LABOR LAW—SYMPATHY STRIKE MAY NOT BE ENJOINED PENDING ARBITRATION OF ITS LEGALITY UNDER THE NO-STRIKE CLAUSE OF A COLLECTIVE BARGAINING AGREEMENT—*Buffalo Forge Co. v. United Steelworkers*, 96 S. Ct. 3141 (1976).

Buffalo Forge Company operated three plants in the vicinity of Buffalo, New York.[1] Production and maintenance (P & M) employees at these plants were represented by Locals 1874 and 3732 of the United Steelworkers of America, while the office and technical (O & T) workers were represented by two other Steelworkers' locals.[2] During 1974, negotiations aimed at establishing a collective bargaining agreement between the O & T locals and Buffalo Forge broke down, whereupon the O & T employees struck and set up picket lines at all three plants.[3]

At one location, P & M Local 3732 respected the O & T picket line, and stopped work for one day.[4] However, after learning that all P & M members planned a general work-stoppage, Buffalo Forge communicated its view that a sympathy strike would breach the no-strike clauses of the P & M locals' collective bargaining agreements.[5] Both local unions, however, observed the picket lines.[6]

Buffalo Forge then brought an action in federal district court

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[1] Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141, 3143 (1976).

[2] *Id.* at 3143–44.

[3] *Id.* at 3144.

[4] Buffalo Forge Co. v. United Steelworkers, 386 F. Supp. 405, 407 (W.D.N.Y. 1974), *aff'd*, 517 F.2d 1207 (2d Cir. 1975), *aff'd*, 96 S. Ct. 3141 (1976).

[5] Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141, 3144 (1976). The contracts which the two P & M locals maintained with Buffalo Forge included identical no-strike clauses, along with identical grievance and arbitration provisions. *Id.* at 3143. The no-strike clause provided in part that

> "[t]here shall be no strikes, work stoppages or interruption or impeding of work. No Officers or representatives of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in any such activity. The Union recognizes its possible liabilities for violation of this provision and will use its influence to see that work stoppages are prevented."

Id. at 3143 n.1 (quoting from Appendix at 16, Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141 (1976) [hereinafter cited as Appendix]). When a disagreement arose over the applicability of the terms of the contract to a particular dispute, the agreements provided that " 'there shall be no suspension of work on account of such differences.' " 96 S. Ct. at 3143 (quoting from Appendix, *supra* at 17). If the grievance procedure established by the parties failed to resolve a conflict over interpretation of contractual terms, the agreement then provided that the question " 'be submitted to arbitration upon written notice of the Union or the Company.' " 96 S. Ct. at 3144 n.2 (quoting from Appendix, *supra* at 19).

[6] Buffalo Forge Co. v. United Steelworkers, 386 F. Supp. 405, 407, 409 (W.D.N.Y. 1974), *aff'd*, 517 F.2d 1207 (2d Cir. 1975), *aff'd*, 96 S. Ct. 3141 (1976).

under section 301(a) of the Labor Management Relations (Taft-Hartley) Act (LMRA)[7] against both the international and the local unions,[8] seeking, in part, a preliminary injunction pending arbitration.[9] In its complaint the employer contended that under section 301(a) an injunction could appropriately issue pending final determination by the arbitrator.[10]

The district court found that the P & M locals' sympathy strike did not give rise to an arbitrable dispute because it had been "preceded and precipitated" by the O & T workers' strike.[11] According to the court, *Boys Markets, Inc. v. Retail Clerks Local 770*[12] permitted an injunction to issue only where the strike had resulted from an arbitrable dispute.[13] Consequently, the ban on injunctions in labor disputes established by section 4 of the Norris-LaGuardia Act[14] was deemed applicable and the employer's request for an injunction against the sympathy strike was denied.[15]

The court of appeals upheld the district court's denial of the injunction on the basis that the strike was not contrary to the federal policy favoring arbitration,[16] and the Supreme Court granted certio-

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[7] 29 U.S.C. § 185(a) (1970). The Act permits "[s]uits for violation of contracts between an employer and a labor organization." *Id.*

[8] Brief for the Petitioner at 3, Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141 (1976).

[9] Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141, 3144, 3146 (1976).

[10] *Id.*

[11] Buffalo Forge Co. v. United Steelworkers, 386 F. Supp. 405, 409–10 (W.D.N.Y. 1974), *aff'd*, 517 F.2d 1207 (2d Cir. 1975), *aff'd*, 96 S. Ct. 3141 (1976).

[12] 398 U.S. 235 (1970) (6–2 decision).

[13] Buffalo Forge Co. v. United Steelworkers, 386 F. Supp. 405, 409–10 (W.D.N.Y. 1974), *aff'd*, 517 F.2d 1207 (2d Cir. 1975), *aff'd*, 96 S. Ct. 3141 (1976). According to Chief Judge Curtin's analysis, a federal district court must make the following findings before an injunction can be issued under *Boys Markets*:

> (1) that the strike is in breach of a no-strike obligation under an effective agreement; (2) that the strike is over an arbitrable grievance, and (3) that both parties are contractually bound to arbitrate the underlying grievance which caused the strike.

386 F. Supp. at 409. For a similar interpretation of the *Boys Markets* standards, see Amstar Corp. v. Amalgamated Meat Cutters & Butcher Workmen, 468 F.2d 1372 (5th Cir. 1972), *discussed at* note 38 *infra*.

[14] 29 U.S.C. § 104 (1970).

[15] Buffalo Forge Co. v. United Steelworkers, 386 F. Supp. 405, 410 (W.D.N.Y. 1974), *aff'd*, 517 F.2d 1207 (2d Cir. 1975), *aff'd*, 96 S. Ct. 3141 (1976).

[16] Buffalo Forge Co. v. United Steelworkers, 517 F.2d 1207, 1211 (2d Cir. 1975), *aff'd*, 96 S. Ct. 3141 (1976). A congressional policy in favor of the formation of private dispute settlement procedures was established in the Labor Management Relations (Taft-Hartley) Act, ch. 20, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141–97 (1970 & Supp. V 1975)). That Act reads in pertinent part that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of griev-

rari.[17] In *Buffalo Forge Co. v. United Steelworkers*,[18] the Court, in a five-to-four decision, held that an injunction halting the sympathy strike could not be issued while the question of the legality of the strike itself was being arbitrated.[19] The Court readily agreed that

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ance disputes arising over the application or interpretation of an existing collective-bargaining agreement." Labor Management Relations (Taft-Hartley) Act § 203(d), 29 U.S.C. § 173(d) (1970).

This federal policy favoring arbitrability was forcefully evoked in three cases known as the *Steelworkers Trilogy*: United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566–68 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596–97 (1960). In *Warrior & Gulf*, the Court made the following statement on the presumption of arbitrability:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

363 U.S. at 582–83; *see* Gateway Coal Co. v. UMW, 414 U.S. 368, 377–78 (1974) (application of presumption of arbitrability in finding safety dispute arbitrable). For a discussion of this presumption, see Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability*, 85 HARV. L. REV. 636 (1972).

[17] Buffalo Forge Co. v. United Steelworkers, 423 U.S. 911 (1975).

[18] 96 S. Ct. 3141 (1976).

[19] *See id.* at 3146–49. Writing for the majority was Justice White, *id.* at 3143, joined by Chief Justice Burger and Justices Stewart, Blackmun and Rehnquist. Justice Stevens was joined in his dissent by Justices Brennan, Marshall and Powell. *Id.* at 3150.

Prior to addressing the substantive issues of the case, the Court determined whether the case presented a justiciable controversy. *See id.* at 3145 n.8. The P & M employees returned to the job after the district court denied the injunction. However, the parties agreed before the court of appeals that if the union so ordered, the strike could be recommenced. *Id.* at 3144–45 & n.8. This situation—the possibility of a recurrence of the strike—was deemed to be an "existing dispute," thus satisfying the Court's "live controversy" requirement. *See id.* at 3145 n.8.

