LABOR LAW: THE AVAILABILITY OF FEDERAL INJUNCTIVE RELIEF TO HALT SYMPATHY STRIKES

INTRODUCTION

The Eighth Circuit Court of Appeals in *Valmac Industries, Inc. v. Food Handlers Local 425*,[1] and the Second Circuit in *Buffalo Forge Co. v. United Steelworkers*[2] reached opposite conclusions as to whether a federal court can enjoin a strike when the work stoppage is in sympathy with another bargaining unit and not the result of an independent contract dispute.

Buffalo Forge and *Valmac* are factually similar. One segment of the employers' union work force went on strike over contract disputes. Picket lines were established and honored by other workers employed under separate and distinct bargaining agreements providing for arbitration and no-strike pledges. The employers requested injunctive relief to halt the sympathetic work stoppages which were in ostensible violation of the no-strike clauses.[3] Both requests were predicated on Section 301 of the Labor-Management Relations Act[4] which gives federal courts jurisdiction over labor disputes.[5]

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1. 519 F.2d 263 (8th Cir. 1975) [hereinafter cited as *Valmac*].
2. 517 F.2d 1207 (2d Cir. 1975) [hereinafter cited as *Buffalo Forge*].
3. *Valmac* at 265-66; *Buffalo Forge* at 1209-10. The *Valmac* collective bargaining agreement provided in part:

> During the whole period this Agreement is in effect, the Company shall not lockout its employees and the Union shall not authorize or sanction any strike, stoppage, slow-down or suspension of work against the Company, except for failure of the other party to submit to the arbitration procedure as provided for in Article V of this Agreement, and only then upon forty-eight (48) hours written notice to the other party, and the other party's continued failure to submit to arbitration. *Valmac* at 265 n.5.

4. *Valmac* at 265; *Buffalo Forge* at 1208-09. The *Buffalo Forge* bargaining contract contained a similar no-strike pledge:

> 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. No employee shall participate in any such activity.

Buffalo Forge Co. v. United Steelworkers, 386 F. Supp. 405, 407 (W.D.N.Y. 1974).

5. Labor Management Relations Act (Taft-Hartley Act) § 301(a), 29 U.S.C. § 185(a) (1971), provides:

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

In *Buffalo Forge*, the District Court for the Western District of New York determined that under the Supreme Court decision of *Boys Markets, Inc. v. Retail Clerks Union*,[6] it was deprived of jurisdiction by the anti-injunction provisions of the Norris-La Guardia Act.[7] Despite the injunction ban of the Norris-La Guardia Act, *Boys Markets* permits a federal court to enjoin a strike when the work stoppage is over a grievance the parties are contractually bound to arbitrate.[8] However, the Second Circuit affirmed the lower court decision since it considered the *Boys Markets* exception to be inapplicable to the facts.[9] In contrast, the District Court for the Eastern District of Arkansas issued the injunction sought by *Valmac Industries*.[10] On appeal, the Eighth Circuit held the issuance of an injunction was a proper method to halt the work stoppage precipitated by the honoring of union picket lines and not by an independent dispute.[11] The court went on to state that the legality of a sympathy strike in apparent contravention of a no-strike clause presents an arbitrable grievance within the meaning of *Boys Markets*.[12]

The ultimate issue in both cases is how far the anti-injunction provision of Section 4 of the Norrris-La Guardia Act should be restricted. *Valmac* represents the majority view and is in accord with decisions rendered in the Fourth, Seventh and Third Circuits.[13] This position is supported by general policy considerations

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merce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

6. 398 U.S. 235 (1970) [hereinafter cited as *Boys Markets*].

7. Buffalo Forge Co. v. United Steelworkers, 386 F. Supp. 405, 409-10 (W.D.N.Y. 1974). The Norris-LaGuardia Act § 4, 29 U.S.C. § 104 (1970), provides in part:

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

8. *Boys Markets* at 254.

9. *Buffalo Forge* at 1210-11.

10. *Valmac* at 265-66.

11. *Id.* at 268-69.

