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NOTES

GIVING STRENGTH TO THE NO-STRIKE CLAUSE: ACCOMMODATION TO ALLOW FEDERAL INJUNCTIONS

I. Introduction

After eight years of controversy over its appropriateness, *Sinclair Refining Co. v. Atkinson*[1] has been overruled by the United States Supreme Court. The case utilized to reconsider the continuing validity of *Sinclair* was *Boys Markets, Inc. v. Retail Clerks, Local 770.*[2] Both of the cases dealt with the power of the federal courts to issue an injunction to enforce no-strike clauses in collective bargaining agreements. Such a power had been denied to the federal courts in *Sinclair. Boys Markets,* in overruling *Sinclair,* allowed a federal injunction where there was a no-strike clause violation and arbitration procedures were present in the labor contract.

Mr. Justice Stewart, who had been a member of the majority in *Sinclair,* joined in the *Boys Markets* decision. In a concurring opinion, he joined the Court in concluding "That *Sinclair* was erroneously decided and that subsequent events have undermined its continuing validity. . . ."[3] In stating his reasons for this change of view Justice Stewart quoted Mr. Justice Frankfurter:[4] "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[5]

II. Background of the Dispute

The events leading up to the *Boys Markets* decision can be seen by tracing the use of labor injunctions as they have evolved over the past century. Starting in the latter part of the 19th Century and continuing through the 1920's, the labor injunction was used by the courts to limit and control labor activities.[6] As early as 1896 the practice of securing labor injunctions was denounced politically as "Government by injunction."[7] Labor continued to gain strength, and more and more agitation developed against the use of labor injunctions. The courts, however, remained preoccupied with the common law emphasis on individual interests and property rights.[8] Conduct which interfered with business relationships was felt to be unlawful, and since most union activity did interfere with business relationships it was subject to ex parte injunction by the employer.

There were no legislative guidelines for judges of the 1900's in the injunction area. They therefore tended to decide cases according to their conservative social

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1 370 U.S. 195 (1962).
2 398 U.S. 235 (1970). The decision was rendered on June 1, 1970.
3 *Id.* at 255.
4 Justice Frankfurter's statement was originally made in Henslee v. Union Planters Bank, 335 U.S. 595, 600 (dissenting opinion).
5 398 U.S. at 255.
6 Aaron, *The Labor Injunction Reappraised,* 10 U.C.L.A. L. REV. 292 (1963).
7 FRANKFURTER & GREEN, THE LABOR INJUNCTION 1 (1930).
8 Kiernan, *Availability of Injunctions Against Breaches of No-Strike Agreements in Labor Contracts,* 32 ALBANY L. REV. 303 (1968).

and political views.[9] The judges were inclined to be more favorable to management, finding union activity to be a restraint of trade or a prima facie tort.[10] The "restraint of trade" concept was set forth legislatively in § 6 of the Clayton Act.[11] The prima facie tort was held by the courts to be present where there was intentional injury caused by the use of economic power by the unions. Employers maintained that the labor injunction was their only effective weapon in disputes with labor. The unions attacked the labor injunction on the grounds that hearings were too short and one-sided, there were no set guidelines for the judges to follow, and the issuance of restraining orders and preliminary injunctions could keep labor from presenting its case to the public.[12]

Political and economic pressures mounted against the use of the labor injunction despite the employer insistence on its necessity.[13] In March of 1932, Congress reacted to this mounting pressure by passing the Norris-LaGuardia Act.[14] The Senate report on the bill showed that concern over the loss of respect for the judiciary was indeed a factor in the bill's passage.[15] To alleviate this concern, § 4 of the Norris-LaGuardia Act withdrew from the federal courts jurisdiction to issue injunctions against strikes and peaceful picketing.[16]

Since the passage of the Norris-LaGuardia Act, the Supreme Court has, on occasion, limited the scope of the Act. One area of accommodation has been in cases involving the Railway Labor Act.[17] There the Court has partially returned the injunctive power to the federal district courts. The Court held in *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co.*[18] that an injunction was proper in "minor disputes" over an existing contract. This was believed necessary to protect the jurisdiction of the Railroad Adjustment Board to enforce a form of compulsory arbitration. The Norris-LaGuardia Act

9 *See generally* FRANKFURTER & GREEN, THE LABOR INJUNCTION 1-46 (1930).
10 *Id.* at 24.
11 Ch. 323, 38 Stat. 731 (1914), *as amended,* 15 U.S.C. § 17 (1964).
12 Aaron, *The Labor Injunction Reappraised,* 10 U.C.L.A. L. REV. 292, 294 (1963).
13 *Id.* at 297.
14 § 2, ch. 90, 47 Stat. 70 (1932), *as amended,* 29 U.S.C. §§ 101-15 (1964).
15 S. REP. No. 163, 72d Cong., 1st Sess. 18 (1932).
16 Norris-LaGuardia Act § 4, ch. 90, 47 Stat. 70 (1932), 29 U.S.C. § 104 (1964) provides in part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> . . . .
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> . . . .
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

