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Labor Law - Norris-LaGuardia Act - Sympathy Strikes - Injunctions

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LABOR LAW—NORRIS-LAGUARDIA ACT—SYMPATHY STRIKES—INJUNCTIONS—The Supreme Court of the United States has held that the Norris-LaGuardia Act prohibits a federal district court from enjoining a sympathy strike, notwithstanding arbitration provisions and an express no-strike clause in the collective bargaining agreement, since the strike is not over a grievance which the parties agreed to submit to arbitration.

Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141 (1976).

Office clerical-technical employees of the Buffalo Forge Company (employer) went on strike during negotiation of a collective bargaining agreement and established picket lines at a number of the employer's plants. Pursuant to the respondent union's[1] instructions, the employer's production and maintenance workers, in support of the striking office employees, refused to cross the picket lines. The employer and the respondent union were parties to a collective bargaining agreement which contained a no-strike clause[2] and grievance and arbitration provisions for settling disputes between the production and maintenance employees and the Buffalo Forge Company.[3] Asserting that the production employees' work stoppage was in violation of the collective bargaining agreement's no-strike clause, the employer filed a complaint under section 301(a) of the Labor Management Relations Act[4] in the District Court for the Western District of New York. It requested a preliminary injunction

1. Both the production and maintenance employees and the office clerical-technical employees were represented by the same international union, the United Steelworkers of America, AFL-CIO. The office employees were represented by local unions not parties to the litigation. Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141, 3144 (1976).

2. The agreement provided: "There shall be no strikes, work stoppages or interruption or impeding of work. No Officers or representatives of the Union shall authorize, instigate, aid or condone any such activities." *Id.* at 3143 n.1.

3. The agreement stated that any differences which might arise between the employer and any employee covered by the agreement would be immediately settled by an arbitration procedure. *See id.* at 3143-44.

4. Buffalo Forge Co. v. United Steelworkers, 386 F. Supp. 405 (W.D.N.Y. 1974). Section 301(a) of the Labor Management Relations Act provides:

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

29 U.S.C. § 185(a) (1970) [hereinafter referred to as section 301].

of the sympathy strike and an order compelling the parties to submit the dispute to grievance procedures.[5] The district court held that the Norris-LaGuardia Act prohibited issuing an injunction.[6] In its view, *Boys Markets, Inc. v. Retail Clerks Local 770*,[7] which authorized an injunction of a strike over a grievance the parties had agreed to arbitrate, was not applicable since the production employees' sympathy strike was not over an arbitrable dispute.[8] Adopting the district court's rationale, the Second Circuit Court of Appeals affirmed the lower court's decision.[9]

The Decision of the Court

In a 5-4 decision, the Supreme Court affirmed.[10] Justice White spoke for the majority and held that the *Boys Markets* exception to the Norris-LaGuardia Act's ban on federal injunctions in labor strikes was not controlling in a sympathy strike situation. The purpose behind *Boys Markets* was to implement congressional preference for private settlement, through arbitration, of disputes between employers and their employees.[11] The quid pro quo for the employer's promise to submit to the arbitration of disputes was the union's promise not to strike over issues that were subject to the

5. 386 F. Supp. 405, 407 (W.D.N.Y. 1974). At the hearing, the union offered to submit the question of the work stoppage's validity to arbitration on proper notice by the employer. *See* 96 S. Ct. at 3144.

6. 386 F. Supp. at 410. Section 4 of the Norris-LaGuardia Act provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
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> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
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> . . . .
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.

29 U.S.C. § 104 (1970).

7. 398 U.S. 235 (1970). *See* notes 32-36 and accompanying text *infra*.

8. 386 F. Supp. at 409. The district court concluded that the production employees were engaged in a sympathy strike in support of the office employees; the work stoppage was not in protest of the employer's order that union members drive non-company owned trucks through the picket lines, a dispute which would have been subject to the mandatory grievance procedure. *Id.*

9. 517 F.2d 1207 (2d Cir. 1975).

10. 96 S. Ct. at 3146.

