Prospective Injunctions and Federal Labor Law Policy: Of Future Strikes, Arbitration, and Equity

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PROSPECTIVE INJUNCTIONS AND FEDERAL LABOR LAW POLICY:
OF FUTURE STRIKES, ARBITRATION, AND EQUITY

I. Introduction

The problem of fairness in the handling of disputes between labor and management has long vexed courts of law and equity. Legislative and judicial policies have alternatively seemed to favor first one side and then the other. It is not surprising, therefore, to find a four-way division among the United States Courts of Appeals over a rarely used but highly controversial instrument of labor law enforcement, the prospective injunction. When called upon to determine the propriety of prospectively enjoining strikes over disputes covered by the binding arbitration clause of a collective bargaining agreement, each of these four circuits has adopted its own distinct position: The Seventh Circuit has broadly approved the use of a prospective injunction, while the Fifth Circuit has strongly disapproved of the use of such a device. The Tenth and Third Circuits have opted for a middle position, each giving only qualified approval.

Though perhaps not surprising, this conflict among the circuits is nonetheless significant. It is especially important because in each case the court involved was dealing with essentially the same collective bargaining agreement. This common element serves to highlight both the importance of analyzing this conflict and the need for its resolution; the fact that an issue arising under the same basic collective bargaining agreement has been treated differently by the various courts directly affects the viability of collective bargaining between nationally based unions and employers. Clearly at stake is the Supreme Court's policy favoring the arbitration of grievances and promoting a uniform treatment of federal labor law.

The purpose of this note is to analyze the conflict and to offer some suggestions toward its resolution. In the course of that analysis, the nature and use of prospective injunctions will be explored, as will the problems raised by the use of these extraordinary remedial instruments. In order to conduct that exploration adequately, however, it is first necessary to discuss the relevant leg-

1 The relevant history of labor-management disputes and the application of injunctive remedies will be discussed infra.
2 The term "prospective injunction" refers to an order enjoining a party from the future commission of such acts as are named in the order. For an example of such an order, see United States Steel Corp. v. UMW, 393 F. Supp. 936, 940-41 (W.D. Pa. 1975).
3 Old Ben Coal Corp. v. UMW Local 1487, 500 F.2d 950 (7th Cir. 1974).
4 United States Steel Corp. v. UMW, 519 F.2d 1236 (5th Cir. 1975), cert. denied, 96 S. Ct. 3221 (1976).
5 The Tenth and Third Circuit decisions were rendered in C&F Steel Corp. v. UMW, 507 F.2d 170 (10th Cir. 1974); and United States Steel Corp. v. UMW, 534 F.2d 1063 (3d Cir. 1976), respectively.
6 Although the facts giving rise to each case differed, the basic contract involved in each one was the National Bituminous Coal Wage Agreement, particularly the 1971 and 1974 versions. There is no "significant" difference in the relevant parts of the 1968, 1971, and 1974 versions. United States Steel Corp. v. UMW, 534 F.2d 1063, 1069-71 (3d Cir. 1976). For the actual text of the relevant sections, see id. at 1070, n.11.
II. Injunctions and the Policy of Federal Labor Law

A. The Legislative Background

Labor history prior to 1932 is characterized by the rather liberal issuance of injunctions.\(^8\) Without the guidance of statutes, courts were for the most part free to conduct what has been referred to as “government by injunction.”\(^9\) Largely in response to the federal judiciary’s actions,\(^10\) Congress enacted the Norris-LaGuardia Act in 1932.\(^11\) Section 4 of that Act essentially withdrew from federal courts the power to issue injunctive relief against strikes.\(^12\) Similarly, passage of the Wagner Act\(^13\) in 1935 imposed extensive and detailed controls on labor-management relations in industry, which further enhanced the strength of labor unions. In 1947, however, congressional policy shifted markedly to an emphasis on collective bargaining, as evidenced by the enactment of the Labor-Management Relations Act (the Taft-Hartley Act) over a Presidential veto.\(^14\) Section 301(a) of this statute granted federal courts jurisdiction over suits between employers and labor organizations involving violations of collective bargaining agreements.\(^15\) The Taft-Hartley Act, however, did not repeal the Norris-LaGuardia Act, and the apparent incompatibility of these two Acts has often occasioned Supreme Court decisions aimed at clarification of their relationship.

B. Judicial Interpretation

The Supreme Court began this clarification process in *Textile Workers Union v. Lincoln Mills*.\(^16\) An employer refused a union’s request to arbitrate a dispute even though the collective bargaining agreement between them provided a special grievance procedure which expressly included arbitration.\(^17\) The Supreme Court held that the district court had properly decreed specific performance in the suit, which had been brought under § 301(a) of the Labor-Management Relations Act.\(^18\) Moreover, the Court added that the appropriate law to be applied in § 301(a) suits was federal law. It called on the courts to fashion that law from the policy of the national labor laws,\(^19\) stating that “[t]he range of judicial inventiveness will be determined by the nature of the problem.”\(^20\) It was also in *Lincoln Mills* that the Court first pointed out the close relationship between arbitration clauses and no-strike provisions, saying:

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\(^8\) See, e.g., F. Frankfurter & N. Greene, *The Labor Injunction* (1930).
\(^9\) Id.
\(^10\) Id. at 449.
\(^16\) 353 U.S. 448 (1957).
\(^17\) Id. at 449.
\(^18\) Id. at 449-56.
\(^19\) Id. at 456.
\(^20\) Id. at 457.
Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, [*§ 301(a)*] does more than confer jurisdiction in federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.\(^{21}\)

That the arbitration of grievances was to be the linchpin of a national labor policy was further articulated in three 1960 cases collectively referred to as the *Steelworkers Trilogy*.\(^{22}\) The Court noted that in [*§ 301(a)*] suits a court was not to weigh the merits of the grievance;\(^{23}\) rather, its purpose should be “confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.”\(^{24}\) The test employed was to be a broad one:

In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.\(^{25}\)

Two years later, *Teamsters Local 174 v. Lucas Flour Co.*\(^{26}\) presented a situation in which an employer sought damages in a state court following a union strike. The governing contract contained a binding arbitration agreement but did not have a no-strike clause.\(^{27}\) The state court awarded damages to the employer, applying principles of state law in finding the strike to be a violation of the collective bargaining agreement.\(^{28}\) While the Supreme Court upheld the award, it did so on federal grounds, dispensing with the state court’s reasoning. In so doing, the Court noted that in [*§ 301(a)*] suits, “Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.”\(^{29}\) Announcing the correct federal grounds, the Court ruled that since the strike was over a dispute subject to compulsory arbitration under the collective bargaining agreement, the strike itself was in violation of that agreement regardless of the absence of an expressed no-strike provision.\(^{30}\) The Court indicated that a contrary view would be at odds with the basic policy of national labor legislation, which promoted the arbitral process as a substitute for economic warfare.\(^{31}\)

Shortly thereafter, however, the Supreme Court itself announced a decision which appeared contradictory to the newly espoused “basic policy.” By a narrow margin,\(^{32}\) the Court in *Sinclair Refining Co. v. Atkinson*\(^{33}\) held that an injunction

\(^{21}\) *Id.* at 455.
\(^{22}\) The cases included in this trilogy are cited in note 7, supra.
\(^{24}\) *Id.*
\(^{26}\) 369 U.S. 95 (1962).
\(^{27}\) Relevant contract provisions are set out in 369 U.S. at 96.
\(^{28}\) *Id.* at 97-98. The state court said the strike violated the contract “because it was an attempt to coerce the employer to forego his contractual right to discharge an employee for unsatisfactory work.” *Id.*
\(^{29}\) *Id.* at 104.
\(^{30}\) *Id.* at 105.
\(^{31}\) *Id.*
\(^{32}\) The actual vote was 5-3. Justice Frankfurter took no part in the consideration or decision of the case. 370 U.S. 195, 215 (1962).
issued in a § 301(a) suit brought against the union for striking in violation of no-strike and binding arbitration clauses itself violated § 4 of the Norris-LaGuardia Act and was therefore invalid. The rationale was that Congress had not intended to repeal § 4 of the Norris-LaGuardia Act when it passed § 301(a) of the Labor-Management Relations Act; thus § 4 remained completely in force and barred such an injunction. The Court in effect said that if Congress had not intended this result, correction would have to come through legislation and not through judicial interpretation.