17 § 127, ch. 139, 63 Stat. 107 (1949), 45 U.S.C. §§ 151-63, 181-88 (1964).
18 353 U.S. 30 (1957).

was controlling, however, in "major disputes."[19] A "major dispute" was held to include changes in a collective bargaining agreement affecting jobs,[20] while a "minor dispute" was held to include mere infractions or interpretations of the sections of an existing agreement.[21]

A further shift in federal attitudes towards labor unions was seen in the Wagner Act of 1935[22] which, among other things, denied the employer use of the yellow dog (anti-union) contract. This showed increased removal of federal court jurisdiction in the area of employer-employee contracts. Since the Wagner Act, the federal government had emphasized voluntary collective bargaining contracts as the primary tool in labor-management relations. But an even larger problem arose in trying to find a forum or a means to resolve conflicts which stemmed from such collective bargaining contracts. Both sides often found arbitration and breach of contract action ineffective. Injunctions were generally unavailable with such exceptions as "minor" railway disputes due to the anti-injunction provisions of Norris-LaGuardia.

In 1947, Congress enacted the Taft-Hartley Act[23] in an attempt to further its policy of supporting voluntary collective bargaining contracts. Section 301 of that act allowed federal courts to decide suits between labor organizations and employers for violations of collective bargaining agreements.[24] Section 301 applied without regard to citizenship or the amount in controversy.[25]

Until the time that § 301 of the Taft-Hartley Act was enacted, state courts usually handled collective bargaining contract cases.[26] One of the major problems, however, was that unions were not suable entities in many states, thus leaving many employers at an extreme disadvantage.[27] This particular problem was solved by § 301(b) which made enforcement of labor contracts possible by both sides in the federal courts.

Two of the major questions still left open by the Taft-Hartley Act concerning § 301 were: 1) could an employer be forced to abide by an arbitration clause through a mandatory injunction? and 2) could federal courts issue injunctions to enforce no-strike agreements?

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19 *See, e.g.,* Order of R.R. Telegraphers v. Chicago and Northwestern Ry. Co., 362 U.S. 330 (1960).

20 *Id.* at 341.

21 *Id. See also* Aaron, *The Labor Injunction Reappraised,* 10 U.C.L.A. L. REV. 292, 314-17 (1963).

22 National Labor Relations Act, ch. 372, 49 Stat. 449 (1935), *as amended,* 29 U.S.C. §§ 141-68 (1964).

23 Labor-Management Relations Act, ch. 120, 61 Stat. 136 (1947), *as amended,* 29 U.S.C. §§ 141-87 (1964).

24 The Labor-Management Relations Act, 29 U.S.C. § 185 (1964), provides in part:

> (a) . . . Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor 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.
>
> (b) . . . Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . .

25 *Id.*

26 Kiernan, *Availability of Injunctions Against Breaches of No-Strike Agreements in Labor Contracts,* 32 ALBANY L. REV. 303, 305 (1968).

27 *Id.*

III. Arbitration and the No-Strike Clause After Taft-Hartley

The problem of federal enforcement of an arbitration clause was reached in *Textile Workers v. Lincoln Mills*.[28] In that case the Supreme Court held that a union suit for specific performance of an arbitration clause could be enforced by a mandatory injunction. It was stated that ". . . the 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."[29] Section 301 was thus held to be more than a jurisdictional section.

Lincoln Mills further stated that the agreement to arbitrate grievances was the *quid pro quo* for the agreement not to strike.[30] One side of the *quid pro quo* —the agreement to arbitrate—was enforcible in the federal courts. The Court did not answer the question as to whether the other side of the *quid pro quo* —the agreement not to strike—was enforcible.

Judging from its legislative history, § 301 was meant to supplement the role of the state courts.[31] Suits brought under § 301 were to be subject to regular legal channels. This was seen in the House Conference Report: "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law. . . ."[32] *Lincoln Mills* appears to have gone beyond this interpretation, however, since it forces federal law to govern in this area:

> Federal interpretation of the federal law will govern, not state law. Cf. *Jerome v. United States,* 318 U.S. 101, 104. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. See *Board of Commissioners v. United States, supra,* at 351-352. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.[33]

The Court appears to believe that a uniform federal law to govern collective bargaining agreements would further the purpose of § 301.

