BOYS MARKETS—NOW IS ARBITRATION A KINGPIN OF NATIONAL LABOR POLICY?

INTRODUCTION

The capability of federal courts to deal effectively with suits brought under Section 301 of the Labor Management Relations Act[1] for violation of arbitration and no-strike clauses of collective bargaining agreements has been seriously hampered for many years by this statute's conflict with the anti-injunction provisions of the Norris-LaGuardia Act.[2] Although there were encouraging signs that the Supreme Court would forge an accommodation between the two statute provisions,[3] these hopes were dashed when it decided *Sinclair Refining Co. v. Atkinson*.[4] In that case, the Court held that the anti-injunction provisions of the Norris-LaGuardia Act prevented a federal district court from enjoining a strike which violated a no-strike promise contained in a labor contract, even though that agreement also contained provisions, enforceable under Section 301, for binding arbitration of the grievance dispute which caused the strike.

The decision, rather than expanding the case law previously

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1 29 U.S.C. § 185 (1964), provides in part:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. [Hereinafter, this statute will be referred to as Section 301.]

2 29 U.S.C. § 104 (1964), 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 (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

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

. . . .

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

. . . .

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

3 *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R., 353 U.S. 30 (1957).

4 370 U.S. 195 (1962).

developed by the Court around Section 301,[5] introduced elements of confusion, uncertainty, and ultimately gamesmanship into an otherwise consistent area of labor law. One commentator likened the decision to a snake who resolutely attempted to swallow a frog for its dinner; no matter how hard the snake swallowed, the frog kept jumping out.[6] This colorful analogy correctly anticipated the difficulties which would arise from the application of *Sinclair* in subsequent years. On the one hand, the Court had declared that Congress intended arbitration to be the primary means for the peaceful resolution of labor disputes.[7] However, *Sinclair* deprived the federal courts of one of their most effective means of promulgating that policy, and instead largely cast the burden upon state courts to force recalcitrant parties to abide by the terms of their collective bargaining agreement through the use of varying state injunctive remedies where they existed.[8] Furthermore, the Court in *Sinclair* seemed unwilling to reconcile Norris-LaGuardia with Section 301; whereas, in prior decisions the Court had appeared amenable to an accommodation between the two statutes.[9]

Problems soon began to develop as employers, seeking injunctive relief against illegal strikes, probed state and federal courts alike for ways to get around *Sinclair.* Just as earnestly, union lawyers attempted to fashion effective defenses to such tactics, primarily through the use of the federal removal statute,[10] an action ultimately approved by the

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5 Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Steelworkers Trilogy, 363 U.S. 593 (1960), 363 U.S. 574 (1960), 363 U.S. 564 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

6 Aaron, *Strikes In Breach of Collective Agreements: Some Unanswered Questions,* 63 COLUM. L. REV. 1027, 1034 (1963).

7 United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); and United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960).

8 In some cases, such remedies did not exist because of the existence of so-called "little Norris-LaGuardia acts" which also barred injunctive relief in circumstances such as those in the *Sinclair* case. In other cases, however, state courts granted injunctive relief despite the existence of such statutes. For a thorough compilation of cases and statutes, *see* Bartosic, *Injunctions and Section 301: The Patchwork of Avco and Philadelphia Marine on the Fabric of National Labor Policy,* 69 COLUM. L. REV. 980, 1001-03, nn. 135-39 (1969).

9 Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R., 353 U.S. 30 (1957).

10 28 U.S.C. § 1441 (1964), provides in part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to

Court in *Avco Corp. v. Aero Lodge No. 735, IAM.*[11] The combined force of *Sinclair* and *Avco* ultimately eliminated the injunction as a means of halting illegal strikes in either federal or state courts and created an imbalance of remedies that the Court could not long ignore. Indeed, the frog had not only jumped out again, but this time it threatened to get clean away.

On June 1, 1970, the Court in a landmark decision, *Boys Markets, Inc. v. Retail Clerks Union, Local 770,*[12] acknowledged that the doctrine of *Sinclair* must finally be reversed:

> It is precisely because *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 and our efforts to accommodate and harmonize this policy with those underlying the anti-injunction provisions of the Norris-LaGuardia Act that we believe *Sinclair* should be reconsidered. Furthermore, in light of developments subsequent to *Sinclair,* in particular our decision in *Avco Corp. v. Aero Lodge 735,* 390 U.S. 557 (1968), it has become clear that the *Sinclair* decision does not further but rather frustrates realization of an important goal of our national labor policy.[13]

With that, Mr. Justice Brennan, who had been the author of a memorable dissent in *Sinclair,* and who had in that opinion largely foreseen the problem areas which did eventually develop, proceeded to establish the accommodation between Section 301 and Norris-LaGuardia which he believed should have been made eight years before.[14] Stated simply, *Boys Markets* holds that a federal district court may enjoin a strike which breaches a no-strike clause in a collective bargaining agreement despite the anti-injunction provisions of Norris-LaGuardia, where the grievance over which the strike was called is subject to final and binding arbitration under that agreement.[15] However, before proceeding to analyze and weigh the overall impact of *Boys Markets* upon national labor law vis-à-vis arbitration and injunctions, it would be well to recount more fully how the law in this area has developed.

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the district court of the United States for the district and division embracing the place where such action is pending.

11 390 U.S. 557 (1968).

12 398 U.S. 235 (1970).

13 *Id.* at 241.

14 370 U.S. 195, 215-16 (1962) (dissenting opinion).

15 398 U.S. at 253.

