

## LABOR LAW REFORM: A LABOR PERSPECTIVE

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In 1935 Congress charted the course of this nation's labor policy by passing the Wagner Act. This Act declared that workers have the right to unionize, to engage in collective bargaining, and to be free from unfair labor practices. Sadly, after 43 years, the promise of the Wagner Act remains a hollow one for millions of Americans. Experience has proven that the National Labor Relations Act, in its present form, contains fatal defects which prevent the policies of the Act from being fully brought to life. Built-in delay, inadequate remedies, and other weaknesses have thwarted the protections ostensibly provided by the NLRA. Indeed, the Act has become a snare and a delusion. Workers seeking to exercise their rights under the Act have been victimized by firings and other employer unfair labor practices. For thousands of workers, the freedom and security promised by our labor laws have been replaced by fear, insecurity, and deprivation.

The labor reform bills, as passed by the House of Representatives and filibustered to death by the Senate, contained several of the improvements most needed in the Act. The bills were designed to ensure that the rights already contained in the NLRA would be enforced through both prompt and fair procedures, and adequate remedies for violations of the Act. Now, after the great filibuster, we are back to where we started. But labor law reform is not dead. The fundamental issues raised by the congressional debates remain for future solution. I believe that three issues which Mr. Kramer and I have chosen to discuss—equal access, injunctive relief, and the make-whole remedy—along with a number of other issues will continue to inspire sharp debate until resolved by a new labor reform bill.

### I. EQUAL ACCESS

There is nothing novel in the suggestion that employees have a right to effective access to the message of union organizers. As recently as this past term, the Supreme Court, in *Beth Israel Hospital v. NLRB*,<sup>1</sup> confirmed that the right to self-organization protected by section 7 of the Act depends on the correlative right to effective access to union information.<sup>2</sup> However,

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<sup>1</sup> —U.S.—, 98 S. Ct. 2463 (1978).

<sup>2</sup> The *Beth Israel* Court maintained that the Supreme Court has long accepted the Board's view that the right of employees to self-organize and bargain collectively established by § 7 of the NLRA . . . necessarily

while the Board and the courts have recognized the importance of access in the abstract, they have severely limited the ability of unions to carry their message effectively to employees. In a series of decisions, unions have been deprived of the most meaningful channels of communication on the basis of mistaken assumptions concerning the availability of alternative channels of communication.

The process of erosion began in 1956 with the Supreme Court's decision in *NLRB v. Babcock & Wilcox Co.*<sup>3</sup> There, the Supreme Court, which in *Republic Aviation Corp. v. NLRB*<sup>4</sup> had upheld the right of employees to distribute union literature on company property,<sup>5</sup> refused to adopt the same approach with respect to distribution by nonemployee union organizers. The basic legal principles enunciated in *Babcock & Wilcox* were sound. The Court, recognizing that the right to organize necessarily gives rise to a right to learn about a union from nonemployee organizers,<sup>6</sup> held that solicitation by organizers could be prohibited by an employer only "if reasonable efforts by the Union through other available channels of communication will enable it to reach the employees with its message . . ."<sup>7</sup> Yet, the Court proceeded to drain that statement of meaning by assuming, without empirical support, that other available channels should be adequate to enable a union to reach employees with its message in virtually every instance, except where employees are inaccessible due to the location of a plant and the living quarters of employees.<sup>8</sup> Based on this assumption, the Court, with reference in general and uncritical terms to "[t]he usual methods of imparting information," and "[t]he various instruments of publicity,"<sup>9</sup> found alternative channels of communication to be adequate in *Babcock & Wilcox*.

Notably absent in *Babcock & Wilcox* was any attempt to appraise the extent to which alternative channels of communication actually enabled the union to

encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.<sup>9</sup>

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9. . . . [Section 7] organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights.

98 S. Ct. at 2469 & n.9 (1978) (quoting *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972)).

<sup>3</sup> 351 U.S. 105 (1956).

<sup>4</sup> 324 U.S. 793 (1945).