11. *See* 398 U.S. at 253.

arbitration provisions of the contract.[12] A strike over a dispute which the parties had agreed to settle in this manner would deprive the employer of its bargain and frustrate the arbitration process;[13] hence, the Court in *Boys Markets* had reasoned that a qualification of the literal commands of the Norris-LaGuardia Act was warranted.[14] The underlying dispute in *Buffalo Forge*, however, was the employer's failure to come to terms with sister local unions. Neither the sympathy strike's causes, nor its underlying issue was subject to the settlement procedures provided by the bargaining agreement between the union and the employer.[15] Since the contract contained a clause for settling disputes over the interpretation of the contract's provisions, the Court conceded that the question of whether the strike violated the no-strike clause was arbitrable. In the majority's view, although the union had agreed to arbitrate the validity of the sympathy strike, enjoining the strike before arbitration was not needed to carry out the promise to arbitrate.[16] Therefore, the concerns underlying *Boys Markets* were not present in *Buffalo Forge* and the Norris-LaGuardia Act's prohibition of federal injunctions should prevail.[17]

Justice Stevens wrote the dissenting opinion and rejected the majority's narrow interpretation of *Boys Markets*.[18] Relying on a case decided after *Boys Markets, Gateway Coal Co. v. UMW*,[19] he argued that the authority to enjoin a strike under section 301 depended not on whether the dispute was over an arbitrable issue but on whether the union was under a contractual duty not to strike.[20]

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12. 96 S. Ct. at 3147. *See* text accompanying notes 42 & 43 *infra* for a discussion of the Court's reasoning. The dissent disagreed with the majority's conceptualization of the union's quid pro quo. *See* notes 18-21 and accompanying text *infra*.

13. 96 S. Ct. at 3147. The Supreme Court has viewed arbitration as a "kingpin of federal labor policy." *See* Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 226 (1962) (Brennan, J., dissenting).

14. *See* 96 S. Ct. at 3147.

15. *Id.* For a thorough analysis of the sympathy strike situation in which the author asserts that a sympathy strike *is* over an arbitrable grievance within the meaning of *Boys Markets* see Connolly & Connolly, *Employers' Rights Relative to Sympathy Strikes*, 14 DUQ. L. REV. 121 (1976) [hereinafter cited as Connolly].

16. 96 S. Ct. at 3149. The Court noted that under the terms of the contract, the employer would be entitled to invoke the arbitration process to determine the legality of the strike, and could obtain a court order requiring the union to arbitrate if it refused to do so. *Id.* at 3146.

17. *Id.* at 3149.

18. *Id.* at 3150 (dissenting opinion).

19. 414 U.S. 368 (1974).

20. 96 S. Ct. at 3150 (dissenting opinion). The *Buffalo Forge* majority responded to this

He considered a union's undertaking not to strike to be its quid pro quo for the employer's agreement to submit grievances to binding arbitration.[21] Section 301 extended federal jurisdiction to grant relief in labor disputes to facilitate enforcement of collective bargaining agreements. Enforcement of a contractual commitment of the union to arbitrate grievances was a basic objective of *Boys Markets* and enjoining the sympathy strike in *Buffalo Forge* would be warranted to protect the arbitration process. According to Justice Stevens, the Norris-LaGuardia Act should not prevent the expansion of *Boys Markets* to reach a sympathy strike clearly in violation of a no-strike clause. The Act's goal of insuring a union's ability to freely negotiate a contract would not be implemented by such an injunction.[22] In Justice Stevens' view, to properly accommodate the Norris-LaGuardia Act and section 301, the Court should simply require that before an injunction issues, there be convincing evidence that the work stoppage is a violation of a contractual duty not to strike. If the lower court determines that the sympathy strike is clearly in violation of the collective bargaining agreement, federal jurisdiction would lie under section 301 and the strike could be enjoined.[23]

Reconciling Section 301 and the Norris-LaGuardia Act

Buffalo Forge required the Court to reconsider the proper balance between the Norris-LaGuardia Act's prohibition against federal in-

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contention by stating that the authority to enjoin the strike in *Gateway Coal* was first premised on the Court's determination that the underlying dispute *was* arbitrable. 96 S. Ct. at 3147-48 n.10. *See also* note 40 *infra*.

In *Gateway Coal*, the union refused to arbitrate the issue of an alleged safety hazard created by the employer and engaged in a strike. Despite a broad arbitration clause, there was a serious question whether the dispute was arbitrable. The workers were unlikely to defer matters concerning their own safety to an arbitrator. The Supreme Court upheld the district court injunction issued under the authority of *Boys Markets*. 414 U.S. at 387. The Court disposed of this substantial question of contract interpretation by invoking the "presumption of arbitrability" previously articulated in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). *See* 414 U.S. at 379. The Court separately addressed the issue of the district court's authority to enjoin the work stoppage, and held that the authority depended on the union's contractual duty not to strike. *Id.* at 380. Since the duty to arbitrate gave rise to an implied no-strike obligation, the union's work stoppage was a violation of the bargaining agreement and therefore enjoinable. *Id.* at 381-82.