INJUNCTIONS, ARBITRATION, AND SECTION 301 BEFORE *Sinclair*

Section 301 was passed by Congress as part of the Labor Management Relations Act (Taft-Hartley Act) of 1947.[16] Its purpose was to make the federal courts available for suits involving violations of collective bargaining agreements in addition to remedies already available through state courts. Prior to this statute, employers had run into considerable difficulty in trying to sue unions for breaches of contracts in state courts because in many cases procedural roadblocks (usually regarding service of process or execution of judgments) had made unions virtually impervious to suit. On the other hand, unions experienced no difficulty in bringing actions against employers. Section 301 was designed to dispell this obstacle[17] as well as to better equalize the legal remedies available to management and labor and to enhance the enforceability of collective bargaining agreements through methods other than self-help (strikes, lockouts, etc.).

What was not covered expressly in Section 301 was: (1) whether or not the issuance of an injunction as a remedy under Section 301 was precluded by the anti-injunction provisions of Norris-LaGuardia; and (2) whether or not Section 301 was strictly a procedural device, or whether it represented as well an intent by Congress to forge a substantive body of law via the federal court system.

The first question appeared to be indirectly answered by *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R., Co.*[18] This case, involving the Railway Labor Act,[19] was brought about when the union decided to strike the carrier over a series of grievances. RLA procedures, however, required submission of the dispute to the National Railroad Adjustment Board for final and binding arbitration on the request of either party.[20] The issue presented was whether the strike, which violated the statutory duty to arbitrate under the RLA, was nonetheless protected from a federal court injunction by Section 4 of Norris-LaGuardia. The lower court thought not,[21] and the Supreme Court agreed unanimously. The Court recognized that

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16 29 U.S.C. §§ 141 *et seq.* (1964).

17 29 U.S.C. § 185(b) (1964), provides in pertinent part:

Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States . . . .

18 353 U.S. 30 (1957).

19 45 U.S.C. §§ 151-63, 181-88 (1964).

20 45 U.S.C. § 153 First (i) (1964); and 45 U.S.C. § 153 First (m) (1964), *as amended*, Pub. L. 89-456, §§ 1, 2, 80 Stat. 208, 209 (1966).

21 229 F.2d 926 (7th Cir. 1956).

an accommodation of the two statutes was necessary,[22] and the reconciliation made was direct and decisive. The Court determined that the situation in *Chicago River* was dominated by the statutory duty to arbitrate, and that this obligation overrode the anti-injunction policies of Norris-LaGuardia, even though taken literally, Section 4 would proscribe the issuance of a federal court injunction to bar continuance of the strike.[23] The Court was obviously influenced by the fact that a "reasonable alternative" to a grievance-oriented strike existed in the form of arbitration. This alternative represented an important federal labor policy which should not be frustrated by an anti-injunction statute which was passed for entirely different reasons.[24]

This spirit of accommodation was soon extended to Section 301 in *Textile Workers Union of America v. Lincoln Mills*,[25] which involved a suit brought by a union for specific performance of an arbitration clause. The injunction issue presented was whether or not Section 7 of the Norris-LaGuardia Act[26] prevented a federal court from granting injunctive relief to compel arbitration of a labor dispute under a collective bargaining agreement.

The Court noted that the abuses at which Norris-LaGuardia was aimed were contained in Section 4 and that the refusal to arbitrate

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22 353 U.S. at 40.

23 *Id.* at 41.

24 *Id.* at 40. It is generally agreed that the Norris-LaGuardia Act was passed in order to put an end to the widespread use of the court injunction by management as a means of discouraging union organizing and collective bargaining activities.

25 353 U.S. 448 (1957).

26 29 U.S.C. § 107 (1964), provides in part:

> No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court to the effect—
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> (a) That unlawful acts have been threatened and will be committed unless restrained, or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;
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> (b) That substantial and irreparable injury to complainant's property will follow;
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> (c) 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;
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> (d) That complainant has no adequate remedy at law . . .
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> . . . .

was not among them.[27] Furthermore, the Court viewed Section 8 of Norris-LaGuardia[28] as encouraging arbitration inasmuch as it denied injunctive relief to anyone who failed to make "every reasonable effort" to settle disputes through negotiation, mediation, or "voluntary arbitration." Consequently, it concluded that federal courts were not barred by Section 7 of Norris-LaGuardia from compelling an employer to arbitrate a labor dispute under Section 301:

> The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of § 7 of the Norris-LaGuardia Act.[29]

Although this decision was in favor of the union, the accommodation reached by the Court between Norris-LaGuardia and Section 301 in this case gave employers substantial reason to believe that they too would receive similar consideration if they petitioned for injunctive relief to compel the union to settle a grievance dispute through arbitration rather than through a work stoppage.

Lincoln Mills also resolved that Section 301 was a substantive as well as a procedural statute and that the courts had been given authority by Congress to formulate the principles by which the policy of peaceful resolution of industrial disputes would be enforced:

> Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.[30]

The Court further concluded "that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws,"[31] and also that federal law as interpreted by federal courts would stand superior to state law where

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27 353 U.S. at 458.

28 29 U.S.C. § 108 provides:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

29 353 U.S. at 458-59.

30 *Id.* at 455.

31 *Id.* at 456.

the two differed.[32] Thus, the message which the Court appeared to convey to both management and labor through *Lincoln Mills* was: (1) that arbitration would be the process upon which the courts would primarily rely to resolve most labor disputes arising during the term of a given labor agreement; (2) that the contractual duty to arbitrate would be specifically enforced by the courts through injunction where necessary; and (3) that the injunction so issued would preempt any state or federal anti-injunction statutes which might be applicable to the circumstances of the case.