Since the Court in *Lincoln Mills* held that Norris-LaGuardia did not prevent a decree of specific performance of an employer's promise to arbitrate,[34] employers were hopeful that the Court would find injunctions to enforce no-strike clauses consistent with the Norris-LaGuardia Act. The Court had stated in regard to Norris-LaGuardia:

> Though a literal reading might bring the dispute within the terms of the Act . . . we see no justification in policy for restricting § 301 (a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act.[35]

28 353 U.S. 448 (1957).
29 *Id.* at 456.
30 *Id.* at 455.
31 *See generally* Vols. 1 & 2 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT (1947 and 1948).
32 H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 42 (1947).
33 353 U.S. at 457.
34 *Id.* at 458.
35 *Id.* To support this conclusion, Justice Douglas cited Virginian Ry. Co. v. Sys. Fed'n, 300 U.S. 515 (1937) and Graham v. Bhd. of Firemen, 338 U.S. 232, 237 (1949) as examples of the similar accommodation of the Norris-LaGuardia Act and the Railway Labor Act.

Employers reasoned that if specific performance was available to one side of the *quid pro quo*—the agreement to arbitrate—then it would be available to enforce the other side—the agreement not to strike. This hopeful reasoning proved to be short-lived.

In a series of 1960 cases, the Court began developing a federal labor policy. The key to this was to be resolution of labor disputes through arbitration. This series of cases came to be known as the *Steelworkers' Trilogy*.[36]

> The gravamen of these decisions is the Court's belief that labor arbitration is a commendable form of self-government within industry and it, rather than economic warfare, should be employed to settle disputes during the duration of the collective bargaining agreement.[37]

The power given to the arbitrator and the role of the court was seen in *United Steelworkers of America v. American Mfg. Co.* There it was stated:

> In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve. See *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 468. The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for. The courts, therefore, have no business weighing the merits of the grievance.[38]

The case involved action by a union to compel arbitration of an agreement.

The *Trilogy* left to the courts the task of deciding questions of contract. The task of deciding the merits of grievances between labor and management was left to the arbitrator. Thus ". . . the mandate of Norris-LaGuardia that federal courts not interfere in industrial disputes, a task for which they are concededly ill-equipped, is preserved inviolate and extended to the arbitration process."[39]

In two 1962 cases[40] the Court considered the continuing jurisdiction of state courts in suits concerning violation of collective bargaining agreements. In *Charles Dowd Box Co. v. Courtney*,[41] it was decided that the state courts have concurrent jurisdiction over § 301 suits with federal courts.[42] The court stated:

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36 United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

37 Bakaly and Pepe, *And After AVCO*, 20 LAB. L.J. 67, 68 (1969).

38 363 U.S. at 567-68.

39 Keene, *The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to AVCO and Beyond*, 15 VILL. L. REV. 32, 38 (1969).

40 Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) and Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962).

41 368 U.S. 502 (1962).

42 *Id.* at 508.

> The legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that Congress expressly intended not to encroach upon the existing jurisdiction of the state courts.[43]

In the second state jurisdiction case, *Teamsters, Local 174 v. Lucas Flour Co.*,[44] the Court held that state law must give way to federal substantive law.[45] Furthermore, a strike, if it is used where arbitration had been agreed to by both parties for final settlement of disputes, is a violation of the arbitration agreement —even where a no-strike clause is not present.[46] The 8-1 decision in *Lucas Flour* affirmed a state court's decision granting damages to an employer for a union's breach of its no-strike clause.[47]

The *Lucas Flour* Court emphasized the need for uniformity between state and federal courts in the area of labor contract law by stating:

> The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.[48]

The unanswered question from *Lincoln Mills* of whether the Norris-LaGuardia Act prohibited the federal courts from issuing injunctions in cases involving violation of no-strike clauses was brought forth in *Sinclair Refining Co. v. Atkinson*.[49] In *Sinclair* an employer brought a suit in federal district court under § 301 to enjoin a strike over an arbitrable grievance where a no-strike clause was present. The Court held, with three judges dissenting,[50] that a federal injunction against a no-strike clause violation was barred by § 4 of the Norris-LaGuardia Act.[51] The Court stated that since the case involved a "labor dispute" it came within the proscriptions of § 4 of the Norris-LaGuardia Act.[52]

> If Congress had intended that § 301 suits should also not be subject to the anti-injunction provisions of the Norris-LaGuardia Act, it certainly seems likely that it would have made its intent known in this same express manner.[53]

In making its decision, the Court distinguished *Chicago River*,[54] *Lincoln*

43 *Id.* at 508-09.
44 369 U.S. 95 (1962).
45 *Id.* at 104.
46 *Id.* at 104-06.
47 *Id.* at 106.
48 *Id.* at 103.
49 370 U.S. 195 (1962).
50 Mr. Justice Black delivered the opinion of the Court. Mr. Justice Frankfurter did not participate. Mr. Justice Brennan, with whom Justices Douglas and Harlan joined, dissented in a separate opinion.
51 370 U.S. at 203.
52 *Id.*
53 *Id.* at 204.
54 *Id.* at 211.

