

APPLICABILITY OF *Boys Markets* INJUNCTIONS TO SYMPATHY STRIKES
Buffalo Forge Co. v. United Steelworkers,
517 F.2d 1207 (2d Cir.), cert. granted, 96 S. Ct. 214 (1975)

While negotiating a collective bargaining agreement with the Buffalo Forge Co., union locals representing the company's office and technical employees struck and picketed the company's facilities.¹ Other locals, affiliated with the same union and representing the company's production and maintenance workers, honored the picket lines and ordered a sympathy strike.² Since the collective bargaining agreement with the production and maintenance unions contained mandatory arbitration³ and no-strike⁴ provisions, the company sought a preliminary injunction⁵ of the secondary work stoppage under section 301(a) of the Labor Management Relations Act.⁶ The district court denied injunctive re-

1. The company recognized the legality of the office workers' picket lines. Brief for Appellant at 4-5, *Buffalo Forge Co. v. United Steelworkers*, 517 F.2d 1207 (2d Cir.), cert. granted, 96 S. Ct. 214 (1975).

2. 517 F.2d at 1209. A sympathy strike is a work stoppage prompted by deference to another union's grievance rather than aimed at extracting a direct concession from the employer. *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953). In this instance, both unions were local affiliates of the same international union, the steelworkers.

The sympathy strike terminated the day after the district court denied the company's request for injunction. *Buffalo Forge Co. v. United Steelworkers*, 386 F. Supp. 405 (W.D.N.Y. 1974). The issue was not moot, however, because the office workers remained on strike during the period of the appeal, and the work stoppage could have been resumed at any time. 517 F.2d at 1210.

3. The arbitration clause of the collective bargaining agreement applied to all "questions as to the meaning and application of the provisions of the Agreement." Brief for Appellees, Attachment B at 17, *Buffalo Forge Co. v. United Steelworkers*, 517 F.2d 1207 (2d Cir. 1975) (agreement between Buffalo Forge Co. and the United Steelworkers). The agreement stipulated that the arbitrator's decisions would bind both parties. *Id.*

4. *Id.* at 16: "There shall be no strikes, work stoppages or interruptions or impeding of work."

5. For an excellent discussion of the different practical procedural considerations involved in the various forms of injunctive relief—temporary restraining orders, preliminary and permanent injunctions, see Axelrod, *The Application of the Boys Markets Decision in the Federal Courts*, 16 B.C. IND. & COM. L. REV. 893, 950-57 (1975).

6. Labor Management Relations Act (Taft-Hartley Act) § 301(a), 29 U.S.C. § 185(a) (1970) provides:

Suits for violations of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having

lief.⁷ The Court of Appeals for the Second Circuit affirmed⁸ and *held*: Section 4 of the Norris-LaGuardia Act precludes enjoining a sympathy strike even though the union is subject to mandatory arbitration and a no-strike clause.⁹

The Norris-LaGuardia Act¹⁰ deprived federal courts of jurisdiction to

jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties.

7. *Buffalo Forge Co. v. United Steelworkers*, 386 F. Supp. 405 (W.D.N.Y. 1974). The district court found "no arbitrable grievance between the parties" because the underlying dispute involved the company and the office workers' union. *Id.* at 410-11.

The district court refused to follow several cases in which injunctions had been granted and which plaintiff argued were controlling; the court found those arbitration clauses broader than that in *Buffalo Forge*. *Id.* at 410, *distinguishing* *Inland Steel Co. v. Local 1545, UMW*, 505 F.2d 293 (7th Cir. 1974) (arbitration clause covered "matters not specifically mentioned"); *NAPA Pittsburgh, Inc. v. Automotive Local 926*, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974) (clause "covered the union's honoring a primary strike against the employer"); *Wilmington Shipping Co. v. Longshoremen's Local 1429*, 86 L.R.R.M. 2846 (4th Cir.), *cert. denied*, 419 U.S. 1022 (1974) (collective bargaining agreement provided "for the union's honoring a 'bona fide' picket line").

The district court also considered five cases that "dealt with agreements which contained no additional language . . ." 386 F. Supp. at 410, *citing* *Monongahela Power Co. v. Local 2332, IBEW*, 484 F.2d 1209 (4th Cir. 1973) (injunction issued); *Amstar Corp. v. Amalgamated Meat Cutters*, 468 F.2d 1372 (5th Cir. 1972) (injunction denied); *Barnard College v. Transport Workers*, 372 F. Supp. 211 (S.D.N.Y. 1974) (injunction issued); *General Cable Corp. v. IBEW Local 1644*, 331 F. Supp. 478 (D. Md. 1971) (injunction denied); *Simplex Wire & Cable Co. v. Local 2208, IBEW*, 314 F. Supp. 885 (D.N.H. 1970) (injunction denied). The district court concluded:

Although [*Monongahela Power* and *Barnard College*] appear to support plaintiff's position, nevertheless, the court finds that the cases in which injunction was denied are controlling [because there was no contractual restriction on the union's right to honor other unions picket lines].

386 F. Supp. at 410.

The district court also rejected the company's contention that the sympathy strike arose out of a disagreement about work assignments. If the evidence had sustained that contention, there would have been an arbitrable grievance and grounds for an injunction. *See* text accompanying note 32 *infra*.

8. The appeal arose under 28 U.S.C. § 1292(a)(1) (1970), which governs appeals of interlocutory orders, including injunctions. 517 F.2d at 1209.

9. *Buffalo Forge Co. v. United Steelworkers*, 517 F.2d 1207 (2d Cir.), *cert. granted*, 96 S. Ct. 214 (1975).

10. Norris-LaGuardia Act § 4, 29 U.S.C. § 104 (1970), provides in part:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from . . .

(a) Ceasing or refusing to perform any work or to remain in any relation of employment . . .

