³²⁶ See, e.g., *Standard Food Prod. Corp. v. Brandenburg*, 76 L.R.R.M. 2366, 2367 (E.D.N.Y. 1970), rev'd on other grounds, 436 F.2d 964, 76 L.R.R.M. 2366, 2367 (2d Cir. 1970).

³²⁷ *Emery Air Freight Corp. v. Teamsters Local 295*, 449 F.2d 586, 589, 590-91, 78 L.R.R.M. 2466, 2468, 2470 (2d Cir. 1971); accord, *Celotex Corp. v. Oil Workers Union*, 377 F. Supp. 750, 753, 87 L.R.R.M. 2389, 2391 (M.D. Pa. 1974).

³²⁸ *Inland Steel Co. v. Local 1545, UMW*, 505 F.2d 293, 300, 87 L.R.R.M. 2733, 2738 (7th Cir. 1974).

³²⁹ The Labor Board has adopted similar policies under its *Collyer* doctrine. See note 197 supra. The Board requires the respondent to an unfair labor practice charge to disclaim any intention of raising procedural defenses to arbitration. See, e.g., *Gary-Hobart Water Co.*, 210 N.L.R.B. No. 87, 86 L.R.R.M. 1210, 1211 n.3 (1974), enforced, 511 F.2d 284, 289, 88 L.R.R.M. 2830, 2833 (7th Cir. 1975). General Counsel Memorandum, "Arbitration Deferral Policy under *Collyer*—Revised Guidelines," reported in 83 Lab. Rel. Rep. 41, 45 (1973). Where the charging party has refused to arbitrate the statutory issues after deferral under *Collyer*, the Board will dismiss an unfair labor practice complaint. See, e.g., *Columbia Typographers Local 101*, 214 N.L.R.B. No. 13, 87 L.R.R.M. 1275 (1974); *Electronic Reproduction Serv. Corp.*, 213 N.L.R.B. No. 110, 87 L.R.R.M. 1211, 1215-16 (1974).

³³⁰ Analysis of the 63 *Boys Markets* cases in which injunctions were issued reveals that in 41 cases, courts simultaneously ordered arbitration and enjoined a strike. In 15 of the remaining 22 cases courts enjoined a strike and subsequently ordered arbitration. No arbitration was ordered in 7 cases.

at any stage of the proceeding may seriously injure the union, particularly if the actual order to arbitrate is ultimately denied. Employee support for a strike may irretrievably disappear during the delay, leaving the union without either a strike or arbitration to force resolution of the dispute.

After ordering arbitration, several courts have imposed time limits to prevent undue delay in case the parties disagree on the selection of the arbitrator, announcing their willingness to select an arbitrator if the parties cannot agree on a selection within a stipulated period.³³¹ Courts have also ordered the parties to complete arbitration expeditiously or within a stipulated period.³³² Such judicial activity is both necessary and appropriate to expedite the resolution of the underlying dispute and decrease employer-union friction.

b. *Restoration of the Status Quo.* Courts normally grant restraining orders and preliminary injunctions primarily to maintain the status quo pending a hearing and determination of the merits of a dispute.³³³ A permanent injunction may later issue to prevent the repetition of a proven legal wrong.³³⁴ Because the status quo is generally defined as "the last uncontested status which preceded the controversy,"³³⁵ normally it is the defendant who must take action to restore the status quo. *Boys Markets*, however, creates a hybrid order since a return to the "last uncontested status" requires movement by both parties, including the cessation both of the strike and of the employer action prompting it. In a *Boys Markets* situation, there is no proven wrong at the time the strike is enjoined. The

³³¹ See, e.g., *Southwestern Bell Tel. Co. v. Communications Workers*, 343 F. Supp. 1165, 1174, 80 L.R.R.M. 2513, 2519 (S.D. Tex. 1972); *American Tel. & Tel. Co. v. Communications Workers*, 75 L.R.R.M. 2178, 2180 (S.D.N.Y. 1970).

³³² See, e.g., *Hanna Mining Co. v. United Steelworkers*, 464 F.2d 565, 570, 80 L.R.R.M. 3268, 3271 (8th Cir. 1972); *Southwestern Bell Tel. Co. v. Communications Workers*, 343 F. Supp. 1165, 1174, 80 L.R.R.M. 2513, 2519 (S.D. Tex. 1972); *Gateway Coal Co. v. UMW*, 80 L.R.R.M. 2633, 2634 (W.D. Pa. 1971), rev'd on other grounds, 466 F.2d 1157, 80 L.R.R.M. 3153 (3d Cir. 1972), rev'd, 414 U.S. 368 (1974); *Great Lakes Dredge & Dock Co. v. Dredge Section*, 78 L.R.R.M. 2192, 2193 (N.D. Ohio 1971); *American Tel. & Tel. Co. v. Communications Workers*, 75 L.R.R.M. 2178, 2180 (S.D.N.Y. 1970).

³³³ See, e.g., *United States v. UMW*, 330 U.S. 258, 292-93 (1947); *National Ass'n of Letter Carriers v. Sombrotto*, 449 F.2d 915, 921, 78 L.R.R.M. 2550, 2555 (2d Cir. 1971); *District 50, UMW v. International Union, UMW*, 412 F.2d 165, 168, 70 L.R.R.M. 3383, 3384 (D.C. Cir. 1969); *American Can Co. v. Steelworkers Local 7420*, 350 F. Supp. 810, 812, 81 L.R.R.M. 2706, 2707 (E.D. Pa. 1972).

³³⁴ See, e.g., *Western Union Tel. Co. v. Local 134, IBEW*, 133 F.2d 955, 957-58 (7th Cir. 1943).

³³⁵ *National Ass'n of Letter Carriers v. Sombrotto*, 449 F.2d 915, 921, 78 L.R.R.M. 2550, 2555 (2d Cir. 1971); accord, *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958); *American Can Co. v. Steelworkers Local 7420*, 350 F. Supp. 810, 812, 81 L.R.R.M. 2706, 2707 (E.D. Pa. 1972); *Great Lakes Dredge & Dock Co. v. Dredge Section*, 78 L.R.R.M. 2192, 2193 (N.D. Ohio 1971).

union's strike is subject to an injunction only if the underlying dispute is arbitrable, with the final decision as to arbitrability left to the arbitrator.³³⁶ Resolution of the legitimacy of the employer conduct prompting the strike is also reserved for the arbitrator. Thus, each stage of the *Boys Markets* injunction process may require restoration of the status quo pending a final decision through the grievance-arbitration mechanism.

In analogous situations under the Railway Labor Act, district courts may impose conditions requiring the employer to maintain the status quo pending resolution of "minor" disputes.³³⁷ When enjoining a strike, the court "must also consider the hardships, if any, that would arise if the employees were required to await the [Railroad Adjustment] Board's sometimes long delayed decisions without recourse to a strike" over the "minor" dispute.³³⁸ The trial court should consider the possible need for conditional relief in each case arising under the Act, although the granting of such relief is purely within its equitable discretion.³³⁹

While an employer's restoration of the status quo may be impractical in certain factual circumstances, *Boys Markets* and many of its progeny have failed even to consider the propriety of such relief. In *Boys Markets* itself, this failure was excusable. The employer had completed the disputed action before the union could announce its grievance, so that restoration of the last uncontested status would have required the employer to leave shelves unstocked pending the arbitrator's award.³⁴⁰ Clearly, that solution would have been intolerable. On the other hand, conditional relief is particularly appropriate where a union strikes to protest unilateral changes in the terms of employment, unjust discipline and discharge, or dangerous safety conditions. Thus, in *Gateway*, the Supreme Court specifically approved the grant of conditional relief in a safety dispute.³⁴¹

In no reported case has the failure to consider conditional relief appeared to seriously harm the union. For example, two courts

³³⁶ See text at notes 166-204 *supra*.

³³⁷ *Locomotive Eng'rs v. Missouri-Kan.-Tex. R.R.*, 363 U.S. 528, 531-32 (1960).

³³⁸ *Id.* at 534. A similar statutory rule requiring maintenance of the status quo applies while the parties exhaust their remedies under the "major" dispute provisions of the Act. See 45 U.S.C. §§ 152, 155-56, 160 (1970); *Detroit & T.S. Line R.R. v. Transportation Union*, 396 U.S. 142, 150-52 (1969).

³³⁹ *Railway Express Agencies, Inc. v. Brotherhood of Railway Clerks*, 437 F.2d 388, 394-95, 76 L.R.R.M. 2328, 2332-33 (5th Cir.), cert. denied, 403 U.S. 919 (1971).

³⁴⁰ See note 42 *supra*.