Mills,[55] and the *Steelworkers' Trilogy*.[56] The majority also looked to the legislative history of § 301.[57] It found that a repeal of the Norris-LaGuardia Act in § 301 had been expressly deleted by the joint conference committee between the Senate and the House of Representatives.[58]

Justice Brennan wrote a strong dissent:

> 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 which will give the fullest possible effect to the central purposes of both.[59]

Thus, Justice Brennan advocated an accommodation similar to the one between the Railway Labor Act and the Norris-LaGuardia Act. He noted the following quotation from *Chicago River*: "There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved."[60]

Justice Brennan rejected the majority's conclusions as to the legislative history and stated:

> The legislative history of § 301 affords the Court no refuge from the compelling effect of our prior decisions. That history shows that Congress considered and rejected "the advisability of repealing the Norris-LaGuardia Act insofar as suits based upon breach of collective bargaining agreements are concerned. . . ." But congressional rejection of outright repeal certainly does not imply hostility to an attempt by the courts to accommodate all statutes pertinent to the decision of cases before them.[61]

Finally, Justice Brennan noted that an injunction could not issue in § 301 cases unless the Court decided that such relief was proper, despite Norris-LaGuardia.[62] Thus:

> When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike.[63]

Justice Brennan felt that the power to enjoin a strike was ". . . essential to the uncrippled performance of the Court's function under § 301."[64]

After *Sinclair*, employers began to look to the state courts for injunctive

55 *Id.* at 212.
56 *Id.* at 213.
57 *Id.* at 205.
58 *Id.* at 207.
59 *Id.* at 215-16.
60 Bhd. of R.R. Trainmen v. Chicago River & Indiana Ry. Co., 353 U.S. 30, 40 (1957).
61 370 U.S. at 220. (Footnote omitted.)
62 *Id.* at 228.
63 *Id.* at 220.
64 *Id.* at 216-17. (Footnote omitted.)

relief from no-strike clause violations.[65] Where a restraining order was proper, the state courts usually issued it as was done in the leading state case of *McCarroll v. Los Angeles County District Council of Carpenters*.[66] In this case the employer sued the union for violating a no-strike clause and obtained an injunction against the strike. In upholding the decision, Justice Traynor, writing for the majority on the California Supreme Court, stated:

> The principal purpose of Section 301 was to facilitate the enforcement of collective bargaining agreements by making unions suable as entities in the federal courts, and thereby to remedy the one-sided character of existing labor legislation . . . . We would give altogether too ironic a twist to this purpose if we held that the actual effect of the legislation was to abolish in state courts equitable remedies that had been available, and leave an employer in a worse position in respect to the effective enforcement of his contract than he was before the enactment of Section 301.[67]

To avoid the effect of such state action and to take advantage of *Sinclair's* proscriptions, unions began to remove state cases to the federal courts.

The most important unanswered question of *Sinclair* was whether the anti-injunction provisions of Norris-LaGuardia were now to be considered part of the federal labor law. If so, then *Lincoln Mills* would have required that the anti-injunction provisions apply to state as well as federal courts.[68] State courts rejected this view, however, and employers sought to keep injunctive actions in state courts.[69] The employers were hopeful that these state court actions would not be removed since federal courts had no jurisdiction to issue injunctions.[70] The reason for not combining injunctive actions with ones for damages was that federal courts had original jurisdiction over the damages question.[71] Thus, there could be removal by federal courts of an action which included a request for damages.

The view that removal would be denied because of lack of original jurisdiction where only an injunction was sought was seen in *American Dredging v. Local 25, Marine*.[72] In this case, the Third Circuit Court of Appeals held that a no-strike clause action was not within the original jurisdiction of federal courts since the action was founded "solely on a state-created right to bring suit for violation of a collective bargaining agreement and sought only a remedy available under state law. . . ."[73]

The *American Dredging* case, however, did not have the unanimous support

65 Bakaly and Pepe, *And After AVCO*, 20 LAB. L.J. 67, 70 (1969).
66 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958).
67 *Id.* at 63-64, 315 P.2d at 332.
68 Keene, *The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to AVCO and Beyond*, 15 VILL. L. REV. 32, 44 (1969).
69 *Id.* at 45.
70 *Id.*
71 28 U.S.C. § 1441 (1964) states:
> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.
72 338 F.2d 837 (3d Cir. 1964), *cert. denied*, 380 U.S. 935 (1965).
73 *Id.* at 846.

of the circuit courts.[74] In *Avco Corp. v. Aero Lodge 735, I.A.M.*,[75] for example, the Sixth Circuit Court of Appeals held that federal removal from state courts of employer suits for injunctive relief of no-strike clause violations was proper. The Supreme Court granted certiorari in the *Avco* case and, on April 8, 1968, affirmed the decision.[76] Justice Douglas wrote the opinion of the Court: "An action arising under § 301 is controlled by federal substantive law even though it is brought in a state court."[77] Such an action was thus in the original jurisdiction of the federal courts. Justice Douglas further commented:

> Title 28 U.S.C. § 1337 says that, "The district courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating Commerce . . . ." It is that original jurisdiction that a § 301 action invokes.[78]

The Court did not, however, decide whether remedies available in state courts are limited to federal law remedies.[79] It also left undecided whether *Sinclair* required dissolution of a removed state court injunction.[80] On the issue of federal removability, *American Dredging* was overruled.