12. *Id.*

13. Armco Steel Corp. v. United Mine Workers, 505 F.2d 1129 (4th Cir. 1974); Inland Steel Co. v. Local 1545 UMW, 505 52d 293 (7th Cir. 1974); NAPA Pittsburg, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3rd Cir. 1974), *cert. denied*, 419 U.S. 1049 (1974); Pilot Freight Carriers, Inc. v. International Bd. of Teamsters, 497 F.2d 311 (4th Cir. 1974), *cert. denied*, 419 U.S. 869 (1974); Monongahela Power Co. v. Local 2332 IBEW, 484 F.2d

and an expansive interpretation of the *Boys Markets* case. The Second Circuit's opinion in *Buffalo Forge* represents the minority view that a work stoppage in support of another union or fellow union members under a separate bargaining agreement does not create an arbitrable grievance within the meaning of *Boys Markets*.[14] This view finds support in the Fifth Circuit and in several district court cases.[15]

This comment will discuss the opposing rationales involved and attempt to show that the Eighth Circuit's position represents an expansion of the anti-injunction exception which is in harmony with the developing trend of federal case law in the area. Background material for the problem will be presented in terms of Section 4 of the Norris-La Guardia Act, Section 301 of the Labor-Management Relations Act, and the judicial resolution of the conflicting policy justifications behind these provisions in the landmark *Boys Markets* case.

NORRIS-LA GUARDIA AND THE LABOR-MANAGEMENT RELATIONS ACTS

Prior to 1932, the labor injunction was a widely used method of quashing union activity.[16] The federal courts were generally regarded as allies of management in resisting the developing labor movement.[17] As a result of the judicial abuse of the injunctive remedy in support of management,[18] Congress passed the Norris-La Guardia Act.[19] Section 4 of the Act prohibited federal courts from issuing temporary or permanent injunctions in most labor dis-

1209 (4th Cir. 1973); Wilmington Shipping Co. v. Longshoremen, 86 L.R.R.M. 2846 (4th Cir. 1974). *See also* Associated Gen. Contractors v. Construction Local 563, 519 F.2d 269 (8th Cir. 1975), for an application of the *Valmac* decision.

14. *Buffalo Forge* at 1211.

15. Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972); Simplex Wire & Cable Co. v. Local 2208 IBEW, 314 F. Supp. 885 (D.N.H. 1970); General Cable Corp. v. Local 1644 IBEW, 331 F. Supp. 478 (D. Md. 1971); Carnation Co. v. Teamsters Local 949, 86 L.R.R.M. 3012 (S.D. Tex. 1974). *But see* Barnard College v. Transport Workers Union, 372 F. Supp. 211 (S.D.N.Y. 1974), apparently overruled by *Buffalo Forge* sub silentio.

16. Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1594 (1970).

17. *Boys Markets* at 250.

18. F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 200-02, 66-81, 86-89 (1930). *See also* Vladeck, *Boys Markets and National Labor Policy*, 24 VAND. L. REV. 93, 94 (1970); Gould, *On Labor Injunctions, Unions, and the Judges: The Boys Markets Case*, 1970 SUP. CT. REV. 215, 234-35.

19. 29 U.S.C. §§ 101 *et seq.* (1970).

putes.[20] However, the ban against injunctions was not absolute, as the courts retained jurisdiction to enjoin "unlawful acts," primarily violence and crime.[21]

Subsequent labor legislation was formulated in a climate different from that which existed at the passage of the Norris-La Guardia Act. With unions growing more powerful under the protection of the injunction ban, "congressional emphasis shifted . . . to the encouragement of collective bargaining and . . . the peaceful resolution of industrial disputes."[22] The Labor-Management Relations Act, which was passed in 1947 to further this policy,[23] allowed federal courts to issue injunctions in order to prevent unfair labor practices, illegal payments to labor officials, and strikes during national emergencies.[24] Partial repeal of the Norris-La Guardia injunction ban also came through judicial interpretation of Section 301 of the Labor-Management Relations Act, which gave federal courts concurrent jurisdiction with state courts over suits for breach of contracts between industry and labor.[25]

JUDICIAL INTERPRETATION OF SECTION 301

Although jurisdictional on its face, Section 301 was interpreted by the Supreme Court in *Textile Workers v. Lincoln Mills* as a congressional mandate to establish a uniform body of substantive federal labor law.[26] The Court initiated the process in *Lincoln Mills* by making arbitration agreements specifically enforceable against employers.[27] Whether a union could be similarly com-

20. U.S.C. § 104 (1970).

21. *Id.* at § 107; Brotherhood of R.R. Trainmen Local 721 v. Central of Georgia Ry. Co., 229 F.2d 901, 905 (5th Cir. 1956); Wilson & Co. v. Birl, 105 F.2d 948, 952 (3rd Cir. 1939).

22. *Boys Markets* at 251.

23. 29 U.S.C. § 141(b) (1970) provides in part:

> It is the purpose and policy of this chapter, in order to promote the full flow of commerce, 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, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

24. 29 U.S.C. §§ 160(j), 186, 178 (1970).

25. 29 U.S.C. § 185(a) (1970); Unkovic, *Enforcing the No-Strike Clause*, 21 LABOR L.J. 387, 390 (1970). State courts retain jurisdiction over labor disputes under Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 511 (1962).

