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Gary M. Cupples

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LABOR LAW—AVAILABILITY OF INJUNCTIVE RELIEF TO RESTRAIN SYMPATHY STRIKES

I. INTRODUCTION

The fluctuations in the balance of power between labor and management during the last fifty years reflect the unstable positions which both the federal judiciary and the Congress have taken in developing a national labor policy. A crucial element in striking this delicate balance between labor and management has been the availability of injunctive relief to enforce a collective bargaining agreement. One of the most frequently litigated issues in this context has been management's ability to obtain injunctive relief when the union is engaging in a work stoppage solely in deference to another union's picket line—the "sympathy strike." In resolving this issue the federal courts have been confronted with the difficult task of accommodating the anti-injunction provision of section 4 of the Norris-LaGuardia Act with both the broad remedial authority granted the federal courts under section 301 of the Taft-Hartley Act and the strong judicial policy favoring the peaceful resolution of labor disputes through compulsory arbitration.

2. Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1970), 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 (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
   (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
   . . .
   (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
   (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute; . . .
3. Section 301(a) of the Labor Management Relations Act (Taft-Hartley), 29 U.S.C. § 185(a) (1970), provides:
   Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, 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.
4. Following the enactment of § 301, the Supreme Court had pointed to the "basic policy of national labor legislation to promote the arbitral process,"
The difficulty encountered by the federal courts in accommodating these legislative and judicial mandates is illustrated by the Supreme Court's inability over the last twenty years to define precisely the contours of this accommodation process when management has sought injunctive relief. In *Sinclair Refining Co. v. Atkinson* the Supreme Court concluded that the broad language of section 4 of the Norris-LaGuardia Act absolutely prohibited the federal courts from enjoining strikes and peaceful picketing. Only eight years later, however, *Sinclair* was overruled in the landmark decision *Boys Markets, Inc. v. Retail Clerks Local 770*, in which the Court held that federal courts could enjoin strikes arising over grievances which were the subject of mandatory grievance and arbitration procedures of a collective bargaining agreement. Yet, in *Buffalo Forge Co. v. United Steelworkers* the Supreme Court concluded that a "sympathy strike" did not subvert the arbitration process and therefore injunctive relief was barred under section 4 of the Norris-LaGuardia Act despite the presence of an express no-strike clause and mandatory arbitration procedures in the collective bargaining agreement.

Although the principles espoused in both *Sinclair* and *Boys Markets* were of general applicability in examining the propriety of injunctive relief where a union is striking, *Buffalo Forge* represents the Court's first attempt to address specifically the availability of injunctive relief to restrain a "sympathy strike." However, in reaffirming the vitality of the anti-injunction provision of section 4 of the Norris-LaGuardia Act and deemphasizing the presence of an express no-strike clause and mandatory arbitration procedures, the Court in *Buffalo Forge* obscured, rather than clarified, the contours of the accommodation process.

The resulting uncertainty created by the Court's decision in *Buffalo Forge* has generated considerable confusion over the availability of injunctive relief in the context of a sympathy strike. The traditional principles of equity limit the issuance of an injunction in all cases. It is the purpose of this comment, however, to examine only whether section 4 of the Norris-LaGuardia Act prohibits federal courts from granting injunctive relief to restrain sympathy strikes. The initial focus of this inquiry

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will be a consideration of relevant legislative and judicial history. Following that will be an analysis of recent judicial decisions dealing with the availability of injunctive relief. A third and final discussion will consider various guidelines and strategies which might prove useful as alternative remedies to employers confronted with a sympathy strike.

II. LEGISLATIVE FRAMEWORK

The controversy over the availability of injunctive relief to restrain sympathy strikes is primarily a product of the long established tension between the anti-injunction proscriptions of section 4 of the Norris-LaGuardia Act and the remedial authority granted the federal courts in section 301(a) of the Taft-Hartley Act. Thus, to understand fully the current dilemma faced by the courts in resolving this issue, it is important to examine the political, social, and economic contexts in which these statutes were enacted, as well as the particular problems sought to be corrected by each.

A. The Norris-LaGuardia Act

Prior to 1932, federal judges liberally issued ex parte restraining orders directed at all phases of union activity. This "government by injunction" was severely criticized as an unwarranted intrusion by the federal judiciary into labor-management disputes. In response to this perceived abuse of the federal courts' equitable powers, Congress enacted the Norris-LaGuardia Act. The primary thrust of the Norris-LaGuardia Act, as evinced in section 2 thereof, is to insulate labor from undue coercion by management and to protect labor's ability to organize the work force effectively. This policy is in part im-

8. Often the injunctive writs were drafted in broad, vague terms, restricting the use of union strike funds, S. REP. No. 163-1, 72d Cong., 1st Sess. 16-17 (1932), the enforcement of union by-laws, Borderland Coal Corp. v. UMW, 275 F. 871, 873 (D. Ind. 1921), depriving employees of the benefits of state laws, S. REP. No. 163-1, 72d Cong., 1st Sess. 16-17 (1932), and of free speech, United States v. Taliaferro, 290 F. 214, 216 (W.D. Va. 1922), aff'd, 290 F. 906 (4th Cir. 1923).