Justices Stewart, Harlan, and Brennan then wrote a concurring opinion on the *Avco* case. In it they said: "The Court will, no doubt, have an opportunity to reconsider the scope and continuing validity of *Sinclair* upon an appropriate future occasion."[81] These Justices seemed to be saying that the Court might be willing to reconsider its holding that § 4 of Norris-LaGuardia barred injunctions by federal courts under § 301 of the Taft-Hartley Act.[82]

Since the *Sinclair* decision, various attempts, all unsuccessful, were made in Congress to include a provision in § 301 repealing the anti-injunction provisions of the Norris-LaGuardia Act.[83] These attempts were quelled despite the adoption of a resolution in 1963 by the Section of Labor Law of the American Bar Association which called for Congress to remedy the alleged defects in the *Sinclair* decision.[84]

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74 *See* Johnson v. England, 356 F.2d 44 (9th Cir. 1966).
75 376 F.2d 337 (6th Cir. 1967).
76 Avco Corp. v. Aero Lodge 735, I.A.M., 390 U.S. 557 (1968).
77 *Id.* at 560. (Footnote omitted.)
78 *Id.* at 561-62.
79 *Id.* at 560 n.2.
80 *Id.* at 561 n.4.
81 *Id.* at 562.
82 Bartosic, *Injunctions and Section 301: The Patchwork of Avco and Philadelphia Marine on the Fabric of National Labor Policy,* 69 COLUM. L. REV. 980, 996 (1969).
83 *See* H.R. REP. No. 12127, 88th Cong., 2d Sess. (1964); H.R. REP. No. 6080, 89th Cong., 1st Sess. (1965); and S. REP. No. 2455, 90th Cong., 1st Sess. (1967).
S. REP. No. 2455, 90th Cong., 1st Sess. (1967) stated:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 4 of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (47 Stat. 70; 29 U.S.C. 104), is amended by inserting before the period at the end thereof a colon and the following: "*Provided,* That nothing contained in this section or in section 8 shall be deemed to deny jurisdiction or prohibit the granting of injunctive relief, where otherwise appropriate, after notice and hearing, where the relief sought is to enjoin the breach of a clause, contained in a contract between an employer and a labor organization, forbidding a strike, slowdown, sitdown, or other interference with production, or a lockout."

84 ABA SECTION OF LABOR RELATIONS LAW, REPORTS AND PROCEEDINGS 226 (1963) provided:

IV. *Boys Markets*—Enforcement of the No-Strike Clause

The reconsideration of the scope and continuing validity of the *Sinclair* opinion occurred in *Boys Markets, Inc. v. Retail Clerks, Local 770.*[85] The dispute arose on February 18, 1969, when the union objected to employees from outside the union being used in the frozen foods area of the employer's Cudahy, California, store.[86] A strike, work stoppage, and picket line resulted from the disagreement.

At the time of the disagreement the union and the employer were parties to a written collective bargaining contract known as the "Retail Food, Bakery, Candy and General Merchandise Agreement, April 1, 1964-March 31, 1969."[87] Besides providing for the wages, hours, benefits, and working conditions for the employer's retail clerks, the contract required arbitration of disputes between the union and the employer.[88] In consideration for the agreement by the employer to arbitrate all grievances, the union gave a no-strike agreement stating that "During the term of this agreement, there shall be no cessation or stoppage of work, lockout, picketing or boycotts . . . ."[89] The union also promised that matters subject to arbitration "shall be settled and resolved in the manner provided herein. . . ."[90]

The employer in this case was a California corporation operating a chain of food supermarkets in southern California. After the strike had started, a representative of the employer immediately notified the union of the dispute, demanded that the strike, work stoppage, and picket line be terminated, and invoked the arbitration provision of the contract.[91] The union, however, continued the strike, work stoppage, and picketing.[92]

On February 19, 1969, the employer filed suit with the California Superior Court, asking that the union be enjoined from picketing, engaging in a strike, or concerted work stoppage in violation of the collective bargaining agreement.[93] The state court granted the requested injunction,[94] and thereupon the union removed the action to the United States District Court for the Central District of California and filed a motion to quash the state court order.[95] In direct opposition to this motion, the employer then filed a motion for an order compelling

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RESOLVED that in view of the recent decision of the United States Supreme Court in *Sinclair Refining Company v. Atkinson* the section on labor relations law of the American Bar Association urgently recommends that Congress enact a modification to Section 4 of the Norris-LaGuardia Act to permit the issuance of a restraining order, temporary or permanent injunction by a Court of the United States in any action brought therein pursuant to Section 301 of the Labor Management Relations Act of 1947, as amended, for the purpose of filling the inequitable gap which exists in the law relating to the mutual enforcement of collective bargaining agreements as provided by the Congress under Section 301 of the Labor Management Relations Act of 1947, as amended.