³⁴¹ 414 U.S. at 387; accord, *Hanna Mining Co. v. United Steelworkers*, 464 F.2d 565, 569, 80 L.R.R.M. 3268, 3271 (8th Cir. 1972) (*per curiam*).

denied conditional relief in jurisdictional disputes.³⁴² In such disputes, the controversy involves the legitimacy of the employer's choice between competing unions, and conditional relief satisfactory to the striking union would merely provoke the chosen union. In some circumstances, however, the denial of conditional relief may have a very serious impact on individual employees, particularly on a discharged employee, since long delayed monetary relief may not restore his credit rating or compensate for his past inability to care for his family.³⁴³

The grant of conditional relief restoring the status quo pending arbitration may be especially significant if the union could not obtain similar relief in an independent action against the employer. Especially after *Boys Markets*, a union usually will obey any employer directive and then file a grievance if it desires to challenge the directive. Pending resolution of the dispute through the grievance-arbitration mechanism, a union may initiate an independent suit to enjoin unilateral employer action if the immediate impact of the unilateral action might be to thwart resolution of the dispute through arbitration.³⁴⁴ Note, however, that if a union could obtain conditional relief in a *Boys Markets* situation without meeting the requirements for injunctive relief against the employer pending arbitration in an independent action, a strike might be a useful litigation tactic.³⁴⁵ An analysis of the reported cases shows that many courts have not applied the irreparable harm standard in granting requests for conditional relief. Some courts have granted conditional relief in cases in which back pay awards would presum-

³⁴² *Frommeyer & Co. v. Bricklayers Local 64*, 87 L.R.R.M. 2512 (E.D. Pa. 1974); *McCord, Condrion & McDonald, Inc. v. Carpenters Local 1822*, 464 F.2d 1036, 80 L.R.R.M. 3374 (5th Cir. 1972).

³⁴³ See *Emery Air Freight Corp. v. Teamsters Local 295*, Civ. No. 71-C-452 (E.D.N.Y. filed June 11, 1971), vacated, 449 F.2d 586, 78 L.R.R.M. 2466 (2d Cir. 1971), cert. denied, 405 U.S. 1066 (1972).

³⁴⁴ Under either the Railway Labor Act or § 301, a union must demonstrate that an arbitrator cannot remedy the injury suffered by employees in order to meet the equitable requirement of a showing of irreparable harm. See, e.g., *Detroit Newspaper Publishers Ass'n v. Typographers Local 18*, 471 F.2d 872, 875-77, 82 L.R.R.M. 2332, 2334-36 (6th Cir. 1972), cert. denied, 411 U.S. 967 (1973); *Railway Clerks Local 2144 v. Railway Express Agency, Inc.*, 409 F.2d 312, 316 (2d Cir. 1969). Typically, courts will enjoin unilateral changes that pose safety hazards, or involve layoffs or the relocation of employees. See, e.g., *United Steelworkers v. Blaw-Knox Foundry & Mill Mach. Inc.*, 319 F. Supp. 636, 640-41, 76 L.R.R.M. 2665, 2668 (W.D. Pa. 1970); *Railway Express*, 409 F.2d at 317-18. The union must also demonstrate some likelihood of success "in obtaining the award in aid of which the injunction is sought." *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974).

³⁴⁵ The union, of course, would have to weigh its potential liability for damages for a strike in breach of contract.

³⁴⁶ See, e.g., *Harmony Dairy Co. v. Teamsters Local 205*, 82 L.R.R.M. 2773, 2778-79 (W.D. Pa. 1972) (pension contributions); *Kauai Elec. Co. v. Local 1260, IBEW*, 79 L.R.R.M.

ably recompense employees.³⁴⁶ On the other hand, one court granted conditional relief only after finding that an arbitral award of money damages might not remedy the harm to employee seniority rights.³⁴⁷ Unless courts adopt the irreparable injury standard for conditional relief in *Boys Markets* situations, a union might attempt to protect its members by striking to provoke an injunction.

c. *Injunction Bonds*. Section 7 of the Norris-LaGuardia Act prohibits the issuance of restraining orders and preliminary injunctions unless the complainant files a bond sufficient to recompense those enjoined for any damages suffered from the erroneous issuance of an injunction.³⁴⁸ Damages specifically include reasonable attorney's fees and all other expenses incurred in defending against an erroneously issued order.³⁴⁹ The bond required under the Federal Rules of Civil Procedure is similar, excluding only the recovery of attorney's fees.³⁵⁰ Although no bond is required statutorily before the issuance of a permanent injunction,³⁵¹ the trial court has discretionary authority to require one.³⁵²

The reported decisions disclose a lack of uniform compliance with the statutory bonding requirements in *Boys Markets* suits against unions. In several cases courts apparently failed to require bonds as a pre-condition of either the initial order or the final order.³⁵³ Furthermore, the bond required by some courts may not be sufficient to compensate a wrongfully enjoined union. One of the most frequent reported bond amounts is \$1,000. Even after the Second Circuit ruled this "nominal" sum "hardly adequate under the

2838, 2844 (D. Hawaii 1971) (work rule changes); *American Can Co. v. International Bhd. of Pulp Workers*, 77 L.R.R.M. 2633 (D. Ore. 1971) (work rule changes); *Stein Printing Co. v. Typographers Local 48*, 329 F. Supp. 754, 759, 77 L.R.R.M. 3084, 3087 (N.D. Ga. 1971) (discharges); *American Tel. & Tel. Co. v. Communications Workers*, 75 L.R.R.M. 2178, 2180 (S.D.N.Y. 1970) (wage increase).

³⁴⁷ *Southwestern Bell Tel. Co. v. Communications Workers*, 343 F. Supp. 1165, 1174, 80 L.R.R.M. 2513, 2519 (S.D. Tex. 1972).

³⁴⁸ 29 U.S.C. § 107 (1970).

³⁴⁹ *Id.* The bonding requirements of § 7 remain in effect, despite the "accommodation" of Norris-LaGuardia in *Boys Markets*. *United States Steel Corp. v. UMW*, 456 F.2d 483, 488-89, 79 L.R.R.M. 2519, 2522 (3d Cir.), cert. denied, 408 U.S. 923 (1972).

³⁵⁰ Fed. R. Civ. P. 65(c); see *United States Steel Corp. v. UMW*, 456 F.2d 483, 488, 79 L.R.R.M. 2519, 2521-22 (3d Cir.), cert. denied, 408 U.S. 923 (1972). See generally *Atomic Oil Co. v. Bardahl Oil Co.*, 419 F.2d 1097, 1100-01 (10th Cir.), cert. denied, 397 U.S. 1063 (1970).

³⁵¹ The bonding requirements of § 7 apply only to temporary orders. 29 U.S.C. § 107 (1970). Bond is required under Rule 65(c) only to protect the defendant against the erroneous issuance of injunctive relief prior to a full hearing on the merits. *United States v. Onan*, 190 F.2d 1, 7 (8th Cir. 1951) (dictum).

³⁵² Costs, excluding attorney's fees and damages, incurred in successfully appealing the issuance of a preliminary or permanent injunction are recoverable. Fed. R. App. P. 39(a), (c).

³⁵³ See, e.g., *Old Ben Coal Corp. v. Local 1487, UMW*, 68 CCH Lab. Cas. ¶ 12951 at 23908 (E.D. Ill. 1971).

Act's standards,"³⁵⁴ several courts regarded such inadequate bonds as sufficient.³⁵⁵

Courts have required significantly higher bonds from unions when enjoining unilateral employer action pending arbitration.³⁵⁶ In addition to attorney's fees, a union bond has been required to reimburse the employer for "wages and fringe benefits paid . . . pursuant to the injunction if the ultimate determination by the arbitrator indicates that the injunctive relief was improvidently granted."³⁵⁷ The arbitrator's ultimate award is an improper basis for recovery since arbitrability of the dispute, potential irreparable injury, and likelihood of success determine whether the injunction was proper. Ultimate loss before the arbitrator on the merits does not determine whether earlier protective relief was justified.³⁵⁸ Few unions can post the high bonds often required in an independent action to enjoin employer action pending arbitration.³⁵⁹

Large bonds have not, however, been required when conditional relief pending arbitration is granted as part of a *Boys Markets* injunction. In ten of the thirteen cases in which conditional relief was granted, the court did not discuss the need for a union bond.³⁶⁰

³⁵⁴ *Emery Air Freight Corp. v. Teamsters Local 295*, 449 F.2d 586, 591, 78 L.R.R.M. 2466, 2470 (2d Cir.), cert. denied, 405 U.S. 1006 (1971).

³⁵⁵

Bond Amount	number Pre-Emery	reported cases Post-Emery
500	1 ^a	2
1,000	5	3
2,000	—	1 ^b
2,500	—	2
5,000	6 ^{a, c}	3
6,500	1	—
10,000	3 ^c	2 ^b
20,000	1	—
150,000	—	2

^a Includes TRO bond raised to 5,000 for PI.

^b Includes TRO bond raised to 10,000 for PI.

^c Includes TRO bond raised to 10,000 for PI.

³⁵⁶ See, e.g., *Typographers Local 18 v. Detroit Newspaper Publishers Ass'n*, 81 L.R.R.M. 2797, 2799 (E.D. Mich. 1972) (\$15,000); *Pressmen Local 9 v. Pittsburgh Press Co.*, 81 L.R.R.M. 2438 (3d Cir. 1972) (\$25,000); *Local 757, UAW v. Budd Co.*, 345 F. Supp. 42, 48, 81 L.R.R.M. 2414, 2419 (E.D. Pa. 1972) (\$100,000).

³⁵⁷ E.g., *United Steelworkers v. Blaw-Knox Foundry & Mill Mach., Inc.*, 319 F. Supp. 636, 641, 76 L.R.R.M. 2665, 2669 (W.D. Pa. 1970).