<sup>5</sup> *Id.* at 805. This right is limited, however, to oral solicitation during non-working time, and distribution of literature during nonworking time in nonworking areas. See *Beth Israel*, 98 S. Ct. at 2469 & n.10. An employer can overcome these solicitation and distribution privileges "by a showing of special circumstances which make [a restriction] necessary to maintain production or discipline." *Id.* at 2469.

<sup>6</sup> 351 U.S. at 113.

<sup>7</sup> *Id.* at 112.

<sup>8</sup> *Id.* at 113.

<sup>9</sup> *Id.* See also *id.* at 107 n.1.

reach employees in a meaningful and effective manner. Thus, while the Court claimed to be striking a balance between property rights and organizational rights in *Babcock & Wilcox*,<sup>10</sup> it did so without considering the actual impact its ruling would have upon organizational rights. In several cases since *Babcock & Wilcox*, unions have convincingly demonstrated the ineffectiveness of alternative channels of communication, but have nevertheless been denied access to the workplace.<sup>11</sup> Following the Supreme Court's lead in *Babcock & Wilcox*, the courts generally have denied access to the workplace<sup>12</sup> except where the workplace is isolated and remote,<sup>13</sup> or where employer unfair labor practices can only be remedied by a grant of access.<sup>14</sup>

In *Babcock & Wilcox*, the Court did not have occasion to discuss what access rights should be available to employees and nonemployee organizers when the employer is waging a campaign against unionization. Rather, *Babcock & Wilcox* addressed the issue of no-solicitation rules as a general proposition, without considering the relevance of antiunion speeches by an employer. The availability of access rights during an employer's antiunionization campaign was first addressed by the Board in 1951 in the *Bonwit Teller* case.<sup>15</sup> The

<sup>10</sup> *Id.* at 112.

<sup>11</sup> For example, compare in the following cases the decisions of the Board granting access and the subsequent decisions of the circuit courts denying access: *NLRB v. Sioux City and New Orleans Barge Lines, Inc.*, 472 F.2d 753, 82 L.R.R.M. 2488 (8th Cir. 1973), *denying enf. of* 193 N.L.R.B. 382, 78 L.R.R.M. 1580 (1971); *Central Hardware Co. v. NLRB*, 468 F.2d 252, 81 L.R.R.M. 2468 (8th Cir. 1972), *denying enf. of* 181 N.L.R.B. 491, 73 L.R.R.M. 1422 (1970); *NLRB v. New Pines, Inc.*, 468 F.2d 427, 81 L.R.R.M. 2423 (2d Cir. 1972), *denying enf. of* 191 N.L.R.B. 944, 77 L.R.R.M. 1543 (1971); *NLRB v. Tamiment, Inc.*, 451 F.2d 794, 78 L.R.R.M. 2726 (3d Cir. 1971), *denying enf. of* 180 N.L.R.B. 1074, 73 L.R.R.M. 1280 (1970); *NLRB v. Kutshers Hotel and Country Club, Inc.*, 427 F.2d 200, 74 L.R.R.M. 2394 (2d Cir. 1970), *denying enf. of* 175 N.L.R.B. 1114, 70 L.R.R.M. 1604 (1969). *See also* *Falk Corp.*, 192 N.L.R.B. 716, 77 L.R.R.M. 1916, 1922 (1971) (Member Brown, dissenting).

<sup>12</sup> *See* *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 205 & n.41 (1978).

<sup>13</sup> *E.g.*, *NLRB v. S & H Grossinger's Inc.*, 372 F.2d 26, 29-30, 64 L.R.R.M. 2295, 2298 (2d Cir. 1967); *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147, 152, 21 L.R.R.M. 2707, 2711 (6th Cir. 1948).

<sup>14</sup> *E.g.*, *NLRB v. J.P. Stevens & Co.*, 81 L.R.R.M. 2285, 2287 (2d Cir. 1972) (contempt order); *NLRB v. Crown Laundry & Dry Cleaners, Inc.*, 437 F.2d 290, 294, 76 L.R.R.M. 2236, 2239 (5th Cir. 1971); *Loray Corp.*, 184 N.L.R.B. 557, 559, 74 L.R.R.M. 1513, 1518 (1970); *Marlene Industries Corp.*, 166 N.L.R.B. 703, 705, 65 L.R.R.M. 1626, 1631-32 (1967), *enforced as modified sub nom.* *Decaturville Sportswear v. NLRB*, 406 F.2d 886, 889, 70 L.R.R.M. 2472, 2474 (6th Cir. 1969); *IUE v. NLRB*, 383 F.2d 230, 232 n.4, 66 L.R.R.M. 2081, 2082 n.4 (D.C. Cir. 1967).