11. Section 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102 (1970), provides: [T]he public policy of the United States is declared as follows: Whereas under prevailing economic conditions, . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to ob-
plemented by section 4 of the Act, which severely restricts the availability of injunctive relief by eliminating the federal courts' jurisdiction to enjoin certain labor activities, including strikes.12

B. The Taft-Hartley Act

Under the protective umbrella of Norris-LaGuardia and with the passage of the Wagner Act13 in 1935, labor unions became powerful and cohesive units. It soon became apparent, however, that in attempting to establish a balance of power between labor and management, Congress had skewed its policies too far in favor of labor. With management's most effective weapon, the injunction, defused, unions violated collective bargaining agreements with relative impunity. By 1947 the nation's economy was seriously impaired by a multitude of illegal union strikes.14

Congress responded with the enactment in 1947 of the Taft-Hartley Act15 which forbade as unfair labor practices the unions' oft-used tactics of the jurisdictional strike and the secondary boycott.16 Additionally, section 301(a) of the Act granted federal courts jurisdiction to entertain suits relating to alleged violations of collective bargaining agreements without regard to either the diversity of citizenship or amount in controversy jurisdictional requirements.17

III. Judicial Interpretation

A. Section 301(a)—Judicial Expansion and Interpretation

Section 301(a) appears to have been enacted purely as a jurisdictional device designed to create a federal forum to entertain suits for violations of collective bargaining agreements. Prior to the enactment of section 301(a), employers faced considerable procedural obstacles in en-

12. See note 2 supra.
17. See note 3 supra.
forcing labor contracts in state courts. This was due primarily to various common law rules which made it difficult to secure service of process upon the unions, which were unincorporated associations. Similarly, the diversity and amount in controversy requirements had consistently prevented the employer from vindicating his contract rights in federal court. With both the state and federal forums effectively foreclosed to the employer, it had become evident that only legislative intervention could resolve the problem. In 1947 Congress enacted section 301(a) in order to remove the federal jurisdictional barriers, thereby creating a federal forum to settle employers' contract grievances.

Although section 301(a) was uniformly accepted as a jurisdictional device designed to expand the availability of the federal forum, a split of authority soon developed among the lower federal courts as to whether section 301(a) was substantive in nature as well. The Supreme Court rejected the contention that section 301(a) was intended to authorize the creation of a body of "federal common law" to resolve labor disputes. In Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., Justice Frankfurter concluded from a lengthy analysis of the pertinent legislative history that section 301(a) was purely procedural in nature. Federal courts acquiring jurisdiction under section 301(a) were therefore bound by the Erie doctrine to apply state and not federal law in resolving substantive issues. While Frankfurter's arguments were persuasive, the Court in Westinghouse was able to decide the case on other grounds and thus was not compelled to resolve the procedural-substantive dichotomy of section 301(a).

18. The major difficulty in obtaining relief against labor unions lay in the fact that voluntary unincorporated associations, such as most labor unions, were not suable as an entity at common law. Rather, to sue a union each individual member of the union had to be named, made a party to the suit, and served with process. Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 446-47 (1955). The unions, of course, did not have a similar problem. The employers, as corporations, were easily amenable to process in state court. See Keene, The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to Asco and Beyond, 15 VILL. L. REV. 32, 34 (1969).
20. See note 3 supra.
22. Id.
23. Id. at 443-49. See also Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
25. The issue before the Court was whether the union had standing under § 301(a) to maintain an action on the behalf of some of its individual members. Mr. Justice Frankfurter concluded that § 301(a) did not extend jurisdiction to the present case because the legislative history of § 301 reinforced the argument that § 301(a) was merely procedural in nature, and the absence of any substan-
In *Textile Workers Union v. Lincoln Mills*, however, the Court focused directly on the scope of section 301(a) and ruled that it "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." The Court subsequently noted in *Teamsters Local 174 v. Lucas Flour Co.* that the purpose of section 301(a) was to promote nationwide uniformity in suits over collective bargaining agreements through the availability of the federal forum, and therefore "doctrines of federal labor law [should] uniformly . . . prevail over inconsistent local rules." 29

Given this view of section 301(a) of the Taft-Hartley Act, a question also arose whether federal jurisdiction over labor relations suits was exclusive or merely concurrent. In *Charles Dowd Box Co. v. Courtney* the Court, relying heavily upon the legislative history of section 301, concluded that the "basic purpose of section 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." Therefore, despite the petitioner's claim that section 301(a) had divested the state courts of jurisdiction in labor disputes, the Court held that the state courts were empowered under section 301 to exercise jurisdiction over labor disputes concurrently with the federal judiciary. However, compliance with the dictates of *Lincoln Mills* and *Lucas Flour* required a state court exercising jurisdiction over a section 301 labor dispute to apply federal and not state law to resolve the substantive issues.

**B. Accommodation of Taft-Hartley and Norris-LaGuardia Acts**

In fashioning a remedy in section 301(a) suits, federal courts were forced to consider the scope of the prohibition in section 4 of the Norris-LaGuardia Act, particularly the statement of Senator Furgeson, a spokesman for the bill, who stated during the 1946 debates that the bill "takes away no jurisdiction of the State courts." 92 CONG. REC. 5708 (1946). The questions whether the Norris-LaGuardia Act might be applicable to a suit brought in a state court for a union's violation of a labor agreement, and whether such a suit could be removed to a federal court were expressly reserved for future disposition. 368 U.S. at 514.

27. Id. at 451.
29. Id. at 104.
31. Id. at 508-09. The Court relied heavily upon the legislative history of the Act, particularly the statement of Senator Furgeson, a spokesman for the bill, who stated during the 1946 debates that the bill "takes away no jurisdiction of the State courts." 92 CONG. REC. 5708 (1946). The questions whether the Norris-LaGuardia Act might be applicable to a suit brought in a state court for a union's violation of a labor agreement, and whether such a suit could be removed to a federal court were expressly reserved for future disposition. 368 U.S. at 514.
32. 368 U.S. at 508-09.

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ris-LaGuardia Act against enjoining strikes. Prior to addressing this issue with respect to section 301(a) labor disputes, the Supreme Court had considered the scope of section 4 in other contexts. In *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad* the union struck rather than submitting a dispute to arbitration as was mandated by the Railway Labor Act. In upholding the issuance of an injunction, the Supreme Court refused to adhere to the literal wording of section 4 of the Norris-LaGuardia Act. The Court stated that it was necessary to accommodate the two statutes (Norris-LaGuardia and Railway Labor Acts) and that, where the union was under a statutory duty to arbitrate a dispute, the anti-injunction prohibition of section 4 was inapplicable.