26. 353 U.S. 448, 451 (1957) [hereinafter cited as *Lincoln Mills*].

27. *Lincoln Mills* at 458-59.

pelled to honor arbitration agreements was unclear since Congress had failed to specify the relationship of Section 301 to the injunction ban in the Norris-La Guardia Act.[28] Although *Lincoln Mills* did not decide this specific issue,[29] the Supreme Court did note that the legislative history of the provision revealed a congressional intent to make collective bargaining agreements enforceable by and against labor unions:

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

It is evident that *Lincoln Mills* was a major contribution to the establishment of arbitration as the central institution in administering collective bargaining contracts.[31] The Court's support of the arbitration process was subsequently reinforced and broadened in the *Steelworkers Triology*.[32] A presumption of arbitrability was enunciated in these cases to resolve questions of contract interpretation.[33] What is significant is that in both

28. Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1594 (1970).

29. The issue was finally resolved by the Supreme Court thirteen years later in the *Boys Markets* decision. *See* text at notes 35-42.

30. *Lincoln Mills* at 455.

31. Wellington and Albert, *Statutory Interpretation & the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547, 1557 (1963).

32. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). *See The Supreme Court, 1969 Term*, 84 HARV. L. REV. 177, 199 (1970-71); Unkovic, *Enforcing the No-Strike Clause*, 21 LABOR L.J. 387, 390-91 (1970); Vladeck, *Boys Markets and National Labor Policy*, 24 VAND. L. REV. 93, 94 (1970).

33. The congressional policy favoring arbitration was firmly recognized in the *Steelworkers Trilogy*:

> 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 and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.

United Steelworkers v. Warrior Gulf Navigation Co., 363 U.S. 574, 581 (1960). All doubts concerning coverage of the arbitration clause are resolved in favor of coverage unless the clause is positively not susceptible to such an interpretation. United Steelworkers v. Warrior & Gulf Navigation Co. at 582-83. The presumption was recently applied to a mine safety dispute in Gateway Coal Co. v. UMW, 414 U.S. 368, 379 (1974).

Lincoln Mills and the *Triology*, Section 301 were interpreted broadly, giving federal courts the ability to enforce arbitration agreements[34] with questions of the agreement's scope being decided in favor of arbitrability via the presumption.

An answer to the question of federal courts enjoining strikes as a method of enforcing arbitration agreements under Section 301 jurisdiction came in *Sinclair Refining Co. v. Atkinson*.[35] Here the Supreme Court stated that, ". . . section 301 was not intended to have any such partially repealing effect upon such a long standing, carefully thought out and highly significant part of this country's labor legislation as the Norris-La Guardia Act."[36] Thus, under the *Sinclair* decision, employers could not obtain an injunction in federal court to enforce collective bargaining agreements.[37]

The Supreme Court later overruled *Sinclair* in *Boys Markets, Inc. v. Retail Clerks Union*[38] in order to solve a self-created jurisdictional dilemma.[39] *Boys Markets* involved a dispute, which the union had agreed to resolve through arbitration, between an employer and a union over the right of union workers to perform designated tasks in the employer's store. The union ignored its agreement, including a no-strike pledge, and called a strike to force the employer to concede that the duties involved had to be performed by union men.[40] These facts confronted the Supreme Court with the conflicting policy goals behind Section 4 of Norris-La Guardia and Section 301 of the Labor-Management Relations Act, namely protection of labor unions and their activities versus promotion of industrial peace through arbitration of disputes. The Court held that a federal court could enjoin a work stoppage when it was over a grievance which the parties were contractually bound to arbitrate, thus creating an exception to the injunction ban of Section 4 of the Norris-La Guardia Act.[41] In doing so, the

34. Unkovic, *Enforcing the No-Strike Clause*, 21 LABOR L.J. 387, 391 (1970).

35. 370 U.S. 195 (1962) [hereinafter cited as *Sinclair*].

36. *Sinclair* at 203.

37. *Id.*

38. 398 U.S. 235 (1970).

39. While state courts could issue injunctions against labor unions under Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 511 (1962), they were effectively deprived of jurisdiction through the use of federal question removal procedures made applicable to § 301 suits by Avco Corp. v. Aero Lodge 735, 390 U.S. 557, 560 (1968); Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1595-96 (1970). The Supreme Court was of the opinion that the dilemma could be resolved either by overruling *Sinclair* or extending that decision to the state courts. *Boys Markets* at 247.

40. *Id.* at 238-40.