The situation was further complicated in *Avco Corp. v. Aero Lodge 735.* In that case, the Court ruled that a § 301(a) suit brought in a state court could be removed to a federal district court through application of the federal removal statute. In light of the *Sinclair* holding, this decision worked strongly to the union's advantage. By empowering a union to compel removal of an employer's § 301(a) suit, *Avco* had the effect of extending the Norris-LaGuardia Act to state cases. Once in federal court, that Act, coupled with *Sinclair,* barred the issuance of an injunction.

As a result of this doctrinal evolution, the Court in 1970 was faced with the choice of either directly extending the Norris-LaGuardia Act to the states or restricting its application. In the landmark case of *Boys Markets, Inc. v. Retail Clerks Local 770,* the Court chose the latter course. The employer, Boys Markets, sought injunctive relief after the union had violated the no-strike clause of the collective bargaining agreement. Furthermore, the strike was over a dispute covered by the contract's binding arbitration clause. Overruling *Sinclair,* the Supreme Court found that the injunction was not barred by Norris-LaGuardia. Admitting that its *Avco* decision had created an anomalous situation, the Court noted that Congress had intended § 301(a) to supplement, not to encroach upon, the jurisdiction of state courts which had existed prior to the enactment of the Labor-Management Relations Act. The Court further declared that extending the *Sinclair* holding to the states would be unacceptable, since the unavailability of equitable remedies would have “devastating implications” for the enforcement of arbitration agreements and concomitant no-strike obligations. Having found an action for damages to be no substitute for an immediate halt to an illegal strike, the Court went on to say:

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34 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. . . .

35 370 U.S. 195, 203.
36 Id. at 214.
40 Id. at 238-40.
41 Id. at 253.
42 Id. at 244-45.
43 Id. at 247.
44 Id. at 248.
Even if management is not encouraged by the unavailability of the injunction remedy to resist arbitration agreements, the fact remains that the effectiveness of such agreements would be greatly reduced if injunctive relief were withheld. Indeed, the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures. This basic purpose is obviously largely undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate. Thus, because *Sinclair*, in the aftermath of *Avco*, casts serious doubt upon the effective enforcement of a vital element of stable labor-management relations—arbitration agreements with their attendant no-strike obligations—we conclude that *Sinclair* does not make a viable contribution to federal labor policy.45

Citing *Lincoln Mills*, the *Steelworkers Trilogy*, and *Lucas Flour* in support of its declaration of a national policy favoring arbitration,46 the Court noted that it was the task of the judiciary to accommodate older statutes with more recent ones.47 Thus, it was proper for the Court to find that the policy of non-intervention by the federal courts, articulated in the Norris-LaGuardia Act, had to yield to what the Court termed the “overriding interest in the successful implementation of the arbitration process.”48 Nevertheless, the Court construed its holding narrowly and indicated no intention of undermining the vitality of the Norris-LaGuardia Act.49 The application of *Boys Markets* was to be restricted to instances in which collective bargaining contracts contained a mandatory grievance adjustment or arbitration procedure. Guidelines first urged in the dissent to *Sinclair* were adopted to aid the district courts in their implementation of this decision.50

*Gateway Coal Co. v. UMW*51 provided the Court with an opportunity to expand on the self-declared narrow holding of *Boys Markets*. Whereas in *Boys Markets* the Court had dealt with a contract containing both a binding arbitration agreement and a no-strike clause, *Gateway Coal* involved only a binding arbitration agreement.52 Focusing on this basic difference, the Court nonetheless found injunctive relief available on the basis of an implied no-strike agreement.53 Once again noting the strong federal policy in favor of labor dispute arbitration,54 the Court announced that unless there was an explicit expression of an intention not to have a broad mandatory arbitration clause imply a no-strike obligation,

45 *Id.* at 249.
46 *Id.* at 252.
47 *Id.* at 251.
48 *Id.* at 252.
49 *Id.* at 253. For a discussion of this “narrowness,” see text accompanying notes 158 et seq., infra.
50 *Id.* at 254. It is of some interest to note that both the dissent in *Sinclair* and the majority opinion in *Boys Markets* were written by Justice Brennan. A comprehensive list of the principles adopted as guidelines in *Boys Markets* and in later Supreme Court cases is provided infra in the text accompanying notes 66-74.
52 The contract in question was none other than the National Bituminous Coal Wage Agreement of 1968. 414 U.S. at 374. The Court noted the broad character of the binding arbitration clause, here deciding that the dispute—one involving the continued presence of two foremen in the mine who faced disciplinary action—was covered by the arbitration clause and that therefore the union was required to arbitrate. *Id.* at 376.
53 *Id.* at 381.
54 *Id.* at 382.
the agreement to arbitrate and the duty not to strike were to be construed as applying coterminously. Furthermore, finding the federal policy favoring arbitration of labor disputes to be firmly grounded in congressional command, the Court reiterated what it termed the "now well-known presumption of arbitrability for labor disputes":

An 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. Thus the Court expressly adopted this pre-Boys Markets presumption and applied it in a case where a Boys Markets injunction was sought.

In its most recent pronouncement on the meaning of Boys Markets, the Court re-emphasized that before a Boys Markets injunction can issue, the strike must be over a dispute covered by the arbitration clause of the collective bargaining agreement. Buffalo Forge Co. v. Steelworkers Union was an attempt to clarify this "over an arbitrable dispute" requirement. The case involved a sympathy strike, and the Court found it improper to enjoin such a strike, since to do so would cut too deeply into the still viable § 4 of the Norris-LaGuardia Act. As the district court had found, the strike was not over a dispute even remotely subject to the coverage of the arbitration clause. Indeed, the issue involved was the sympathy strike itself; this took it out of the control of Boys Markets. The Court distinguished between a strike over an arbitrable dispute and a strike which itself produced an arbitrable dispute, the former falling within the Boys Markets rule and the latter without. In the course of so holding, the Court summarized the rationale behind Boys Markets injunctions:

Striking over an arbitrable dispute would interfere with and frustrate the arbitral processes by which the parties had chosen to settle a dispute. The quid pro quo for the employer's promise to arbitrate was the union's obligation not to strike over issues that were subject to the arbitration machinery. Even in the absence of an express no-strike clause, an undertaking not to strike would be implied where the strike was over an otherwise arbitrable dispute. [citing Gateway Coal and Lucas Flour] Otherwise, the employer would be deprived of his bargain and the policy of the labor statutes to implement private resolution of disputes in a manner agreed upon would seriously suffer.

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55 Id.
56 Id. at 377. The court here quoted § 203(d) of the Labor-Management Relations Act, 29 U.S.C. § 173(d) (1970), which states in part:

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising out of the application or interpretation of an existing collective-bargaining agreement.

57 414 U.S. at 277.
59 414 U.S. 368, 379-80, 387.
60 96 S. Ct. 3141 (1976).
61 Id. at 3148-49.
62 Id. at 3147.
63 Id. at 3148.
64 Id. at 3147.
65 Id.
C. Current Requirements for a Boys Markets Injunction

Combining the decisions in Boys Markets, Gateway Coal, and Buffalo Forge, it is apparent that a number of requirements must be satisfied before a Boys Markets injunction may issue. First, the collective bargaining agreement must be found to contain a no-strike clause, either expressed or implied. It must also be determined that a breach of that clause is occurring and will continue, or has been threatened and will be committed. The collective bargaining agreement must contain a mandatory grievance adjustment or arbitration procedure. The strike sought to be enjoined must be over a dispute falling within the arbitration clause, but there is a presumption of arbitrability. The employer has to be prepared to proceed with arbitration at the time the injunction is sought and obtained. Additionally, it must be shown that the breach of the binding arbitration and no-strike clauses has caused or will cause irreparable injury to the employer, and the employer has to demonstrate that he will suffer more from a denial of the injunction than the union will from its issuance. Finally, the employer must be ordered to arbitrate as a condition to the obtaining of an injunction against the strike.