Congress mandated this *laissez faire* approach in response to what it perceived to be abuses of the injunctive power in labor controversies. *Arco Corp. v. Local 787, UAW*,

enjoin labor disputes except in limited circumstances.¹¹ The legislation encouraged collective bargaining, and implicitly recognized the strike as a legitimate means to that end.¹² The National Labor Relations Act (NLRA)¹³ continued the national commitment to collective bargaining, and expressly recognized the right of employees to organize and engage in concerted activities.¹⁴ As labor organizations expanded,¹⁵ industrial

459 F.2d 968 (3d Cir. 1972); *Associated Gen. Contractors v. Illinois Conf. of Teamsters*, 454 F.2d 1324 (7th Cir. 1972). For an excellent documentation of the abuses prompting the Act, see F. FRANKFURTER & F. GREENE, *THE LABOR INJUNCTION* (1930).

11. See, e.g., *United States v. UMW*, 330 U.S. 258 (1947) (strike against federal government enjoined); *Milk Wagon Drivers v. Meadowmoor Dairies Inc.*, 312 U.S. 287 (1941) (picketing attended by violence enjoined).

Generally, as a prerequisite to an injunction, the court must find that unlawful acts have been threatened and would be committed unless restrained. In addition, the Norris-LaGuardia Act conditions injunctive relief on satisfaction of certain procedural safeguards including notice, a full hearing, and findings of fact. 29 U.S.C. §§ 107-109 (1970). See Axelrod, *supra* note 5, at 945-50.

12. Norris-LaGuardia Act § 2, 29 U.S.C. § 102 (1970):

[T]he public policy of the United States is declared as follows: . . . the individual unorganized worker . . . shall be free from the interference, restraint, or coercion of employers of labor . . . in self-organization or other concerted activities for the purpose of collective bargaining

The Act's legislative history reveals that Congress intended to recognize strikes as an appropriate form of action. See S. REP. NO. 163, 72d Cong., 1st Sess. 9-10 (1932), reprinted in *STATUTORY HISTORY OF THE UNITED STATES LABOR ORGANIZATIONS* 168 (R. Koretz ed. 1970) [hereinafter cited as *STATUTORY HISTORY*].

13. 29 U.S.C. §§ 151-66 (1940), as amended, 29 U.S.C. §§ 151-66 (1970).

14. National Labor Relations Act § 1, 29 U.S.C. § 151 (1970):

It is declared to be the policy of the United States to [promote] the free flow of commerce by encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing

. . . .

For a synopsis of the legislative history of the Act, see *STATUTORY HISTORY* 277-347. Section 157 established the right of workers to join unions, bargain collectively, honor picket lines, and strike or picket. "Employees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining" National Labor Relations Act § 7, 29 U.S.C. § 157 (1940), as amended, 29 U.S.C. § 157 (1970).

Under the NLRA, employees' right to honor picket lines received federal protection. *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 75-76 (1953). Discussion of whether a sympathy strike should be enjoined is complicated by this right and the necessary result of an injunction—infringement of the right to honor a picket line. See Note, *Boys Markets Injunctions in Sympathy Strike Situations*, 6 *LOYOLA U. CHI. L.J.* 644 (1975); Note, *The Fruits of Boys Markets*, 53 *TEXAS L. REV.* 1086 (1975).

15. One measure of the success of the NLRA was the growth of unions. Their membership increased from three million in 1936 to almost fifteen million in 1945. W. OBERNER & K. HANSLOWE, *LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY* 149 (1972).

peace,¹⁶ achieved through arbitration and collective bargaining,¹⁷ emerged in the Labor Management Relations Act of 1947 (LMRA)¹⁸ as the principal objective of federal labor policy.¹⁹ Section 301(a) of the LMRA²⁰ furthered that aim by allowing suits to enforce collective bargaining agreements.²¹

Recognizing the pro-arbitration foundations of the LMRA, the Supreme Court held in *Textile Workers v. Lincoln Mills*²² that, despite the prohibitions of the Norris-LaGuardia Act,²³ section 301(a) granted

16. Labor Management Relations Act § 1(b), 29 U.S.C. § 141(b) (1970). In reaction to the labor unrest that followed World War II, Congress became concerned with maintaining industrial peace. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 3-4 (1947), reprinted in STATUTORY HISTORY 613-16; S. REP. NO. 105, 80th Cong., 1st Sess. 2 (1947) [hereinafter cited as SENATE REPORT], reprinted in STATUTORY HISTORY 589-90.

17. By the language of the Act, Congress gave the strongest possible approval to arbitration as the preferred means of settling disputes. Labor Management Relations Act § 201, 29 U.S.C. § 171 (1970). SENATE REPORT 13-14, reprinted in STATUTORY HISTORY 603-04. Some authorities argue that the Norris-LaGuardia Act, particularly § 108, which preconditions an injunction on an agreement to arbitrate, and the LMRA are consistent in favoring arbitration, though to different degrees. See Keene, *The Supreme Court, Section 301, and No-Strike Clauses: From Lincoln Mills to Avco and Beyond*, 15 VILL. L. REV. 32 (1969). See also *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 458 (1957).

18. 29 U.S.C. §§ 141-44, 151-68, 171-82, 185-87 (1970), amending 29 U.S.C. §§ 151-58 (1940).

19. See source quoted note 26 *infra*.

20. 29 U.S.C. § 185(a) (1970), quoted in note 6 *supra*. Accommodating § 301(a) with § 4 of the Norris-LaGuardia Act is difficult because Congress failed to enunciate the relationship between the acts. Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1594 n.18 (1970). Congress did not intend § 301(a) to repeal the Norris-LaGuardia Act. *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 203 (1962), overruled on other grounds, *Boys Markets, Inc. v. Retail Clerks, Local 770*, 398 U.S. 235 (1970).

21. Congress intended that this enforcement provision would induce unions and employers to enter and adhere to collective bargaining agreements. SENATE REPORT 16-18, reprinted in STATUTORY HISTORY 606, 608.