The first attempt by the Court to clarify the scope of the Norris-LaGuardia Act in a section 301(a) suit arose in a non-strike context. In *Textile Workers Union v. Lincoln Mills* the employer refused a union's request to arbitrate a dispute even though the collective bargaining agreement between them provided a special procedure which expressly included arbitration. The Court held that section 301(a) authorized the federal courts to employ equitable relief to enforce labor agreements and ordered specific performance of the arbitration clause by the employer. The Court emphasized that the employer's agreement to arbitrate grievance disputes was the *quid pro quo* for the union's agreement not to strike. Thus, the Court concluded that industrial peace could best be obtained by holding the parties strictly to their bargain.

Having found that section 301(a) authorized the federal courts to grant equitable relief, the Court next addressed the possible conflict with the Norris-LaGuardia Act. Section 7 of the Act prescribes strict procedural requirements which, unlike section 4, are of general applicability to the issuance of an injunction in labor disputes. In rejecting the contention that section 7 of the Norris-LaGuardia Act prohibited this type of relief, the Court relied heavily on the fact that the "failure to arbitrate was not a part and parcel of the abuses against which [that] Act was aimed." Furthermore, the Court pointed out that the congres-

35. 353 U.S. at 40.
37. The collective bargaining agreement between the parties provided that there would be no strikes or work stoppages and that grievances would be handled pursuant to a specified procedure. The last step in the procedure, a step that could be taken by either party, was arbitration. 353 U.S. at 449.
38. *Id.* at 451.
39. "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." *Id.* at 455.
41. While § 4 is limited by its terms to prohibiting injunctive relief against union activities, § 7 is applicable equally to both union and management activities.
42. 353 U.S. at 458.
sional policy evinced in section 8 of the Norris-LaGuardia Act favored the settlement of labor disputes by arbitration. Viewed in this light, Lincoln Mills established an important precedent whereby the Court accommodated the Norris-LaGuardia and Taft-Hartley Acts by refusing to adhere to the literal wording of the Norris-LaGuardia Act and instead focusing on the policy favoring the resolution of labor-management disputes through arbitration.

In 1962, however, the United States Supreme Court announced a decision which appeared contradictory to the policies espoused in Lincoln Mills. In Sinclair Refining Co. v. Atkinson the Court held that section 4 of the Norris-LaGuardia Act barred federal district courts from enjoining work stoppages and peaceful picketing which were the subject of a section 301(a) suit. In Sinclair the employer sought to enjoin a series of strikes which arose over a grievance clearly subject to the grievance and arbitration procedures under the collective bargaining agreement. In addition to these provisions for compulsory, final, and binding arbitration, the collective bargaining agreement also contained a clause in which the union agreed not to strike over any cause which was or might have been the subject of a grievance. Mr. Justice Black, writing for the Court, concluded that the Norris-LaGuardia Act was intended to forestall injunctive relief in precisely this type of situation. The Court relied heavily upon the fact that Congress had not intended to repeal or otherwise narrow section 4 of the Norris-LaGuardia Act when it passed section 301(a) of the Labor Management Relations Act. Thus, what Congress had refused to do explicitly or implicitly the Court refused to do through the accommodation process. Mr. Justice Brennan dissented and argued that even though section 301(a) did not repeal section 4 of the Norris-LaGuardia Act, granting the injunction would not result in the judicial abuse which prompted the Norris-LaGuardia Act and therefore a "judicial accommodation" should be sought.

43. Section 8 of the Norris-LaGuardia Act denies injunctive relief to any person who has failed to make "every reasonable effort to settle such dispute either by negotiation . . . mediation or voluntary arbitration." 29 U.S.C. § 108 (1970).
45. In reviewing the legislative history of § 301(a), the Court noted that although the bill passed by the House of Representatives had expressly provided for the repeal of section 4 of Norris-LaGuardia in a § 301 suit, the Senate bill had provided that only the NLRB could enjoin breaches of the collective bargaining agreement. Following joint conference, Senator Taft, chairman of the Conference Committee, stated that neither the House nor Senate provisions had been adopted and that "[t]he Conferences . . . rejected the repeal of the Norris-LaGuardia Act." 93 CONG. REC. 6445-56 (1947), quoted in 370 U.S. at 208. Accordingly, the majority in Sinclair concluded that § 301 had neither explicitly nor implicitly repealed § 4 of the Norris-LaGuardia Act.
46. 370 U.S. at 209-10.
47. Conceding that "§ 301 of the Taft-Hartley Act did not, for purposes of actions brought under it, 'repeal' § 4 of the Norris-LaGuardia Act . . .,” Mr.
The *Sinclair* decision quickly received severe criticism by commentators as being inconsistent with the underlying bases of federal labor policies.\(^{48}\) Indeed, discontent over the decision surfaced within the Supreme Court itself.\(^{49}\) Eight years after *Sinclair* was decided, the Court reevaluated its position and overruled that decision in the landmark case of *Boys Markets, Inc. v. Retail Clerks Local 770*.\(^{50}\)

The collective bargaining agreement in *Boys Markets* contained a mandatory grievance procedure which provided for the submission of disputes concerning the interpretation or application of the terms of the agreement to binding arbitration.\(^{51}\) In addition, the collective bargaining agreement provided that there could be no cessation or stoppage of work, lock-outs, picketing, or boycotts, except where either party failed to perform a contract provision or to abide by an arbitral award.\(^{52}\) The dispute arose when a nonunion store supervisor rearranged a frozen food case. When the company refused to comply with the union's demands to restock the food case using union personnel, Local 770 struck and established picket lines. The employer brought suit in state court where a temporary restraining order was issued forbidding continued participation in the strike. The union then removed the case to federal district court where a preliminary injunction was granted. The Ninth Circuit Court of Appeals reversed, relying primarily on the *Sinclair* decision.