In reaching this conclusion the Court relied on Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115 (1974), and Division 1287, Bus Employees v. Missouri, 374 U.S. 74 (1963). *See* 96 S. Ct. at 3145 n.8. In *Bus Employees*, the Governor of Missouri, acting pursuant to a state statute, had seized a struck public transportation company, but rescinded the seizure order after the union filed a jurisdictional statement in the Supreme Court. 374 U.S. at 75–77. The Court, noting that the labor dispute underlying the seizure order remained unresolved and that the seizure could be recommenced at any time, held the case not moot. *Id.* at 78. In *Super Tire*, the initial labor dispute engendering the controversy had ended, but the Court rejected the mootness claim on the basis that the plaintiff had also sought a declaratory judgment that New Jersey's payment of welfare benefits to striking workers was unconstitutional. 416 U.S. at 121–22. The Court then commented upon the difficulties inherent in basing the decision to review a case upon the length of a strike:

> If we were to condition our review on the existence of an economic strike, this case most certainly would be of the type presenting an issue "capable of repetition, yet evading review. . . ."
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> . . . Economic strikes are of comparatively short duration. . . . [T]he great

under *Boys Markets* an injunction could be granted if the strike sought to be enjoined had "been precipitated by" an arbitrable grievance.[20] However, lacking the causal requirement of a pre-existing dispute which the parties had agreed to arbitrate, the P & M employees could not be said to have struck *"over"* an arbitrable issue.[21] The case thus being removed from the purview of *Boys Markets*, the Court ruled that, notwithstanding the employer's allegation of the illegality of the sympathy strike, an injunction could not be issued prior to a final determination by the arbitrator.[22]

The landmark *Boys Markets* decision provided federal courts with the power to enjoin strikes in breach of collective bargaining agreements.[23] In that case, a supervisor and several non-union workers began reorganizing items in the supermarket's frozen food section.[24] The union representative demanded that the items be taken out and restocked by union employees. When the supermarket management refused, the union struck and set up picket lines despite the presence of a no-strike clause in the collective bargaining agreement.[25] The management, after offering to arbitrate the dispute, moved successfully in federal district court to have the strike enjoined.[26]

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majority . . . do not last long enough for complete judicial review of the controversies they engender.

Id. at 125–26 (citations omitted).

[20] 96 S. Ct. at 3146–47.

[21] *Id.* at 3147 (emphasis in original). For a more extensive analysis of this causal requirement, see sources cited at note 39 *infra*.

[22] 96 S. Ct. at 3148. For a more detailed examination of the majority's reasoning, see notes 68–79 *infra* and accompanying text.

[23] 398 U.S. at 254. *Boys Markets* has been extensively commented upon. *See, e.g.*, Axelrod, *The Application of the* Boys Markets *Decision in the Federal Courts*, 16 B.C. INDUS. & COM. L. REV. 893 (1975); Gould, *On Labor Injunctions, Unions, And the Judges: The Boys Market Case*, 1970 SUP. CT. REV. 215; Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593 (1970).

[24] 398 U.S. at 239.

[25] *Id.* at 238–39 & n.4. The collective bargaining agreement also contained a broad arbitration clause covering " 'interpretation or application of the terms of' " the contract. *Id.* at 238 n.3 (quoting from collective bargaining agreement between Boys Market, Inc. and Retail Clerks Local 770). For an analysis of the various types of arbitration clauses and the jurisdiction that they confer, see Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1497, 1500–01 (1959).

[26] 398 U.S. at 239–40. The employer originally filed suit in a state court, which issued a temporary restraining order. *Id.* The union then responded by removing the case to federal district court, where it moved to vacate the restraining order. 398 U.S. at 240. The district court denied the motion, issued an order compelling arbitration and enjoined the work stoppage. *Id.*

The district court's ruling was not consonant with the Supreme Court's prior decisions in Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962), and Avco Corp. v. Aero

In sustaining the district court's decision, the Court was required to rectify two countervailing federal policy considerations: the Norris-LaGuardia Act's ban on injunctions in labor disputes, and the need to enforce the union's commitment not to strike—its "quid pro quo" for the employer's promise to arbitrate.[27] The *Boys Markets*

Lodge 735, 390 U.S. 557 (1968). *See* 398 U.S. at 240–47. In *Sinclair*, the Court had held that the Norris-LaGuardia Act precluded the issuance of injunctions even when a union had refused to comply with its duty to arbitrate and had struck in violation of a no-strike clause. 370 U.S. at 197, 200, 203. The *Avco* Court held that actions for breach of a collective bargaining agreement arose under federal law and, therefore, could be removed to a federal district court. 390 U.S. at 561–62. As the *Boys Markets* Court noted, these cases jointly rendered it impossible for an employer to obtain injunctive relief in a state court, since that action could be removed to federal court where, under *Sinclair*, an injunction could not be granted. 398 U.S. at 244–45; *see* 96 S. Ct. at 3154–55 (Stevens, J., dissenting). The *Boys Markets* Court asserted that such a result contradicted the Court's prior ruling in Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 511 (1962), which stated that while section 301(a) of the LMRA gave federal courts jurisdiction over suits to enforce collective bargaining agreements, it did not displace state court jurisdiction. 398 U.S. at 245. In addition, the *Boys Markets* Court stated that *Sinclair-Avco* removal would be incompatible with the federal policy in favor of a uniform labor law announced in Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962). 398 U.S. at 245–46. The cumulative result would be "rampant forum shopping" which would "greatly frustrate any relative uniformity in the enforcement of arbitration agreements." *Id.* Thus, the *Boys Markets* Court expressly overruled the *Sinclair* decision. *Id.* at 254–55. For an analysis of the *Sinclair-Avco* problem, 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, 987–96 (1969); Keene, *The Supreme Court, Section 301 and No-Strike Clauses: From* Lincoln Mills *to* Avco *and Beyond*, 15 VILL. L. REV. 32, 39–56 (1969).

[27] 398 U.S. at 247–52 (emphasis deleted); *see* 96 S. Ct. at 3147. The concept that the agreement by the employer to arbitrate constitutes the *"quid pro quo"* for a no-strike commitment by the union was first announced in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957). There the Court found that "the entire tenor of the history" of the LMRA illustrated that Congress intended the no-strike provision to be a reciprocal promise for the employer's agreement to arbitrate. *Id.* This interpretation was reaffirmed in United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960), and, again, in Gateway Coal Co. v. UMW, 414 U.S. 368, 382 (1974) (absent an express agreement to the contrary, no-strike and arbitration clauses should be given "coterminous application").

Language in other opinions, however, indicates that the Supreme Court will not always construe the no-strike and arbitration clauses as comprising an exact, precise quid pro quo. For example, in Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionery Workers, 370 U.S. 254 (1962), Drake Bakery brought a suit for damages resulting from an allegedly illegal strike. *Id.* at 256. Drake claimed that by striking, the union had repudiated the arbitration provisions of the contract, thus exempting the employer from arbitrating the grievance claim. *Id.* at 260. In holding that the employer had to arbitrate the issue of damages, the Court stated the following:

> We do not understand the opinions in *Textile Workers Union v. Lincoln Mills*, . . . or *United Steelworkers v. American Mfg. Co.*, . . . to enunciate a flat and general rule that these two clauses are properly to be regarded as exact counterweights in every industrial setting, or to justify either party to the con-

majority found that Congress had left to the judiciary the task of reconciling Norris-LaGuardia's prohibition on court-ordered injunctions with the congressional policy, later expressed in section 301(a) of the LMRA,[28] granting the federal courts jurisdiction over labor contract disputes.[29] In an attempt to reconcile these two policies, the majority reasoned that the issuance of an injunction under section 301(a) to compel labor unions to live up to their freely assumed obligations would not have the effect of subverting what it perceived to be the policy of the Norris-LaGuardia Act "to foster the growth and viability of labor organizations."[30]

> tract in wrenching them from their context in the collective agreement on the ground that they are mutually dependent covenants which are severable from the other promises between the parties.

Id. at 261 n.7 (citations omitted) (emphasis in original); *accord*, Local 721, Packinghouse Workers v. Needham Packing Co., 376 U.S. 247, 250–52 (1964).

[28] 29 U.S.C. § 185(a) (1970), *quoted in part at* note 7 *supra*.

[29] 398 U.S. at 251. The Norris-LaGuardia Act provides in part that "[n]o 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." Norris-LaGuardia Act § 4, 29 U.S.C. § 104 (1970). On the other hand, section 301(a) of the LMRA grants district courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a) (1970).

Writing in 1958, Professor Cox set forth the view that the Norris-LaGuardia Act was "the high water mark of the philosophy that law had no useful role to play in labor relations." Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MTN. L. REV. 247, 253 (1958). Labor-management disputes were believed to be best settled through the use of economic power. *Id.* at 253–54. This laissez-faire stance of Congress lasted only a short time as legislative controls were reintroduced into labor relations three years later by the passage of the National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151–68 (1970 & Supp. V 1975)). Cox, *supra* at 254. This reintroduction culminated in the passage of the Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141–97 (1970, Supp. III 1973, Supp. IV 1974 & Supp. V 1975)). Section 301(a) of the latter Act was viewed as establishing a congressional policy in favor of the enforcement of collective bargaining agreements. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957). Thus, in Professor Cox's view, "[t]o an undefined extent the Norris-LaGuardia Act ha[d] become an anachronism." Cox, *supra* at 254.