The decisions which followed *Lincoln Mills* consistently upheld and expanded upon its basic premises. The *Steelworkers Trilogy*[33] established the framework within which the courts would operate in reviewing suits concerning the arbitration process. Courts were directed to limit their adjudication to the sole question of arbitrability of the grievance and to leave the merits of the grievance and related contract interpretation to the arbitrator.[34] On the question of arbitrability, the Court stated that where the contract contained a broadly worded arbitration clause without more, then all issues arising under it were to be deemed arbitrable unless specifically excluded by the parties.[35] Finally, the Court declared that they would not tamper with the findings of an arbitrator under any circumstances unless it were shown that the arbitrator in making his award had exceeded the jurisdiction given to him by the collective bargaining agreement.[36]

On the question of state v. federal jurisdiction over Section 301 actions, the Court held in *Charles Dowd Box Co. v. Courtney*[37] that Congress did not intend through Section 301 to displace state court jurisdiction with that of federal courts. Rather, the statute was designed merely to provide the parties with an additional forum in which to resolve their differences.[38] Consequently, either party could, if it chose, validly bring a Section 301 type action in a state court.

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32 *Id.* at 457. The Court also stated, however, that:

> [S]tate law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy.

Id.

33 United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); and United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960).

34 United Steelworkers of America v. American Mfg. Co., 363 U.S. at 567-68 (1960).

35 United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. at 584 (1960).

36 United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. at 599 (1960).

37 368 U.S. 502 (1962).

38 *Id.* at 508-09.

Lincoln Mills, however, required that federal labor policy be adhered to whether the action be brought under state or federal statute.[39]

This latter point was reinforced shortly thereafter by *Teamsters Local 174 v. Lucas Flour Co.*[40] In this case, the Court affirmed a state court's award of damages to an employer for a union's breach of a no-strike clause. However, the Court stated that while federal jurisdiction did not preempt state court jurisdiction to try Section 301 type cases, substantive federal labor law must be applied to the facts of each case no matter whether the forum be state or federal.[41] The rationale behind this holding was that Congress desired, through Section 301, to establish a *uniform* body of labor law, and this end could be achieved only if federal law prevailed over "inconsistent local rules."[42] The obvious alternative was a lack of consistency between state and federal courts in deciding Section 301 type cases. The result would be that parties to an action would expend more effort attempting to have their case heard in the court more likely to favor their position rather than in resolving the substantive issues.

Lucas Flour also held that the court would imply a no-strike pledge by a union where a contract contained arbitration provisions to settle grievance disputes, even though an express no-strike clause was not contained in the agreement. To hold otherwise, said the Court,

> would obviously do violence to accepted principles of traditional contract law. Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare.[43]

THE DISLOCATION OF *Sinclair*

With the holding in *Lucas Flour*, the Court now seemed to have provided a basic foundation of substantive federal labor law around which to apply Section 301. It had established its authority

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39 353 U.S. at 457.

40 369 U.S. 95 (1962).

41 *Id.* at 102.

42 *Id.* at 104.

43 *Id.* at 105. In so holding, the Court affirmed a doctrine espoused by five different federal circuits. *See* Local 25, Teamsters Union v. W.L. Mead, Inc., 230 F.2d 576, 583-84 (1st Cir. 1956); United Construction Workers v. Haislip Baking Co., 223 F.2d 872, 876-77 (4th Cir. 1955); NLRB v. Dorsey Trailers, Inc., 179 F.2d 589, 592 (5th Cir. 1950); Lewis v. Benedict Coal Corp., 259 F.2d 346, 351 (6th Cir. 1958); and NLRB v. Sunset Minerals, Inc., 211 F.2d 224, 226 (9th Cir. 1954).

to create such law; it had determined that such law must be respected by state and federal courts alike on a uniform basis; it had crowned arbitration as a "kingpin"[44] of its federal labor policy; and it appeared willing to reconcile Section 301 of the Labor Management Relations Act with the Norris-LaGuardia Act in order to enforce arbitration clauses whether the complaining party be management or labor. Consequently, when the Court was petitioned in *Sinclair Refining Co. v. Atkinson*[45] by an employer to enjoin a strike which violated a bargaining agreement, management attorneys were understandably shocked and dismayed when the Court refused to render for employers the same accommodation between Norris-LaGuardia and Section 301 which it had awarded labor in *Lincoln Mills.*

The majority centered its ruling primarily around the legislative history of Section 301, relying principally upon Congress' refusal to expressly exempt Section 301 from the proscriptions of Norris-LaGuardia after having specifically considered a proposal to do so at the time the statute was adopted. Because of this, the Court concluded that Congress had not intended that strike injunctions were to be employed as a means of making a "kingpin" out of arbitration.[46] If federal anti-strike injunctions were to be sanctioned under Section 301, then Congress, and not the Supreme Court, should so declare.[47]

The dissenting opinion of Mr. Justice Brennan scored the majority for failing to recognize the need for accommodation between the two statutes;[48] for deciding the case in a manner inconsistent with the holdings in *Chicago River* and *Lincoln Mills*;[49] for basing its decision largely on the basis of legislative history which it considered to be shrouded in ambiguity;[50] and for dislocating generally that which had been heretofore a consistent and increasingly harmonious body of federal law governing suits under Section 301.[51] Mr. Justice Brennan then stated the perplexing and troublesome new issues which the Court would inevitably have to resolve because of this decision (and to which he himself would ultimately respond in *Boys Markets*):

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44 The term "kingpin" as applied to the standing of the arbitration process in federal labor law was first coined by Mr. Justice Brennan in Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 226 (1962) (dissenting opinion).