Overruling *Sinclair*, the Supreme Court held that injunctive relief was not barred by section 4 of the Norris-LaGuardia Act.\(^{53}\) Mr. Justice Brennan, author of the *Sinclair* dissent, wrote the opinion of the Court and concluded that "*Sinclair* stands as a significant departure from our

Justice Brennan recognized that "the two provisions do co-exist, [and] ... that they apply to the case before us in apparently conflicting senses." *Id.* at 215-16. Therefore, Justice Brennan sought a "judicial accommodation," *id.* at 224, which would "give the fullest possible effect to the central purposes of both ..." *Id.* at 216.


\(^{49}\) Mr. Justice Douglas stated that *Sinclair* had "caused a severe dislocation in the federal scheme of arbitration," *International Longshoremen's Assoc. Local 1291 v. Philadelphia Marine Trade Assoc.*, 389 U.S. 64, 77 (1967) (Douglas, J., concurring in part and dissenting in part), and later, Mr. Justice Stewart stated that the Court should "reconsider the scope and continuing validity of *Sinclair*." *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 562 (1968) (Stewart, J., concurring).

\(^{50}\) 398 U.S. 235 (1970).
\(^{51}\) 398 U.S. at 238-39 n.3.
\(^{52}\) *Id.* at 239 n.4.
\(^{53}\) *Id.* at 238.
otherwise consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration. . . .”

The Court gave two reasons for its holding. First, the Court recognized that *Sinclair* had achieved the anomalous result of depriving state courts of jurisdiction over labor disputes. Although most state courts had jurisdiction to enjoin a strike which violated a collective bargaining agreement providing for mandatory arbitration of unresolved contract disputes, the Court in *Avco Corp. v. Aero Lodge No. 735* had held that state court suits to enforce collective bargaining agreements could be removed to the federal courts under the federal removal statute. Although the Court in *Avco* did not decide whether federal courts would be required upon removal to dissolve extant state court injunctions in view of *Sinclair*, this position was soon adopted by the lower federal courts. Consequently, the decision in *Sinclair*, coupled with the result

54. *Id.* at 241. The majority concluded that *Sinclair* had undermined the cornerstone of the federal labor policy—mandatory arbitration of grievances—by dissipating employer incentive to accept arbitration clauses. *Id.* at 248.

55. *Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), had stated that § 301 was enacted to supplement, not supplant, state court jurisdiction. See text accompanying notes 30 & 31 supra.


57. *Id.* at 560. The federal removal statute, 28 U.S.C. § 1441(c) (1970), provides:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

In an attempt to avoid removal under this provision, employers faced with strikes in violation of the collective bargaining agreement frequently excluded claims for damages in suits for injunctive relief brought in state courts. Employers believed that a claim merely for injunctive relief would be beyond the original jurisdiction of the federal courts because the language of § 4 of Norris-LaGuardia restricted the jurisdiction granted the federal courts under § 301 of Taft-Hartley: “No court of the United States shall have jurisdiction to issue any restraining order . . .” In *Avco*, however, the Court held that a suit to enforce a collective bargaining agreement would invoke original jurisdiction under § 301 irrespective of the particular relief sought.

58. See, e.g., *General Elec. Co. v. Local 191, Int'l Union of Elec., Radio & Mach. Workers*, 413 F.2d 964 (5th Cir. 1969). The court affirmed dissolution of a state court-issued injunction following removal of the action to a federal district court, saying:

We are of the view that the District Court did not err in dissolving the injunction, not because either either [sic] *Sinclair* . . . or *Avco* . . . explicitly dictates that result, but because, in our view, once this case was removed, a failure to dissolve the state court injunction would have been tantamount to issuance of that same injunction by the federal district court, which, as we have just noted, would be prescribed by the Norris-LaGuardia Act under the *Sinclair* decision.”

*Id.* at 966.
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in *Avco*, as a practical matter deprived the state courts of jurisdiction by encouraging the removal of all state court suits to federal court. Faced with the task of maintaining concurrent state and federal jurisdiction, the Court in *Boys Markets* found it necessary to “accommodate” the literal terms of section 4 with its interpretations of the subsequently enacted section 301(a). Thus, in approving the issuance of injunctive relief in federal court, the Supreme Court eliminated one of the more important incentives to remove state court actions to federal court, and thereby preserved the parity of the federal and state courts' jurisdiction to resolve labor disputes.

The second articulated basis for the *Boys Markets* decision was that the decision in *Sinclair* was inconsistent with the federal labor policy favoring arbitration as the preferred method of settling disputes. In *Lincoln Mills* the Court had noted that the employer's promise to submit disputes to binding arbitration was the *quid pro quo* for the union's agreement not to strike. With employers deprived of their most potent weapon for enforcing the no-strike clause, Mr. Justice Brennan concluded that there would be little incentive to accept arbitration clauses in negotiating collective bargaining agreements. Employers would be wary of assuming obligations to arbitrate, which under *Lincoln Mills* were specifically enforceable against them, when no “similarly efficacious remedy is available to enforce the concomitant undertaking of the union to refrain from striking.”

Having concluded that the result in *Sinclair* was unsatisfactory, the Court was careful to define the limits of this newly created exception to section 4 of the Norris-LaGuardia Act. First, the Court stressed the “narrowness” of its holding by stating that it was dealing “only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure.” Second, the Court adopted the principles advanced in Mr. Justice Brennan's dissenting opinion in *Sinclair* that injunctive relief should be granted if the strike is over a grievance which both parties are contractually bound to arbitrate. Third, the Court made it clear that it did not intend to “undermine the vitality of the Norris-LaGuardia Act.”

59. See note 55 supra.
60. See note 39 supra.
61. The Court quite properly concluded that an action for damages was not an effective means of enforcing the no-strike obligation. The Court stated that “an award for damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike.” 398 U.S. at 248.
62. Id. at 248.
63. Id. at 252.
64. Id. at 253.
65. Id.
66. A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate.
IV. Availability of Boys Markets Injunctions To Restrain Sympathy Strikes

Even though Boys Markets took an important step toward delineating the boundaries of the “accommodation” of section 4 of the Norris-LaGuardia Act and section 301(a) of the Taft-Hartley Act, it soon became apparent that the Court's adoption of the standards espoused by Justice Brennan in his Sinclair dissent was inadequate to resolve many of the complex issues raised by the expanded role of injunctive relief in the scheme of federal labor law. Of particular importance was the unresolved conflict over whether injunctive relief was available in the context of a “sympathy strike.”