<sup>15</sup> *Bonwit Teller, Inc.*, 96 N.L.R.B. 608, 28 L.R.R.M. 1547 (1951), *enf. denied*, 197 F.2d 640, 30 L.R.R.M. 2305 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953). Prior to *Bonwit Teller*, the Board had held that a "captive audience" speech by an employer is per se unlawful. *Clark Bros. Co.*, 70 N.L.R.B. 802, 805, 18 L.R.R.M. 1360, 1361 (1946). The Second Circuit disagreed, however, in *NLRB v. Clark Bros. Co.*, 163 F.2d 373, 376, 20 L.R.R.M. 2436, 2438 (2d Cir. 1947), as did Congress in enacting § 8(c) of the National Labor Relations Act. Taft-Hartley Act, ch. 120, title I, § 101, 61 Stat. 140 (1947), 29 U.S.C. § 158(c) (1976). *See* *Babcock & Wilcox Co.*, 77 N.L.R.B. 577, 578, 22 L.R.R.M. 1057, 1058 (1948). Nevertheless, while rejecting a per se ban on captive au-

Board held that "an employer who chooses to use his premises to assemble his employees and speak against a union may not deny that union's reasonable request for the same opportunity to present its case, where the circumstances are such that only by granting such request will the employees have a reasonable opportunity to hear both sides."<sup>16</sup> The Board based its ruling on the principle "that the right of employees, guaranteed by Section 7 of the Act, freely to select or reject representation by a labor organization necessarily encompasses the right to hear both sides of the story under circumstances which reasonably approximate equality."<sup>17</sup>

Two years later, the Board, with newly appointed members, overruled *Bonwit Teller* in *Livingston Shirt Corp.*<sup>18</sup> Like the Supreme Court's decision in *Babcock & Wilcox*, the Board's decision in *Livingston Shirt* rested on broad, unsupported assumptions as to the effectiveness of alternative routes of communication.<sup>19</sup> The Board said:

We do not believe that unions will be unduly hindered in their right to carry on organizational activities by our refusal to open up to them the employer's premises for group meetings, particularly since this is an area from which they have traditionally been excluded, and there remains open to them all the customary means for communicating with employees. These include individual contact with employees on the employer's premises outside working hours . . . , solicitation while entering and leaving the premises, at their homes, and at union meetings. These are time-honored and traditional means by which unions have conducted their organizational campaigns, and *experience* shows that they are fully adequate to accomplish unionization and accord employees their rights under the Act to freely choose a bargaining agent.<sup>20</sup>

Still, the Board provided no details of the "experience" to which it referred—and which had led it to a contrary result only two years earlier.

An issue closely related to the "right of reply" issue of *Livingston Shirt* reached the Supreme Court five years later in *NLRB v. United Steelworkers (NuTone, Inc.)*.<sup>21</sup> In *NuTone*, the Supreme Court considered the issue whether an employer may enforce a concededly valid no-solicitation rule while himself engaging in antiunion solicitation.<sup>22</sup> The Court refused to "rule that

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dience speeches, neither the Second Circuit in *Clark* nor Congress in enacting § 8(c) ruled out a requirement of equal access if captive audience speeches are made. See *Bonwit Teller*, 96 N.L.R.B. at 614 n.12, 28 L.R.R.M. at 1549 n.12.

<sup>16</sup> 96 N.L.R.B. 608, 612, 28 L.R.R.M. 1547, 1548.

<sup>17</sup> *Id.*

<sup>18</sup> 107 N.L.R.B. 400, 33 L.R.R.M. 1156 (1953).

<sup>19</sup> See *id.* at 406-08, 33 L.R.R.M. at 1158-59.