III. The Prospective Injunction

It is apparent from this brief review of the role of injunctions in federal labor law that the process of determining the propriety and delimiting the boundaries of injunctions is not a simple one. Nor is it a process which is by any means complete, for it is from this history that the question of prospective injunctions has arisen.

Prospective-type injunctions are not entirely new to labor law. In a situation where it was shown that past picketing was connected with acts of violence, an injunction which in effect banned all picketing for the remaining life of the contract was approved by the Supreme Court. But as the Third Circuit observed when called upon to resolve the issue, the question of prospectively enjoining the right to strike itself is actually one of first impression. In a sense, all injunctions are somewhat prospective in nature, for their purpose is to prevent the occurrence of future violations and unlawful activity. What distinguishes a prospective Boys Markets injunction is the effect of the injunction's operation. In the typical injunction situation, a union is enjoined from continuing a strike which it has begun as the result of a particular dispute.

66 398 U.S. 235, 248, n.16; 414 U.S. 368, 381.
68 Id. at 253.
69 Id. at 254; 96 S. Ct. 3146.
70 414 U.S. 368, 377.
72 Id.
73 Id.
74 Id.
75 Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).
76 United States Steel Corp. v. UMW, 534 F.2d 1063, 1075 (3d Cir. 1976).
77 See, e.g., United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952). "The sole function of an action for injunction is to forestall future violations." Id. at 333.
78 See the text accompanying notes 16-74, supra.
When a prospective injunction issues, however, the Court finds that strikes over a certain type of dispute have occurred in the past, and orders the union to refrain from striking over future disputes of a similar nature. While both types of injunctions are essentially attempts to compel the use of agreed-upon arbitration procedures instead of economic warfare, the prospective injunction is principally aimed at future compliance. Thus, if a dispute of the type covered by the prospective injunction arises in the future and the union strikes over it, the union thereby violates a standing court order and is thus immediately liable for contempt citation. Without an order phrased broadly enough to cover such future disputes, the union can be enjoined only after it actually strikes. 

Since, as a practical matter, the union is given some time to comply with an order before a contempt citation is issued, the result is that such a strike, even if ultimately enjoined, is not without economic significance to the employer. Indeed, it is mainly to counteract the effect of a series of such strikes that the prospective injunction device is used.

Of the four circuit court cases reviewed below, it is significant to note that in each the district court issued a prospective injunction only when confronted by a series of strikes by the union. Furthermore, each lower court found that the issuance of a regular injunction would be ineffective in halting that series of illegal strikes. Thus, it was against the continuation of a pattern of illegal strikes that the prospective injunctions were issued. The propriety of those injunctions in light of legal precedents and practical effects was the exact question which confronted four circuits of the Court of Appeals.

IV. The Conflict over Prospective Injunctions: Four Circuit Court Views

It is important to note initially the presence of a number of elements common to each court of appeals case: The various disputes in question arose under essentially the same collective bargaining contract, the National Bituminous Coal Wage Agreement. 

Before any of the district courts issued a prospective injunction, they affirmatively found the existence of a series of strikes over issues covered by the binding arbitration provisions of the contract. The appellant union in each case was the United Mine Workers, and it opposed the prospective injunction on the grounds of Boys Markets, the Norris-LaGuardia Act, and Federal Rule of Civil Procedure 65(d). Furthermore, each of the prospective injunctions under review had first been sought under § 301(a) of the Labor-Management Relations Act. Finally, and perhaps most significantly, each court had before it the same set of judicial precedents and statutes on which to base

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79 One way of looking at the difference is that in the usual case, there is nothing to enjoin until the union actually goes out on strike. Prospective injunctions effectively enjoin continuance of a pattern of illegal strikes by ordering the union not to strike over disputes arising in the future if those disputes are of a type specified in the injunction.

80 See note 6, supra.

81 See note 15 and the accompanying text, supra.

82 Gateway Coal was decided on January 8, 1974, and the Seventh Circuit case of Old Ben Coal II, the first of the four, was decided on August 2, 1974, 414 U.S. 368; 96 F.2d 950. The Third Circuit decision came down on March 16, 1976, and Buffalo Forge was decided on July 6, 1976, 534 F.2d 1063; 96 S. Ct. 3141. Buffalo Forge was announced the same day as was the denial of certiorari to the appeal from the Fifth Circuit case. See 96 S. Ct. 3221 (1976).
A. The Seventh Circuit

The prospective injunction question first arose before the United States Court of Appeals for the Seventh Circuit amid an exasperating factual situation. In *Old Ben Coal Corp. v. UMW Local 1487 (Old Ben Coal I)*, the court had affirmed the order of the district court enjoining the union from striking, but it had narrowed the broad scope of that order, applying it only to strikes over disputes that were actually before the court. It had in effect warned the union that a broader order might be appropriate in some future action, however. Following the *Old Ben Coal I* decision, the union continued to strike over various disputes, walking out eight more times. In one of these instances, the employer sought and was granted a temporary injunction, later made permanent by the district court. The permanent injunction not only forbade the union from striking over the particular dispute which had precipitated the temporary injunction, but it enjoined all work stoppages and strikes resulting from any other differences or local troubles which the parties were obligated to arbitrate. It was the scope of this injunction that prompted the union appeal.

In *Old Ben Coal Corp. v. UMW Local 1487 (Old Ben Coal II)*, the Seventh Circuit responded to the union's challenge. The court first summarily disposed of the union's claim that it should have been allowed a grace period after *Old Ben Coal I* to "absorb the impact" of that decision. Nor did the court look favorably on the union's contention that strikes during that period should not have been considered as part of a pattern of continuing misconduct. Simply stating that it knew of no rule allowing such a grace period, the court took a rather dim view of the union's actions. Indeed, finding a questionable union motivation for the strikes as well as a likelihood of their continuation, the court saw no alternative but the issuance of a permanent injunction.

The court went on to find that damages or disciplinary actions against offending employees were inadequate remedies, since coal production lost by these stoppages was lost forever, and disciplinary actions had in the past merely provoked further stoppages and were "inefficacious." Therefore, issuance of an injunction was justified.
Addressing the union’s overbreadth charge based on the Norris-LaGuardia Act, the court initially found that the breadth of an injunction was to be determined by the extent of the misconduct involved. It interpreted *Boys Markets* as approving a broad injunction if merited by the facts and calculated to aid the arbitration process between the parties as set out by their contract. The court found it significant that the terms of the injunction were actually drawn from the contractual language of the parties’ collective bargaining agreement. It felt this obviated the vagueness question:

In essence the union is claiming it does not know what differences or local troubles are arbitrable. We think the incorporation of the parties’ own contractual language into the injunction is of sufficient specificity to avoid the complaint of vagueness.

The court additionally denied credence to the union’s fear that it would be subject to criminal contempt penalties for violations arguably not covered by the arbitration clause. While noting that the union would have access to declaratory proceedings promptly and accurately to determine the actual scope of the clause in such situations, the court also expressed its opinion that “proper consideration of circumstances of this nature will be given in any future contempt proceedings.”

