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Prospective Labor Injunctions: Do They Have a Future?

CHARLES E. TRANT*

I. INTRODUCTION

The employment relationship is rarely, if ever, a static entity. Rather, it is a continuing reevaluation by both parties of their respective positions to insure that their interests are satisfied. Therefore, labor disputes are inevitable, although not necessarily undesirable, so long as the bargaining strength of each party keeps excesses by the other in check. In these disputes the most potent weapon in the union arsenal is the strike or the threat of strike, both of which require a highly fluid situation in which the ability to build economic pressure and adjust stategies is the key to victory.

An employer's success depends upon his ability to defuse the fluid situation and freeze the "status quo." Traditionally, employers have relied upon theories such as criminal and civil conspiracy, nuisance, and interference with advantageous relationships. More recently, the injunction has become the most prevalent device, as well as the singularly most effective method of killing a strike.

Because a prospective injunction magnifies the employer's bargaining strength, policy considerations must be balanced in determining if and to what extent an injunction will be allowed. The prospective injunction must be viewed from the historical perspective of the ordinary injunction. The latter underwent a period of widespread use and resultant abuse, which prompted a period of legislative action engendered by public discontent to perceived judicial excesses. Initially, anti-trust legislation was enacted, however, because of subsequent judicial emasculation, specific labor legislation was later enacted.

The courts have been involved in an ongoing attempt to accommodate these legislative acts when apparent conflicts arise. Such a conflict exists between the anti-injunction posture of the Norris-LaGuardia Act and the presumption of favorability accorded arbitration and injunctive relief under the Taft-Hartley Act. The use of the

*Charles E. Trant, Captain, United States Army JAG Corps; B.A., Suffolk University, 1973; J.D., Suffolk University, 1975; Bar admissions include the Supreme Court of the United States and the Supreme Judicial Court of Massachusetts.

prospective injunction in this accommodation process ultimately revolves around policy considerations of its social desirability, its potential uses and abuses.

II. Historical Perspective

The labor injunction is so inextricably intertwined with the socio-political-economic climate of the times, that an understanding of its origin and development is essential in determining its desirability. Injunctions are an integral part of our labor laws, laws which are rooted in the English experience.[1] The ability of laborers to challenge the economic superiority of employers in England became a dilemma of major proportions in 1348 when the available work force was drastically reduced by the ravages of the Black Plague. To prevent the sought after employees from controlling the terms of their employment and to preclude interference with the employment relationship, Parliament enacted The Statute of Laborers[2] and A Statute of Laborers.[3] In succeeding years additional laws were passed, culminating in a comprehensive labor code, the Elizabethan Statute of Laborers.[4]

A. Criminal Conspiracy

The laborers' attempts to improve their conditions of employment, notwithstanding these restrictive laws, gave rise to the theory of concerted activity as criminal conspiracy. This theory was clearly enunciated in *Rex v. Journeymen-Taylors of Cambridge*,[5] in which the court found concerted demands by the journeymen tailors for higher wages to be an unlawful conspiracy. This concept was readily assimilated into the American experience as evidenced by the famous *Philadelphia Cordewainers* case decided in 1806.[6] In that case, the leaders of the strike were convicted of criminal conspiracy and the union was effectively destroyed.[7]

A series of indictments and convictions occurred over the three

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[1]*See generally*, R. HEDGES & A. WINTERBOTTOM, THE LEGAL HISTORY OF TRADE UNIONISM (1930).

[2]The Statute of Laborers, 1349, 22 Edw. 3, c.1-8.

[3]A Statute of Laborers, 1350, 25 Edw. 3, c.1-7.

[4]Elizabethan Statute of Laborers, 1562, 5 Eliz. c.4.

[5]88 Eng. Rep. 9 (K.B. 1721).

[6]Commonwealth v. Pullis (Mayor's Court of Philadelphia, 1806), *reprinted in* 3 THE DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59-248 (J. Commons & E. Gilmore eds. 1910). These records include the entire testimony and proceedings in several of the early unreported labor cases in inferior courts.

[7]The court reasoned, "A combination of workmen to raise their wages may be considered in a two fold point of view: one is to benefit themselves . . . the other is to injure those who do not join their society. The rule of law condemns both." Commonwealth v. Pullis (Mayor's Court of Philadelphia, 1806), *reprinted in* 3 THE DOCUMEN-

decades which followed *Philadelphia Cordewainers*.[8] The basis of these convictions was succinctly illustrated in *People v. Melvin*,[9] in which the court noted that conspiracy is the gist of the charges; and even to do a thing which is lawful in itself, by conspiracy is unlawful.[10]

Fortunately, equating a labor organization with a criminal conspiracy was permanently arrested in *Commonwealth v. Hunt*.[11] The court in *Hunt* held that the purpose of labor organizations was not unlawful and thus "the legality of such an association will therefore depend upon the means to be used for its accomplishment."[12] The emphasis thus shifted from the justifiable objectives of the labor association to its tactics.[13]

B. Civil Theories

Employers were also active in the civil courts, basing their claims on such common law theories as nuisance, trespass, and tortious interference with advantageous relationships.[14] Again, drawing sustenance from the English traditions, American civil courts were receptive to restraints on concerted activity.[15] The courts utilized an "objectives" test to determine the validity of the concerted activity. Because union demands necessarily curtail the employer's private property interests, the courts held that any intentional infliction of

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TARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 233 (J. Commons & E. Gilmore eds. 1910).

[8]*See, e.g.*, People v. Fisher, 14 Wend. 9 (N.Y. Sup. Ct. 1835). *See generally* Witte, *Early American Labor Cases*, 35 YALE L.J. 825 (1926).

[9]2 Wheel. Cr. Cas. 263 (Crim. Ct. N.Y. 1810).

[10]*Id.* at 279-80.

[11]45 Mass. (4 Met.) 111 (1842).

[12]Labor associations were no longer subject to criminal conspiracy charges in England by act of Parliament in 1875. The Conspiracy, and Protection of Property Act, 1875, 38 & 39 Vict., ch. 86, § 3.

[13]Thus, although criminal conspiracy charges continued to exist into the 1880s, it was not as easy to establish "means," as it was merely to prove "purpose." This caused such charges to simply fall into disuse.

[14]In Lumley v. Gye, 118 Eng. Rep. 749, 755 (Q.B. 1853) (Erle, J.) the court stated:

> The authorities are numerous and uniform, that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present; for, there, the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed; and the present case is the same.

See also South Wales Miners' Fed'n v. Glamorgan Coal Co. [1095] A.C. 239.

[15]With the demise of the criminal conspiracy concept, the English were invoking a concept of civil conspiracy which precluded a combination of workers to injure their employers without justifiable objectives. *See, e.g.*, Quinn v. Leathem, [1901] A.C. 495. This practice ended with the Trade Disputes Act, 1906, 6 Edw. 7, c.47.

temporal damage to those interests required justification. The union had to win immunity for its actions through its purpose. Certain objectives of concerted action, such as higher wages, were of a direct and obvious benefit to the workers and were therefore protected.[16] However, the step across some nebulous line to an area where the objectives could be subjected to dispute was not far.[17] Because unions had their objectives[18] subjected to the personal philosophies and predilections of judges, results were often illusory, ambiguous, and contradictory.[19] The conservative nature of the judiciary resulted in the repressive use of injunctions against unions, depriving them of their most valuable economic weapon, the strike.[20]

Despite intervening legislation[21] which afforded employers additional avenues of attack, the vitality of the "objectives" test, cir-

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[16]F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930):

> Self-interest, in its undefined amplitude is the end that justifies. But of the innumerable ways in which self-interest may be asserted, only those grant immunity which have "a direct relation to benefits that laborers are trying to obtain." Obviously this is a test implying judgment on economic and social data; yet it is treated as "a question of law to be decided by the court."

Id. at 27 (quoting respectively Folsom v. Lewis, 208 Mass. 336, 338, 94 N.E. 316, 317 (1911) and DeMinico v. Craig, 207 Mass. 593, 598, 94 N.E. 317, 319 (1911)).

[17]One degree more remote and the courts could vary. *See, e.g.*, Mechanics' Foundry & Mach. Co. v. Lynch, 236 Mass. 504, 128 N.E. 877 (1920) (seeking the reinstatement of a discharged employee was *not* a protected objective).

[18]If a number of objectives were involved, it was only necessary for one objective to be illegal to render the union activity illegal. *See* Folsom v. Lewis, 208 Mass. 336, 94 N.E. 316 (1911).

[19]C. GREGORY, LABOR AND THE LAW (2d Rev. Ed., 1961).

[20]*See* Cox, *The Role of Law in Labor Disputes*, 39 CORNELL L.Q. 592 (1954). Illustrative of judicial thought during this era is the classic case of Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896), wherein the court stated:

> A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. But a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful.

Id. at 98-99, 44 N.E. at 1077-78. This theory was later overturned by Congress's enactment of the Norris-LaGuardia Act. *See* notes 60, 66-67 *infra*. In dissent, Justice Holmes would have allowed intentional infliction of temporary damage to the employer (absent violence) to balance the economic realities of the parties. *Id.* at 104-09, 44 N.E. at 1079-82 (Holmes, J., dissenting). *See also* Plant v. Woods, 176 Mass. 492, 504-05, 57 N.E. 1011, 1015-16 (1900) (similar dissent by Holmes); Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894).

