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The Labor Injunction and The Refusal to Cross Another Union’s Picket Line

Roger I. Abrams*

Courts have recently confronted the issue of whether the no-strike injunction made available by the Supreme Court in Boys Markets should apply to refusals by members of a nonstriking union to cross the picket line of a legitimately striking union. Some jurisdictions have distinguished the refusal-to-cross from Boys Markets on the absence of an underlying contractual dispute. Others have held that the refusal was a breach of the bargaining agreement’s no-strike clause and therefore enjoinable. The author suggests that neither approach is consistent with the equitable underpinnings of Boys Markets. He proposes an alternative which would assure representation of the important public and private interests involved in the dispute.

I. INTRODUCTION

THE SUPREME COURT’S DECISION in Boys Markets, Inc. v. Retail Clerks Local 7701 has regenerated the dormant judicial adventure of injunctive intervention into labor disputes. Among the most troubling post-Boys Markets developments has been the simplistic application of that case to the refusal of members of one union, bound by a no-strike pledge, to cross the legal picket line of another union. The federal courts have not enunciated a fully satisfactory rationale for granting or refusing injunctive relief in such a situation. Rather, they have resorted to a monocular application of the Boys Markets doctrine, inconsistent with the broad interest-balancing mandated both by general equitable considerations and pragmatic labor policy. Because of the recurring nature of the problem and its importance in the industrial setting, the issue deserves careful analysis, with an emphasis on seeking a judicial strategy that would promote multi-faceted national labor goals. Before the Supreme Court addresses the issue,2 a full discussion is warranted.

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2. The Court has recently granted certiorari to a Second Circuit decision rais-
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All courts which have dealt with the refusal-to-cross situation have agreed that the judicial response is controlled by *Boys Markets*. However, they have not agreed what *Boys Markets* mandates for this situation, nor have they demonstrated a clear understanding of what that case sought to accomplish. The Supreme Court in *Boys Markets* was trying to work its way out of a self-created dilemma. In 1962, in *Sinclair Refining Co. v. Atkinson*, the Court, finding in the barren phrases of section 301(a) of the Labor-Management Relations Act no implied congressional intent to repeal partially the Norris-LaGuardia Act, ruled that federal courts could not enjoin strikes carried out in violation of contractual no-strike promises. Subsequently in *Avco Corp. v. Aero Lodge 735*, the Court allowed

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removal to federal court of state court suits brought to obtain specific enforcement of contractual no-strike clauses. The Court reserved the question whether injunctions available in a state forum would have to be dissolved upon removal and, therefore, whether Sinclair would have to be reconsidered. But it was inevitable that the problem would have to be confronted sometime.\footnote{Three concurring Justices in \textit{Avco} expressly stated that \textit{Sinclair Refining} should be reconsidered "upon an appropriate future occasion." \textit{Id.} at 562 (Stewart, J., concurring).} That sometime was \textit{Boys Markets}.

If Sinclair was still good law, reasoned the \textit{Boys Markets} Court, then an existing state remedy, the anti-strike injunction,\footnote{See, \textit{e.g.}, \textit{McCarroll v. Los Angeles Council of Carpenters}, 49 Cal. 2d 45, 315 P.2d 322 (1957), \textit{cert. denied}, 355 U.S. 932 (1958).} would be displaced. Contrary to "clearly expressed congressional policy," the pre-existing jurisdiction of state courts would be "encroached upon" rather than "supplemented,"\footnote{398 U.S. at 245.} and federal removal jurisdiction transmuted into a tool for rampant forum-shopping threatening to "effect a wholesale dislocation in the allocation of judicial business between the state and federal courts."\footnote{\textit{Id.} at 247.} The Court determined to overrule Sinclair, proffering various reasons. First of all, the Court posited "devastating implications for the enforceability of arbitration agreements and their accompanying no-strike obligations if equitable remedies were not available":\footnote{\textit{Id.} at 248.} “Any incentive for employers to enter into [arbitration clauses] is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated.”\footnote{\textit{Id.} at 248. \textit{But see} note 146 infra.} Damages were “no substitute for an immediate halt to an illegal strike” and would only aggravate the labor dispute and delay its early resolution.\footnote{398 U.S. at 248. It might be suggested that by this reference the Court was determining that damages are always an inadequate remedy. \textit{See, \textit{e.g.}, \textit{Contractors Ass'n v. Highway Workers Local 158}, 86 L.R.R.M. 2861, 2863 (M.D. Pa. 1974).} The Court’s later statement that injunctive relief would \textit{not} be granted in every instance, 398 U.S. at 254, and its direction to trial courts to determine whether equitable considerations mandate relief indicate that the Court’s earlier reference was puffed argument.} Moreover, the Court argued, even if employers would accept the arbitration clause “quo” without a specifically enforceable no-strike clause “quid,” the “effectiveness” of arbitration agreements would be “greatly reduced” without injunctive relief:

\begin{quote}
Indeed, the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of in-
\end{quote}
dustrial disputes *without resort to* strikes, lock-outs, or other self-help measures. This basic purpose is obviously largely undercut if there is no immediate, effective remedy for those tactics that arbitration is designed to obviate.\(^5\)

Addressing the seemingly absolute terms of the Norris-LaGuardia Act ("no court of the United States . . . shall have jurisdiction to issue any . . . injunction . . ."\(^6\)), the Court found "harmonizing" and "accommodation" to be in order. Since pre-Norris-LaGuardia labor conditions and attendant abuses by the federal judiciary no longer presented a problem to a mature labor system and since settlement of labor disputes through arbitration had become a central component of federal labor policy, a "narrow" exception to the Norris-LaGuardia Act was appropriate.\(^7\) An injunction could issue against a striking union if 1) the collective bargaining agreement contained a mandatory arbitration provision; 2) the strike were over a dispute which the parties had promised to resolve through arbitration; 3) the normal equitable prerequisites for an injunction (e.g., threatened irreparable injury, more harm resulting from denial than issuance of the injunction, absence of an adequate remedy at law) were satisfied.\(^8\)

For the most part, courts have had little difficulty applying the *Boys Markets* standard to requests for injunctive relief against strikes called to pressure employer concessions on disputes which parties had agreed would be resolved through the "therapeutic"\(^9\) "regime of peaceful settlement."\(^10\) The reported decisions indicate that specific enforcement of no-strike and arbitration promises is

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15. *Id.* at 249 (emphasis added).
17. 398 U.S. at 253.
willingly granted. One *Boys Markets* interstice, the application of the *Steelworkers Trilogy* presumption of arbitrability to the *Boys Markets* situation, caused some judicial inconsistency. But the Supreme Court definitively responded in *Gateway Coal Co. v. United Mine Workers* by mandating application of the presumption to *Boys Markets* situations.

II. THE JUDICIAL TRACK-RECORD

The other major decisional conflict concerning the application of *Boys Markets* stems from the situation at hand, the failure or refusal of members of one union to cross the picket line of another union despite a contractual promise not to strike. In most reported instances, the union has directed or at least ratified the refusal-to-


Whether the injunctive relief has necessarily resulted in the projected "regime of peaceful settlement" is another question, however. There is some evidence to indicate that the injunction has created more dissension and discord than it has obviated, particularly in certain industries such as coal-mining. *Cf.* N.Y. Times, Sept. 9, 1975, at 38, col. 2. A definitive study of the impact of the *Boys Markets* injunction on the labor relations scene has yet to be written.


23. *Compare* *Southwestern Bell Tel. Co. v. Communications Workers Local 6222*, 454 F.2d 1336 (5th Cir. 1971), with *Standard Food Prods. Corp. v. Brandenburg*, 436 F.2d 964 (2d Cir. 1970).


25. At the same time the Court, directing that a strike over a safety dispute be enjoined, implied a no-strike promise from the arbitration procedure, notwithstanding provisions in the agreement which expressly "rescinded, cancelled, abrogated and made null and void" all prior no-strike promises (*id.* at 384 n.15), and which gave a
cross. Although broadly analogous to the quintessential *Boys Markets* situation, the refusal-to-cross issue is much more complex. Both private and public interests are involved which are not found in the standard *Boys Markets* pattern. These new interests suggest an altered judicial strategy. First, however, it is profitable to review the record of the federal courts in refusal-to-cross cases since *Boys Markets*. The following hypothetical fact pattern is typical of actual situations confronted by courts asked to respond to an employer's plea for an injunction compelling non-striking employees to cross another union's picket line:

The Shipbuilding Company [hereinafter "the Company"] operates extensive shipbuilding facilities in New City and Old Town. Essentially the same products (viz., ships) are manufactured at each yard. Recently, the Company won a defense contract after highly competitive bidding. Time is of the essence in the performance of this contract, and the Company stands to lose both a large liquidated damages award and a substantial amount of future business if it is unable to complete the project on time.

At the New City yard, the Company employs 1000 shipbuilders, represented by Shipbuilding Workers, Local 10. The Company has entered into a series of collective bargaining agreements with Local 10 over the past twenty years. The present agreement with Local 10, which does not expire for one year, contains a no-strike provision: "During the term of this Agreement, there shall be no strikes, work stoppages, slowdowns, or any other interferences with or impeding of work." In addition, it provides for mandatory arbitration of disputes over the application or interpretation of the terms of the agreement.