³⁵⁸ Compare *Blaw-Knox*, id., with the picket line cases, notes 206-27 *supra* and accompanying text. If the *Blaw-Knox* focus on the award in determining recovery on the bond is correct, unions enjoined on the *Monongahela-NAPA* theory should recover on the employer's bond if they win before the arbitrator. See, e.g., *Valmac Indus., Inc. v. Meat Cutters Local 425*, 519 F.2d 263, 269, 89 L.R.R.M. 3073, 3077 (8th Cir. 1975).

³⁵⁹ See, e.g., *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 559 n.6, 560 n.8, 85 L.R.R.M. 2517, 2519 n.6, 2520 n.8 (2d Cir. 1974).

³⁶⁰ See, e.g., *Kauai Elec. Co. v. Local 1260, IBEW*, 79 L.R.R.M. 2838, 2844 (D. Hawaii 1971).

In one of the remaining cases, the court released an employer's bond because both parties had been granted equitable relief.³⁶¹ Another court ordered each party to post a nominal bond.³⁶² The third court ordered the union to post a \$20,000 bond, which it later released.³⁶³ In granting conditional relief collateral to a *Boys Markets* injunction, courts apparently have not linked a union bond requirement to the employer's potential damage if the conditional relief is later found to have been inappropriate. Until courts require a bond reasonably related to the employer's potential recovery, a strike to provoke an injunction may be a useful litigation tactic.³⁶⁴

B. *The Substantive Requirements Imposed by the Norris-LaGuardia Act*

While *Boys Markets* seemingly adopted several of the Norris-LaGuardia Act requirements for the granting of an injunction,³⁶⁵ the Court did not expressly consider whether the Act itself applies in *Boys Markets* situations, stating only that section 4, the absolute prohibition of injunctions against strikes, must be accommodated with section 301.³⁶⁶ In the Railway Labor Act cases, the Court has held that the Norris-LaGuardia Act and the policies behind it apply only to the extent they are not inconsistent with the Railway Labor Act.³⁶⁷ In *Boys Markets* situations, courts have applied the same test and have found only one provision of Norris-LaGuardia, section

³⁶¹ *Stein Printing Co. v. Typographers Local 48*, 329 F. Supp. 754, 759 (N.D. Ga. 1971).

³⁶² *American Can Co. v. International Bhd. of Pulp Workers*, 77 L.R.R.M. 2633 (D. Ore. 1971) (\$1,000).

³⁶³ *Southwestern Bell Tel. Co. v. Communications Workers*, 343 F. Supp. 1165, 1173-74 (S.D. Tex. 1972).

³⁶⁴ But see note 345 supra.

³⁶⁵ A court must find under both *Boys Markets* and the Act:

(a) that substantial and irreparable injury to a complainant's property would follow from the denial of the injunction, 398 U.S. at 254, 29 U.S.C. § 107(b) (1970);

(b) that as to each item of relief granted, greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief, 398 U.S. at 254, 29 U.S.C. § 107(c) (1970);

(c) that complainant has no adequate remedy at law, 398 U.S. at 254, 29 U.S.C. § 107(d) (1970);

(d) that the employer has made every reasonable effort to settle the dispute either by negotiation or with the aid of any available machinery of mediation or voluntary arbitration, see 398 U.S. at 254, 29 U.S.C. § 108 (1970).

Judicial treatment of these requirements has been analyzed above.

³⁶⁶ 398 U.S. at 250; accord, *Gateway*, 414 U.S. at 380-81. But see *Granny Goose*, 415 U.S. at 445 n.19.

³⁶⁷ *Virginian Ry. v. Railway Employees System Fed'n* 40, 300 U.S. 515, 563 (1937). See also *Railway Express Agency, Inc. v. Railway Clerks*, 437 F.2d 388, 395, 76 L.R.R.M. 2328, 2332 (5th Cir.), cert. denied, 403 U.S. 919 (1971); *Chicago, R.I. & Pac. R.R. v. Switchmen's Union*, 292 F.2d 61, 71, 48 L.R.R.M. 2412, 2420 (2d Cir. 1961), cert. denied, 370 U.S. 936 (1962).

4, completely inconsistent with section 301.³⁶⁸ It is submitted that, with one exception, all Norris-LaGuardia requirements not expressly incorporated in *Boys Markets* should be applied in *Boys Markets* suits for injunctive relief.

1. *Burden of Proof and Findings of Fact*

Section 7 of the Norris-LaGuardia Act requires the complainant to provide the court with an evidentiary basis for the requisite findings of fact.³⁶⁹ In *Granny Goose*, the Supreme Court, without referring to Norris-LaGuardia, emphasized that the burden of proving the appropriateness of injunctive relief was on the employer.³⁷⁰ Logically, then, the employer seeking a *Boys Markets* injunction must allege and prove that the requirements of *Boys Markets* have been satisfied. Some courts have indicated, however, that where a union strikes without divulging the nature of its grievance, the employer need not allege and prove that an arbitrable dispute provoked the strike.³⁷¹ That doctrine cannot be reconciled with *Boys Markets*, for absent an arbitrable grievance Norris-LaGuardia and *Boys Markets* expressly forbid injunctive relief.

In every action filed under section 301, the "preponderance of the evidence" standard applies to all contested factual issues.³⁷² Thus, the employer need not bring out clear proof that the union has ratified or participated in the strike to obtain injunctive relief against the union under *Boys Markets*, as he would if the basis of his demand for injunctive relief was the violent or unlawful acts of union members.³⁷³

Under both the Act³⁷⁴ and the Federal Rules of Civil Proce-

³⁶⁸ See *Associated Gen. Contractors v. Illinois Conf. of Teamsters*, 486 F.2d 972, 975-76 n.8, 84 L.R.R.M. 2555, 2557 n.8 (7th Cir. 1973); *Old Ben Coal Corp. v. Local 1487, UMW*, 457 F.2d 162, 165, 79 L.R.R.M. 2845, 2847 (7th Cir. 1972); *United States Steel Corp. v. UMW*, 456 F.2d 483, 487-89, 79 L.R.R.M. 2519, 2520-22 (3d Cir.), cert. denied, 408 U.S. 923 (1972); *Emery Air Freight Corp. v. Teamsters, Local 295*, 449 F.2d 586, 588, 591, 78 L.R.R.M. 2466, 2467-68, 2470 (2d Cir. 1971), cert. denied, 405 U.S. 1066 (1972); *New York Tel. Co. v. Communications Workers*, 445 F.2d 39, 49-50, 77 L.R.R.M. 2785, 2792-93 (2d Cir. 1971).

³⁶⁹ 29 U.S.C. §§ 107, 109 (1970).

³⁷⁰ *Granny Goose*, 415 U.S. at 443.

³⁷¹ *Parade Publications, Inc. v. Mailers Local 14*, 459 F.2d 369, 373 n.3, 80 L.R.R.M. 2264, 2266 n.3, 80 L.R.R.M. 2264, 2266 n.3 (3d Cir. 1972); see *Morning Telegraph v. Powers*, 450 F.2d 97, 100-02, 78 L.R.R.M. 2710, 2714 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972); cf. *United States Steel Corp. v. UMW*, 74 L.R.R.M. 2607, 2608 (W.D. Pa.), rev'd, 74 L.R.R.M. 2611, 2612-13 (3d Cir. 1970).

³⁷² See, e.g., *Bartels v. Lithographers Local 1-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); *Machinists Lodge 37 v. Higgins*, 239 F. Supp. 252, 254, 58 L.R.R.M. 2539, 2541 (E.D. La. 1965); cf. *Ramsey v. UMW*, 401 U.S. 302, 308, 311 (1971).

³⁷³ Compare 29 U.S.C. § 185(e), with 29 U.S.C. § 106 (1970). See *UMW v. Gibbs*, 383 U.S. 715, 736 (1966); H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 66 (1947).

³⁷⁴ 29 U.S.C. § 109 (1970).

ture,³⁷⁵ a court's failure to file findings of fact in connection with the grant of equitable relief is reversible error.³⁷⁶ However, a court's failure to issue simultaneous findings of fact does not affect its contempt jurisdiction³⁷⁷ unless the failure renders the order too vague to be enforceable.³⁷⁸

2. Public Officers

While Norris-LaGuardia removes judicial authority to restrain peaceful strike activity,³⁷⁹ Congress left unchanged the preexisting equitable jurisdiction to restrain violence and fraud, although the employer must demonstrate that public officials are unwilling or unable to protect the continued operation of the employer's business.³⁸⁰ Where violence occurs during an otherwise lawful strike, the court's equity jurisdiction is not grounded on section 301, and adherence to the requirements of *Boys Markets* is unnecessary. Conversely, where the basis of the claim for injunctive relief is *Boys Markets*, a finding that public officers cannot protect the employer's property is irrelevant.³⁸¹

3. Scope of the Order—Acts Enjoined

Section 9 of the Act permits an order prohibiting only those unlawful acts expressly alleged in the complaint and expressly set forth in the court's finding of facts.³⁸² Furthermore, the Federal Rules of Civil Procedure require courts to specify in reasonable detail the acts to be restrained.³⁸³ Those limitations upon the court's equitable powers prohibit blanket injunctions by confining the order to the illegal acts complained of and found by the court and by notifying the party enjoined of the precise limits placed upon its conduct.³⁸⁴ Despite those requirements, the employer's attorney,

³⁷⁵ Fed. R. Civ. P. 52(a).