22. 353 U.S. 448 (1957), noted in Kramer, *In the Wake of Lincoln Mills*, 9 LAB. L.J. 835 (1958); Note, *Lincoln Mills: Labor Arbitration and Federal-State Relations*, 57 COLUM. L. REV. 1123 (1957); Note, *Federal Enforcement of Grievance Arbitration Provisions under the Doctrine of Lincoln Mills*, 42 MINN. L. REV. 1139 (1958). In *Lincoln Mills*, the union and the employer were parties to a collective bargaining agreement. A grievance arose over work assignments, and the union exercised its right to refer the matter to arbitration. When the employer refused to arbitrate, the union successfully sought specific performance of the agreement to arbitrate. 353 U.S. at 449.

23. The Court in *Lincoln Mills* rejected the employer's contention that the Norris-LaGuardia Act prohibited specific performance of an agreement to arbitrate, remarking that "a [refusal] to arbitrate was not part and parcel of the abuses against which the Act was aimed." 353 U.S. at 458.

jurisdiction to federal courts to compel specific performance of arbitration agreements.²⁴ In the *Steelworkers Trilogy*,²⁵ the Court recognized arbitration as a crucial element of national labor policy.²⁶ The Court formulated a presumption of arbitrability²⁷ to resolve doubts about

24. The Court reasoned:

Plainly the agreement to arbitrate grievances is the *quid pro quo* for an agreement not to strike. . . . [Section 301(a)] expresses a federal policy that federal courts should enforce these agreements on behalf or against labor organizations and that industrial peace can be best obtained only in that way.

353 U.S. at 455.

The subsequent enunciation of the presumption of arbitrability logically followed from *Lincoln Mills*. See note 26 *infra* and accompanying text. Judicial recognition of a pro-arbitration policy in *Lincoln Mills* also led courts to find implied no-strike clauses when there was mandatory arbitration, and waivers of the union's right to honor a picket line. See note 37 *infra*. See generally Keene, *supra* note 17; Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability*, 85 HARV. L. REV. 636 (1972).

25. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), *noted in* Meltzer, *The Supreme Court, Arbitration & Collective Bargaining*, 28 U. CHI. L. REV. 464 (1961); *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 181 (1960); 2 B.C. IND. & COM. L. REV. 359 (1961). For a discussion why these cases are a "trilogy," see note 27 *infra*.

26. In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), Justice Douglas explained the relationship between arbitration and the national labor policy:

The present federal policy is to promote industrial stabilization through the collective bargaining agreement. . . . A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in a collective bargaining agreement.

. . . For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

Id. at 578.

See *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974); *Boys Markets, Inc. v. Retail Clerks, Local 770*, 398 U.S. 235 (1970); *Drake Bakeries v. Bakery Workers*, 370 U.S. 254 (1962); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *NAPA Pittsburgh, Inc. v. Automotive Local 926*, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974).

27. Justice Douglas stated the presumption:

An order to arbitrate 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.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (footnote omitted).

All of the *Trilogy* cases involved bargaining agreements that provided for the arbitration of all disputes between the parties over the meaning, interpretation, and application of all provisions of the agreements. Matters that were strictly a function of management, however, were excluded from arbitration. In *Warrior & Gulf Navigation*, the Court applied the presumption of arbitrability to the union's grievance about the employer's contracting-out policy—arguably a prerogative of management not subject to arbitration under the terms of the agreement. 363 U.S. at 583.

coverage of arbitration agreements, thus expanding section 301(a) and *Lincoln Mills*. Specific performance of a no-strike clause was denied, however, in *Sinclair Refining Co. v. Atkinson*.²⁸ Instead of attempting to accommodate section 301(a) and the Norris-LaGuardia Act, the Court found the Norris-LaGuardia Act an absolute bar against injunctive relief.²⁹ In *Boys Markets, Inc. v. Retail Clerks, Local 770*,³⁰ which involved a strike aimed at undermining mandatory arbitration,³¹ the Court overruled *Sinclair* and held that an injunction was proper. By

The National Labor Relations Board applied the presumption to withhold consideration of an alleged unfair labor practice until it had been arbitrated. Collyer Insulated Wire Co., 192 N.L.R.B. 837 (1971); cf. Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). For a discussion of the role of the presumption in *Boys Markets* injunctions, see note 37 *infra*.

28. 370 U.S. 195 (1962), noted in *The Supreme Court, 1961 Term*, 76 HARV. L. REV. 54, 205-10 (1962); 47 MINN. L. REV. 643 (1963); 111 U. PA. L. REV. 247 (1962).

29. Congress' refusal to repeal or amend the Norris-LaGuardia Act led the *Sinclair* majority to conclude that neither *Lincoln Mills* nor the *Steelworkers Trilogy* compelled a modification of the Norris-LaGuardia bar to injunctions. 370 U.S. at 213.

Justice Brennan's dissent argued for an accommodation of the Norris-LaGuardia Act with § 301(a). *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 215 (1962) (Brennan, J., dissenting). Eight years later in *Boys Markets*, his view formed the basis for overruling *Sinclair*. 398 U.S. 235 (1970). See note 30 *infra* and accompanying text. One possible explanation of the *Sinclair* decision is that the Court applied the "plain meaning rule" of statutory construction. See generally Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547, 1549 (1963).

30. 398 U.S. 235 (1970), noted in Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593 (1970). See also Axelrod, *supra* note 5. Writing for the majority, Justice Brennan criticized *Sinclair*, and concluded that it made no "viable contribution" to federal labor policy. *Id.* at 249. He predicated overruling on three grounds. First, the *Sinclair* decision disregarded the Court's emphasis on the congressional policy of promoting arbitration. Second, without the possibility of an injunction, employers could not effectively enforce collective bargaining agreements. Finally, when taken in conjunction with *Avco Corp. v. Aero Lodge 735*, 390 U.S. 577 (1968) (removal of suits involving labor disputes to federal court where they were subject to the Norris-LaGuardia Act), *Sinclair* displaced the jurisdiction of state courts, contrary to the intent of the framers of the Norris-LaGuardia Act, and precluded injunctive relief in any court. 398 U.S. at 241-49.