[21]Sherman Anti-Trust Act of July 2, 1890, ch. 647, 26 Stat. 209 (1934) (current version at 15 U.S.C. §§ 1-7 (1976)) [hereinafter cited as the Sherman Act]; Clayton Anti-Trust Act, Pub. L. No. 212, ch. 323, 38 Stat. 730, 731, 736-40 (1914) (current version at 15 U.S.C. §§ 12-27 (1976)) [hereinafter cited as the Clayton Act]. *See* notes 25 & 42 *infra* and accompanying text.

cumscribed narrowly by an anti-union judicial tenor, survived virtually unabated into the twentieth century.[22] The Supreme Court of the United States reiterated the test in the highly criticized opinion of *Hitchman Coal & Coke Co. v. Mitchell*.[23] The Court held:

> [A]ny violation of plaintiff's legal rights contrived by the defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employees constitutes such a violation.[24]

III. Anti-Trust Legislation

A. Sherman Act

During the same period that the civil conspiracy injunctions and the "objectives" test were at the height of their popularity, big business was expanding and amassing tremendous economic power. The abuses which resulted created a storm of public indignation that prompted Congress to pass the Sherman Anti-Trust Act.[25] The principal thrust of the Act was to protect trade and commerce against unlawful restraints and monopolies.[26] However, employers latched onto the general language of the Act[27] and utilized it as another vehicle to enjoin labor organizations.[28] The catalyst for employers utilizing the Sherman Act was *In re Debs*,[29] in which the Court upheld federal intervention in breaking the Pullman Strike.[30]

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[22]*E.g.*, American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 (1921); Coppage v. Kansas, 236 U.S. 1 (1915).

[23]245 U.S. 229 (1917).

[24]*Id.* at 257. *See also* Adair v. United States, 208 U.S. 161 (1908).

[25]245 U.S. at 257. *See* note 21 *supra*.

[26]*See generally* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933); United States v. Colgate & Co., 250 U.S. 300, 307 (1919); D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 173-74 (1915).

[27]Prior to its amendment by Act of Aug. 17, 1937, Pub. L. No. 314, § 690, 50 Stat. 693, the Sherman Act, § 1, provided, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Sherman Act, ch. 647, 26 Stat. 209 (current version at 15 U.S.C. § 1).

[28]In United States v. Workingmen's Amalgamated Council, 54 F. 994 (C.C.E.D. La., 1893), the court, interpreting the Sherman Act as outlawing such combinations whether the source be massed capital or labor, found that concerted activity was illegal as a combination in restraint of trade.

[29]158 U.S. 564 (1895).

[30]The American Railway Union, founded in 1893 by Eugene V. Debs, struck the Pullman Place Car Company, causing a nationwide transportation problem. A violent strike ensued which eventually resulted in the intervention of the United States Army. Debs and his associates were jailed for violating the court's injunction. The

Although the court of appeals had found[31] that section 1 of the Sherman Act[32] applied to labor organizations, the Supreme Court affirmed on narrower grounds.[33]

Following *In re Debs*,[34] there was a proliferation of injunctions against unions, resulting in an era of "law by injunction."[35] Public concern regarding the applicability of the Sherman Act to labor peaked after the famous *Danbury Hatters* case,[36] in which an unanimous Supreme Court held that labor unions were subject to the Sherman Act.[37]

B. Clayton Act

Congress, by enacting the Clayton Anti-Trust Act,[38] moved to curb what it perceived as judicial excesses in the application of the

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resulting destruction of the union was, according to Debs, the result of the injunction not the military intervention.

Following the Pullman strike, a United States Strike Commission, recognizing the inequality of bargaining strength, prompted Congress to pass the Erdman Act in 1898 aiding organized labor. Erdman Act of June 1, 1898, ch. 370, 30 Stat. 424. However, in Adair v. United States, 208 U.S. 161 (1908), the Court struck it down because it unconstitutionally deprived employers of property without "due process of law." Additionally, the Court found that the employment relationship was local in nature and thus, not within the power of Congress to regulate under the Commerce Clause. *Id.* at 180.

[31]United States v. Debs, 64 F. 724 (C.C.N.D. Ill. 1894).

[32]*Id. See* note 27 *supra.*

[33]In re Debs, 158 U.S. at 600. Whether Congress intended for labor organizations to be subject to the Sherman Act was unclear. *See* E. BERMAN, LABOR AND THE SHERMAN ACT ch. 3 (1930) (maintaining that Congress did not intend for labor organizations to be subject to the Act). *But see* A. MASON, ORGANIZED LABOR AND THE LAW chs. 7-9 (1925) (maintaining that Congress did intend for labor organizations to be subject to the Act). However, the courts proceeded on the assumption that Congress did intend for labor organizations to be subject to the Act. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911), in which the Court applied the Sherman Act to unlawful combinations of capital or labor.

[34]158 U.S. 564 (1895). *See also* Lewis, *A Protest Against Administering Criminal Law By Injunction—The Debs Case (1894)*, 33 AM. L. REG. (N.S.) 879 (1894).

[35]*See* S. REP. NO. 163, pt. 1, 72d Cong., 1st Sess. 18 (1932), *reprinted in* STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION 184-85 (R. Koretz ed. 1970).

[36]Lowew v. Lawlor, 208 U.S. 274 (1908).

[37]The Court stated:

> The act made no distinction between classes. It provided that "every" contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act reminded as we have it before us.

Id. at 301.

[38]Clayton Act, 38 Stat. 730 (current version at 15 U.S.C. § 12 (1976)).

Sherman Act.[39] Labor organizations, relying on sections 6[40] and 20,[41] perceived the Clayton Act as its "Magna Carta."[42] However, the only significant benefit that unions ultimately received under the Clayton Act was that they could not be dissolved by the courts as unlawful per se.[43]

Despite the obvious attempt by Congress to assist labor organizations by enactment of the Clayton Act, the Supreme Court emasculated the Act in *Duplex Printing Press Co. v. Deering*.[44] The Court held that

> there is nothing in the section [6] to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws.[45]

The Court extrapolated this rationale from what it considered to be ambiguous language in sections 6 and 20 of the Clayton Act.[46] The

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[39]*See* Kovner, *The Legislative History of Section 6 of the Clayton Act*, 47 COLUM. L. REV. 749 (1947).

[40]Section 6 of the Clayton Act provides in part:

> [T]he labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (1976).

[41]Section 20 of the Clayton Act prohibits federal judges from issuing injunctions in cases between employers and employees involving disputes arising out of terms and conditions of employment, except in very limited circumstances. 29 U.S.C. § 52 (1976).

[42]Curiously, in Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917), the Supreme Court simply ignored section 6 in its decision.

[43]Overall, the Act may have been more detrimental than it was beneficial to the labor movement. Prior to the Clayton Act, under section 4 of the Sherman Act, only the government could move for an injunction. *See* Paine Lumber Co. v. Neal, 244 U.S. 459 (1917). However, section 16 of the Clayton Act, 15 U.S.C. § 26 (1976), expanded this right to private individuals with obviously detrimental ancillary effects on labor.

[44]254 U.S. 443 (1921).

[45]*Id.* at 469.

[46]The ambiguous language of section 6 includes "legitimate objects" and "lawfully" carried out. The ambiguous language of section 20 includes "peaceful means," "lawfully," and "peacefully."

courts relentlessly continued their application of anti-trust laws to labor organizations,[47] to the point where the double standard that they applied toward employers and labor became blatant. In *Bedford Cut Stone Co. v. Journeyman Stone Cutters Association*,[48] the Court applied an "effects" test[49] under which the pursuit of legitimate objectives was not determinative, but the result would be. The Court stated: "A restraint of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint."[50] The distrustful attitude of labor toward the judiciary that developed during this period remained for some time.

IV. Labor Legislation

A. *Railway Labor Act*

Because of the continuing interference of the courts into labor matters,[51] the first purely labor relations piece of federal legislation, the Railway Labor Act,[52] was enacted. Although the Railway Labor Act was not as comprehensive[53] as the later National Labor Relations Act,[54] it clearly recognized the right of laborers to organize and bargain collectively,[55] and interestingly, imposed a mandatory injunction against employers to bargain with a certified union.[56] This mandatory injunction was upheld in *Virginian Railway v. System*

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[47]*See, e.g.*, United States v. Brims, 272 U.S. 549 (1926); United Leather Workers Local 66 v. Herkert & Meisel Trunk Co., 265 U.S. 457 (1924).

[48]274 U.S. 37 (1927).

[49]The same "effects" test had been rejected as applied to employers in United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895).

[50]274 U.S. at 47.

[51]*See, e.g.*, Corondo Coal Co. v. UMW, 268 U.S. 295 (1925).

[52]Railway Labor Act, Pub. L. No. 257, ch. 347, 44 Stat. 577 (1926) (current version at 45 U.S.C. § 151 (1976)) (as amended by Railway Labor Act Amendments of 1934, ch. 691, § 3, 48 Stat. 1189 (current version at 45 U.S.C. § 153 (1976))).

[53]The Railway Labor Act had no enforcement agency similar to the National Labor Relations Board, no lists of prohibited practices similar to unfair labor practices, and no limitation on the amount of economic force that could be used in labor disputes. The Act did set up a National Railroad Adjustment Board for the resolution of disputes. Railway Labor Act, ch. 347, 44 Stat. 577, 578 (current version at 45 U.S.C. § 151 (1976)).

[54]National Labor Relations (Wagner) Act of July 5, 1935, Pub. L. No. 74-198, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-69 (1976)) [hereinafter cited as the Wagner Act].

[55]*See* Texas & N.O. Ry. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548 (1930) (upholding the constitutionality of the Railway Labor Act).

[56]Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (current version at 45 U.S.C. § 151 (1976)).

Federation No. 40,[57] despite the enactment in the interim of the Norris-LaGuardia Anti-Injunction Act.[58] Indeed, the Railway Labor Act had a significant impact on the law of labor injunctions in cases where an *accomodation* of the two Acts had to be struck.[59]

B. Norris-LaGuardia Act

The Norris-LaGuardia Act was the preeminent legislative enactment dealing with labor injunctions. Prior to this Act, there was no general legislative labor law guidance, leaving the courts to rely upon common law and anti-trust law. The personal predilections of judges prevailed. Employers had turned to the injunction as their primary weapon because damage remedies often proved to be inadequate.[60] Injunctions were swift, effective, and often determinative but were subject to procedural inadequacies and substantive errors.[61] Against this backdrop, Congress, through the Norris-LaGuardia Act, sought to limit the federal courts by withdrawing their injunctive power.[62]

In the Norris-LaGuardia Act, Congress set forth a broad prohibition:

> [N]o court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or

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[57]300 U.S. 515, 562-63 (1937). The Court viewed the Railway Labor Act, as amended in 1934, as a more recent and more specific legislative act than the Norris-LaGuardia Act. Therefore, this injunctive provision was crucial and created only a minimal intrusion into the Norris-LaGuardia Act. *Id.*

[58]Norris-LaGuardia Act, Pub. L. No. 65, ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101-15 (1976)).