85 398 U.S. 235 (1970).

86 Brief for Petitioner at 4, Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235 (1970) [hereinafter Brief for Petitioner].

87 *Id.* at 3.

88 *Id.* at 3-4.

89 *Id.* at 4.

90 *Id.*

91 *Id.* at 5.

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

arbitration, an order requiring specific performance of the agreement to arbitrate, and an application for a preliminary injunction.[96]

The district court granted the employer an Order Compelling Arbitration and an Order for Injunction on March 12, 1969.[97] Court findings indicated that the dispute was one for arbitration under the collective bargaining contract and enjoined the union from violating its no-strike pledge.

Once again the union appealed; this time to the Court of Appeals for the Ninth Circuit.[98] The court of appeals reversed the district court, holding on September 26, 1969 that *Sinclair Refining Co. v. Atkinson* was nearly the same situation as existed in this case, and that it was thus bound by the *Sinclair* holding.[99] On January 12, 1970, the Supreme Court granted certiorari in the case.[100]

A number of amicus curiae briefs were then filed in the case. The American Federation of Labor and Congress of Industrial Organizations filed an amicus brief in support of the respondent, Retail Clerks Union Local 770. This brief argued that *Sinclair* should rule under the doctrine of stare decisis.[101] It stated that "quickie" arbitration[102] procedures showed that problems in the area were being solved by the parties themselves.[103] Even further, it noted that such reliance on quick arbitration to solve disputes: ". . . confirms the wisdom of the devotion to Congressional intent demonstrated by this Court in *Sinclair*."[104]

On the side of the petitioner, Boys Markets, Inc., amicus briefs were filed by the Associated Industries of New York State, Inc. and the Plumbing-Heating and Piping Employers Council of Southern California, Inc. The brief for the Associated Industries of New York argued in part that:

> The only way to achieve equality of employer and union in regard to the enforceability of collective bargaining agreements is to make such contracts binding and enforceable on both parties. This may be achieved by allowing employers in a proper case to apply to District Court for an injunction temporarily enjoining a union strike in violation of a collective bargaining contract containing a no-strike clause.[105]

The brief of the Plumbing-Heating and Piping Employers Council of Southern California dealt with the role of the state court in *Boys Markets*. It advocated that federal courts let state court injunctions stand.[106] Justice Traynor's opinion

96 *Id.* at 6.
97 *Id.*
98 Boys Markets, Inc. v. Retail Clerks, Local 770, 416 F.2d 368 (9th Cir. 1969).
99 *Id.* at 369.
100 396 U. S. 1000 (1970).
101 Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae at 2, Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235 (1970) [hereinafter American Federation Brief].
102 *See* New Orleans S.S. Assn. v. ILA Local 1417, 389 F.2d 369, 370 (5th Cir. 1968), *cert. denied,* 393 U.S. 828.
103 Brief at 6.
104 *Id.*
105 Brief for the Associated Industries of New York State, Inc. in Support of Petitioner at 5, Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235 (1970).
106 Amicus Curiae of the Plumbing-Heating and Piping Empoyers Council of Southern California, Inc. at 10-11, Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235 (1970) [hereinafter Plumbing-Heating Brief].

from *McCarroll v. Los Angeles County Dist. Council*[107] was quoted in this brief as follows:

> Finally, there is no invariable requirement, implicit in the federal system, that a state court enforcing a federal right must not go beyond the remedies available in a federal court. Uniformity in the determination of the substantive federal right itself is no doubt a necessity, but such uniformity is not threatened because a state court can give a more complete and effective remedy.[108]

Both the respondent's and the petitioner's briefs dealt with the major injunction problems in the case. The argument in the respondent's brief emphasized its belief in the correctness of the *Sinclair* decision. It felt that no major difference in factual situation existed between *Sinclair* and *Boys Markets*.[109] Overruling *Sinclair* would tip the ". . . balance of collective bargaining obligations in favor of the employers and against the unions and their members."[110] The brief continued:

> Mutuality of remedy, whether before the arbitrator or the courts is essential to the federally protected balance of collective bargaining. The restoration of injunctive powers to the District Courts will again place labor-management disputes primarily in the courts. Moreover, the decision of a Federal judge, without the hearing of evidence, in granting or refusing to grant an application for an injunction, will unfairly prejudice the non-prevailing party in the ensuing arbitration since its burden there will also consist of seeking, in effect, the arbitral overruling of the District Court, the very Court that may subsequently be requested to confirm, modify or vacate the award.[111]