**B. The Tenth Circuit**

Following the seminal decision of the Seventh Circuit, the Tenth Circuit was faced with a somewhat similar set of facts. In *CF&I Steel Corp. v. UMW*, the court reviewed an injunction forbidding the union from striking or stopping work over disputes arising from employee suspensions, employee discharges, and work assignments during the remaining life of the National Bituminous Coal Wage Agreement of 1971. Within a four-year span, there had been eight wildcat strikes at one mine, six of which the court determined to have been in violation of the union’s agreement not to strike over arbitrable issues. After hearing testimony on each of the eight strikes, the district court found that, while four of the disputes involved were not likely to recur and thus were not appropriate cases for equitable relief, disputes over employee suspensions, discharges, and work assignments were likely to occur again unless enjoined permanently by the court.

In the court of appeals, the union attacked the district court’s decree as being impermissibly vague and thus violative of Federal Rule of Civil Procedure

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98 Id.
99 Id.
100 Id.
101 Id. at 954.
102 507 F.2d 170 (10th Cir. 1974).
103 Id. at 171, 172, n.3. *See also* note 6, supra.
104 Id. at 172.
105 Id. at 172-73.
65(d). The court, however, found that, since only specific concerted activity was enjoined by using "terms of reasonably specific content in the 'common law of the shop,'" there was no incapacitating vagueness involved.

The union also challenged the injunction on overbreadth grounds, and, unlike the rather summary treatment afforded by the Seventh Circuit, the Tenth Circuit's answer was more direct. First, the court looked to the Supreme Court's standard on the breadth of injunctions, finding it basically to be an equitable one dependent upon the circumstances of each case. After reviewing the history preceding the Supreme Court's decision in *Boys Markets* and evaluating the relevance of that case to the instant one, the court concluded that it was clear the Supreme Court had favorably considered the possibility of remedial action directed toward future conduct in a proper case. Moreover, the court found that the employer's complaint adequately satisfied § 9 of the Norris-LaGuardia Act; testimony at trial, offered and received without objection, had dealt with the entire course of past conduct of the union, and there had been no claim of surprise or lack of fair warning as to the issues being litigated.

Thus, citing the need for courts to seek an accommodation between the Labor-Management Relations Act and the Norris-LaGuardia Act, the court approved this prospective injunction as limited to the three types of disputes found likely to recur.

The Tenth Circuit's approach thus differed significantly from that of the Seventh Circuit. Whereas the latter had approved a prospective injunction phrased as broadly as the contract language itself, the Tenth Circuit restricted the injunction's scope to strikes over specific types of disputes affirmatively found likely to occur again.

C. The Fifth Circuit

In the year following the Tenth Circuit's decision, the Court of Appeals for

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Notes:

106 Id. at 173. The opinion as reported in 507 F.2d states that the union's vagueness objection was based on Fed. R. Civ. P. 65(c), but this must be an error, since Fed. R. Civ. P. 65(c) deals with the giving of security by the applicant seeking an injunction. The correct basis for the union's contention would be Fed. R. Civ. P. 65(d), which states:

(d) Form and Scope of Injunction or Restraining Order. 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.

107 507 F.2d 170, 173.

108 Id. at 174. The court of appeals here cites to NLRB v. Express Publishing Co., 312 U.S. 426 (1941), a case dealing with an NLRB order against an employer. The Supreme Court is cited as saying:

To justify an order restraining violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past.

507 F.2d 170, 176, quoting from 312 U.S. 426, 436-37.

109 507 F.2d 170, 176.

110 Id. See note 120, infra.

111 Id. at 176-77.
the Fifth Circuit heard an appeal from both a prospective injunction and a civil contempt determination made thereon in United States Steel Corp. v. UMW. Following a series of strikes over disputes involving arbitrable issues, the district court issued a prospective injunction against the union phrased in the exact terms of the arbitration clause of the collective bargaining agreement, which again was the National Bituminous Coal Wage Agreement of 1971. When the union stopped work at certain U.S. Steel mines in a "memorial protest" against the Alabama Power Company and its importation of coal from South Africa, the district court held the union in civil contempt of its injunctive order.

The court of appeals began its analysis by reviewing the Supreme Court's attempts at an accommodation between the Norris-LaGuardia Act and the Labor-Management Relations Act, concluding that it was clearly the purpose of Boys Markets to vindicate the arbitral process. But against this clear purpose the court juxtaposed the narrowness of the Boys Markets holding, noting that it had in the past emphasized the limits of that decision and that no reason existed to alter that emphasis. This caveat made, the court initially focused its attention on the prospective injunction and only subsequently addressed the contempt issue. Although it noted that the district court had found a series of illegal strikes and a pattern of disobedience of regular injunctive orders, the Fifth Circuit nonetheless found it improper to issue a prospective injunction. It grounded this holding on three points. First, such an injunction violated the guidelines of Boys Markets, which the court interpreted as clearly calling for ad hoc adjudication of each alleged violation. Though neither the Tenth nor the Seventh Circuits had heeded this call, the Fifth Circuit supported its position by noting that not even Boys Markets would enjoin every strike over an arbitrable issue. Indeed, a prospective injunction for the life of the contract amounted to an order to work every day and was thus "strongly reminiscent of 'government by injunction.'" Second, by being phrased in the broad language of the contract's arbitration clause, the injunction failed under § 9 of the Norris-LaGuardia Act for lack of specificity.

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112 519 F.2d 1236 (5th Cir. 1975), cert. denied, 96 S. Ct. 3221 (1976). The union actually had filed an appeal of the prospective injunction before it was found in civil contempt. The court consolidated both appeals and reversed the lower court on both issues. Id. at 1238.
113 Id. at 1239.
114 Id. See note 6, supra.
115 Id. at 1240-41.
116 Id. at 1241-43.
117 Id. at 1244. The court here cited to its decisions in Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972), and Port Authority v. International Organization of Masters, 456 F.2d 50 (5th Cir. 1971).
118 519 F.2d 1236, 1245.
119 Id.
120 Id. at 1245-46. § 9 of the Norris-LaGuardia Act reads as follows: No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act 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 as provided in this chapter.
In so holding, the court directly rejected the Seventh Circuit's position. Finally, this same ambiguity problem violated the procedural notice requirements of Fed. R. Civ. P. 65(d).\textsuperscript{121} Use of the contract's own language simply did not give adequate notice, since the parties themselves were often unsure of the meaning of the agreement's terms. Indeed, the special nature of the collective bargaining agreement was the very reason for the arbitration clause.\textsuperscript{123}

The court did note the Seventh and Tenth Circuit decisions on the prospective injunction question, but construed them as holding that any strike in violation of a no-strike clause raised an arbitrable issue as to whether the strike itself was in violation of the no-strike clause.\textsuperscript{122} The court tersely distinguished these opinions by stating that in its circuit, at least, the strike itself was not an issue arbitrable under the contract and thus the power of \textit{Boys Markets} could not be invoked.\textsuperscript{124}

Before discussing the Fifth Circuit's treatment of the contempt citation, it is important to note that the dispute involved in that citation was not over an arbitrable issue. As \textit{Buffalo Forge} was later to reaffirm, a \textit{Boys Markets} injunction can issue only if the strike sought to be enjoined is actually over an arbitrable dispute.\textsuperscript{125} Thus, when the only arbitrable dispute is as to whether or not the strike itself is proper, \textit{Boys Markets} does not apply. Here, although not a sympathy strike to the extent of the one before the Supreme Court in \textit{Buffalo Forge}, the "memorial protest" was beyond the provisions of the arbitration clause. The Fifth Circuit found it beyond belief that the contracting parties had intended to arbitrate the question of whether Alabama Power Company should import South African coal.\textsuperscript{126} Thus, since the strike was not within the \textit{Buffalo Forge} interpretation, it could not be enjoined. With both the prospective injunction held invalid and the memorial protest found unenjoinable, the union had violated no valid order and was not subject to contempt.\textsuperscript{127}

\textbf{D. The Third Circuit}

Less than one year after the Fifth Circuit's ruling, the Third Circuit, in \textit{United States Steel Corp. v. UMW},\textsuperscript{128} announced its view on the prospective injunction controversy. In the case before it, the district court had, within one month, thrice issued injunctions against union strikes over arbitrable disputes.\textsuperscript{129} Seven times within the past year the employer had been forced to resort to a § 301(a) suit in the district court because of work stoppages over disputes falling within the "Settlement of Disputes" procedure of the 1974 (and 1971)}
National Bituminous Coal Wage Agreement. Faced with such an “unlawful proclivity” on the part of the union, the district court had issued an injunction not only directing use of the “Settlement of Disputes” procedure for the three specific disputes that had occurred within the month, but also prospectively prohibiting strikes, work stoppages, or picketing over any dispute defined as falling within the contract’s arbitration clause.