21. 96 S. Ct. at 3152-54 (dissenting opinion).

22. *See* notes 33 & 34 and accompanying text *infra*.

23. 96 S. Ct. at 3159 (dissenting opinion).

junctions of labor strikes and section 301's command to honor contractually created arbitration procedures designed to peacefully resolve labor disputes. In 1932, Congress passed the Norris-LaGuardia Act[24] to limit federal intervention in labor disputes which previously had been marked by broad, ex parte injunctions against striking unions.[25] As a result of the Act's protection of labor's ability to organize and to bargain collectively, unions grew in strength and Congress eventually found it necessary to take steps to control the flood of strikes hampering the economy. In 1948, it passed the Labor Management Relations Act,[26] which included section 301, to promote collective bargaining and support existing agreements freely bargained for. In enacting the new law, Congress did not repeal the Norris-LaGuardia Act, nor did it state what relief federal courts could grant under section 301. The Supreme Court reconciled the two federal statutes in the landmark case of *Textile Workers Union v. Lincoln Mills.*[27] It held that federal courts had jurisdiction to compel arbitration pursuant to a collective bargaining agreement despite the Norris-LaGuardia Act. The Court reasoned that section 301 authorized federal courts to enforce collective bargaining agreements based on its belief that Congress had indicated industrial peace could best be obtained by assuring performance of agreed-upon settlement procedures.[28]

Fears that *Lincoln Mills*' construction of section 301 would promote massive federal intervention in labor disputes were dispelled

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24. 29 U.S.C. §§ 101-10, 113-15 (1970). For the text of the relevant portion of the Act see note 6 *supra*.

25. By enacting the Norris-LaGuardia Act, Congress attempted to "correct the abuses that had resulted from the interjection of the federal judiciary into union-management disputes on the behalf of management." Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 251 (1970). The federal courts had been regarded as allied with management in an attempt to prevent the strengthening of labor unions. *Id.* at 250. *See generally* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930).

26. 29 U.S.C. §§ 141-44, 151-68, 171-82, 185-88, 191-97 (1970). The declared purpose of the Act was

> to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other . . . [and to] proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare . . . .

Id. § 141 (1970). *See* 398 U.S. at 251.

27. 353 U.S. 448 (1957).

28. *Id.* at 455. In *Lincoln Mills*, the Court first announced that the union's no-strike agreement was the quid pro quo for an employer's agreement to arbitrate. *Id.*

by the Supreme Court in the so-called *Steelworkers Trilogy*.[29] In this series of cases, the Court established a policy of judicial deference to the arbitration procedure chosen by the parties. Justice Douglas stated that in claims brought under section 301, federal courts were to presume a grievance was covered under the arbitration agreement; they were, therefore, precluded from ruling on the merits of the dispute.[30] In the years following its decisions in the *Steelworkers Trilogy*, the Court maintained a pro-arbitration position,[31] but was eventually faced with deciding whether a union's strike over a dispute it had agreed to submit to arbitration could be enjoined under section 301. In *Boys Markets*, which overruled a contrary decision in *Sinclair Refining Co. v. Atkinson*,[32] the Court declared that an accommodation of section 301 and the Norris-LaGuardia Act was required[33] if the arbitration procedure was to be effectively en-

29. The three cases generally referred to as the *Steelworkers Trilogy* are: United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). *See generally* Gould, *On Labor Injunctions, Unions, and the Judges: The Boys Markets Case*, 1970 SUP. CT. REV. 215 [hereinafter cited as Gould].

30. The Court emphasized § 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d) (1970), which states that final adjustment of disputes between labor and management by the method they agreed upon is desired. 363 U.S. at 566.

31. *See, e.g.*, Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962), where the Court expanded the quid pro quo theory by upholding a damage award to an employer for a union strike despite the absence of an express no-strike obligation. The Court determined that the agreement contained an implied no-strike clause since it expressly imposed binding arbitration on the parties. A strike to settle a dispute subject to arbitration frustrated federal labor policy as manifested in the *Steelworkers Trilogy*. *Id.* at 105. *Cf.* Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R., 353 U.S. 30 (1957) (strikes over issues properly submitted to the National Railroad Adjustment Board pursuant to the Railway Labor Act enjoined to insure effectiveness of the Act).

