Boys Markets Injunctions: The Continuing Clash between Norris-LaGuardia and Taft-Hartley

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BOYS MARKETS INJUNCTIONS: THE CONTINUING CLASH BETWEEN NORRIS-LAGUARDIA AND TAFT-HARTLEY

by

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THE judiciary has struggled with competing policies behind labor relations statutes for more than four decades.† At common law, courts served as a potent deterrent to union activity. Employers easily could obtain injunctions against strikes. In 1932, however, the pendulum swung in favor of unions with the passage of the Norris-LaGuardia Act. Section 4 of the Act[1] removes the jurisdiction of federal courts over issuing restraining orders or injunctions, whether permanent or temporary, in labor disputes.[2] The growth of union activity and the frequency of strikes following Norris-LaGuardia prompted Congress to pass the Taft-Hartley Act in 1947. Section 301 of this Act[3] reintroduced the judicial injunction to serve a policy of encouraging arbitration when contractual disputes arose between employees and unions.

The evolution of labor law since the passage of these statutes has concerned the critical question of whether and how to reconcile the conflicting policies. The issue arises when the employer and union agree in a collectively bargained contract to arbitrate all disputes relating to the contract in return for the union's commitment not to strike when disputes covered by the contract arise. If the union does strike over an arbitrable issue, or if the employer refuses to arbitrate over an arbitrable issue, should courts refuse to enjoin the breaching party pursuant to the nonintervention policy of Norris-LaGuardia, or should courts order arbitration pursuant to the policy of Taft-Hartley? The Supreme Court determined in the landmark case

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† Editor's Note: The *Boys Markets* injunction is once again before the Supreme Court in Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 626 F.2d 455 (5th Cir. 1980), *cert. granted*, 101 S. Ct. 1737, 68 L. Ed. 2d 223 (1981) (No. 80-1045), involving the propriety of injunctions against strikes that might violate a no-strike clause. The author of this Article argues in Part IV that the *Buffalo Forge* case, which refused an injunction against sympathy strikes in the face of a no-strike clause, should be overruled. *Jacksonville Bulk Terminals* now presents the Court with this opportunity.

1. 29 U.S.C. § 104 (1976).
2. *Id.*
3. *Id.* § 185.

of *Boys Markets, Inc. v. Retail Clerks Local 770*[4] that an injunction may be permitted under certain circumstances. This Article discusses the judicial grappling with this issue in detail, with an analysis of the early cases, the *Boys Markets* decision, the criteria set forth in *Boys Markets* to obtain an injunction, the union injunction to preserve the status quo, and procedural requirements for obtaining an injunction.

I. HISTORY AND BACKGROUND

At common law, prior to 1933, union strikes could be thwarted with relative ease by the employer's use of the injunction.[5] Injunctions were granted without substantial forethought, usually at ex parte hearings, if the union activity was considered "tortious" and unjustifiable according to the judge's assessment of the union's objectives and methods.[6] As a response to considerable public dissatisfaction with lenient injunction standards, Congress passed the Norris-LaGuardia Act of 1932[7] to control the injunctive powers of the federal district courts[8] and to promote the "growth and viability of labor organizations."[9] Section 4 of the Act lists various labor activities immune from federal court injunctions, including peaceful strikes in connection with labor disputes.[10]

Five years after the passage of the Act, the number of strikes had increased sixfold.[11] The legislation also fostered a tremendous growth in unionism.[12] In response to this growth, Congress in 1947 passed the Taft-Hartley Act,[13] also known as the Labor-Management Relations Act, to limit the power of unions.[14] Section 301 of Taft-Hartley granted jurisdiction to the federal courts over labor disputes without regard to the amount in controversy or diversity of citizenship,[15] and aided the bargaining process by enforcing collective bargaining contracts under the rationale of promoting industrial peace.[16] One commentator viewed the Taft-Hartley

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4. 398 U.S. 235 (1970).

5. *See generally* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930).

6. *Report of Special Atkisson-Sinclair Committee*, ABA LABOR RELATIONS LAW SECTION—PROCEEDINGS 242 (1963).

7. 29 U.S.C. §§ 101-115 (1976).

8. *See* 75 CONG. REC. 4510 (1932).

9. Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235, 241 (1970).

10. 29 U.S.C. § 104(a) (1976).

11. 19 L.R.R.M. 49 (1947).

12. A. COX, LAW AND NATIONAL LABOR POLICY 12 (1960).

13. 29 U.S.C. §§ 141-187 (1976 & Supp. III 1979).

14. *Id.* § 151; *see* Note, *Labor Law—Buffalo Forge Co. v. United Steelworkers: The End to the Erosion of the Norris-LaGuardia Act*, 55 N.C.L. REV. 1247 (1977). To avoid confusion, this Article refers to the statute as the Taft-Hartley Act.

15. 29 U.S.C. § 185(a) (1976). Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . 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.

Id.

16. S. REP. No. 105, 80th Cong., 1st Sess. 17 (1947).

Act as a "shift in Congressional emphasis away from the protection of labor to the encouragement of the peaceful settlement of labor disputes and the protection of contractual rights under collective bargaining agreements."[17] The passage of Taft-Hartley, together with the failure to repeal any portion of Norris-LaGuardia, left potentially conflicting statutes alive: the latter requiring federal courts not to interfere in labor disputes, and the former permitting intervention.

Textile Workers Union v. Lincoln Mills[18] presented in 1957 the first opportunity for the Supreme Court to resolve the conflict. *Lincoln Mills* was a union suit to compel employer arbitration of a grievance as required by the collective agreement. The Court ordered the employer to arbitrate the grievance as required by the contract, reasoning that the employer's agreement to arbitrate was the quid pro quo of the union's no-strike agreement.[19] The scope of section 301 was thus viewed as not merely jurisdictional, but also as a basis for affirmative relief from the violation of provisions within a collective bargaining agreement. Although the ruling clearly conflicted with the Norris-LaGuardia Act, the Court side-stepped the issue by relying upon cases permitting the specific performance of an agreement to arbitrate pursuant to the Railway Labor Act.[20] It found the Taft-Hartley policy favoring the arbitration of disputes compelling, and concluded that future section 301 suits would be governed by a federal common law of labor relations "which the courts must fashion from the policy of our national labor laws."[21] This body of law would determine the rights and duties of parties to collective bargaining agreements.

The *Steelworkers* trilogy,[22] decided by the Supreme Court in 1960, reinforced the *Lincoln Mills* statements concerning the national policy favoring arbitration as a method of resolving disputes. These cases instruct courts having jurisdiction over an arbitrated settlement not to investigate the merits of a grievance award by the arbitrator unless no preexisting agreement to arbitrate the dispute had been made. Under these conditions, the arbitrator's order should be enforced without judicial inquiry into the propriety of the actual award. In the *Steelworkers* trilogy the Court articulated a presumption of arbitrability of labor disputes such that all doubts concerning the application of arbitration clauses to particular disputes should be resolved in favor of coverage.[23] Providing a guideline for interpretation of arbitration clauses, the Supreme Court said: "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance

17. Note, *supra* note 14, at 1253.
18. 353 U.S. 448 (1957).
19. *Id.* at 455.
20. *See* text accompanying notes 26-37 *infra*.
21. 353 U.S. at 456.
22. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).
23. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process."[24]

The *Steelworkers* trilogy and *Lincoln Mills* case concerned suits against employers, and they established the importance of arbitration in our national labor policy. Not until later cases, however, was the issue of the apparent conflict between Norris-LaGuardia and section 301 of Taft-Hartley addressed. Before discussing these opinions, a look at the Court's treatment of a similar conflict between the Norris-LaGuardia Act and the Railway Labor Act will be useful.

A. Accommodation Between Norris-LaGuardia and the Railway Labor Act

The Railway Labor Act was adopted in 1926 to protect railroad workers from discharge due to union membership, and to prevent employer meddling in the organization of employees covered by the Act.[25] Norris-LaGuardia and the Act were first accommodated in 1937, ten years before the enactment of Taft-Hartley, in *Virginian Railway v. System Federation No. 40, Railway Employees*.[26] In this case the Supreme Court approved the issuance of an injunction to require the defendant-railroad employer to bargain with the plaintiff-union under the Railway Labor Act.[27] The Court granted the relief despite the employer's argument that Norris-LaGuardia prohibited federal court injunctions in labor disputes.[28] The Court reasoned that the requirements of the Railway Labor Act could not be superseded by the more general provisions of the Norris-LaGuardia Act.[29] *Graham v. Brotherhood of Firemen*[30] followed *Virginian Railway* by allowing an injunction to force a firemen's union to represent its members without discrimination against Negroes as required by the Railway Labor Act.[31] The Supreme Court found nothing in Norris-LaGuardia that prohibited it from enjoining a union under these circumstances and emphasized that any other decision would have left the union members without a statutory remedy.[32]

In *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad*[33] the Court continued to chip away at the vitality of Norris-LaGuardia by upholding an injunction against a strike involving a dispute subject to final and binding arbitration. *Chicago River* required an accommodation of the Railway Labor Act and Norris-LaGuardia so that the purposes

24. *Id.* at 581.
25. Virginian Ry. v. System Fed'n No. 40, Ry. Employees, 300 U.S. 515, 563 (1937).
26. 300 U.S. 515 (1937).
27. 45 U.S.C. §§ 151-163 (1976).
28. 300 U.S. at 562-63.
29. *Id.* at 563.
30. 338 U.S. 232 (1949).
31. *Id.* at 240.
32. *Id.* at 239.
33. 353 U.S. 30 (1957).

of both would be preserved.[34] The Court reasoned that the issuance of an injunction did not violate the purpose of Norris-LaGuardia because the injunction did not intrude on the merits of the case or "[strip] labor of its primary weapon without substituting any reasonable alternative"[35]—the alternative being arbitration. Thus, *Chicago River* almost negated Norris-LaGuardia where it conflicted with the Railway Labor Act.[36] Subsequent cases followed the above results, although they altered somewhat the circumstances in which accommodation would occur.[37] The precedent set by the accommodation of the Railway Labor Act with Norris-LaGuardia greatly influenced the resolution of conflicts between Norris-LaGuardia and section 301 of Taft-Hartley.