The Third Circuit first dealt with the contention that the 1974 Agreement differed from the 1971 Agreement in that the 1974 arbitration clause was not broad enough to imply the required no-strike obligation. Comparing the language of the two Agreements, the court found them to be practically identical, containing no significant differences. As to the implied no-strike obligation, the court noted that the Supreme Court had construed most authoritatively the 1971 agreement as giving rise to an implied no-strike obligation in Gateway Coal. The contention that no Boys Markets relief was appropriate was thus rejected.

Although the general applicability of Boys Markets was thus acknowledged, the propriety of the particular injunction issued was not as clear. The court noted that although the district court had found that, unless restrained, breaches of the agreement would continue, it had not found that the likelihood of these breaches was attributable to any specific action or lack of action by the union. Noting that the Fifth Circuit argument that Boys Markets requires a case-by-case analysis could not be lightly regarded, the court nonetheless observed that the Fifth Circuit’s broad ban of prospective injunctions was narrower than it seemed. The court found it appropriate here to sum up the conflict among the circuits before proceeding with its own analysis:

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.

As to overbreadth, the court found that there was nothing in § 9 of the Norris-LaGuardia Act to prevent a federal court having jurisdiction under § 301(a) of the Labor-Management Relations Act from enjoining a union’s pattern of conduct which it finds to have resulted in repeated and similar violations:

Once it has done so it should not be required to relitigate essentially the same issue in a slightly different context over and over again. . . . The court that has once determined in an adversary proceeding the meaning of

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130 Id.
131 Id. at 1066-67.
132 Id. at 1069-71.
133 Id. at 1071.
134 Id.
135 Id. at 1075. The court also discussed various theories concerning the liability of the parent union organizations for the activities of the Local. Id. at 1071-74. However, that question is beyond the scope of this Note.
136 Id. at 1075.
137 Id.
138 Id. at 1077.
a contract must have the power to protect the parties and itself from the necessity for and burden of repeatedly adjudicating what often may be the identical issue. \(^{139}\)

Thus it disagreed with the Fifth Circuit view; however, it similarly found the Seventh Circuit approach unacceptable for the instant cause at least, stating that the evidence here would not support an injunction framed from the broad contract language. \(^{140}\) Instead, the court instructed district courts to make specific findings as to what types of violations have occurred in the past and “to limit 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.” \(^{141}\) This approach closely paralleled that of the Tenth Circuit. The court ruled likewise on the Fed. R. Civ. P. 65 (d) question, requiring the district courts to tell both the union local and any parent organization enjoined which specific steps each must take to prevent future illegalities and to insure compliance with contractual obligations. Thus, it differed somewhat from the Tenth Circuit’s view that shop terms were sufficiently specific; rather the court here read 65 (d) as requiring a delineation of prophylactic steps as well as actions prohibited. It also found that injunctions phrased in the language of the contract did not promote the collective-bargaining process, but instead were weapons which facilitated harassment of unions by contempt citations. \(^{142}\)

Finally, the court addressed itself to an issue conspicuously absent from the discussions of the other circuits. The Third Circuit observed that Boys Markets conditioned the issuance of an injunction on an order directing the employer to arbitrate. \(^{143}\) Although it did not discuss the point at length, the court did require any district court issuing a prospective injunction to include such an order. Furthermore, that order was to be at least as broad as the injunction, both in scope and in time. \(^{144}\)

It is apparent that the Third Circuit’s position on prospective injunctions falls between those of the Seventh and Fifth Circuits. While it did find that federal courts have the power prospectively to enjoin patterns of contract violations in § 301 (a) suits, in nonetheless held that the instant injunction was too broad for the facts involved. \(^{145}\) Beyond these findings, the court noted in a per curiam opinion on the petition for rehearing that the issues involved in the prospective injunction question “are exceptionally important and controversial.” \(^{146}\) Not wishing to delay a possible Supreme Court determination of the matter, \(^{147}\) it declined the petition for en banc reconsideration. Observing that

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139 Id.
140 Id.
141 Id.
142 Id. at 1077-78.
143 Id. at 1078.
144 Id. at 1079.
145 Its position was not one unanimously arrived at, however. The concurring opinion of Judge Rosenn, id. at 1079-83, and the concurring and dissenting opinion of Chief Judge Seitz, id. at 1083-84, are cited infra as they are relevant to the analysis there conducted.
146 Id. at 1078.
147 Id. at 1084.
148 Id. at 1085. The court was concerned with the appeal of the Fifth Circuit decision in United States Steel Corp. v. UMW, 519 F.2d 1236 (5th Cir. 1976). However the Supreme Court denied certiorari. 96 S. Ct. 3221 (1976).
three other circuit courts had reached differing opinions regarding the propriety of prospective injunctions in federal labor law, the Third Circuit concluded that "[o]nly the Supreme Court is in position to resolve this conflict."149

V. An Analysis of the Issues Involved in the Use of Prospective Injunctions in Labor Disputes

It is apparent that until the Third Circuit’s plea for Supreme Court resolution of this issue is answered,150 the uniformity necessary to an effective federal labor law is greatly jeopardized. In resolving the prospective injunction question, it is imperative that each of the issues involved be carefully analyzed. Clearly one of the most important issues is the function of the Labor-Management Relations Act vis-a-vis the Norris-LaGuardia Act. Perhaps within that context the single most important point is one emphasized by the Supreme Court in Boys Markets: The purpose of any attempt to reconcile seemingly conflicting laws in this area should be to reach an accommodation that will further the national policy favoring arbitration of labor disputes and the peaceful settlement thereof.151

A. The Effect of Boys Markets and Its Progeny

Common to each of the cases before the circuit courts was the question of the effect of Boys Markets on the prospective injunction issue. Initially, it must be noted that the language used by the Supreme Court in Boys Markets can be read as allowing prospective injunctions. The principles of the Sinclair dissent, which the Boys Markets Court expressly adopted,152 speak of the considerations which district courts must weigh in deciding whether to grant a Boys Markets injunction; among other things, the courts are to consider “whether breaches are occurring and will continue,” whether they “have been threatened and will be committed,” whether they “have caused or will cause irreparable injury to the employer.”153

It is clear that the Court anticipated injunctive relief against future actions. But merely saying that the guidance given to the district courts can be read this way is not dispositive as to whether it should be read this way. That question is essentially one of policy; to find the answer, one needs to search for policy pronouncements in the opinion itself.