<sup>20</sup> *Id.* at 406, 33 L.R.R.M. at 1158 (emphasis added).

<sup>21</sup> 357 U.S. 357 (1958).

<sup>22</sup> The Board had answered this question in the negative as an alternate holding in *Bonwit Teller*, 96 N.L.R.B. 608, 611-12, 28 L.R.R.M. 1547, 1548 (1951), but then reversed its position in *Livingston Shirt*, 107 N.L.R.B. at 409, 33 L.R.R.M. at 1159. In the two cases consolidated for review by the Supreme Court in *NuTone*, the Board had held that the enforcement of a no-solicitation rule constituted an unfair labor practice

the coincidence of these circumstances necessarily violates the Act, regardless of the way in which the particular controversy arose or whether the employer's conduct to any considerable degree created an imbalance in the opportunities for organizational communication."<sup>23</sup>

A critical element of the Court's analysis in *NuTone* was that the unions involved had made no attempt to show that the no-solicitation rules actually diminished their ability to reach the employees.<sup>24</sup> As in *Babcock & Wilcox*, the Court did recognize that effective communication is central to the realization of section 7 rights. Indeed, the *NuTone* Court went even further and stated that section 7 mandates not only *effective* communication, but "opportunities for effectively reaching the employees with a pro-union message . . . at least as great as the employer's ability to promote . . . his anti-union views . . ." <sup>25</sup> While recognizing the principle of equal access, the Court nonetheless held the Board could not conclude that the enforcement of a no-solicitation rule, combined with antiunion solicitation, necessarily violates the principle of equal access without pointing to "some basis, in the actualities of industrial relations, for such a finding."<sup>26</sup>

In view of the conceptual framework of *NuTone*—a recognition of the principle of equal access, coupled with a requirement that the principle be applied in light of the "actualities of industrial relations"—one might have expected the Board to reconsider the fabric of its rules on equal access. In particular, one might have expected a review of the *Livingston Shirt* ruling that unions have no right to reply to a captive audience speech. The *Livingston Shirt* ruling seemed especially open to question after *NuTone* since, as we have seen, the Board's decision in that case was based on a perfunctory analysis of alternative channels of communication, completely ignoring any real consideration of "industrial realities." Yet, when the labor movement made a major effort, in the 1966 *General Electric Co.* case,<sup>27</sup> to persuade the Board to overrule *Livingston Shirt* and to return to the *Bonwit Teller* doctrine, the Board refused to reconsider its position.

The *General Electric* Board based its refusal to reconsider *Livingston Shirt* in large part on the *Excelsior* rule,<sup>28</sup> promulgated the same day *General Electric* was handed down. The *Excelsior* rule requires employers to furnish unions

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if, and only if, the enforcement of the rule resulted from an antiunion animus manifested by other unfair labor practices committed by the employer in the course of the organizing campaign. *Avondale Mills*, 115 N.L.R.B. 840, 842-43 & nn. 8 & 9, 37 L.R.R.M. 1423, 1424 & nn.8 & — (1956), *enforced in part*, 242 F.2d 669, 39 L.R.R.M. 2626 (5th Cir. 1957), *aff'd*, 357 U.S. 357 (1958); *NuTone, Inc.*, 112 N.L.R.B. 1153, 36 L.R.R.M. 1165 (1955), *enforced as modified*, 243 F.2d 593, 39 L.R.R.M. 2103 (D.C. Cir. 1956).

<sup>23</sup> 357 U.S. at 362.

<sup>24</sup> *Id.* at 363.

<sup>25</sup> *Id.* at 364 (emphasis added). Similarly, the *NuTone* Court stated that "an imbalance in the opportunities for organizational communication" would give rise to a violation of the Act. *Id.* at 362 (emphasis added).

<sup>26</sup> *Id.* at 364.

<sup>27</sup> 156 N.L.R.B. 1247, 61 L.R.R.M. 1222 (1966).