³⁷⁶ See *McCord, Condron, & McDonald, Inc. v. Carpenters Local 1822*, 464 F.2d 1036, 80 L.R.R.M. 3374, 3375 (5th Cir. 1972) (per curiam).

³⁷⁷ *Bethlehem Mines Corp. v. UMW*, 476 F.2d 860, 862, 82 L.R.R.M. 2601, 2603 (3d Cir. 1973).

³⁷⁸ See *Longshoremen's Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 73-76 (1967).

³⁷⁹ 29 U.S.C. § 104 (1970).

³⁸⁰ *Id.* § 107(a), (e) (1970); see *Cater Constr. Co. v. Nischwitz*, 111 F.2d 971, 977 (7th Cir. 1940).

³⁸¹ *United States Steel Corp. v. UMW*, 456 F.2d 483, 488, 79 L.R.R.M. 2519, 2521 (3d Cir.) (dictum), cert. denied, 408 U.S. 923 (1972).

³⁸² 29 U.S.C. § 109 (1970).

³⁸³ Fed. R. Civ. P. 65(d). See generally Comment, *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 1064-69 (1965).

³⁸⁴ *Longshoremen's Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 74-76 (1967); *Virginian Ry. v. Railway Employees System Fed'n 40*, 300 U.S. 515, 562-63 (1937); *Sanders v. Air Line Pilots Ass'n*, 473 F.2d 244, 247, 82 L.R.R.M. 2023, 2024 (2d Cir. 1972).

who naturally seeks the broadest possible relief, often determines the scope of the order since the judge may simply adopt his proposed draft. Consequently, the order is often overbroad, posing grave dangers for those enjoined since they may easily be found in contempt unless a reviewing court subsequently restricts the scope of the decree.³⁸⁵

Courts have not strictly complied with the rules prohibiting overbroad orders. In *Boys Markets*, the district court carefully limited its order to the specific dispute involved.³⁸⁶ Other courts, however, have been less precise, and have broadly prohibited strikes over "any arbitrable dispute,"³⁸⁷ or even "any dispute."³⁸⁸ Perhaps not suprisingly, these broad orders are most frequently issued ex parte.³⁸⁹ One might therefore assume that orders issued upon notice and after argument will be more precise, although even litigation will not ensure precision.³⁹⁰ Either union attorneys are unaware that courts can be required to tailor their orders to the specific complaint, or courts are unresponsive to their arguments. The former possibility appears more likely, since most courts expressly considering the issue have chosen a narrow order or narrowly interpreted an apparently broad order.³⁹¹ Where a union has shown a general tendency to strike rather than arbitrate, it has been held that *Boys Markets* permits a broad injunction against all possible breaches in order to promote arbitration.³⁹² The Seventh Circuit

³⁸⁵ *New York Tel. Co. v. Communications Workers*, 445 F.2d 39, 48-49, 77 L.R.R.M. 2785, 2792 (2d Cir. 1971).

³⁸⁶ See *Boys Markets, Inc. v. Retail Clerks Local 770*, 70 L.R.R.M. 3071, 3076 (C.D. Cal. 1969). The court enjoined various acts "in connection with, related to or in furtherance of a strike or work stoppage against plaintiff involving the pending dispute as to the stocking of frozen foods." *Id.* at 3076. See also *Anheuser-Busch, Inc. v. Brewery Drivers Local 133*, 346 F. Supp. 702, 707, 81 L.R.R.M. 2673, 2676 (E.D. Mo. 1972).

³⁸⁷ See, e.g., *Old Ben Coal Corp. v. Local 1487, UMW*, 68 CCH Lab. Cas. ¶ 12951 at 23908, 23910-11 (E.D. Ill. 1971), vacated in pertinent part, 457 F.2d 162, 165, 79 L.R.R.M. 2845, 2847 (7th Cir. 1972).

³⁸⁸ See, e.g., *American Can Co. v. International Bhd. of Pulp Workers*, 77 L.R.R.M. 2633 (D. Ore. 1971).

³⁸⁹ See, e.g., *Restaurant Associates Indus., Inc. v. Restaurant Workers Local 71*, 79 L.R.R.M. 2502, 2503 (E.D.N.Y. 1972); *Stearns-Roger Corp. v. Millwrights Local 1182*, 77 L.R.R.M. 2776 (D. Ariz. 1971); *Southbridge Plastics Div. v. Rubber Workers Local 759*, 76 L.R.R.M. 2113, 2114 (N.D. Miss. 1970).

³⁹⁰ See, e.g., *Hilton Int'l Co. v. Asociacion de Empleados*, 324 F. Supp. 492, 493-94, 77 L.R.R.M. 2622, 2623-24 (D.P.R. 1971); *United States Steel Corp. v. UMW*, 74 L.R.R.M. 2607, 2608, 2611 (W.D. Pa.), vacated on other grounds, 74 L.R.R.M. 2611, 2613 (3d Cir. 1970).

³⁹¹ See, e.g., *Old Ben Coal Corp. v. Local 1487, UMW*, 457 F.2d 162, 165, 79 L.R.R.M. 2845, 2847 (7th Cir. 1972); *New York Tel. Co. v. Communications Workers*, 445 F.2d 39, 47-50, 77 L.R.R.M. 2791-93 (2d Cir.), rev'g 77 L.R.R.M. 2780 (S.D.N.Y. 1971); *Herald Co. v. Hopkins*, 325 F. Supp. 1232, 1234, 79 L.R.R.M. 2199, 2201 (N.D.N.Y. 1971); cf. *Consolidation Coal Co. v. Disabled Miners*, 442 F.2d 1261, 1267 (4th Cir.), cert. denied, 404 U.S. 911 (1971).

³⁹² *Old Ben Coal Corp. v. Local 1487, UMW*, 500 F.2d 950, 953, 87 L.R.R.M. 2078,

specifically approved an order incorporating the parties' grievance provision, holding that the order was not too vague because the union could reasonably interpret its own contract and because the union could seek a declaratory judgment in close cases.³⁹³ That conclusion is inconsistent with the Norris-LaGuardia Act requirement that the employer prove actual or threatened unlawful activity.³⁹⁴ Simply stated, the Act looks to more than the employer's fears and the union's past tendencies.

Once a court enjoins a strike, it may enjoin a wide variety of collateral supporting activity, including picketing, interference with the employer's operations, and any other activity promoting the strike.³⁹⁵

4. *Scope of the Order—Persons Enjoined*

Section 7(a) of the Act permits courts to issue an injunction against any person or organization committing or threatening an unlawful act, or authorizing or ratifying an unlawful act after actual knowledge thereof.³⁹⁶ The order binds the parties to the action, those in active concert with them and their privies with actual knowledge of the order.³⁹⁷ The number of persons explicitly covered by the order is, therefore, irrelevant.³⁹⁸ Thus, an injunction against a union presumably would prohibit strike activity by any union members with actual knowledge of the order, because of the privity relationship involved.³⁹⁹ Accordingly, courts should refuse to issue any injunction where there is no unity of interest among the defendant union and its striking members. In those circumstances, the member employees are virtually unrepresented in the injunction

2080 (7th Cir. 1974). See *C.F. & I. Steel Corp. v. UMW*, 372 F. Supp. 846, 853, 84 L.R.R.M. 2885, 2890-91 (D. Colo. 1973), *aff'd*, 507 F.2d 170, 87 L.R.R.M. 3197 (10th Cir. 1974). *Contra*, *United States Steel Corp. v. UMW*, — F.2d —, 90 L.R.R.M. 2539, 2544-46 (5th Cir. 1975).

³⁹³ *Old Ben Coal Corp. v. Local 1487, UMW*, 500 F.2d 950, 953-54, 87 L.R.R.M. 2078, 2080 (7th Cir. 1974). This procedure was specifically criticized in *United States Steel Corp. v. UMW*, — F.2d —, 90 L.R.R.M. 2539, 2545-46 (5th Cir. 1975).

³⁹⁴ 29 U.S.C. § 107(a) (1970).

³⁹⁵ See, e.g., *Avco Corp. v. Local 787, UAW*, 459 F.2d 968, 974, 80 L.R.R.M. 2290, 2294 (3d Cir. 1971).

³⁹⁶ 29 U.S.C. § 107(a) (1970).

³⁹⁷ *Fed. R. Civ. P.* 65(d). See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 179-80 (1973); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13-14 (1945); *In re Lennon*, 166 U.S. 548, 554 (1897).

³⁹⁸ "A person who knowingly assists a defendant in violating an injunction" is liable in contempt regardless of the scope of the decree. *Backo v. Carpenters and Joiners Local 281*, 438 F.2d 176, 180, 76 L.R.R.M. 2184, 2187 (2d Cir. 1970), *cert. denied*, 404 U.S. 852 (1971), quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930).