The search for statements of policy regarding labor dispute settlements is not a difficult one, however. The Court speaks of its “consistent emphasis,” despite Sinclair, to promote arbitration of labor disputes in accordance with what it finds to be congressional policy.154 It talks of the need for an immediate, effective remedy for resort to the tactics that are supposed to be obviated by the

149 Id.
150 Id.
153 Id. (Author's emphasis.)
154 Id. at 241.
agreed-upon arbitration procedure.\textsuperscript{155} Indeed, it was because \textit{Sinclair} cast "serious doubt upon the effective enforcement of a vital element of stable labor-management relations—arbitration agreements with their attendant no-strike obligations—"\textsuperscript{156} that it had to be overruled.\textsuperscript{156} Such language is certainly potent, and it seems equally applicable to a situation where the mutual agreement to follow a binding arbitration clause is broken by a pattern of strikes over arbitrable issues. The arbitration clause is designed to obviate such tactics, and without a prospective injunction forcing compliance with that clause there is no immediate and effective remedy. The Court seems readily to acknowledge this, noting that an award of damages after settlement of a dispute is no substitute for an immediate halt to an illegal strike. Furthermore, such actions for damages prosecuted during or after a dispute are likely only to aggravate the industrial strife, thereby delaying settlement and tending to frustrate a peaceful attempt to resolve the dispute.\textsuperscript{157}

Any attempt to "extend" \textit{Boys Markets} beyond the fact pattern of that case is met by the Court's own characterization of its holding as a narrow one. Similarly restrictive is its statement that injunctive relief is not appropriate in every case of a strike over an arbitrable grievance.\textsuperscript{158} The Fifth Circuit seized upon these statements in interpreting \textit{Boys Markets} as calling for a case-by-case adjudication.\textsuperscript{159} It fortified its reasoning in this regard by noting that the language of the \textit{Boys Markets} guidelines, compelling district courts to consider "whether breaches are occurring and will continue or have been threatened and will be committed," is but a paraphrasing of the words of the Norris-LaGuardia Act itself.\textsuperscript{160} Thus that court of appeals read the above-mentioned phrases from the \textit{Boys Markets} opinion as requiring that the determination of the arbitrability of a given dispute be made at the time that dispute arises.

This may well be a valid reading of those statements, yet the opinion must be read as a whole, and the Supreme Court's disclaimer must be taken in context. It is clear from the expressly adopted guidelines for implementation of the Court's holding that an appropriate case for an injunction of a strike over an arbitrable grievance is one where the parties are contractually bound to arbitrate such disputes.\textsuperscript{161} Thus, while the Fifth Circuit is correct that an injunction should not issue merely because the strike is over an issue which is \textit{capable of} being arbitrated, the Court is merely enforcing the mutual agreement of the parties when it enjoins a strike that is over a dispute that both sides have \textit{bound} themselves to settle by arbitration. Such indeed is a correlative implication of the holding in \textit{Buffalo Forge}.\textsuperscript{162} The self-asserted narrowness of the \textit{Boys Markets} holding is also explained by the Court in its own words immediately following

\begin{itemize}
\item \textsuperscript{155} \textit{Id.} at 249.
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{Id.} at 248.
\item \textsuperscript{158} \textit{Id.} at 253-54.
\item \textsuperscript{159} United States Steel Corp. v. UMW, 519 F.2d 1236, 1245 (5th Cir. 1975).
\item \textsuperscript{160} \textit{Id.} at 1245, n.17. The Court's specific reference is to § 7(a) of the Norris-LaGuardia Act, 29 U.S.C. § 107(a) (1970). Section 7(a) declares that no court of the United States shall have jurisdiction to issue injunctions in labor dispute cases except after findings of fact by the court "[t]hat unlawful acts have been and will be committed unless restrained or have been committed and will be continued unless restrained. . . ."
\item \textsuperscript{161} \textit{Id.} at 254.
\item \textsuperscript{162} 96 S. Ct. 3141. \textit{See also} 398 U.S. 235, 253, n.22.
\end{itemize}
the narrowness statement; the Court says that it deals only with the situation "in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure." The fact that Boys Markets was extended beyond its own narrow fact situation by the Gateway Coal decision, which implied a no-strike obligation though none was expressed, lends support to this interpretation.

Thus, insofar as there is a collective bargaining contract containing a mandatory arbitration procedure, nothing in Boys Markets seems specifically to exclude the use of prospective injunctions. On the contrary, the policies avowed in Boys Markets and reinforced in Gateway Coal and by dicta in Buffalo Forge would seem to encourage the use of a prospective injunction in a proper case.

B. The Norris-LaGuardia Act Argument

The applicability of Boys Markets to prospective injunctions is by no means the only issue, however. The Court itself said in Boys Markets: "We do not undermine the vitality of the Norris-LaGuardia Act." It is this statement, coupled with the fact that the Supreme Court sought to accommodate the Norris-LaGuardia and Labor-Management Relations Acts rather than subjugate one to the other, that seems to put the force of the Supreme Court behind arguments against prospective injunctions based on the Norris-LaGuardia Act.

One thing is clear from the outset. In order to escape the prohibition of § 4 of the Norris-LaGuardia Act, an injunction of any type must meet the tests outlined by the Court in Boys Markets. Since that decision is the authoritative interpretation of § 4, any argument based on that section is really an argument based on Boys Markets, and the direct applicability of that decision to prospective injunctions has been discussed above. However, insofar as Norris-LaGuardia arguments are based on § 9 of that Act, Boys Markets applies by analogy only.

The requirement of § 9 most relevant to attacks on prospective injunctions, and thus to this analysis, is its allowance of injunctions only as to specific acts complained of and expressly found as facts by the court. Thus arguments based on overbreadth rely on § 9 for support.

It is appropriate here to note the distinction between overbreadth and vagueness in the context of this discussion. As phrased by the Fifth Circuit:

"Vagueness" is a question of notice, i.e. procedural due process, and "broadness" is a matter of substantive law.

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165 The other requirements must of course be met as well. See the text accompanying notes 66-74, supra.
167 See, e.g., id. at 241, 249. See also Buffalo Forge Co. v. Steelworkers Union, 96 S. Ct. 3141, 3147 (1976).
169 Id.
170 United States Steel Corp. v. UMW, 519 F.2d 1236, 1246, n.19 (5th Cir. 1975).
Section 9 arguments are thus substantive in nature. They claim that an injunction which prohibits more than specific acts expressly included in the court's findings of fact is too broad. On the other hand, arguments premised on Rule 65(d) of the Federal Rules of Civil Procedure are procedural, and claim that the prospective injunction is so vague as to fail to give the specific notice required by that rule.

There is indeed some merit to the argument based on the specificity requirement of §9. Clearly, it is difficult to understand how strikes which have not yet occurred, over disputes which have not yet arisen, can possibly be included in express findings of fact. When considered together with a view of Boys Markets that requires an ad hoc determination of the arbitrability of each dispute,171 the §9 argument does seem to bar prospective injunctions.

There is, however, a conflict among statutory provisions in this area. Section 301 of the Labor-Management Relations Act,172 as interpreted by the Supreme Court,173 empowers district courts to enjoin strikes arising out of the disputes between unions and employers. Given that Boys Markets worked the appropriate accommodation between §4 of the Norris-LaGuardia Act174 and the policy underlying §301,175 the relevant inquiry here is as to the degree of accommodation necessary between §301 and §9.

The policy behind the Supreme Court's construction of §301 in Boys Markets is clear. As interpreted in Buffalo Forge, it is "to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties."176 To the extent that the specificity requirement of §9 prevents the granting of an "immediate, effective remedy" for a breach of a contract containing a binding arbitration clause, it conflicts with the policy of §301, and some accommodation appears necessary.

The Supreme Court has allocated to the courts the task of reconciling older statutes with the more recent ones.177 In working such an interpretive accommodation, "consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions."178 Thus district courts, in §301 suits, must determine whether the dispute over which the union is striking is arbitrable rather than the merits of the dispute.179 In other words, district courts are to determine whether the dispute in question falls within the mandatory arbitration provision that must be present in the contract between the parties before they may issue a Boys Markets injunction.180 Following the argument advanced by the Third Circuit,181 once the district court has made an

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171 See United States Steel Corp. v. UMW, 519 F.2d 1236, 1245 (1975).
173 Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). See also Gateway Coal Co. v. UMW, 414 U.S. 368 (1974), where the Court stated: "... § 301(a) empowers a federal court to enjoin violations of a contractual duty not to strike." Id. at 381.
175 See the text accompanying note 176, infra.
176 96 S. Ct. at 3147.
178 Id. at 250.
181 United States Steel Corp. v. UMW, 534 F.2d 1063, 1077 (1976).
affirmative finding that a specific type of dispute, or a specific pattern of conduct, falls within the arbitration clause of the contract and that strikes over such disputes are likely to recur, nothing in the language of § 9 would seem to require the court to make the same determination over and over again.