B. The Sinclair *Decision*

Sinclair Refining Co. v. Atkinson[38] offered the Supreme Court its first opportunity to adopt the *Chicago River* reasoning and apply it to section 301 actions. *Sinclair* was an action by an employer to enjoin a union from violating a no-strike clause and to compel arbitration of an underlying grievance pursuant to their collective bargaining agreement. The action was a result of nineteen months of work stoppages and nine strikes over arbitrable grievances.[39] The Court held that no injunction should issue, rejecting the opportunity to adopt *Chicago River* and distinguishing that case on the basis that the Railway Labor Act was a statutorily imposed method of deciding disputes, while *Sinclair* dealt only with a method prescribed within a collective bargaining agreement.[40] The Court found the language of section 4 of Norris-LaGuardia crystal clear[41] as prohibiting the use of injunctions despite the national policy favoring arbitration. The Court distinguished *Lincoln Mills* as simply an action to compel the use of arbitration; it was not an injunction against "work stoppages, peaceful picketing or the nonfraudulent encouraging of those activities,"[42] prohibited by sections 4(a), (c), and (i) of Norris-LaGuardia.[43] The majority would have allowed an order to arbitrate, but not an injunction against strikes over arbitrable grievances due to the anti-injunction policy of Norris-LaGuardia.[44]

Justice Brennan sharply criticized the majority in his dissent,[45] which

34. *Id.* at 40.
35. *Id.* at 41.
36. *See* Note, *supra* note 14, at 1251.
37. *See, e.g.*, Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570 (1970) (removes "reasonable alternative to striking" requirement); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) (limited to situation in which injunctive remedy alone could preserve plaintiff's right and there is reasonable alternative to striking available).
38. 370 U.S. 195 (1962).
39. *Id.* at 211.
40. *Id.*
41. *Id.* at 215.
42. *Id.* at 212.
43. 29 U.S.C. §§ 104(a), (e), (i) (1976).
44. 370 U.S. at 213.
45. *Id.* at 215.

eventually had a significant impact on the accommodation controversy. He argued that although section 301 of Taft-Hartley was not a repeal of the Norris-LaGuardia Act, the courts had a duty to "seek out that accommodation of the two which will give the fullest possible effect to the central purposes of both."[46] Justice Brennan called for an accommodation of Norris-LaGuardia similar to the one reached by *Chicago River* pertaining to the Railway Labor Act.[47] Responding to the majority's argument that at the time of the Taft-Hartley amendments[48] Congress considered and rejected a repeal of section 4 of Norris-LaGuardia, Justice Brennan found an intent "at least as strong that Congress was content to rely upon the courts to resolve any seeming conflicts between § 301 and § 4 as they arose in the relatively manageable setting of particular cases."[49] He argued further that even Norris-LaGuardia encourages the use of arbitration, calling the majority decision a "crippling blow" to arbitration.[50] Employers, Justice Brennan predicted, would not be inclined to agree to arbitration clauses if they could not gain relief when such clauses were defied.[51]

Sinclair clearly undermined the arbitration process and the previous decisions that national policy favored the use of arbitration to resolve labor disputes. The Supreme Court removed the judicial teeth necessary to implement those decisions,[52] making it very difficult to reconcile *Chicago River* with *Sinclair*. The Court's distinction of statutory versus contractual arbitration requirements did not change the national policy favoring arbitration. *Sinclair* has been interpreted narrowly so as not to preclude enforcement of an arbitrator's decision after it was reached.[53] Further, in federal court an employer could be ordered to arbitrate, but employees striking over an arbitrable grievance could not be ordered back to work. By refusing to enforce union agreements not to strike, the courts were removing the quid pro quo for the employer's agreement to arbitrate.[54] Justice Brennan was correct. Employers would not be inclined to enter into an agreement knowing they could not enforce a collectively bargained no-strike clause.

Unable to enforce the no-strike clause in federal courts, employers turned to state courts, where they were often successful. This was so at least partially because of the Supreme Court holding in *Charles Dowd Box Co. v. Courtney*[55] that section 301 did not preclude state court jurisdiction to hear suits concerning enforcement of collective bargaining agreements.

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46. *Id.* at 216.
47. *Id.* at 218.
48. The Taft-Hartley amendments enacted § 301.
49. 370 U.S. at 223.
50. *Id.* at 227.
51. *Id.* (citing Norris-LaGuardia Act § 8, 29 U.S.C. § 108 (1976)).
52. Keene, *The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to Avco and Beyond*, 15 VILL. L. REV. 32 (1969).
53. *See, e.g.*, New Orleans S.S. Ass'n v. Longshore Workers Local 1418, 389 F.2d 369, 371 (5th Cir.), *cert. denied*, 393 U.S. 64 (1968).
54. *See* Note, *supra* note 14, at 1255.
55. 368 U.S. 502 (1962).

Although in *Local 174, Teamsters v. Lucas Flour Co.*[56] the Court required state courts to apply federal law in these suits, the Court did not answer whether Norris-LaGuardia limitations applied.[57] Many state courts ignored Norris-LaGuardia and issued injunctions pursuant to state law.[58]

Subsequently, in *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists*[59] the Court thwarted the employer's tactic of resorting to the state courts by holding that state court actions were removable to federal courts.[60] Thus, the employer could acquire an injunction in a state court only to have the union remove the action to federal court, which in turn would be obliged to dissolve the injunction under the *Sinclair* interpretation of Norris-LaGuardia and Taft-Hartley. This effectively left no jurisdiction in the state courts and stripped the employer of any practical means of enforcing a no-strike clause. A rethinking of *Sinclair* was in order.[61]

II. THE *BOYS MARKETS* CASE

In *Boys Markets, Inc. v. Retail Clerks Local 770*[62] the Court reviewed the *Sinclair* decision and in effect overruled it by sustaining an injunction to restrain a strike over a contractually arbitrable grievance.[63] *Boys Markets* arose from a collective bargaining agreement providing that all disputes concerning its "interpretation or application" be resolved by arbitration and that during the term of the contract the union would not engage in strikes, lockouts, picketing, or similar occurrences.[64] A dispute arose when management directed nonunion supervisory personnel to rearrange merchandise in a frozen food case. The union's unsuccessful attempt to replace the supervisors with union personnel precipitated a called strike.[65] *Boys Markets* was an appeal of a district court order enjoining the strike, picketing, and "any attempts by the union to induce the employees to strike or to refuse to perform their services."[66]

The Court in *Boys Markets* called the *Sinclair* decision a "significant departure" from their "otherwise consistent emphasis"[67] of the national policy of settling labor disputes by arbitration. It noted that as a result of later cases, particularly *Avco*, the *Sinclair* decision did "not further but rather frustrate[d] realization" of this labor policy.[68] *Dowd Box*[69] found a

56. 369 U.S. 95 (1962).
57. The question was answered negatively in 1974 in William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12 (1974).
58. Note, *supra* note 14, at 1256.
59. 390 U.S. 557 (1957).
60. *Id.* at 560.
61. *See* Justice Stewart's concurrence in *Avco*, which suggested that the Court reconsider *Sinclair*. *Id.* at 562.
62. 398 U.S. 235 (1970).
63. *Id.* at 254-55.
64. *Id.* at 238-39.
65. *Id.* at 239.
66. *Id.* at 240.
67. *Id.* at 241.
68. *Id.*
69. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

congressional intent in the enactment of section 301 of not disturbing, but merely supplementing, the jurisdiction of states over disputes concerning collective bargaining agreements. In *Boys Markets*, though, the Court said this intent was clearly usurped by the removal of state court actions to federal courts, where state injunctions would be dissolved. The removal process was used for a "totally unintended function," ousting state courts from jurisdiction in section 301 suits where injunctive relief was sought for breach of a no-strike obligation.[70]

The Court also found *Sinclair* offensive to the federal policy of labor law uniformity as stated in *Lucas Flour*.[71] It recognized, however, that the *Boys Markets* decision also would result in a certain disparity in results among state and federal forums, but it viewed the injunction as "so important a remedial device, particularly in the arbitration context"[72] that the ability to obtain it in some courts but not others would "produce rampant forum shopping and maneuvering from one court to another."[73] Such a result would greatly frustrate any uniformity of law and the enforcement of arbitration clauses.

The Court observed that a no-strike provision is the quid pro quo for an employer's agreement to submit grievances to arbitration.[74] Without the availability of an injunction to enforce the no-strike obligation, the employer's incentive to enter into arbitration agreements would be greatly reduced, thus frustrating the policy of encouraging arbitration to reduce industrial strife.[75] Other remedial avenues open to the employer, including actions for damages, were considered inadequate. In fact, the action for damages "would only tend to aggravate industrial strife and delay an early resolution of the difficulties."[76] *Sinclair* frustrated the purpose of arbitration: to "provide a mechanism for the expeditious settlement of industrial disputes."[77]

Thus, *Sinclair* was overruled and the principles of the *Sinclair* dissent were adopted. The Court required an accommodation between section 4 of Norris-LaGuardia and section 301 of Taft-Hartley to further national policy.[78] It found the principles of *Chicago River*[79] "equally applicable to [*Boys Markets*]."[80] Although it articulated an abrupt change in the law, the Court in *Boys Markets* characterized its holding as a narrow one, stating that an injunction would not issue in every case where a strike was

70. 398 U.S. at 244-45.
71. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).
72. 398 U.S. at 246.
73. *Id.*
74. *Id.* at 248.
75. *Id.*
76. *Id.*
77. *Id.* at 249.
78. *Id.* at 250.
79. Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30 (1957).
80. 398 U.S. at 252. Also interesting is Justice Stewart's concurrence, which is basically an apology for *Sinclair*. *Id.* at 255.

called over an arbitrable grievance.[81] Rather, the issuing court must first find that the facts met several criteria, first stated in the *Sinclair* dissent and specifically adopted by the Court in *Boys Markets*.[82] Subsequent to *Boys Markets*, these criteria have been the subject of many lower court decisions; normally, each must be met before an injunction may issue.[83]

A. The Collective Bargaining Agreement Must Contain a Mandatory Grievance and Arbitration Procedure and the Strike Must Be Over a Grievance the Parties Are Contractually Bound to Arbitrate

Whether the contract contains a mandatory grievance procedure applicable to a particular grievance depends largely upon the language of the particular contract. After *Boys Markets*, the question of how the particular contract was to be interpreted still remained. *Boys Markets* had not answered the question of whether the presumptions of arbitrability principles, set out in the *Steelworkers* trilogy, applied to *Boys Markets* cases as it did to the other section 301 actions. *Gateway Coal Co. v. UMW*[84] provided an affirmative answer.