In Boys Markets the union went on strike over a dispute which was clearly an issue which both parties had agreed to submit to the grievance arbitration procedures. In the context of a sympathy strike, however, the underlying dispute concerns the validity of the refusal to cross a picket line established by employees from a different bargaining unit. Consequently, the employees engaging in a sympathy strike are not refusing to work because of a dispute they have with the employer; rather, their refusal to cross another picket line is itself the dispute.

In determining whether injunctive relief is appropriate in a sympathy strike, the Courts of Appeals have disagreed over the significance to be given to the fact that the sympathy strike is not over an underlying dispute between the employer and the sympathetically striking union. The primary differences have concerned the interpretation of Mr. Justice Brennan's statement in Sinclair and Boys Markets that before a strike can be enjoined, the district court must find that the strike is “over a grievance which both parties are contractually bound to arbitrate.”

A. Division of the Circuit Courts

In resolving this difficult issue the Third, Fourth, and Eighth Circuits have adopted an expansive view of Boys Markets and thus have

despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract does have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity.

Id. at 254.
67. Id. at 253.
68. See text accompanying note 1 supra. Indeed, a sympathy strike is not limited to the honoring of picket lines at the employer's plant, but may extend to employee refusals to cross picket lines established at nonemployer plants.
69. 398 U.S. at 254.
permitted the issuance of injunctions to restrain sympathy strikes.\textsuperscript{70} The rationale underlying this position is exemplified by the Fourth Circuit's decision in \textit{Monongahela Power Co. v. IBEW Local 2332}.\textsuperscript{71} The contract involved in that case contained an express no-strike clause as well as a mandatory grievance arbitration procedure.\textsuperscript{72} The court stated that the breadth of the grievance and arbitration provision contained in the collective bargaining agreement made it clear that a dispute over whether a refusal to cross nonbargaining-unit picket lines was a violation of the no-strike clause was arbitrable.\textsuperscript{73} Because the scope of the no-strike clause was itself an arbitrable issue, the court reasoned that a \textit{Boys Markets} injunction could then issue to enjoin the strike. This position expands the scope of the \textit{Boys Markets} decision by interpreting the requirement that the strike be "over an arbitrable issue" to require only that the validity of the strike itself be arbitrable.

The Second, Fifth, and Sixth Circuits, on the other hand, have adopted a more restrictive view of \textit{Boys Markets} and have consistently refused to issue injunctions to restrain sympathy strikes.\textsuperscript{74} This position is best illustrated by the Fifth Circuit's decision in \textit{Amstar Corp. v. Amalgamated Meat Cutters}.\textsuperscript{75} The court refused to issue an injunction in that case, ruling that the strike was not "over" an arbitrable issue, and thus not enjoinable under \textit{Boys Markets} because the validity of the strike sought to be enjoined was itself the arbitrable dispute.\textsuperscript{76} This position is more restrictive than the \textit{Monongahela Power} interpretation of \textit{Boys Markets} in that it requires that the arbitrable dispute be the underlying cause of the strike to be enjoined.\textsuperscript{77}

The Seventh Circuit has not formulated a clear position on this issue. It initially sustained an injunction to restrain a sympathy strike,
stating that the “exceptionally broad arbitration clause is itself expansive enough to encompass the present disputes.” Yet, in two subsequently decided cases the Seventh Circuit distinguished its earlier position on the grounds that the language of the arbitration clause was not as broad as the clause in the earlier case. In these latter decisions, the Seventh Circuit concluded that not only was injunctive relief inappropriate but also that the validity of the sympathy strike was not an arbitrable issue.

B. Response of the Supreme Court

In order to resolve the split among the circuits on this issue, the Supreme Court attempted to clarify its position taken in Boys Markets. In Buffalo Forge Co. v. United Steelworkers production and maintenance employees honored picket lines established at their employer's plants by “office clerical-technical” employees during an economic strike. The production and maintenance employees were parties to a collective bargaining agreement which contained an express no-strike clause and provided a mandatory grievance-arbitration procedure covering “differences ... as to the meaning and application of the provisions of [the] Agreement” and “any trouble of any kind” arising at the plant.

The employer brought suit under section 301(a) of the Taft-Hartley Act, claiming that the strike by production and maintenance employees was a violation of the express no-strike clause and contending in the alternative that the work stoppage violated the no-strike clause was itself arbitrable. The employer requested both injunctive relief and damages. The union asserted that the work stoppage did not violate the no-strike clause.

The district court in Buffalo Forge found that the production and maintenance employees were engaged in a sympathy strike in support of the striking office clerical-technical employees. The district court then held that section 4 of the Norris-LaGuardia Act forbade the issuance of an injunction because the production and maintenance employees' strike was not over an arbitrable grievance and thus was not within the narrow exception to the Norris-LaGuardia Act established in Boys Markets. The Second Circuit affirmed.

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78. Inland Steel Co. v. Local 1545, UMW, 505 F.2d 293 (7th Cir. 1974).
79. See Hyster Co. v. Independant Towing Ass’n, 519 F.2d 89 (7th Cir. 1975), cert. denied, 428 U.S. 910 (1976); Gary Hobart Water Corp. v. NLRB, 511 F.2d 284 (7th Cir.), cert. denied, 423 U.S. 925 (1975).
80. See cases cited note 79 supra.
82. Id. at 400.
83. Id. at 401.
84. Id. at 402.
85. Id. at 402-03.
86. Id. at 403. See 517 F.2d 1207 (2d Cir. 1975).
In affirming the decision of the Second Circuit, the Supreme Court held that *Boys Markets* injunctions are limited to situations in which a strike has been “precipitated by” or is “over” an arbitrable dispute between the employer and the striking union. 87 The Court distinguished the factual setting in *Buffalo Forge* from that in *Boys Markets*. A distinction was drawn between *Boys Markets* in which a strike was “precipitated by a dispute ... subject to binding arbitration under the provisions of the contract,” 88 and *Buffalo Forge*, in which the validity of the strike “in support of sister unions negotiation with the employer,” 89 was itself the arbitrable issue. Thus, the Court concluded that *Boys Markets* was not controlling.