At the Company's Old Town facility, 100 miles to the south, the 2000 production employees are represented by Shipbuilding Workers, Local 50. The contract between the Company and Local 50 has expired. Recently, Local 50 voted to strike the Old Town facility and has established picket lines at that yard. In order to publicize its strike and apply further economic pressure on the Company to reach an agreement favorable to its members, Local 50 extended its picket line to the New City yard. Members of Local 10, under the guidance of their union officers, refused to cross Local 50's peaceful picket line. The Company formally demanded that the New City local cease the work stoppage, on grounds that the stoppage violated the no-strike pledge, and offered to arbitrate immediately any dispute concerning the parties' contractual obligations.

union mine safety committee the unreviewable right to remove all mine workers from an unsafe area. *Id.* at 383.
No employees crossed the line. Alleging that the union was striking in violation of a valid no-strike provision in a contract providing for mandatory arbitration of disputes and that continuation of the strike would cause irreparable injury, the Company filed suit in federal district court seeking *Boys Markets* injunctive relief ordering arbitration and compelling Local 10 employees to end their stoppage and report to work.26

If the Company were to bring its suit in the Fifth Circuit,27 it likely would leave the courthouse empty-handed. In *Amstar Corp. v. Amalgamated Meat Cutters*,28 the first of the circuit court decisions on point,29 the employer sought specific enforcement of the union's no-strike pledge. It argued that the legality of the refusal-to-cross depended on a disputed interpretation of the no-strike clause, which in turn was reserved for exclusive resolution under the provisions of the contract's arbitration clause. But the court refused to grant the injunction. Since the refusal-to-cross itself "precipitated the dispute," the stoppage of work was not "over" any underlying dispute.30 If it permitted the very strike to be enjoined to be bootstrapped into an arbitrable issue sufficient, under *Boys Markets*, to support a federal court injunction, the court feared it would undermine the "vitality" of federal anti-injunction legislation since the same argument could be made in favor of enjoining each and every strike during the term of an agreement.31 The facts in *Amstar*

26. Note that, assuming common control of labor relations at the two facilities by the Company, Local 50's picketing at New Town is not secondary picketing, obviating possible resort to an injunction under LMRA sections 8(b)(4)(B) and 10(I). The hypothetical describes a situation involving two plants and one union, albeit with different locals. Apart from the question of common situs picketing, there is no particular reason why the hypothetical could not have involved a single plant with two unions. See discussion at note 42 infra.

27. For example, the Company could be the Alabama Dry Dock and Shipbuilding Co., with production and maintenance workers represented by Local 18 of the Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO. The collective bargaining agreement effective until March 6, 1976, contains a no-strike promise prohibiting, *inter alia*, "suspension of work" and a mandatory grievance and arbitration procedure covering disputes "as to the interpretation of, the application of, or the compliance with the provisions of this Agreement." *Alabama Dry Dock and Shipbuilding Co. and Shipbuilding Workers Local 18, Labor Agreement, art. XXIV, § 1 and art. XXI, § 1* (March 2, 1973).

28. 468 F.2d 1372 (5th Cir. 1972).

29. There were a few district court decisions prior to *Amstar* which refused to grant injunctive relief in the refusal-to-cross situation. See *General Cable Corp. v. IBEW Local 1644, 331 F. Supp. 478 (D. Md. 1971); Ourisman Chevrolet Co. v. Automotive Lodge No. 1486, 77 L.R.R.M. 2084 (D.D.C. 1971); Simplex Wire & Cable Co. v. IBEW Local 2208, 314 F. Supp. 885 (D.N.H. 1970).

30. 468 F.2d at 1373.

31. *Id.* The Court's concern with the universality of strike injunctions, if the refusal-to-cross were enjoined, is unfounded. Unions may strike over important issues or unimportant issues, but rarely do they strike over no issues at all. Strikes
differ in no relevant respect from the facts in the hypothetical, and thus under the Fifth Circuit's analysis, the Company's claim would fail.

Were the Company to bring its suit in the Fourth Circuit, its prospects for obtaining relief would be improved greatly. In *Monongahela Power Co. v. IBEW Local 2332,* the bargaining agreement between the parties provided that all "claimed violations" of any of the express provisions of the agreement constituted grievances to be settled by resorting to the specified arbitration procedure. The agreement contained an express prohibition of any "strike, work stoppage, slowdown, or any other interference with or impeding of work." The Fourth Circuit, viewing the union's refusal-to-cross another union's strike line as falling clearly within the "extremely broad and encompassing language" of the agreement, held that the work stoppage was arbitrable and therefore a *Boys Markets* injunction could appropriately issue pending arbitration of the contractual legality of the union's conduct. The Fifth Circuit's fears of unbounded judicial intervention into labor disputes and a concomitant emasculation of the Norris-LaGuardia Act were not even addressed by the Court, nor was the import of the absence of a pre-strike dispute considered. As discussed previously, the latter was the distinguishing factor from *Boys Markets* which had precipitated the Fifth Circuit's apprehensions.

32. For example, the Company could be the Maryland Shipbuilding & Drydock Co., with production and maintenance workers represented by Local 31 of the International Union of Marine and Shipbuilding Workers of America, AFL-CIO. The collective bargaining agreement effective until November 13, 1975, contains a no-strike promise prohibiting "suspension of work," and an apparently open-ended grievance and arbitration procedure covering "complaints, disputes, or grievances." Maryland Shipbuilding & Drydock Co. and Shipbuilding Workers Local 31, Labor Agreement Arts. XXI, VI, VII (Nov. 13, 1972).

33. 484 F.2d 1209 (4th Cir. 1973).

34. *Id.* at 1210.

35. The *Monongahela* court failed even to cite Amstar, which at the time was the only federal appellate decision on point.

36. The Fourth Circuit has reaffirmed the *Monongahela* approach. *See Armco
Upon analysis, the *Amstar* and *Monongahela* decisions can be seen as dividing on the implication of the single word "over" in the guideposts specified in *Boys Markets*: "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."

Based on the premise that the refusal-to-cross the picket line was not "over" any matter already disputed by the parties, *Boys Markets* was held in *Amstar* to be inapposite and therefore the arbitrability issue was not raised. The *Monongahela* court, ignoring the import, if any, of the "over a grievance" language and the absence of a pre-existing dispute, found it sufficient that the strike's legality was an arbitrable issue, therefore justifying a *Boys Markets* injunction since the claimed violation of the agreement was "a grievance which both parties are contractually bound to arbitrate."

Thus, by the end of 1973, the lines were drawn. The *Monongahela* court had stressed arbitration as the industrial salve even at the expense of doing "violence to a spontaneous textual reading" \(^{38}\) of *Boys Markets*; the *Amstar* court, apprehensive of judicial abrogation of the right to strike, had distinguished *Boys Markets* and refused to act at all.\(^{39}\) Confronted with these disparate legal interpretations and a clear choice between outcomes, the circuits have chosen sides.

The Third Circuit, in *NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Local 926*,\(^{40}\) joined the *Monongahela* side and issued an injunction in a refusal-to-cross situation where there was no pre-existing contractual dispute between the parties. The contract contained a "protection of rights clause"\(^{41}\) authorizing a concerted refusal to cross if the picket line was primary, but the employer

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38. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 186 (1941).

39. As suggested below, at the very least the court should have considered the alternative of directing arbitration while refusing to enjoin the refusal-to-cross. *See* text accompanying notes 66-69, *infra*.


41. The clause provided: "It shall not be a violation of this Agreement . . . in the event an employee refuses to enter upon any property involved in a primary labor dispute or refuses to go through or work behind any primary picket lines . . . at the Employer's [NAPA Pittsburgh's] place or places of business." *Id.* at 322 (brackets in original).
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contested the status of the picket line (i.e., whether it was primary or secondary\textsuperscript{42}) and the court viewed this controversy as an arbitrable matter sufficient to support the Boys Markets injunction. Amstar and its district court predecessors\textsuperscript{43} were distinguished on the basis that they did not involve bargaining agreements containing such a protection of rights clause. This curious treatment of the clause—i.e., as a restriction rather than an enlargement of permissible union activity—was roundly criticized by the dissent.\textsuperscript{44}

Indeed, the NAPA Pittsburgh decision is noteworthy for Judge Hunter's efforts in dissent to devise a rationale for dealing with the refusal-to-cross situation. Judge Hunter reasoned that the typical refusal-to-cross situation does not involve a union attempt to circumvent its arbitration undertaking by proceeding with self-help measures which pressure an employer to forego arbitration and accede to union demands on an otherwise arbitrable issue. Based on the premise that the pro-arbitration policy underpinnings of the Boys Markets decision are inapposite when the work stoppage is not called in derogation of the arbitration promise, Judge Hunter concluded that injunctive relief should be denied.\textsuperscript{45}

The Third Circuit has since elaborated on its criteria for issuing injunctions in the refusal-to-cross situation:

\begin{quote}
If the contract gives the union and the employees the right to gripe and arbitrate the given dispute, that remedy must
\end{quote}

\textsuperscript{42} The picketing union represented employees at another branch of the plaintiff company's operations in another city. It seems clear that, assuming there was common control, the picket line would be primary as directed at the same primary employer. \textit{See, e.g.}, Miami Pressmen's Local 46 v. NLRB, 322 F.2d 405 (D.C. Cir. 1963). Moreover, no unfair labor charge was filed with the Labor Board seeking injunctive curtailment of the line as violative of section 8(b)(4), which fact should have barred the company's action in the first instance. \textit{See note 57 infra}.

\textsuperscript{43} \textit{See note 29 supra}.

\textsuperscript{44} The dissent viewed the protection of rights clause as enlarging the union's right to strike since it was written as an exception to the contract's general no-strike provision. 502 F.2d at 331 n.14.