[59]The Norris-LaGuardia Act did not deprive federal courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act. Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232, 237 (1949). Also, in Steele v. Louisville & N.R.R., 323 U.S. 192 (1944), the Court enjoined the union to give fair representation to all employees. *See also* Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944). *See generally* Comment, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 YALE L.J. 70 (1960).

[60]Among the inadequacies were the procedural difficulties in suing a union *qua* union, the judgment-proof status of many unions and the interminable delays.

[61]Decisions were often ex parte and based on misleading evidence. Hasty decisions made in an emotionally charged atmosphere based upon amorphous and illusory substantive law resulted in many errors. Although these errors could be corrected in later proceedings, in practice the initiative and morale of the union had been broken. Employers had the unions' economic power in check while their own was relatively unabated.

[62]In Marine Cooks & Stewards, A.F.L. v. Panama S.S. Co., 362 U.S. 365, 369 n.7 (1960), the Court noted that the Norris-LaGuardia Act "was prompted by a desire . . . to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer."

> permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.[63]

Section 4 of the Act provided a similar proscription and delineated specific acts, including strikes and picketing, which would not be enjoined.[64] Thus, the Act put an end to the criminal conspiracies and the civil "objectives" test theories[65] and brought judicial interpretation of the use of injunctions in anti-trust cases into proper perspective.[66] The Norris-LaGuardia Act reflected the laissez-faire philosophy of Congress,[67] a philosophy which had to be accommodated to prior and subsequent regulatory schemes.[68]

Accommodation with the Railway Labor Act was usually effected with minimal intrusion into the Norris-LaGuardia Act.[69] However, when the Supreme Court enjoined a strike in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railway*,[70] its holding was in direct conflict with the specific language of section 4 of the Norris-LaGuardia Act.[71] The Court stated:

> We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accomodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of

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[63]Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (current version at 29 U.S.C. § 101 (1976)).

[64]*Id.* at 70-71 (current version at 29 U.S.C. § 104 (1976)).

[65]As there was no mention of "objectives" in the Norris-LaGuardia Act, the court in Wilson & Co. v. Birl, 27 F. Supp. 915, 917 (E.D. Pa.), *aff'd*, 105 F.2d 948 (3d Cir. 1939), concluded that the rationale of the dissent in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 479 (1921) (Brandeis, J., dissenting), was the intended result.

[66]*See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), wherein the Court indicated that a union, pursuing its own interest by lawful means, did not violate anti-trust laws, thus reversing the restrictive precedents. *See also* United States v. Hutcheson, 312 U.S. 219 (1941) in which the Court resurrected section 20 of the Clayton Act.

[67]*See* S. REP. NO. 163, pt. 1, 72d Cong., 1st Sess. 18 (1932), *reprinted in* STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION 184-85 (R. Koretz ed. 1970); H.R. REP. NO. 669, 72d Cong., 1st Sess. 3 (1932), *reprinted in* STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION 193-94 (R. Koretz ed. 1970).

[68]*See generally* Loeb, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 11 LAB. L.J. 473 (1960).

[69]*See, e.g.*, Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937).

[70]353 U.S. 30 (1957).

[71]*Id.* at 42. Compare this holding with the Norris-LaGuardia Act, ch. 90, 47 Stat. (current version at 29 U.S.C. § 104 (1976)).

> each is preserved. We think that the purposes of these Acts are reconcilable.[72]

Thus, the Court, in holding the injunction permissible,[73] looked at both statutes as "part of a pattern of labor legislation."[74]

C. The Wagner Act

The task of accommodating the Railway Labor Act[75] and the Norris-LaGuardia Act was immeasurably different from that of accommodating the latter act with the Wagner Act,[76] because the Wagner Act was passed subsequent to the Norris-LaGuardia Act with a full congressional debate on its impact. The Wagner Act, to a limited extent, reopened the door to federal court use of the labor injunction. Section 10(e)[77] granted power to the National Labor Relations Board to seek judicial enforcement of its orders in the appropriate United States circuit court of appeals. In granting jurisdiction to the circuit courts to entertain such proceedings, the Wagner Act specifically bestowed the power to grant equitable relief, including "such temporary relief or restraining order as it deems just and proper."[78] Section 10(f)[79] allowed petitions to be filed by "[a]ny person aggrieved by a final order of the Board," with the grant of jurisdiction and equitable relief power identical to that of section 10(e). The courts were not presented with any ambiguity as to the congressional intent vis-a-vis Norris-LaGuardia, because section 10(h) specifically rendered Norris-LaGuardia inapplicable.[80]

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[72]353 U.S. at 40.

[73]The court believed that the Adjustment Board provided a reasonable alternative to the limited concession of the right to strike. To offset this inbalance of economic power, the Court, in Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas R.R. Co., 363 U.S. 528 (1960) held that as a condition precedent to the issuance of such an injunction, management could be ordered to maintain the status quo. *Id.* at 535.

[74]353 U.S. at 42.

[75]Railway Labor Act, ch. 347, 44 Stat. 577 (current version at 45 U.S.C. §§ 151-188 (1976)).

[76]The Wagner Act, ch. 372, 49 Stat. 449 (current version at 29 U.S.C. § 160 (1976)).

[77]Wagner Act, § 10(e), 49 Stat. at 454-55 (current version at 29 U.S.C. § 160(e) (1976)).

[78]Wagner Act, § 10(e) 49 Stat. at 454 (current version at 29 U.S.C. § 160(e) (1976)).

[79]Wagner Act, § 10(f) 49 Stat. 454 (current version at 29 U.S.C. § 160(f) (1976)).

[80]Wagner Act, § 10(h) 49 Stat. 454 (current version at 29 U.S.C. § 160(h) (1976)). Section 10(h) of the National Labor Relations Act provides:

> When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by [the Norris-LaGuardia Act].

However, in *Fur Workers Union Local 72 v. Fur Workers Union No. 21238*,[81] the court held that the Wagner Act did not modify the Norris-LaGuardia Act prerequisites to the issuance of labor injunctions.[82] Nevertheless, section 10(h) was not a signal to return to the pre-Norris-LaGuardia days, because it was later determined that section 10(h) did not carry with it any private rights to seek injunctions.[83]

D. Taft-Hartley Act

In 1947, the Wagner Act was amended by the Labor Management Relations (Taft-Hartley) Act.[84] With enactment of the Wagner Act, Congress focused on actions of employers; with enactment of the Taft-Hartley Act, Congress evidenced a change of attitude toward the role of unions by adding a list of union unfair labor practices to balance the Wagner Act list against employers.[85] This change was prompted by certain post-Wagner Act practices of organized labor which Congress perceived as causing industrial unrest and coercive influence by unions over employees. Although Congress, in the Taft-Hartley Act expressly accepted the desirability of collective bargaining, it determined that change in the remedial and enforcement provisions of the Wagner Act was required.

This change necessarily required an examination of the efficacy of the injunction as a remedial device. In section 101 of the Taft-Hartley Act, Congress added among others sections 10(*l*) and 10 (j) to the Wagner Act. Section 10(*l*) compels the Board to seek an injunction whenever a union is charged with violating section 8(b)(4), subsections (A), (B), or (C), and the regional director has reasonable cause

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[81]105 F.2d 1, 17 (D.C. Cir.), *aff'd mem.*, 308 U.S. 522 (1939).

[82]Earlier courts interpreting the impact of the Wagner Act seemed to be more concerned with the question of whether a particular dispute was a "labor dispute" and thus within the ambit of the Wagner Act. *See, e.g.*, International Union of United Brewery v. California State Brewers Inst., 25 F. Supp. 870 (S.D. Cal. 1938), *rev'd on other grounds*, 106 F.2d 871 (9th Cir. 1939) (involved jurisdictional dispute not between employer and employees, thus no true labor dispute); Grace Co. v. Williams, 20 F. Supp. 263 (W.D. Mo. 1937) (certification of bargaining representative was no "labor dispute"). *But cf.*, Donnelly Garment Co. v. I.L.G.W., 99 F.2d 309 (8th Cir. 1938) and Cupples Co. v. A.F.L., 20 F. Supp. 894 (E.D. Mo. 1937) (finding labor disputes existed).

[83]Bakery Sales Drives, Local No. 33 v. Wagshal, 333 U.S. 437, 442 (1948).

[84]Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 101, ch. 120, 61 Stat. 136 (1947) (as amended by Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (current version at 29 U.S.C. § 401 (1976))) (current version at 29 U.S.C. § 141 (1976)).

[85]Taft-Hartley Act, § 8(b), 61 Stat. 141 (current version at 29 U.S.C. § 158(b) (1976)).

to believe the charge is true.[86] Although section 10(*l*) does not have language specifically exempting it from the Norris-LaGuardia Act, it does state that injunctive relief can be granted "notwithstanding any other provision of law."[87] Section 10(j) grants the Board discretionary power to seek an injunction in any case where it has issued an unfair labor practice complaint against an employer or a union.[88] This section contains no exempting language similar to sections 10(h) or 10(*l*). Nevertheless, the court in *Douds v. Local 294, International Brotherhood of Teamsters*,[89] stated:

> The measure of the court's jurisdiction is similar in both subdivisions (j) and (*l*); to-wit, to grant such injunctive relief or temporary restraining order as it deems just and proper. No other grant or limitation of power is found.
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> . . . .
>
> . . . When the court is given jurisdiction without limitation, the Act means just that; the phrase [notwithstanding any other provision of law] may be considered as surplusage. Certainly, it can not be used to imply a limitation upon another subsection where the phrase is not found.[90]

The resurrection of the injunction in federal courts as a mode of regulating labor disputes under sections 10(j) and 10(*l*) can be reconciled with the underlying rationale of the Norris-LaGuardia Act, because procedural safeguards[91] obviate many of the evils previously associated with the private use of labor injunctions.[92]

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[86]Taft-Hartley Act, § 10(*l*), 61 Stat. 149 (current version at 29 U.S.C. § 160(*l*) (1976)).