In *Boys Markets* the Court rejected the union's argument that employers could rely on damage suits to protect their interests because such suits were ineffective substitutes for injunctions. *Id.* at 248. See Wellington & Albert, *supra* note 29, at 1558; Spelfogel, *Enforcement of No-Strike Clause by Injunction, Damage Action and Discipline*, 7 B.C. IND. & COM. L. REV. 239 (1966).

31. 398 U.S. at 243. The union demanded certain changes in the work procedure that were subject to compulsory arbitration. When the company offered to arbitrate the grievance, the union refused and called a strike. The company promptly sought an injunction.

limiting injunctions to instances in which parties were contractually bound to arbitrate the grievance over which the strike arose,³² the holding retained the anti-injunctions essence of the Norris-LaGuardia Act while accommodating the pro-arbitration policy of section 301(a).³³

In the wake of *Boys Markets*, courts have disagreed whether a sympathy strike can be enjoined.³⁴ One group of cases denied injunctive relief because the sympathy strike was not over an arbitrable grievance,³⁵ reasoning that to hold otherwise would extend *Boys Mar-*

32. *Id.* at 253. The Court imposed several other prerequisites to injunctive relief: a mandatory arbitration provision in the agreement, the employer's willingness to submit to arbitration once the injunction is issued, and judicial determination that the injunction is warranted by equitable considerations. *Id.* at 254.

33. By imposing these limitations, *see* note 32 *supra*, the Court restricted its holding in a way consistent with the opinion's underlying rationale of reconciling conflicting policies. *But see* 16 VILL. L. REV. 176, 185-86 (1970) (*Boys Markets* was "major intrusion into" Norris-LaGuardia because it allowed injunction "contrary to the literal reading of the anti-injunction provision"). *See generally* Gould, *On Labor Injunctions, Unions, and Judges: The Boys Markets Case*, 1970 S. CT. REV. 215; Note, *supra* note 20.

34. Although *Buffalo Forge* was a case of first impression in the Second Circuit, the court recognized the division among other courts. 517 F.2d at 1209 n.3. Some courts denied injunctive relief. *Amstar Corp. v. Amalgamated Meat Cutters*, 468 F.2d 1372 (5th Cir. 1972); *General Cable Corp. v. IBEW Local 1644*, 331 F. Supp. 478 (D. Md. 1971); *Simplex Wire & Cable Co. v. Local 2208, IBEW*, 314 F. Supp. 885 (D.N.H. 1970). Other courts issued injunctions. *Inland Steel Co. v. Local 1545, UMW*, 505 F.2d 293 (7th Cir. 1974), *noted in 1974-75 Annual Survey of Labor Relations & Employment Discrimination Law*, 16 B.C. IND. & COM. L. REV. 965, 1046 (1975); *NAPA Pittsburgh, Inc. v. Automotive Local 926*, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974); *Monongahela Power Co. v. Local 2332, IBEW*, 484 F.2d 1209 (4th Cir. 1973); *Barnard College v. Transport Workers*, 372 F. Supp. 211 (S.D.N.Y. 1974). That division extends beyond the issue whether a sympathy strike should be subject to a *Boys Markets* injunction. Indeed, it is grounded on differing interpretations of the scope of *Boys Markets*. *See* Axelrod, *supra* note 5; notes 35 & 37 *infra*.

35. Although an arbitrable grievance might be found, it would be the *result* rather than the *underlying cause* of the strike. For example, the strike itself might be held to be arbitrable. The mere discovery of an arbitrable grievance, however, would not lead to an injunction since the strike could not be said to be over an arbitrable grievance. Absent a determination that there exists a cause-effect relationship in which the strike is caused by an arbitrable grievance, these courts would refuse to issue a *Boys Markets* injunction. *See Plain Dealer Pub. Co. v. Cleveland Typographers, Local 53*, 520 F.2d 1220 (6th Cir.), *petition for cert. filed*, 44 U.S.L.W. 3286 (Oct. 2, 1975) (No. 565); *Gary-Hobart Water Co. v. NLRB*, 511 F.2d 284 (7th Cir.), *cert. denied*, 96 S. Ct. 269 (1975); *Amstar Corp. v. Amalgamated Meat Cutters*, 468 F.2d 1372 (5th Cir. 1972); *Johnson Builders Inc. v. Carpenters Local 1095*, 422 F.2d 137 (10th Cir. 1970); *Stokely-Van Camp, Inc. v. Thacker*, 394 F. Supp. 715 (W.D. Wash. 1975); *Carnation Co. v. Teamsters Local 949*, 381 F. Supp. 156 (S.D. Tex. 1974); *Pilot Freight Carriers, Inc. v. Local 560, Teamsters*, 373 F. Supp. 19 (D.N.J. 1974); *General Cable Co. v. IBEW Local 1644*, 331 F. Supp. 478 (D. Md. 1971). The NLRB has adopted this "underlying

kets to all disputes.³⁶ Other opinions stressed the importance of arbitration in national labor relations and applied a presumption of arbitrability.³⁷ Consequently, sympathy strikes would fall within the *Boys*

cause" requirement. *Gary-Hobart Water Corp.*, 210 N.L.R.B. 742 (1974), *enforced*, 511 F.2d 284 (7th Cir.), *cert. denied*, 96 S. Ct. 269 (1975).

Some decisions foreshadowed the approach of the *Buffalo Forge* court by implying that injunction can also be denied without undermining a pro-arbitration labor policy. *See* notes 49 & 57 *infra*.

36. *Amstar Corp. v. Amalgamated Meat Cutters*, 468 F.2d 1372 (5th Cir. 1972); *New York Tel. Co. v. Communication Workers*, 445 F.2d 39 (2d Cir. 1971). *See* note 48 *infra* and accompanying text.