In *Gateway*, a union struck over a safety dispute concerning the reinstatement of two foremen who had been convicted of criminal falsification of safety records. The employer sought a *Boys Markets* injunction against the strike, asserting that the dispute was covered by a broad arbitration clause in the collective bargaining agreement, even though the applicability of that clause to safety disputes was questionable.[85] The trial court granted the injunction, but the Third Circuit reversed, holding that injunctive relief was inappropriate where safety disputes were involved.[86] Relying in part on section 502 of Taft-Hartley,[87] the Supreme Court acknowledged a public policy "disfavoring compulsory arbitration of safety disputes"[88] but nonetheless reversed the circuit court, stating that the *Steelworkers* trilogy applied to this case and to *Boys Markets* cases in general.[89] The Court pointed to section 203(d) of Taft-Hartley,[90] which calls arbitration the "desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."[91] The Court continued that in an ambiguous agree-

81. *Id.* at 253-54.
82. *Id.* at 254; *see* United States Steel Corp. v. UMW, 320 F. Supp. 743, 746 (W.D. Pa. 1970).
83. United States v. Cunningham, 599 F.2d 120, 126 (6th Cir. 1979); Jackson Maritime Ass'n v. International Longshoremen's Ass'n, 571 F.2d 319, 323 (5th Cir. 1978).
84. 414 U.S. 368 (1974).
85. *Id.* at 373.
86. 466 F.2d 1157 (3d Cir. 1972).
87. 29 U.S.C. § 143 (1976).
88. 414 U.S. at 373.
89. *Id.* at 379.
90. 29 U.S.C. § 173(d) (1976).
91. 414 U.S. at 377.

ment, "doubts should be resolved in favor of coverage."[92] Thus, *Gateway* held the *Steelworkers* trilogy presumption of arbitrability applicable to *Boys Markets* cases.

Although this presumption is quite strong, in the following cases courts refused injunctions on the basis of no sufficient underlying agreement.[93] In *Teledyne Wisconsin Motors v. Local 283, UAW*[94] the Seventh Circuit found a dispute not covered by an arbitration clause and denied injunctive relief. No injunction was issued in *Burke v. Nasland Engineering*[95] because the contract had expired, and none in *National Mine Service Co. v. Steelworkers*,[96] in which the contract had been lawfully terminated by one of the parties. In *Baldwin Associates v. Teamsters*[97] a federal district court denied an injunction on grounds that arbitration was not mandatory under the agreement.[98] Apparently a mandatory grievance procedure without binding arbitration as its final step will not support injunctive relief.[99]

Compare these cases to *Emery Air Freight Corp. v. Local 295*,[100] in which a binding arbitration clause did exist, but the parties disputed the existence of the contract itself. An injunction was issued.[101] In *Certified Corp. v. Teamsters Local 996*[102] an injunction was granted even though an oral extension of a written contract had occurred. Only where the arbitration clause clearly cannot be construed to cover the dispute will a court refuse to compel arbitration.

B. The Collective Bargaining Agreement Must Contain a No-Strike Clause, Express or Implied

Where the "no-strike" provision of the collective bargaining agreement is clear on its face, no problem is present. A more difficult question arises when the contract does not contain an express agreement not to strike. In *Local 174, Teamsters v. Lucas Flour Co.*[103] the Supreme Court sustained a state court damage award to an employer for the breach of a provision requiring arbitration of grievances, although no express no-strike clause existed in the contract. The Court in *Boys Markets* cited *Lucas Flour* with apparent approval;[104] however, since *Boys Markets* was a case in which an

92. *Id.* at 380 n.10 (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960)).

93. For a more exhaustive list of cases, see R. HOTVEDT, STRIKES, STOPPAGES, AND BOYCOTTS 29-30 (1980).

94. 530 F.2d 727 (7th Cir. 1976).

95. 95 L.R.R.M. 2606 (S.D. Cal. 1977).

96. 510 F.2d 966 (4th Cir. 1975).

97. 101 L.R.R.M. 2685 (C.D. Ill. 1979).

98. *Id.* at 2686. *See also* Standard Food Prods. Corp. v. Brandenburg, 436 F.2d 964 (2d Cir. 1970).

99. Associated Gen. Contractors v. Illinois Conference of Teamsters, 454 F.2d 1324 (7th Cir. 1972).

100. 449 F.2d 586 (2d Cir.), *cert. denied*, 405 U.S. 1066 (1971).

101. 449 F.2d at 590.

102. 597 F.2d 1269 (9th Cir. 1979).

103. 414 U.S. 368 (1974).

104. 398 U.S. at 248 n.16.

express no-strike clause did exist, the question of whether a no-strike clause would be implied by the courts where injunctive relief was sought was left open.

In *Gateway Coal Co. v. UMW*[105] the Court held that a *Boys Markets* injunction was proper even in the absence of an express no-strike clause, reasoning that the principles of *Lucas Flour* were equally applicable to the *Boys Markets* situation.[106] The Court noted that "a contractual commitment to submit disagreements to final and binding arbitration gives rise to an implied obligation not to strike over such disputes."[107] It stated that absent an expression of intent to the contrary, "the agreement to arbitrate and the duty to not strike should be construed as having coterminus application."[108] Therefore, after *Gateway Coal* the question becomes whether a no-strike agreement was expressly excluded from the collective bargaining agreement. If not, a court probably will find a no-strike obligation.

C. *The Employer Should be Ordered to Arbitrate as a Condition of His Obtaining an Injunction Against the Strike*

In *Boys Markets* the Supreme Court stated the employer must be ordered to arbitrate as a condition of the granting of the injunction.[109] The Second Circuit in *Emery Air Freight Corp. v. Local 295*[110] ruled subsequently that a court must also find that both parties are required to arbitrate under the agreement.[111] The requirement that the employer be compelled to arbitrate can become a troubling issue. In *Chief Freight Lines Co. v. Local 886*[112] a dispute occurred over the right to represent eight of the employer's office employees. The employer refused to recognize the union and the issue was submitted to arbitration; a decision was reached, but the parties disagreed over the application of the decision. The union threatened a strike, and the employer requested and was granted a *Boys Markets* injunction. In the meantime, a rival union filed a representation petition seeking to represent the same employees. The employer then asked that the injunction order include a stay of arbitral proceedings in view of the conflicting claims for representation. The Tenth Circuit held that the injunction order was improper with the stay, as the order did not require the employer to arbitrate as a condition of his obtaining the injunction.[113]

An attempt to require the employer to allege and prove its willingness to arbitrate the issue in controversy was thwarted in *Jacksonville Maritime*

105. 414 U.S. 368 (1974).
106. *Id.* at 381.
107. *Id.*
108. *Id.* at 382.
109. 398 U.S. at 255.
110. 449 F.2d 586 (2d Cir.), *cert. denied*, 405 U.S. 1066 (1971).
111. 449 F.2d at 591. This requirement will take on greater significance in the discussion of the use of *Boys Markets* injunctions by unions. *See* text beginning with note 62 *supra*.
112. 514 F.2d 572 (10th Cir. 1975).
113. *Id.* at 581.

Association v. International Longshoremen's Association Local 1408-A.[114] The Fifth Circuit in this case noted that this procedure was not specifically required by *Boys Markets* and would "confuse issues," allowing "the very conditions—work stoppage and circumvention of arbitration—that *Boys Markets* sought to remedy."[115] Evidently, the issue of willingness to arbitrate must be raised defensively to become part of a case.[116]

D. A Breach of the No-Strike Requirement, Either Occurring or Imminent, Must Exist

Normally, courts will require an actual strike before an injunction will issue. Prospective injunctions, when a strike is imminent but not yet occurring, raise more difficult questions. Where a pattern of illegal strikes or similar activity has been demonstrated, most courts are inclined to issue an injunction against future strikes.[117] For example, in *Old Ben Coal Corp. v. Local 1487, UMW*[118] the employer showed that the union had engaged in a series of at least eleven illegal strikes over arbitral grievances, including eight since the granting of a previous, more narrow injunction. The Seventh Circuit, finding "no other avenues of relief," granted the prospective injunction.[119] Not all circuits are in agreement that a prospective injunction may be issued,[120] nor are the ones that seem to allow issuance in agreement as to the circumstances necessary for issuance.[121] Nevertheless, their attitude seems to be that, given the right set of circumstances, a prospective injunction will issue.[122]

E. Traditional Equitable Principles Must Support Issuance of the Injunction

The issues involved in this broad category spill over into those discussed in the next two categories and will be more fully discussed there; however, an "equitable principles" issue was discussed in *Western Publishing Co. v. Local 254, Graphic Arts International Union*.[123] In *Western Publishing* an employer brought an action for damages under section 301 of Taft-Hartley[124] against a union and certain of its officers and members for violation

114. 571 F.2d 319 (5th Cir. 1978).
115. *Id.* at 324.
116. *See* Avco Corp. v. Local 787, UAW, 459 F.2d 968, 973 (3d Cir. 1972).
117. *See, e.g.*, United States Steel Corp. v. UMW, 534 F.2d 1063 (3d Cir. 1976); CF&I Steel Corp. v. UMW, 507 F.2d 170 (10th Cir. 1974).
118. 500 F.2d 950 (7th Cir. 1974).
119. *Id.* at 953.
120. *See, e.g.*, United States Steel Corp. v. UMW, 534 F.2d 1063 (3d Cir. 1976); United States Steel Corp. v. UMW, 519 F.2d 1236 (5th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976).
121. *See* Latas Libby's, Inc. v. United Steelworkers, 609 F.2d 25 (1st Cir. 1979), and cases cited therein.
122. *See* Drummond Co. v. District 20, UMW, 598 F.2d 381 (5th Cir. 1979), in which the Fifth Circuit left open the question of a "single subject" prospective injunction. In United States Steel Corp. v. UMW, 519 F.2d 1236 (5th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976), the Fifth Circuit had disallowed a prospective injunction broader in scope.
123. 522 F.2d 530 (7th Cir. 1976).
124. 29 U.S.C. § 185 (1976).

of arbitration and no-strike clauses in their collective bargaining agreement. A dispute developed over whether a certain job constituted struck work, work transferred from another plant of the employer involved. Both the union and the employer agreed that if it was struck work, the union could refuse to do the work, as the struck work provision was an exception to the no-strike clause. Further, they agreed that the issue was subject to arbitration.[125] The employer argued that the union did not have the right to strike until the issue was determined favorably by arbitration. The union argued that to deny its right to refuse to work until the arbitration process was completed was equivalent to "a destruction of that right";[126] it could not undo work already done while the arbitration process was pending. In addition, the union would not exercise its right for fear of a damage award should it be wrong. The union reasoned that in order to preserve the right to refuse to do the work it must be allowed to exercise that right prior to the arbitral determination.[127]

The Seventh Circuit acknowledged the union's arguments, but called them "misdirected," asserting that such arguments would be proper in a *Boys Markets* injunction case, not a damage case. Consequently, the court refused to evaluate them.[128] Although it is a damages case, *Western Publishing* indicates the equitable considerations that would be appropriate and that must be evaluated in each case, for it "does [not] follow . . . that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance."[129] In this respect, Western Publishing may provide an effective blueprint for future anti-injunction advocates.