\textsuperscript{45} \textit{Id.} at 333. The dissent also raises the objection that granting an injunction in the refusal-to-cross situation would undermine the federal policy favoring arbitration since an employer, securely holding an injunction against his employees' work stoppage has "every incentive to avoid and obstruct arbitration by every means" available. \textit{Id.} at 327. Only in the subsequent arbitration of the issue does he risk loss on the merits and a renewal of the strike. \textit{Id. See Boys Markets: Developments in the Third Circuit, 48 Temp. L.Q. 281, 309 (1975).} Supporting this theory, however, the dissent claims that district courts cannot mitigate this delay because the contract procedures must be allowed to run their prescribed course. To the contrary, a district court, in the exercise of its equitable powers, can order expedited arbitration, even eliminating a multi-step grievance procedure, perhaps by establishing an express timetable. \textit{See, e.g.}, Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 442 F.2d 246 (8th Cir. 1970), cert. denied, 404 U.S. 871 (1971); Northwest Airlines, Inc. v. Machinists Lodge 143, 442 F.2d 244 (8th Cir. 1970). Alternatively, the court could limit the duration of its injunction as a disincentive to employer foot-dragging.
be pursued in preference to a work stoppage. Thus the
initial inquiry should not be whether the employer is en-
titled to an injunction, but rather, whether the underlying
dispute is one which the union and the employees could
grieve and arbitrate. 46

Judge Adams dissented, rueing the fact that "by a process of at-
trition, the salutary rule established after long and sometimes bitter
struggle by the Norris-LaGuardia Act will be imperceptibly chipped
away until it has lost a substantial portion of its vitality." 47

The Seventh Circuit, disclaiming any intention to align itself with
either camp, first found the Monongahela approach more appealing
in Inland Steel Co. v. Local 1545, UMW, 48 but switched prefer-
ences eight months later in Hyster Co. v. Independent Machine
Association. 49 In Inland Steel, the court asserted that the "principal
circumstance" required to support a Boys Markets injunction "is
that the work stoppage or strike must have been generated over an
arbitrable dispute," 50 but then ignored this requirement in dealing
with the case at hand. It found the refusal-to-cross to be an arbi-
trable matter and thus "there exists an obligation not to strike over
that dispute"; injunctive relief was in order. 51 Judge Fairchild dis-
sented that Amstar accorded more with the Boys Markets principle
of "narrowly circumscribed . . . accommodation" and therefore
should be followed. 52

When it next addressed the refusal-to-cross injunction issue in
Hyster, the court distinguished Inland Steel on the basis of the
breadth of the covenant to arbitrate. The clause in Inland Steel
had covered "differences . . . about matters not specifically men-
tioned in this agreement" and "any local trouble of any kind," 53
while in Hyster the clause was restricted to "[a]ll differences, dis-
putes, or controversies which arise between the Union, the Company
or any employee covered by this Agreement and the Company. 54
Under the latter clause, the court held, a refusal-to-cross was not

46. Island Creek Coal Co. v. Local 998, UMW, 507 F.2d 650, 652 (3d Cir.
47. Id. at 654.
48. 505 F.2d 293 (7th Cir. 1974).
49. 519 F.2d 89 (7th Cir. 1975), petition for cert. filed sub nom. Hyster v. Em-
ployees Ass'n, 44 U.S.L.W. 3230 (U.S. Oct. 6, 1975) (No. 75-524).
50. 502 F.2d at 299 (emphasis added).
51. Id.
52. The court also considered civil contempt citations against the unions for
violating the district court's injunctive orders requiring the employees to cross the
picket line. The fines levied were substantial; in one instance a union had originally
been fined $10,000 for each day of the violation. Id. at 296.
53. Id. at 297 n.5.
54. 519 F.2d at 91.
subject to compulsory arbitration, thus rendering Boys Markets inapposite. Since the Supreme Court had intended to create only a "very limited exception" to the Norris-LaGuardia Act, and since the dispute was not over a grievance the parties were bound to arbitrate pursuant to Amstar, injunctive relief was denied.55

On May 1, 1975, the Second Circuit, in Buffalo Forge Co. v. United Steelworkers of America,56 aligned itself with Amstar and denied relief in a refusal-to-cross situation because of the "virtual obliteration" of the policy of the Norris-LaGuardia Act which would result if injunctive relief were available where the strike was "not an attempt to circumvent arbitration machinery."57 Relying on the "narrowness" of the Boys Markets holding, the Court held that the "over a grievance" language in the controlling text mandated non-intervention.58

Most recently, the Eighth and Sixth Circuits have joined in the fray —on opposite sides. The Eighth Circuit, in Valmac Industries, Inc. v. Food Handlers Local 42559 and Associated General Contractors v. Laborers Local 563,60 decided the same day, aligned itself with the Monongahela court and upheld injunctions ordering non-striking workers to cross picket lines.61 Valmac is particularly noteworthy because the company, having obtained the desired injunction, then refused to arbitrate the issue of the union's failure to cross. It contended that the granting of the injunction "decided" the issue and made further proceedings unnecessary. As the court correctly pointed out, Boys Markets injunctions are themselves conditioned upon compliance with an order to arbitrate.62 But the company's stance clearly indicates that the granting of the injunction may not have the totally nonpartisan effect which Boys Markets contemplates.63

The Sixth Circuit, reviewing Plain Dealer Publishing Co. v. Typographical Union No. 53,64 upheld the district court's refusal to grant an injunction in a per curiam decision following the Second

55. Id. at 92.
56. 517 F.2d 1207 (2d Cir. 1975), cert. granted, 44 U.S.L.W. 3238 (Oct. 20, 1975) (No. 75-339).
57. Id. at 1211.
58. Id. at 1210.
60. 519 F.2d 269 (8th Cir. 1975).
62. Id.
63. See text accompanying notes 112-18 infra.
64. 88 L.R.R.M. 2155 (N.D. Ohio 1974).
Circuit's reasoning in *Buffalo Forge*. Judge Green of the Northern District of Ohio denied the request of the Cleveland Plain Dealer for injunctive relief against four printing craft unions who had refused to cross the picket line of the Newspaper Guild. Recognizing the "uncertain state of the law on the issue before the Court," Judge Green concluded that *Amstar* represented "the sounder view," consistent with the Supreme Court's narrow holding in *Boys Markets*. In the alternative, the court recognized the "potential" for violence in crossing the picket line and, relying on 29 U.S.C. section 143, concluded that those employees refusing to cross, who had at least tried to cross, were *not* on strike because of the "abnormally dangerous conditions for work," *i.e.*, going to work through the Guild's line. This conclusion is troubling because the county court of common pleas, on the first day of the strike and prior to the federal court hearing, had enjoined all mass picketing and violence on the picket line. It might be suggested that as a matter of comity a federal court should not ignore the existence of a no-violence injunction in ruling on assertions of violence on the line.

67. Id. at 1227.
68. The statute provides in relevant part: "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter." The legislative history is mute as to what Congress intended by this savings provision, but the Supreme Court in *Gateway Coal* fleshed out the statutory bones by requiring "ascertainable, objective evidence supporting [the] conclusion that an abnormally dangerous condition for work exists." 414 U.S. at 387. The safety hazard at issue there was an unsafe condition in a mine caused by supervisory misfeasance. Whether a posited unsafe condition *outside* the workplace falls within the statutory reference is a much more difficult question.
69. 520 F.2d at 1228.
70. Furthermore, Judge Green, while proclaiming allegiance to the *Gateway Coal* standard of "ascertainable, objective evidence," 414 U.S. at 385, relied upon the testimony of employees that "they fully believed" and "honestly believed" danger would ensue from their crossing the line. 520 F.2d at 1229. While, as the Supreme Court has stated in another context, "[f]ear may indeed prevent some from crossing a picket line," *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 306 (1974), the district court's reliance on subjective fears and not objective conditions appears in error. *But see* *Jones & Laughlin Steel Corp. v. United Mine Workers*, 89 L.R.R.M. 3118 (3d Cir. July 24, 1975), where the *Gateway Coal* standard is eased in the presence of a contractual provision authorizing cessation of work in an area where an "imminent danger" exists.
71. Plain Dealer Publishing Co. v. Typographical Union No. 53, 90 L.R.R.M.
Other district courts have shown a similar affinity for the *Amstar* approach. The Southern District of Texas, in *Carnation Co. v. Teamsters Local 949*, followed the controlling Fifth Circuit *Amstar* approach in a suit brought not to compel employees to cross the picket line, but rather to enjoin their union leadership from encouraging them to honor the line. This clever twist in employer strategy, however, did not affect the outcome. Acknowledging that although the refusal to cross “may constitute an issue subject to arbitration, it is not the focus of the . . . strike and thus does not fit within the narrow exception to Norris-LaGuardia established in *Boys Markets*."

Finally, the Western District of Washington, in *Stokely-Van Camp, Inc. v. Thacker*, followed both schools of thought in ruling on refusals-to-cross involving separate unions and separate bargaining agreements. One union, Cannery Warehousemen Local 788, had bargained for a “protection-of-rights” clause which broadly insulated from contractual censure employee respect of a primary picket line sanctioned by the Local. The parties disputed whether the stranger picket line was primary or secondary and the court, despite treating this dispute as arbitrable, found *Boys Markets* injunctive relief inappropriate. The "work stoppage is not designed to force settlement of an arbitrable issue before [the] Employer can present its side to an arbitrator. The work stoppage, therefore, is not the result of an arbitrable dispute . . . ." The *Amstar* line of cases was cited as controlling. But the court then proceeded to find that “Local 788 never agreed to cross all picket lines pending arbitration,” and since the refusal-to-cross constituted "arguably legal union activity," an injunction would "impose upon the union an additional obligation not contracted for, one that would undermine the union's contractual position." On the other hand, a second union, Teamsters Local 411, had

71. One matter not raised on appeal was the failure of Judge Green to order the parties to arbitration as distinguished from his refusal to grant an injunction ordering nonpicketing union members to cross the line. Prior to *Boys Markets*, the Supreme Court had held that a federal district court could specifically enforce an arbitration promise at the behest of parties to the contract. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). There is no reason why this practice should be disturbed by *Boys Markets*. See text accompanying notes 75-78 infra.