Many of the decisions which denied *Boys Markets* injunctions were efforts to preserve the Supreme Court's characterization of its holding in *Boys Markets* as "narrow." *See, e.g., Emery Air Freight Corp. v. Local 295, Teamsters*, 449 F.2d 586 (2d Cir.), *cert. denied*, 405 U.S. 1066 (1971).

37. This presumption of arbitrability takes one of two forms. Some courts look to the language of the arbitration provisions and apply the presumption to bring the dispute within that language. The dispute itself is presumed arbitrable. The Supreme Court, noting the strong pro-arbitration policy, applied the presumption to a safety dispute to bring it within an arbitration clause covering "any local trouble of any kind arising at the mine." *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1973). Lower courts encountering the same language (found in the National Bituminous Coal Wage Agreement) in sympathy strike situations generally have followed *Gateway*, applied the presumption, and enjoined the dispute. *See Island Creek Coal Co. v. UMW*, 507 F.2d 650 (3d Cir. 1975); *Armco Steel Corp. v. UMW*, 505 F.2d 1129 (4th Cir. 1974); *Inland Steel Co. v. Local 1545, UMW*, 505 F.2d 293 (7th Cir. 1974); *Bethlehem Mines Corp. v. UMW*, 494 F.2d 726 (3d Cir. 1974). *But see United States Steel Corp. v. UMW*, 519 F.2d 1236 (5th Cir. 1975).

Arbitration clauses in the coal mining industry are exceptionally broad. But other decisions, involving the application of the presumption to more restrictively worded clauses to produce the same result—an injunction—suggest that the application of the presumption is not dependent on the wording of the arbitration clause. *See Associated Contractors v. Construction Local 563*, 519 F.2d 269 (8th Cir. 1975) (refusal to cross picket line created arbitrable issue); *Valmac Indus. Inc. v. Food Handlers Local 425*, 519 F.2d 263 (8th Cir. 1975) (same); *Pilot Freight Carriers, Inc. v. Teamsters Local 391*, 497 F.2d 311 (4th Cir.), *cert. denied*, 419 U.S. 839 (1974); *Wilmington Shipping Co. v. Longshoremen's Local 1429*, 86 L.R.R.M. 2846 (4th Cir.), *cert. denied*, 419 U.S. 1022 (1974); *Monongahela Power Co. v. Local 2332, IBEW*, 484 F.2d 1209 (4th Cir. 1973) (breach of no-strike clause an arbitrable issue, although the court stated that the issue was so clearly arbitrable that an injunction would issue irrespective of the presumption); *Avco Corp. v. Local 787, UAW*, 459 F.2d 968 (3d Cir. 1972) (violation of no-strike clause and capacity of both parties to initiate arbitration are arbitrable issues); *Barnard College v. Transport Workers*, 372 F. Supp. 211, 212 (S.D.N.Y. 1974) (breach of no-strike clause held a dispute "arising out of the interpretation or application of the collective bargaining agreement").

Other courts, rather than applying the presumption to the language of the arbitration provisions, cited it to justify an injunction granted out of deference to the pro-arbitration element of national labor policy. *See NAPA Pittsburgh, Inc. v. Automotive Local 926*, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974). *See also* *Southwestern Bell*

Markets exception to the anti-injunction provisions of the Norris-La Guardia Act and could be enjoined.³⁸

Emphasizing the narrowness of the *Boys Markets* holding,³⁹ the court in *Buffalo Forge Co. v. United Steelworkers*⁴⁰ determined that if a strike is to be enjoined, it must be "over a grievance" that the parties had agreed to arbitrate.⁴¹ The court found that the sympathy strike

Tel. Co. v. Communication Workers, 454 F.2d 1333 (5th Cir. 1971) ("arguable" arbitrable approach drew dispute within the coverage of arbitration). *But see* Standard Food Prod. Corp. v. Branderburg, 436 F.2d 964, 966 (2d Cir. 1970) (no injunction when union presents a "colorable claim" that the underlying dispute is excluded from arbitration).

Some courts have justified injunctions by inferring that the union waived its right to honor a picket line when it agreed to a no-strike clause. Courts base that inference on the pro-arbitration policy announced in *Lincoln Mills* and effectuated through the presumption. *See* Island Creek Coal Co. v. UMW, *supra*; Armco Steel Co. v. UMW, *supra*. Such a finding of waiver is contrary to the general requirement that a waiver be clear and unmistakable. *See* N.L.R.B. v. Wisconsin Aluminum Foundry Co., 440 F.2d 393, 399 (7th Cir. 1971); Timken Roller Bearing Co. v. N.L.R.B., 325 F.2d 746, 751 (6th Cir.), *cert. denied*, 376 U.S. 971 (1963); Gary-Hobart Water Co., 210 N.L.R.B. 742 (1974), *enforced*, 511 F.2d 284 (7th Cir.), *cert. denied*, 96 S. Ct. 269 (1975); Axelrod, *supra* note 5, at 923. *See generally* Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability*, 85 HARV. L. REV. 636 (1972) (indiscriminate application of the presumption would undermine narrowness of *Boys Markets*); Comment, *Federal Labor Policy and the Scope of the Prerequisites of a Boys Markets Injunction*, 19 ST. LOUIS U.L.J. 328 (1975).

38. When courts have relied upon the presumption, injunctions have followed as a matter of course. *See* note 37 *supra*.

With the exception of the Sixth Circuit, most courts have ignored the other prerequisites to a *Boys Markets* injunction. *See* note 32 *supra*. Those decisions following Justice Brennan's guidelines have found injunctive relief unwarranted by equity since the companies failed to show that the strikes would cause irreparable harm. *See* North Am. Coal Corp. v. UMW, 497 F.2d 459 (6th Cir. 1974); Detroit Newspaper Pub. Ass'n v. Detroit Typographers Union, 471 F.2d 872 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973). For an interesting discussion of an ignored element in equitable considerations, *see* Abrams, *The Labor Injunction and the Refusal to Cross Another Union's Picket Lines*, 26 CASE W. RES. L. REV. 178 (1975).