³⁹⁹ But see *Pilot Freight Carriers, Inc. v. Teamsters Union*, 497 F.2d 311, 86 L.R.R.M. 2337 (4th Cir.), *cert. denied*, 419 U.S. 869 (1974), holding that an injunction against a sympathy strike could only apply to union encouragement and not to strike activities by individual members. *Id.* at 312, 86 L.R.R.M. at 2337-38.

proceeding, yet must risk a contempt proceeding to determine the order's force. Conversely, the enjoined union and its officers are obligated to end any strike, even one by members they cannot control.⁴⁰⁰ The vicariously represented members and the vicariously responsible officials may each find themselves unable to avoid contempt of the order. Thus, to avoid such vicarious liability, which is repugnant to due process of law,⁴⁰¹ injunctive relief should be totally avoided when it is apparent that the defendant union and its members are openly at odds.

C. *The Procedural Framework*

The general procedure for obtaining an injunction is relatively simple. The plaintiff initiates the process by filing a verified complaint,⁴⁰² generally accompanied by sworn affidavits alleging the substantive prerequisites for equitable relief.⁴⁰³ The complaint may conclude with a prayer for a permanent injunction. However, there is often need for temporary relief in the interval before the issuance of a permanent injunction. Courts will, therefore, entertain a motion for a temporary restraining order to enjoin the defendant until the hearing on the merits.⁴⁰⁴ After the hearing, the restraining order will either terminate or merge into a preliminary injunction, which will preserve the status quo until the final decision is rendered. While temporary and preliminary relief are not procedural prerequisites for a permanent injunction, plaintiffs frequently seek such relief in labor disputes.⁴⁰⁵

Despite this simplicity, courts have encountered great difficulty in following the procedural standards established in the Norris-LaGuardia Act and the Judicial Code. As the practitioner well realizes, these procedural rules often determine the practical result of the litigation. This is particularly true in labor litigation, where the timing and duration of an injunction may permanently affect the relationship between an employer and a union. This section will evaluate the *Boys Markets* decisions under the procedural standards established by Congress and the Supreme Court.

1. *Removal*

Federal district courts "have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating

⁴⁰⁰ See text at notes 256-64 *supra*.

⁴⁰¹ *North Am. Coal Corp. v. Local 2262, UMW*, 497 F.2d 459, 466, 86 L.R.R.M. 2339, 2344 (6th Cir. 1974).

⁴⁰² Fed. R. Civ. P. 65(b).

⁴⁰³ *Id.*

⁴⁰⁴ See, e.g., *Major v. Sowers*, 297 F. Supp. 664, 666 (D. La. 1969).

⁴⁰⁵ An appendix listing the type of relief sought in *Boys Markets* injunction cases is available for inspection at the Boston College Industrial and Commercial Law Review.

commerce'⁴⁰⁶ Plaintiffs may thus invoke either original federal jurisdiction through a suit under section 301, or any independent state jurisdiction which may exist.⁴⁰⁷ Any breach of contract suit initiated in state court and covered by section 301 may be removed to federal courts under the federal removal statute.⁴⁰⁸ Twenty-six of the first one hundred *Boys Markets* cases were initiated in state courts and removed, but in only seven could the unions perfect removal to the federal court before the state court had acted upon the complaints. Once removal is perfected, a state injunction "remain[s] in full force until dissolved or modified by the district court."⁴⁰⁹

In *Granny Goose*, the Supreme Court accommodated the removal statute with the Federal Rules of Civil Procedure and ruled that "[a]n ex parte temporary restraining order issued by a state court prior to removal remains in force after removal no longer than it would have remained in effect under state law, but in no event does the order remain in force longer than the time limitations imposed by Rule 65(b), measured from the date of removal."⁴¹⁰ Thus, a removed, ex parte state court restraining order can be effective for no longer than ten days unless the federal court extends the order upon the employer's showing of good cause.⁴¹¹ The employer must then obtain a grant of continuing relief in federal court, since the denial of a union's motion to dissolve a state order does not operate as a grant of preliminary relief by the federal court.⁴¹² Pursuant to *Granny Goose*, a district court must promptly schedule hearings on the employer's motion for a preliminary injunction or allow the removed state order to expire within ten days.⁴¹³ Prior to *Granny*

⁴⁰⁶ 28 U.S.C. § 1337 (1970).

⁴⁰⁷ *Avco Corp. v. Machinists Aero Lodge 735*, 390 U.S. 557, 561-62 (1968); see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

⁴⁰⁸ 28 U.S.C. § 1441 (1970); *Boys Markets*, 398 U.S. at 245 n.11; *Avco*, 390 U.S. at 560.

Within 30 days after receipt of the initial pleadings stating a removable cause or of the service of summons if no pleading is served (but before a final adjudication), a defendant may file a verified petition seeking removal to the district court for the district and division within which the state action is pending. 28 U.S.C. §§ 1446(a), (b) (1970). The petition must contain a short statement of the facts allowing removal and a copy of all process, pleadings and orders. *Id.* § 1446(a). The defendant must also file a surety bond to pay all costs resulting from improper removal. *Id.* § 1446(d). After filing the petition and bond notifying all adverse parties, the defendant must then notify the clerk of the state court. Upon compliance with these procedural requirements, jurisdiction automatically vests in the federal district court. *Id.* § 1446(e). The district court may remand the case and award costs if, before final judgment, it appears that removal was improper. *Id.* § 1447(c). There is no review of a remand order in a section 301 case. *Id.* § 1447(d). *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533 (6th Cir. 1970), cert. denied, 401 U.S. 939 (1971).

⁴⁰⁹ 28 U.S.C. § 1450 (1970).

⁴¹⁰ *Granny Goose*, 415 U.S. at 439-40. See text at note 115 *supra*.

⁴¹¹ Fed. R. Civ. P. 65(b).

⁴¹² *Granny Goose*, 415 U.S. at 440, 445.

⁴¹³ *Id.* at 440.

Goose, some courts, acting upon the assumption that they were also granting preliminary injunctions, merely denied union motions to dissolve.⁴¹⁴ In the long run, however, *Granny Goose's* impact will be slight, since employers will routinely request a preliminary injunction and an expedited hearing once a union removes a section 301 action.

Once an action has been removed, the parties must consider the differences between state requirements for injunctive relief and the requirements of *Boys Markets*. One federal court dismissed a state court complaint which failed to allege an arbitrable grievance.⁴¹⁵ Another court apparently permitted the employer to amend the complaint initiated in state court and prove the presence of an arbitrable issue.⁴¹⁶

2. Temporary Restraining Order

A temporary restraining order is used to restore and preserve the last peaceful status quo until the propriety of a preliminary injunction can be determined. A court may grant a restraining order upon a showing of an actual emergency or of threats of future acts which can be anticipated with reasonable probability and which present a danger of irreparable harm to the complainant.⁴¹⁷ A petitioner may obtain emergency equitable relief only upon a "prima facie showing" of his right to ultimate relief.⁴¹⁸

In *Granny Goose*, the Supreme Court indicated that Rule 65(b) establishes the minimum standards for the issuance of an ex parte temporary restraining order.⁴¹⁹ Rule 65(b) permits ex parte orders only if the specific facts alleged in the verified complaint or accompanying affidavits demonstrate that immediate and irreparable injury to the complainant will occur before the adverse party can be heard.⁴²⁰ The Rule further requires the applicant to specify in writing his efforts to give notice and to explain why notice should not be required.⁴²¹ An ex parte order is effective for ten days, but within that period, the order may be extended for a ten day period

⁴¹⁴ See, e.g., *Morning Tel. v. Powers*, 450 F.2d 97, 99, 78 L.R.R.M. 2710, 2712 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972).

⁴¹⁵ *Adams Stone Corp. v. United Steelworkers*, 367 F. Supp. 956, 957 (E.D. Ky. 1973).

⁴¹⁶ See *Parade Publications, Inc. v. Mailers Local 14*, 459 F.2d 369, 371, 80 L.R.R.M. 2264, 2265 (3d Cir. 1972).

⁴¹⁷ Fed. R. Civ. P. 65(b).

⁴¹⁸ See, e.g., *Anheuser-Busch, Inc. v. Brewers and Maltsters Local 6*, 80 L.R.R.M. 2914 (E.D. Mo. 1972).

⁴¹⁹ See 415 U.S. at 438-39.

⁴²⁰ Fed. R. Civ. P. 65(b)(1).

⁴²¹ Id. 65(b)(2). This second requirement was added in 1966 "to make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all." Notes of the Advisory Committee on Proposed Amendments to Rules, 39 F.R.D. 69, 125 (1966).

without the adverse party's consent if the complainant demonstrates a good cause, or for an unlimited period with his consent.⁴²² There is no limitation on the duration of a restraining order issued after notice.⁴²³

Rule 65(e) specifies that the Federal Rules "do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee,"⁴²⁴ a clear reference to the Norris-LaGuardia Act. In *Granny Goose*, the Supreme Court specifically reserved consideration of whether Norris-LaGuardia rather than the Rules establishes the procedural requirements in *Boys Markets* cases.⁴²⁵ Nevertheless, many lower courts have held that litigants must comply with the restrictive procedural requirements of the Norris-LaGuardia Act.⁴²⁶ Courts issuing injunctions enforcing the Railway Labor Act have also applied the Norris-LaGuardia Act standards to the extent that they are not inconsistent with the specific provisions of the Railway Labor Act.⁴²⁷ Since *Boys Markets* allows courts to issue orders which Congress expressly precluded, it is only reasonable that they precisely follow all other conditions upon which Congress would have permitted relief.⁴²⁸

Section 7 removes federal court jurisdiction to issue preliminary and permanent injunctions in labor disputes "except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made

⁴²² Fed. R. Civ. P. 65(b). See also *Sims v. Greene*, 160 F.2d 512, 516 (3d Cir. 1947).