32. 370 U.S. 195 (1962). In *Sinclair*, the Court held that the broad, inclusive language of the Norris-LaGuardia Act prevented the injunction of a union's strike over an arbitrable dispute in a section 301 action. The *Sinclair* decision surprised a number of commentators. *See, e.g.*, Isaacson, *A Fresh Look at the Labor Injunction*, 1971 LAB. L. DEV. 231; Keene, *The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to Avco and Beyond*, 15 VILL. L. REV. 32 (1969).

33. The accommodation was appropriate since the Norris-LaGuardia Act was responsive to a labor situation totally different from that existing in 1970. *See* 398 U.S. at 250. The public policy underlying the Norris-LaGuardia Act is explicitly set forth in the statute:

> Whereas under prevailing economic conditions . . . [the] worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment . . . [it is necessary] that he shall be free from the interference, restraint, or coercion of employers . . . in other concerted activities for the purpose of collective bargaining or other mutual aid . . . .

forced.[34] The Court ruled that despite the absolute language in the Norris-LaGuardia Act, a strike over an arbitrable grievance could be enjoined provided: (1) the parties were contractually bound to arbitrate the grievance; (2) the employer was required to arbitrate the grievance as a condition of obtaining the injunction; and (3) the injunction was warranted under general equity principles.[35] The Court emphasized that its holding was a narrow one, not intended to undermine the vitality of the Norris-LaGuardia Act.[36]

Requirement that the Underlying Dispute Be Over an Arbitrable Issue

The *Boys Markets* test for injunctive relief was not easily applied in a *Buffalo Forge* situation due to the nature of a dispute leading to a sympathy strike. In *Boys Markets*, the grievance that the parties had agreed to arbitrate—work assignments—provoked a strike which allegedly violated the no-strike clause.[37] The strike was *over* a dispute which the employer and the employees had agreed to arbitrate. In *Buffalo Forge*, the union had called a strike not by reason of any dispute it or any of its members had with the employer, but in support of other local unions. The validity of the sympathy strike itself, however, did produce a dispute which the parties were contractually bound to arbitrate. Circuit courts had been evenly divided on whether injunctive relief was proper under these circumstances.[38] Those circuits that held sympathy strikes

29 U.S.C. § 102 (1970). In *Boys Markets*, the Supreme Court observed that the core purpose of the Act was not sacrificed by granting an injunction which merely enforces an obligation the union freely undertook. 398 U.S. at 252.

34. In *Boys Markets*, the union protested the employer's assignment of certain work to supervisory personnel. When the employer refused to alter the situation, the union struck despite an express no-strike clause and an arbitration clause which appeared to cover the dispute in question. The Supreme Court held that since the purpose of the arbitration procedure was to provide a mechanism for the expeditious settlement of disputes without resort to strikes, its effectiveness was undercut if there were no immediate remedy for those tactics which arbitration was designed to eliminate. *Id.* at 249.

35. *Id.* at 254. The *Boys Markets* requirements were initially tested in Parade Publications, Inc. v. Philadelphia Mailers Local 14, 459 F.2d 369 (3d Cir. 1972) (injunction improperly issued where employer failed to affirmatively allege that union's strike was over an arbitrable issue and merely suggested that an arbitrator might determine the question in the future).

36. 398 U.S. at 253.

37. *Id.* at 239.

38. The Third, Fourth, and Eighth Circuits had enjoined sympathy strikes, while the

enjoinable apparently believed the federal pro-arbitration policy warranted injunctive relief; since the goal of arbitration was to peacefully settle disputes, the union should be prevented from striking while arbitrating the right to strike.[39] Those circuits that held sympathy strikes not enjoinable emphasized the narrowness of *Boys Markets*' qualification of the Norris-LaGuardia Act;[40] an injunction should be granted only when a strike is *over* an arbitrable dispute.[41] In *Buffalo Forge*, the Supreme Court settled the issue by, in effect, recognizing that only a portion of the union's quid pro quo is enforceable by injunction.[42] Although the union's commitment not to strike is its quid pro quo for the employer's agreement to arbitrate, the union's obligation is enforceable only if the strike is *caused* by a grievance subject to the parties' arbitration procedure. While a

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Second, Fifth and Sixth Circuits refused to issue injunctions under these circumstances; the Seventh Circuit had conflicting decisions. *See* 96 S. Ct. at 3145-46 n.9.