41. *Id.* at 254.

majority concluded that *Sinclair* had been erroneously decided and that the anti-injunction provision must be "accommodated"[42] to give effect to the mandate of Section 301:

> The *Sinclair* decision, however, seriously undermined the effectiveness of the arbitration technique as a method peacefully to resolve [sic] industrial disputes without resort to strikes, lockouts, and similar devices . . . We conclude, therefore, that the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, [and] that the core purpose of the Norris-La Guardia Act is not sacrificed by the limited use of equitable remedies to further this important policy. . . .[43]

The *Boys Markets* exception to the Norris-La Guardia injunction ban was intended to be restrictive in order to avoid undermining the continued validity of the Norris-La Guardia Act.[44] Specific prerequisites were established to determine when federal injunctive relief was appropriate.[45] These requirements are: 1) the parties to an injunction must be bound by a collective bargaining agreement that contains a mandatory grievance and arbitration procedure which covers the dispute precipitating the strike; 2) the injunction action must be warranted under ordinary principles of equity; and 3) the relief must be conditioned on an order to arbitrate the issue.[46]

VALMAC AND THE MAJORITY VIEW

Jurisdictions which have approved injunctions where the work stoppage itself is the arbitrable issue have emphasized the dominant policy favoring the settlement of labor disputes by binding arbitration.[47] Arguably, the purpose of a sympathy strike is to bring indirect pressure on the employer to settle with another striking union. Arbitration is discouraged indirectly because settlement of

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42. The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act [Taft-Hartley Act] and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions.

Id. at 250. The accommodation process was not a novel rationale; it was previously employed in Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 42 (1957).

43. *Boys Markets* at 252-53.

44. *Id.* at 253.

45. *Id.* at 254.

46. *Id.*

47. *Valmac* at 266 (citing cases).

the primary dispute would terminate the sympathetic work stoppage without a determination of its legality by an impartial umpire.[48] Even though a sympathy strike is not the result of an independent artitrable dispute as considered in *Boys Markets*,[49] the sympathy strike is an ostensible violation of a no-strike clause and thus precipitates an arbitrable dispute. Therefore, the majority of courts reason that the issue of the strike's permissibility should be settled by arbitration in order to further congressional policy.

The purpose of a *Boys Markets* injunction, and its only justification as an exception to the Norris-La Guardia Act, is to suspend a strike in order to facilitate the contractually provided method of dispute resolution.[50] The prominence of collective bargaining as the means of regulating industrial relations further justifies emphasis on contract enforcement through the use of an injunction.[51] A union may specifically enforce the bargain against the employer under *Lincoln Mills*, but without the injunctive remedy the employer is helpless to compel the union to honor its no-strike pledge, the *quid pro quo* for compulsory arbitration.[52] To allow the union to disregard the no-strike clause would render the collective bargaining agreement illusory.[53] Disciplinary action against participating employees or a suit for damages against the union are also available as remedies for breach of no-strike agreements,[54] but valid practical considerations significantly reduce the viability of these alternatives:

> The Norris-La Guardia Act was enacted before collective agreements had become the cornerstone of sound industrial relations, and most of the proponents of its philosophy also held that a collective bargaining agreement should carry only moral and economic sanctions. Congress rejected their approach in Section 301 by providing for suits for violation of the agreement. The statute does not specify the remedy but an injunction is the only practical relief against a strike. Damages are inadequate because injury to the business cannot be measured accurately. Further-

48. *But cf.* NAPA Pittsburg, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 327 n.7 (3rd Cir. 1974) (dissent by Judge Hunter).

49. *See Boys Markets* at 239.

50. *Valmac* at 268.

51. Note, *New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1599 (1970).

52. *Lincoln Mills* at 455, 458; Avco Corp. v. Local 787 UAW, 459 F.2d 968, 972 (3rd Cir. 1972).

53. Avco Corp v. Local 787 UAW, 459 F.2d 968, 972 (3rd Cir. 1972).

54. *See* Edwards and Bergmann, *The Legal and Practical Remedies Available to Employers to Enforce A Contractual "No-Strike" Commitment*, 21 LABOR L.J. 3, 6-10 (1970).

> more, an employer can rarely afford to exacerbate labor-management relations by suing a union made up of his employees after the end of the strike.[55]

In contrast, the injunction is a more effective method for the enforcement of contractual agreements because it respects freedom of contract while insuring industrial peace.[56] From the above it would appear that injunctive relief is applicable to the sympathy strike situation where a no-strike clause exists.