39. The court remarked:

In assessing the extent to which § 301(a) modified the anti-injunction policy of Norris-LaGuardia, we base the tenor of our inquiry on the Court's emphasis in *Boys Market* [*sic*] on the narrowness of its holding in favor of injunctive relief.

517 F.2d at 1210. *See* note 36 *supra*.

40. 517 F.2d 1207 (2d Cir.), *cert. granted*, 96 S. Ct. 214 (1975).

41. 517 F.2d at 1210. In its petition for certiorari, plaintiff argued that this language allowed injunctions only in situations in which the strike was over an arbitrable grievance initiated by the union. Thus, a "double standard" of arbitrability arose under which employee-initiated grievances were arbitrable while the grievances of the employer were not. Petitioner's Brief for Petition for Certiorari at 10, *Buffalo Forge Co. v. United Steelworkers*, 96 S. Ct. 214 (1975). If the presumption of arbitrability is applied to the issue whether the employer can invoke the arbitration procedures,

stemmed from the union's respect for the picket lines rather than a grievance with the company.⁴² From this finding, the court deduced that there was neither an arbitrable dispute precipitating the stoppage nor grounds for portraying the strike as an attempt to displace arbitration procedures.⁴³

The court also considered whether an injunction would promote accommodation of the anti-injunction policy of Norris-LaGuardia and the pro-arbitration policy of section 301(a).⁴⁴ The court reasoned that if it enjoined a sympathy strike "it is difficult to conceive of any strike which could not be so enjoined."⁴⁵ Moreover, the court feared that accommodation would become meaningless because injunctions would "virtually obliterate" the Norris-LaGuardia Act.⁴⁶ Having determined

however, petitioner's argument is refuted. In addition, a possible reading of *Buffalo Forge* suggests that the court merely required that both the employer and the union be bound by the arbitrator's decision, not that both parties be capable of initiating the arbitration mechanism. See *Avco Corp. v. Local 737, UAW*, 459 F.2d 968 (3d Cir. 1972); *Geo. A. Hormal & Co. v. Local P-31, Amalgamated Meat Cutters*, 349 F. Supp. 785 (N.D. Iowa 1972). But see *Martin Hageland, Inc. v. United States Dist. Court*, 460 F.2d 789 (9th Cir. 1972); *General Cable Corp. v. IBEW Local 1644*, 331 F. Supp. 478 (D. Md. 1971).

42. 517 F.2d at 1210. Although the court cited no particular case, its approach corresponds with that applied in *General Cable Corp. v. IBEW Local 1644*, 331 F. Supp. 478 (D. Md. 1971). See note 35 *supra*.

43. 517 F.2d at 1211. This characterization of sympathy strikes originated in *NAPA Pittsburgh, Inc. v. Automotive Local 926*, 502 F.2d 321, 324 (3d Cir.) (en banc) (Hunter, J., & Seitz, C.J., dissenting), cert. denied, 419 U.S. 1049 (1974), and *Inland Steel Corp. v. Local 1545, UMW*, 505 F.2d 293, 300-01 (7th Cir. 1974) (dissenting opinion).

44. By raising these policy considerations the court intended to avoid an "undue expansion of the 'narrow' holding in *Boys Market*. [sic]" 517 F.2d at 1211. It is unclear, however, whether the court thought that the analysis based on the "over a grievance" requirement might unduly expand *Boys Markets*, or simply felt that the policy arguments insured that the Court's holding would not be broadly construed. See note 35 *supra*.

45. 517 F.2d at 1211, quoting *Amstar Corp. v. Amalgamated Meat Cutters*, 468 F.2d 1372, 1373 (5th Cir. 1972). This conclusion would be true only if a *Boys Markets* injunction depended solely on an underlying grievance. *Boys Markets*, however, also required that the parties have agreed to mandatory arbitration. See note 32 *supra*. Moreover, courts may not infer such an agreement. Only when mandatory arbitration was lacking would enjoining a sympathy strike ignore the *Boys Markets* prerequisites and effect a de facto repeal of the Norris-LaGuardia Act. *Associated Gen. Contractors v. Illinois Conf. of Teamsters*, 454 F.2d 1324 (7th Cir. 1974) (provision requiring mutual consent for arbitration not mandatory; injunction denied); *Emery Air Freight Corp. v. Local 295, Teamsters*, 449 F.2d 586 (2d Cir.), cert. denied, 405 U.S. 1066 (1971) (expired collective bargaining agreement precludes finding of mandatory arbitration); see *Morning Tel. v. Powers*, 450 F.2d 97 (2d Cir. 1971).

46. 517 F.2d at 1211.

that the sympathy strike did not circumvent the arbitration procedures,⁴⁷ the court concluded that denial of an injunction would not impinge upon the general policy favoring arbitration.⁴⁸ Therefore, the court believed that its action maintained the vitality of Norris-LaGuardia without offending pro-arbitration considerations.⁴⁹

While the Second Circuit relied heavily on the reasoning of other cases,⁵⁰ its *Buffalo Forge* opinion shifted the emphasis to policy considerations affected by the grant of an injunction.⁵¹ Although *Buffalo*

47. *Id.* Although the facts in *Buffalo Forge* support this conclusion, it is questionable whether it would follow in all instances. For example, a sympathy strike could be merely a guise for pressuring an employer to yield on a grievance that is subject to arbitration. See *Food Fair Stores, Inc. v. Food Handlers Local 500*, 363 F. Supp. 1254 (E.D. Pa. 1973). See also *NAPA Pittsburgh, Inc. v. Automotive Local 926*, 502 F.2d 321, 326 n.6 (3d Cir.) (Hunter, J., dissenting), *cert. denied*, 419 U.S. 1049 (1974).