<sup>28</sup> *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 61 L.R.R.M. 1217 (1966).

with the names and addresses of all eligible voters prior to a representation election.<sup>29</sup> Significantly, the Supreme Court, in *NLRB v. Wyman-Gordon Co.*,<sup>30</sup> upheld the substantive validity of the *Excelsior* rule specifically on the basis of equal access principles.<sup>31</sup> The Court held that requiring employers to disclose the names of eligible voters furthers the objective of fair and free choice of bargaining representatives "by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses."<sup>32</sup> In refusing to overrule *Livingston Shirt*, the *General Electric* Board stressed the increased opportunities for employee access to union communication which should result from *Excelsior*, while admitting that the Board had "no experience" from which to assess how the *Excelsior* rule would contribute to meaningful access rights.<sup>33</sup> Yet, in the years which have passed since *General Electric* and *Excelsior*, the Board has failed to reevaluate the efficacy of its equal access rules.

Thus, the thirty year history of litigation concerning rights of access for employees and organizers reveals that the limitations on those rights have stemmed not from the requirements of the Act, but from unfounded assumptions as to the effectiveness of alternative channels of communication. While the *Babcock & Wilcox* Court recognized the right of employees to receive the message of non-employee organizers, the Court assumed, without empirical evidence, that the "usual methods of imparting information" normally would enable a union to get its message through. In *NuTone*, and again in *Wyman-Gordon*, the Court explicitly recognized the right of employees not only to effective communication from organizers, but also to opportunities for communication at least as great as the employer's opportunity to convey his opposing view. Nevertheless, the *NuTone* Court concluded that the Board had failed to show, in "the actualities of industrial relations," that an imbalance of opportunities for communication necessarily results when an employer enforces a no-solicitation rule while himself engaging in an antiunion campaign. In *Livingston Shirt*, the Board rejected a right to reply to "captive audience" speeches, again on the basis of unsupported conclusions as to the effectiveness of "time-honored and traditional" means of union campaigning. Finally, in *General Electric*, the Board refused to reassess its equal access rules primarily on the untested hypothesis that the *Excelsior* rule might adequately improve the potential ability of organizers to reach employees. Thus, on the basis of faulty and outdated assumptions, the communication rights of employees and organizers today remain greatly restricted. An unjustifiable imbalance exists between the channels of communication which are open to employers and those which are available to employees and unions, particularly since employers are permitted to make "captive audience" antiunion speeches on

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<sup>29</sup> *Id.* at 1236-37, 61 L.R.R.M. at 1218.

<sup>30</sup> 394 U.S. 759 (1969).

<sup>31</sup> *Id.* at 767.

<sup>32</sup> *Id.*

<sup>33</sup> 156 N.L.R.B. at 1251, 61 L.R.R.M. at 1223.

company time and on company premises, without granting the union an opportunity to reply.<sup>34</sup>

Whatever may have been the state of knowledge regarding the "actualities of industrial relations" at the time the various decisions of the Board and the Supreme Court were rendered, it is apparent today that the existing rules of law give employers an overwhelming advantage over unions in conveying their views to employees. The research study published in 1976 by Professors Getman, Goldberg, and Herman proves this point beyond question.<sup>35</sup> The empirical data collected by the authors demonstrates that employers who utilize working time and work premises for antiunion campaigns, while denying similar channels of communication to unions, contact a substantially greater proportion of employees than do unions.<sup>36</sup>

Professors Getman, Goldberg, and Herman found that an employer's advantage in a representation campaign stems primarily from a strong correlation between campaign familiarity and attendance at meetings. The study demonstrated that "[e]mployees who attended meetings conducted by either party were significantly more familiar with that party's campaign than employees who did not attend meetings."<sup>37</sup> Significantly, the authors also found that employers are generally far more successful in attracting employees to meetings scheduled during working time on work premises than unions are in attracting employees to meetings scheduled after working hours away from work premises.<sup>38</sup> Eighty-three percent of the employees in the research sample attended company meetings, while only thirty-six percent attended union meetings.<sup>39</sup> In addition, the study showed that since employees attending union meetings tend to be union supporters, employers have a substantial advantage in communicating with undecided employees. This advantage is particularly important because, as the research demonstrated, "attendance at union meetings is significantly related to switching to the union."<sup>40</sup>