Under the majority interpretation of *Boys Markets*, the scope of the arbitration clause is determinative of the applicability of the anti-injunction exception. Where a matter has been made arbitrable by the terms of a contract between the union and the employer, an injunction may be issued to enforce arbitration.[57] Whether an independent arbitrable dispute is the underlying cause of the work stoppage is immaterial.[58] Doubts concerning a particular dispute's arbitrability are decided in favor of arbitration in accord with the presumption enunciated by the Supreme Court in the *Triology* cases.[59] In line with the majority view, the Eighth Circuit in *Valmac* promulgated a rule which allows an injunction to issue when the dispute is *arguably* covered by arbitration under the bargaining contract.[60] The *Valmac* court considered the issue of the work stoppage's permissibility to be within the scope of the arbitration clause contained in the sympathy striker's contract.[61] A similar focus on the scope of the arbitration clause was employed by the Fourth Circuit in the leading majority decision, *Monongahela Power Co. v. Local 2332, IBEW*.[62] *Monongahela* also involved a sympathy strike in violation of a bargaining contract's express no-strike clause.[63] The Fourth Circuit stated that the issue was whether the violation of an express no-strike clause itself creates

55. Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247, 255 (1958). *See also* Wellington, *The No-Strike Clause and the Labor Injunction: Time for A Re-Examination*, 30 PITT L. REV. 293, 306-07 (1968); *Boys Markets* at 248-49 n.17.

56. *Id.* *See also* Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1599 (1970); *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 177, 199 (1970-71).

57. *Valmac* at 267; Monongahela Power Co. v. Local 2332 IBEW, 484 F.2d 1209, 1213-14 (4th Cir. 1973); Armco Steel Corp. v. United Mine Workers, 505 F.2d 1129, 1131-32 (4th Cir. 1974).

58. *Valmac* at 267-68.

59. *Steelworkers Trilogy*. *See* note 32.

60. *Valmac* at 268.

61. *Id.* at 267. The binding arbitration provisions in the *Valmac* contract related to any grievance "involving an interpretation, application or violation of [the] Agreement . . . ." *Id.*

62. 484 F.2d 1209 (4th Cir. 1973) [hereinafter cited as *Monongahela*].

63. *Id.* at 1210.

an arbitrable issue for the purposes of a *Boys Markets* injunction, and concluded that a sympathy strike in violation of a no-strike clause is a proper target for injunctive relief.[64]

Although the Seventh Circuit granted injunctive relief against a sympathy strike in *Inland Steel Co. v. Local 1545 UMW*,[65] it considered the *Monongahela* case to be inapplicable since an express no-strike clause was not present.[66] The *Inland Steel* court held that the sympathy striker's right to honor picket lines established by another union was an arbitrable issue within the "exceptionally broad" terms of the arbitration clause.[67] *Inland Steel* was distinguished in a recent Seventh Circuit case, *Gary Hobart Water Corp. v. NLRB*.[68] Here, the court refused to enjoin a sympathy strike because the scope of the arbitration clause was narrower than the clause in *Inland Steel* and consequently it did not render the right to honor picket lines arbitrable.[69] It may be inferred from the

64. *Id.* at 1213-14.

65. 505 F.2d 293, 300 (7th Cir. 1974) [hereinafter cited as *Inland Steel*].

66. *Inland Steel* at 299.

67. *Id.* at 297-98. Union coal miners employed by Inland Steel Co. honored picket lines established by construction workers who were on strike as the result of a failure to receive the full amount of a negotiated pay increase. *Id.* at 295. Both Inland Steel Co. and Local 1545 were bound by the arbitration provisions of the National Bituminous Coal Wage Agreement of 1971:

> Should differences arise between the Mine Workers and the operators as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately. . . .
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> 5. Should the board fail to agree the matter shall, within twenty (20) days after decision by the board, be referred to an umpire to be mutually agreed upon by the operator or operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. . . .

Id. at 297-98 n.5.

68. 511 F.2d 284, 288 (7th Cir. 1975) [hereinafter cited as *Gary Hobart*].

69. The no-strike and arbitration clauses in the *Gary Hobart* case provided in part:

> [The parties agree that] there shall be no lockouts by the Company and there shall be no strike, stoppages of work or any other form of interference with any of the production or other operations of the Company by the Union or its members, and any and all disputes and controversies arising under or in connection with the terms of provisions hereof shall be subject to the grievance procedure. . . .

Id. at 287-88.

The Seventh Circuit distinguished the *Inland Steel* arbitration clause on the presence of two phrases it considered sufficiently broad to include the right to honor picket lines as an arbitrable issue. *Gary Hobart* at 288.

Gary Hobart decision that the Seventh Circuit will not enjoin a sympathy strike, unless the scope of the arbitration clause in question is at least as broad as the one contained in *Inland Steel.*[70]

The Seventh Circuit's refusal to base the granting of injunctive relief on the broader grounds present in the Fourth Circuit's *Monongahela* decision appears to be invalid for a number of reasons.