For a thorough discussion of the role of the federal courts in labor relations prior to the passage of the Norris-LaGuardia Act, see F. FRANKFURTER & N. GREEN, THE LABOR INJUNCTION (1930); C. GREGORY, LABOR AND THE LAW 95–104 (rev. ed. 1949).

[30] 398 U.S. at 252–53. In reaching this decision the Court relied heavily on a previous decision, Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30 (1957), in which the statutory provisions of Norris-LaGuardia were not given literal effect. 398 U.S. at 251–52. In that case an "Adjustment Board" had been created under the Railway Labor Act, ch. 347, § 3, 44 Stat. 577 (1926) (current version at 45 U.S.C. § 153 (1970)), to which union or management could submit disputes for final binding arbitration. 353 U.S. at 31, 34. The Court reasoned that since the Board was available to settle disputes, an injunction would not deprive the union of its economic power as had earlier injunctions. *Id.* at 40–41; *accord*, Virginian Ry. Co. v. System Fed'n 40, Ry. Employees, 300 U.S. 515, 562–63 (1937).

Alternatively, the injunction was seen as promoting the peaceful settlement of labor disputes in two ways. The Court, asserting that the issuance of an injunction was superior to an action for damages resulting from a union's breach of a no-strike provision, reasoned that the unavailability of an injunction would make employers reluctant to enter into arbitration agreements.[31] Secondly, the Court viewed the injunction as necessary to insure that the parties did not attempt to evade the arbitration process by resorting to the use of economic force.[32]

Stressing that its holding was "a narrow one," the *Boys Markets* majority limited the use of the injunctive power to cases in which the collective bargaining agreement contained a mandatory arbitration clause.[33] Writing for the majority, Justice Brennan stated several guidelines to be followed by district courts in determining whether to enjoin a strike " *'over a grievance* which both parties are contractually bound to arbitrate.' "[34] Beyond the requirement that the ordinary principles of equity be met,[35] before an injunction can be issued, a district court must find that the dispute is arbitrable and that the strike violated the no-strike clause, and it also must order the employer to arbitrate.[36]

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[31] 398 U.S. at 248. The majority stated that

> [a]ny incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated. While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union.

Id.

Professor Gould has pointed out that the data available in 1970 indicated that the making of arbitration pacts had not been discouraged by the unavailability of injunctive relief. Gould, *supra* note 23, at 230. He noted that, in the eight years between the Court's decision in Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962), and the *Boys Markets* decision in 1970, "[a]pproximately 94 percent of the collective bargaining agreements negotiated . . . contain[ed] arbitration clauses" despite *Sinclair*'s prohibition of the issuance of injunctions to enforce the terms of labor contracts. Gould, *supra* at 230 & n.63.

[32] *See* 398 U.S. at 249.

[33] *Id.* at 253.

[34] 398 U.S. at 254 (quoting from Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 228 (1962) (dissenting opinion)) (emphasis added). The guidelines set out in *Boys Markets* originally appeared in Justice Brennan's dissent in *Sinclair*. *See* 370 U.S. at 228.

[35] 398 U.S. at 254.

[36] *See id.* Several commentators have noted that, although the Court never expressed the requirement, the existence of an express or implied no-strike clause must be ascer-

While the word *"over"* may seem innocuous in the context in which it is used in *Boys Markets*, several courts of appeals focused on that specific term in determining whether *Boys Markets* was applicable to the sympathy strike situation. The Fifth Circuit, in *Amstar Corp. v. Amalgamated Meat Cutters & Butcher Workmen*,[37] was the first appellate court to literally construe the *Boys Markets* wording that the strike be *"over"* an arbitrable grievance.[38] There the court interpreted that language to establish a causal relationship: an arbitrable dispute must first have arisen and the work stoppage must have been the direct result of the dispute.[39] The circuit court found that "the strike itself precipitated the dispute," and, therefore, that a *Boys Markets* injunction could not issue.[40] The crux of the *Amstar* decision was the belief that the *Boys Markets* Court intended to restrict the application of its holding to those cases in which the union and the employer were in direct dispute *"over"* a grievance which was in fact

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tained. *See* R. GORMAN, BASIC TEXT ON LABOR LAW 613 (1976); Note, Boys Markets *Injunctions in Sympathy Strike Situations: A Return to Pre-*Norris-LaGuardia *Days?*, 6 LOYOLA U. CHI. L.J. 644, 671–73 (1975) [hereinafter cited as *Injunctions*]; Note, *supra* note 23, at 1599–1600; *accord*, Gateway Coal Co. v. UMW, 414 U.S. 368, 374 (1974).

[37] 468 F.2d 1372 (5th Cir. 1972). A number of federal district courts had faced the issue prior to the Fifth Circuit ruling in *Amstar*. *See* General Cable Corp. v. IBEW Local 1798, 333 F. Supp. 331, 334 (W.D. Tenn. 1971) (sympathy strike enjoined on theory that dispute over legality of that strike arose when picket lines were set up and thus "prior to the work stoppage"); General Cable Corp. v. IBEW Local 1644, 331 F. Supp. 478, 482 (D. Md. 1971) (injunction could not issue because sympathy strike was not "over" an arbitrable grievance); Simplex Wire & Cable Co. v. Local 2208, IBEW, 314 F. Supp. 885, 886 (D.N.H. 1970) (injunction denied upon finding that no arbitrable grievance existed between the union and the employers).

[38] *See* 468 F.2d at 1372–73. The *Amstar* court read *Boys Markets* as establishing three conditions for the issuance of an injunction:

> (1) the strike must be in breach of a no-strike obligation under an effective collective agreement, (2) the strike must be "over" an arbitrable grievance, and (3) both parties must be contractually bound to arbitrate the underlying grievance which caused the strike.

Id. at 1373.

[39] *Id.* at 1372–73. A number of commentators have also interpreted *Amstar* as requiring a causal relationship. *See* Connolly & Connolly, *Employers' Rights Relative to Sympathy Strikes*, 14 DUQ. L. REV. 121, 127 (1976); Note, *The Applicability of* Boys Markets *Injunctions to Refusals to Cross a Picket Line*, 76 COLUM. L. REV. 113, 124 (1976). *See also* Comment, Boys Market: *Developments in the Third Circuit*, 48 TEMP. L.Q. 281, 306 (1975).

[40] 468 F.2d at 1373. The court made no finding as to whether the issue of the legality of the sympathy strike was arbitrable. It noted, however, that if it had found that this issue "constituted a sufficiently arbitrable underlying dispute for a *Boys Markets* injunction to issue," then practically any strike called before the expiration of the collective bargaining agreement could be enjoined merely by questioning its legality. *Id.* (emphasis in original). *Contra*, Abrams, *The Labor Injunction and the Refusal to Cross Another Union's Picket Line*, 26 CASE W. RES. L. REV. 178, 184 & n.31 (1975).

arbitrable.[41]

A little over a year after *Amstar* was decided, the Fourth Circuit interpreted *Boys Markets* as permitting an injunction to issue against a sympathy strike. In *Monongahela Power Co. v. Local 2332, IBEW*,[42] members of the defendant local refused to cross a picket line set up at their plant by a union local from another of the employer's plants.[43] The collective bargaining agreement in force between the sympathetic union and the company contained both a no-strike clause prohibiting any "work stoppage" and a mandatory grievance arbitration provision.[44]

In remanding with instructions to grant injunctive relief pending arbitration, the *Monongahela* court noted the strong anti-injunction stance of the Norris-LaGuardia Act, but appraised the federal policy in favor of settling labor disputes through arbitration as being " 'equally strong.' "[45] Emphasizing the broad character of the language of the collective bargaining agreement, the court held that the dispute over whether the sympathy strike violated the no-strike clause was an arbitrable one, and that the case thus fell into the "narrow" exception to Norris-LaGuardia carved out in *Boys Markets*.[46]

The causal relationship stressed by the *Amstar* court, *i.e.*, that the strike be the direct result of a dispute which was arbitrable, was not addressed by the *Monongahela* court.[47] The main conceptual

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[41] 468 F.2d at 1372–74. *See also* United States Steel Corp. v. UMW, 519 F.2d 1236, 1238, 1244–45 (5th Cir. 1975) (decision not to enjoin strike over importation of South African coal based in part on *Amstar*'s holding that the strike must be the result of an arbitrable dispute), *cert. denied*, 96 S. Ct. 3221 (1976).

[42] 484 F.2d 1209 (4th Cir. 1973).

[43] *Id.* at 1210.