45 370 U.S. 195 (1962).

46 *Id.* at 213.

47 *Id.* at 214-15.

48 *Id.* at 224.

49 *Id.* at 219-20.

50 *Id.* at 216-17.

51 *Id.* at 226-27.

(1) Does the majority decision in *Sinclair* carry over to state courts as a portion of federal labor law? If so, then employers will be deprived "of a state remedy they enjoyed prior to its [Section 301's] enactment."[52]

(2) If not, then how is a uniform body of federal law to be maintained when the sole forums for antistrike injunctions are state courts applying state law (since no federal policy exists which is applicable to the states)?[53]

(3) What about removal of the state suit to the federal court? Will Section 4 of Norris-LaGuardia permit that action? And if so, will this not also destroy a contract remedy available before its enactment?[54]

(4) Is not the future effectiveness of grievance arbitration as a desirable technique to insure industrial tranquillity adversely affected by the majority decision? After all, said the minority:

> [S]ince unions cannot be enjoined by a federal court from striking in open defiance of their undertakings to arbitrate, employers will pause long before committing themselves to obligations enforceable against them but not against their unions.[55]

FORUM-SHOPPING AND THE FEDERAL REMOVAL QUESTION AS A RESULT OF *Sinclair*

With the effect of *Sinclair* being to shift injunctive relief actions to state courts, union attorneys began to employ the federal removal statute[56] as a means of countering these actions where state laws did not prevent anti-strike injunctions from issuing against labor unions.[57] Obviously, if unions could get Section 301 cases removed to a federal court, they could prevent any anti-strike injunctions from issuing. Since actions in state courts which contained claims for damages as well as for injunctive relief were more likely to be subject to removal to federal courts, employers tended to restrict their remedial prayers

52 *Id.* at 226. Justice Brennan was obviously implying that *Lucas Flour* and *Lincoln Mills* would say yes, if consistency was to be maintained. Such a holding, however, would essentially overrule *Dowd Box* regarding Section 301 as being supplementary to state jurisdiction.

53 *Id.* at 226. *See also* McCarroll v. Los Angeles Cty. Dist. Coun. of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957).

54 370 U.S. at 227.

55 *Id.*

56 28 U.S.C. § 1441 (1964).

57 *See* note 8 *supra*. Also, for a concise description of the mechanics of federal removal, *see* Bartosic, *supra* note 8, at 991.

to injunctions,[58] because putting a quick end to a grievance-precipitated strike was the primary relief sought.

The theory behind this tactic was that Section 4 of Norris-LaGuardia not only denied federal courts the power to grant injunctive relief, but also denied the court original jurisdiction to even consider the merits of the controversy where only injunctive relief was sought. The logic was that a court which had no power to grant the relief petitioned for could hardly be expected to have the power to consider the merits of the dispute. Therefore, it followed that any such cases statutorily removed to federal courts should be remanded to state courts where proper and effective jurisdiction rested.[59]

This principle of remand to state courts was adopted by the Third Circuit Court of Appeals in *American Dredging Co. v. Local 25, IUOE.*[60] Other federal circuits, however, would not go along, most notably the ninth circuit in *Johnson v. England*,[61] and the sixth circuit in *Avco Corp. v. Aero Lodge No. 735, IAM.*[62] Since both these cases disagreed openly with the holding in *American Dredging*, the Supreme Court granted certiorari to resolve the issue in its review of *Avco Corp. v. Aero Lodge No. 735, IAM.*[63] Its holding was that a union was entitled to remove from a state to a federal court an employer's suit for an injunction against a strike claimed to be in violation of a no-strike bargaining agreement. The claim arose under a law of the United States (L.M.R.A. Section 301) and, hence, was within the original jurisdiction of a federal district court. The Court, however, dealt only with the issue of removability in *Avco* and expressly reserved any decision as to: (1) whether Section 4 of Norris-LaGuardia as interpreted by *Sinclair* was applicable to state courts through *Lucas Flour*[64] (as was maintained by the sixth circuit[65]); and (2) whether *Sinclair* also required that a federal court dissolve any state court injunction which might have been issued against the strike (the district court had so acted in *Avco*, although, the Court noted, for reasons not altogether clear[66]).

The *Avco* decision caused great concern among labor attorneys

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58 *See* 28 U.S.C. § 1441(c) (1964). *See also* Bartosic, *supra* note 8, at 988.

59 *See generally* Bartosic, *supra* note 8, at 988-89; Keene, *The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to Avco and Beyond*, 15 VILL. L. REV. 32, 45 (1969).

60 338 F.2d 837 (3d Cir. 1964), *cert. denied*, 380 U.S. 935 (1965).

61 356 F.2d 44 (9th Cir. 1966).

62 376 F.2d 337 (6th Cir. 1967).

63 390 U.S. 557 (1968).

64 *Id.* at 560 n.2.

65 376 F.2d at 343.