⁴²³ Fed. R. Civ. P. 65(b); see, e.g., *Morning Telegraph v. Powers*, 450 F.2d 97, 99, 78 L.R.R.M. 2710, 2712-13 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972).

⁴²⁴ Fed. R. Civ. P. 65(e). The 1948 amendments substituted the quoted language for the words "do not modify . . . the Act of March 23, 1932, c. 90 (47 Stat. 70), U.S.C., Title 29, c. 6" Compare the 1939 amendments to the Federal Rules, 308 U.S. 645, 745 (1939), with the 1948 amendments, 335 U.S. 919, 932 (1948). The Advisory Committee noted that "[s]pecific enumeration of statutes dealing with labor injunctions is undesirable due to the enactment of amendatory or new legislation from time to time." 8 F.R.D. 591, 598 (1948).

⁴²⁵ 415 U.S. at 445 n.19.

⁴²⁶ *United States Steel Corp. v. UMW*, 456 F.2d 483, 487-88, 79 L.R.R.M. 2518, 2521 (3d Cir.), cert. denied, 408 U.S. 923 (1972) ("Certainly the requirements of a verified complaint, notice and a hearing in open court in no way conflict with the policies of the Labor-Management Relations Act."); *Emery Air Freight Corp. v. Teamsters Local 295*, 449 F.2d 586, 588, 591, 78 L.R.R.M. 2466, 2467-68, 2470 (2d Cir. 1971), cert. denied, 405 U.S. 1066 (1972). See *Restaurant Associates Indus., Inc. v. Restaurant Workers Local 71*, 79 L.R.R.M. 2502, 2506 (E.D.N.Y. 1972); *Barnes & Tucker Co. v. District 2, UMW*, 338 F. Supp. 924, 925-26, 80 L.R.R.M. 2316, 2317-18 (W.D. Pa. 1972). But see *Transamerican Trailer Trans., Inc. v. Seafarers Int'l*, 336 F. Supp. 1052, 1054, 80 L.R.R.M. 2965, 2966 (D.P.R. 1971).

⁴²⁷ See, e.g., *Railway Express Agency, Inc. v. International Bhd. of Railway Clerks*, 437 F.2d 388, 395, 76 L.R.R.M. 2328, 2332 (5th Cir.), cert. denied, 403 U.S. 919 (1971).

⁴²⁸ But see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). In *Lincoln Mills*, the Supreme Court held that strict compliance with § 7 was unnecessary because specific performance of an arbitration clause was not prohibited by § 4. *Id.* at 457-59.

under oath, and testimony in opposition thereto, if offered"⁴²⁹ The court must ensure that each person against whom relief is sought has received "due and personal knowledge" of the hearing.⁴³⁰ Where the complainant alleges that issuance of a temporary restraining order without notice is necessary to avoid substantial and irreparable injury, the court may issue such an order "upon testimony under oath, sufficient, if sustained, to justify the court in issuing a [preliminary] injunction upon a hearing after notice."⁴³¹ This ex parte restraining order is effective "for no longer than five days" before becoming void.⁴³²

Three obvious distinctions exist between the requirements of Rule 65 and section 7 for the issuance of a temporary restraining order. Section 7 requires the complainant to present oral evidence rather than mere affidavits supporting his claim for temporary relief.⁴³³ Section 7 requires ex parte temporary orders to expire in five days, rather than ten.⁴³⁴ Section 7 does not provide for extensions of the order. Obviously, section 7 affords a defendant significant advantages, since in ex parte cases the judge can question the complainant's witnesses and assess their credibility and in notice cases the defendant's counsel may cross-examine those witnesses and present his own case. Application of section 7 also means that the longest temporary order to which the defendant can be subject lasts five days rather than twenty.⁴³⁵

Measured against either section 7 or Rule 65, it is clear that courts have not afforded unions the required protections. Of the

⁴²⁹ 29 U.S.C. § 107 (1970).

⁴³⁰ *Id.*

⁴³¹ *Id.* See *Emery Air Freight Corp. v. Teamsters Local 295*, 449 F.2d 586, 78 L.R.R.M. 2466 (2d Cir. 1971), cert. denied, 405 U.S. 1066 (1972):

Section 107 apparently contemplates oral testimony as a prerequisite for the issuance of restraining orders. We need not consider those situations in which the claim may be made that the taking of such testimony is impossible and affidavits must be relied upon: the district court made no such finding here.

Id. at 591 n.2, 78 L.R.R.M. at 2470 n.2 (citations omitted). Accord, *Hoh v. Pepsico*, 491 F.2d 556, 560, 85 L.R.R.M. 2517, 2519-20 (2d Cir. 1974).

⁴³² 29 U.S.C. § 107 (1970). However, this limitation does not preclude the court from continuing an order once hearings on a preliminary injunction have begun. *Toledo, P. & W.R.R. v. Railroad Trainmen Lodge 27*, 132 F.2d 265, 267 (7th Cir. 1942), rev'd on other grounds, 321 U.S. 50, 65-66 (1944).

⁴³³ See note 431 *supra*. But see *Celotex Corp. v. Oil Workers Union*, 516 F.2d 242, 89 L.R.R.M. 2372 (3d Cir. 1975). In *Celotex*, the Third Circuit indicated that the accommodation of section 301 and the Norris-LaGuardia Act would allow the issuance of a temporary restraining order without oral testimony in some circumstances. *Id.* at 247-48, 89 L.R.R.M. at 2376 (dictum).

⁴³⁴ See note 432 *supra*; *Celotex Corp. v. Oil Workers Union*, 516 F.2d 242, 248, 89 L.R.R.M. 2372, 2376 (3d Cir. 1975).

⁴³⁵ Rule 65(b) is more extensive than § 7 in terms of the protections provided in its special requirement of an affidavit of attempt to serve notice. See note 421 *supra* and accompanying text.

twenty known *ex parte* orders, only three courts cited the filing of a Rule 65 affidavit.⁴³⁶ Of the fifteen *ex parte* orders with known duration, none expired within five days as required by section 7 and only nine complied with the twenty day maximum of Rule 65.⁴³⁷ Oral testimony was required in none of the fourteen *ex parte* hearings, but was required at twelve of the nineteen hearings with notice.⁴³⁸ Not surprisingly, courts were more likely to grant a request for an *ex parte* order than to grant an order after a hearing with notice.⁴³⁹

Even when the statutory restrictions are carefully followed, the availability of a temporary restraining order offers obvious potential for abuse. The order must be obeyed under threat of contempt, yet it is not appealable.⁴⁴⁰ To meet this problem, Rule 65(b) permits a party opposing an *ex parte* order to appear and move for the dissolution or modification of the order.⁴⁴¹ The court must resolve such motions expeditiously.⁴⁴² Similarly, after issuing an *ex parte* order, the court must schedule a hearing on the preliminary injunction "at the earliest possible time."⁴⁴³ It may, however, be impossible in some circumstances to schedule a hearing, much less to resolve disputed factual and legal issues, within the statutory time limits. Obviously, the potential for abuse is decreased where orders issue only after full evidentiary hearings or where orders issue on affidavits but are extended after prompt evidentiary hearings. Nonetheless, the defendant's opportunity to contest the complainant's factual or legal assertions does not guarantee accurate resolution by the court. The defendant may stipulate to a preliminary or permanent injunction to appeal the underlying order.⁴⁴⁴ Yet by choosing that tactic, the defendant forfeits his opportunity to liti-

⁴³⁶ *Celotex Corp. v. Oil Workers Union*, 516 F.2d 242, 247 n.7, 89 L.R.R.M. 2373, 2376 n.7 (3d Cir. 1974); *New York Tel. Co. v. Communications Workers*, 445 F.2d 39, 42, 77 L.R.R.M. 2785, 2786 (2d Cir. 1971); *Restaurant Associates Indus., Inc. v. Restaurant Workers Local 71*, 79 L.R.R.M. 2502, 2503 (E.D.N.Y. 1972).

⁴³⁷ The decisions which differentiate between *ex parte* and noticed orders reveal that a hearing with notice provides a slight advantage for a union, disregarding all other factors:

	relief granted	relief denied
<i>ex parte</i>	19	3
notice	16	5

⁴³⁸ See note 437 *supra*.

⁴³⁹ See note 437 *supra*.

⁴⁴⁰ See, e.g., *Morning Tel. v. Powers*, 450 F.2d 97, 99, 78 L.R.R.M. 2710, 2711-12 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972).

⁴⁴¹ Fed. R. Civ. P. 65(b). Only two days' notice, or shorter notice if the court permits, to the party obtaining the temporary order is required. *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ See, e.g., *Parade Publications, Inc. v. Mailers Local 14*, 459 F.2d 369, 372-73, 80 L.R.R.M. 2264, 2266 (3d Cir. 1972).

gate the complainant's factual allegations except through affidavits or in a summary hearing.