73. *Id.* at 3013.
75. *Id.* at 718.
76. *Id.*
77. *Id.* at 718-19. The court here relied upon the analysis of *NAPA Pittsburgh* in Note, 88 HARV. L. REV. 463, 467 (1975).
bargained for a more limited "protection-of-rights" clause in its collective agreement. This provision protected refusals-to-cross only if the picket line was one established by employees of the company's Burlington facility. Since the picketers in the case at bar were admittedly strangers to the plant, the court reasoned that compelling Local 411 to cross the line would not impose an additional noncontractual obligation. Although the court recognized that the refusal-to-cross was not "over" an arbitrable matter, it found that "[t]he illegality of Local 411's actions under the . . . agreement is the overriding factor . . . that brings [this part of the case] within the scope of Boys Markets."78 Island Creek Coal Co. v. Local 998, UMW,79 the most recent of the Monongahela line of cases, was cited as precedent.

Local 411 also represented employees at the company's Mt. Vernon facility, but there was conflicting evidence whether the newly negotiated agreement had been executed by the parties. Since there was no "conclusive showing of the existence of an effective collective bargaining agreement," no Boys Markets injunction could issue.80 The Stokely-Van Camp smorgasbord indicates that a reasoned analysis of the problem is in order.81

III. A Behavioral Perspective of Boys Markets

The judicial "track record" demonstrates a clear conflict among the circuits.82 Although the courts have had adequate opportunity, judicial adherents of neither school have fully thought through the issues and their practical implications to formulate an appropriate judicial strategy. Instead, both schools frequently have demonstrated a willingness "to sacrifice good sense to a syllogism."83

78. 394 F. Supp. at 720. It is, of course, not clear that Local 411 had agreed to cross all picket lines by virtue of its no-strike clause. That determination, much like the question whether Local 788 had a contractual right not to cross, was for the arbitrator. By enjoining Local 411's action the court may have been imposing the same "additional obligation" which it foresaw relative to Local 788.


80. 394 F. Supp. at 720.

81. One is reminded of Justice Jackson's frustration over the Supreme Court's failure to reach a consistent analysis of the issues in Chenery II: "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" SEC v. Chenery Corp., 332 U.S. 194, 214 (1947) (Jackson, J., dissenting).

82. The score is currently tied at 3 1/2-3 1/2. The Third, Fourth, and Eighth Circuits would probably grant the injunction, and the Second, Fifth, and Sixth Circuits would probably deny it. The Seventh Circuit has indicated it could go either way. See notes 26-56 supra and accompanying text.

83. O. HOLMES, THE COMMON LAW (1881).
order to undertake a more comprehensive evaluation of the problem, in an attempt to reach a conclusion more consistent with national labor policy, it is necessary first to return to the fountainhead of the divergent views, the *Boys Markets* decision. It is instructive to view the Court's opinion from a behavioral perspective: What course of conduct does the Court expect of parties in the industrial circumstance, who are bound by a collective bargaining agreement containing both arbitration and no-strike clauses? What is the preferred behavioral model?

Parties to an agreement to arbitrate are expected to comply with their self-created procedure for resolving conflicts; a dispute arguably falling within the parameters of the arbitration promise should be brought to the arbitral forum for resolution. The subsequent award of the arbitrator, if within the scope of his power, binds the parties. The union must abide by its voluntary promise to adhere to the contractual mechanism, to grieve but not to strike when an arguably arbitrable dispute arises during the term of the agreement. A court, in turn, is empowered to mandate this preferred behavior pursuant to the "wholesome federal policy promoting enforcement of dispute-settlement procedures fashioned by the parties" by enjoining strikes employed to pressure concessions in lieu of arbitration.

84. Whether the Court's expectation is justifiable and reasonable, although an inquiry worthy of pursuit, is beside the immediate question. *Boys Markets* stands as the present law. However, its mere existence does not mean that injunctions should be issued in all sets of circumstances. Assuming *Boys Markets* to be a beneficial accommodation of conflicting policies and interests, the Court must guard against any "expansion" which becomes "the latest manifestation of the destructive potential of any good idea carried out to its logical extreme." Gertz v. Welch, 418 U.S. 323, 399 (1974) (White, J., dissenting).

85. See, e.g., Consolidated Coal Co. v. Local 1993, UMW, 390 F. Supp. 497 (W.D. Pa. 1975). The parties are also expected to pursue pre-arbitration grievance procedures in an attempt to settle the matter through mid-term negotiation. None of the *Boys Markets* decisions has addressed the question whether such grievance steps must precede the arbitration when the court enjoins strike action and sends the parties back to their contract for private resolution. The beneficial role played by grievance steps in the structure of industrial jurisprudence, e.g., administering the contract, screening out minor matters, alerting management to workplace dysfunctions, affording management a mechanism for control over supervision, allowing quick resolution at low cost, does not appear apposite in a situation where union officedom and rank-and-file have felt so strongly about an issue that they have broken the industrial peace. On the other hand, this should not preclude a federal court, in the exercise of its equity powers under *Boys Markets*, from ordering full or truncated use of pre-arbitration procedures, if the court has determined the provision of a forum for preliminary bargaining advisable.

86. Blake Constr. Co. v. Laborers Int'l Union, 511 F.2d 324, 326-27 (D.C. Cir. 1975). Lockouts by employers in lieu of arbitration would appear to be enjoinable under the preferred behavioral model, but no court has faced the issue, presumably
On its face, the refusal of members of one union to cross another union's picket line does not transgress this behavioral model. The union has not abjured arbitration in favor of coercing the employer to accede to its demands concerning a pre-existing dispute since by definition there is no pre-existing dispute. While this facile resolution of the problem has met some judicial and commentative acceptance, it is not totally satisfactory. Why should not the policy initiated in *Boys Markets*—the avoidance of labor strife where peaceful alternatives are mandatory and immediately available—carry over to this conduct as well?

It could be argued with some force that a union which refuses to arbitrate the question of its primary contractual obligation to work has turned its collective back on contract procedures. Admittedly, there may be no pre-existing dispute, but a dispute is "created" by the union's conduct, the employer's demand, and the union's continuation of activity which, arguably, is contractually proscribed. Adherence to a voluntarily assumed "no-strike" clause is undoubtedly favored national policy. Why not enforce the mutual voluntary promises and direct the parties to the bargained-for forum for dispute resolution?

A possible response might be that because the Court, in *Boys Markets*, expressly stated its intent to create only a "narrow" exception to the Norris-La Guardia Act, broad application of that decision would be inconsistent with this modest judicial purpose. But how narrow is "narrow"? The Court has demonstrated in

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because employers ordinarily may act to institute their managerial desires without union acquiescence as long as the statutory requirements of good-faith bargaining are met. *Cf.* Detroit Newspaper Publishers Ass'n v. Typographical Union No. 18, 471 F.2d 872 (6th Cir. 1972), cert. denied, 411 U.S. 967 (1973).

87. Of course, if the union uses the existence of a picket line as a windfall circumstance to pressure the employer over pre-existing issues in dispute, *Boys Markets* is operative; injunctive relief would be warranted if the other requirements of the decision, e.g., irreparable injury, mandatory arbitration of disputes, balance of equities, are met. *See*, e.g., Food Fair Stores, Inc. v. Food Drivers Local 500, 363 F. Supp. 1254, 1256 (E.D. Pa. 1973).


89. *Boys Markets*, of course, dealt with a strike called to pressure the employer concerning an arbitrable matter, thus the reference to "over a grievance" in its call to the district courts. It is not at all frivolous to suggest that limiting the application of the policies supporting that decision in all instances to the precise fact pattern addressed therein "is to shrivel a versatile principle to an illustrative application." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941).
Gateway Coal that an expansive reading of Boys Markets is not merely possible—it might even be anticipated.

IV. THE EQUITY EQUATION

Boys Markets freed the federal courts, in certain situations, from the blanket proscriptions of the Norris-LaGuardia Act. The Court, however, required that "ordinary principles of equity" be followed in granting or refusing injunctive relief. One of those "ordinary principles" involves judicial identification and accommodation of the legitimate, but conflicting, interests and policies affected by the decision. In Boys Markets, the Court recognized the private interests of voluntarism, promise-keeping, and resolution of disputes by private expert mechanisms and the general public policy of labor peace as the supporting structure for its approval of injunctive relief. In the refusal-to-cross situation, however, the Boys Markets equity equation is altered by the infusion of important new interests.

The legally striking and picketing union, though not a party to the court's injunctive proceeding, has a legitimate interest worthy of judicial protection of dissuading persons from dealing with the struck employer. This interest parallels national labor policy. Despite the "maturity" of the national labor relations system, the strike

91. The Court has consistently followed a comprehensive weighing process in dealing with labor issues. For example, in the context of a lockout, the Court has noted the need to balance interests for just adjudication. The right to strike, the Court said, "is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. . . . The ultimate problem is the balancing of the conflicting legitimate interests." NLRB v. Truck Drivers Local 449, 353 U.S. 87, 96 (1957). See also John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) (categorized in NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272, 286 (1972), as an "accommodation between the legislative endorsement of freedom of contract and the judicial preference for peaceful arbitral settlement of labor disputes"); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) ("adjustment" of right of self-organization and right to maintain discipline). "[T]he advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941).