66 390 U.S. at 561 n.4.

when considered with *Sinclair*.[67] As Justice Brennan later summed up the situation in *Boys Markets*:

> The principal practical effect of *Avco* and *Sinclair* taken together is nothing less than to oust state courts of jurisdiction in § 301(a) suits where injunctive relief is sought for breach of a no-strike obligation. Union defendants can, as a matter of course, obtain removal to a federal court, and there is obviously a compelling incentive for them to do so in order to gain the advantage of the strictures upon injunctive relief which *Sinclair* imposes on federal courts.[68]

While *Avco* settled the federal removal question as related to Section 301 suits, it intensified the need for resolution of the more basic issue as to whether or not Norris-LaGuardia's anti-injunction provisions must apply to state-instituted Section 301 type actions, as implied strongly by *Lincoln Mills*.[69] Three times now the Court had passed the question by.[70] Furthermore, *Avco* did nothing to discourage forum-shopping by the parties. This decision only made it much easier for the striking union to have the complaint steered into the jurisdiction less likely to act effectively against its interests, a finding of illegal conduct on the union's part notwithstanding.[71] Hence, the emphasis remained on where the case was to be heard rather than on the fact situation involved.

In the meantime, state courts generally regarded *Sinclair* and Norris-LaGuardia as not applicable to state-instituted Section 301 type actions, even though the case might be removable to a federal court. The leading state case which upheld their right to issue anti-strike injunctions in Section 301 cases was *McCarroll v. Los Angeles County District Council of Carpenters*,[72] in a much admired opinion

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67 *See, e.g.*, Bartosic, *supra* note 8; Keene, *supra* note 59; Wellington, *The No-Strike Clause and the Labor Injunction: Time for a Re-Examination*, 30 U. PITT. L. REV. 293 (1968); Kiernan, *Availability of Injunctions Against Breaches of No-Strike Agreements in Labor Contracts*, 32 ALBANY L. REV. 303 (1968).

68 398 U.S. at 244-45.

69 The third circuit in *American Dredging*, 338 F.2d at 852, had also held that Norris-LaGuardia did not extend to the states; whereas, the sixth circuit in *Avco*, 376 F.2d at 342-43, had challenged the third circuit on this position as well as on the federal removal question. The Supreme Court in *Avco*, as noted before at 390 U.S. 557, 560 n.2, expressly avoided this issue, leaving the two cases still opposing each other. The dispute in Johnson v. England, 356 F.2d 44 (9th Cir. 1966), did not involve the Norris-LaGuardia Act.

70 *Dowd Box*, *Sinclair*, and *Avco* presented the issues but left them unresolved.

71 Federal courts could not grant any injunctive remedies against such conduct but could only grant less effective remedies, such as an order to arbitrate the dispute, and damages.

72 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958).

by Justice Traynor of the California Supreme Court.[73] Similar stands were taken by other state courts after *Sinclair*, the most notable being *Shaw Electric Co. v. IBEW Local No. 98*,[74] and *C. D. Perry & Sons, Inc. v. Robilotto*.[75] Only New Jersey seemed inclined to follow federal anti-injunction policies in interpreting its own anti-injunction statute regarding breach-of-contract strikes,[76] and in extending *Sinclair* to the state level.[77]

Flanking Maneuvers in the Federal Courts to Avoid the Combined Effects of *Sinclair/Avco*

While state courts still possessed the power to enjoin strikes (provided their own laws permitted this), as well as to give other remedies, employers were struggling to find some means of immediate and effective relief in the federal courts without offending *Sinclair* in order to halt breach-of-contract strikes. This tendency was virtually guaranteed by the *Avco* decision, since that holding insured that a much greater number of Section 301 cases brought by employers would end up in federal court through the removal statute. One such method which appeared to show considerable promise was judicial enforcement of an arbitration award which upheld and enforced a no-strike clause upon an offending union.[78] The Third Circuit Court of Appeals, which had also handed down the *American Dredging* decision, had first encountered this issue in *Philadelphia Marine Trade Ass'n v. ILA, Local 1291*,[79] (which predated the *Avco* ruling by the Supreme Court) and had affirmed the enforcement of such an award by a federal district court. This case was reversed by the Supreme Court, and like *Avco*, it turned on a procedural matter involving the Federal Rules of Civil Procedure,[80] rather than on the basic labor law issue presented.

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73 For a detailed treatment of the *McCarroll* case, *see* Aaron, *supra* note 6, at 1030-34; Bartosic, *supra* note 8, at 1003-06; Keene, *supra* note 59, at 50-52.

74 418 Pa. 1, 208 A.2d 769 (1965).

75 39 Misc. 2d 147, 240 N.Y.S.2d 331 (Sup. Ct. 1963), *aff'd*, 23 App. Div. 2d 949, 260 N.Y.S.2d 158 (1965).

76 Commercial Can Corp. v. Local 810, Teamsters, 61 N.J. Super. 369, 160 A.2d 855 (App. Div. 1960).

77 Independent Oil Workers v. Socony Mobil Oil Co., 85 N.J. Super. 453, 205 A.2d 78 (Ch. 1964).

78 For an enthusiastic endorsement of this possibility, *see* Keene, *supra* note 59, at 55-61. Bartosic, *supra* note 8, also advocated this approach at 1011-17.

79 365 F.2d 295 (3d Cir. 1966).

80 389 U.S. 64 (1967). The specific Federal Rule involved was Rule 65(d).