One other case that has considered the balancing of equities problem is *National Rejectors Industries v. United Steelworkers*.[130] In *National Rejectors* an employer's suspension of employees for violation of work rules dropped plant production by thirty percent. The record noted that if these conditions continued, the company could not perform existing contracts and would lose future contracts. The district court granted an injunction, and the Eighth Circuit affirmed, concluding that these suspensions were the result of deliberate union attempts to break the rules and disrupt the operations of the plant.[131]

In contrast, the company went to considerable effort to keep the plant in operation. It suspended the rules in an attempt to keep the work force active. The fact that the company was at all times prepared to resolve the disputes through arbitration was undisputed. The union offered no evidence that it would be harmed by an injunction. Balancing the respective equities, the Court found them greatly favoring the employer.[132]

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125. 522 F.2d at 530-32.
126. *Id.* at 533.
127. *Id.*
128. *Id.*
129. *Id.*
130. 562 F.2d 1069 (8th Cir. 1977).
131. *Id.* at 1077.
132. *Id.* at 1077-78. Note that in this case, as in most others, the balancing of equities

F. The Activity Will Cause Irreparable Harm to the Employer

The irreparable harm requirement in *Boys Markets* was simply an indication by the Supreme Court that traditional equitable principles would be applied in conjunction with the special requirements peculiar to *Boys Markets* injunctions.[133] One of the basic underlying principles of *Boys Markets* is that in these cases an action for damages under section 301 of Taft-Hartley is inadequate to an employer who is losing the good will of the business through the illegal activity of the union.[134] The employer's damages are irreparable and difficult to measure. In addition, according to *Boys Markets*, the damages action during or after a dispute would "tend to aggravate industrial strife and delay in early resolution of the difficulties between employer and union."[135]

Given these judicial guidelines the employer seemingly can characterize its particular fact situation to fit the *Boys Markets* "irreparable harm" requirement quite easily. The employer need only allege the facts that will show it is being damaged more than just monetarily, and that this damage is both irreparable and difficult to measure. This situation is illustrated by *Panella v. Teamsters Local 150*,[136] in which an injunction was granted to an employer upon a finding that a strike would interfere substantially with the employer's ability to carry on its business and to retain customer goodwill.[137] An injunction also was granted in *McNichol Co. v. Food Drivers Local 500*,[138] as the court found that "continuation of the strike would make it impossible for the employer to meet its contractual commitments."[139] In neither case were anything more than these broad and "boiler plate" types of allegations required to obtain an injunction.

In *General Building Contractors Association v. Local Unions 542, 542-A, 542-B, International Union of Operating Engineers*[140] a federal district court found that the plaintiff-employer would lose $25,000 per day if a work stoppage occurred. It also found that the "public likewise [would] suffer irreparable injury"[141] because the employer was a contractor in charge of constructing a high rise building and six other projects. This case is noteworthy in that it did not consider the question of whether the $25,000 per day loss was in fact irreparable, and more importantly, that it did consider the issue of irreparable harm to persons who were strangers to the lawsuit. The case seems to illustrate that traditional broad equity principles are quite alive in *Boys Markets* cases, and that the magnitude of the

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requirement is closely akin to the irreparable harm and relative harm requirements in the discussion of criteria 6 and 7.

133. *See* Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability*, 85 HARV. L. REV. 636 (1972).

134. *See* William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12 (1974).

135. 398 U.S. at 248.

136. 89 L.R.R.M. 2463 (E.D. Cal. 1974).

137. *Id.* at 2463.

138. 88 L.R.R.M. 3349 (E.D. Pa. 1975).

139. *Id.* at 3349.

140. 371 F. Supp. 1130 (E.D. Pa. 1974).

141. *Id.* at 1136.

loss bears directly upon whether the harm is characterized as irreparable.

This is not to say that the irreparable harm requirement is never a stumbling block in a *Boys Markets* case. In *Postal Workers v. Bolger*[142] the union was granted an injunction by a federal district court to stop the employer's unilateral elimination of a shift and a transfer of employees pending resolution of the issue by arbitration. The Fourth Circuit vacated the injunction on grounds that the union failed to make a sufficient showing of irreparable harm.[143] The court noted that the employees simply had been reassigned within the same office, and that it would be a simple matter for an arbitration award to return the parties to the status quo ante should the union prevail.[144] Because no threat to the arbitration process was present, in that the arbitrator's award could repair any harm done, no need for "judicial intrusion" existed.[145]

G. The Employer Will Suffer More Harm from the Denial of the Injunction than Will the Union from Its Issuance

This requirement is another traditional equity principle retained in the *Boys Markets* criteria. It again requires the courts to balance the equities of a labor dispute. Normally this balancing will be relatively simple once an employer shows irreparable harm. Examples are the *McNichol*[146] and *Panella*[147] cases in which the courts did not separate the "irreparable harm" and "balancing of equities" problems. This is not always the case, however.

In *Anheuser-Busch, Inc. v. Teamsters Local 633*[148] a dispute arose over an employee rule prohibiting the wearing of "tank-tops" during working hours. Those employees who refused to follow the rule were sent home. As a result, more and more employees wore tank tops and were sent home until a plant shutdown ensued. The employer sought a *Boys Markets* injunction prohibiting the wearing of tank tops and ending the plant shutdown pending arbitration of the underlying dispute.

Although the dispute unquestionably was arbitrable, the First Circuit vacated the federal district court's injunction by balancing the equities and stating that a rule designed to stop the wearing of tank tops in areas seen by persons touring the plant was hardly "the type of injury properly providing the basis for relief."[149] Further, the court could not see any irreparable injury to the employer by the wearing of tank tops pending arbitration. The court noted, however, that this was a limited ruling based

142. 104 L.R.R.M. 2341 (4th Cir. 1980).
143. *Id.* at 2343.
144. *Id.*
145. *Id.*
146. McNichol Co. v. Food Drivers Local 500, 88 L.R.R.M. 3349 (E.D. Pa. 1975).
147. Panella v. Teamsters Local 150, 89 L.R.R.M. 2463 (E.D. Cal. 1974).
148. 511 F.2d 1097 (1st Cir. 1975).
149. *Id.* at 1100.

on the facts of the case,[150] and stated that a different result might occur if the employees refused to comply with a rule regarding a safety precaution, or if the disregard of work rules seriously undermined the employer's ability to conduct business.[151]

The *Anheuser-Busch* facts may be contrasted with those in *National Rejectors Industries v. United Steelworkers*,[152] a work rules case in which the employer was granted an injunction. The Eighth Circuit distinguished *Anheuser-Busch*, noting that the employer had offered to suspend the rules pending arbitration so that the disruptions caused by suspensions for violations of the rules would cease.[153] This case thus indicates that conduct of the parties prior to issuance will be one of the factors considered by the courts when balancing the equities, a principle similar to the "clean hands" doctrine.

H. Likelihood of Success: An Additional Issue?

One issue, the genesis of which may be found in the application of traditional principles in *Boys Markets* cases, is whether the party seeking the injunction must show a reasonable likelihood of success before the arbitrator. In nonlabor cases, under Federal Rule of Civil Procedure 65, a court is required to make an interim evaluation of the merits of the case to determine if a reasonable likelihood exists that the person seeking the injunction will prevail on the merits.[154] The question, then, is whether this requirement is carried over to *Boys Markets* cases.

Authority on this issue seems to be severely split. *Transit Union Division 134 v. Greyhound Lines, Inc. (Greyhound I)*[155] indicates that a preliminary showing of reasonable likelihood of success is not necessary in *Boys Markets* cases; the moving party need show only that the claims in arbitration were not "plainly without merit."[156] *Hoh v. Pepsico, Inc.*,[157] however, indicates that a showing of reasonable likelihood of success is required. Although, at first glance, these cases appear to be at odds, they most probably are not. As Judge Sneed attempted to explain in *Greyhound I*:

> A reasonable interpretation is that "plainly without merit" is the negative form of a standard, the affirmative form of which is "some likelihood of success." Under this view, Judge Friendly was merely illustrating the standard "some likelihood of success" when he described the inequity of issuing preliminary injunctions pending arbi-

150. *Id.* (citing United Steelworkers v. Blaw-Knox Foundry & Mill Mach., Inc., 319 F. Supp. 636, 640-41 (W.D. Pa. 1970)).

151. 511 F.2d at 1100.

152. 562 F.2d 1069 (8th Cir. 1977).

153. *Id.* at 1077-78.

154. FED. R. CIV. P. 65; *see* Penn v. San Juan Hosp., Inc. 528 F.2d 1181, 1185 (10th Cir. 1975).

155. 529 F.2d 1073 (9th Cir.), *vacated and remanded on other grounds*, 429 U.S. 807 (1976), *rev'd*, 550 F.2d 1237 (9th Cir. 1977).

156. 529 F.2d at 1077.

157. 491 F.2d 556, 561 (2d Cir. 1974).

tration which were "plainly without merit."[158]

So, the two tests are quite similar or, perhaps, the same.

Nonetheless, the issue continues to cause confusion in the courts. One case, *Teamsters Local 764 v. Branch Motor Express Co.*[159] cites both *Greyhound I* and *Hoh*, and concludes that "some likelihood of success on the merit of the dispute,"[160] must exist and that this test may not be met by a showing that the "position [plaintiff] will espouse in arbitration is sufficiently sound to prevent arbitration from becoming a futile endeavor."[161] Evidently, in *Branch Motor* the court viewed the "likelihood of success" requirement as met by the showing of the "soundness" of the position of the person requesting arbitration. *Reasonable* likelihood of success may mean *any* likelihood of success under this standard.

Other courts have not taken this approach. Many require more than just a showing of arbitrability of the underlying issue, instead requiring a showing that the party seeking an injunction has a reasonable likelihood of prevailing on the merits at the arbitration hearing.[162] In *Drivers Local 71 v. Akers Motor Lines, Inc.*[163] the district court held a "mini-hearing" on the merits, reminiscent of some early class action certification hearings, to determine if the likelihood of success requirement was met. On appeal, the Fourth Circuit castigated the lower court for abusing its discretion.[164] In any event, the problem of proving likelihood of success, however treated by a court, is one that must be considered by the seekers of a *Boys Markets* injunction.

The better result would be to require only the preliminary showing of arbitrability to cut short frivolous claims or those using the arbitration process as a pretext for obtaining an injunction. This would prevent arbitration from becoming a "futile endeavor."[165] A court cannot and should not be called upon to assess the merits of labor disputes. This is left to the arbitrator and is expressly withheld from courts by national labor policy as expressed in Norris-LaGuardia.[166] The Supreme Court in both *Boys Markets* and *Sinclair* made no such assessment requirement, and none should be read into their decisions. A court should make a finding as to whether the dispute is "arguably arbitrable,"[167] and look no further into the merits of the case.

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158. 529 F.2d at 1077.

159. 463 F. Supp. 282 (M.D. Pa. 1978).

160. *Id.* at 288.

161. *Id.* at 289.

162. *See, e.g.*, Communications Workers v. Western Elec. Co., 430 F. Supp. 969 (S.D.N.Y. 1977).

163. 582 F.2d 1338 (4th Cir. 1978).

164. *Id.* at 1342.

165. Transit Union Div. 1384 v. Greyhound Lines, Inc. (Greyhound I), 529 F.2d 1073, 1078 (9th Cir.), *vacated and remanded on other grounds*, 429 U.S. 807 (1976), *rev'd*, 550 F.2d 1237 (9th Cir. 1977).