First, the Third, Fourth and Eighth Circuits all recognize that a sympathetic work stoppage in violation of a no-strike clause, express or implied, constitutes an arbitrable grievance within the scope of a standard arbitration clause.[71]

Secondly, the absence of an express no-strike clause in a bargaining contract is immaterial as a no-strike clause is implied to the extent that there is a contractual commitment to submit disagreements to final and binding arbitration.[72]

Finally, the presence of a picket line provision in the bargaining contract, as in *Valmac,*[73] does not make submission of the dispute to arbitration unnecessary since a party's subjective interpretation

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The *Inland Steel* clause covered differences about matters not specifically mentioned in the agreement and local trouble of any kind arising at the mine. *See* note 67. The *Inland Steel* arbitration provisions also included disputes over the meaning and application of the agreement, but the court in *Gary Hobart* characterized this phrase as clearly not affecting the right to engage in a sympathy strike. *Gary Hobart* at 288. The *Gary Hobart* case was brought to the attention of the Fourth Circuit in another majority decision, Armco Steel Corp. v. United Mine Workers, 505 F.2d 1129 (4th Cir. 1974). The Fourth Circuit stated that nothing in *Gary Hobart* militates against the applicability of *Boys Markets* injunctive relief to sympathy strikes. The Fourth Circuit interpreted the *Gary Hobart* holding to be merely another way of expressing the principle that *Boys Markets* applies only when the grievance is arbitrable. Armco Steel Corp. v. United Mine Workers, 505 F.2d 1129, 1133 (4th Cir. 1974).

70. *Cf. Gary Hobart* at 288.

71. *Valmac* at 267-68; *Monongahela* at 1213-14; NAPA Pittsburg Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 324 (3rd Cir. 1974). A standard form of arbitration clause is set forth in United Steelworkers v. American Mfg. Co., 363 U.S. 564, 565 n.1 (1960):

> Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision. . . .

See Cox, *Reflections Upon Labor Arbitration,* 72 HARV. L. REV. 1482, 1497-1500 (1959).

72. Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 381 (1974); Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 105 (1962).

73. The *Valmac* provision stated:

> It shall not be a violation of this Agreement for an employee to refuse to pass through a picket line authorized by the Union.

Valmac at 265 n.4.

of the provisions of a collective bargaining agreement is insufficient to justify resort to self-help as a means of resolving a dispute.[74] A determination of whether a work stoppage caused by the honoring of picket lines is a permitted activity under a collective bargaining agreement requires an impartial interpretation of the contract. It therefore seems unnecessary to find the scope of an arbitration clause to be exceptionally broad before an injunction may be properly issued to halt a sympathy strike.

When the arbitrable issue is the legality of the work stoppage, the union must suspend its right to strike until the umpire determines the right exists.[75] Consequently, there is a distinct possibility that legitimate work stoppages will be terminated pending arbitration, thereby depriving the union of an important economic weapon.[76] By agreeing to a no-strike clause, a union gives up the right to strike over subject matter contained in the collective bargaining contract, although the waiver does not operate against the union's right to protect itself from unfair labor practices.[77] A union can avoid the possibility of waiving its right to strike or honor picket lines in specific instances by negotiating express exceptions to the no-strike pledge.[78] When the relationship between an exception, such as a picket line provision, and the no-strike clause is unclear an arbitrable issue arises under *Valmac* and cases in agreement with it.[79] When the relationship is unclear from the face of the agreement, the burden of suspending activities pending an interpretation of the agreement can be minimized by adherence to the guidelines in *Boys Markets* and prompt arbitration of the

74. In Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974), the Supreme Court rejected an argument which would have allowed the union to make a subjective interpretation of the bargaining contract in order to invoke an exception to an implied no-strike agreement. The Court was "unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be." *Id.* at 386.

75. NAPA Pittsburg, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 324 (3rd Cir. 1974).

76. Refusals to cross picket lines are highly dependent on timing. Even if the arbitrator decides the work stoppage is legitimate, post-arbitration stoppage could be less effective. Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1601 (1970). *See* Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 467 (1969).

77. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 281-83 (1956) (right to strike may be waived); NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953) (right to honor picket lines may be waived). Unfair labor practices are set out in 29 U.S.C. § 158 (1970).

78. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579 n.5 (1960).