[44] *Id.* at 1210–11 (emphasis deleted). The no-strike clause provided that during the life of the contract " '[n]o employee shall participate in any . . . strike, *work stoppage*, slowdown or any other interference with or impeding of work.' " *Id.* at 1210 (quoting from the collective bargaining agreement between Monongahela Power Co. and Local 2332, IBEW) (emphasis by the court). The arbitration clause covered disputes involving " 'the interpretation [and] application' " of the contract, including disputes over a " 'claimed violation.' " *Id.* (quoting from the collective bargaining agreement between Monongahela Power Co. and Local 2332, IBEW) (emphasis by the court deleted).

[45] 484 F.2d at 1211, 1215 (quoting from Avco Corp. v. Local 787, UAW, 459 F.2d 968, 970 (3d Cir. 1972)).

[46] 484 F.2d at 1213–14. Conceding that employees possess "a statutory right . . . to refuse to cross . . . picket line[s]," the court nevertheless found that the "right may be waived and [had been] waived . . . by the action of [the] union in agreeing to a no-strike clause." *Id.* at 1214. *But see* Gary Hobart Water Corp. v. NLRB, 511 F.2d 284, 287 (7th Cir.) (holding that waiver must appear "in 'clear and unmistakeable language' " in the contract) (quoting from NLRB v. Wisconsin Aluminum Foundry Co., 440 F.2d 393, 399 (7th Cir. 1971)), *cert. denied*, 423 U.S. 925 (1975); Axelrod, *supra* note 23, at 923.

[47] Professor Abrams points out that the court did not even mention the *Amstar* deci-

hurdle for the Fourth Circuit was whether the dispute over the legality of the sympathy strike was arbitrable.[48] Once the determination of arbitrability was made, the court saw no obstacle to enjoining the strike, provided the ordinary principles of equity had also been met.[49] In a subsequent case, the Fourth Circuit reaffirmed this holding and enjoined a sympathy strike despite the fact that the collective bargaining agreement had an express exception within the no-strike clause allowing individual union members to refuse " 'to cross a bona fide picket line.' "[50]

Several other circuits also reached conflicting conclusions on the issue of whether sympathy strikes are subject to injunctions.[51] The divisiveness over the injunction question was highlighted in the Third Circuit decision of *NAPA Pittsburgh, Inc. v. Automative Chauffeurs Local 926*.[52] In that case, the defendant local refused to cross a picket line set up at their plant by Local 110 of the Chauffeurs' Union,

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sion even though it was the only circuit court of appeals case on point at the time. Abrams, *supra* note 40, at 185 & n.35; *see Injunctions*, *supra* note 36, at 653.

[48] *See* 484 F.2d at 1213–14.

[49] *Id.* at 1214.

[50] Wilmington Shipping Co. v. Longshoremen, 86 L.R.R.M. 2846, 2847 (4th Cir.) (quoting from collective bargaining agreement between Wilmington Shipping Co. and union), *cert. denied*, 419 U.S. 1022 (1974). *Cf.* Pilot Freight Carriers, Inc. v. International Bhd. of Teamsters, 497 F.2d 311, 312–13 (4th Cir.) (conceding that individuals had right to refuse to cross picket lines, but enjoining local from striking on the ground that question of whether union was using this individual right to camouflage system-wide strike was arbitrable), *cert. denied*, 419 U.S. 869 (1974).

Additionally, in Armco Steel Corp. v. UMW, 505 F.2d 1129 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975), the Fourth Circuit held that a sympathy strike could be enjoined under *Boys Markets* regardless of whether the no-strike clause was express or implied when "the work-stoppage [was] over a grievance or involve[d] a matter which the parties [were] contractually bound to arbitrate." *Id.* at 1131–32.

[51] *Compare* Plain Dealer Publishing Co. v. Cleveland Typographical Union Local 53, 520 F.2d 1220, 1221–22 (6th Cir. 1975) (injunction denied), *cert. denied*, 96 S. Ct. 3221 (1976) *and* Valmac Indus., Inc. v. Food Handlers Local 425, 519 F.2d 263, 268 (8th Cir. 1975) (injunction could be issued when dispute could "arguably" be concluded by arbitration and was not excluded from purview of the arbitration clause), *vacated and remanded*, 96 S. Ct. 3215 (1976) (remanded in light of the *Buffalo Forge* decision).

The Seventh Circuit, placing strong interpretive emphasis on the breadth of the arbitration and no-strike clauses, has both enjoined and refused to enjoin sympathy strikes. *See* Hyster Co. v. Independent Towing & Lifting Mach. Ass'n, 519 F.2d 89, 92 (7th Cir. 1975) (injunction denied on the grounds that waiver of right to engage in sympathy strike was not explicit and that strike did not give rise to arbitrable dispute), *cert. denied*, 96 S. Ct. 3220 (1976); Inland Steel Co. v. Local 1545, UMW, 505 F.2d 293, 298–300 (7th Cir. 1974) (noting broad scope of arbitration clause, court found question of legality of strike arbitrable and enjoined strike).

[52] 502 F.2d 321 (3d Cir.) (en banc) (6–3 decision), *cert. denied*, 419 U.S. 1049 (1974), *noted in* Comment, *supra* note 40, at 306–10; 88 HARV. L. REV. 463 (1974); 21 VILL. L. REV. 608 (1976).

which was seeking to become the bargaining representative of the employees at another NAPA plant.[53] NAPA claimed that an arbitrable question existed as to whether the union could refuse to cross the picket line under the terms of the collective bargaining agreement and, therefore, that an injunction should issue while this matter was being arbitrated.[54]

A majority of the court, utilizing a rationale similar to that of the *Monongahela* court, concentrated on that portion of *Boys Markets* which emphasized the desirability of arbitration.[55] *Boys Markets* was read as holding that where a dispute is determined to be arbitrable, "an injunction may be issued to enforce" that procedure.[56] Finding the dispute concerning the right to cross the picket line arbitrable, the majority ruled that the sympathy strike could be enjoined pending settlement of that issue.[57]

In a cogent dissent, Judge Hunter contended that the majority had not come to grips with the essential issue before it.[58] In his opinion, the majority's ruling that the legality of the sympathy strike was

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[53] 502 F.2d at 322. Local 196 counseled its members that under its interpretation of the collective bargaining agreement they could refuse to cross Local 110's picket lines. *Id.* This advice was based on that part of the contract which provided that no violation would occur " 'in the event an employee refuses to enter upon any property involved in a primary labor dispute or refuses to go through or work behind any primary picket lines . . . at the Employer's . . . place or places of business.' " *Id.* (quoting from collective bargaining agreement between NAPA Pittsburgh, Inc. and Automotive Chauffeurs Local 926). NAPA Pittsburgh, while acknowledging some connection with NAPA Altoona, *id.* at 322 n.2, maintained that the picket line at its plant was not primary, *id.* at 323. Local 110's picket lines would have been primary if NAPA Pittsburgh could have been shown to be the same employer with which the union was in dispute at Altoona. *See id.* at 322 n.2; J. JENKINS, LABOR LAW § 14.9, at 265 n.4 (1969). Since this was the very issue that the arbitrator would have to determine, the court never decided whether NAPA Pittsburgh and NAPA Altoona were the same employer. *See* 502 F.2d at 322 n.2, 323.

[54] 502 F.2d at 322–23. The collective bargaining agreement bound the parties "to arbitrate '. . . any and all grievances, complaints or disputes arising between the employer and the union.' " *Id.* at 323 (quoting from the collective bargaining agreement between NAPA Pittsburgh, Inc. and Automotive Chauffeurs Local 926).

[55] 502 F.2d at 323. For a discussion of the *Monongahela* decision, see notes 42–47 *supra* and accompanying text.

[56] 502 F.2d at 323.

[57] *Id.* at 324.

[58] *Id.* at 324–25. Judge Hunter was joined by Chief Judge Seitz. Judge Adams also filed a dissenting opinion. *Id.* at 333–35. While largely agreeing with Judge Hunter, Judge Adams maintained that he would place more emphasis on the limits of the judicial exception to Norris-LaGuardia created in *Boys Markets*. *Id.* at 333. Theorizing that the Court in that case may not have wanted to extend its holding beyond the narrow factual considerations of that case, Judge Adams asserted that "[a]bsent a clear signal from the Supreme Court, doubts should be resolved in favor of the applicability of the Norris-LaGuardia Act." *Id.* at 334.

an arbitrable issue did not adequately resolve the question of whether the sympathy strike could properly be enjoined. Judge Hunter phrased the issue for determination as whether, conceding arbitrability, the employer was entitled to injunctive relief while the issue was being arbitrated.[59]

The dissent viewed the focal point of its disagreement with the majority as "the scope of the rule" fashioned in *Boys Markets*.[60] In his analysis, Judge Hunter first attempted to distinguish that case from *NAPA* in terms of the operative policy considerations in each. He noted that the *Boys Markets* Court had been confronted with two competing federal policies: first, that which favored the arbitration of disputes and, second, that expressed in Norris-LaGuardia which prohibited the use of injunctions in labor disputes by federal courts.[61] Because the strike in *Boys Markets* had endangered the federal policy in favor of arbitration by attempting to force the employer to concede on the arbitrable issue[62] it was necessary to partially limit Norris-LaGuardia and allow an injunction to issue.[63] However, since the sympathy strike in *NAPA* was "not designed to force settlement of [an] arbitrable issue before arbitration [could] take place," no need existed to frustrate the policy of Norris-LaGuardia.[64]

The dissent next considered whether "the rule created in [*Boys*

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[59] *Id.* at 325. The union, as the dissent noted, never disputed the finding of the trial court that the issue was arbitrable. *Id.* at 324.