[87]Taft-Hartley Act, § 10(*l*), 61 Stat. 149 (current version at 29 U.S.C. § 160(*l*) (1976)). Section (h) carries such an express exception. Taft-Hartley Act, § 10(h), 61 Stat. 149 (current version at 29 U.S.C. § 160(h) (1976)). *See also* § 208(a) of the Taft-Hartley Act, which states that the provisions of the Norris-LaGuardia Act are inapplicable in situations dealing with national health or safety. Taft-Hartley Act, ch. 120, § 208(a), 61 Stat. 155 (current version at 29 U.S.C. § 178 (1976)).

[88]Taft-Hartley Act, § 10(j), 61 Stat. 149 (current version at 29 U.S.C. § 160(j) (1976)).

[89]75 F. Supp. 414 (N.D.N.Y. 1947).

[90]*Id.* at 417-18.

[91]The Board must make preliminary findings of fact and law justifying the issuance of the unfair labor practice complaint. The petition for the injunction must allege substantial and irreparable injury or else the person charged must be given notice and the right to appear and present testimony prior to the issuance of the injunction. Taft-Hartley Act, ch. 120, § 10(*l*)), 61 Stat. 149 (current version at 29 U.S.C. § 160(*l*) (1976)).

[92]Injunctive relief upon petition of private parties was not contemplated under these sections of the Act. G. VAN ARKEL, AN ANALYSIS OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, 63 (1947). In Amazon Cotton Mill Co. v. Textile Workers Union, 167 F.2d 183, 190 (4th Cir. 1948), the court upheld the exclusive jurisdiction of

Section 301(a) of the Taft-Hartley Act caused the greatest difficulty in accommodating the Norris-LaGuardia Act and eventually thrust federal courts back into a preeminent role in establishing labor policy. Section 301(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, 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.[93]

Ostensibly, this provision granted federal courts plenary jurisdiction in suits between employers and unions over contract violation disputes. Such a broad jurisdictional grant would be expected to carry with it the full panoply of legal and equitable remedial power, including the injunction. The legislative history, however, casts doubt on such an assumption. A comparison of the original versions of section 301(a) indicates that Congress did not intend a *sub silentio* authorization of federal injunctive relief. The Senate version[94] made collective bargaining agreement breaches unfair labor practices and gave the Board injunctive power under section 10(j) to enjoin such violations. The House version,[95] however, provided that violations of the collective bargaining agreement fell within the jurisdiction of the federal courts and expressly authorized the issuance of injunctions against private parties for such violations. This latter grant would have been a de facto repeal of Norris-LaGuardia Act in this area. The conference committee accepted the House version but eliminated the portion which reinstituted private injunctive relief.[96] Thus, the apparent Congressional rejection of injunctive relief in section 301(a) as evidenced by its history, coupled with a broad jurisdictional grant, presumably including full remedial powers, renders the section instrinsically inconsistent. Although it is obvious that the Taft-Hartley Act made some inroads into Norris-

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the Board to petition for 10(*l*) injunctions. *See also*, International Longshoremen's and Warehousemen's Local No. 6 v. Sunset Line & Twine Co., 77 F. Supp. 119 (N.D. Cal. 1948).

[93]Taft-Hartley Act, ch. 120, § 301(a), 61 Stat. 156 (current version at 29 U.S.C. § 185(a) (1976)).

[94]S. 1126, 80th Cong., 1st Sess., § 8(b)(5) (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 114 (1948).

[95]H.R. 3020, 80th Cong., 1st Sess., § 302(e) (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 95 (1948).

[96]H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 67, *reprinted in* [1947] U.S. CODE CONG. & AD. NEWS 1135, 1174.

LaGuardia's restrictions, the absence of definitive criteria in section 301(a) renders nebulous the exact extent.

V. JUDICIAL INTERPRETATION

A. Lincoln Mills *to* Avco

Section 301(a) is framed in such broad jurisdictional terms that a split arose among the circuits as to whether the section was only a procedural grant[97] or an authorization for federal substantive law.[98] In *Textile Workers Union v. Lincoln Mills of Alabama*,[99] the Supreme Court resolved this split in the context of a suit to compel arbitration.[100] The Court focused on the Congressional intent of section 301(a) to make collective bargaining agreements "equally binding and enforceable."[101] The Court concluded that "[T]he substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The range of judicial inventiveness will be determined by the nature of the problem."[102] Recognizing that an employer's agreement to arbitrate is the quid pro quo for a no-strike clause, the Court adopted the rationale expressed in *Textile Workers Union v. American Thread Co.*[103] in stating that section 301 "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements."[104] The Court did not feel constricted by the stiff procedural requirements of section 7 of the Norris-LaGuardia Act, and asserted that a failure to comply with an agreement to arbitrate was not similar to the type of acts listed in section 4 which had given rise to abuses of the injunctive power against which the

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[97]*See, e.g.*, I.L.G.W. v. Jay-Ann Co., 228 F.2d 632 (5th Cir. 1956); Mercury Oil Ref. Co. v. Oil Workers Int'l Union, 187 F.2d 980 (10th Cir. 1951).

[98]*See, e.g.*, Signal-Stat Corp. v. Local 475, United Elec. Radio and Mach. Workers, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957); United Elec. Radio and Mach. Workers v. Oliver Corp., 205 F.2d 376 (8th Cir. 1953).

[99]353 U.S. 448 (1957).

[100]The employer, after complying with graduated steps of a negotiated grievance procedure pursuant to a contract that contained a no-strike clause and a broad arbitration clause, refused to submit to arbitration. The district court's order to arbitrate was reversed by the circuit court which held that § 301(a) granted jurisdiction but not the power to grant the requested relief. Lincoln Mills v. Textile Workers Union, 230 F.2d 81 (5th Cir. 1956).

[101]353 U.S. at 454 (quoting S. REP. NO. 105, 80th Cong., 1st Sess. 15 (1947)).

[102]353 U.S. at 456-57. The Court noted Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301*, 66 YALE L.J. 167 (1956).

[103]113 F. Supp. 137 (D. Mass. 1953).

[104]353 U.S. at 451.

Norris-LaGuardia Act was aimed.[105] Admitting that a literal reading of the Norris-LaGuardia Act would bring the dispute within its purview, the Court, relying on section 8 which evinces a Congressional policy in favor of "voluntary arbitration," nevertheless reasoned that "the congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of § 7 of the Norris-LaGuardia Act."[106] However, although arbitration could be compelled, the status of injunctions to prevent violations of no-strike clauses was uncertain.

The preference for the peaceful resolution of labor disputes via arbitration, having received Congressional approval, continued to receive judicial blessing. In the *Steelworkers Trilogy*,[107] the Court stated:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . ." That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.[108]

The Court cautioned, however, that the function of the federal courts is not to weigh the merits of the grievance but to ascertain "whether the party seeking arbitration is making a claim which on its face is governed by the contract."[109] Noting that "arbitration is the substitute for industrial strife,"[110] the Court stated that the arbitrator is knowledgable in the "common law of the shop."[111] Therefore, absent an express exclusionary provision or other forceful evidence, "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[112]

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[105]*Id.* at 458.

[106]*Id.*

[107]*See, e.g.*, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

[108]United Steelworkers v. American Mfg. Co., 363 U.S. at 566 (quoting the Labor Management Relations Act, 1947, 29 U.S.C. § 173 (1976) (amended 29 U.S.C. § 173 (Supp. III 1979)).

[109]363 U.S. at 568.

[110]United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. at 578.

[111]*Id.* at 582. *Accord*, Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-1500 (1959).

[112]363 U.S. at 582-83.

Two years later, in *Charles Dowd Box Co. v. Courtney*,[113] the Supreme Court recognized that state courts were not divested of their jurisdiction to entertain suits for contract violations between employers and unions.[114] In rejecting any federal "exclusivity" in this area, the Court relied upon the permissive "may" language of section 301(a), as opposed to mandatory "shall" language, and the fact that Congress left the enforcement of collective bargaining agreements "to the usual processes of the law."[115] However, the Court quickly dispelled any notion that state court concurrent jurisdiction would be allowed to create a multifarious body of substantive labor law. In *Local 174, Teamsters v. Lucas Flour Co.*,[116] the Supreme Court held that "incompatible doctrines of local law must give way to principles of federal labor law. . . . The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute."[117] Thus, a state court proceeding would be procedurally appropriate, but the substantive law to be applied was federal.

In *Lincoln Mills*, the *Steelworkers Trilogy*, and *Lucas Flour*, the suits to compel arbitration were union initiated. Employers soon began to question whether they could likewise expect judicial enforcement of the union side of the bargain—the no-strike clause. Although a split developed among the circuits,[118] the issue was resolved in *Sinclair Refining Co. v. Atkinson*.[119] In *Sinclair* the employer, seeking to enjoin a union violation of a no-strike clause, relied upon the Congressional concern expressed in section 2 of the Norris-LaGuardia Act "to protect concerted activities for the purpose of collective bargaining."[120] The employer contended that

> [a]n interpretation of the term "labor dispute" so as to include a dispute arising out of a union's refusal to abide by the terms of a collective agreement to which it freely acceded is

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[113]368 U.S. 502 (1962).

[114]*Id.* The Court rejected the analogy to San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), in which the Court recognized the necessity of withdrawing from the state courts, jurisdiction over controversies subject to the jurisdiction of the NLRB. 368 U.S. at 507.

[115]368 U.S. at 511.

[116]369 U.S. 95 (1962).

[117]*Id.* at 102-03. *Accord*, Humphrey v. Moore, 375 U.S. 335 (1964).

[118]*See* Chauffeurs Local 795 v. Yellow Transit Freight Lines, Inc., 282 F.2d 345 (10th Cir. 1960), *rev'd per curiam*, 370 U.S. 711 (1962) (upholding an injunction in violation of a no-strike clause). *But see* A.H. Bull S.S. Co. v. Seafarers' Int'l Union, 250 F.2d 326 (2d Cir. 1957), *cert. denied*, 355 U.S. 932 (1958) (refusing to uphold an injunction in a similar case).