79. *Valmac* at 267-68.

issue.[80] Other commentators have suggested procedural safeguards to lessen the adverse impact of an injunction on union activity such as: submission of the question of arbitrability to an arbitrator who may be technically more competent to decide the issue;[81] elimination of the ex parte restraining order; closer judicial scrutiny of arbitrability without exclusive reliance on the presumption of arbitrability;[82] and use of accelerated arbitration procedures.[83]

BUFFALO FORGE AND THE MINORITY VIEW

Several courts, including the Second Circuit in *Buffalo Forge*, have concluded that when the legality of a work stoppage is the only issue between the employer and the union, the stoppage is not over an arbitrable dispute and the *Boys Markets* exception is rendered inapposite.[84] Policy justifications for this conclusion are comprehensively articulated by Judge Hunter in his dissent in *NAPA Pittsburg, Inc. v. Automotive Chauffeurs Local 926*.[85] Under Judge Hunter's analysis, the policy considerations behind the *Boys Markets* decision are absent in the circumstances of a sympathy strike.[86] The strike in *Boys Markets* was designed to pressure the company on the arbitrable issue before it could present its position to an arbitrator. Therefore, an injunction was justified to prevent circumvention of the arbitration process.[87] In the case of a sympathy strike no economic pressure is exerted against the employer to forego arbitration since there is no dispute between the union and the employer. Judge Hunter maintains that the argument which asserts that arbitration is indirectly discouraged is fallacious because it assumes that resolution of the legality of the sympathy strike would become superfluous upon termination

80. *See* text at note 45. For cases establishing an expedited timetable for arbitration, *see* Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 442 F.2d 246 (8th Cir. 1970), *cert. denied*, 404 U.S. 871 (1971); Northwest Airlines v. International Ass'n of Machinists, 442 F.2d 244 (8th Cir. 1970).

81. *See generally* Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1602, 1608 (1970).

82. Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability*, 85 HARV. L. REV. 636, 644-49 (1972).

83. Gould, *On Labor Injunctions, Unions, and the Judges: The Boys Markets Case*, 1970 SUP. CT. REV.

84. *See* note 15.

85. 502 F.2d 321, 325-29 (3rd Cir. 1974), *cert. denied*, 419 U.S. 1049 (1974) (dissent by Judge Hunter) [hereinafter cited as *NAPA*]. *Compare* this dissent *with* majority opinions in Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972), *and* Simplex Wire & Cable Co. v. Local 2208 IBEW, 314 F. Supp. 885 (D.N.H. 1970) (mem.).

86. *NAPA* at 325-29.

87. *Id.* at 326-27.

of the picketing. He reasons that this assumption is invalid since the sympathy strike's legality would remain at issue if the employer sought damages or decided to discipline participating employees.[88] Judge Hunter concludes that issuing an injunction does nothing to promote federal policy; rather, it discourages arbitration.[89] The employer does not have to win on the merits in order to obtain an injunction, and he will attempt to avoid the arbitration process with its attendant possibility of losing on the merits, once the injunction has been issued.[90]

Two criticisms of Hunter's analysis should be noted here. First, once the sympathy strike is terminated the issue of the strike's legality is rendered superfluous for practical purposes because monetary damages are inadequate to compensate the employer and disciplinary action tends to exacerbate union-management relations unnecessarily.[91] Secondly, motivation for delay seems to be on the union's side prior to the issuance of an injunction. A possibly impermissible strike can be continued until an arbitrator determines the work stoppage to be in breach of the collective bargaining agreement. Issuance of an injunction may shift the advantage of delay to the employer, but he must eventually comply with the order to arbitrate the dispute as a prerequisite to a *Boys Markets* injunction.[92] Delay on either side may be minimized through the court's equitable power to establish an expedited timetable for arbitration.[93]

Opinions opposing an expansive interpretation of *Boys Markets* point to the narrowness of the decision, relying on the fact that the Supreme Court did not intend to undermine the Norris-La Guardia injunction ban by allowing federal injunctions to issue when the dispute is subject to arbitration.[94] This view sees the expansion of the decision's applicability beyond the factual circum-

88. *Id.* at 327 n.7.
89. *Id.* at 327.
90. The presumption of arbitrability is in part designed to prevent the courts from reaching the merits of a dispute. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 585 (1960). Objections to court involvement rest primarily on two grounds: arbitrators are thought to have special competence in determining the scope of collective bargaining agreements, and judicial intervention on the merits would violate the parties' contractual intent to have disputes settled by an arbitrator. Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability*, 85 HARV. L. REV. 636, 645-46 (1972).
91. *See* text at note 55.
92. *See* text at note 46.
93. *See* note 80.
94. *NAPA* at 330; *Inland Steel* at 301; Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372, 1373-74 (5th Cir. 1972).

stances of *Boys Markets* as allowing the exception to subsume the rule. The phrase, *over an arbitrable dispute* connotes a strict requirement that an arbitrable grievance be an independent underlying cause of the strike.[95] If a strike not seeking to redress any independent grievance can be enjoined, then Section 4 of Norris-La Guardia will be emasculated.[96] For whenever a collective bargaining agreement contains a no-strike clause or one is implied by the court, it is, as the Fifth Circuit has concluded, "difficult to conceive of any strike which could not be so enjoined."[97]