166. 29 U.S.C. § 104 (1976).

167. Jacksonville Maritime Ass'n v. International Longshoremen's Ass'n Local 1408-A, 424 F. Supp. 58 (M.D. Fla. 1976).

III. THE UNION INJUNCTION TO PRESERVE THE STATUS QUO

The *Boys Markets* decision dealt with an attempt by an employer to enjoin a union from striking in violation of a no-strike clause in a collective bargaining agreement when the underlying dispute was subject to arbitration. The arbitration clause, whether coupled with an express or implied no-strike clause, is viewed as the quid pro quo for the no-strike clause: the union promises not to strike over certain grievances if the employer, in turn, allows the arbitration process to intrude upon his right to manage his own affairs.[168] But does it follow that the employer, by promising to arbitrate disputes, has agreed not to implement changes in company policy until the grievance process has resolved the dispute? Many would argue that the employer has made no such agreement, and that to enjoin him pending arbitration enforces a promise neither made by the employer nor intended by either party.[169]

Opinions in two cases, known as *Greyhound I*[170] and *Greyhound II*,[171] illustrate this problem. In *Greyhound I* the Ninth Circuit considered the appeal of an injunction restraining an employer from changing existing employee work schedules. The court recognized the national policy favoring arbitration of disputes, but it desired to exercise some restraint in granting injunctive relief by focusing upon "irreparable injury" as a significant requirement.[172] Although it believed that injunctive suits would not then be used to usurp the collective bargaining process judicially, the court found the requisite irreparable injury and sustained the injunction: the trial court's decision was not "clearly erroneous."[173] If the interests of the union (or the employees) are likely to suffer the requisite injury, or if the arbitration process itself appears to be in danger, then the court will be allowed to intrude in the dispute. Otherwise, the court will demur. In other instances the retention of the status quo pending arbitration "may be bargained for by the union and agreed to by the employer."[174] Thus, the parties may make it part of the collective bargaining agreement, but if they fail to do so, *Boys Markets* will not provide the judicially imposed equivalent.

Greyhound I was vacated and remanded for further consideration in light of the *Buffalo Forge Co. v. United Steelworkers*[175] decision. In *Greyhound II*, decided the following year, the Ninth Circuit revised its decision and denied the status quo ante injunction.[176] It reasoned that the *Buffalo*

168. *See* Comment, *Injunctions Restraining Employers Pending Arbitration: Equity and Labor Policy*, 82 DICK. L. REV. 487, 502-03 (1978).
169. *Id.* at 503.
170. Transit Union Div. 1384 v. Greyhound Lines, Inc., 529 F.2d 1073 (9th Cir.), *vacated and remanded*, 429 U.S. 807 (1976).
171. Transit Union Div. 1384 v. Greyhound Lines, Inc., 550 F.2d 1237 (9th Cir.), *cert. denied*, 434 U.S. 837 (1977).
172. 529 F.2d at 1079.
173. *Id.* at 1078.
174. *Id.* at 1079.
175. 428 U.S. 397 (1976); *see* text accompanying notes 215-27 *infra*.
176. 550 F.2d at 1239.

Forge[177] decision required a different analysis, and focused on the contents of the labor agreement rather than the nature of the injury. In the absence of an agreement not to strike, a union could not be enjoined from striking. Consequently, in absence of an agreement to preserve the status quo during arbitration, the employer could not be compelled to preserve the status quo. In *Greyhound II* the court found no such express promise, and because of *Buffalo Forge*, none would be implied.[178]

The court in *Greyhound II* recognized the *Gateway Coal* holding that a promise to submit a dispute to arbitration may justify an implied duty not to strike, but it denied that this promise implied a duty to preserve the status quo.[179] The court stated that the "source of this difference is that a strike pending arbitration generally will frustrate and interfere with the arbitration process while the employer's altering the *status quo* generally will not."[180] The court also stated, however, that "the implication of a duty not to strike may be 'essential to carry out the promise to arbitrate and to implement the private arrangements for the administration of the contract.' "[181] Ordinarily no corresponding necessity requires the implication of an agreement to preserve the status quo. If the employer's action is wrong, the situation can be restored substantially to the status quo ante. The court did not say that an agreement to remain at the status quo pending arbitration may not be implied in the proper case, but that case seems to be one in which the arbitrator by his decision would not be able to return the parties to the status quo ante.

The court calls the *Greyhound II* test more restrictive than that in *Greyhound I*, but this view may be superficial. To decide whether the status quo ante can be preserved, one still must look to the nature and extent of the injury caused by the employer's activity. If the activity causes irreparable harm, under *Greyhound II* the status quo ante is not preserved and an agreement may be implied. Clearly the *Greyhound I* test also is met. The only distinction, then, most probably lies in the amount of harm required. By its reversal in *Greyhound II* the court seems to indicate it will require more.

Subsequent to *Greyhound II*, courts have had a difficult time wrestling with these concepts. In *Lever Brothers v. Chemical Workers Local 217*,[182] decided prior to *Greyhound II*, the Fourth Circuit granted an injunction, citing *Greyhound I*. After *Greyhound II*, and on petition for rehearing, it noted that *Greyhound II* allowed for an "implied" promise to preserve the status quo,[183] but the court failed to analyze whether such a promise was in fact implied. Rather, it argued that had the status quo not been pre-

177. *Buffalo Forge* was an injunction against a sympathy strike, in which the Court found no express agreement not to strike over a sympathy strike.
178. 550 F.2d at 1239.
179. *Id.* at 1238.
180. *Id.* at 1239 (quoting *Buffalo Forge*, 428 U.S. at 411).
181. 550 F.2d at 1239.
182. 554 F.2d 115, 119-20 (4th Cir. 1976).
183. *Id.* at 122 n.12.

served, the employer would have moved its plant permanently, causing great harm to the union and making arbitration futile.[184] Thus, the court paid lip service to *Greyhound II*, but failed to move beyond *Greyhound I*'s relative harm analysis.

The Third Circuit in *United Steelworkers v. Fort Pitt Steel Casting*[185] paid even less homage to the *Greyhound II* analysis. "The critical issue," according to the court, "was whether breaches of the contractual agreement to arbitrate caused or threatened to cause irreparable injury to Union members."[186] It found that the employer was threatening to discontinue making premium payments on hospital insurance benefits, which would cause the policies to lapse; therefore, injunctive relief was necessary to prevent irreparable harm.[187] It cited *Greyhound II* only for the proposition that the propriety of a status quo injunction was based on whether "the party seeking equitable relief could be restored to the *status quo ante* by arbitration."[188]

Consideration of injury and the ability to return to status quo appear to be the dominant tests for the denial or issuance of injunctions against employers. The underlying question, however, remains: What amount and type of harm will the union be likely to sustain? In *United Steelworkers v. Blaw-Knox Foundry & Mill Machinery, Inc.*[189] a federal district court decided an injunction would issue when jobs would be lost, resulting in a possible safety hazard to remaining employees. This decision does not mean that an injunction will necessarily issue in circumstances in which loss of jobs and wages are involved, particularly not when a showing is made that an arbitrator's award may be able to compensate for those losses.[190] Mere inconvenience is not sufficient,[191] although actions of an employer that cause a "tremendous disruption" in the lives of the employees and their families may constitute irreparable injury.[192] Irreparable harm is immediate injury that is certain and great.[193] Whether that test is met is determined as a question of fact.

Although courts have focused upon the irreparable injury requirement in status quo injunctions, the *Boys Markets* criteria must be met before an injunction may issue.[194] Should the union fail to make a showing that it is ready and willing to arbitrate, or fail to show that the grievance is arbitrable,[195] an injunction will not issue. Courts scrutinize closely equitable

184. *Id.* at 122.
185. 598 F.2d 1273 (3d Cir. 1979).
186. *Id.* at 1280.
187. *Id.*
188. *Id.* at 1280 n.19.
189. 319 F. Supp. 636 (W.D. Pa. 1970).
190. Local 764 v. Branch Motor Express Co., 100 L.R.R.M. 2939 (M.D. Pa. 1978).
191. Local 174, Utility Workers Union v. South Pittsburg Water Co., 345 F. Supp. 52 (W.D. Pa. 1972).
192. Technical Office & Professional Workers Union Local 757 v. Budd Co., 345 F. Supp. 42 (E.D. Pa. 1972).
193. Flood v. Kuhn, 309 F. Supp. 793, 799 (S.D.N.Y. 1970).
194. Lever Bros. v. Chemical Workers Local 217, 554 F.2d 115 (4th Cir. 1976).
195. Cedar Coal Co. v. UMW, 560 F.2d 1153 (4th Cir. 1977).

principles when confronted with a union request for a *Boys Markets* injunction. Even if a finding of irreparable harm is made, an injunction may not issue if the court balances the equities in favor of the employer. Thus, in *Communications Workers v. Western Electric Co.*,[196] although a court found loss of employee recall rights that could not be returned through arbitration to be sufficient irreparable injury, it nonetheless refused to grant an injunction, balancing the equities in favor of the employer.

An unusual example of balancing the equities occurred in *Columbia Typographical Union 101 v. Evening Star Newspaper Co.*[197] The plaintiff-union contested the right of a newspaper publisher to close its business during the life of a collective bargaining contract. The issue clearly was arbitrable under the terms of the contract, which contained a clause allowing for the maintenance of the status quo during the arbitration. Consequently, the union sought injunctive relief to stay the closing, and the court found irreparable injury: "In this case, if the *Star* goes out of existence prior to the arbitrator's decision, the arbitrator will be effectually handcuffed from remedying the situation."[198] The court stated that the employer would not be hurt anymore than it had been previously during the life of the contract. In addition, the court recognized a "public interest in diverse viewpoints expressed in the media," and observed that trying to keep Washington from becoming a "one-paper town" was everyone's responsibility.[199]

The *Newspaper Co.* analysis is unusual in two respects. First, it looks at the employer's injury in terms of whether the injunction will increase the harm to the employer and does not take into account the continuation of the past injury or the efforts of the employer to curb that harm. Secondly, it includes within its balancing formula a public interest component.

IV. SYMPATHY STRIKES: THE NEW BATTLEGROUND

The sympathy strike is a work stoppage called by one union for the purpose of supporting another union's strike. The enjoinability of sympathy strikes where the governing collective bargaining agreement contained no-strike and mandatory arbitration clauses has troubled the courts and provided fruits for much litigation since the *Boys Markets* decision. Courts have been divided over the question: the Fourth Circuit has held such strikes enjoinable under *Boys Markets*,[200] whereas the Fifth Circuit has held them not enjoinable because such strikes were not "over a grievance."[201] The Supreme Court, in 1976, resolved the issue by holding against the enjoinability of sympathy strikes in *Buffalo Forge v. United*

196. 430 F. Supp. 969 (S.D.N.Y. 1977).
197. 100 L.R.R.M. 2394 (D.D.C. 1978).
198. *Id.* at 2396.
199. *Id.*
200. *See, e.g.*, Monongahela Power Co. v. Local 2322, International Bhd. of Electrical Workers, 484 F.2d 1209 (4th Cir. 1973).
201. *See, e.g.*, Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972).