92. If the picket line is illegal, e.g., involving violence or mass picketing, the employer has recourse to various judicial methods for removing the line, or cleansing it of illegalities. This relief may be available either under the National Labor Relations Act or under state statutes or under common law. See, e.g., Squillacote v. Local 248, Meat & Allied Food Workers., 390 F. Supp. 1180 (E.D. Wis. 1975); note 57 supra.


and the picket line remain the generators within the collective bargaining relationship.\textsuperscript{95} Congress demonstrated its recognition of this primary datum in designing "administrative techniques for the peaceful resolution of industrial disputes,"\textsuperscript{96} and in requiring that industrial partners bargain in "good faith" only, without compulsion to make concessions or reach agreement.\textsuperscript{97} Its policy was "to allow the balance of bargaining advantage to be set by economic power realities."\textsuperscript{98} The parties in the industrial circumstance

\textit{[S]}til proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.\textsuperscript{99}

Further, section 13 of the National Labor Relations Act broadly protects the right to strike, "except as specifically provided for" in the statute.\textsuperscript{100}

A union exercising this protected weapon in a lawful manner has an interest in the integrity of its picket line. "Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is . . . contributing to the operations which the strike is endeavoring to halt."\textsuperscript{101} Picketing has been held to be consistent with the public interest\textsuperscript{102} except in those instances where it has been used to achieve undesirable ends.\textsuperscript{103} If the right to picket is

\begin{itemize}
\item \textsuperscript{95} In the end the force which makes management and labor agree is often an awareness of the costs of disagreement. The strike is the motive power which makes collective bargaining operate. Freedom to strike, the threat of a strike and possibly a number of actual strikes are, therefore, indispensable parts of a national labor policy based upon the establishment of wages, hours and other terms and conditions of employment by private collective bargaining.
\item \textsuperscript{96} Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 251 (1970).
\item \textsuperscript{97} National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1970).
\item \textsuperscript{98} NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272, 288 (1972).
\item \textsuperscript{99} NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488-89 (1960).
\item \textsuperscript{100} "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C. § 163 (1970).
\item \textsuperscript{101} United Steelworkers of America v. NLRB, 376 U.S. 492, 499 (1964).
\item \textsuperscript{102} See Garner v. Teamsters Local 776, 346 U.S. 485, 500 (1953): "[I]t is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing."
\item \textsuperscript{103} NLRB v. Fruit Packers Local 760, 377 U.S. 58 (1964).
\end{itemize}
to be protected, its necessary corollary, the right to dissuade others peacefully from crossing the line, is likewise worthy of judicial cognizance. A court compelling employees to cross a legal picket line infringes on this interest; nonstriking employees so enjoined can respect the line only by risking contempt sanctions. A court of equity cannot cavalierly ignore this important national and personal interest.

However, the court must also recognize that while the picketing union certainly has the right to dissuade persons from crossing its line and doing business with the struck employer, an individual not predisposed to honor a union picket line may not be coerced into such a stance. The courts and the NLRB should act to protect the antipodal interest, the individual's right to cross. To pose the counterargument, when the refusing-to-cross union bargained with its employer for benefits in exchange for promises, including a no-strike promise, it may be deemed to have waived its right to be dissuaded from crossing a picket line surrounding the employer's premises. It could be argued that members of the refusing-to-cross union, by voluntary contract, have designated themselves as persons predisposed not to honor the line—persons who have a protected interest in being permitted to cross the line. The employer, as promisee, should be allowed to obtain enforcement of that interest in the judicial forum.

The picketing union's interest in dissuading is certainly no greater than the non-striking union's contractually based interest in crossing. Thus a court order compelling the refusing-to-cross union to abide by its contract, while it infringes upon the picketing union's interest in the integrity of its line, does so consistent with the national policy of enforcing voluntary agreements.

To alter the perspective slightly, it can be said that the right to picket involves a set of legitimate expectations which are worthy of judicial respect. The picketing union may legitimately expect to be allowed to parade peacefully before the primary situs, but not to be permitted to mass picket, to block ingress or egress, or to use

104. Of course, the countervailing interest of restricting labor disputes to the primary situs and to the primary work of an employer proscribes even peaceful secondary pressure by picketing, as evidenced by section 8(b)(4)(B) of the Act. The Act thus conforms to "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." NLRB v. Denver Bldg. Council, 341 U.S. 675, 692 (1951).

105. For a recent discussion of contempt and its limitations in the Boys Markets context, see North American Coal Corp. v. United Mine Workers, 512 F.2d 238 (6th Cir. 1975).
violent means to isolate the primary employer from business intercourse. A picketing union may legitimately expect to be allowed to refuse to cross. Until the scope of the no-strike undertaking but may not expect a free hand in peacefully dissuading employees of independent contractors whose work is "unrelated to the day-to-day operation of the primary employer" from dealing with the primary employer. The no-strike promise, it might then be argued, adds the non-striking union members to the class of individuals which the picketing union has no legitimate expectation of being able to dissuade from crossing. A court should not respect an interest in contract-breaking. The conclusion is, then, that an order compelling the non-strikers to cross the line does not derogate any legitimate expectation involved in the right to strike and picket.

What this counterargument ignores is that it is not at all clear that members of the refusing-to-cross union have agreed not to respect another union's picket line. This is especially true in those situations where the express terms of the agreement protect the right to refuse to cross. Until the scope of the no-strike undertaking is determined by some tribunal on the merits—and the appropriate tribunal would be arbitral because the parties have assigned the initial determination of the scope of that undertaking to the arbitrator—it is not apparent whether the picketing union lacks a predominant interest in or legitimate expectation of dissuading these individuals from crossing its line. A court must be wary of trampling on the picketing union's tools of industrial combat protected by national labor policy.

Moreover, refusing-to-cross employees themselves may have a protected right to make that refusal which would be placed in jeopardy by a court order compelling a traverse of the line. Section 7 of the National Labor Relations Act protects the right of an employee to refuse as a matter of principle to cross a picket line at his employer's place of business, and the Labor Board has con-

107. See, e.g., International Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, National Master Freight Agreement art. 9 (June 28, 1973), reprinted in BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 30:1 (1975). To the contrary, an express clause requiring all employees to cross all picket lines might support a different analysis. None of the refusal-to-cross cases discussed above concerned such a clause. Such a clause may be as difficult for an employer to obtain as the express "no-no-strike" clause suggested by the Court in Gateway Coal as the only way to negate an implied no-strike promise. Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 373 (1974).
sistently upheld that right. This right may of course be waived, but such waiver must be in clear and unmistakable language. No presumption of waiver is applicable in determining whether by the terms of a collective bargaining agreement employees have relinquished a right protected by the Act.

A court must also recognize the practical realities of the economic struggle which has occasioned the litigation. The employer seeking an injunction is engaged in a battle of economic strength with the striking union. He has the right to continue his business if he can. The strikers, on the other hand, have the right to attempt to close that business and thereby pressure the employer to accede to their demands. An obvious pawn in this struggle is a

110. See, e.g., Keller-Crescent Co., 89 L.R.R.M. 1201 (NLRB May 2, 1975). Note also that the Act, in section 8(b)(4), contains an express proviso against making unlawful any "refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike. . . ." 29 U.S.C. § 158(b)(4) (1970). While by its terms the proviso does not apply to the situation at hand, it does indicate a congressional recognition of the historical reluctance on the part of unionized workers to cross picket lines.

111. In Gary Hobart Water Corp. v. NLRB, 511 F.2d 284 (7th Cir. 1975), cert. denied, 44 U.S.L.W. 3263 (Nov. 3, 1975) the Seventh Circuit enforced a Labor Board order finding that an employer who discharged clericals for refusing to cross a picket line had violated, inter alia, section 8(a)(3) of the Act. The clericals had agreed to a broad no-strike promise, but with an arbitration clause limited to differences as to the meaning and application of the provisions of the agreement. Since the contract contained no clause expressly waiving the right of employees to refuse to cross picket lines, the court held that the refusal-to-cross was not an arbitrable grievance. Since the no-strike undertaking was interpreted to be as broad as the arbitration clause, the court further held that the "refusal to dishonor another local union's picket line [was] not . . . subject to the no-strike provisions." Id. at 288. The court distinguished Inland Steel Co. v. Local 1545, UMW, 505 F.2d 293 (7th Cir. 1974), on the basis that the arbitration clause involved there covered "any local trouble of any kind." Gary Hobart, supra at 288. The court's analysis in Gary Hobart is inconsistent with a presumption of arbitrability in disputes involving section 7 rights. The implication is that refusal-to-cross cases might be viewed differently when the issue is a possible waiver of section 7 rights or injunctive relief to compel employees to cross picket lines in possible derogation of those rights.

112. "The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes." Vegelahn v. Guntner, 167 Mass. 92, 106, 44 N.E. 1077, 1080 (1896) (Holmes, J., dissenting).

113. He may, for example, seek to replace the strikers. See NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

non-striking union; if its members cross the line and work, the employer may be able to continue operations notwithstanding the strike. The pawn may, in certain cases, be a queen.

If a court enters this arena at the behest of the employer, it may well determine the outcome of the economic struggle between the employer and the legally striking union. Even if only psychologically (psychology is a potent factor in such economic wars), the court has certainly affected that struggle. "Such a result is wrong, not because we can be sure that the [pickets'] cause is just . . . but because the judicial power has been used prematurely and unfairly to aid one party to a private dispute." Admittedly, the employer is merely asking the court to enforce bargained-for promises in support of a preferred dispute-resolving mechanism. Nevertheless, the employer is motivated primarily by purposes extraneous to the contractual provisions before the court, i.e., the desire to bolster its power position vis-à-vis the striking union. There is nothing censurable about this purpose, but it clearly has little to do with the rationale underlying Boys Markets: the strengthening of the arbitration process as the central national strategy for insuring labor peace. Courts should be wary of taking sides in a peaceful economic struggle by supplying new weapons to one side. The court does not do this in a standard Boys Markets situation, since the injunction affects both parties to the dispute and, in any case, merely specifies the use of a means previously agreed upon for resolving conflicts. But in the refusal-to-cross situation, this mutuality does not exist. The interests of the striking union receive no representation in the court's processes.

V. A QUESTION OF ORIENTATION

In addition to their failure to consider the new interests involved in the refusal-to-cross situation, courts have infrequently recognized

115. This assumes, of course, the availability of workers—new employees or supervisor replacements—to replace the strikers, and the independence of the employer's business from others, such as deliverers of supplies, who are disinclined to cross the union picket line. Conversely, if the other union does not cross, the odds against the employer's ability to continue operations are measurably increased.