The brief for the respondent further emphasized its belief that "accommodation" of § 301 of the Taft-Hartley Act and § 4 of the Norris-LaGuardia Act was a legislative and not a judicial function. It was alleged that such an "accommodation" actually amounted to judicially repealing § 4 of the Norris-LaGuardia Act.[112]

The petitioner's brief placed much reliance upon the national labor policy called for in *Textile Workers Union v. Lincoln Mills*.[113] It was argued that the prohibition against granting injunctions to uphold no-strike clauses was a serious flaw in this federal labor policy.[114] Enforcement of the arbitration agreement was allowable, but enforcement of its *quid pro quo*—the covenant not to strike—was denied by *Sinclair*. "Without injunctive relief, the promise not to strike becomes, as a practical matter, meaningless."[115] Petitioner argued that *Avco* barely left a

107 49 Cal. 2d 45, 315 P.2d 322 (1957).
108 Plumbing-Heating Brief at 10.
109 Brief for Respondent at 4, Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235 (1970).
110 *Id.* at 15.
111 *Id.* at 16-17.
112 *Id.* at 4.
113 353 U.S. 448 (1957).
114 Brief for Petitioner at 7.
115 *Id.*

remedy for the employer faced with strikes in breach of contract.[116] Whenever a state court issued an injunction, the union would probably remove the action to a federal court.

The legislative history of § 301, relied on extensively in the *Sinclair* decision, was held by the petitioner to be ". . . cloudy and imperfect upon the question of the intent of Congress regarding the equitable powers of Courts under Section 301."[117] Accommodation was urged in petitioner's brief to be both necessary and proper in a case such as *Boys Markets*. Under both the Railway Labor Act and anti-trust law cases,[118] support was found for accommodation.[119]

Since the district court in *Boys Markets* issued its own injunctive order, the petitioner's brief stated that the case touched only upon the effect of § 301 on the state injunction once removal was achieved.[120] Petitioner thus left this issue to be covered by amicus curiae.[121]

The Supreme Court decided *Boys Markets* on June 1, 1970,[122] reversing *Sinclair Refining Company v. Atkinson*. Justice Brennan wrote the opinion with Justices Black and White giving dissenting opinions. Justice Marshall took no part in the decision.

Justice Brennan's opinion was similar to his dissent in *Sinclair*. The opinion said:

> It is precisely because *Sinclair* stands as a significant departure from our otherwise consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration and our efforts to accommodate and harmonize this policy with those underlying the anti-injunction provisions of the Norris-LaGuardia Act that we believe *Sinclair* should be reconsidered.[123]

Lincoln Mills[124] pointed out the need for a federal labor law when it held generally that "the 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."[125] Speaking of this federal labor policy, the Court in *Boys Markets* stated:

> [I]n light of developments subsequent to *Sinclair*, in particular our decision in *Avco Corp. v. Aero Lodge 735*, 390 U.S. 557 (1968), it has become clear that the *Sinclair* decision does not further but rather frustrates realization of an important goal of our national labor policy.[126]

The opinion answered the argument that action here belonged to Congress by saying: "The Court has cautioned that '[i]t is at best treacherous to find in con-

116 *Id.*
117 *Id.* at 8.
118 *See, e.g.*, United States v. Hutcheson, 312 U.S. 219 (1941).
119 Brief for Petitioner at 29.
120 *Id.* at 35.
121 *See* Plumbing-Heating Brief.
122 398 U.S. 235 (1970).
123 *Id.* at 241.
124 Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957).
125 *Id.* at 456.
126 398 U.S. at 241.

gressional silence alone the adoption of a controlling rule of law.' *Girouard v. United States,* 328 U.S. 61, 69 (1946)."[127]

The practical effect of *Avco* and *Sinclair* was to displace the jurisdiction of the state courts. Due to *Sinclair's* federal anti-injunction standards, the unions would quickly remove to the federal courts state injunction actions under 28 U.S.C. § 1441.[128] The Court pointed out that this was contrary to *Dowd Box,*[129] where it was found that the congressional purpose of § 301(a) was to "*supplement,* and not to encroach upon, the pre-existing jurisdiction of the state courts."[130]

The Court did put limitations on the decision:

> We do not undermine the vitality of the Norris-LaGuardia Act. We deal only with the situation in which a collective bargaining contract contains a mandatory grievance adjustment or arbitration procedure. Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance.[131]

The principles set out in the dissenting opinion of *Sinclair* to be used by district courts in determining whether or not to grant an injunction were adopted by the Court.[132] These principles were:

> 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 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. 370 U.S., at 228.[133]

Justice Black stated in his dissent to the *Boys Markets* decision that *Sinclair* had been properly decided.[134] He believed that the power to give federal courts injunctive jurisdiction was with Congress, and since Congress had not acted, the Court should not act.[135] He noted that:

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127 *Id.* at 241-42.
128 *Id.* at 244.
129 Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).
130 398 U.S. at 245.
131 *Id.* at 253-54.
132 *Id.* at 254.
133 *Id.*
134 *Id.* at 256.
135 *Id.*

> The only "subsequent event" to which the Court can point is our decision in *Avco Corp. v. Aero Lodge 735,* 390 U.S. 557 (1968). The Court must recognize that the holding of *Avco* is in no way inconsistent with *Sinclair.*[136]

In closing his dissent, Justice Black quoted the words of John Adams as seen in the Declaration of Rights in the Constitution of the Commonwealth of Massachusetts: "The judicial [department] shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."[137]

Justice White dissented for the reasons given in the *Sinclair* majority opinion.[138]

Despite these dissents, the *Sinclair* holding was overruled by the *Boys Markets* decision. Section 301 of the Taft-Hartley Act and § 4 of the Norris-LaGuardia Act were "accommodated." In the proper circumstances, a federal court can now grant injunctions to stop violations of no-strike clauses.

V. *Boys Markets*—Observations and Conclusions

Did Congress mean to accommodate § 4 of the Norris La-Guardia Act with § 301 of the Taft-Hartley Act in order to give injunctive powers to the federal courts in the collective bargaining area? The voluminous legislative history of § 301 is inconclusive on this question, yet the Court in *Boys Markets* has concluded that such an accommodation is proper and necessary.

An agreement to arbitrate in a collective bargaining contract is, as stated in *Lincoln Mills,* enforceable by the federal courts. *Lincoln Mills* is silent, however, as to the other side of the *quid pro quo*—the union's agreement not to strike where a grievance is arbitrable. *Boys Markets,* in overruling *Sinclair,* held that this agreement not to strike was *also* enforceable. It allowed the use of injunctions by the federal courts to halt strikes that arise in violation of collective bargaining agreements. The employer can now seek an injunction to enforce the no-strike clause, and the employee can now seek an injunction to enforce a no-lockout agreement. As stated by the petitioner in *Boys Markets*:

> Accommodation of Norris-LaGuardia with Section 301 would obviously provide equal access to the judicial process by empoyers and labor organizations alike. Thus, a no-strike/arbitration agreement is invariably also a no-lockout/arbitration agreement. Section 301 makes both sides of the commitment to arbitrate rather than to use economic force equally enforceable by the courts. See *Teamsters Local 174 v. Lucas Flour Co.,* 369 U.S. 95 (1962).[139]

"Quickie" arbitration was advocated as a better solution than the use of the equitable injunction in the brief of the American Federation of Labor and

136 *Id.* at 260.
137 *Id.* at 261.
138 *Id.*
139 Reply Brief for Petitioner at 4, Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235 (1970).

Congress of Industrial Organizations.[140] The brief cited *New Orleans Steamship Association v. General Longshore Workers I.L.A.*[141] as an example of a "quickie" arbitration providing effective relief for an employer. "Quickie" arbitration alone, however, is not the answer. Such arbitrations are not necessarily quick, and thus are not necessarily effective relief for an employer. The case of *New Orleans Steamship* is a good example. The hearing in that case began on October 8, 1965, and the arbitrator's award was not given until December 13, 1965.[142] To an employer faced with a strike, a two-month period is anything but "quick."

An additional observation concerning Congressional inaction should be given here. Justice Black, in his *Boys Markets* dissent, pointed to the failure of Congress to change § 301 after the *Sinclair* decision as an indication that *Sinclair* should be reaffirmed.[143] The opinion in *Boys Markets* noted that this does not necessarily follow: "the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision."[144] Failure of Congress to act in an area requiring definition militates for court action. If the *Boys Markets* case has given injunctions where Congress feels they are not proper, Congress can pass legislation to change the situation.

Finally, it should be emphasized that the *Boys Markets* decision dealt only with the collective bargaining contract and alleged contractual violations. This is in keeping with the *Steelworkers' Trilogy* doctrine of leaving contract decisions to the court and giving the task of deciding the merits of grievances to the arbitrator. If there is no enforcement available for the various clauses in a contract, then there is less reason for the parties to want a formal agreement. To encourage arbitration the courts must encourage collective bargaining agreements *and* the enforcement of such agreements.

The *Boys Markets* decision, therefore is an affirmative step in the creation of a federal labor policy. Encouragement of arbitration to solve collective bargaining contract disputes is for the public good whereas economic warfare in the form of strikes, lockouts, and work stoppages hurts the nation's economy. Arbitration, in many cases, allows for settlement of disputes without these detrimental battles between labor and management, and enforcement of a union's promise not to strike makes the promise to arbitrate the underlying dispute meaningful.

Randall L. Stamper

140 American Federation Brief at 27-32.
141 389 F.2d 369 (5th Cir. 1968), *cert. denied,* 393 U.S. 828 (1968).
142 *Id.* at 370.
143 398 U. S. at 256.
144 *Id.*