Judge Hunter criticized the majority in *NAPA*[98] for finding by implication a relaxation of the underlying cause requirement in the Supreme Court's decision in *Gateway Coal Co. v. United Mine Workers.*[99] Hunter stated that the strike in *Gateway* was caused by an arbitrable safety dispute, thus fulfilling the underlying cause prerequisite of *Boys Markets.*[100] Although the facts in *Gateway* fit the typical *Boys Markets* factual pattern, the legality of the work stoppage under the collective bargaining agreement was at issue.[101] The union maintained it had a right to strike based upon a contractual exception to the implied no-strike pledge. The Supreme Court stated that, "whether the union properly invoked this provision is a substantial question of contractual interpretation," and subject to arbitration.[102] An analogous situation is present in a sympathy strike in contravention of a no-strike clause. When the right to observe picket lines and strike in sympathy is

95. The underlying cause requirement was enunciated in Parade Publications, Inc. v. Philadelphia Mailers Union, 459 F.2d 369, 374 (3rd Cir. 1972). This precedent was not mentioned in the conflicting majority opinion in the later Third Circuit case, NAPA Pittsburg, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3rd Cir. 1974), *cert. denied,* 419 U.S. 1049 (1974). The underlying cause of the strike in the seminal *Boys Market* decision was the dispute over the exclusive performance of designated tasks in the employer's store by union employees. *See* text at notes 39, 40. The *Valmac* court considered the underlying cause rationale to be unpersuasive, stating that, "It makes little sense to argue that because the work stoppage precipitated the dispute it was not a work stoppage 'over' a grievance which the parties were contractually bound to arbitrate. We think the holdings in *NAPA* and *Monongahela* and their progeny are consistent with a congressional purpose to encourage settlement of disputes by arbitration, including situations in which purported exceptions to a no-strike clause under the collective bargaining agreement are in dispute." *Valmac* at 267-68.

96. *Buffalo Forge* at 1211.

97. Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372, 1373 (5th Cir. 1972); *Buffalo Forge* at 1211.

98. *NAPA* at 331-32.

99. 414 U.S. 368 (1974) [hereinafter cited as *Gateway*].

100. *NAPA* at 332.

101. Gateway at 382.

102. *Id.* at 384.

contractually reserved, the arbitrator must reconcile this provision with the no-strike agreement and its application to the facts through a process of contract interpretation that involves not only the agreement itself, but past dealing between the union and management, and industry practice.[103] The underlying cause rationale should not be insisted upon when it precludes full implementation of the arbitration process including impartial interpretation of the collective bargaining agreement itself.

CONCLUSION

Valmac represents an extension of the *Boys Markets* case that is consistent with the continued formulation of federal labor law under Section 301 of the Labor-Management Relations Act. Earlier Supreme Court cases, most notably *Lincoln Mills* and the *Steelworkers Triology*, have set the tone for development in this area of the law.

Abuse of the labor injunction, once widely prevalent, is no longer a critical problem.[104] With the maturation of labor organizations, injunctive relief can no longer be validly characterized as an oppressive weapon designed to thwart legitimate goals of labor.[105] Rather, the injunction should be viewed as an effective means of enforcing voluntary undertakings in a collective bargaining agreement. An expansive interpretation of *Boys Markets* allows both parties to the agreement to use effective means of enforcing the bargain. Therefore, when a sympathetic work stoppage occurs in apparent violation of the agreement, an arbitrable issue arises, even if the sole issue is the strike's permissibility under the bargaining contract.

Gary M. Lane—'77

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103. *See* Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-1500 (1959).

104. As stated by Professor Cox:

> The greatest evils, apart from procedural unfairness, lay in the doctrines of tort law which made the lawfulness of a strike depend upon judicial views of social and economic policy. The Norris-LaGuardia Act abolished the objective test by making the legality of employee activities depend upon external conduct rather than an appraisal of the rightness or wrongness, or the desirability or impropriety, of their goals. This policy of the Norris-LaGuardia Act has retained its vitality . . . . Making an exception for strikes in breach of contract would carry out a fairly specific legislative enactment without inviting judicial determination of labor policy.

Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247, 256 (1958). The Norris-LaGuardia Act itself manifests a policy of encouraging arbitration. 29 U.S.C. § 108 (1970).

105. Kiernan, *Availability of Injunctions Against Breaches of No-Strike Agreements in Labor Contracts*, 32 ALBANY L. REV. 303, 315 (1968).