39. *See, e.g.*, NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974). *See also* Valmac Indus., Inc. v. Food Handlers Local 425, 519 F.2d 263 (8th Cir. 1975), *rev'd mem.*, 96 S. Ct. 3215 (1976) (since work stoppage precipitated an arbitrable dispute, it makes no sense to argue that sympathy strike is not a work stoppage over an arbitrable dispute).

40. Some commentators had believed that *Gateway Coal* signaled the expansion of *Boys Markets*. *See, e.g.*, Note, *The Applicability of Boys Markets Injunctions to Refusals to Cross a Picket Line*, 76 COLUM. L. REV. 113, 123 (1976). Prior to *Gateway Coal*, it had been suggested that the *Boys Markets* requirement that the strike be over a dispute subject to the arbitration provisions of the contract could not be satisfied by a court's presumption that a dispute is arbitrable. *See* Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability*, 85 HARV. L. REV. 636 (1972). Others argued that a duty to arbitrate should not give rise to an "implied" no-strike obligation supporting a *Boys Markets* injunction. *See* Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593 (1970). *Gateway Coal* dispelled the possibility of either of these limitations on *Boys Markets*. *See* note 20 *supra*.

In *Gateway Coal*, the Court utilized the "presumption of arbitrability," developed in the *Steelworkers Trilogy*, to expand the basis of federal equity jurisdiction. A strike over a substantial question of contract interpretation could be enjoined if the agreement provided that such questions were to be arbitrated. *See* 414 U.S. at 384. Federal authority to issue an injunction was dependent on the union's violation of a no-strike obligation. In *Gateway Coal*, however, it was not clear that the union had an obligation not to strike since it was not certain whether the dispute was arbitrable. Arguably, *Gateway Coal* represented an erosion of the Norris-LaGuardia Act beyond *Boys Markets* since the decision increased the risk a lawful strike might be enjoined. *Accord*, 96 S. Ct. at 3158 (Stevens, J., dissenting) (Norris-LaGuardia Act does not eliminate the danger of an erroneously issued injunction).

41. *See, e.g.*, Plain Dealer Publishing Co. v. Cleveland Typographical Union Local 53, 520 F.2d 1220 (6th Cir. 1975), *cert. denied*, 96 S. Ct. 3221 (1976); Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972).

42. 96 S. Ct. at 3150 (Stevens, J., dissenting). Under the majority's rationale, however, there was no splitting of the quid pro quo. The union's obligation not to strike extended only to arbitrable disputes. *Id.* at 3146.

sympathy strike creates a question of contract interpretation which the union may have agreed to settle by arbitration, the strike is not caused by an arbitrable issue. Such a strike is not a proper subject for injunctive relief.

The basic labor policy which prompted the *Boys Markets* decision—protection of the arbitration procedure[43]—supports the requirement adopted in *Buffalo Forge* that the strike must be over a dispute subject to the contract's arbitration provisions. The union's strike in *Boys Markets* was designed to force the employer to concede an arbitrable issue, and was therefore an attempt by the union to avoid its obligation to arbitrate the disputed issue. An injunction was necessary to insure that the arbitration process was not disrupted. A sympathy strike such as in *Buffalo Forge*, however, is not called as a result of a grievance the union has with the employer; therefore, it is not intended to force settlement of an issue which the parties have agreed to submit to arbitration. The sympathy strike in *Buffalo Forge*, motivated by the union's desire to support a sister union in its negotiations with the employer, is not an effort to avoid an obligation to arbitrate.[44] Even if the parties have agreed to arbitrate questions of contract interpretation, including the scope of a no-strike clause, to enjoin a strike arising from a dispute which the parties did not agree to arbitrate would arguably interfere with the arbitrator's function[45] without furthering a main concern of *Boys Markets*—enforcing the parties' agreement to arbitrate certain grievances. To this extent, the policy underlying *Boys Markets* is not subverted when a federal court refuses to enjoin a sympathy strike.

A difficulty with the majority position in *Buffalo Forge*, however, is that other considerations supported the *Boys Markets* decision, policy concerns which may be applicable to a sympathy strike situation despite the fact the strike is not over an arbitrable dispute. A goal of federal labor law is to substitute arbitration for the economically destructive strike, as permitted by the parties' agreement.[46] In the collective bargaining agreement at issue in *Buffalo Forge*, the

43. *See* note 34 *supra*.