In addition to distinguishing the factual setting in *Buffalo Forge* from that in *Boys Markets*, the Court also propounded several policy justifications for its holding. First, the Court noted that the sympathy strike had not “deprived the employer of his bargain.” 90 The basis for this finding was the Court’s rather narrow definition of the employer’s *quid pro quo* as only the “union’s obligation not to strike over issues that were subject to the arbitration machinery.” 91

A second policy consideration espoused by the majority focused on the congressional intent in enacting section 301 of the Taft-Hartley Act. The Court stated that section 301 was intended to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties. 92 Thus, where the sympathy strike at issue “had neither the purposes nor the effect of denying or evading an obligation to arbitrate,” 93 the purpose of section 301 was not subverted by refusing to enjoin such a strike. 94 The Court stated:

> Section 301 of the Act assigns a major role to the courts in enforcing collective-bargaining agreements, but aside from the enforcement of the arbitration provisions of such contracts, within the limits permitted by *Boys Markets*, the Court has never indicated that the courts may enjoin actual or threatened contract violations despite the Norris-LaGuardia Act. 95

Therefore, the majority concluded that, if the policy of encouraging arbitration is not served, there is no authority for the federal courts to promote a “general federal anti-strike policy.” 96

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87. 428 U.S. at 404.
88. Id. at 407.
89. Id.
90. Id. at 408.
91. Id. at 407.
92. Id. at 409, 411-12.
93. Id. at 408.
94. Id.
95. Id. at 409.
96. Id.
A third policy consideration noted by the majority in *Buffalo Forge* was the concern that a preliminary injunction restraining a sympathy strike would involve a "judicial preview" of the facts in the dispute and would improperly infringe upon the arbitrator's role by effectively preempting the arbitrator's independent interpretation of the collective bargaining agreement. Additionally, the Court expressed a concern that expanding the issuance of injunctions beyond the narrow limits of *Boys Markets* would "embroil" the already overburdened federal courts with "massive" preliminary injunction litigation.

The dissenters in *Buffalo Forge*, conceding that *Boys Markets* did not by the terms of its narrow holding require the issuance of an injunction in *Buffalo Forge*, argued that the literal wording of section 4 of the Norris-LaGuardia Act did not prohibit injunctive relief in the context of a sympathy strike. Furthermore, the dissenters advanced several persuasive arguments which refuted the majority's policy justifications for denying injunctive relief.

In reviewing the legislative history of the Norris-LaGuardia Act, the dissenters concluded that the purpose of the Act was to "foster the growth and viability of labor organizations." Therefore, the dissenters argued that an extension of *Boys Markets* was not hindered by the literal terms of the Norris-LaGuardia Act because the central concerns of that Act were not threatened. At this level, the dissent's point is well-taken because the majority's strict adherence to the literal wording of the Norris-LaGuardia Act disregards the underlying purposes of the Act. Norris-LaGuardia was responsive to the federal judiciary's abuses of its equitable powers and was adopted to deprive federal judges of the authority to issue injunctions in furtherance of management's attempts to interfere with union development. The enforcement of collective bargaining agreements freely entered into between the parties was not one of the abuses sought to be corrected by Congress. Rather, as the dissenters in *Buffalo Forge* recognized, one of the fundamental goals of both the Norris-LaGuardia and Taft-Hartley Acts was to allow the parties freedom to engage in the collective bargaining process and to leave the enforcement of bargaining agreements to the "usual processes of law."

In addition to challenging the majority's apparent disregard of the policies underlying the Norris-LaGuardia Act, the dissenters also at-

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97. *Id.* at 412.
98. *Id.* at 411 n.12.
99. Mr. Justice Stevens authored the dissent and was joined by Justices Brennan, Marshall, and Powell.
100. 428 U.S. at 417.
101. *Id.* at 416. *See generally* F. Frankfurter & N. Greene, supra note 9.
102. 428 U.S. at 417, 415-16 n.6.
103. *Id.* at 420.
tacked the validity of the majority's premise that a sympathy strike did not frustrate the arbitration process. First, the dissenters expressly rejected the majority's analysis which characterized the employer's *quid pro quo* as extending only to the union's agreement not to strike over arbitrable issues. Rather, the dissenters noted that the employer usually bargains for a broad, unlimited no-strike clause. Thus, even conceding that a sympathy strike does not circumvent the arbitration process, the dissenters contended that the inability to obtain preliminary injunctive relief would "frustrate the more basic policy of motivating employers to agree to binding arbitration" by limiting the employer's ability to ensure uninterrupted production. At this level, the majority's refusal to expand *Boys Markets* to the sympathy strike context ignores the creation of a strong disincentive for employers to agree to submit disputes to arbitration in exchange for the union's promise not to strike.

In refuting the majority's policy justifications for denying injunctive relief, the dissenters also maintained that the majority's concern over the usurpation of the arbitrator's role by the federal judiciary was largely illusory because the arbitrator's final decision is not precluded by an interim determination by the court. Rather, a preliminary injunction would merely maintain the status quo and preserve the arbitrator's ability to make a meaningful determination of the merits of the dispute. The dissenters also noted that the risk of an "erroneously issued injunction" against a lawful strike was not more likely in the *Buffalo Forge* context than that to which the unions had been subjected under *Boys Markets*.

Even though the Supreme Court in *Buffalo Forge* eliminated continued confusion over the issue of the enjoinability of sympathy strikes, the decision is unsatisfactory. It would appear that the Court failed to recognize the substantial policies supporting the issuance of injunctive relief to compel performance of the union's no-strike obligations. Furthermore, the Court did not articulate persuasive reasons for denying such relief. Therefore, *Buffalo Forge* is not only a significant retreat from the principles set forth in *Boys Markets*, but it stands as a significant hurdle to the development of a sound federal labor policy.