Given the Supreme Court's direction to consider the total corpus of pertinent law, it is useful to review the Court's own analogy to court-issued injunctions. In delineating the appropriate scope of an NLRB order against an employer, the Court noted:

The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past. . . . To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past.\(^{182}\)

The Supreme Court appears to tie the appropriate breadth of an injunction to the circumstances in each case and the violations to be prevented. Thus, it would seem that the degree of specificity required by § 9 must also be tied to the circumstances of each case and to the type of relief which would best effectuate the policies behind the Court's construction of § 301. Section 9 need not be sacrificed to accomplish this. It must be recognized, however, that the essential finding which the court must make here is that the type of strikes sought to be enjoined involves an arbitrable dispute.\(^{183}\) The § 9 specificity requirement may be met if the court finds a specific type of dispute to be arbitrable under the contract's binding arbitration clause. An injunction phrased so as to be broad enough to cover future strikes over that specific type of dispute may well match both the Supreme Court's view on the breadth of injunctions and the specificity requirement of § 9.

An accommodation of § 9's requirements to the peculiarities of a prospective Boys Markets injunction case would not necessarily "undermine the vitality" of the Norris-LaGuardia Act. The key word in the Supreme Court's statement is "vitality."\(^{184}\) As stated by that Court, the "central purpose" of the Act is "to foster the growth and viability of labor organizations."\(^{185}\) The Act's "vitality" is inseparable from its "central purpose," and the words of the Court regarding the effect on that central purpose of granting Boys Markets injunctions are equally applicable here. That central purpose "is hardly retarded—if anything, this goal is advanced—by a remedial device that merely enforces the obligation that the union freely undertook under a specifically enforceable agreement to submit disputes to arbitration."\(^{186}\) Thus, following the Supreme Court's own guidelines, § 9 of the Norris-LaGuardia Act may be interpreted to meet the peculiarities of the court's duties in a prospective Boys Markets injunction case.

183 See note 179, supra.
184 See the text accompanying note 166, supra.
186 Id.
without vitiating either its specificity requirement or the central purpose of the Act itself. The avowed policy favoring peaceful resolution of labor disputes by means mutually agreed upon by the parties, and the Supreme Court's other reasoning in the Boys Markets line of cases, seem to mandate such an accommodation.

C. The Argument Based on Fed. R. Civ. P. 65(d)

Whereas the § 9 argument turns more on questions of substantive law, the problem arising under Fed R. Civ. P. 65(d)\textsuperscript{187} is essentially a procedural one of notice and fairness. The party enjoined must be adequately warned as to what type of conduct he must perform or refrain from performing to avoid being held in contempt:

The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. . . . We do not deal here with a violation of a court order by one who fully understands its meaning but chooses to ignore its mandate. We deal instead with acts alleged to violate a decree that can only be described as unintelligible.\textsuperscript{188}

The question, then, is one of intelligibility. So phrased, it squarely focuses on use of the parties' contractual language, for there would seem to be no real Rule 65(d) notice problem when strikes over specific, named types of disputes are enjoined, as the union would adequately be put on notice.\textsuperscript{189} The problem most graphically arises when, by using contract language, the court in effect tells the union merely not to strike over any arbitrable issue. Such was the effect, for example, of the order approved by the Seventh Circuit in Old Ben Coal II.\textsuperscript{190} But by so phrasing an injunction in the very language of the arbitration clause itself, the court is not only rightly refraining from immediately deciding the merits of each dispute; it is indeed going so far as to abdicate its duty to determine whether a particular type of dispute is arbitrable or not.\textsuperscript{191} It is, in effect, placing its own burden of decision on the shoulders of the one enjoined, forcing him to decide rightly under pain of contempt. This seems to go too far.

The reason that the parties' own language may be effectively unintelligible to them stems from the need for the arbitration clause itself. As the Fifth Circuit points out, a collective bargaining agreement is often anything but a precise document.\textsuperscript{192} Broad agreements reached in collective bargaining sessions

\textsuperscript{187} For the text of Rule 65(d), see note 106, supra.
\textsuperscript{188} Longshoremen's Local 1291 v. Marine Trade Ass'n, 389 U.S. 64, 76 (1967).
\textsuperscript{189} See, e.g., CF&I Steel Corp. v. UMW, 507 F.2d 170 (10th Cir. 1974). The Tenth Circuit found that an injunction against "specific concerted activity, namely 'strike, work stoppage, interruption of work, or picketing at the Allen mine'" used "terms of reasonably specific content in the 'common law of the shop.'" Id. at 173.
\textsuperscript{190} 500 F.2d 950 (7th Cir. 1974). The Fifth Circuit, in its United States Steel Corp. decision, quotes the exact language of the prospective injunction and italicizes the words taken directly from the collective bargaining agreement. 519 F.2d at 1239.
\textsuperscript{191} See the text accompanying note 179, supra.
\textsuperscript{192} 519 F.2d 1236, 1246.
may be left to the arbitration process for application to particular circumstances. "Indeed, the special nature of the collective bargaining agreement is the very reason for the arbitration clause."193

Thus, it would seem that, as a bare minimum, the notice requirements of Rule 65(d) would require more specificity as to the type of acts enjoined than is given by the broad language likely to be found in a collectively bargained arbitration clause. Equitable considerations, however, may arguably allow the imposition of a broad, contract-language prospective injunction in a proper case. If the court were specifically to find that a union's pattern of conduct was too varied to permit specific categorization, and yet was clearly aimed at or had the specific, primary effect of frustrating the arbitration clause and causing irreparable injury to the employer, that court may well find it appropriate to use the arbitration clause's own language in prospectively enjoining the union from such a course of conduct. In such a case, however, the court should allow the union a fair chance to seek declaratory judgments on specific disputes as they arise.194 The employer seeking such a prospective injunction would of course have to meet all the Boys Markets requirements,195 one of which is a showing that he will suffer more from the denial of an injunction than will the union from its issuance.

It is especially in connection with this last mentioned requirement that the practical effect of such an extraordinary injunction must be considered. When a prospective injunction is issued, the union pays heavily by losing much of the effectiveness of its strike threat. As to any disputes arguably within the arbitration clause of the collective bargaining agreement, the union would have to seek a declaratory judgment from the court, hoping it would state that the dispute in question was not one covered by the arbitration clause. A strike then over that dispute would not be barred by the standing prospective injunction. Such public notice of its intent to strike, however, would eliminate any element of surprise the union might otherwise have in its favor. This would allow the employer and its customers to stockpile. While the amount of stockpiling possible would vary in direct proportion to the speed with which a declaratory judgment might be rendered, a union's right to strike is nonetheless curtailed, and when the particular dispute is found to lie outside of the arbitration clause and thus outside of the injunction, that right is wrongly curtailed. Thus, procedural problems can result in substantive wrongs.

Undoubtedly, then, the burden of proof that the employer will suffer more from denial than will the union from issuance would be a heavy one. Yet a court may be willing to find Rule 65(d) satisfied even in such an admittedly extraordinary situation by holding that, given the circumstances and the equities involved, the order did describe "in reasonable detail"196 the act or acts sought to be restrained. The reason behind such an extreme "interpretation" of

193 Id.
194 See United States Steel Corp. v. UMW, 534 F.2d 1063, 1083 (3d Cir. 1976) (Rosenn, J., concurring.) See also Old Ben Coal Corp. v. UMW Local 1487, 500 F.2d 950, 953-54 (7th Cir. 1974).
195 See the text accompanying notes 66-74, supra.
Fed. R. Civ. P. 65(d) is an important one, for in a sense it is one which underlies the very concept of prospective injunctions.