44. For a detailed analysis of the propriety of the "underlying dispute" requirement see NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 324-33 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974) (Hunter, J., dissenting).

45. *See* note 52 and accompanying text *infra*.

46. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 105 (1962). *See* note 31 *supra*.

parties agreed there would be no work stoppages and all disputes would be arbitrated. Arguably, the policy of the Norris-LaGuardia Act, insuring the union's ability to negotiate, would not be offended by forcing the production employees to honor the no-strike obligation they freely undertook.[47] Indeed, in *Boys Markets*, the Court had recognized that the union's obligation not to strike, its quid pro quo, must be specifically enforced along with the employer's obligation to submit disputes to arbitration machinery, if the quid pro quo theory was to have any rationality.[48]

While this analysis would tend to undermine the holding of *Buffalo Forge*, the majority's view is supported by another well-established policy of federal labor law. When a federal court is asked to enjoin a sympathy strike pending binding arbitration, it has not yet been determined whether the sympathy strike violates an existing no-strike clause. It is conceivable that a sympathy strike is not a bona fide "strike" as contemplated by the parties in the no-strike clause, and hence, not a violation of their collective bargaining agreement.[49] It may be true that the union and the employer had agreed that an arbitrator would resolve their differences of interpretation of the collective bargaining agreement, including the scope of the no-strike clause; but a court's authority to enjoin a strike under the *Boys Markets* exception to the Norris-LaGuardia Act depends on whether the union is under a contractual duty not to

47. *See* note 33 and accompanying text *supra*.

48. 398 U.S. at 248.

49. The illegality of a strike is a complex issue. The right to strike and the right to refuse to cross another union's picket line are protected by both the Norris-LaGuardia Act, 29 U.S.C. §§ 101-10, 113-15 (1970), and the Labor Management Relations Act, *id.* §§ 157-58, 163 (1970). This right can be waived in the collective bargaining agreement, although the cases are not consistent as to the clarity required for a waiver to be effective. *Compare, e.g.*, NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953) (employer permitted to discharge employee for refusal to cross a picket line under contract provision prohibiting strikes or other cessation of work), *with, e.g.*, Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (union undertaking not to engage in work stoppage does not waive right to strike solely in response to unfair labor practices of employer). The individual's right to strike is distinct from the union's, and may not be waived merely by a no-strike clause in the union's contract with the employer. *See, e.g.*, Kellogg Co. v. NLRB, 457 F.2d 519 (6th Cir.), *cert. denied*, 409 U.S. 850 (1972); Ourisman Chevrolet Co. v. Automotive Lodge 1486, 77 L.R.R.M. 2084 (D.D.C. 1971). Concerted action by individual members of a union, even without official sanction, is, however, generally deemed to be union action. *See* United States v. UMW, 77 F. Supp. 563 (D.D.C. 1948), *aff'd*, 177 F.2d 29 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949) (president of UMW could not disclaim responsibility for simultaneous nationwide work stoppage by union members).

strike.[50] To enjoin the sympathy strike in *Buffalo Forge* would in effect be a decision that the strike was illegal, the functional equivalent of a decision on the merits of the only dispute subject to arbitration. Not only have the parties not bargained for a federal court's determination of law and fact before an arbitrator has had the opportunity to consider the issues,[51] but also such decision-making by the courts arguably contravenes the *Steelworkers Trilogy*'s policy of judicial deference to the expertise of arbitrators.[52] Concededly, under *Boys Markets*, federal courts may become involved in contract interpretation—they must initially determine if the dispute underlying any strike is arbitrable.[53] Yet, even in these circumstances, the courts do not reach the *merits* of the underlying dispute; this judgment is left to an arbitrator. Although in *Gateway Coal* the Court did acknowledge that substantial questions of contract interpretation might be grounds for federal equity jurisdiction,[54] a federal court's interpretation of whether a dispute is arbitrable under the contract will not settle the dispute between the parties as would a determination that a sympathy strike is enjoinable. Thus, while *Buffalo Forge* may represent a retrenchment of *Gateway Coal*, a contrary result would have involved a greater usurpation of the

50. *See* Gateway Coal Co. v. UMW, 414 U.S. 368, 380 (1974).