[119]370 U.S. 195 (1962) (overruled in Boys Mkts., Inc. v. Retail Clerks, Local 770, 398 U.S. 235 (1970)).

[120]370 U.S. at 201.

> to apply the Norris-LaGuardia Act in a way that defeats one of the purposes for which it was enacted.[121]

Although the Court recognized this as a forceful argument with support among the legal commentaries,[122] it declared that nothing in section 2 narrowed the broad definition of "labor dispute,"[123] and that section 301(a) "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-LaGuardia Act."[124] The Court distinguished its holding in *Sinclair* from that in *Lincoln Mills* because the latter involved injunctions against failure to arbitrate, which Norris-LaGuardia was not intended to prevent, while the former involved injunctions to prevent strikes, at which Norris-LaGuardia was specifically directed.[125] The Court refused to accomodate section 4 of the Norris-LaGuardia Act and section 301(a) of the Taft-Hartley Act.

In a noteworthy dissent, Justice Brennan stated:

> Of course § 301 of the Taft-Hartley Act did not, for purposes of actions brought under it, "repeal" § 4 of the Norris-LaGuardia Act. But the two provisions do coexist, and it is clear beyond dispute that they apply to the case before us in apparently conflicting senses. Our duty, therefore, is to seek out that accommodation of the two which will give the fullest possible effect to the central purposes of both.[126]

Justice Brennan noted that while section 301 does not specifically address the remedy question, a court's function may be crippled if it is deprived of its injunctive power.[127] Also, when faced with this surface conflict, prior decisions had flexibly applied the Norris-LaGuardia language.[128] Therefore, Justice Brennan justifiably considered the majority opinion in *Sinclair* to be out of harmony with prior decisions.[129]

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[121]*Id.*

[122]*See* Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635 (1959); Rice, *A Paradox of Our National Labor Law*, 34 MARQ. L. REV. 233 (1951); Stewart, *No-Strike Clauses in the Federal Courts*, 59 MICH. L. REV. 673 (1961).

[123]370 U.S. at 202 n.13 (quoting Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938)).

[124]370 U.S. at 203.

[125]*Id.* at 212. *See* Keene, *The Supreme Court, Section 301 and No- Strike Clauses: From* Lincoln Mills *to* Avco *and Beyond*, 15 VILL. L. REV. 32, 49 (1969).

[126]370 U.S. at 215-16 (Brennan, J., dissenting).

[127]*Id.* at 216-17.

[128]*Id.* at 217. In *Lincoln Mills*, § 7 of the Norris-LaGuardia Act was *accommodated* to § 301(a) of the Taft-Hartley Act. *Id.* at 219.

[129]Brennan stated, "Accommodation requires only that the anti-injunction policy of Norris-LaGuardia not intrude into areas not vital to its ends, where injunctive relief is

Additionally, Justice Brennan realized the effect of the decision on state court injunctive relief. The state courts would become the preferred forum for enforcement of arbitration agreements placing the "development of a uniform body of federal contract law . . . in for hard times."[130] Finally, if removal to federal courts were allowed, it would result in an extension of the Norris-LaGuardia Act to the states, effectively negating their injunctive power.[131]

Although *Sinclair* ostensibly left state court injunctive power intact, the tactical procedural maneuver of the federal removal statute[132] quickly preempted the field. Courts had to grapple with the question of whether the Norris-LaGuardia Act denied jurisdiction to the federal courts when the sole relief requested in a labor dispute was an injunction. Again a split arose among the circuits.[133] The question was answered in *Avco Corp. v. Aero Lodge No. 735*[134] in which the Supreme Court held:

> Removal is but one aspect of "the primacy of the federal judiciary in deciding questions of federal law." *See England v. Medical Examiners*, 375 U.S. 411, 415-416.
>
> It is thus clear that the claim under this collective bargaining agreement is one arising under the "laws of the United States" within the meaning of the removal statute. 28 U.S.C. § 1441(b). It likewise seems clear that this suit is within the "original jurisdiction" of the District Court within the meaning of 28 U.S.C. §§ 1441(a) and (b).[135]

Thus, the holding in *Sinclair* was unquestionably extended to the state courts.[136] The three concurring justices in *Avco*, realizing the impact of the decision in connection with *Sinclair*, expressed a willingness to reconsider *Sinclair* at an appropriate time.[137]

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vital to a purpose of § 301; it does not require unconditional surrender." 370 U.S. at 225 (Brennan, J., dissenting).

[130]*Id.* at 226.

[131]*Id.* at 227.

[132]28 U.S.C. § 1441(a) (1976).

[133]In American Dredging Co. v. Local 25, Marine Div., Int'l Union of Operating Eng'rs, 338 F.2d 837 (3d Cir. 1964), *cert. denied*, 380 U.S. 935 (1965), the court found no jurisdiction under 28 U.S.C. § 1441(a) (1976). *Contra*, Avco Corp. v. Aero Lodge No. 735, 376 F.2d 337 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968), wherein the court found jurisdiction.

[134]390 U.S. at 557, *rehearing denied*, 391 U.S. 929 (1968).

[135]390 U.S. at 560 (footnote omitted).

[136]Indeed, some commentators thought that *Sinclair* should be so extended. *See, e.g.*, Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 468-73 (1969).

[137]390 U.S. at 562 (Stewart, Harlan, and Brennan, J.J., concurring).

B. Boys Markets *and Beyond*

The opportunity to reconsider *Sinclair* presented itself in *Boys Markets, Inc. v. Retail Clerks Union, Local 770,*[138] in which a state court issued an injunctive order against a violation of a no-strike clause. The case was removed to the district court, which upheld the order. The Ninth Circuit, relying on *Sinclair*, reversed the holding.[139] However, the Supreme Court found that the holding of *Sinclair* represented a "significant departure from [a] . . . consistent . . . congressional policy [favoring] . . . arbitration" and was undermined by subsequent events, requiring its overruling.[140] The Court declared, "The principal practical effect of *Avco* and *Sinclair* taken together is nothing less than to oust state courts of jurisdiction in § 301(a) suits where injunctive relief is sought for breach of a no-strike obligation."[141] Such an occurrence would result in rampant forum shopping based on the availability of injunctive relief and frustrate efforts to establish a uniform federal labor law. It would effectively eliminate equitable remedies leaving only inadequate money damages.[142] The Court accommodated the instant situation under section 301(a) with the Norris-LaGuardia Act because the abuses which led to the latter were not present. However, the Court noted that its holding was a very narrow one and set forth strict criteria for the issuance of injunctions in this area. Adopting his own language from the *Sinclair* dissent, Justice Brennan speaking for the court stated:

> 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 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

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[138]398 U.S. 235 (1970).

[139]416 F.2d 368 (9th Cir. 1969), *rev'd*, 398 U.S. 235 (1970).

[140]398 U.S. at 241. The Court refused to accept congressional silence *re Sinclair* as approval, noting that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Id.* (quoting Girouard v. United States, 328 U.S. 61, 69 (1946)).

[141]398 U.S. at 244-45.

[142]Even Justice Black, in his dissenting opinion in *Boys Mkts.*, recognized that damages were not as effective as injunctions in stating, "[t]he court would have it that these techniques [money damages] are less effective than an injunction. That is doubtless true." 398 U.S. at 261 (Black, J., dissenting). *Accord*, Edwards & Bergmann, *The Legal and Practical Remedies Available to Employers to Enforce a Contractual "No-Strike" Commitment*, 21 LAB. L.J. 3 (1970).

> 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—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.[143]

Thus, the Court felt that the "overriding interest in the successful implementation of the arbitration process"[144] required this limited intrusion into the broad nonintervention policy of the Norris-LaGuardia Act.

The Supreme Court had an opportunity to address the *Boys Markets* criteria in a slightly expanded manner in *Gateway Coal Co. v. UMW.*[145] Applying the presumption in favor of arbitration established in the *Steelworkers Trilogy* and under section 203(d) of the Taft-Hartley Act to safety disputes,[146] the Court addressed the applicability of *Boys Markets* to situations in which, despite a broad arbitration clause, there was no express no-strike clause. The Court held, "Although the collective-bargaining agreement in *Boys Markets* contained an express no-strike clause, injunctive relief also may be granted on the basis of an implied undertaking not to strike."[147] Realizing that, although unusual, it was possible that the contractual intent of the parties was to have a broad arbitration clause without a no-strike clause, the Court stated, "Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application."[148] The Court, having found an implied no-strike agreement and that the limited exception to express or implied no-strike clauses under section 502 was inapplicable,[149] upheld the district court injunction.

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[143]398 U.S. at 254 (quoting Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting)).

[144]398 U.S. at 252.

[145]414 U.S. 368 (1974).

[146]The Court stated, "Relegating safety disputes to the arena of economic combat offers no greater assurance that the ultimate resolution will ensure employee safety. Indeed, the safety of the workshop would then depend on the relative economic strength of the parties rather than on an informed and impartial assessment of the facts." *Id.* at 379.

[147]*Id.* at 381 (footnote omitted).

[148]*Id.* at 382.

[149]The Taft-Hartley Act § 502, 29 U.S.C. § 143 (1976), provides, in part, "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or

Another aspect of the *Boys Markets* criteria to receive additional amplification was the "over an arbitrable dispute" requirement. The issue arose in the context of sympathy strikes when, after a split in the circuits,[150] the Supreme Court decided *Buffalo Forge Co. v. Steelworkers.*[151] The Court held that a sympathy strike, "was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract. . . . The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of its bargain."[152] Although the question of whether the strike itself was a violation of the no-strike clause was conceded to be an arbitrable issue,[153] because the underlying cause of the strike—sympathy—was not an arbitrate issue, the Court would not enjoin it. To hold otherwise the Court acknowledged "would cut deeply into the policy of the Norris-LaGuardia Act."[154]

VI. Prospective Injunctions: A View of the Circuits

A. Generally

The question left unanswered after *Boys Markets* and its progeny is the availability of prospective injunctions. The typical injunction halts an on-going strike over a particular dispute. Absent the injunction, the strike would continue into the future; therefore, although directed at terminating an existing condition, the ultimate effect is somewhat prospective in nature. Conversely, a prospective injunction is directed not at an existing condition but at a dispute arising in the future over an arbitrable issue. Issuance of prospective injunctive relief is usually based on a history of similar strikes which portend a reasonable likelihood of future repetition. The benefit the

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employees be deemed a strike under this chapter." The Court found this section inapplicable because the union presented no "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists." 414 U.S. at 387 (quoting Gateway Coal Co. v. UMW, 466 F.2d 1157, 1162 (1972)).