Steelworkers.[202]

One of the leading cases prior to *Buffalo Forge* supporting injunctive relief against sympathy strikes was *NAPA, Pittsburgh, Inc. v. Automotive Chauffeurs Local 926*.[203] In *NAPA* the district court enjoined the union from striking when another union, seeking to gain control of a different plant owned by the employer, began picketing NAPA's plant. Local 926 refused to cross the picket line, arguing its action to be proper because a provision of its collective bargaining agreement allowed the union to refuse to cross a picket line during a "primary labor dispute."[204] The company urged that the dispute was secondary in nature and that the primary-secondary question was subject to the mandatory arbitration and no-strike provisions in the collective bargaining agreement. The injunction was granted as within the *Boys Markets* exception to the Norris-LaGuardia Act.[205] The Third Circuit affirmed the district court, relying upon "the basic premise that the law favors arbitration of labor disputes."[206] It found the primary-secondary disagreement to be an arbitrable dispute under the contract and, accordingly, held that the strike was enjoinable under *Boys Markets*.

A similar result in *Valmac Industries, Inc. v. Food Handlers Local 425*[207] illuminates the policy problems in these cases. An injunction was granted by the district court, enjoining work stoppage as the result of a picket line, but the order did not specifically require arbitration. Consequently, the company refused to arbitrate, asserting that the issue had been decided by the district court. On appeal, the Eighth Circuit remanded, conditioning the injunction on the requirement that the issue be arbitrated within ten days.[208] In a footnote, the court contemplated the competing policy considerations:

> We stress the need for promptness. Unless the District Court so conditions its order that arbitration must closely follow the issuance of the injunction, the economics of the situation rather than the merits of the dispute may decide the outcome, and the union may have been unfairly denied its right to engage in authorized activity. *Boys Markets* was not intended to permit such a result.[209]

Representing the opposite view prior to *Buffalo Forge* is *Amstar Corp. v. Amalgamated Meat Cutters*.[210] In *Amstar* union workers refused to cross a picket line of workers from a different plant owned by a common employer whose collective bargaining agreement had expired. The employer filed suit, seeking a *Boys Markets* injunction, alleging that the work stoppages were in violation of a bargained no-strike clause and that the dispute

202. 428 U.S. 397 (1976).
203. 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974).
204. 502 F.2d at 322.
205. *Id.* at 323.
206. *Id.*
207. 519 F.2d 263 (8th Cir. 1975).
208. *Id.* at 268.
209. *Id.* n.10.
210. 468 F.2d 1372 (5th Cir. 1972).

was arbitrable. The district court granted the injunction,[211] but the Fifth Circuit reversed, stating that the pivotal question was whether the underlying dispute over which the strike had been called was arbitrable.[212] In *Amstar* the Fifth Circuit reasoned that the dispute was not over a grievance that the parties were contractually bound to arbitrate. "Rather," noted the court, "the strike itself precipitated the dispute—the validity under the Union's no-strike obligation of the member-employees honoring the . . . picket line."[213] The court stated that if an injunction were to issue when the legality of the strike itself was the issue, it would be "difficult to conceive of any strike which could not be so enjoined."[214] To issue an injunction in this type of case would broaden the "narrow" *Boys Markets* injunction beyond its permissible scope.

With these conflicting holdings, the stage was set for the Supreme Court to decide *Buffalo Forge v. United Steelworkers*.[215] In *Buffalo Forge* an employer's office and clerical-technical (O&T) employees struck and picketed the employer's plants. The production and maintenance employees honored the O&T picket lines. The employer filed a section 301 action, claiming that the work stoppage violated the no-strike clause and that the dispute was arbitrable under the collective bargaining agreement. The district court refused to grant an injunction because the strike was not an arbitrable grievance and not within the *Boys Markets* exception to the Norris-La Guardia Act.[216]

The Second Circuit agreed that the strike was "not over a grievance" but "instead is a manifestation of the striking workers' deference to other employees' picket lines."[217] It considered the distinction "crucial" in light of the need to accommodate Norris-LaGuardia and Taft-Hartley. The court, using the *Amstar* reasoning, stated "[i]f a strike not seeking redress of any grievance is enjoinable then the policy of Norris-LaGuardia is virtually obliterated."[218] The court argued further that allowing an injunction would be to repeal judicially section 4 of Norris-LaGuardia.[219]

The Supreme Court affirmed the Second Circuit in a five-to-four decision. Justice White, writing for the majority, concluded that *Boys Markets* "plainly does not control,"[220] because the strike was not *over* a dispute between the employer and the union that was "even remotely subject to the arbitration provisions of the contract."[221] In the words of the Court:

> The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; neither its causes nor the issue under-

211. 337 F. Supp. 810 (E.D. La. 1972).
212. 468 F.2d at 1372.
213. *Id.* at 1373.
214. *Id.*
215. 428 U.S. 397 (1976).
216. 386 F. Supp. 405, 409 (W.D.N.Y. 1974).
217. 517 F.2d 1207, 1210 (2d Cir. 1975).
218. *Id.*
219. *Id.* at 1211.
220. 428 U.S. at 407.
221. *Id.*

> lying it were subject to the settlement procedures provided by the contracts between the employer and respondents. The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of its bargain.[222]

The Court stated that the holding in *Boys Markets* was justified to implement the strong congressional preference for dispute settlement in a method agreed upon by the parties.[223] *Boys Markets*, according to the Court, should be extended only so far as necessary to accommodate section 4 of Norris-LaGuardia and section 301 of Taft-Hartley.[224] In effect, it was to insure that the parties got what they bargained for. They did not bargain for judicial intervention; if they had, such a bargain would have appeared in the collective bargaining agreement.[225]

The Court also echoed the Second Circuit's fear that if an injunction could issue when the question was *whether* a sympathy strike violated a no-strike clause, then almost any strike would be enjoinable. This would, the Court believed,

> cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes under the many existing and future collective-bargaining contracts, not just for the purpose of enforcing promises to arbitrate, which was the limit of *Boys Markets*, but for the purposes of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator . . . .[226]

The Court evidenced a great fear that this further step would embroil the district courts in massive injunction litigation and allow them to intrude on factual issues that should be decided by arbitration.[227] The Court could not see how such a result would further national labor policy; rather, it would frustrate it by usurping the function of the arbitrator.

As one might expect, a vigorous dissent took issue with the majority. Justice Stevens argued that *Boys Markets* protects the arbitration process. The Court may enjoin a contractually arbitrable grievance only if the issue is arbitrable and the strike violates the agreement, considering ordinary equitable principles.[228] Removal of the injunction to enforce the no-strike clause removes the incentive to arbitrate, as the employer's primary concern is uninterrupted production.[229] Thus, injunctive relief furthers, and may be essential to, the national policy in favor of arbitration. In response to the union's first argument that under *Boys Markets* only the arbitrator may interpret a collective bargaining agreement,[230] Justice Stevens countered that a court's interim determination that a dispute was not arbitrable

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222. *Id.* at 407-08.
223. *Id.* at 407.
224. *Id.* at 411.
225. *Id.* at 410.
226. *Id.*
227. *Id.* at 412.
228. *Id.* at 424.
229. *Id.*
230. *Id.* at 427.

would not usurp the arbitrator's role.[231] Justice Stevens reasoned that "[b]y definition, issuance of an injunction pending the arbitrator's decision does not supplant a decision that he otherwise would have made."[232] Responding to the union's second argument that the right to strike will be deprived prematurely by an interim injunction,[233] Justice Stevens maintained that a denial of an injunction in this situation might be "just as devastating to an employer as the issuance of an injunction may [be] to the union when the strike does not violate the agreement."[234] Finally, in response to the union's third argument that the purpose of Norris-LaGuardia was to eliminate the risks of enjoining a lawful strike,[235] Justice Stevens argued that not all risks of erroneous injunctions are "immunized" by the Act.[236] He noted that *Boys Markets* and *Gateway Coal* each imposed injunctive risks against unions.[237]

The above conclusions notwithstanding, the dissent conceded that sympathy strikes should not always be enjoined temporarily just because a no-strike clause and an arbitration clause appear in a bargained contract.[238] Due to the risk that federal judges may misinterpret labor contracts or otherwise usurp the arbitrator's role in interpreting the contract, Stevens set forth four conditions that should govern a judge's contemplated issuance of an injunction, including: (1) whether the union had an opportunity to advance its interpretation of the agreement before the judge;[239] (2) whether the strike is "clearly" in violation of the no-strike clause;[240] (3) whether the parties have submitted the issue to the agreed-upon grievance procedure;[241] and (4) whether the "normal conditions of equitable relief" under *Boys Markets* are met.[242]

The result in *Buffalo Forge* is somewhat surprising. One would think, given the developments in case law from *Lincoln Mills* and the *Steelworkers* trilogy to *Boys Markets* and *Gateway Coal*, that the decision would have been contrary. The Supreme Court had been consistent in its insistence on the settling of industrial disputes without the use of the strike whenever possible. *Buffalo Forge*, however, represents a departure from that policy, focusing instead on the nature of underlying disputes between an employer and a union, or the absence of such a dispute, and whether it is covered by the collectively bargained contract. The lower courts appear to be seizing on this principle to construe narrowly the impact of *Buffalo Forge*.

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231. *Id.* at 428.
232. *Id.*
233. *Id.* at 427.
234. *Id.* at 428.
235. *Id.* at 427.
236. *Id.* at 430.
237. *Id.*
238. *Id.* at 431.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*

In *Zeigler Coal v. Local 1870, UMW*,[243] an employer was attempting to obtain a civil contempt order against a union for violation of a *Boys Markets* injunction against striking over arbitrable matters. The union had refused to cross another union's picket line; the employer urged that this was an issue subject to arbitration under the collective bargaining agreement allowing for arbitration "of any local trouble of any kind arising at the mine."[244] The Seventh Circuit held that the union was engaging in a sympathy strike and was not striking "over" any arbitrable dispute.[245] The court, however, noted that an injunction might be proper if the union adopted for its own the grievance of its sister union.[246]

In *Cedar Coal Co. v. UMW*[247] the Fourth Circuit held that despite *Buffalo Forge*, sympathy strikes may be enjoined when they are used to compel the employer to concede to an arbitrable issue. Additionally, a dispute that begins over a nonarbitrable issue may, in some circumstances, be transformed into an arbitrable issue. The Sixth Circuit held in *Complete Auto Transit, Inc. v. Reis*[248] that such a strike once transformed no longer falls under the *Buffalo Forge* umbrella, and is enjoinable. Thus, where the work stoppage began over a nonarbitrable issue that later was resolved, but the strike continued over amnesty, clearly an arbitrable issue, an injunction will be upheld.[249]

The union also may waive its right to engage in a sympathy strike. Such a waiver was upheld by the Eighth Circuit in *Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters*.[250] In this case, the no-strike clause was extremely broad, declaring that there would be "no strike, stoppage . . . on the part of the union."[251] In addition, as a supplement, the contract stated that the union members were "to preserve their normal duties notwithstanding the existence of *any* picket line."[252] The court held that *Buffalo Forge* did not apply in this case and that an injunction, therefore, could issue. The decision may be compared with the approach of the National Labor Relations Board, which requires that the contract show a "clear and unmistakable"[253] intent to cover sympathy strikes.