The next significant case along this line was *New Orleans Steamship Ass'n v. ILA, Local No. 1418.*[81] This decision also affirmed the specific enforcement of an arbitration award ordering an end to a union's work stoppages which violated a no-strike clause, on the theory that neither *Sinclair* nor Section 4 of Norris-LaGuardia barred federal courts from effecting such relief. Such an approach was also followed by the Federal District Court for the Northern District of California in *Pacific Maritime Ass'n v. ILWU.*[82] However, the Federal District Court for the Southern District of New York held that even in this situation, the *Sinclair* rule prevented a federal court from enjoining strike activity through enforcement of an arbitration award.[83] By the Supreme Court's refusal to deal with this issue in *Philadelphia Marine,* followed by its refusal to grant certiorari to *New Orleans Steamship Ass'n,* optimism arose that the Supreme Court might in due course be willing to affirm this type of judicial activity as an indirect way of modifying *Sinclair.*[84]

This form of remedy, however, even if adopted, would not have represented a wholly adequate substitute for a direct court injunction because the ad hoc arbitration process in most labor contracts is not swift enough to react to sudden strike actions. Without the existence of special contract provisions, the normal arbitration procedure involves arbitrator selection, presentation of the dispute, a decision, and a refusal by the losing party to abide by the decision before any specific performance complaint can be brought before the court—a period of time which could involve several weeks.

Another issue working its way up toward the Supreme Court was whether or not a federal court must, under *Sinclair,* dissolve any state anti-strike injunction which had been issued prior to removal to federal court under the removal statute. This point was also expressly avoided in *Avco;* however, the Fifth Circuit Court of Appeals

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81 389 F.2d 369 (5th Cir.), *cert. denied,* 393 U.S. 828 (1968).

82 304 F. Supp. 1315 (N.D. Cal. 1969).

83 Marine Transport Lines, Inc. v. Curran, 65 L.R.R.M. 2095, 55 CCH Lab. Cas. § 11,748 (S.D.N.Y. 1967).

84 A more novel approach was taken by the United States District Court for the Eastern District of Pennsylvania in Tanker Service Comm., Inc. v. International Org., AFL-CIO, 269 F. Supp. 551 (E.D. Pa. 1967), *aff'd,* 394 F.2d 160 (3d Cir. 1968, where the judge gave substantial compensatory damages against a striking union on a conditional basis: such an award would become effective if the union failed to return to work within 48 hours. The strategy forced the union to end the strike. It is suggested, however, that this tactic would have limited application. *See* Keene, *supra* note 59, at 63-65.

felt obliged to affirm dissolution of the injunction in *General Electric Co. v. Local 191, IUE*[85] on the ground that,

> once this case was removed, a failure to dissolve the state court injunction would have been tantamount to issuance of that same injunction by the federal district court, which . . . would be proscribed by the Norris-LaGuardia Act under the *Sinclair* decision.[86]

Thus, the state of affairs which greeted the Supreme Court in 1970 was as follows:

(1) Because of *Sinclair*, federal courts were prevented by Norris-LaGuardia from employing one of their most effective means of insuring that arbitration, rather than industrial strife, was the primary method used to resolve grievance-type labor disputes. As a result, many Section 301 suits had been driven into state courts where injunctive relief was determined according to diverse local principles of contract and labor law. Consequently, after having espoused the virtues and necessities for uniform application of labor laws,[87] the Supreme Court had contributed materially to bringing about the contrary result.

(2) As a result of the *Sinclair-Avco* combination, Section 301 cases had, practically speaking, been largely extracted from state court jurisdiction despite the Court's express holding that Section 301 was designed to supplement, not replace, state court activities in this area of labor law.[88] The effect of this combination was to seriously exacerbate the imbalance of remedies available to employers as opposed to unions in Section 301 actions.

(3) Federal courts had begun to respond to attempts to outflank the *Sinclair* decision through such legal devices as judicial enforcement of arbitration awards relating to no-strike clauses, "conditioned" compensatory damages, etc., in a persistent effort to keep upright the "kingpin" of federal labor policy.

(4) State courts were generally standing fast in their belief that Section 4 of Norris-LaGuardia as interpreted by *Sinclair* did

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85 413 F.2d 964 (5th Cir. 1969).

86 *Id.* at 966.

87 Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

88 Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

not apply to them. Opinion in the lower federal courts was divided on the issue, and up to 1970 the Supreme Court had refused to rule on it. In addition, controversy was beginning to build over the status of a state's anti-strike injunction once the case had been removed to a federal court.

It was in this atmosphere that the *Boys Markets* case arrived for consideration by the Supreme Court.[89]

Boys Markets, Inc. v. Retail Clerk's Union, Local 770[90]

The dispute which prompted Boys Markets, Inc. to bring this action arose when its frozen foods supervisor, and certain persons working for him, rearranged merchandise in the frozen foods section of one of petitioner's food markets. Inasmuch as the individuals involved did not belong to the authorized union representing employees in the firm, the union representative demanded that the cases be emptied of all merchandise and restocked by bargaining unit employees. When the employer refused, the union called a work stoppage and commenced picketing the premises. This action was taken despite the existence of a collective bargaining agreement which contained an arbitration clause for the resolution of such disputes, and in addition, a no-strike clause. Petitioner, after failing in its attempts to invoke said articles, filed a complaint in California Superior Court and obtained a temporary injunction forbidding continuation of the strike. It also obtained an order to show cause why a preliminary injunction should not be granted. Thereupon, the union removed the case to the United States District Court for the Central District of California and there moved to have the restraining order quashed. The district court, however, concluded that the dispute was subject to arbitration and that the strike violated the contract. Hence, it ordered the parties to arbitrate the matter, and enjoined the strike.[91]

This ruling, of course, led to an appeal by the union, and a reversal by the court of appeals.[92] In a brief opinion, the circuit court held that the employer's reliance upon *ILA, Local 1291 v. Philadelphia Marine Trade Ass'n*[93] and *New Orleans Steamship Ass'n v. ILA Local No. 1418*[94] was misplaced since these cases involved judicial

89 *Cert. granted*, 396 U.S. 1000 (1970).