C. Impact of Buffalo Forge on Existing Contracts

In assessing the impact of *Buffalo Forge* on the availability under existing labor contracts of injunctive relief to restrain a sympathy strike, three basic factual patterns emerge which are useful for analytical purposes. The first and perhaps most complex pattern consists of contracts which expressly forbid sympathy strikes and which provide a mandatory grievance and arbitration procedure. Focusing on the *Boys Markets* con-
cern with the frustration of the arbitral process, the Court in *Buffalo Forge* made it clear that *Boys Markets* had not authorized the district courts to issue injunctions against strikes merely because those strikes were alleged to be violations of the labor contract.\footnote{Id. at 409.} The Court read *Boys Markets* to authorize injunctions against strikes that not only violated the labor contract but also frustrated the congressional preference for arbitration.\footnote{Id.} It was the inability to satisfy this latter requirement which contributed substantially to the employer's failure in *Buffalo Forge* to obtain injunctive relief. Whether a sympathy strike in violation of an express no-sympathy strike clause, unlike the general no-strike clause in *Buffalo Forge*, would similarly fail to frustrate the arbitration process is uncertain. In *Buffalo Forge* the majority emphasized the fact that the dispute in *Boys Markets* was clearly in violation of the no-strike clause.\footnote{Id. at 406.} This finding would appear to be much more likely in the presence of an express no-sympathy strike clause than with the general no-strike clause present in *Buffalo Forge*. Additionally, the majority in *Buffalo Forge* emphasized the fact that the sympathy strike did not have the effect of depriving the employer of his bargain.\footnote{Id. at 408.} Although such a conclusion is questionable,\footnote{Id.} the presence of an express no-sympathy strike clause would appear to dispel any doubts about the employer's *quid pro quo* and should compel a finding that the employer would be deprived of his bargain if injunctive relief were denied.

If these were the only relevant factors to be considered, it might follow that a sympathy strike in violation of an express no-sympathy strike clause would frustrate the congressional preference for arbitration and therefore warrant injunctive relief. It is important to note, however, that Mr. Justice Stevens suggested such an argument in the dissenting opinion to *Buffalo Forge*, whereby injunctive relief should be authorized if there is "convincing evidence that the strike is clearly within the no-strike clause."\footnote{See text accompanying note 104 supra.} The majority expressly rejected this as a viable solution, noting that the arbitrator might be unduly influenced by a judicial finding, however preliminary, of illegality of the strike.\footnote{428 U.S. at 431.} Whether this last consideration espoused by the Court in *Buffalo Forge* will prove fatal to obtaining injunctive relief in federal court is, however, a question which has not been directly resolved.\footnote{Id. at 412.} Furthermore, if *Buffalo Forge* is narrowly read to allow injunctions only when the strike is over an arbi-

\begin{footnotes}
\footnotenumlist
\item Id. at 409.
\item Id.
\item Id. at 406.
\item Id. at 408.
\item See text accompanying note 104 supra.
\item 428 U.S. at 431.
\item Id. at 412.
\item Although no court has yet addressed the factual pattern of the express no-sympathy strike clause, some courts have denied injunctive relief in the presence of only "qualified" no-sympathy strike clauses. See note 117 infra.
\end{footnotes}
trable dispute, an injunction could not be issued even where the contract expressly prohibits sympathy strikes.

Even assuming injunctive relief is appropriate if the sympathy strike violates an express no-sympathy strike clause, the employer faces the more practical problem of determining what language in the no-strike clause would be sufficient to bring the strike within the narrow exception described above. Typically, there is a qualification in the collective bargaining agreement that provides the union with the right to honor only "primary," 114 "authorized," 115 or "bona fide" 116 picket lines. With such provisions in the collective bargaining agreement, however, the legality or illegality of the strike may not be clear. Consequently, the risk of enjoining lawful conduct necessarily would increase, perhaps so much as to bring the strike back within the Buffalo Forge prohibition of injunctive relief. 117 Such a limitation may appear too narrow, but it simply reflects the heavy burden draftsmen must bear in carefully delineating the prohibited conduct.

The second factual pattern consists of contracts similar to the one presented in Buffalo Forge which contain a general no-strike clause and a provision for mandatory arbitration of all grievances. Buffalo Forge clearly prohibits issuance of an injunction pending arbitration, but it suggests that, should the arbitrator determine that the strike is illegal, it could be enjoined at that time. 118 Subsequent to the decision in Buffalo Forge, an argument was proposed to distinguish that decision on the grounds that the sympathy strike in Buffalo Forge was in support of a primary strike which was itself bona fide and legal and that if the primary strike is illegal the restrictions on the availability of Boys Markets injunction should not apply. 119 The general consensus has been to reject such a distinction. The rationale for this position is explicated in Southern

117. In Valmac Indus., Inc., v. Food Handlers Local 425, 519 F.2d 263, 264 (8th Cir. 1975), vacated 428 U.S. 906 (1976), the no-strike clause provided: "It shall be a violation of this Agreement for an employee to refuse to pass through a picket line authorized by this Union." 519 F.2d at 265 n.4. Nevertheless, the Supreme Court vacated judgment and remanded to the Eighth Circuit for further consideration in light of Buffalo Forge.
118. 428 U.S. at 405. The Court stated: "[W]here the issue arbitrated and the strike found illegal, the relevant federal statutes as construed in our cases would permit an injunction to enforce the arbitral decision." Id.
119. See Southern Ohio Coal Co. v. UMW, 551 F.2d 695, 704 (6th Cir. 1977); United States Steel Corp. v. UMW, 548 F.2d 67, 74 (3d Cir. 1976); Republic Steel Corp. v. UMW, 428 F. Supp. 637 (W.D. Pa. 1977).
Ohio Coal Co. v. United Mine Workers\textsuperscript{120} in which the court properly concluded that the focus of its inquiry should not be on the illegal pickets but rather on the employees against whom the injunction is sought.\textsuperscript{121}

The third factual pattern consists of contracts which contain provisions for mandatory arbitration of grievances but which do not contain an express no-strike clause. Buffalo Forge seems to address this situation directly where the Court stated that “to the extent that the Courts of Appeals ... have assumed that a mandatory arbitration clause implies a commitment not to engage in sympathy strikes, they are wrong.”\textsuperscript{122} Thus, a court is unquestionably prohibited from issuing an injunction against a sympathy strike where there is no express no-strike clause.