Admittedly, these cases pose unusual instances. The brunt of sympathy strike cases will follow *Buffalo Forge* and disallow an injunction. Nevertheless, the method of analysis should be consistent no matter what the outcome.[254] Courts seem to focus upon the contents of a contract rather

243. 566 F.2d 582 (7th Cir. 1977).
244. *Id.* at 583.
245. *Id.* at 585.
246. *Id.*
247. 560 F.2d 1153, 1172 (4th Cir. 1977). This was a consolidation of several cases.
248. 103 L.R.R.M. 2722 (6th Cir. 1980).
249. *Id.* at 2725.
250. 101 L.R.R.M. 2235 (8th Cir. 1979).
251. *Id.* at 2239.
252. *Id.* (emphasis added).
253. Chevron U.S.A., Inc. & Boilermakers Local 351, 102 L.R.R.M. 1311 (N.L.R.B. 1979).
254. *E.g.*, Design & Mfg. Corp. v. International Union, UAW, 608 F.2d 767, 770 (7th Cir.

than the national policy favoring arbitration. If the contract makes the underlying issue arbitrable, or if the contract explicitly bars a sympathy strike, an injunction should issue. In other cases, it should not. Whether this analysis will filter into non-sympathy-strike cases remains to be seen. *Greyhound II* indicates that it might.[255] In *Greyhound II* the district court on remand shifted its inquiry in a status quo ante situation from "extent of injury" to whether an explicit promise not to strike was within the contract. Quite possibly, *Buffalo Forge* may be read to restrict other *Boys Markets* cases as well.

Buffalo Forge represents an almost shocking change in the attitude of the Supreme Court. Although the majority is correct in asserting that the facts of *Buffalo Forge* differ from *Boys Markets*, this writer questions whether such a distinction is truly important. In the typical *Boys Markets* case the union is striking over an issue that, according to the terms of the contract, is arbitrable. The injunction compels the union and employer to resolve their differences in the agreed-upon manner, through arbitration, and compels the union to adhere to its no-strike promise. In a *Buffalo Forge* case a sympathy strike issue over which the strike occurred is almost certainly not arbitrable, but the issue of *whether* the no-strike provision of the collective bargaining agreement prohibits the sympathy strike remains. Most probably, this is an arbitrable issue and compelling a union to honor its no-strike pledge during the resolution of the issue would seem to be a simple step. The underlying policies are, or should be, the same because the union and employer have agreed to settle their differences through arbitration rather than by strike. This ensures no interruption in wages for employees and in production for the employer, and comports with the strong national policy toward the settlement of disputes through arbitration. This writer does not believe that to decide otherwise will allow undue intrusion on the merits of the case by federal district courts, especially if the guidelines of the dissent were followed. Like *Sinclair*, *Buffalo Forge* is wrong and should be reconsidered.

V. PROCEDURAL PROBLEMS IN *BOYS MARKETS* CASES

In addition to the applicability of traditional equitable principles in *Boys Markets* cases, courts require adherence to the procedural provisions of the Norris-LaGuardia Act. In *United States Steel Corp. v. UMW*[256] *Boys Markets* was alleged to prohibit the use of the procedural requirements of Norris-LaGuardia. The Third Circuit rejected this contention, stating that the only portion of Norris-LaGuardia rendered inapplicable by *Boys Markets* was the express prohibition against specific injunctions contained in

1979), in which the court held that the strike was the subject of the parties' dispute and dissolved the injunction.

255. *See* text accompanying notes 175-81 *supra*.

256. 456 F.2d 483 (3d Cir. 1972).

section 4 of the Act,[257] insofar as they would bar injunctions necessary to accomplish the purposes of Taft-Hartley.[258] In other instances, the procedural provisions of Norris-LaGuardia remain applicable in *Boys Markets* cases, so long as they do not conflict with, and may be accommodated with, Taft-Hartley.[259] The court in *United States Steel* provided an example of how the accommodation may be accomplished in its treatment of section 7 of Norris-LaGuardia.[260] Section 7 prohibits the allowance of an injunction growing out of a labor dispute: "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 . . . . Such hearing shall be held after due and personal notice."[261] The court noted that unlike section 4, section 7 was a procedural section, which may be followed without conflicting with Taft-Hartley.[262] Thus, the requirements of a verified complaint and notice and a hearing in open court were held not to conflict with the policies of Taft-Hartley: "Indeed," stated the court, "Fed. R. Civ. P. 65(a) requires as much in any event."[263]

Both rule 65[264] and section 7 of Norris-LaGuardia set forth notice and hearing requirements that must be met prior to the issuance of an injunction. Failure to meet these requirements will lead to a reversal of the in-

257. 29 U.S.C. § 104 (1976). Section 4 prohibits injunctions against the following activities:

> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of such undertaking or promise as is described in section 103 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

258. 456 F.2d at 487.

259. *Id.*

260. 29 U.S.C. § 107 (1976).

261. *Id.*

262. 456 F.2d at 487.

263. *Id.* This was not true at the time of passage of Norris-LaGuardia, since the federal rules had not been enacted.

264. FED. R. CIV. P. 65.

junction.[265] Rule 65(b) allows an ex parte temporary restraining order (TRO) only under certain conditions, among them when "immediate and irreparable injury, loss, or damage will result to the applicant."[266] Section 7 requires that the complaint allege that "a substantial and irreparable injury to complainant's property will be unavoidable" before a TRO will be granted without notice and hearing to the defendant.

The existence of these varying standards prompted an accommodation of the two in *Celotex Corp. v. Oil, Chemical & Atomic Workers International Union (Celotex I)*.[267] In this case, the federal district court required the complaint to state that plaintiff's property would be physically harmed unless a TRO without notice[268] was issued, as required by section 7 of Norris-LaGuardia. Mere allegation of loss of profits and business would not suffice.[269] The court found this test satisfied because the complaint alleged that the plant's pipes would freeze, thus creating a risk of fire if they drained, and a possible shutdown of the Pennsylvania plant in Febru-

265. *See, e.g.*, United States Steel Corp. v. UMW, 519 F.2d 1236 (5th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976).

266. FED. R. CIV. P. 65(b) states:

> A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

267. 377 F. Supp. 750 (M.D. Pa. 1974), *rev'd on other grounds*, 516 F.2d 242 (3d Cir. 1975).

268. Although a discussion of the type and quality of notice required is beyond the scope of this paper, since it is governed by general principles of law, not peculiar to *Boys Markets* cases, it is interesting to note that in this case a 1:00 p.m. phone call to the union office for a 5:00 p.m. hearing was held by the court to be insufficient notice, since it did not give the defendants time to prepare for the hearing and did not give notice to all defendants. Therefore, it was treated for purposes of review as if no notice had been given. 377 F. Supp. at 753.

269. *Id.*

ary. The Third Circuit considered these issues on appeal[270] and agreed at first with the district court that in a *Boys Markets* case, where a TRO is requested, a court may in a proper instance grant the motion without notice and hearing to the defendant.[271] Nevertheless, the appellate court reversed the result because it agreed with the union that the complaint did not allege such "substantial and irreparable injury to complainant's property"[272] to justify a TRO under section 7. Interestingly, although the Third Circuit disagreed with the result of the district court, it did not disapprove the section 7 "injury to property" test.[273]

The Third Circuit set out another procedural prerequisite to the issuance of a TRO, found in the first sentence of rule 65(b). This sentence mandates that the applicant's attorney certify to the court the "efforts, if any, which have been made to give notice" and also the "reasons supporting his claim that notice should not be required."[274] Although this requirement is not mentioned in section 7, the court found no direct conflict with it in either Norris-LaGuardia or Taft-Hartley, and no overriding policy reason for not honoring it. Thus, no accommodation was necessary.[275]

Another portion of section 7 of Norris-LaGuardia that has been expressly held to apply to *Boys Markets* cases is the requirement of an undertaking for loss, expense, or damage caused by the wrongful issuance of an injunction. This undertaking was not clear until *United States Steel*,[276] as rule 65(a) imposes no attorneys' fees requirement while section 7 of Norris-LaGuardia does. Once again an accommodation was necessary. The Third Circuit in *United States Steel* found no strong policy within the federal rules against the attorneys' fees requirement and, therefore, saw no reason to deprive the union of its normal protection against attorneys' fees under section 7.[277]

Section 9 of Norris-LaGuardia[278] requires that findings of fact set out in section 7[279] be made and filed by the court prior to the issuance of an injunction. In *Boys Markets* cases, courts have required compliance with section 9, although not in absolute terms.[280] Clearly, the finding requirement of section 7(e), "[t]hat the public officers charged with the duty to protect complainant's [*sic*] are unable or unwilling to furnish protec-

270. Celotex Corp., Pittston Plant, Harding, Pa. v. Oil, Chem. & Atomic Workers Int'l Union (Celotex II), 516 F.2d 242 (3d Cir. 1975).

271. *Id.* at 247.

272. *Id.*

273. *Id.*

274. FED. R. CIV. P. 65(b).

275. The Third Circuit found "substantial compliance" with this requirement, although it appears that the party did not track the literal requirements of the rule. The best policy, of course, would be to track the rule. 516 F.2d at 247.

276. 456 F.2d 483 (3d Cir. 1972).

277. *Id.* at 488; *accord*, Celotex Corp., Pittston Plant, Harding, Pa. v. Oil, Chem. & Atomic Workers Int'l Union (Celotex II), 516 F.2d 242 (3d Cir. 1975).

278. 29 U.S.C. § 109 (1976).

279. *See* text accompanying note 261 *supra*.