[60] *Id.* at 325.

[61] *Id.* at 325–26. For a discussion of the competing policies the Court faced in *Boys Markets*, see notes 28–30 *supra* and accompanying text.

[62] *Id.* at 325. Judge Hunter noted that in *Boys Markets*

> the union ignored both its no strike pledge and its agreement to arbitrate the issue and struck for the avowed purpose of forcing a favorable resolution to the arbitrable dispute. Thus, the union's actions made it clear that they did not intend to return to work until the Company conceded that the tasks involved had to be performed by union men.
>
> Clearly, this strike had the effect of undermining the rule of law that favors the arbitration of labor disputes, since the strike was an attempt to force a union victory on the very issue that was made arbitrable not through the presentation of reasoned arguments to a neutral arbitrator, but rather through the use of sheer economic force.

Id.

[63] *Id.* at 326.

[64] *Id.* (emphasis deleted). The dissent supported this analysis by noting that since the union was not striking over its right to respect the picket lines, the employer could not have ended the strike by capitulating on that issue. *Id.* The result would have been different if the union had taken the position that it would not return to work until the employer acceded to its interpretation of the no-strike clause. In that situation, the strike would have been a direct attempt to settle an arbitrable issue through economic pressure, and a *Boys Markets* injunction would have been appropriate in order to protect the arbitration process. *Id.* at 326 n.6; *see* 21 VILL. L. REV. 608, 612 (1976).

Markets] encompass[ed] the factual situation" in *NAPA*.[65] According to the dissent's exegesis of the *Boys Markets* holding, a strike could be enjoined only when "the 'underlying cause' of [that] strike" was a dispute which both parties had agreed to arbitrate.[66] Applying this analysis to *NAPA*, Judge Hunter found that the dispute underlying the sympathy strike was the conflict between NAPA and its Altoona employees. While the dispute over the legality of the sympathy strike was admittedly arbitrable, it was not the underlying cause of the strike; therefore, it did not justify the issuance of a *Boys Markets* injunction.[67]

In *Buffalo Forge*, the Supreme Court, utilizing an approach similar to that of the dissent in *NAPA*,[68] perceived no threat to the arbi-

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The dissent also foresaw an injunction in a sympathy strike situation as hindering rather than safeguarding the arbitration process. 502 F.2d at 327. Once having obtained an injunction by simply demonstrating the arbitrability of the dispute over the legality of the sympathy strike, the employer would have successfully ended the work stoppage and would likely procrastinate, rather than proceed to arbitration and risk losing on the merits. *Id.* The majority attempted to ameliorate this possible result by calling upon the district courts to use their equitable powers to ensure prompt arbitration. *Id.* at 324. The dissent, however, maintained that a district court would be powerless to prevent the employer from considerably delaying arbitration. *Id.* at 328. In *NAPA*, the employer could have postponed final disposition for at least nine days by going through the various steps of the grievance and arbitration process. *Id.* at 328–29. Since strikes are so dependent on proper timing, this delay could possibly "render . . . ineffective" even those strikes that the aribtrator finds to be legal. *Id.* at 329.

[65] 502 F.2d at 329.

[66] *Id.* at 330. Judge Hunter based this interpretation on three considerations. First, he read the *"over"* language of *Boys Markets* as requiring a causal relationship between the strike and the dispute. *Id.* Secondly, since the *Boys Markets* Court had termed its holding "a 'narrow' one," the dissent construed this as limiting the decision to "the key factual circumstances that were present in [that] case." *Id.* Lastly, the dissent saw any broader reading of *Boys Markets* as carrying its holding beyond the point necessary to effectuate that decision's seminal policy consideration of preventing the circumvention of arbitration. *Id. See also* Parade Publications, Inc. v. Philadelphia Mailers Union No. 14, 459 F.2d 369, 373–74 (3d Cir. 1972) (requiring by remand that an employer show that the dispute "underlying" a strike was arbitrable before allowing an injunction to issue); Axelrod, *supra* note 23, at 924.

The *NAPA* dissent speculated that the majority had been swayed "by an unstated feeling" that Gateway Coal Co. v. UMW, 414 U.S. 368 (1974), had broadened the exception to the Norris-LaGuardia Act created in *Boys Markets*. 502 F.2d at 331–32. According to Judge Hunter, however, *Gateway* had no such effect since in that case the strike was not enjoined until the Court had found that the dispute underlying it was arbitrable. *Id.* at 332. He reasoned that this " 'underlying cause' " approach fostered the basic policy rationale of *Boys Markets*, *i.e.*, that only those strikes designed to circumvent the arbitration process should be enjoined. *Id.* Since the dissent could find no deviation from this labor policy in *Gateway*, it concluded that "the 'underlying cause' " test remained in full force. *Id.* at 333.

[67] *Id.* at 331.

[68] For a discussion of the *NAPA* dissent, see notes 58–67 *supra* and accompanying text.

tration process if the P & M locals' sympathy strike was not enjoined.[69] The Court reasoned that the concern in *Boys Markets* had been with those strikes which were disrupting the arbitration process and depriving the employer of his quid pro quo.[70] In *Buffalo Forge*, however, the strike was not brought *"over"* an arbitrable grievance; therefore, the union was not attempting to circumvent that process.[71] Furthermore, since the Court found the employer to have bargained for a no-strike clause prohibiting only strikes *"over"* arbitrable issues, the sympathy strike would not result in a loss of bargain.[72] Thus, the federal policy at stake in *Boys Markets*, that of promoting the use of "private dispute settlement mechanisms," was not threatened by the sympathy strike.[73]

Absent an impairment of congressional labor policy, the Court maintained that the Norris-LaGuardia Act precluded the issuance of an injunction solely on the basis of an allegation that the strike violated the no-strike clause.[74] Although LMRA section 301(a) had granted federal courts "a major role . . . in enforcing collective bargaining agreements," precedent did not support the conclusion that this power had been extended beyond "the enforcement of . . . arbitration provisions."[75] Nor could Norris-LaGuardia be disregarded by the majority simply because the contract provided broad grievance and arbitration mechanisms. It was reasoned that an injunction in the present case would provide a basis for enjoining any alleged breach of contract in the future and also deeply involve the courts in contract interpretation.[76] In the Court's opinion, this result, would seriously

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[69] 96 S. Ct. at 3149. The majority did concede that an injunction would be appropriate in the present situation to compel the parties to arbitrate and also to enforce the arbitrator's final award. *Id.* at 3146.

[70] *Id.* at 3147.

[71] *Id.* Here the Court, without specific reference, apparently adopted the causal interpretation of the *Boys Markets "over* a grievance" phrasing previously enunciated in *Amstar* and the *NAPA* dissent. The holdings of these cases are discussed in the text accompanying notes 40 and 67 *supra*.

[72] 96 S. Ct. at 3147.

[73] *Id.*

[74] *Id.* at 3148.

[75] *Id.* To bolster its argument the majority pointed out that in passing section 301(a), Congress had declined to except injunctions enforcing collective bargaining agreements from the provisions of Norris-LaGuardia. *Id.* Although this had also been an important rationale for the Court's decision in Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 205–08 (1962), it was later rejected in *Boys Markets*, where the Court asserted that "[t]he literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration." 398 U.S. at 250; *see* 96 S. Ct. at 3154 n.11 (Stevens, J., dissenting).