51. It is apparent the parties did not agree that the courts should resolve disputes as to the meaning of the agreement; such questions are reserved for the arbitrator. Some courts have reasoned, however, that enjoining a sympathy strike is not a decision on the merits. The union's right to honor a picket line would not be nullified by the injunction; the right is merely suspended until it is established by an arbitrator. *See* NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 324 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974). This approach fails to take into account that timing is critical to the success of a strike; even a temporary injunction can permanently defeat its purpose. *See* Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 467 (1969). Because of a shortage of arbitrators, there are often long delays in arbitration, compounding the effect of the temporary injunction. *See* Cohen, *The Search for Innovative Procedures in Labor Arbitration*, 29 ARB. J. 104, 107 (1974). Also, congressional preference for agreed-upon settlement procedures is thwarted since, in many instances, courts may permanently resolve contract disputes at the preliminary injunction stage. *See* 96 S. Ct. at 3149.

52. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). The question of whether a no-strike clause was breached by a sympathy strike is best left to an arbitrator skilled in the interpretation of labor contracts. *See* Connolly, *supra* note 15, at 140.

53. One commentator has criticized *Boys Markets* as infringing upon the arbitrator's domain, to the extent its holding requires some degree of contract interpretation by the courts. *See* Markson, *The End of an Experiment in Arbitral Supremacy: The Death of Sinclair*, 21 LAB. L.J. 645 (1970).

54. 414 U.S. at 384.

arbitrator's function. *Buffalo Forge*'s determination that an injunction is not authorized solely because it is alleged the strike violates the no-strike clause appears sound at least within the existing policies of federal labor law.[55]

Impact of Buffalo Forge

It seems clear that the rationale in *Buffalo Forge* extends beyond the sympathy strike situation. The Court's holding would appear to be apposite to any strike which is not "over an arbitrable dispute." Such a strike under *Buffalo Forge* is simply not amenable to federal injunctive relief. In view of the majority's concern that a contrary decision could involve the federal courts in a burdensome amount of litigation,[56] the decision's probable effect is a desirable one of reducing the role of the federal courts in labor disputes. The decision may also have practical effects on the relations between labor and management and the collective bargaining agreements they negotiate. Although it remains to be seen whether a refusal to enjoin a sympathy strike will interfere with the subsequent arbitration procedure, a union may employ procedures to delay final arbitration

55. The majority did indicate a willingness to enjoin a sympathy strike following an arbitrator's decree that the strike is illegal. *See* 96 S. Ct. 3146. Although the Supreme Court has not ruled on this issue, the power to do so has been recognized by a lower court. *See* New Orleans Steamship Ass'n v. General Longshore Workers Local 1418, 389 F.2d 369 (5th Cir.), *cert. denied*, 393 U.S. 828 (1968). Furthermore, the power to enforce an arbitrator's award appears to be consistent with the federal labor policy of promoting arbitration. *See generally* Gould, *supra* note 29, at 246.

In his dissent, Justice Stevens maintained that, assuming the existence of the power to enjoin the strike after an arbitrator's decree, the *Buffalo Forge* decision was inconsistent with federal labor policy. The effect of arbitration is to remove any ambiguity from the collective bargaining agreement. The sympathy strike may so clearly violate the agreement that its validity does not present a bona fide issue for submission to an arbitrator. Under these circumstances, the court should have the authority to enforce the no-strike clause. *See* 96 S. Ct. at 3156 (dissenting opinion).

The dissent's "clear violation of a no-strike agreement" approach may be less of an infringement on the Norris-LaGuardia Act than the *Gateway Coal* decision; a legal sympathy strike is not likely to be enjoined. *See* note 40 *supra*. But a judicial determination of even a clear violation of a no-strike clause arguably contravenes the *Steelworkers Trilogy's* policy of nonintervention in arbitrable matters. It is not only the possible lack of a judge's competence in labor matters which gave rise to this policy; there is also a congressional preference that disputes be settled in the manner the parties negotiated. *See* note 30 and accompanying text *supra*.