90 398 U.S. 235 (1970).

91 59 CCH Lab. Cas. § 13,366 (C.D. Cal. 1969).

92 416 F.2d 368 (9th Cir. 1969).

93 389 U.S. 64 (1967).

94 389 F.2d 369 (5th Cir.), *cert. denied*, 393 U.S. 828 (1968).

enforcement of arbitration awards. In this case, however, no such award had been made, and, therefore, the principles of *Sinclair* were controlling.[95]

It does not appear surprising that the Supreme Court agreed to hear the *Boys Markets* case. Several justices had indicated in *Avco*[96] and *Philadelphia Marine*[97] a need to reconsider the *Sinclair* case. Secondly, the *Avco* decision clearly had created an ambiguous situation which threatened to seriously limit arbitration as a primary method of resolving grievance disputes. Finally, the legal community was becoming increasingly vocal about modifying or refining the *Sinclair* decision in some way. Commentators varied, however, as to what approach should be taken. Some advocated reversal, or at least strong modification, of *Sinclair*.[98] Others favored instead an extension of the *Sinclair* rule to state courts as the way to regain uniformity of the law.[99] A third approach suggested was that of judicial enforcement of arbitration awards banning strikes which violated no-strike clauses.[100] Finally, there were those who agreed with Mr. Justice Black in his dissenting opinion in *Boys Markets*[101] that Congress was the only entity empowered to alter the effects of *Sinclair*.[102]

With many legal scholars proposing subtle forms of circumvention or dilution of *Sinclair*, and with the Court's previous reluctance in extending or modifying *Sinclair* to any extent, it is perhaps somewhat surprising to find that the Court faced the matter directly and admitted that *Sinclair* was a mistake which must be reversed.[103] However, when one really understands the confusion and the inequities created in the aftermath of *Sinclair* and *Avco*, and the substantial threat posed to the future of arbitration as a viable instrument of federal labor policy, reversal of *Sinclair* was really the only effective alternative. After brushing aside the need to respect stare decisis as a consideration in the present case,[104] and rejecting the theory that "congressional silence should be interpreted as acceptance of the

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95 416 F.2d at 370.

96 390 U.S. at 562 (Stewart, J., concurring).

97 389 U.S. at 77 (Douglas, J., concurring in part, dissenting in part).

98 Wellington, *supra* note 67 at 306-08; Kiernan, *supra* note 67, at 315-16.

99 Aaron, *supra* note 6, at 1051-52; Bartosic, *supra* note 8, at 1001-11.

100 Bartosic, *supra* note 8; Keene, *supra* note 59, at 55-61.

101 398 U.S. at 256.

102 Wellington and Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547, 1559-66 (1963); Bartosic, *supra* note 8, at 996-1001.

103 398 U.S. at 238.

104 *Id.* at 240-41.

[*Sinclair*] decision,"[105] the Court proceeded to address itself to the issues at hand. First, it reaffirmed the doctrine established in *Dowd Box* that Congress had not intended that state court jurisdiction be displaced by Section 301. However, because *Sinclair*, coupled with *Avco*, had brought this result about in cases where injunctive remedies were sought, a situation was created which was clearly not intended by Congress and which was contrary to its expressed desires.[106] The Court also recognized the lack of uniformity which had developed contrary to the doctrine expressed in *Lucas Flour*. The Court stated:

> The injunction . . . is so important a remedial device, particularly in the arbitration context, that its availability or nonavailability in various courts will not only produce rampant forum shopping and maneuvering from one court to another but will also greatly frustrate any relative uniformity in the enforcement of arbitration agreements.[107]

The Court next turned to the question of extending *Sinclair* to the state courts as a solution to this problem. The Court did not make this extension but instead adopted the rationale expressed in Justice Traynor's opinion in *McCarroll v. Los Angeles County District Council of Carpenters*,[108] which stated that Congress had not attempted either through Norris-LaGuardia or through Section 301 to limit a state court's anti-strike injunctive powers when enforcing a collective bargaining agreement.[109] An additional reason, the Court said, for not extending *Sinclair* to the states was the fear of "devastating implications for the enforceability of arbitration agreements and their accompanying no-strike obligations if equitable remedies were not available."[110] This latter point, however, seems a more appropriate reason to justify accommodating Section 301 with Norris-LaGuardia than it does for refusing to extend *Sinclair* and, hence, Norris-LaGuardia to the states. In view of the Court's basic decision, however, the question of Norris-LaGuardia's applicability to the states, at least over the issue of enforcement of collective bargaining agreements, appears now to have become a moot issue.

The Court's real purpose in *Boys Markets* was to bring about the long overdue accommodation between Section 301 and Norris-La-

105 *Id.* at 241.
106 *Id.* at 245.
107 *Id.* at 246.
108 49 Cal. 2d 45, 61, 315 P.2d 322, 332 (1957), *cert. denied*, 355 U.S. 932 (1958).
109 398 U.S. at 247.
110 *Id.*

Guardia. Citing the *Chicago River* case as stating the proper principles applicable to an accommodation with Norris-LaGuardia,[111] the Court went on to say:

> We conclude, therefore, that the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy, and consequently that the Norris-LaGuardia Act does not bar the granting of injunctive relief in the circumstances of the instant case.[112]

In a sharp dissent, Mr. Justice Black observed that the only change which had occurred since *Sinclair* was the membership of the Court and the personal views of Mr. Justice Stewart toward the primary issue.[113] The rest of his opinion, however, submerged into familiar (and somewhat tiresome) rhetoric which scored the majority for not observing the doctrine of stare decisis; for not "letting Congress do it"; and for exercising legislative rather than judicial powers.[114] Mr. Justice White also dissented without further opinion on the strength of the majority opinion in *Sinclair*.