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<sup>34</sup> Indeed, an employer, even while making captive audience speeches, normally can exclude nonemployee organizers from the plant altogether. See text at notes 3-9 *supra*. Only in certain narrow categories of cases must an employer who makes antiunion, captive audience speeches grant a union's request to reply. One such instance is where the employer has an unlawful no-solicitation rule—for example, a rule prohibiting solicitation by employees on nonworking time. Another instance is where the employer has a no-solicitation rule which, while lawful, is of a particularly broad nature such as the Board has permitted in certain special circumstances—for example, a rule prohibiting union solicitation during nonworking time in areas of a retail department store open to the public. See, e.g., *General Electric Co.*, 157 N.L.R.B. at 1250, 61 L.R.R.M. at 1223. In addition, it should be noted that the Board has outlawed captive audience speeches on company time—whether by the employer or by the union—within the twenty-four hour period prior to an election. *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429, 33 L.R.R.M. 1151, 1152 (1953).

<sup>35</sup> J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976) [hereinafter cited as GETMAN].

<sup>36</sup> See GETMAN, *supra* note 35, at 156-57.

<sup>37</sup> *Id.* at 156.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 156-57.

Accordingly, the study concluded that union communication with undecided employees could substantially improve union performance in elections.<sup>41</sup>

Based on their research, Professors Getman, Goldberg, and Herman called for legislation to remedy the disparity in opportunities for communication. In testimony before the Labor Subcommittee of the Senate Committee on Human Resources, the professors supported legislation providing for increased union access to employees when employers use working time or work premises for antiunion campaigns.<sup>42</sup> Professor Goldberg testified that:

Our data shows quite plainly that the employer who conducts campaign meetings on working time or premises has a substantial advantage over the union in communicating with employees. Many employees know little or nothing about unions prior to the union organizing campaign, and have neither the time, energy nor inclination to travel to a union meeting at the end of their working day. If these employees are to make a free and informed choice with respect to unionization, a choice based on hearing both sides of the unionization question, the union must have an opportunity to communicate with them under the same circumstances as the employers.<sup>43</sup>

The Getman, Goldberg, and Herman study confirms what many observers have long believed—that the assumptions regarding alternative means of communication which underlie decisions such as *Babcock & Wilcox* and *Livingston Shirt* have no basis in reality.<sup>44</sup> Indeed, the “actualities of industrial relations” are that the existing rules stifle unions in their efforts to convey their message to employees in an organizing campaign. This imbalance between unions and employers regarding opportunities for communication is contrary to the principles enunciated by the Supreme Court, particularly in

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<sup>41</sup> *Id.* at 157.

<sup>42</sup> S. REP. NO. 628, 95th Cong., 2d Sess. 24 (1978) (testimony of Professor Goldberg).

<sup>43</sup> *Id.*

<sup>44</sup> This point was well put by Judge Clark in *NLRB v. United Aircraft Corp.*, 324 F.2d 128, 54 L.R.R.M. 2492 (2d Cir. 1963), *cert. denied*, 376 U.S. 951 (1964). Judge Clark stated:

The chances are negligible that alternatives equivalent to solicitation in the plant itself would exist. In the plant the entire work force may be contacted by a relatively small number of employees with little expense. The solicitors have the opportunity for personal confrontation, so that they can present their message with maximum persuasiveness. In contrast, the predictable alternatives bear without exception the flaws of greater expense and effort, and a lower degree of effectiveness. Mailed material would be typically lost in the daily flood of printed matter which passes with little impact from mailbox to wastebasket. Television and radio appeals, where not precluded entirely by cost, would suffer from competition with the family's favorite programs and at best would not compare with personal solicitation. Newspaper advertisements are subject to similar objections. Sidewalks and street corners are subject to the vicissitudes of climate and often force solicitation at awkward times, as when employees are hurrying to or from work.

324 F.2d at 130, 54 L.R.R.M. at 2495-96.



*NuTone* and in *Wyman-Gordon*, and it frustrates the NLRA's objective of "an informed employee electorate."<sup>45</sup> This imbalance must be corrected.