The discussion herein is meant to be suggestive, not all-inclusive. If the picketing union represents all production and maintenance employees and the other union represents clericals or technical employees, the latter's crossing or refusing to cross may have only a marginal effect on the employer's ability to continue operations.

116. As Frankfurter and Greene noted 45 years ago, the labor injunction "employs the most powerful resources of the law on one side of a bitter social struggle." F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 81 (1930).


that *Boys Markets* is not simply a template of rules to be laid atop the facts of the refusing-to-cross situation.¹¹⁹ Justice Frankfurter's words are particularly instructive: "No such mechanical answers will avail for the solution of this non-mechanical, complex problem in labor-management relations."¹²⁰ The substantive law to be applied in suits under section 301 must be federal law "fashioned from the policy of our national labor laws" with appropriate "judicial inventiveness."¹²¹ This common law emphasis in federal labor law is disserved by immutable rules and mechanical tests.¹²² Judicial myopia must give way to creative "judicial insights that are born of further experience" under the regime of *Boys Markets*.¹²³

Thus, a court applying "the traditional considerations of equity"¹²⁴ must take care to accommodate these additional legitimate interests and national labor policies found in the refusal-to-cross situation (e.g., the protected interests of the two adversaries and the refusing-to-cross employees, and the national policy of avoiding judicial interference with an economic struggle). This does not necessarily imply that the injunction remedy must be shelved in the judicial closet whenever a complaint bespeaks a labor injunction. To the contrary, once these interests have been clearly identified

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¹¹⁹ One court which did so recognize, in circumstances analogous to *Boys Markets*, is the First Circuit. Chief Judge Frank M. Coffin in Anheuser-Busch, Inc. v. Teamsters Local 633, 511 F.2d 1097 (1st Cir. 1975), cert. denied, 44 U.S.L.W. 3205 (Oct. 6, 1975), faced with what he termed a "tempest... in a very small teapot," found general principles of equity insufficient to support a court injunction to enforce minor employer work rules in the face of employee work stoppage protests. A court must hesitate before taking sides in such an issue, especially where evidence of irreparable injury is not easily divined. See text accompanying notes 68-70 supra.


¹²² Chief Justice Lemuel Shaw's words in 1854 are enlightening:

> It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. . . . [A] consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances.


and evaluated, a court may well determine that injunctive relief which maximizes the competing interests is appropriate.

A. Suggested Procedural Innovations

Turning momentarily from substance to procedure, the court's equitable resolution of the dispute in the refusal-to-cross situation will be facilitated by investigating a possible joinder of the picketing union in the injunction suit. Although typically that union may be aware of the struck employer's legal strategies, no court has required that notice be formally served or that the picketing union be joined as a party.

The legally striking union may qualify as a necessary party under rule 19(a) of the Federal Rules of Civil Procedure. "Rule 19 is a practical rule, focusing on pragmatic considerations rather than the abstract and theoretical."125 As a "person" whose interest in the integrity of its picket line will be seriously and detrimentally affected by a court injunction, the picketing union has "an interest relating to the subject of the action."126 A court order compelling the non-strikers to cross the picketing union's line will have a "direct, immediate impact" on this protected interest.127 The mere fact that the picketing union is not party to the collective bargaining agreement before the court does not disqualify it as a necessary party under rule 19(a).128 It is certainly clear that "the disposition

126. Rule 19(a) provides:

Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

of the action in [its] absence may ... as a practical matter impair or impede [its] ability to protect [its] interest." Once the picketing union is found to be a necessary party, the district court "shall order" it joined, as "insurance that the ultimate goal" of recognizing all interests and policies "is accomplished in the most equitable and least disruptive manner possible."

Even if the picketing union is not considered a necessary party, the court, in the exercise of its general equitable powers, should order the petitioning employer to give notice to the union of the pendency of the litigation, thus affording it the opportunity to intervene. If the picketing union thereupon refrains from seeking intervention, it has waived any equitable right to be heard. But if the picketing union seeks to intervene, it should be allowed to do so as a matter of right. As the age-old maxim says, "Equity delights to do justice, and that not by halves."

An employer should recognize the advantage of having the picketing union before the court. Questions may arise, as they did in Plain Dealer Publishing Co. v. Typographical Union No. 53, concerning potential violence on the strike line if the court mandates a return to work. The picketing union would of course deny such censurable intentions. As a party to the action, the picketing union would be covered by the court's injunction; disobedience could result in a contempt citation.

At the same time, the picketing union's joinder would afford it the opportunity to suggest to the court that its interests, protected by national labor policy, be considered among the interplay of interests before the tribunal. It must be remembered that in many instances the refusing-to-cross union may not be a steadfast or disinterested advocate of the picketing union's interests before the

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the other hand, this does not mean that the picketing union's absence requires dismissal as an indispensable party under Rule 19(b). See id. at 48. See generally Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102, 113 (1968); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1601 et seq. (1972). In almost all cases service can be obtained on the picketing union, and jurisdiction, based on section 301, is not destroyed by its being joined as a party. Cf. NLRB v. Plasterers' Local 79, 404 U.S. 116 (1971).


132. Equity aids the vigilant, not those who slumber on their rights.


Refusing to work is costly for a union; its members lose wages over someone else's issue. It has been suggested that pan-union solidarity is on the wane, especially in this era of double-digit inflation and severe unemployment. It is not an unreasonable conjecture that a court order compelling its members to cross the line may be precisely what the refusing-to-cross union desires. In such a situation, the picketing union's most reliable advocate is itself. Its inclusion among the parties to the litigation, while perhaps creating "a three-ring donnybrook," may be the only way to insure a full presentation of all interests affected.

Even if the picketing union abjures intervention—and it may do so to decrease its exposure to a contempt citation—the court must nonetheless take into consideration the national labor policy supporting the peaceful right to strike when it fashions its relief. To ignore the existence of a legally picketing union in weighing the interests before it is to do justice by "halves"; the half left out—the striking union's right to respect of its picket line—is an interest protected by statute and national policy.

B. An Historical Perspective of a Limited Institution

Another factor affecting the appropriate judicial strategy in the refusal-to-cross situation is the historical background of the labor injunction. Memories of the abuse of this ultimate remedy are etched deeply into the psyche of the American labor movement. It cannot be gainsaid that the labor injunction employed as a weapon at the behest of management was, and may continue to be, a dysfunction in the labor relations system. Specific performance of an employment contract is an extraordinary remedy indeed. Although an opera singer may be restrained from singing for anyone else, the court will not order her to sing for the petitioner, let alone to sing well.

Judicial reticence in granting labor injunctions should be the norm. That much of the Norris-LaGuardia Act certainly with-
stands the *Boys Markets* onslaught.\textsuperscript{140} The effectiveness of the injunction as the most powerful civil instrument of court policy depends upon judicious use of the remedy. The "esteem of the courts upon which our reign of law depends" is "undermined" by "the administration of law by decrees."\textsuperscript{141} As the extreme remedy, injunctions should be reserved for use in exceptional circumstances.

There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by

\begin{footnotesize}
\textsuperscript{140} Although the *Boys Markets* Court "harmonized" Norris-LaGuardia with section 301, it did not contemplate judicial repeal of the statute. The applicable requirements of Norris-LaGuardia, therefore, must be satisfied in ruling on an application for a *Boys Markets* injunction. See *Hoh* v. *PepsiCo*, Inc., 491 F.2d 556 (2d Cir. 1974); *United States Steel Corp.* v. *United Mine Workers*, 456 F.2d 483 (3d Cir.), cert. denied, 408 U.S. 923 (1972). \textit{But cf.} Associated Gen. Contractors v. Illinois Conference of Teamsters, 486 F.2d 972, 975 n.7 (7th Cir. 1973). Section 8 of Norris-LaGuardia, 29 U.S.C. § 108 (1970), requires the complainant to have pursued "every reasonable effort to settle [the] dispute . . . by negotiation [and] with the aid of any available governmental machinery of mediation [and] voluntary arbitration." Brotherhood of Railroad Trainmen v. Toledo, P. & W.R.R., 321 U.S. 50 (1944). While it is true that the employer must have sought, and be willing to pursue, "voluntary arbitration" as a condition precedent to injunctive relief, no court applying *Boys Markets* has required that the statutory prerequisite of mediation through the Federal Mediation and Conciliation Service or analogous state agencies be met. Even though such mediative strategies may clearly be futile, the statute mandates that the employer make "every reasonable effort." \textit{See} *Food Fair Stores, Inc.* v. *Food Drivers Local 500*, 363 F. Supp. 1254, 1258 (E.D. Pa. 1973).

Likewise, Norris-LaGuardia section 7(e), 29 U.S.C. § 107(e) (1970), requires judicial determination whether "public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." In a situation such as *Plain Dealer Publishing Co.* where the employees assert their desire to cross but interpose a fear of resulting violence, the availability of police protection is a relevant factor in the court's calculus. \textit{Cf.} Detroit Newspaper Publishing Ass'n v. Typographical Union No. 18, 471 F.2d 872, 876 (6th Cir. 1972), cert. denied, 411 U.S. 967 (1973); Rochester Tel. Corp. v. Communications Workers of America, 456 F.2d 1057 (2d Cir. 1972).

There appears to be no reason why section 10's call for an expedited appeal to the circuit court, 29 U.S.C. § 110 (1970), should not also be followed in the *Boys Markets* case. For a well-reasoned decision applying Norris-LaGuardia procedures to a *Boys Markets* injunction, see *Celotex Corp.* v. *Oil Workers Union*, 516 F.2d 242 (3d Cir. 1975).