[76] 96 S. Ct. at 3148.

undermine the intent of Norris-LaGuardia and also involve the courts in a potential flood of litigation.[77]

The majority also reasoned that such judicial involvement had not been contemplated by the parties when they struck the bargain. Here the issue was concededly arbitrable and, pending the outcome, the parties "ha[d] not contracted for a judicial preview of the facts and the law."[78] The majority concluded that extensive judicial involvement would undermine the federal policy in favor of the establishment of private procedures for the adjustment of disputes.[79]

In a dissenting opinion, Justice Stevens maintained that the issue for determination was the extent of the enforceability by injunction of the union's quid pro quo.[80] He characterized the majority's holding as dividing the quid pro quo into two parts, with only that part pledging no strikes "*over*" arbitrable grievances susceptible to enforcement by injunction.[81] The majority had exempted strikes not preceded by an arbitrable dispute from the courts' injunctive powers based on what the dissent perceived as a "literal interpretation of the Norris-LaGuardia Act" and an unwillingness to further involve the federal courts in interpreting collective bargaining agreements.[82] The dissent argued that the rationale underpinning the *Boys Markets* decision compelled "a different result," and concluded that *Boys Markets* could be read to permit a preliminary injunction when "convincing

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[77] *Id.* at 3148–49. Noting that as of 1972 "more than 21,000,000 workers . . . were covered under more than 150,000 collective bargaining agreements," the Court reasoned that these figures were a harbinger of the amount of possible litigation federal courts would face. *Id.* at 3149 n.12.

The dissent disputed the majority's interpretation of these figures, questioning whether they foretold "the number of sympathy strikes which may violate an express no-strike commitment." *Id.* at 3150 n.3. Observing that only "a dozen such cases [had] arisen" in the last few years, the dissent stated that the number could be reduced further by the parties making existing no-strike clauses more precise. *Id.*

[78] *Id.* at 3149. The Court asserted that "[h]ad [the parties] anticipated additional regulation of their relationships pending arbitration, it seems very doubtful that they would have resorted to litigation rather than to private arrangements." *Id.*

[79] *See id.*

[80] *Id.* at 3150.

[81] *Id.* at 3150 & n.2. The dissent noted that, although a strike in protest of an arbitrator's decision would not be "*over*" an arbitrable grievance, the majority had admitted that such a strike could be enjoined. *Id.* at 3150 n.2. Thus, in this respect the majority had deviated from its own causal standard. *See id.*

[82] *Id.* at 3150. In response to the majority's first rationale, the dissent noted that strict compliance with Norris-LaGuardia had been foregone in prior cases. *Id.* The second, according to the dissent, had been "implicitly rejected" in Gateway Coal Co. v. UMW, 414 U.S. 368 (1974), where the Court, in determining whether an exception to the no-strike clause had been properly invoked, decided " 'a substantial question of contractual interpretation.' " 96 S. Ct. at 3150 (quoting from 414 U.S. at 384).

evidence [shows] that the strike is clearly within the no-strike clause."[83]

Justice Stevens' reading of *Boys Markets* centered on that Court's distinction of the Norris-LaGuardia Act[84] and its concentration on fostering the negotiation of arbitration agreements by employers.[85] Because these agreements could, in most circumstances, be created only by the mutual consent of the parties,[86] he found it essential to provide employers with an assurance that a strike in breach of a no-strike clause would be enjoined.[87] Since a sympathy strike could act to deprive an employer of his bargain had he negotiated "for a no-strike clause that extends beyond strikes over arbitrable disputes," Justice Stevens reasoned that a "public interest" identical to that in *Boys Markets* could dictate the issuance of an injunction in order to preserve the motivational factor.[88]

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[83] 96 S. Ct. at 3150, 3158. The dissent would also require that upon request by the union the preliminary stages of the dispute settlement process be passed over. *Id.* at 3158–59. Justice Stevens justified this preliminary determination of the scope of the no-strike clause on the grounds that the purpose of arbitration "[wa]s to remove completely any ambiguity in the agreement." *Id.* at 3156. Thus, when a breach of commitment is so clear that an arbitrator's decision would merely be pro forma, "it would be reasonable to give . . . legal effect to [the parties'] agreement" pending final arbitration. *Id.*

[84] *Id.* at 3151–52. The dissent observed that both *Buffalo Forge* and *Boys Markets* "deal[t] with the enforceability of a collective-bargaining agreement rather than with the process by which such agreements are negotiated and formed." *Id.* at 3152. For an analysis of the contradictory policies expressed in the Norris-LaGuardia Act and section 301(a) of the LMRA, see notes 29–30 *supra* and accompanying text.

As further support, the dissent cited a number of cases, *see* 96 S. Ct. at 3153, in which the federal policy against racial discrimination necessitated a departure from the exact wording of Norris-LaGuardia. *See, e.g.*, Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232, 234, 237 (1949) (agreement between employer and all-white union to deny Negro employees promotions enjoined despite the Norris-LaGuardia Act on ground that an injunction is the only effective method with which to protect rights of Negro workers). *See also* Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768, 770, 774 (1952).

[85] *See* 96 S. Ct. at 3152–55.

[86] *Id.* at 3155. For an example of an arbitration procedure established by statute, see The Railway Labor Act, 45 U.S.C. §§ 153–59 (1970).

[87] 96 S. Ct. at 3155. Justice Stevens reasoned that

> [a] sympathy strike in violation of a no-strike clause does not directly frustrate the arbitration process, but if the clause is not enforceable against such a strike, it does frustrate the more basic policy of motivating employers to agree to binding arbitration by giving them an effective "assurance of uninterrupted operation during the term of the agreement."

Id. (quoting from Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 454 (1957)).

[88] *See* 96 S. Ct. at 3152–53; Aaron, *The Strike and the Injunction—Problems of Remand and Removal*, N.Y.U. 18TH ANN. CONF. ON LAB. 93, 101 (1966); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 758–59 (1973).

Noting that it was possible that the union had not relinquished its right to engage

A basic disagreement between the majority and the dissent was whether the employer had received his full bargain. While Justice Stevens was uncertain as to the extent of the no-strike clause,[89] the majority found that the strike did not have "the effect . . . of depriving the employer of his bargain."[90] This finding may serve to explain the majority's failure to address the motivational issue raised by Justice Stevens. Also, the majority's conclusion, in effect, amounted to a preliminary determination of the arbitrable issue: the scope of the no-strike clause.[91]

Since an arbitrator may indeed thereafter conclude that the sympathy strike was illegal, the result of Justice White's finding is the creation of a rebuttable presumption of the legality of the strike, at least when an express general no-strike clause is involved.[92] Should an arbitrator make a final award in favor of the employer, however, the employer will have lost part of his bargain and, thus, to a certain extent, the "incentive"[93] to enter into arbitration agreements deemed necessary by the *Boys Markets* Court.[94] Of course, the danger of employers being discouraged from entering into arbitration agreements is not as severe in a *Buffalo Forge* situation as it was in *Boys Markets*, since an employer can still have strikes *"over"* arbitrable grievances enjoined.[95] Nevertheless, *Buffalo Forge*, by prohibiting the enjoining of sympathy strikes potentially in violation of contract,[96] could possibly deter certain affected employers from entering into fu-

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in a sympathy strike, Justice Stevens stated that the policy of encouraging arbitration applied only where sympathy strikes positively came under the no-strike clause. *See* 96 S. Ct. at 3153.

[89] *See* 96 S. Ct. at 3153 (dissenting opinion).

[90] *Id.* at 3147 (majority opinion).

[91] *See id.* at 3146–47. Justice White initially stated that the issue of whether the sympathy strike was illegal was a question to be determined by the arbitrator. *Id.* at 3146. The majority later found, however, that the strike did not result in a loss of the employer's bargain. *Id.* at 3147.

[92] *See id.* at 3146–47. Subsequent opinions have also interpreted *Buffalo Forge* as, in effect, creating a presumption of the legality of a sympathy strike that may be rebutted before the arbitrator. *See, e.g.*, United States Steel Corp. v. UMW Local 6321, 548 F.2d 67 (3d Cir. 1976) (Garth, J., concurring). *See also* NLRB v. Keller-Crescent Co., 538 F.2d 1291, 1296 (7th Cir. 1976).

[93] 398 U.S. at 248.

[94] *See* 96 S. Ct. at 3155; Gateway Coal Co. v. UMW, 414 U.S. 368, 382 (1974); 398 U.S. at 248, 252–53. *See also* William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12, 18–19 (1974); Alexander v. Gardner-Denver Co., 415 U.S. 36, 54 (1974). *But see* note 31 *supra* (discussion of Professor Gould's observation that available statistics contradicted this portion of the *Boys Markets* decision).

[95] 96 S. Ct. at 3146.

[96] *See id.* at 3146–49.

ture arbitration agreements.[97] Moreover, the majority's silence may be interpreted as an indication that the motivational policy is no longer an important aspect of an analysis of the injunction question.