The necessary step, in my view, is legislation requiring that where an employer communicates with employees concerning unionization on company time or on company premises, the union seeking to organize the workplace must be granted the opportunity to communicate with an equivalent group of employees for an equivalent period of time and in an equivalent manner.<sup>46</sup> The details of such a statutory provision could take many forms. It is not my purpose to debate those details here, or to choose among the various "equal access" proposals advanced in the last session of Congress.<sup>47</sup> As Mr. Kramer's article indicates,<sup>48</sup> while the legislative debates revolved in part around the details of an equal access rule, the basic concept of such a rule continues to engender opposition. Once the concept is accepted, as I believe it must be, the details of the legislation will not pose insurmountable problems.

A rule granting unions equal access to employees following employer communication during working time or at the workplace would be relatively modest compared with other possible approaches. One alternative is that Congress allow unions to have access to employees even where an employer has not engaged in antiunion communication. Another alternative is that Congress reinstate the Board's original rule barring employer "captive audience" speeches altogether.<sup>49</sup> I am convinced, from the experiences recounted by union organizers, that such speeches are inherently coercive. The very act of calling employees together for a captive audience speech is a demonstration of the employer's power, and is seen as a show of force by employees. The content of such speeches generally reinforces the coercive impact of the occasion. Even if the employer does not in so many words cross the rather tenuous line drawn between lawful speech and unlawful threats or promises,<sup>50</sup> he generally comes as close to the line as possible. Moreover, it is often extremely difficult to assess the true meaning and effect of the nuances of a captive audience speech on a case-by-case basis. Accordingly, there is much to be said for a rule—such as the Board originally adopted in 1946<sup>51</sup>—which would replace that approach with a complete ban on captive audience speeches.

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<sup>45</sup> *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969).

<sup>46</sup> For example, if an employer utilizes company premises in his antiunion campaign, the union likewise would be entitled to utilize company premises.

<sup>47</sup> H.R. 8410, 95th Cong., 1st Sess. § 3, 123 CONG. REC. H10632-48 (daily ed. Oct. 5, 1977); S. 2467, 95th Cong., 2d Sess. § 4, 124 CONG. REC. S7526 (daily ed. May 16, 1978). The full text of the equal access provisions of H.R. 8410 and S. 2467 may be found at Kramer, *supra* this issue, note 2.

<sup>48</sup> See Kramer, *supra* this issue, text and notes at 22-26.

<sup>49</sup> See note 15 *supra*.

<sup>50</sup> See generally *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-20 (1969); *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409-10 (1964).

<sup>51</sup> *Clark Bros. Co.*, 70 N.L.R.B. 802, 805, 18 L.R.R.M. 1360, 1361 (1946), *enforced*, 163 F.2d 373, 20 L.R.R.M. 2436 (2d Cir. 1947); see note 15 *supra*. Such a rule would not violate § 8(c) of the Act, 29 U.S.C. § 158(c) (1976), or the first amendment, because the rule would be based on the coercive nature of captive audience speeches and their tendency to interfere with employee free choice. As the Supreme Court stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969):

In contrast to the two alternatives just stated, the equal access principle—by permitting captive audience speeches and by granting unions access rights only after the employer has himself addressed employees—presents a more narrow proposal. Nor are there any constitutional impediments to this proposal. Although the Supreme Court's decisions in this area have spoken, as Mr. Kramer notes,<sup>52</sup> of the need to strike a balance between property rights and the right to organize, the Court has regarded such a balance as required by the Congress, not by the Constitution. *Babcock & Wilcox* and the subsequent cases turn on what "[t]he Act requires,"<sup>53</sup> not on what the Constitution requires. If Congress were to require equal access, nothing in *Babcock & Wilcox* or its progeny presents a constitutional problem. Indeed, *Babcock & Wilcox* itself, as well as all the other cases in this area,<sup>54</sup> stand for the proposition that property rights must yield to organizational rights to the extent required by Congress. As Chief Justice Warren wrote, "[w]hen a choice has been required between an employer's rights in his premises and the rights that Congress has protected under Section 7, this Court has not hesitated to give effect to the congressional will."<sup>55</sup> As the Supreme Court has properly observed, "[i]nconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining."<sup>56</sup>

Furthermore, the notion that Congress is somehow required to strike a precise balance between judicially defined property rights and organizational rights would revive the substantive due process doctrine, long ago laid to rest in the area of social legislation.<sup>57</sup> The Constitution does not require Congress to balance an interest it wishes to promote against the property interest of employers. Rather, the familiar rule is that the Constitution requires "only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."<sup>58</sup>

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Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

395 U.S. at 617. Indeed, even outside the employment context, speech "impos[ed] upon a captive audience" may be subjected to restraints not otherwise permitted by the first amendment. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974).