Implications and Future Impact of *Boys Markets*—Broad or Limited?

Mr. Justice Brennan declared that the ruling in *Boys Markets* was to be construed as "a narrow one" which was not intended to undermine Norris-LaGuardia:

> We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure. Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance.[115]

It is interesting to note that Justice Brennan was careful not to make his holding so narrow as to include only labor contracts with express no-strike clauses. By so doing, he indirectly reaffirmed another important holding in the *Lucas Flour* case, that an agreement to arbi-

111 *Id.* at 252.
112 *Id.* at 253.
113 *Id.* at 256.
114 *Id.* at 257-59
115 *Id.* at 253-54.

trate implies an agreement not to strike even though no express language to that effect exists in the collective bargaining agreement.[116] Hence, he strongly implied that striking unions could not take refuge from *Boys Markets* by bargaining no-strike clauses out of future labor contracts.

What perhaps might be of more concern would be the risk that certain federal district courts might become overly zealous in their use of the injunction to prevent grievance-oriented strikes without due regard for the merits or the arbitrability of the dispute. As *Lucas Flour* stated in qualifying its holding:

> What has been said is not to suggest that a no-strike agreement is to be implied beyond the area which it has been agreed will be exclusively covered by compulsory terminal arbitration. Nor is it to suggest that there may not arise problems in specific cases as to whether compulsory and binding arbitration has been agreed upon, and if so, as to what disputes have been made arbitrable.[117]

It seems clear that Justice Brennan had this in mind when he reiterated much the same guidelines in *Boys Markets* as in his *Sinclair* dissent;[118] principles which obviously were designed to discourage any sort of return to the inglorious days when federal courts abused the injunctive process to prevent union organizing and collective bargaining.[119] Thus, a federal district court is not empowered to grant injunctive relief against concerted activity unless the following conditions are met:

(1) The facts of the case must be such that an injunctive order would be appropriate despite the Norris-LaGuardia Act.
(2) The strike must involve a grievance which both parties are contractually bound to arbitrate. Furthermore, such provisions must be specifically enforceable against either party.
(3) The employer must be willing to arbitrate the dispute, *i.e.*, any anti-strike injunction issued will be effective only if the employer agrees to arbitrate the grievance dispute.
(4) The injunction must be warranted under ordinary equitable principles, *i.e.*, the nature of the breach, probabilities of irreparable damages, inadequacy of other forms of relief, etc.[120]

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116 369 U.S. at 104-06.
117 *Id.* at 106.
118 370 U.S. at 228.
119 *See*, F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930).
120 398 U.S. at 254.

At the same time, *Boys Markets* does recognize that the labor injunction is an extremely important judicial remedy which, if properly controlled, can render effective service to the cause of peaceful industrial relations. It also admits that a too restrictive policy against its use can be as unsatisfactory as an unrestricted one.

Although at this time it is too early to discern a clearly emerging pattern, it is submitted that *Boys Markets* will have a powerful impact upon the future viability of arbitration in labor relations and in the stability of collective bargaining agreements. The first indication of this trend has already appeared when the Court remanded the *General Electric Co. v. Local 191, IUE* case for reconsideration in the light of the *Boys Markets* decision.[121] As was previously discussed, it was this case which had held that the *Sinclair* rule required that a federal court must dissolve a state court anti-strike injunction, even though the strike action violated a union contract and also a state law. Consequently, a federal court may now, at its discretion, continue or abolish a state court injunction (which was also the basic issue facing the federal district court in the *Boys Markets* case). *Boys Markets* has also been cited recently as authority in discussing the interpretation of congressional silence,[122] and as applicable in principle to an N.L.R.A. Section 10 (k) proceeding.[123]

Also, two federal district courts have recently applied *Boys Markets* to fact situations similar to those in that case. In *Stroehmann Bros. Co. v. Local 427, Confectionary Workers*,[124] the United States District Court for the Middle District of Pennsylvania held that an employer was *not* entitled to a temporary injunction against a union strike which allegedly breached a no-strike agreement. The court determined that the labor agreement was not specifically enforceable against both parties, and that neither employer nor union were contractually bound to arbitrate grievance disputes such as that which caused the strike.[125] Thus, since the question of arbitrability had not been affirmatively resolved as required by *Boys Markets*, no anti-strike injunction could issue.[126] In *Holland Construction Co. v. IUOE Local No. 101*,[127] the United States District Court for the District of Kansas

121 74 L.R.R.M. 2420 (1970).
122 Salerno v. American League, 74 L.R.R.M. 2929 (2d Cir. 1970).
123 Plasterer's Local 79 v. NLRB, 74 L.R.R.M. 2575 (D.C. Cir. 1970).
124 74 L.R.R.M. 2957 (M.D. Pa. 1970).
125 *Id.* at 2959-60.
126 *Id.* at 2960.
127 74 L.R.R.M. 3087 (D. Kan. 1970).

held that an anti-strike injunction was warranted and proper within the *Boys Markets* guidelines, since all questions of arbitrability and equity had been resolved in favor of the employer.

These two cases demonstrate that the *Boys Markets* decision will undoubtedly be applied in varying degrees to increasingly varied fact situations in the months to come. Continued lively discussions and legal activities regarding this area of labor law are not likely to wither away, even though the *Sinclair* "frog" has finally been swallowed by the Supreme Court.

Paul H. Martin