The majority objected to the dissent's suggested procedure for insuring that the employer receive his bargain on the grounds that it would lead to both an unacceptable erosion of the Norris-LaGuardia Act and an additional judicial encroachment on the arbitration process.[98] It is highly questionable, however, whether the Norris-LaGuardia Act precludes the dissent's suggested method of realizing the motivational policy. When enacted, the Act was intended to insure that labor unions would not be deprived of the use of economic power through the issuance of injunctions.[99] It is anomalous, however, to apply Norris-LaGuardia to protect breaches of contracts that the same Act enabled the unions to enter into originally.[100] The Act should instead be read in light of its past accommodation and should not be deemed to prevent the enforcement of a valid collective bargaining agreement.[101]

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[97] *Id.* at 3155 (Stevens, J., dissenting). A related problem raised by the *Buffalo Forge* decision is its apparent conflict with the federal policy of preserving state court jurisdiction over suits for a breach of a collective bargaining agreement while maintaining a uniform labor law. *See* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 511 (1962). In the limited area of suits seeking to enjoin sympathy strikes, forum shopping between federal courts and state courts, where an injunction may still issue, will be encouraged and the goal of a uniform federal labor law frustrated. *See* 96 S. Ct. at 3154–55 (Stevens, J., dissenting); 398 U.S. at 244–47; Keene, *supra* note 26, at 49.

[98] *See* 96 S. Ct. at 3148–49.

[99] *See* 398 U.S. at 250–51; Cox, *supra* note 29, at 253–54; Wellington, *The No-Strike Clause and the Labor Injunction: Time for a Re-examination*, 30 U. PITT. L. REV. 293, 304–05 (1968).

[100] *See* 398 U.S. at 252–53 & n.22; Stewart, *No-Strike Clauses in the Federal Courts*, 59 MICH. L. REV. 673, 678 (1961).

[101] *See* 398 U.S. at 250–52; Cox, *supra* note 29, at 253–56; Keirnan, *Availability of Injunctions Against Breaches of No-Strike Agreements in Labor Contracts*, 32 ALB. L. REV. 303, 315 (1968); Stewart, *supra* note 100, at 683; Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 HARV. L. REV. 354, 365–66 (1958). *But see* Comment, *Labor Injunctions and Judge-made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 YALE L.J. 70, 94–100 (1960).

Justice White argued that contract enforcement in this case would indirectly lead to an evisceration of Norris-LaGuardia in that all alleged breaches would be subject to injunction. 96 S. Ct. at 3148–49. This fear, however, does not seem applicable to the dissent's proposed procedure. First, under the dissent's proposal only illegal strikes would be enjoined—not breaches of contract in general. *See id.* at 3158–59 (Stevens, J., dissenting). Secondly, there would have to be "convincing evidence that the strike is" illegal in order for it to be enjoined. *Id.* at 3158. In addition, the majority does not take sufficient cognizance of the fact that the arbitration agreement and the no-strike clause are quid pro quo. Since only the no-strike commitment has this special relationship

Although Norris-LaGuardia standing alone appears to provide insufficient support for the majority position, an adequate basis for the majority's conclusion may exist in the *Steelworkers Trilogy*.[102] The *Trilogy* required that in order to protect the jurisdiction of the arbitrator judicial interpretation of the collective bargaining agreement be limited to a finding of arbitrability, and no more.[103] Although the later need for an injunction forced the court in *Boys Markets* beyond a finding of mere arbitrability and into a determination of a no-strike clause violation,[104] the finding did not involve a great deal of contract interpretation since the strike was clearly "*over*" an arbitrable grievance.[105] *Buffalo Forge* presented a different situation, in that the strike was not "*over*" an arbitrable grievance, and the no-strike clause contained no specific reference to sympathy strikes. Consequently, whether the strike violated the no-strike clause was a more complex question requiring greater judicial interpretation.[106] A judicial determination of this magnitude increases the possibility of error by the court[107] and, in addition, might later prejudice an arbitrator's deter-

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with the arbitration agreement, there would seem to be no strong policy reason for enforcing other promises in the collective bargaining agreement by injunction. *See id.* at 3156–57 n.21.

[102] 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).

[103] United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567–68 (1960); *id.* at 570–71 (Brennan, J., concurring); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 585 (1960). According to the Court in *Warrior & Gulf*, parties themselves prefer an arbitrator over a judge because he can bring to bear on the problem his knowledge of a particular industry and the variances of the labor-management relationship. *Id.* at 582. *But see* P. HAYS, LABOR ARBITRATION, A DISSENTING VIEW 47–54, 66–75 (1966). For an explication of the relevant differences between the roles of an arbitrator and a judge, see Jones, *Power and Prudence in the Arbitration of Labor Disputes: A Venture in Some Hypotheses*, 11 U.C.L.A. L. REV. 675, 683–93 (1964).

[104] *See* 398 U.S. at 254; note 36 *supra*.

[105] *See* 96 S. Ct. at 3146; Gateway Coal Co. v. UMW, 414 U.S. 368, 382 (1974); 398 U.S. at 254.

[106] *See* 96 S. Ct. at 3149.

[107] *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 570 (1960) (Brennan, J., concurring); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581–82 (1960). Whether a sympathy strike is prohibited by an express general no-strike clause which makes no specific reference to sympathy strikes can be an intricate question. *See The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 247, 248 n.9 (1976) [hereinafter cited as *1975 Term*]. It may well be that neither party is exactly certain of the scope of the no-strike clause. *See* Cox, *supra* note 25, at 1491; Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1004–05 (1955). Thus, even a preliminary determination in that situation could cause the court to explore extensively the bargaining history, past agreements and common law of the shop. *See* Montana-Dakota Utils. Co. v. NLRB, 455 F.2d 1088, 1090 (8th Cir. 1972); *1975 Term*, *supra* at 248 n.9.

mination.[108]

Buffalo Forge differs from cases where the strike is directly "*over*" an arbitrable dispute in another important respect. Although the Court ruled in those cases that the strike violated the no-strike clause, it refrained from ruling on the merits of the dispute that caused the strike.[109] On the other hand, by ruling on the scope of the no-strike clause in a sympathy strike situation the Court would be adjudicating the primary contract dispute that is to be determined by the arbitrator.[110]

The judicial incursion into the merits necessary to implement the dissent's suggested motivational policy would, therefore, be greater than that in a typical *Boys Markets* situation. Such an increased imposition would go beyond that condoned within previous cases and could not be limited effectively in the spirit of the *Steelworkers Trilogy*.[111] In addition, the increased judicial intrusion needed to carry out the motivational policy would risk the loss of the right to engage in sympathy strikes—a right protected by section 7 of the NLRA[112]—through a mistaken preliminary de-

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[108] *See* 96 S. Ct. at 3149.

[109] Gateway Coal Co. v. UMW, 414 U.S. 368, 387–88 (1974); 398 U.S. at 254; *see* Abrams, *supra* note 40, at 209; Gorman, *supra* note 36, at 613. In *Boys Markets*, the strike was caused by a controversy over whether nonunion personnel could be used to stock the frozen food shelves. 398 U.S. at 239. In *Gateway Coal*, the arbitrable issue was whether the reinstatement of two foremen who had criminal prosecutions pending against them for falsification of mine ventilation records constituted a safety hazard. 414 U.S. at 371–72.

[110] 96 S. Ct. at 3146. *See* Abrams, *supra* note 40, at 209 & n.152; Gorman, *supra* note 36, at 613.

[111] Abrams, *supra* note 40, at 209–10.

[112] 29 U.S.C. § 157 (1970). Section 7 reads in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Id. While the Supreme Court has not ruled directly on the subject of whether a sympathy strike is protected activity under section 7, in NLRB v. Rockaway News Supply Co., Inc., 345 U.S. 71 (1953), the Court implied that, although subject to waiver, a refusal to cross a picket line was protected. *Id.* at 80; *see* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260–62 (1975).