[150]*See* Plain Dealer Publishing Co. v. Cleveland Typographical Local 53, 520 F.2d 1220 (6th Cir. 1975), *cert. denied*, 928 U.S. 909 (1976); Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972) (holding no injunction against a sympathy strike). *But see* Valmac Indus., Inc. v. Food Handlers Local 425, 519 F.2d 263 (8th Cir. 1975), *vacated and remanded*, 428 U.S. 905 (1976); NAPA Pittsburg, Inc. v. Automotive Chauffers Local 926, 502 F.2d 321 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1049 (1974); Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1029 (4th Cir. 1973) (holding that an injunction against a sympathy strike was permissible).

[151]428 U.S. 397 (1976).

[152]*Id.* at 407-08.

[153]The court stated that the employer could obtain a court order compelling the union to arbitrate this issue and later obtain an order enforcing the arbitrator's decision. *Id.* at 410.

[154]*Id.*

employer is that when the anticipated violation occurs, the union is immediately in violation of a standing court order and thus, subject to contempt citations.

The courts have moved cautiously in this area, mindful of congressional reaction to perceived judicial abuse of the injunctive power as evidenced by the Norris-LaGuardia Act. The issuance of a prospective injunction would require an extension of the admittedly narrow exception carved out in *Boys Markets*. Although the precise issue has not been decided by the Supreme Court, the Court has provided guidance to the district courts. " '[T]he District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and *will continue*, or have been threatened and *will be committed;* whether they have caused or *will cause* irreparable injury to the employer. . . .' "[155] The emphasized language appears to address future activity, but it is unclear if this is future activity of an ongoing condition or if it is future activity of a condition that will arise at some later time. It may be loose language, or it may be tacit approval of prospective injunctions.

The Court in *Boys Markets* relied heavily upon the *Sinclair* dissent, and language in the latter opinion clearly recognized the possibility of prospective injunctions. The dissent in *Sinclair* stated:

> Under the contract and the complaint, . . . the District Court might conclude that there have occurred and will continue to occur breaches of contract of a type to which the principle of accommodation applies. It follows that rather than dismissing the complaint's request for an injunction, the Court should remand the case to the District Court with directions to consider whether to grant the relief sought—an injunction against *future repetitions.* This would entail a weighing of the employer's need for such an injunction against the harm that might be inflicted upon legitimate employee activity. It would call into question the feasibility of setting up *in futuro* contempt sanctions against the union (for striking) and against the employer (for refusing to arbitrate) in regard to *prospective disputes* which might fall more or less clearly into the adjudicated category of arbitrable grievances. In short, the District Court will have to consider with great care whether it is possible to draft a decree which would deal equitably with all the interests at stake.[156]

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[155]Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. at 254 (quoting Sinclair Ref. Co. v. Atkinson, 370 U.S. at 228 (Brennan, J., dissenting) (emphasis added)).

[156]370 U.S. at 228-29 (emphasis added).

The Court in *Boys Markets* did not specifically address this proposition; however one must bear in mind that the *Sinclair* dissent and the *Boys Markets* opinion were both written by Justice Brennan, who stated at one point, "We have also determined that the dissenting opinion in *Sinclair* states the correct principles concerning the accommodation necessary between the seemingly absolute terms of the Norris-LaGuardia Act and the policy considerations underlying § 301(a)."[157]Thus, *Boys Markets* may be read to embrace the entire *Sinclair* dissent analysis, including the approval of prospective injunctions. However, until the Supreme Court specifically addresses the issue, there is room for conflicting interpretations as illustrated by the existing split among several circuit courts.

B. Seventh Circuit

The first circuit court to address the issue was the Seventh Circuit in *Old Ben Coal v. Local 1487, UMW, (Old Ben II).*[158] The district court permanently enjoined the union based on "its finding that the union had a general policy of 'resort to self help through strikes and work stoppages which were in violation of existing labor agreements.' "[159] The union conduct occurred before and after the decree in *Old Ben I.*[160] Finding that damages were inadequate and disciplinary measures were inefficacious, the circuit court reasoned:

> In light of the frequency of the work stoppages and of the nature of the disputes, most if not all of minor dimension, it is apparent that defendants have utilized the device of work stoppages with questionable motivation and little justification. We are far from convinced that without a permanent injunction similar conduct would not continue.[161]

The court focused on the intent of *Boys Markets*, that an injunction enhances the arbitration process, and considered the Norris-LaGuardia Act, which "declares that the breadth of an injunction is to be determined by the extent of the misconduct."[162] The court concluded that "there is a proper basis for the issuance of a broad in-

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[157]398 U.S. at 249.

[158]500 F.2d 950 (7th Cir. 1974). In Old Ben Coal Corp. v. Local 1487, UMW, 457 F.2d 162 (7th Cir. 1972) (Old Ben I), although the circuit court upheld an injunction against the union, it narrowed its holding from a prospective injunction to one covering only the existing dispute. 457 F.2d at 165.

[159]500 F.2d at 952.

[160]The union had been admonished in *Old Ben I* that "[p]erhaps a broad injunction would be appropriate in some future action should it appear that the Union is unwilling to accept the present adjudication with respect to its rights." 457 F.2d at 165.

[161]500 F.2d at 952. The mere number of work stoppages was not determinative. *Id.*

[162]*Id.* at 953.

junction, given the appropriate facts."[163] The union's allegation of vagueness and lack of specificity in the order was discounted by the court because the order incorporated the specific contract language and thus required the union to do only that for which it had specifically negotiated.[164]

C. Tenth Circuit

Approximately four months after *Old Ben II*, the Tenth Circuit, addressing the issue of prospective injunctions, reached the same result in *CF&I Steel Corp. v. UMW.*[165] Having considered eight strikes in the complaint, the district court found four strikes to be over issues unlikely to arise again[166] and four strikes to be over issues likely to arise again.[167] The court granted a permanent injunction against those activities in the latter group.[168] On appeal, the circuit court disposed of the union's contention that the order was impermissibly vague under Rule 65(d) of the Federal Rules of Civil Procedure:[169] "We find enjoined specific concerted activity, namely, 'strike, work stoppage, interruption of work, or picketing at the Allen mine.' These are terms of reasonably specific content in the 'common law of the shop.' . . . We find no incapacitating vagueness in the decree."[170] The court of appeals also rejected the union's position that the injunction was prohibited by the Norris-LaGuardia Act as interpreted by *Boys Markets*. After discussing the countervailing influences of the Norris-LaGuardia Act and the preference for the peaceful resolution of labor disputes by arbitration, the court, em-

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[163]*Id.*

[164]*Id.* Moreover, the court noted that the union could utilize declaratory remedies to clear up ambiguities. *Id.* at 954.

[165]507 F.2d 170 (10th Cir. 1974). The Tenth Circuit made no mention of *Old Ben I* in its decision.

[166]The issues included portal-to-portal pay, medical services, vacation pay, and hoistman's pay. *Id.* at 172.

[167]The issues included employee suspensions, employee discharges, and work assignments. *Id.*

[168]The union had argued that it was inconsistent to permanently enjoin one group but not the other. The circuit court rejected this as a "confusion of thought." *Id.* at 176.

[169]FED. R. CIV. P. 65(d) provides in pertinent part:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

[170]507 F.2d at 173.

phasizing the future tense language in *Boys Markets*,[171] reasoned, "It is clear that the opinion [in *Boys Markets*] considered also the possibility of remedial action directed toward future conduct in a proper case. . . ."[172] The Tenth Circuit upheld the district court's accommodation between section 4 of the Norris-LaGuardia Act and section 301(a) of the Taft-Hartley Act and sustained the injunction within the permissible limits, to specific activities likely to recur.[173] The principal difference between the results achieved by the Seventh and Tenth Circuits was that the former had approved a prospective injunction as broad as the contract language while the latter's approval was limited to specific incidents with a likelihood of recurrence.

D. Fifth Circuit

Less than a year later, it was the Fifth Circuit which grappled with the prospective injunction issue in *United States Steel Corp. v. UMW*.[174] The district court, after a long series of strikes and disregard for court orders, permanently enjoined the union from striking over arbitrable issues for the life of the contract. In its order, the court utilized the exact language of the contract arbitration clause to delineate the scope of arbitrable issues. A subsequent sympathy strike resulted in a contempt citation, which together with the original order was appealed.[175] The circuit court reversed, relying on its interpretation of *Boys Markets*, section 9 of the Norris-LaGuardia Act, and Rule 65(d) of the Federal Rules of Civil Procedure.[176] First, the court held that *Boys Markets*' "carefully drawn guidelines" required a "case-by-case adjudication" of whether a strike was over an arbitrable issue and, if so, whether the strike was enjoinable.[177] The court concluded that the order was overbroad and "nothing less than an injunction against striking for the life of the contract."[178] Second, the court declared that section 9 of the Norris-LaGuardia Act requires injunctions to be for "specific acts or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court. . . ."[179] Therefore, reliance

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[171] *Id.* at 176. *See* note 157 *supra*.

[172] 507 F.2d at 176.

[173] *Id.* at 177. *See* note 170 *supra*.

[174] 519 F.2d 1236 (5th Cir. 1975), *rehearing and rehearing en banc. denied*, 526 F.2d 376 (5th Cir.), *cert. denied*, 428 U.S. 910 (1976).

[175] 519 F.2d at 1238.

[176] *Id.* at 1238, 1245.