The issuance of a prospective injunction has the effect of shifting the burden and expense of seeking court action to the party whose course of conduct has specifically been found to be aimed at frustrating the mutually agreed-upon contract and to be in violation thereof. Presumably, if all the substantive requirements for a *Boys Markets* injunction197 have been met, only a union found to have been abusing the protection afforded it by such laws as the Norris-LaGuardia Act through a continuing repudiation of its own binding agreement will be prospectively enjoined. Having failed to convince the court not only that it did not violate the law in the past, but also that it is not likely to do so in the future, part of the remedial obligation imposed on the union may be the requirement that it seek the court’s permission in the form of a declaratory judgment before it strikes over a dispute.

It should be noted here that the dispute must be at least arguably within the binding arbitration clause for the court to be concerned with it.198 If it is not, the prospective injunction does not apply. Only one significant aspect of the situation is thus changed. Whereas previously the employer bore the burden of seeking court action when there was a strike over an issue arguably within the agreed-upon clause, now the union must bear that burden as a result of its continued transgressions. Before this burden of seeking court relief would fall to the union, however, the court would have already found the union not only to be in violation of its own agreement but likely willfully to remain so. To the extent that a prospective injunction enjoined future strikes over specific types of disputes, only to that same extent would the burden of seeking court action shift to the union.

D. The Need for an Order Compelling the Employer to Arbitrate

The same considerations of fairness, however, that serve to justify the shift of the burden of going to court also require that the union be adequately protected against employer abuse of the prospective injunction. Although an order compelling the employer to arbitrate as a condition of the injunction is clearly mandated by *Boys Markets*,199 it is apparent that a number of injunctions supposedly following *Boys Markets* do not contain an explicit order to arbitrate.200 While such laxity may be excusable in some situations,201 where a prospective injunction is issued it is imperative that the employer also be ordered to arbitrate.202 Were such an order not issued, the employer would have little incentive to proceed expeditiously with the arbitration process. He would have his injunction against the union, and should the union become frustrated with his delaying of any dispute’s arbitration, he would have the power of contempt on

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197 See note 195, supra.
198 The statement is a corollary to the “presumption of arbitrability,” for the application of which see Gateway Coal Co. v. UMW, 414 U.S. 368 (1974).
201 See United States Steel Corp. v. UMW, 534 F.2d 1063, 1078 (3d Cir. 1976).
202 Id.
his side to keep the union working regardless of his unwillingness to arbitrate. The simultaneous issuance of an order against the employer that required him to arbitrate as a condition of the injunction would, however, give the union the protection against abuse that it has a right to expect.

If the issuance of any prospective injunction were routinely coupled with such an order against the employer, it would have at least three salutary effects: 1) Employers would not lightly seek such an extraordinary prospective injunction, since if they failed to abide by the concomitant arbitration order, not only would the injunction dissolve but they would lie open to possible contempt liability themselves. Thus, prospective injunctions would likely be sought only in those situations where they are most appropriate, i.e., where no other remedy will vindicate the employer's rights. 2) Unions prospectively enjoined would have both a safety valve and a defense against employer abuse. Even though under an injunction not to strike over arbitrable issues, the union would not lose bargaining power since both sides would be equally under the arbitration obligation by the same pain of contempt. If faced with an attempt by an employer to utilize the contempt power in lieu of arbitration, the union could defend by asserting that a necessary condition of the injunction had failed. 3) Courts would have more immediate and powerful leverage against both sides to insure that the purpose of the whole process—the resolution of disputes through the agreed-upon arbitration procedure—would indeed be realized.

VI. Conclusion

While it is desirable that federal law be uniformly applied throughout the land, in the context of labor disputes a uniform position is especially important. The following quote from the Supreme Court's Lucas Flour opinion may be applied, at least by analogy, to the current situation existing among the forums governed by the conflicting courts of appeals:

More important, the subject matter of § 301(a) "is peculiarly one that calls for uniform law." . . . Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. . . . Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.203

Clearly a result such as this would itself be contrary to the avowed national policy favoring arbitration of labor disputes. Although the Supreme Court later stated that a policy favoring uniformity "could hardly require, as a practical matter, that labor law be administered identically in all courts,"204 it nonetheless specifically excepted injunctions from that statement:

\[203\] 369 U.S. 95, 103-04.
\[204\] 398 U.S. 235, 246.
The injunction, however, is so important a remedial device, particularly in the arbitration context, that its availability or non-availability in various courts will not only produce rampant forum shopping and maneuvering from one court to another but will also greatly frustrate any relative uniformity in the enforcement of arbitration agreements.205

From the review of the history relevant to the question, and from the analysis of the considerations involved, it is apparent that the needed uniform position should be one allowing prospective injunctions if "the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare"206 is to be followed. Insofar as it has been shown above that nothing in Boys Markets, § 9 of the Norris-LaGuardia Act, or Federal Rule of Civil Procedure 65(d) specifically precludes the use of prospective injunctions in labor disputes, the question of their use becomes one of policy. Since the relevant policy considerations have clearly been shown to favor vindication of the arbitral process over economic warfare, prospective injunctions should be used to achieve this end when no other remedy will be successful. To insure that proper use is made of this admittedly extraordinary remedial device, a concomitant order against the employer requiring him to arbitrate in good faith will cause employers not to seek this remedy lightly, will provide a safeguard and a defense for the union, and will allow courts more leverage to see that the end result of all this is, indeed, a furtherance of the use of mutually agreed-upon arbitration procedures to resolve labor disputes peacefully. Such an outcome, if realized, would redound to the long-range best interests of both labor and management to achieve stable employment relationships.

The use of prospective injunctions, however, must be limited to those situations in which the court affirmatively finds that there is an abusive pattern of strikes over arbitrable disputes, that regular injunctions will not provide adequate relief, and that no other remedy is appropriate. While a national policy favoring enforcement of binding arbitration agreements may in some circumstances mandate their use, prospective injunctions are too volatile a remedy and too drastic a response to be lightly invoked. Their use places a heavy burden on the issuing court to monitor their effect and to guard against their abuse. Lest it be forced to heap contempt penalties upon frustrated parties, the court must stand ready to provide declaratory relief swiftly and fairly in borderline cases. Because of the adverse effects on the union's right to strike over non-arbitrable issues—a right which even the availability of declaratory relief cannot wholly protect—the court must not rely too heavily on the possibility of declaratory relief. In particular, it must not be tempted to substitute declaratory relief for the utmost care in framing the injunctive order to include only those abuses found to be continuing.

Thus, the issues concerning the use of prospective injunctions in federal labor law are significant ones. Significant too is the unsettled state of federal law in this area. Yet, as the Third Circuit has said, "Only the Supreme Court is in

205 Id.  
position to resolve this conflict."\textsuperscript{207} Until it does so,\textsuperscript{208} the possibility that a single contract provision will entail different obligations depending on the court applying the law will "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."\textsuperscript{209} In order to insure both productive negotiations and peaceful administration, the "prayer for relief" voiced by the Third Circuit\textsuperscript{210} should be expeditiously, and affirmatively, answered.

\textit{Michael James Wahoske}

\textsuperscript{207} 534 F.2d 1063, 1083.
\textsuperscript{208} The fact that the Supreme Court denied certiorari to the appeal from the Fifth Circuit case, 96 S.Ct. 3221 (1976), should not be taken to imply the ultimate decision it will reach. On the question as to whether a \textit{Boys Markets} injunction should issue against sympathy strikes, the Court thrice denied certiorari in such cases (see Note, \textit{Boys Markets Injunctions in Sympathy Strike Situations: A Return to Pre-Norris-LaGuardia Days?}, 6 Loy. Cin. L.J. 644, 677 (1975),) before finally granting certiorari and deciding the issue in Buffalo Forge Co. v. Steelworkers Union, 96 S. Ct. 3141 (1976).
\textsuperscript{209} Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 103 (1962).
\textsuperscript{210} See note 207, supra.
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