3. *Preliminary and Permanent Injunctions*

On the return date of the order to show cause, the court will determine whether to grant a preliminary injunction, protecting the petitioner's rights pending ultimate resolution of the litigation. The pleading and evidentiary requirements for a preliminary injunction are less stringent than those for a permanent injunction, since the plaintiff is required to make only a prima facie showing that there has been an invasion of his rights and that injunctive relief is the necessary remedy.⁴⁴⁵ In *Granny Goose*, the Supreme Court held that Rule 65(a) requires notice affording "a fair opportunity to oppose the application and to prepare for such opposition,"⁴⁴⁶ and implied that five days' notice may be required.⁴⁴⁷

After a final hearing on the merits, the court will grant or deny the prayer for a permanent injunction. In a *Boys Markets* case, however, the court is expressly precluded from considering the merits of the dispute, since that function is reserved for the arbitrator. Many courts have viewed their role at the permanent injunction stage as limited to determining whether the prima facie elements of *Boys Markets* have been shown, with the ultimate determination of a number of key elements, including arbitrability, left to the arbitrator. Thus, the role of a court issuing a permanent injunction should be treated as essentially identical to the normal role of a court issuing a preliminary injunction. That role is to preserve the status quo pending resolution of the merits of a dispute, with the only real distinction being that the merits will be tried before an arbitrator after a *Boys Markets* permanent injunction and not before the court which issues a preliminary injunction.

Furthermore, in labor disputes, a preliminary injunction often permanently defeats a strike. As a result, whenever a preliminary injunction is sought the defendant must be given a full evidentiary hearing on the propriety of relief under both section 7⁴⁴⁸ and Rule 65(a).⁴⁴⁹

⁴⁴⁵ See, e.g., *Ring v. Spina*, 148 F.2d 647, 654 (2d Cir. 1945).

⁴⁴⁶ 415 U.S. at 434 n.7. Section 7 of the Norris-LaGuardia Act also requires notice to the adverse party. 29 U.S.C. § 107 (1970).

⁴⁴⁷ See 415 U.S. at 434 n.7, citing *C. Wright & A. Miller*, *Federal Practice and Procedure: Civil* § 2949, at 468 (1973 ed.).

⁴⁴⁸ *Detroit & T. S. Line R.R. v. Bhd. of Locomotive Firemen and Enginemen*, 357 F.2d 152, 153-54, 61 L.R.R.M. 2388, 2389 (6th Cir. 1966).

⁴⁴⁹ See *Consolidation Coal Co. v. Disabled Miners*, 442 F.2d 1261, 1269-70 (4th Cir.), cert. denied, 404 U.S. 911 (1971); *Sims v. Greene*, 161 F.2d 87, 88-89 (3d Cir. 1947). See also *Marshall Durbin Farms, Inc. v. National Farmers Org., Inc.*, 446 F.2d 353, 356 n.4, 357-58

4. *Appeal*

District court orders involving permanent⁴⁵⁰ and interlocutory (i.e., preliminary)⁴⁵¹ injunctions may be appealed. As a general rule the grant or denial of a temporary restraining order is not appealable.⁴⁵²

On appeal, the court must consider three factors. The court must determine whether the district court's findings of fact are "clearly erroneous."⁴⁵³ The court must also determine whether the district court has applied the pertinent rule of law.⁴⁵⁴ Finally, where relief is discretionary (as in all *Boys Markets* injunction cases), the appellate court must determine whether the district court has abused its equitable discretion.⁴⁵⁵

A key consideration in the appellate process is the time necessary to perfect an appeal and secure a decision. In labor disputes, the initial grant of relief may be practically decisive and an appeal futile. Recognizing the need for speed, Congress provided that appeals involving application of the Norris-LaGuardia Act should be decided "with the greatest possible expedition."⁴⁵⁶ and directed appellate courts to give "the proceedings precedence over all other matter except older matters of the same character."⁴⁵⁷ Appellate courts have not consistently followed that mandate. In one case, the appellate decision was rendered five days after the initial district court order.⁴⁵⁸ In others, 500 days elapsed.⁴⁵⁹

V. THE VIEW FROM THE LABOR BAR

The reported cases provide an incomplete picture of *Boys Markets'* impact upon the practice of labor law. This article has

(5th Cir. 1971); *Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Corp.*, 443 F.2d 867, 872 n.5 (2d Cir. 1971); *SEC v. Frank*, 388 F.2d 486, 490-91 (2d Cir. 1968); *Ross-Whitney Corp. v. Smith Kline & French Labs.*, 207 F.2d 190, 198 (9th Cir. 1958).

⁴⁵⁰ 28 U.S.C. § 1291 (1970). See, e.g., *Boys Markets, Inc. v. Retail Clerks Local 770*, 416 F.2d 368, 369, 72 L.R.R.M. 2527, 2528 (9th Cir. 1969), rev'd on other grounds, 398 U.S. 235, 253 (1970).

⁴⁵¹ 28 U.S.C. § 1292(a)(1) (1970). See, e.g., *Associated Gen. Contractors v. Illinois Conf. of Teamsters*, 454 F.2d 1324, 1327, 79 L.R.R.M. 2555, 2557 (7th Cir. 1972).

⁴⁵² See, e.g., *Morning Tel. v. Powers*, 450 F.2d 97, 99, 80 L.R.R.M. 2710, 2711-12 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972).

⁴⁵³ Fed. R. Civ. P. 52(a).

⁴⁵⁴ Cf. *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 832 (D.C. Cir. 1972).

⁴⁵⁵ *Bayless v. Martine*, 430 F.2d 873, 877 (5th Cir. 1970); see *Yakus v. United States*, 321 U.S. 414, 440 (1944).

⁴⁵⁶ 29 U.S.C. § 110 (1970).

⁴⁵⁷ Id.

⁴⁵⁸ *United States Steel Corp. v. UMW*, 74 L.R.R.M. 2611 (3d Cir. 1970).

⁴⁵⁹ See, e.g., *Parade Publications, Inc. v. Philadelphia Mailers Union*, 459 F.2d 369 (3d Cir. 1972).

analyzed the more than one hundred court decisions reported as of April 1, 1975. Yet, these cases represent merely the tip of the iceberg. Several attorneys responding to a survey one year earlier reported that they had personally participated in approximately one hundred *Boys Markets* type of controversies.⁴⁶⁰

The impact of *Boys Markets* extends far beyond litigated cases to encompass the practical considerations in the decisional process of the labor practitioner and his clients. For example, the survey revealed hundreds of instances where the threat of a restraining order or injunction stopped a strike or threatened strike. In innumerable situations the threat of injunctive relief is not explicit: forty percent of the union attorneys responding indicated that they would not recommend a strike where the employer could obtain *Boys Markets* relief and 27.5 percent would not recommend a strike where the employer might be able to obtain an injunction. Thus, *Boys Markets* has a noticeable deterrent effect even in marginal situations. On the other hand, in many situations the threat of a strike may have prevented an employer from taking unilateral action until a union's objections could be arbitrated. According to the union attorneys surveyed, some of these employers either feared employee resentment fanned by court interference or felt they could not survive preinjunction damages. To a certain extent, these employers may also have realized that the court might order restoration of the status quo after issuing the injunction.⁴⁶¹ One union attorney stated that he would recommend a strike even where the right to an injunction is clear, if he felt the court would also order the employer to restore the status quo pending arbitration.

Boys Markets may have a permanent effect upon the scope of arbitration clauses bargained for by unions and employers. Approximately 74 percent of the union attorneys and 85 percent of the management attorneys indicated that *Boys Markets* had affected their recommendations concerning the desirable scope of no-strike and arbitration clauses. Surprisingly, more than 15 percent of the union attorneys affected now recommend broader arbitration clauses. Slightly more than half now recommend narrower arbitration clauses. Several commented that the scope of arbitration must depend upon the relative strengths of the parties. On the other hand, fewer than one in every ten management attorneys affected by *Boys Markets* now recommends a narrower arbitration clause. Several management attorneys now advise against clauses permit-

⁴⁶⁰ The computer print-out analyzing the data is available for inspection at the offices of the Boston College Industrial and Commercial Law Review. Participants in the survey were guaranteed anonymity.

⁴⁶¹ See text at notes 333-47 *supra*.

ting the employer to invoke the grievance procedure, lest a court order the employer to arbitrate his dispute with the union. However, another management attorney saw a major trend toward explicit arbitrability of employer grievances, commenting that expansion of the scope of arbitrable issues outweighs any hazard of being subject to a suit for injunctive relief.

It is difficult to reconcile this widespread union acceptance of the *Boys Markets* concept with their adamant opposition to particular injunctions. Other values apparently outweigh the historic union fear of government by injunction. Foremost, of course, is the appreciation of the benefits of arbitration in resolving labor disputes. Union-sponsored litigation is largely responsible for arbitration's high stature in the national labor policy and unions are apparently very hesitant to forfeit those victories merely because of the *Boys Markets* decision. Secondarily, however, a substantial 41.9 percent of union attorneys admit that *Boys Markets* may be an effective tool for achieving a stable industrial relationship through which both union and management can prosper. In addition, 36 percent of union attorneys agreed with the Supreme Court's assumption that there is "no substitute for an immediate halt to an illegal strike."⁴⁶² One-third agree with the Court's assumption that an injunction is less disruptive than a damage action.⁴⁶³ In fact, two attorneys, one of whom represents an international union involved in several *Boys Markets* actions, viewed a damage action as a much more serious threat to a union than a suit for injunctive relief. Slightly more than one-third of union attorneys felt that an injunction is less abrasive than the discharge or discipline of individual strikers. On the other hand, an injunction does not preclude the employer's utilization of the traditional remedies. Many management attorneys wrote that an injunction without discipline and a damage action would merely invite repeated strikes. Moreover, a partner in a management firm involved in more than 100 *Boys Markets* situations commented that the management response to an illegal strike should be as abrasive as possible.