The circuit courts have split on the issue, with the majority holding that the right to refuse to cross is protected. *Compare* Kellogg Co. v. NLRB, 457 F.2d 519, 523 (6th Cir.) (refusal to cross picket line is individual right "protected by law, whether . . . for economic reasons, for the purpose of improving working conditions, or for mutual aid or protection of employees who are members of another Union"), *cert. denied*, 409 U.S. 850 (1972); General Tire & Rubber Co. v. NLRB, 451 F.2d 257, 258 (1st Cir. 1971) (employee who refuses to cross picket line takes on rights of strikers and may not be discharged); NLRB v. Union Carbide Corp., 440 F.2d 54, 55–56 (4th Cir.) (refusal to cross picket line on principle is for mutual aid and protection and thus, protected activ-

termination.[113] Moreover, while there has not been an exhaustive study of the need to offer employers an incentive, existing empirical data indicates that such motivation may not be necessary.[114]

These factors should be weighed against the need to give employers incentive by enjoining a sympathy strike which the court has found to be illegal prior to arbitration. In the specific factual setting of *Buffalo Forge*—a no-strike clause without express inclusions *and* a strike not *"over"* an arbitrable grievance—the majority's abandonment of the motivational policy appears justified. However, by refusing to squarely face the difficult problem of ordering and evaluating the various policy demands, the majority has left unclear the weight these policies should carry in factual settings differing from that presented in *Buffalo Forge*.[115]

The shortcomings of the majority holding would crystalize in a case where the collective bargaining agreement contained a no-strike provision forbidding a sympathy strike. In the face of this express inclusion of sympathy strikes, it is difficult to discern how the

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ity), *cert. denied*, 404 U.S. 826 (1971) *and* NLRB v. Southern Greyhound Lines, 426 F.2d 1299, 1301 (5th Cir. 1970) (employee who refuses to cross line on principle is engaged in protected activity) *with* NLRB v. L. G. Everist, Inc., 334 F.2d 312, 317–18 (8th Cir. 1964) (refusal to cross is refusal to work and subjected employees to discharge for cause) *and* NLRB v. Illinois Bell Tel. Co., 189 F.2d 124, 127–29 (7th Cir. 1951) (employees could not act for mutual aid and protection individually, but only collectively through their bargaining unit). *See generally* Connolly, *Section 7 and Sympathy Strikes: The Respective Rights of Employers and Employees*, 25 LAB. L.J. 760 (1974).

In addition, the primary striking unit would seem to have an interest in having its picket line respected. *See* Abrams, *supra* note 40, at 196–97. An erroneously issued injunction may act to deprive the picketing union of legitimate bargaining power and strengthen the employer's position. *See id.* at 197. To remedy this problem one commentator has suggested joining the primary striking unit in the action to enjoin the sympathy strike as a necessary party under FED. R. CIV. P. 19(a). Abrams, *supra* at 202–04.

[113] *See* Abrams, *supra* note 40, at 198–99; Connolly & Connolly, *supra* note 39, at 146.

[114] *See* Gould, *supra* note 23, at 229–30 & n.63.

[115] One commentator has suggested that under the majority's holding a possible loss of the employer's bargain could be mitigated by submitting the issue to the arbitrator for a preliminary determination. *1975 Term*, *supra* note 107, at 254; *see* Jones, *supra* note 103, at 778. The court would then give effect to the award by injunction. *1975 Term*, *supra* at 254. It is contended that such a procedure would be as speedy as a judicial determination and would serve to keep the courts out of contract interpretation. *Id.* A quick determination would also ensure the employer his quid pro quo and thus discharge the motivational policy. However, it is questionable whether it is possible to ensure that the arbitrator will reach a prompt decision. *See* NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d at 328–29 (Hunter, J., dissenting), *discussed at* note 64 *supra*. Although it seems likely that a court will enforce such an order, *see* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597–99 (1960), the Supreme Court has never specifically so held. Moreover, such a solution offers little in the way of constructing a definitive federal labor policy.

majority's holding may fairly be applied. In such a case, the assumption made by the *Buffalo Forge* majority that the employer had bargained for a no-strike clause covering only strikes *"over"* an arbitrable grievance, could not be made. That a sympathy strike would deprive the employer of his bargain would be plain from the face of the collective bargaining agreement.[116]

In the case of an express inclusion of sympathy strikes, a weighing of the various factors leads to the conclusion that the motivational policy should be maintained. Denial of enforcement of an express union commitment may well serve to sour an employer's appetite for entering future arbitration agreements. Furthermore, judicial intrusion would be minimal in that the violation of the contract would be obvious, and there would be virtually no chance of the arbitrator differing with the court's finding.[117] Despite the *Buffalo Forge* majority's emphasis on the strike being *"over"* an arbitrable grievance, the enjoining of a sympathy strike when in violation of an express prohibition would be in line with the majority's reliance on the policy of enforcing dispute settlement mechanisms as agreed upon by the parties.[118] Moreover, it would be supportive of the federal policy in favor of the collective bargaining process.[119]

As the majority and dissenting opinions both demonstrate, the determination of whether to enjoin a strike pending arbitration of its legality necessarily entails an analysis of numerous considerations. In previous decisions, as well as in the dissenting opinion of Justice Stevens, these competing considerations have been resolved in favor of a greater degree of judicial involvement in the merits of labor disputes and away from a literal reading of Norris-LaGuardia.[120] The majority's decision in *Buffalo Forge*, however, has for the present arrested this trend.[121] Whether the Court in the future adheres to the ma-

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[116] *See* 96 S. Ct. at 3147.

[117] *See* Note, *supra* note 39, at 139–40.

[118] *See* 96 S. Ct. at 3147; Stokley-Van Camp, Inc. v. Thacker, 394 F. Supp. 715, 719–20 (W.D. Wash. 1975) (injunction issued to force union to comply with provisions of collective bargaining agreement where "[t]here [wa]s no arguable legality to sympathy strike").

[119] *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 453–54 (1957).

[120] *See* Gateway Coal Co. v. UMW, 414 U.S. 368, 377–84 (1974); 398 U.S. at 242–43, 251–53; Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455, 457–59 (1957).

[121] Justice White's holding is consonant with the views he expressed as part of the majority in Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 203 (1962). For a discussion of the *Sinclair* holding, see note 27 *supra*. *Sinclair* was subsequently overruled by *Boys Markets* in which Justice White dissented for the reasons stated in *Sinclair*. 398 U.S. at 254–55, 261. It is also interesting to note that Justice Brennan, author of the *Boys Markets* majority opinion, joined in Justice Stevens' dissent in *Buffalo Forge*. 96 S. Ct. at 3150.

jority's reasoning in *Buffalo Forge*, the reliance by the majority and the dissent on separate interpretations of *Boys Markets* illustrates the present vague and often contradictory character of federal labor policy.

In the wake of *Buffalo Forge*, the federal labor policy remains a mélange of various competing considerations.[122] The relevancy and relative importance of these elements remains unclear. Policies have been largely ignored without being explicitly overruled. As a result, the theoretical framework from which the Court approaches various situations is vague and confused. It may well be that the disparate policies of preventing the circumvention of arbitration, encouraging employers to agree to dispute settlement mechanisms, and keeping the courts out of the merits of the disputes can never be adequately accommodated, thus creating a serious need for congressional clarification of the national labor policy. Absent such action, it is uncertain which approach will predominate, and policy will continue to be structured on a case-by-case basis.

Gregory Jaeger

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[122] In a case decided subsequent to *Buffalo Forge*, the Third Circuit has refused to enjoin a sympathy strike. Latrobe Steel Co. v. United Steelworkers, 545 F.2d 1336, 1341–42 (3d Cir. 1976) (lower court injunction of sympathy strike vacated on grounds that strike not "over" an arbitrable grievance and thus was not an attempt to frustrate the arbitration process). *See also* United States Steel Corp. v. UMW, 418 F. Supp. 172, 174–75 (W.D. Pa. 1976).

In a concurring opinion in United States Steel Corp. v. UMW, 548 F.2d 67 (3d Cir. 1976) (Garth, J., concurring), Judge Garth attempted to clarify the *Buffalo Forge* holding by examining its application in light of various types of collective bargaining agreements. *Id.* at 74. The first type of contract would contain, in addition to an arbitration clause, a no-strike clause explicitly forbidding sympathy strikes. *Id.* at 75. Judge Garth maintained that under *Buffalo Forge* such a strike would be enjoinable pending arbitration. *Id.*

In a second type of situation such as that in *Buffalo Forge*, where the collective bargaining agreement contained arbitration procedures and a no-strike clause with no express inclusions, a sympathy strike could not be enjoined prior to arbitration. *Id.* The legality of the sympathy strike, however, would be arbitrable and should the arbitrator find the strike illegal the employer would then be able to obtain an injunction. *Id.*

The final class of contracts examined were those that provide for arbitration but do not contain an express no-strike clause. *Id.* With respect to such agreements Judge Garth stated that "*Buffalo Forge* established as a matter of law that a sympathy strike does not violate a labor contract which falls into this category." *Id.* (emphasis in original). Consequently, the legality of such strikes would not even be arbitrable. *Id.*

One commentator, however, has disagreed with Judge Garth as to whether a sympathy strike in violation of an express prohibition would be enjoinable under *Buffalo Forge*. Rains, Boys Markets *Injunctions: Strict Scrutiny of the Presumption of Arbitrability*, 28 LAB. L.J. 30, 37 (1977). Noting the *Buffalo Forge* majority's emphasis on the "*over*" requirement, the author concluded that the sympathy strike would not have been enjoined even if the no-strike clause had expressly included sympathy strikes. *Id.*