V. ALTERNATIVE REMEDIES AVAILABLE TO MANAGEMENT

Although Buffalo Forge prohibits the enforcement of a union’s no-strike obligation by the issuance of an injunction prior to the arbitrator’s resolution of the validity of the strike, management might be able to pursue alternative courses of action. One possible tactic consists of disciplinary suspension of employees who participate in a sympathy strike. The dilemma faced is whether the employer thereby subjects himself to a valid unfair labor practice charge.\textsuperscript{123} In NLRB v. Keller-Crescent Co.\textsuperscript{124} the Seventh Circuit held that the mandatory arbitration clause contained in the contract covered grievances relating to an alleged violation of the no-strike clause and that the employees should not have honored the picket line without first confirming their contractual right to do so through the grievance and arbitration procedures.\textsuperscript{125} Thus, the court concluded that the employer had not committed an unfair labor practice when it suspended certain employees who participated in the sympathy strike.\textsuperscript{126} This decision appears to provide management with a viable alternative by utilizing discipline as a deterrent to honoring picket lines in violation of no-strike clauses.\textsuperscript{127}

\textsuperscript{120} 551 F.2d 695, 704 (6th Cir. 1977).
\textsuperscript{121} Id.
\textsuperscript{122} 428 U.S. at 408 n.10. The importance of an express no-strike clause also was pointed out in Teledyne Wis. Motor v. Local 283, UAW, 386 F. Supp. 1231 (E.D. Wis. 1975), in which the plaintiff urged that a mandatory arbitration clause was not necessary in support of a Boys Markets injunction, but could be implied from an express no-strike clause. While the court admitted the possible validity of the plaintiff’s argument, it denied the relief sought upon its finding that there was no express no-strike clause.
\textsuperscript{123} The minimum potential risk to the employer could be the award of back pay to improperly suspended or discharged employees.
\textsuperscript{124} 538 F.2d 1291 (7th Cir. 1976).
\textsuperscript{125} Id. at 1300.
\textsuperscript{126} Id.
\textsuperscript{127} A question is raised whether a sympathy strike is to be afforded the protection of § 7 of the National Labor Relations Act which protects concerted activity for “mutual aid or protection” and “to assist labor organizations.” 29 U.S.C.
A second alternative for the employer would be to bring an action before the NLRB to establish an unfair labor practice by the stranger pickets.\textsuperscript{128} This remedy would be available only if the picket line being honored amounted to a secondary boycott.\textsuperscript{129} If so, the employer may pursue remedies before the NLRB alleging a violation of section 8(b)(4) of the National Labor Relations Act.\textsuperscript{130} The Board is required to give expedited treatment to a secondary boycott charge, and, if there is "reasonable cause to believe such charge is true," the Board must go to court and seek an injunction under section 10(1) of the Act.\textsuperscript{131}

Another possible alternative for the employer is to seek through the collective bargaining process an express no-sympathy strike clause and additionally to obtain an agreement which provides for the expedited arbitration of disputes concerning the scope of the no-strike clause. Although the first provision probably would not circumvent the injunction prohibition set forth in \textit{Buffalo Forge},\textsuperscript{132} it does guarantee that a sympathy strike is an arbitrable issue. This will not only permit the employer to compel the union to arbitrate the issue, but also will permit the employer to enforce in federal court injunctive relief awarded by the arbitrator.\textsuperscript{133} Moreover, the expedited arbitration plan effectively protects the employer from a protracted strike period.

\section*{VI. Conclusion}

Although the decision in \textit{Buffalo Forge} did not fully resolve the conflict between section 4 of Norris-LaGuardia and section 301 of Taft-
Hartley, it did more fully delineate the requirements which must be satisfied to obtain a Boys Markets injunction by requiring that the dispute underlying the strike itself be an arbitrable issue. The result achieved in Buffalo Forge, however, is unsatisfactory for several reasons. First, applied in the context of a sympathy strike, it has the potential if not certain effect of depriving the employer of his bargain. Absent the availability of injunction relief prior to an arbitrator's decision, management has little choice but to employ alternative remedies such as disciplinary suspensions, expedited arbitration procedures, or direct action against the stranger pickets. Although these procedures are useful, they do not provide an adequate substitute for the employer's most potent weapon of preliminary injunctive relief. Moreover, this decision effectively preempts state courts' jurisdiction to grant injunctive relief to restrain sympathy strikes and therefore would appear to be inconsistent with well-established federal labor policies.

A response to the clearly inadequate result achieved in Buffalo Forge is unlikely to come from the Supreme Court in the near future. Although revision of the Court's policies perhaps will take place, a reversal such as that between Sinclair and Boys Markets is unlikely. Rather, the initiative must come from congressional pronouncements on federal labor policies which could more effectively modify the apparent obstacles presented by section 4 of the Norris-LaGuardia Act.134

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134. Senator Robert Griffin (R. Mich.) recently proposed a labor reform bill which would grant federal courts the power to enjoin strikes in breach of the collective bargaining agreement through the specific performance of a no-strike/no-lockout clause. More importantly, the bill contemplates the availability of injunctive relief notwithstanding the finding by the court that the strike be over a dispute which the parties have agreed to arbitrate. 123 Cong. Rec. S. 13,302, 13,305 (daily ed. Aug. 2, 1977).