48. 517 F.2d at 1211. In support of this conclusion the court cited two dissenting opinions, *NAPA Pittsburgh, Inc. v. Automotive Local 926*, 502 F.2d 321, 324, 330-31 (3d Cir.) (Hunter, J., dissenting), *cert. denied*, 419 U.S. 1049 (1974); *Inland Steel Co. v. Local 1545, UMW*, 502 F.2d 293, 300-01 (7th Cir. 1974) (Fairchild, J., dissenting). Judge Hunter's dissent convincingly illustrated why injunctions do not promote arbitration. Accepting the premise of the majority of the court in *NAPA Pittsburgh* that a sympathy strike involves an arbitrable dispute, Judge Hunter nevertheless maintained that injunctive relief was improper because the arbitrable dispute was not the underlying cause of the strike. By definition, a sympathy strike does not attempt to defeat the arbitrator's jurisdiction, nor pressure the employer to forego arbitration and yield to the demands of the union as in *Boys Markets*. A concession to the union would not halt the work stoppage since the grievance between the primary union and the employer would remain unresolved. 502 F.2d at 326.

Moreover, an injunction frustrates the aims of the Norris-LaGuardia Act without furthering a pro-arbitration policy. Judge Hunter believed that the arbitration process would suffer from the issuance of an injunction. Having obtained an injunction, the employer would have achieved all that is possible, and has nothing to gain from arbitration. Given the costs of arbitration, the possibility of losing on the merits, and the resumption of the strike, employers have a strong incentive to delay arbitration proceedings. *Id.* at 328. In this setting, unions would be less willing to submit to arbitration or enter into arbitration agreements—contrary to the congressional intent underlying section 301(a). Furthermore, the *NAPA Pittsburgh* majority's broad interpretation of *Boys Markets* would permit an employer to halt any work stoppage merely by alleging that the strike itself was illegal under the contract. Note, *Boys Markets: Developments in the Third Circuit*, 48 TEMP. L.Q. 281, 309 (1975).

49. 517 F.2d at 1211. Judge Hunter, dissenting in *NAPA Pittsburgh*, would go beyond the Second Circuit's argument. He believed that denial of injunctive relief is not merely consistent with a pro-arbitration policy, but actually promotes it by creating an incentive for employers to enter arbitration. 502 F.2d at 326. This argument presupposes, however, an arbitrable dispute which the employer might win on the merits in arbitration, thus ending the strike.

50. See cases cited notes 36 & 42 *supra*.

51. An awareness of the policy implications surrounding an injunction runs throughout the Second Circuit's interpretation of *Boys Markets*. See *Emery Air Freight Corp.*

Forge and *Boys Markets* reached different conclusions, both cases stressed policy accommodation.⁵² Furthermore, the court's conclusion that refraining from enjoining the strike did not offend the pro-arbitration policy is strengthened by distinguishing the causes and effects of the strikes in *Boys Markets* and *Buffalo Forge*.⁵³

The court correctly denied the injunction, but it failed to address the applicability of the presumption of arbitrability.⁵⁴ Although the court logically reasoned that there was no underlying grievance between the parties because the dispute causing the sympathy strike in-

v. Teamsters Local 295, 449 F.2d 586 (2d Cir.), cert. denied, 405 U.S. 1006 (1971); New York Tel. Co. v. Communication Workers, 445 F.2d 39 (2d Cir. 1971). In contrast, many courts have denied injunctions on the ground that the sympathy strike does not arise over an arbitrable grievance. That determination implies certain policy considerations, but its principal focus is factual. Although the two approaches—factual and policy—are ultimately interdependent, policy considerations dominated the reasoning of *Buffalo Forge*.

52. By emulating the accommodation approach of *Boys Markets*, *Buffalo Forge* avoided a one-sided analysis, and reinforced the essence of the former's argument. The impact of an injunction was considered, but not at the expense of ignoring any impact on the pro-arbitration policy. This policy-centered approach explains why *Boys Markets* is inapplicable to the facts of *Buffalo Forge*. It also parries the criticism that the court mechanically limits *Boys Markets* to comparable factual patterns. In contrast, decisions that deny injunctions because of an emphasis on factual determinations are susceptible to such criticism. See Note, *The Fruits of Boys Markets*, supra note 14.

53. Although the court did not explicitly distinguish the factual setting of the two cases, there is a strong indication that factual differences account for the distinguishable effects of an injunction on promoting arbitration. Compare *Buffalo Forge Co. v. United Steelworkers*, 517 F.2d 1207, 1208 (2d Cir. 1975), with *Boys Markets, Inc. v. Retail Clerks, Local 770*, 398 U.S. 235, 254 (1970). The cases can also be reconciled by viewing *Buffalo Forge* as falling within the statement in *Boys Markets* "that injunctive relief is [not] appropriate as a matter of course in every case of a strike over an arbitrable grievance." 398 U.S. at 253-54.

54. An application of the presumption would probably dictate an injunction. See note 37 supra. Nothing in the opinion suggests that the court found the presumption rebuttable in the sympathy strike context. The line of cases in which the doctrine has been considered indicates that the presumption is irrebuttable in practice, if not in fact.

A policy argument, that the necessity of retaining the Norris-LaGuardia Act precludes the application of the presumption, could be inferred from the *Buffalo Forge* opinion. This argument was rejected, however, by the Supreme Court's sustaining the issuance of an injunction based on the presumption in *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1973). Compare *Abrams*, supra note 38, at 182 (reading *Gateway* as mandating application of the presumption to *Boys Markets* situations), with *NAPA Pittsburgh, Inc. v. Automotive Local 926*, 502 F.2d 321, 331-32 (3rd Cir.) (Hunter, J., dissenting), cert. denied, 419 U.S. 1049 (1974). *Abrams*' analysis begs the question: What is a *Boys Markets* situation? See generally Note, supra note 37; note 48 supra.