Union attorneys are also discussing revisions of the no-strike-arbitration system to avoid a *NAPA-Monongahela* injunction, where the arbitral issue is the scope of the no-strike clause or the picket line reservation. A union may seek to eliminate the no-strike clause entirely, hoping that the bargaining history will negate the presumption of an implied no-strike clause. Another suggestion would contractually prohibit the employer from seeking an ex parte injunction. A third possibility would exclude picket line disputes from the

⁴⁶² *Boys Markets*, 398 U.S. at 248.

⁴⁶³ *Id.*

arbitration system. There, however, the union would lose the ability to arbitrate the propriety of discipline imposed upon "sympathy strikers." A final possibility is a clause requiring an employer who feels that a union is violating the no-strike or picket line clause to submit the issue to immediate arbitration, and stipulating that, pending resolution of this grievance, the activity shall be presumed lawful and the employer may not seek injunctive relief. This last option might eliminate the unwarranted use of *NAPA-Monongahela* injunctions, but might also eliminate *Boys Markets* injunctions by always requiring an employer to exhaust his contractual remedies.

Unions will apparently choose another strategy to avoid injunction while retaining the benefits of arbitration. Three union attorneys of every five surveyed now recommend a narrower no-strike clause. By expressly retaining the right to strike over a particular grievance as well as the right to arbitrate it, a union can maximize its options. No *Boys Markets* injunction should issue where the union has explicitly refused to waive its right to strike, even if the underlying dispute is arbitrable.⁴⁶⁴

Because the scope of the arbitration clause is crucial to *Boys Markets*, any factor affecting the arbitration clause will affect the impact of *Boys Markets*. Dissenting in *Collyer*, Labor Board Member Fanning predicted that "[m]any may decide they cannot afford the luxury of . . . 'voluntary' arbitration."⁴⁶⁵ It is clear, however, that *Collyer* has not had a major impact upon the negotiation of arbitration clauses. Significantly, two-thirds of the union attorneys reported that *Collyer* had not affected their recommendations. Those union attorneys affected by *Collyer* divide almost evenly between advising broader and narrower arbitration clauses. Slightly more than 42 percent of management attorneys were affected by *Collyer*. These attorneys divided almost 4.5 to 1 in favor of a broader arbitration clause.

Approximately one-sixth of the union attorneys affected would seek an arbitration clause incorporating the unfair labor practice language of the NLRA in order to require the arbitration of all unfair labor practice claims. Surprisingly, only 10 percent of management attorneys would seek such a clause, although one firm stated it would be more receptive to union requests. More than 41 percent of the union attorneys affected would seek a clause excluding unfair labor practice allegations from arbitration. The union reaction is quite surprising considering the sharp criticism *Collyer* has drawn from union attorneys. Perhaps unions realize that the long term advantages of arbitration outweigh the disadvantages of

⁴⁶⁴ See id. at 254.

⁴⁶⁵ *Collyer Insulated Wire*, 192 N.L.R.B. 837, 847, 77 L.R.R.M. 1931, 1937 (1971).

deferral. Unions may also prefer their limited control over the arbitration process to the vagaries of an employer-dominated Labor Board. As one union attorney commented, "[i]n the long run, however, we have always found more succor from an arbitrator than from the Board."

An important factor leading to the reversal of *Sinclair* was the Court's belief that a union's right to remove a section 301 case would destroy state court jurisdiction unless federal courts could also enjoin strikes in breach of contract.⁴⁶⁶ If there is any vitality left in the Norris-LaGuardia Act, unions should still seek removal to obtain the greater protection afforded in federal court. In fact, almost 95 percent of union attorneys do prefer to litigate *Boys Markets* type cases in federal court. But, surprisingly, so do almost 66 percent of management attorneys. Thus, the pre-Norris-LaGuardia race to federal court continues.

A wide variety of factors propel the labor practitioner into federal court. Even management attorneys preferring to sue in state court find the quality of judges higher in federal court. Management attorneys like the speed and availability of ex parte orders in federal court, although these same factors rate highest among those preferring state court. Significantly, many management attorneys wrote that the availability and strength of the federal contempt power was an important consideration; in fact, this "write-in" factor ranked fourth among the management's hierarchy. As one management firm commented, where management expects prompt compliance with a court order, it will seek an ex parte state court order; but where contempt may be necessary, it will litigate in federal court.

Union attorneys prefer federal court for the quality of the judiciary and the federal requirement of an evidentiary hearing. Significantly, however, the protections afforded by the Norris-LaGuardia Act were far less important than the quality of the judiciary in influencing union attorneys in the choice of forum.

VI. CONCLUSION

Four and one half years ago, the Supreme Court limited the Magna Carta of the Norris-LaGuardia Act by holding that under certain circumstances federal district courts may enjoin strikes in breach of contract. An analysis of court decisions under *Boys Markets* and a survey of labor law practitioners reveal that the early union fear that the Court had reopened the door to government by injunction was largely unwarranted. Undoubtedly, the federal judiciary has matured considerably in the last third of a century.

⁴⁶⁶ *Boys Markets*, 398 U.S. at 245-47.

Nonetheless, courts have generally shown great sensitivity toward management; the courts assume that any strike causes irreparable injury to the employer, but that employer unilateral actions and discipline rarely cause irreparable injury to a union or its members. Courts seem acutely aware that a strike may damage an employer's reputation, but unable to realize that a union must often protect its own image when provoked and must appear to act dramatically or lose the support of its present and potential membership. On the other hand, the *Boys Markets* injunction does allow a union to dramatize its displeasure yet limit its financial liability for the resulting breach of contract.

At the same time, some courts appear slightly over-zealous in their regard for the arbitration system. Many courts are unwilling to scrutinize the facts to determine whether a dispute is actually arbitrable before restraining a strike. Others have sought imaginative rationales to convert an arbitrable issue into a union's grievance in order to enjoin a strike. Here, too, the Supreme Court's guidelines promote the cavalier issuance of injunctions: the presumption of arbitrability masks superficial analysis and the Court's tacit acceptance of the picket line injunction obliterates the distinction between arbitrable issues and grievances.

Furthermore, several courts have largely ignored many of the procedural protections of the Norris-LaGuardia Act. In particular, district courts have granted ex parte orders without explicitly considering whether a short delay to notify union counsel would irreparably injure the employer. Unless the courts demonstrate greater skepticism toward the employer's complaint, the presence of opposing counsel is necessary to prevent improper restraint. Perhaps *Granny Goose* and several appellate court decisions signal a return to stricter conformity with the procedural safeguards.

Courts applying *Boys Markets* have generally shown less regard for the rights of individual employees than for the needs of the union and employer. Several courts, for example, have promoted stability at the cost of stifling internal union opposition to a particular contract. Others have rejected the distinction between a wildcat and a union action, further binding employees to their union. The result of that conclusion is that employees can force a union to arbitrate their grievances by striking, thus decreasing union control over the use of the arbitration system and possibly increasing the danger of union breaches of the duty of fair representation. Courts should weigh the rights of individual employees when balancing the equities between unions and employers.

On the whole, however, district courts have demonstrated con-

siderably more care than most union attorneys would have predicted five years ago. Moreover, a union willing to pursue an appeal will almost uniformly obtain delayed but eventual vindication. The picket line cases apparently provide the sole exception to the rule, for there appellate court reversals have promoted the issuance of injunctions.

Boys Markets also provides a union with several useful opportunities. In many situations, a union can strike to obtain previously unavailable conditional protective orders requiring the cessation of employer conduct pending arbitration of a dispute. Unions may also strike, assuming that to obtain an injunction an employer will agree to arbitrate previously nonarbitrable issues. Perhaps most usefully, *Boys Markets* provides a helpful safety valve, releasing employee tensions, while simultaneously leading to arbitration of the underlying dispute.

By characterizing its holding as "narrow," the Court clearly misconstrued the impact of the *Boys Markets* decision. There are almost as many reported *Boys Markets* injunctions as there were reported federal injunctions in the first 27 years of the century—the pre-Norris-LaGuardia era. Yet, the nature of the injunctions differs remarkably. Only in the picket line cases do courts interfere with union organizing campaigns. There is no massive, repressive use of the injunction to undermine unionism. Instead, courts have granted equitable relief which, with few exceptions, merely obligates unions to comply with voluntarily negotiated agreements to arbitrate. Certain changes in the scope of arbitration may well occur as segments of management attempt to broaden the arbitration clause to obtain increased protection against strikes and, conversely, some unions seek a narrower clause. But these countervailing pressures will not produce drastic changes in the arbitration process. Arbitration will retain its preeminent status in the national labor policy, and with certain exceptions, the Norris-LaGuardia Act and a mature, impartial judiciary will protect unions against unwarranted injunctions.

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