[177] *Id.* at 1245.

[178] *Id.*

[179] *Id.* at 1246 (quoting 29 U.S.C. § 109 (1976)).

upon the general language of the contract was insufficient to meet the "specific acts" requirement. Lastly, in finding that the order violated Rule 65(d) with regard to vagueness, the court rejected the employer's argument that the contract language rendered the order unambiguous. The court stated, "A collective bargaining agreement, however, is anything but a precise document; the parties themselves are often unsure of what it means."[180] Thus, the Fifth Circuit refused to recognize the use of prospective injunctions in labor disputes, where the injunction was based on broad contract language. However, the position of the Fifth Circuit in regard to prospective injunctions limited to specific acts is still an open question.[181]

E. Third Circuit

The following year, the Third Circuit voiced its opinion on prospective injunctions in *United States Steel Corp. v. UMW.*[182] The district court, having issued three injunctions within a month, issued a prospective injunction as broad as the arbitration clause of the contract. The court maintained that unless restrained prospectively, the union would continue to breach its contract.[183] Although the circuit court found the *Boys Markets* holding applicable, it found error in the particular order because "[n]o finding was made . . . that the likelihood of future breaches of contract was attributable to any specific activity or lack of activity on the part of the UMW, District 5, or the officers of the Local."[184] Furthermore, the court specifically addressed the prospective nature of the injunction, summarizing the opinions of the Fifth, Tenth, and Seventh Circuits.

> Thus the Fifth Circuit seems to suggest that no injunctive relief against future violations would be proper, the Tenth Circuit holds that a prospective injunction against specifically identified types of future violations which have in the past occurred is proper, and the Seventh Circuit holds that an injunction as broad as the contract is permitted. We think that a position somewhere between the extremes is appropriate.[185]

The court stated that prospective injunctions would not run afoul of the overbreadth proscription of section 9 of the Norris-

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[180]519 F.2d at 1246. The court recognized the decisions of the Seventh and Tenth Circuits but distinguished them.

[181]In Drummond Co. v. District 20, UMW, 598 F.2d 381 (5th Cir. 1979), the court noted that the "[f]ate of single-subject prospective injunctions in this circuit, a matter of speculation after *United States Steel*, must be decided elsewhere." *Id.* at 386.

[182]534 F.2d 1063 (3d Cir. 1976).

[183]*Id.* at 1068-69.

[184]*Id.* at 1075.

[185]*Id.* at 1077.

LaGuardia Act if there is evidence of a "pattern of conduct which results in repeated and similar violations,"[186] and the court limits "injunctive relief to the likelihood of their recurrence, or to new and different kinds of violations which may be expected to occur in the future."[187] The Third Circuit considered the prospective injunction to be necessary to combat a "chronic pattern of continuing mischief"[188] which burdened the court and the parties with repeated litigation over "essentially the same issue in a slightly different context . . . ."[189] On the issue of notice and vagueness, the court declared that Rule 65(d) required that the parties be notified of specific steps that must be taken to comply with the court order.[190] Thus, the Third Circuit's position is somewhere between the extremes of the Seventh and Fifth Circuits, and although it is most analogous to the Tenth Circuit's position, it differs in certain particulars such as the Rule 65(d) effect.[191]

F. Ninth Circuit

Less than two weeks after the Third Circuit's pronouncement, the Ninth Circuit added its thoughts to the evolving split. In *Donovan Construction Co. v. Construction, Production & Maintenance Laborers Union Local 383*,[192] the court stated that if a party seeking a *Boys Markets* injunction can show "a reasonable apprehension that the misconduct will recur, a hearing to determine the appropriateness of future injunctive relief is proper."[193] Under *Boys Markets*, the district court's inquiry must encompass the ordinary principles of equity;

> The difficulties of such an inquiry are naturally compounded when the court is faced with anticipated troubles rather than a present controversy. However, the complexity of this task will not deny a party access to this remedy if he can ad-

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[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Id.* at 1078. This differs from the Tenth Circuit which stated that the "law of the shop" rendered the broad language specific enough. CF & I Steel Corp. v. UMW, 507 F.2d 170, 173 (10th Cir. 1974) (quoting Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1499 (1959)).

[191] Furthermore the Third Circuit addressed an issue that may have been implied in the other decisions but which was not specifically discussed, to wit, the need for the prospective order to include an order to the employer "directing compliance with the settlement of disputes clause at least as broad, and for the same period, as the injunction." 534 F.2d at 1079.

[192] 533 F.2d 481 (9th Cir. 1976).

[193] *Id.* at 484.

> duce convincing evidence that the anticipated labor dispute is sufficiently likely to occur, and that the harm threatened thereby is of such magnitude as to bring his situation within the *Boys Markets* guidelines.[194]

Thus, although the Ninth Circuit would permit prospective injunctions, the order must be accompanied by detailed factual findings that specifically identify contractual violations which have occurred in the past and are likely to recur in the future.[195]

G. Sixth Circuit

The Sixth Circuit, having the benefit of five previous circuit opinions, articulated its own in *Southern Ohio Coal Co. v. UMW*.[196] After recognizing the lack of consensus among the circuits with regard to prospective injunctions and summing up their respective positions, the court took an "intermediate position."[197] Initially, the court stated, "We see nothing in *Boys Markets* that is inconsistent with a grant of prospective injunctive relief in the exercise of § 301 jurisdiction."[198]

Unlike the other circuits, the Sixth Circuit not only relied upon the future tense language of *Boys Markets* but also set forth verbatim the *Sinclair* dissent language that clearly envisioned the possibility of prospective injunctions.[199] Because the basic thrust of *Boys Markets* was the enhancement of the arbitration process, the court reasoned that a "[w]ide-scale disregard of the union's no-strike obligation . . . threatens the underpinnings of the arbitration process"[200] unless the employer has the effective immediate remedy of the prospective injunction. Joining the circuit courts that fall somewhere between the Seventh and Fifth Circuits, the Sixth Circuit held:

> Once a court has found that a union is engaged in a continuing practice of striking over arbitrable disputes and the *Boys Markets* guidelines are satisfied, we believe that the

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[194]*Id.* (citations omitted).

[195]*Id.* at 485. The court remanded the case because the factual support for the broad based injunction was insufficient. However, the circuit court acknowledged that a modification "may embrace 'any strike or work stoppage, or a threat of work stoppage' incident to a jurisdictional dispute substantially similar to that which was resolved by the May 16 arbitration award," provided sufficient record support was established. *Id.* at 486.

[196]551 F.2d 695 (6th Cir.), *cert. denied*, 434 U.S. 876 (1977)).

[197]551 F.2d at 708.

[198]*Id.*

[199]*Id.* at 708-09. *See* text accompanying note 158 *supra*.

[200]551 F.2d at 709.

> ensuing injunction may be extended to encompass future strikes over disputes similar to those which caused strikes in the past.[201]

The court left undecided the issue of whether a prospective injunction could be "as broad as the contractual arbitration clause."[202] However, the court cautioned that prospective injunctions should be drawn as narrowly as possible[203] and should be "firmly grounded on factual support in the record."[204] District courts were given the following instructions by the Sixth Circuit:

> Before an injunction may issue which grants prospective relief, the District Court should expressly find: that the present strike may be enjoined under *Boys Markets*; that the union has engaged in a pattern of strikes over arbitrable grievances that is likely to continue; that the strikes constituting the pattern of violation would warrant relief under the *Boys Markets* formula; and, that the decree is limited to specifically identified areas of dispute which have already been adjudicated and which satisfy the *Boys Markets* guidelines.[205]

The court also addressed the Rule 65(d) issue, declaring that the order should "include instructions informing the parties of specific steps they must take to prevent a recurrence of the illegal work stoppages"[206] so that the scope of the order need not be tested through contempt proceedings. Finally, like the Third Circuit, the court stated that prospective injunctions "must include an order to the employer directing him to arbitrate all grievances within the scope of the injunction."[207]

VII. Prospective Injunctions: Relevant Considerations

The relevant considerations with respect to prospective injunctions appear to be: (1) the nature of the present dispute *vis-à-vis* the *Boys Markets* decision, (2) the existence of a pattern of the same or similar disputes and the likelihood of future recurrence, (3) the applica-

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[201] *Id.*

[202] *Id.* at 709-10 (footnote omitted).

[203] *Id.* at 710. The court noted that the overbroad injunctions run the risk of going afoul of Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976).

[204] 551 F.2d at 710.

[205] *Id.* (footnote omitted).

[206] *Id.* at 711.

[207] *Id.* The court held that the preliminary injunctions issued by the district court were overbroad and failed to comport with the established guidelines of the *Boys Mkts.* opinion. *Id.*

bility of *Boys Markets* to this category of disputes, (4) the accommodation of section 4 of the Norris-LaGuardia Act to this category, (5) compliance with the substantive requirements of section 9 of the Norris-LaGuardia Act, (6) the effect of Rule 65(d), and (7) the inclusion of the employer in the order.

Five of the six circuits that have addressed the issue have found that *Boys Markets* can be read consistently with the use of prospective injunctions. The lone hold-out, the Fifth Circuit, elected to stress the narrowness of the *Boys Markets* opinion. Although recognizing that vindication of the arbitration process was at the core of the *Boys Markets* opinion, the Fifth Circuit concluded that such vindication must be established by case-by-case adjudication. The future tense language of *Boys Markets* did not convince the Fifth Circuit otherwise as they noted that such language is "in almost identical words, . . . mandated by the Norris-LaGuardia Act before any labor injunctions may issue."[208] The Fifth Circuit felt that any extension of these words to include prospective injunctions was reading "too much into this language."[209]

Such a restrained application of *Boys Markets*, while perhaps sustainable if looked at from the narrow nature of the holding, does not appear to further the overall rationale of *Boys Markets*. The other circuits have chosen to place *Boys Markets* in the larger perspective of enhancement of the arbitration process itself. *Boys Markets* cannot be read *in vacuo* but must be seen as a concomitant part of the overall process of "peaceful resolution of labor disputes." Indeed, it was the very deviance of *Sinclair* from that process that resulted in its subsequent repudiation.