Moreover, by failing to consider the effect of the presumption, the court avoided an opportunity to indicate why the presumption is inapplicable to sympathy strikes. See note 58 infra.

volved the employer and another union,⁵⁵ this analysis becomes truly compelling only when carried to its logical conclusion. The court should have proceeded to acknowledge that no grievance could have been resolved by submitting the secondary dispute to arbitration. The presumption of arbitrability should not apply to the question whether the sympathy strike falls within the coverage of the no-strike clause.⁵⁶ Nor should the breach of a no-strike clause create an arbitrable issue justifying a *Boys Markets* injunction.⁵⁷ The presumption of arbitrability is inapplicable, as a matter of fact, when there is no underlying grievance

55. The court recognized this distinction, but failed to see its full implication. See text accompanying note 42 *supra*. See also *Amstar Corp. v. Amalgamated Meat Cutters*, 468 F.2d 1372, 1373-74 (5th Cir. 1972); *Parade Pub., Inc. v. Philadelphia Mailers Local 14*, 459 F.2d 369 (3d Cir. 1972).

56. *Boys Markets* recognized that the no-strike clause, express or implied, is the quid pro quo for the employer's agreement to submit to arbitration. 398 U.S. at 248. *Lincoln Mills* stated that "the agreement to arbitrate grievance disputes [was] the quid pro quo for an agreement not to strike." 353 U.S. at 454. Taken together, these decisions strike a balance, and suggest that the scope of the no-strike clause should extend only so far as necessary to preserve that balance. See *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 106 (1962) ("A no-strike agreement is [not] to be implied beyond the area . . . exclusively covered by compulsory terminal arbitration"). Expanding the scope of the no-strike clause to sympathy strikes by applying the presumption upsets that balance since the union cannot submit the underlying grievance to arbitration.

Thus the scope of the no-strike clause is an inappropriate issue for arbitration. Moreover, no purpose would be served by submitting the sympathy strike to arbitration once the question of the scope of the no-strike clause was recognized as an inappropriate subject for arbitration. This point can be clearly illustrated. Suppose E represents the employer, O the union which originally struck, and S the union engaged in the sympathy strike. The grievance prompting the sympathy strike is between E and O. If the strike is enjoined, E and S could only arbitrate the grievance that prompted the strike, but that grievance involves E and O. Therefore, any resolution between E and S will fail to resolve the grievance since O is not a party to arbitration. S might reach an agreement with E that the underlying dispute between O and E should be resolved in E's favor, but O, not being a party to the decision, is not bound. Requiring S to arbitrate would delay or circumvent any discussion of the real grievance between E and O. See *Pilot Freight Carriers, Inc. v. Local 560, Teamsters*, 373 F. Supp. 19 (D.N.J. 1974). See also Note, *Boys Markets Injunctions in Sympathy Strike Situations*, *supra* note 14, at 652.

57. Had the mere breach of the no-strike clause been considered an arbitrable issue, the Supreme Court would not have had to establish the *Boys Markets* guidelines. The breach of a no-strike clause, by itself, cannot create an arbitrable issue on which a *Boys Markets* injunction should issue. To hold that the breach is an arbitrable issue upon which a *Boys Markets* injunction could be issued would allow employers to secure injunctions at will since they could always claim a breach without showing an express no-strike clause. *Gateway Coal Co. v. UMW*, 414 U.S. 368, 381-82 (1974); see *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). Moreover, if the grievance is the very legality of the strike, and the district court must find this illegality to enjoin the strike, there is then nothing remaining for the arbitrator to decide. Note, *Boys Markets Injunctions in Sympathy Strike Situations*, *supra* note 14, at 671.

between the sympathetic union and the employer.⁵⁸

By affirming the narrowness of the *Boys Markets* holding, *Buffalo Forge* retained the Norris-LaGuardia Act as an element of national labor policy.⁵⁹ Resolution of the disagreement among the courts awaits the Supreme Court's disposition of *Buffalo Forge* during the current term.⁶⁰ Its decision may carry ramifications beyond the area of sympathy strikes since contempt proceedings⁶¹ and politically-inspired strikes⁶² involve many of the same considerations. In the meantime, unions within the Second Circuit can engage in sympathy strikes while employer's reliance on a *Boys Markets* injunction is curtailed.

58. There are several reasons why the presumption should not be used to determine whether a sympathy strike should be enjoined. The presumption was not applied in *Boys Markets*, but simply cited as evidence of the strong pro-arbitration considerations in labor policy. 398 U.S. at 242-43. To apply the presumption would be inconsistent with *Boys Markets'* accommodation of both statutes, because application of the presumption would erase all restrictions on the Court's holding and obliterate the Norris-LaGuardia Act for all practical purposes. See note 37 *supra*.

Showing that the presumption is factually inapplicable eliminates the argument that its application justifies an injunction. See note 57 *supra*. Decisions that rely on the presumption to support their policy arguments are refuted by the *Buffalo Forge* argument that an injunction does not further arbitration. Therefore, no reason remains for issuing a *Boys Markets* injunction against a sympathy strike.

59. After the Second Circuit's decision, the Sixth Circuit relied on *Buffalo Forge* to deny an injunction. *Plain Dealer Pub. Co. v. Cleveland Typographers, Local 53*, 520 F.2d 1220 (6th Cir.), *petition for cert. filed*, 44 U.S.L.W. 3286 (Oct. 2, 1975) (No. 565).

60. In the view of one court, any change with respect to the status of the Norris-LaGuardia Act must come from Congress. *Pilot Freight Carriers, Inc. v. Local 560 Teamsters*, 373 F. Supp. 19, 28 (D.N.J. 1974). Given the Court's action in *Boys Markets*, however, it is doubtful that the Court will feel obliged to defer decision on this issue to Congress. Cf. *Wellington & Albert*, *supra* note 29, at 1563. On the basis of the Court's denial of certiorari in several cases in which injunctions were granted, one commentator predicts that *Buffalo Forge* will be reversed. See Axelrod, *supra* note 5, at 920 n.206.

61. See *Consolidated Coal Co. v. Local 1784, UMW*, 514 F.2d 763 (6th Cir. 1975).

62. Cf. *United States Steel Corp. v. UMW*, 519 F.2d 1236 (5th Cir. 1975). But see *United States Pipe & Foundry Co. v. UMW*, 397 F. Supp. 1 (N.D. Ala. 1975).