\textsuperscript{141} F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 200 (1930).
\end{footnotesize}
the protecting preventive process of injunction: but that will not be awarded in doubtful cases, or new ones, not coming within well established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the courts are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case the court owes it to its suitors and its own principles, to administer the only remedy which the law allows to prevent the commission of such act.\textsuperscript{142}

It is therefore significant that if the employees fail to cross and an injunction is denied, an employer may not be left without recourse. It might hire replacements who will cross.\textsuperscript{143} It can pursue contractual damage remedies through the grievance and arbitration provisions of the collective bargaining agreement.\textsuperscript{144} If these rem-

\textsuperscript{142} 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1431 (Wright ed. 1958) (quoting Justice Baldwin sitting at circuit in 1830).

\textsuperscript{143} See note 49 supra. In Redwing Carriers, Inc., 137 N.L.R.B. 1545, \textit{enforced sub nom.} Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), the Board held that although employees engage in protected concerted activity when they respect a picket line established by other employees, employee replacement or discharge would be upheld "where it [was] clear from the record that the employer acted only to preserve efficient operations of his business, and terminated the services of the employees only so it could immediately or within a short period of time replace them with others willing to perform the scheduled work." \textit{Id.} at 1547. The discharge must be for an overriding employer interest and may not be punitive. In determining the existence of this interest, the Board has required the balancing of the opposing rights of the employer and the employees. A mere showing that someone else may have to do the work is insufficient. The business need of the employer to replace employees must clearly outweigh the employees' right to engage in a protected activity to justify an invasion of statutory rights. Overnite Transport, 154 N.L.R.B. 1271, 1274 (1965); \textit{cf.} NLRB v. International Van Lines, 409 U.S. 48 (1972). This standard has been consistently applied in refusal-to-cross cases. See, \textit{e.g.}, Keller-Crescent Co., 89 L.R.R.M. 1201 (NLRB May 2, 1975); Smith Transit, Inc., 176 N.L.R.B. 1074, \textit{enforced sub nom.} Teamsters Local 657 v. NLRB, 429 F.2d 204 (D.C. Cir. 1970). For a comprehensive study on NLRB handling of refusal-to-cross cases, see Haggard, \textit{Picket Line Observance as a Protected Concerted Activity}, 53 N.C.L. REV. 43 (1974).

\textsuperscript{144} Cf. Meat Cutters Local 195 v. Cross Bros. Meat Packers, 77 CCH LAB. CAS. ¶ 10,919 (3d Cir. June 10, 1975); General Dynamics Corp. v. Shipbuilding Workers Local 5, 469 F.2d 848 (1st Cir. 1972). An arbitrator may be wary of finding that the no-strike pledge covered the refusal-to-cross situation because of the import of NLRA section 7 and the protected right of employees to honor a line in the absence of a clear waiver. See discussion at text accompanying notes 99-102 supra. The employer's difficulties in the arbitral forum may be increased if, in bargaining with the union, it sought unsuccessfully to obtain an express "cross-picket-line" clause. Other fora have viewed ill-fated attempts to broaden the no-strike clause as evidence that the existing clause does not cover the situation. Compare Gary Hobart Water Corp. v. NLRB, 511 F.2d 284 (7th Cir. 1975), \textit{cert. denied}, 44 U.S.L.W. 3263
edies are unavailable, it can seek damages in federal court under section 301.145 All of these factors must be weighed before granting injunctive relief.146

C. The Necessity of Establishing Irreparable Injury

Flowing from judicial appreciation of the injunction as a special remedy is the necessity of paying careful attention to the issue of irreparable injury. The inquiry must proceed on a case-by-case basis147 and must not be perfunctory. Review of the Boys Markets progeny indicates that although the district courts typically make at least passing reference to the necessity of finding irreparable injury,148 they too often recite litany without supportive facts.149


145. See Rhode Island and M. Associates v. Local 99, Operating Engineers, 88 L.R.R.M. 2007 (D.D.C. 1974); Firestone Tire & Rubber Co. v. Rubber Workers Union, 84 L.R.R.M. 2741 (M.D. Ga. 1973), aff'd on other grounds, 476 F.2d 603 (5th Cir. 1973); cf. Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. 254 (1962); Sinclair Refining Co. v. Atkinson, 370 U.S. 238 (1962). Moreover, the pendency of a meritorious damage claim against the union is an effective stimulus to union "reasonableness" on other matters. It is difficult to assess whether this strategy is a viable substitute for a court order compelling a union to cross a picket line. But this discussion of alternative remedies is not intended to show that the other tools are just as effective as a labor injunction. The point is, rather, that an employer is not left totally defenseless when faced with a refusal-to-cross. A court should be wary of adding to this arsenal in the absence of extraordinary circumstances.

146. Empirical study is required to support the argument that an employer has viable alternative strategies available to continue its operations in the refusal-to-cross situation. But, in any case, the appropriateness of injunctive relief is not determined solely by estimates of how effective the alternative strategies are in the particular litigation before the court.

It might also be noted that the Boys Markets Court rested its decision on a behavioral assumption unsupported by empirical study, i.e., that employers would not agree to arbitration clauses if they did not receive a specifically enforceable no-strike promise in return. Indeed, under the brief regime of Sinclair Refining, about 94% of 1717 major collective bargaining agreements contained arbitration clauses despite the absence of specifically enforceable no-strike promises. BUREAU OF LABOR STATISTICS, MAJOR COLLECTIVE BARGAINING AGREEMENTS: ARBITRATION PROCEDURE 5 (Dept. of Labor Bull. No. 1425-26, 1966). Apparently employers did agree to arbitration clauses in the absence of a specifically enforceable no-strike clause.

147. For example, if the production and maintenance unit is striking, the clericals refuse to cross, and the resulting injury is the failure to get some letters typed, that injury can hardly be considered irreparable. On the other hand, if the clericals were assembling production material requests and failure to transmit those requests promptly would result in indeterminate delays in material procurement, a claim of irreparable injury might be supported.


149. See, e.g., Holland Constr. Co. v. Int'l Union of Operating Eng'rs, 315
Federal Rule of Civil Procedure 52(a) requires that the district court "set forth the findings of fact and conclusions of law which constitute the grounds of its action" in support of interlocutory injunctive relief. The Court of Appeals should vacate an injunction granted with insufficient specification.\footnote{150}

As an evidentiary matter, mere assertions of disaster are no substitute for proof of irreparable loss. The court must distinguish between injury caused by the failure to cross and injury caused by the legal strike. Only evidence of the former is relevant. The injury caused by the strike in general, although perhaps irreparable, is not a sufficient cause for injunctive relief.\footnote{151}

\footnote{150} See, e.g., McCord, Candron & McDonald Inc. v. Carpenters Local 1822, 464 F.2d 1036 (5th Cir. 1972); cf. Detroit Newspaper Publishers Ass'n v. Typographical Union No. 18, 471 F.2d 872, 876 (6th Cir. 1972), cert. denied, 411 U.S. 967 (1972) (preliminary injunction vacated because "the District Court announced only a bare conclusion as to irreparable harm and failed to make findings of fact to support this conclusion"). "There must be a . . . separation of the meritorious sheep from the capricious goats." Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 872 (D.C. Cir. 1970).

\footnote{151} Some of the better discussion concerning factors constituting irreparable harm can be found in analogous cases under the Railway Labor Act. For example, in Ozark Airlines v. Air Line Pilots Ass'n, 361 F. Supp. 198, 202 (E.D. Mo. 1973), a refusal-to-cross situation, the court noted: Plaintiff has no adequate remedy at law and will suffer substantial and irreparable injury if the relief sought is not granted. It will lose customers to other modes of transportation and to other airlines, unless service is resumed. The public interest in the interruption of service of an interstate carrier is of primary concern to the courts and is sufficient irreparable damage for an injunction to issue. Damages cannot be accurately estimated as to Ozark's loss of identity as a carrier, loss of routes to other carriers, loss of customers permanently, and general loss of good will of the public.

The NLRB General Counsel, in a memorandum authorizing Regional Directors to act on requests for temporary restraining orders in certain section 10(j) cases without prior clearance from Washington, offers illustrations of irreparable injury for the guidance of the Regions: (1) substantial financial loss, if uncollectable from the respondent or if combined with other indicia; (2) substantial impact on national defense, cf. Boire v. Local 295, Plumbers, 59 L.R.R.M. 2694 (M.D. Fla. 1956); (3) picketing or strike conduct which presents an imminent threat of bankruptcy or insolvency, loss of a business relationship, substantial unemployment or a substantial loss of business or customer good will, cf. Kaynard v. Independent Routemen's Ass'n, 479 F.2d 1070, 1073 (2d Cir. 1973); (4) violence of mass picketing, cf. In re Puerto Rico Newspaper: Guild Local 225, 476 F.2d 856, 857 (1st Cir. 1973); (5) dangerous consequence of a work stoppage; (6) threatened spoilage of perishable goods, cf. Samoff v. Longshoremen Local 1694, 188 F. Supp. 308, 311 (D. Del. 1960); (7) serious adverse impact upon the community, cf. Hoffman v. ILWU Local 10, 85 L.R.R.M. 2353, 2354 (9th Cir. 1974); (8) time of the essence; (9) situations posing serious remedial problems in Board litigation, cf. Dauds v. Anheuser-
VI. A Strategy of Accommodation

The refusal-to-cross situation can be distinguished from the typical Boys Markets cause in one final important way, and that distinction gives rise to a suggested judicial strategy. In the typical Boys Markets case the granting of an injunction does not constitute a determination of the merits of the underlying dispute. Enjoining a refusal-to-cross, on the other hand, unavoidably entails a judicial ruling on the matter in issue; the court implicitly decides that the union has bargained away its prerogative to refuse to cross. Moreover, once a work stoppage is enjoined, its resumption after arbitration is unlikely. Functionally, such an injunction may therefore mean that the employer’s interpretation of the agreement has prevailed. Even though the arbitrator may subsequently find no contract violation in the union’s actions, the court’s injunction has, in a practical sense, mooted the issue.