56. *See* 96 S. Ct. at 3149 n.12.

while it continues to strike.[57] Since employers are now without assurance of uninterrupted business operations, and are therefore deprived of a prime impetus for agreeing to arbitrate, the *Buffalo Forge* decision may discourage them from agreeing to binding arbitration in the future. Without an arbitration clause, however, the employer lacks even the protection of a *Boys Markets* injunction.[58] *Buffalo Forge* may force employers to rely on other remedies[59] to enforce a no-strike clause when injunctive relief is not available. The decision may also reduce the number of section 301 damage actions based on a breach of an implied no-strike obligation of the union, in view of the Court's dictum that an agreement to arbitrate, standing alone, does not imply a duty not to engage in sympathy strikes.[60] As an alternative, an employer may opt for an expedited

57. In *Buffalo Forge*, the Supreme Court suggested a different effect on the arbitration process if injunctions were authorized; a court's initial determination that a sympathy strike is illegal, though not technically binding on the arbitrator's subsequent ruling, may overly influence his decision. 96 S. Ct. at 3149. *Cf.* NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 327 (3d Cir. 1974) (Hunter, J., dissenting) (issuing an injunction is likely to discourage arbitration since employer will utilize procedural delays in arbitration).

58. Traditionally, it had been assumed that without specific enforcement of the no-strike obligation, there was no incentive for employers to enter into arbitration agreements. *See* 398 U.S. at 248. Empirical evidence from the period following *Sinclair*, however, indicates that despite the nonavailability of injunctive relief, employers are still willing to enter into mandatory arbitration agreements. *See* Gould, *supra* note 29, at 246. Gould suggested that the short-run impact of *Boys Markets* could be to increase work stoppages over terms in a new contract since the powerful industrial unions might demand elimination of no-strike clauses. *Id.* at 267. *Buffalo Forge* will serve to limit the conditions under which a no-strike obligation will be specifically enforced against a union, thus possibly reducing the demand for the elimination of such clauses.

59. Other remedies available to the employer include an action for damages against the union for injury resulting from an illegal strike, or disciplining or discharging employees for refusing to cross a picket line. *See* Connolly, *supra* note 15, at 143-63; Edwards & Bergmann, *The Legal and Practical Remedies Available to Employers to Enforce a Contractual "No-Strike" Commitment*, 21 LAB. L.J. 3 (1970). These remedies, however, are often determined to be inadequate since retribution after a work stoppage is a poor substitute for an immediate halt to an illegal strike. *See* 398 U.S. at 248. Furthermore, employers are often reluctant to use these other remedies since they tend to aggravate labor relations. Gould, *supra* note 29, at 230.

Generally, where the parties have a broad agreement to arbitrate all complaints, disputes, or grievances arising between them, an employer who seeks damages or disciplinary action for a violation of a no-strike agreement must proceed to arbitration. *See* Drake Bakeries, Inc. v. American Bakery & Confectionary Workers Local 50, 370 U.S. 254 (1962).

60. In *Buffalo Forge*, the Court noted that lower courts which had assumed that a mandatory arbitration clause implied a commitment not to engage in sympathy strikes were in error. 96 S. Ct. at 3147 n.10. *Buffalo Forge* apparently limits the scope of the implied no-strike clause established in Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). *See* note

arbitration clause in the collective bargaining agreement to minimize the time delay between a union's alleged violation of a no-strike clause and an arbitrator's decision that the clause was violated.[61] An expedited arbitration clause would have the advantage of reducing a sympathy strike's potentially deleterious effect on productivity.

CONCLUSION

Boys Markets returned to the federal courts the authority to enjoin certain labor strikes, a power which Congress had previously sought to eliminate by enacting the Norris-LaGuardia Act. *Buffalo Forge* conclusively establishes that this equitable remedy is to be used only when necessary to insure compliance with a negotiated arbitration procedure. The decision, perhaps, represents a revitalization of the Norris-LaGuardia Act and at least a temporary end to any further expansion of the federal court's power to intervene in labor disputes. Moreover, the Court's expressed concern with embroiling district courts in massive preliminary injunction litigation[62] may signal a rethinking of the scope of federal jurisdiction under section 301.

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31 *supra.* A sympathy strike is not over an arbitrable dispute and therefore does not violate an implied no-strike clause. The basis of a section 301 damage action is an illegal strike. *Buffalo Forge* may preclude the granting of damages by a federal court where the employer alleges the sympathy strike violates an implied no-strike clause.

61. Expedited arbitration is an optional process which the parties may employ for handling certain disputes. Generally, a hearing is commenced within 72 hours after the dispute arises. The parties, however, usually limit this procedure to routine matters. *See* Cohen, *supra* note 51, at 106.

62. 96 S. Ct. at 3149 n.12.