280. *See, e.g.*, United States Steel Corp. v. UMW, 456 F.2d 483, 488 (3d Cir. 1972); Texaco Independent Union v. Texaco, Inc., 452 F. Supp. 1097, 1103 (W.D. Pa. 1978).

tion,"[281] is not appropriate in a *Boys Markets* case. Some indication exists, though, that additional findings required by section 7 may not be required if they are not appropriate.[282] The *Boys Markets* criteria, however, must be found in the court order. Failure to so include could result in the overturning of the injunction.[283]

The sufficiency of findings issue also was treated in *Celotex II*.[284] The union argued that the failure of the injunction to make a finding that the dispute was arbitrable was fatal. The Third Circuit considered this omission "harmless," as the union had conceded this issue at every step in the proceedings.[285] This writer, however, believes a specific finding upon the arbitrability of the underlying dispute within a TRO to be essential. Such an omission in a case with facts not exactly the same as *Celotex II* may result in bond forfeiture. The court in *Celotex II* raised another issue that is quite important procedurally. The TRO was issued for a ten-day period in compliance with rule 65(b).[286] Section 7 of Norris-LaGuardia permits an ex parte TRO for five days duration only. The court found no reason why the five-day requirement should not apply in section 301 actions.[287] *Celotex II* offers the only authority on the five-day, ten-day controversy, so the requirement is far from settled. The existence of *Celotex II*, however, should cause the cautious counsel attempting to obtain an ex parte TRO to think carefully before asking that it be issued for a period beyond five days.

The procedural requirements of a *Boys Markets* injunction are by no means settled. Indeed, in a dictum the Sixth Circuit has called section 7 arguably not applicable to *Boys Markets* injunctions,[288] as the Supreme Court expressly reserved review of this issue. Failure to comply with procedural requirements, however, may well constitute "wrongful issuance" and allow the forfeiture of an injunction bond.[289] Something more than mere noncompliance is required. In *Celotex II* the Third Circuit failed to forfeit the bond despite procedural deficiencies. It held that the TRO, although wrongfully issued, had not harmed the union and, therefore, allowed no recovery on the bond.[290]

The bond is conditioned upon the finding by a court that an injunction was improvidently or erroneously issued, or in the following circumstances: "where the Court did not hold a proper hearing or failed to make

281. 29 U.S.C. § 107(e) (1976).
282. Plain Dealer Publishing Co. v. Cleveland Typographical Union 53, 520 F.2d 1220 (6th Cir. 1975), *cert. denied*, 428 U.S. 909 (1976).
283. *Id.*
284. 516 F.2d at 248.
285. *Id.*
286. Rule 65(b) is set out at note 266 *supra*.
287. 516 F.2d at 248. The Supreme Court expressly reserved review of this issue in Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local 70, 415 U.S. 423, 445 n.19 (1974).
288. United States v. Cunningham, 500 F.2d 120, 126 n.12 (6th Cir. 1979).
289. United States Steel Corp. v. UMW, 456 F.2d 483 (3d Cir. 1972).
290. 516 F.2d at 249.

the factual determinations mandated by Part V of the *Boys Markets* opinion or where the Court erroneously issued a preliminary injunction over labor disputes not covered by the contract grievance-arbitration provision."[291] The bond is not conditioned on a victory on the merits at arbitration by the party seeking the injunction. Instead, a hindsight approach is used to see if it was proper at the time of issuance. Recoverable damages under the bond are "those that are directly attributable to the restraining order or injunction . . . as a result of the wrongful restraint"[292] and do not include any damages as a result of a suit independent of the injunction. Bonds are often quite large, especially when much is at stake financially.[293] This is not surprising because the bonds are based on attorney's fees and potential lost profits or lost wages.

An interesting question concerning the remedy of the aggrieved party was considered in *Associated General Contractors v. Illinois Conference of Teamsters*.[294] Although the union requested a $10,000 bond, no formal motion to that effect was filed, and a $1,000 bond was posted by the employer. The Seventh Circuit considered the union's remedies for wrongful issuance where the bond was inadequate. It first stated that the express language of section 7 of Norris-La Guardia does not authorize any recovery in excess of the amount of an injunction bond; thus, none may be had under the statute. The statute does not, however, preclude the aggrieved party from pursuing its ordinary remedy "by suit at law or equity"[295] for wrongful issuance. The two actions are separate and may be pursued independently.[296]

Another argument addressed by the Third Circuit in *Celotex II* concerned the section 7 requirement of live testimony of witnesses in open court before a TRO may issue. The court acknowledged that section 7 does so provide but noted that rule 65(b) would permit reliance upon affidavits or a verified petition. The court found here a situation "where accommodation between Section 301 and Section 7, rather than rigid application of the latter is appropriate."[297] Upon some issues, "such as the existence of contractual relationship relied upon," or where the no-strike clause would be so that "there cannot really be any dispute that a work

291. Transit Union Div. 134 v. Greyhound Lines, Inc. (Greyhound I), 529 F.2d 1073, 1079 (9th Cir.), *vacated and remanded on other grounds*, 429 U.S. 807 (1976), *rev'd*, 550 F.2d 1237 (9th Cir. 1977).

292. *Id.* (quoting 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 65.10[1], at 65-96 to -97 (1980)).

293. In Lever Bros. v. Chemical Workers Local 217, 559 F.2d 114, 120 (4th Cir. 1976), the bond was $60,000, the highest that this writer has encountered.

294. 486 F.2d 972 (7th Cir. 1973).

295. *Id.* at 975.

296. Note, however, that an action outside the bond is akin to the tort of malicious prosecution; it is not an action for costs and attorney's fees. So, if the bond is not sufficient, the aggrieved party may have no remedy for its costs and attorney's fees in excess of the bond. *See* National Maritime Union v. Commerce Tankers Corp., 411 F. Supp. 1224 (S.D.N.Y. 1976).

297. 516 F.2d at 247.

stoppage violates the collective bargaining agreement,"[298] live testimony will not aid the trier of fact. In contrast, the complaint may "paint a picture of potential harm more exaggerated than would appear from live testimony before the Court,"[299] so that the issue of arbitrability may be in doubt.[300] In these cases requiring live testimony will be appropriate.[301]

Providing more procedural pitfalls for the unwary injunction-seeker are the related problems of specificity within the order and contempt. Section 9 of Norris-LaGuardia[302] requires that the injunction order may enjoin only "such specific act or acts expressly complained of in the bill of complaint or petition in such a case." Where no specific act is complained of in the petition or prohibited in the injunction, the injunction is invalid.[303] Rule 65(d) requires that the terms of the order be "specific," and "describe in reasonable detail . . . the act or acts sought to be restrained."[304] Any ambiguity in the order is resolved in favor of the person against whom it is issued,[305] and simply tracking the language of the collective bargaining agreement may not suffice.[306] In this instance, both section 7 and rule 65(d) must be honored. This probably reflects the court's sensitivity to due process considerations.

An injunction order also must meet these specificity requirements in order to provide the notice required before a violator may be held in contempt.[307] Assuming the order meets the specificity standards, a contempt citation may issue for failure to comply with the order even if it was wrongfully issued and later overturned.[308] The order must be obeyed until overturned or dissolved. This is true for both civil and criminal contempt.[309]

Although not an area presenting any problems peculiar to *Boys Markets* cases, the subject of the appeal of the injunction merits some discussion. Generally no appeal will be allowed, except from a final judgment.[310] A TRO and temporary injunction will fail to meet this test in almost all cases, but in many cases a permanent injunction will not.[311] Federal laws

298. *Id.*
299. *Id.* at 247-48.
300. *Id.*
301. In *Celotex II* the court evidences a strong preference for live testimony. 516 F.2d at 248. This is as a result of § 7. It follows then that live testimony will almost always be required in the case of a preliminary injunction. However, in at least one case, the use of "voluminous affidavits" was upheld where the court felt the issues were not subject to "greater elucidation" by live testimony, and where arguably there was a waiver. Drywall Tapers, Inc. v. Operative Paperers, 537 F.2d 699 (2d Cir. 1976).
302. 29 U.S.C. § 109 (1976).
303. United States Steel Corp. v. UMW, 519 F.2d 1236 (5th Cir. 1975).
304. FED. R. CIV. P. 65(d).
305. New York Tel. Co. v. Communications Workers, 445 F.2d 39 (3d Cir. 1971).
306. 519 F.2d at 1246.
307. *Developments in the Law: Injunctions*, 78 HARV. L. REV. 994, 1064-67 (1965).
308. New York Tel. Co. v. Communications Workers, 445 F.2d 39, 42 (3d Cir. 1971).
309. United States v. Cunningham, 500 F.2d 120 (6th Cir. 1979).
310. *See* Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932).
311. *Developments in the Law, supra* note 307, at 1072-73.

provide for interlocutory appeal of the grant or denial of injunctions,[312] and this has generally been held to exclude most TRO's.[313] Where, however, a TRO is maintained for an excessive length of time and takes on the character of a preliminary injunction,[314] or where time is short and the order amounts to a final disposition,[315] an appeal may be allowed.[316]

The Norris-LaGuardia Act also provides for an interlocutory appeal of an injunction "in a case involving or growing out of a labor dispute."[317] The term "labor dispute" is defined in section 13 as "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."[318] Courts have uniformly held that the term "labor dispute" must be broadly and liberally construed.[319] It certainly includes any dispute in the *Boys Markets* context. Courts will scrutinize the record to determine whether the requirements of Norris-LaGuardia have been met.[320] Section 10 allows appeal of temporary and permanent injunctions, but not TROs.[321] Also under this section a TRO apparently may be appealed if it takes on the characteristics of a temporary injunction.[322]

VI. CONCLUSION

Early interpretations of the conflict between Norris-LaGuardia and Taft-Hartley up to *Boys Markets* and its progeny have provided considerable controversy. From *Sinclair* to *Boys Markets* to *Buffalo Forge* and beyond, the courts have wrestled with competing policy considerations. The Taft-Hartley policy of settlement of industrial disputes through arbitration clashes with the older Norris-LaGuardia attitude of protecting unions'

312. 28 U.S.C. § 1292(a)(1) (1976).

313. *See* Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 368 (1961).

314. Sims v. Greene, 160 F.2d 512 (3d Cir. 1947). This may no longer be an issue since indications are that a TRO may only last five days. *See* note 287 *supra* and accompanying text.

315. United States v. Wood, 295 F.2d 772 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962).

316. *Developments in the Law, supra* note 307, at 1071.

317. 29 U.S.C. § 110 (1976). Section 110 states:

> Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

Id.

318. *Id.* § 113.

319. *See, e.g.*, United Elec. Coal Cos. v. Rice, 80 F.2d 1 (7th Cir. 1935).

320. Cater Constr. Co. v. Nischwitz, 111 F.2d 971 (7th Cir. 1940).

321. Charles D. Bonanno Linen Serv., Inc. v. McCarthy, 535 F.2d 189 (1st Cir. 1976).

322. *Id.* at 190.

rights to engage in concerted activity. What appeared to be a consistent emphasis on the former stalled with the appearance of *Buffalo Forge*. Whether *Buffalo Forge* takes the first of many steps backward from the emphasis on arbitration, whether it simply denotes where the line must be drawn, or whether it will be overturned like *Sinclair*, remains to be seen. In any event, continued controversy is assured.