The Supreme Court has generally sought to avoid prejudging on the merits issues appropriately reserved for the arbitral process. In United Steelworkers of America v. Warrior & Gulf Navigation Co., a suit to compel arbitration, the Court avoided deciding the employer’s assertions on the merits by applying a presumption of arbitrability. The employer had argued that subcontracting maintenance work was a management prerogative under the bargaining agreement’s management rights clause. If the contested conduct did fall within the management rights provision, not only would the matter not be arbitrable, but there would be no contract violation on the merits. The parties, however, had bargained for use of an arbitrator to settle this type of dispute. To avoid a judicial determination on the merits, the dispute was sent to arbitration, so that the arbitra-

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152. It is true that the court order enjoining the stoppage of work, applying the required presumption of arbitrability, in effect decides the merits of any union claim that the no-strike promise does not cover the situation at bar. The court, however, does not decide the underlying contract dispute.

153. Note, Labor Injunctions, Boys Markets, and the Presumption of Arbitrability, 85 HARV. L. REV. 636, 641 (1972). Frankfurter and Greene quote the testimony of Eugene V. Debs before the United States Strike Commission investigating the Pullman strike of 1894: "[T]he ranks were broken, and the strike was broken up . . . not by the Army, and not by any other power, but simply and solely by the action of the United States Courts in restraining us from discharging our duties as officers and representatives of the employees." F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 17 (1930). The authors later submit that "the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption even if the injunction is later lifted." Id. at 201.

tor, clothed with a mantle of expertness by Supreme Court pronouncement, might work his magic.\textsuperscript{155} In the refusal-to-cross situation the tables are rearranged, but the thrust of that policy—a judicial respect for the parties' intent and the recognized limitations of the judicial institution—is equally applicable. To send the question of whether the no-strike clause has been breached to an arbitrator while enjoining the strike as a violation of the no-strike pledge decides the issue, \textit{i.e.}, the scope of the no-strike clause, squarely on the merits.\textsuperscript{156} This, the Court has said, is not its job.\textsuperscript{157}

A court does, however, have an appropriate, albeit limited, role to play at the request of an aggrieved employer.\textsuperscript{158} Applying the presumption of arbitrability, it should order arbitration of the employer's complaint against the refusing-to-cross union if it finds the contractual duty to cross to be an issue arguably within the parameters of the arbitration clause. Merely because the union claims a right to cross (even where a protection-of-rights clause indicates the union is probably correct in its assertion), arbitration should be required "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the . . . dispute."\textsuperscript{159} If the arbitrator determines that the union is vio-

\textsuperscript{155} Likewise in United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960), the Court mandated the forwarding of even frivolous grievances to arbitration because of the "therapeutic" and "cathartic value" of the process.

\textsuperscript{156} Judge Fairchild, dissenting in \textit{Inland Steel}, noted that "to enjoin in the present case is not to prevent substitution of a strike weapon for the arbitration procedure agreed upon, but to presume that recognition of a picket line has been forbidden by the contract unless and until an arbitrator rules that it has not." \textit{Inland Steel Co. v. Local 1545, UMW, 505 F.2d 293, 301 (7th Cir. 1974)}.

\textsuperscript{157} Only in a duty of fair representation case has the Court strayed from the policy of deferring to the arbitral forum. \textit{Vaca v. Sipes, 386 U.S. 171, 176-77, 190-93 (1967)}.

\textsuperscript{158} Of course, if the employer asserts, as did the plaintiff in \textit{NAPA Pittsburgh}, that the picket line is secondary in nature, the court should certainly require as a prerequisite that the employer pursue its remedies before the Labor Board under section 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4) (1970). A secondary boycott charge is required by statute to be given expedited treatment by the Labor Board and upon a finding of "reasonable cause to believe such charge is true," the Labor Board "shall" petition for injunctive relief. 29 U.S.C. § 160(J) (1970). Injury caused by failure to cross an illegal secondary picket line is not only irreparable, it is self-imposed.

\textsuperscript{159} United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

lating its no-strike promise and has waived the protected right of its members to refuse to cross, he may order the employees to cross the line. Such an order may be sufficient to effect a resumption of work.\textsuperscript{160} If the arbitrator's action by itself is insufficient, the employer can move for court enforcement of the award.\textsuperscript{161}

But doesn't this strategy also infringe upon the picketing union's interest in dissuading nonstrikers from crossing its line? It certainly does, but it does so as a necessary accommodation of conflicting interests perfectly consistent with national labor policy as developed in the labor equity forum. \textit{Boys Markets} demonstrates that "accommodation" is a necessary adjudicatory principle in this area.\textsuperscript{162}

This strategy does not initially involve court anti-strike action; until the culmination of the arbitration the nonstriking employees may respect the picket line without court sanction.\textsuperscript{163} The arbitration process, which is what the \textit{Boys Markets} Court intended to support, is permitted to function. The section 7 rights of the employees to refrain from crossing a picket line are likewise protected pending a definitive arbitration award which finds those rights to have been waived. If that finding is made, the picketing union's interest in having its line respected by the nonstriking employees must become inferior to the nonstriking employees' contractually expressed interest in crossing the line in order to uphold the national labor policy favoring promise keeping. The arbitrator has placed members of

\begin{itemize}
\item \textsuperscript{160} The author was among counsel in such a situation in September, 1973. When the court refused to enjoin the refusal-to-cross, the parties at the court's suggestion moved expeditiously to arbitration that same afternoon. Arbitrator James Healey of the Harvard Business School, after a hearing, ordered the union to cross the line and resume work, which it did the following day.
\item \textsuperscript{161} See, e.g., \textit{General Dynamics Corp. v. Shipbuilders Local 5, 469 F.2d 848} (1st Cir. 1972). The court's role in reviewing the arbitral award is limited to ascertaining whether the award "draws its essence from the collective bargaining agreement." \textit{United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597} (1960). This is not to suggest that a judicial rubber stamp is in order; "the arbitrator's authority to render a given award is subject to meaningful review." \textit{Torrington Co. v. Metal Workers Local 1645, 362 F.2d 577, 680} (2d Cir. 1966). Merit questions are not open for rethinking, but "power" questions certainly are. In addition, the court must review questions of procedural fairness and misdealing. \textit{Cf. Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 154} (1968); \textit{United States Arbitration Act, 9 U.S.C. § 1 et seq.} (1970).
\item \textsuperscript{162} 398 U.S. at 249, 250.
\item \textsuperscript{163} The Court may establish a precise and expedited timetable for the arbitration order in order to mitigate the costs to both the employer and the refusing-to-cross union members, who are, as noted above, not being paid while they stand outside the line. See \textit{Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 373 F.2d 136} (8th Cir.), \textit{cert. denied, 389 U.S. 827} (1967); \textit{Northwest Airlines, Inc. v. Machinists Lodge 143, 185 F. Supp. 129} (D. Minn. 1960); \textit{Cf. Eisenberg v. Hartz Mountain Corp., 77 CCH LAB. CAS. ¶ 10,938} (3d Cir. June 13, 1975) (six-month limit set on section 10(j) injunctions).
\end{itemize}
the refusing-to-cross union in the category of persons "unable to be dissuaded" from crossing. When the court subsequently enforces the arbitration award, it is not preempting the arbitrator, but rather enforcing his award. All private interests and public policies are thereby accommodated and the court has not prematurely taken sides in the external economic struggle.

VII. ONE FINAL LOOK

Applying the suggested strategy to the earlier hypothetical situation of a refusal-to-cross,164 a court addressing the Company's application for injunctive relief should determine whether, applying the presumption of arbitrability, the dispute concerning Local 10's refusal to cross Local 50's line is an arbitrable matter. The no-strike provision encompasses, at least arguably, some implied requirements concerning crossing picket lines. Since it is a controversy over the application or interpretation of the terms of the agreement, the refusal-to-cross is arbitrable.

A court following Monongahela would end its inquiry at this point and an injunction would issue. A court adhering to the Amstar rationale would have already found that the refusal-to-cross was not "over" a pre-existing dispute and denied injunctive relief. But neither of these simplistic approaches will suffice. "The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer."165 That "evolutionary process" has demonstrated that the court must weigh the legitimate interests of the adversaries in the primary dispute, the possible protected interest of the refusing-to-cross employees, and applicable national labor policies in working through the equity equation.

At the very least, the court should require that notice of the action be given to Local 50 to afford it an opportunity to defend its interest in the equity forum. The court should then order expedited arbitration of the refusal-to-cross issue, perhaps establishing a set timetable, and retain jurisdiction to consider enforcement of a subsequent arbitral award if necessary and appropriate.

VIII. CONCLUSION

Under Boys Markets an employer may be entitled to obtain an injunction in federal court when a union disavows contractual prom-

164. See text accompanying note 26 supra.
ises and strikes over an arbitrable matter. Courts which have dealt with the refusal-to-cross issue, however, have failed to recognize that labor relations involve a full spectrum of inherently conflicting interests and policy pronouncements and that labor peace and industrial welfare depend upon actualization and reconciliation of these variables.

The courts must act by reason and not by rote. The issue before them is a difficult one and there are no easy answers. No single policy standing alone, whether the right to strike, the support of arbitration as the core strategy for dispute resolution, or labor peace, necessarily determines the proper court action.

All rights tend to declare themselves to the logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.166

This point has been reached when courts are asked to apply *Boys Markets* to the refusal-to-cross situation. Injunctive relief which maximizes and accommodates all legitimate interests and policies is certainly appropriate, but it is a matter of the first importance that courts go through the process of acknowledging the conflicting interests and policies before employing this ultimate remedy.