A reading of *Boys Markets* to preclude prospective injunctions prohibits the realization of the decision's full potential. While a case-by-case adjudication of violations of a no-strike clause may be acceptable to resolve an existing condition, this method fails to give meaningful relief in the face of widespread disregard of such a clause. It is theoretically unobjectionable, but in the practical realities of labor disputes, it is intolerable. The circuits that allow prospective injunctions recognize the necessity of such remedial devices in the arbitration process. Furthermore, the language in *Boys Markets* does not specifically prohibit prospective injunctions and, despite a narrow holding, would conversely appear to encourage them. The *Boys Markets* opinion is the definitive accommodation of section 4 of the Norris-LaGuardia Act and section 301(a) of the Taft-Hartley Act;

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[208]United States Steel Corp. v. UMW, 519 F.2d at 1245 n.17. *See* Norris-LaGuardia Act, § 7(a), 29 U.S.C. § 107(a) (1976).

[209]519 F.2d at 1245 n.17.

courts have correctly extended its guidance and rationale to prospective situations.

Having resolved the question of the applicability of *Boys Markets* to future violations, the courts had to determine if the orders complied with the mandates of section 9 of the Norris-LaGuardia Act[210] and Rule 65(d).[211] Although these two provisions appear to address the same category of defects, lack of specificity, the former is directed against the substantive problem of overbreadth while the latter concerns the procedural defect of vagueness.[212]

Section 9 of the Norris-LaGuardia Act obviously must be accommodated,[213] although to a lesser extent than section 4 of the same Act. However, as the Sixth Circuit has indicated, section 9 "still requires a court to issue the narrowest possible injunction necessary to effectively safeguard the plaintiff's rights."[214] The "express findings of fact" requirement of section 9 of the Norris-LaGuardia Act can be satisfied if the court expressly finds that specific violations of the no-strike clause have occurred in the past and are likely to recur in the future. The record should indicate the specific violations and predictions about future violations should be reasonable.

The Fifth Circuit, in addition to its unwillingness to interpret *Boys Markets* to include prospective injunctions, also held that failure to allege a *specific* act in the complaint was unsupportable under section 9 of the Norris-LaGuardia Act.[215] However, if specific acts were complained of, the Fifth Circuit may have taken a different view of the applicability of section 9.[216] The point that gave rise to the overbreadth concern in the other circuits was whether the language of the order could be as broad as the arbitration agreement. Only the Seventh Circuit has gone this far.[217] The remaining circuits fear that blanket injunctions may present an unacceptable

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[210]Norris-LaGuardia Act, § 9, 29 U.S.C. § 101 (1976).

[211]*See* note 172 *supra*.

[212]The court noted that vagueness and overbreadth are distinct concepts:

> Analytically, the broadness of an injunction refers to the range of proscribed activity, while vagueness refers [to] the particularity with which the proscribed activity is described. Developments in the Law—Injunctions, 78 HARV. L. REV. 994, 1064 (1965). "Vagueness" is a question of notice, i.e., procedural due process, and "broadness" is a matter of substantive law. *See* Wright & Miller, Federal Practice & Procedure 2953 at 546-47 (1973).

Southern Ohio Coal Co. v. UMW, 551 F.2d 695, 705 n.11 (6th Cir.), *cert. denied*, 434 U.S. 876 (1977) (quoting United States Steel Corp. v. UMW, 519 F.2d 1236, 1246 n.19 (5th Cir. 1975)).

[213]551 F.2d at 709.

[214]*Id. Accord*, International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

[215]519 F.2d at 1246.

[216]*See* Drummond Co. v. District 20, UMW, 598 F.2d at 386.

[217]Old Ben Coal Corp. v. Local 1487, UMW, 500 F.2d 950 (7th Cir. 1974).

risk of excessive judicial entanglement.[218] The issuance of an injunction, based upon the arbitration clause language of the contract, would create a drastic shift in the economic power balance between employers and unions. Instead of fostering arbitration, it may result in excessive employer reliance upon contempt proceedings instead of the arbitration process. The court should avoid this result which is obviously counterproductive to the entire purpose of the national policies. The procedure which safely accommodates section 9 to these policies is for the court to make specific findings of fact on violations that have occurred, determine if they meet the *Boys Markets* criteria, identify the likelihood of their recurrence or that of analogous violations, and limit the scope of the order to those areas.

Attacks on prospective injunctions based on Rule 65(d) center around the adequacy of notice that has been given to allow the party to know in advance what actions will violate the order. They are premised on procedural due process requirements and efforts of the courts have been to compel compliance. The union should have fair notice of the prohibited scope of activities and should not have to test the parameters of the order in contempt proceedings.[219] This again raises questions concerning the feasibility of drafting an order as broad as the arbitration clause. Often, unions may be unable to comply with such an indefinite standard. Many disputes are not clearly definable as arbitrable or nonarbitrable as evidenced by the frequency with which this issue arises even in arbitration proceedings. A court which limits its order to specifically identified violations with steps that the union must take to comply, should easily meet the Rule 65(d) requirements.[220] However, the converse is not necessarily true; that is, an order drafted in the arbitration clause language is not always in noncompliance with Rule 65(d). If a union has an established history of disregarding its contractual obligations, the court should be allowed to draft an order that is sufficiently broad to meet this contingency. This is not to advocate blanket injunctions but is a realization of the practical difficulties that often occur in declaring certain activities as being within a particular category. If the order had to be overly specific, a union could attempt to circumvent it by pointing to minute distinctions between its present act and the prohibited category. Courts should be given enough flexibility to deal with the realities of labor disputes and draft an order which recognizes the interests of both parties as well as the national labor policy. Thus, so long as the court describes "in reasonable detail"

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[218] *See, e.g.*, 551 F.2d at 710.

[219] *See* United States Steel Corp. v. UMW, 534 F.2d at 1078.

[220] *Id.*

the scope of the prohibited acts, Rule 65(d) can be complied with in the issuance of prospective injunctions.

The extent to which Rule 65(d) allows or limits broad language was addressed in *United States Steel Corp. v. UMW*,[221] wherein its was stated:

> A union should not be allowed to escape injunctive restraints merely because the range of previous violations by its members defies categorization. The injunction "should be broad enough to prevent evasion." *Local 167 v. United States*, 291 U.S. 293, 299, 54 S.Ct. 396, 399, 78 L.Ed. 804, 810 (1934), *cited with approval in May Stores Co. v. Labor Board*, 326 U.S. 376, 391, n.13, 66 S.Ct. 203, 212, 90 L.Ed. 145, 157 (1945). When past violations may be reasonably categorized, the order should do so. *See CF&I, supra*, 507 F.2d at 173. When, however, the pattern of past conduct does not readily lend itself to such treatment, I see no objection to the use of carefully considered language broadly restraining strikes over arbitrable grievances, especially if it can be joined with specific language to provide effective relief. *See May Stores Co. v. Labor Board*, 326 U.S. at 391, 66 S.Ct. at 212, 90 L.Ed. at 157.

As a procedural safeguard, the union should have available the declaratory relief process to eradicate doubtful situations.

To keep the arbitration process functioning properly, the court should, of course, include as part of its order a requirement compelling the employer to arbitrate that is as broad as the order to the union not to strike. While only the Third and Sixth Circuits have specifically addressed the issue,[222] it is clear from the entire rationale of the accommodation process that this requirement should be mandatory. Otherwise, the employer would have a tremendous weapon without any compensating obligations. Employers could use the prospective injunction to harass the union. Also, without such an order, the employer has no incentive to arbitrate because he can take unilateral action and indefinitely delay compliance with his contractual obligation to arbitrate, so long as the union via the prospective injunction could not retaliate with a strike.

VIII. Conclusion

The injunction, a distinctly equitable remedy,[223] plays an important, sometimes outcome determinative, role in labor disputes.

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[221] *Id.* at 1083 (Rosenn, J., concurring).

[222] *See* notes 190 & 207 *supra*.

[223] In Truly v. Wanzer, 46 U.S. (5 How.) 141 (1847) the Court stated, "There is no power, the exercise of which is more delicate, which requires greater caution, delibera-

Whenever an injunction is issued in a labor dispute, no matter how narrowly drafted by the court, there is a critical alteration in the balance of power in the economic struggle between the employer and the union. If such an injunction has prospective application, the alteration is drastic. Nevertheless, although prospective injunctions have social desirability as labor policy, the circuit courts, have been acutely aware of their potential abuses. Thus, a majority of the courts have allowed prospective injunctions, but have set stringent guidelines to insure their proper use.

Labor disputes are complex affairs. To maintain economic equilibrium, injunctions, particularly prospective injunctions, should not be used to provide an easy solution. The arbitration agreement coupled with a no-strike clause, supported by Congress and the judiciary, has evolved as the preferred method of peaceful resolution of labor disputes,[224] as is evidenced by the entire accommodation process between section 4 of the Norris-LaGuardia Act and section 301(a) of the Taft-Hartley Act. So long as courts, recognizing that labor disputes are not of comparable simplicity, continue in the direction of the Sixth Circut,[225] the prayer of the Third Circuit[226] for a definitive resolution by the Supreme Court, should be answered affirmatively in favor of prospective injunctions.

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tion and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity. . . ." *Id.* at 142.

[224]*See, e.g.*, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

[225]*See* Southern Ohio Coal Co. v. UMW, 551 F.2d 695 (6th Cir.), *cert. denied*, 434 U.S. 876 (1977), wherein the court stated, "[G]ranting prospective injunctive relief in appropriate cases is consistent with the accommodation reached in *Boys Mkts.* between the policies of the Norris-LaGuardia Act and the public policy encouraging peaceful settlement of labor disputes through arbitration." *Id.* at 709.

[226]In United States Steel Corp. v. UMW, 534 F.2d 1063 (3d Cir. 1976), the court stated, "Only the Supreme Court is in position to resolve this conflict . . . . The issue of injunctive relief with respect to future violations of implied no strike agreements is of such importance that we prefer to take no step that might delay a petition for certiorari." *Id.* at 1085.