<sup>52</sup> Kramer, *supra* this issue, text at note 4.

<sup>53</sup> 351 U.S. at 113-14.

<sup>54</sup> See *Beth Israel*, 98 S. Ct. at 2475; *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976).

<sup>55</sup> *NuTone*, 357 U.S. at 369 (Warren, C.J., dissenting and concurring).

<sup>56</sup> *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 232 (1949) (quoting *Republic Aviation*, 324 U.S. 793, 802 n.8 (1945)).

<sup>57</sup> *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

<sup>58</sup> *Id.* at 525. This standard has been applied repeatedly in labor cases. *E.g.*, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 18-19 (1976); *Day-Brite Light-*

The California Supreme Court recently recognized this principle in sustaining an equal access rule promulgated by the California Agricultural Labor Relations Board.<sup>59</sup> Congress should follow California's lead.<sup>60</sup> Our contemporary understanding of the realities of the representation election process leaves no doubt that, without an equal access rule, employees will continue in far too many cases to hear only one side of the issues regarding unionization. Where only one side can be heard, a free and fair choice is impossible. The matter is really that simple.

ing, Inc. v. Missouri, 342 U.S. 421, 423 (1952); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949); West Coast Hotel v. Parrish, 300 U.S. 379, 398 (1937).

<sup>59</sup> Agricultural Labor Relations Board v. Superior Court of Tulare County, 16 Cal. 3d 392, 546 P.2d 687, 128 Cal. Rptr. 183, 91 L.R.R.M. 2657, *appeal dismissed*, 429 U.S. 802 (1976). Mr. Kramer attempts to limit *Tulare* by stating that the California ALRB's rule was based on "factual findings" and contained several restrictions on union access. Kramer, *supra* this issue, text at notes 39-41. But the *Tulare* court referred to the "factual findings" only in considering whether the board had complied with its statutory obligation to follow NLRB precedents. 16 Cal. 3d at 411-19, 546 P.2d at 699-705, 128 Cal. Rptr. at 195-201, 91 L.R.R.M. at 2664-69. The court did *not* discuss the "findings" in considering the constitutional question. *Id.* at 402-11, 546 P.2d at 693-99, 128 Cal. Rptr. at 189-95, 91 L.R.R.M. at 2659-64. Indeed, the court quite properly held that the Constitution does not require factual findings of the need for access in a particular case before an access rule may be applied. In so doing, the court stated:

The principal objection . . . to the board's decision . . . is that there will be individual instances in which access might in fact have been unnecessary in order to effectively communicate with the workers. This is inevitable, as the board candidly recognizes. But it does not follow therefrom that the regulation is unconstitutional. "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' [Citation] 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.'" (*Dandridge v. Williams* (1970) 397 U.S. 471, 485 . . . .) Moreover, "a classification that meets the test articulated in *Dandridge* is perforce consistent with the due process requirement of the Fifth Amendment." (*Richardson v. Belcher* (1971) 404 U.S. 78, 81 . . . .)

*Id.* at 410, 546 P.2d at 699, 128 Cal. Rptr. at 195, 91 L.R.R.M. at 2664. As for the "restrictions" contained in the ALRB access rule, one need only read the rule, Kramer, *supra* this issue, note 37, to note its great breadth. For example, the rule provides unions a right to address employees even if the employer has not done so.

<sup>60</sup> There could be no first amendment objection to an equal access rule. Mr. Kramer attempts to formulate such an objection on the basis of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), in which the Court struck down a Florida statute requiring newspapers to give a political candidate an opportunity to reply in print to criticism of the candidate by the newspaper. The issue in *Tornillo* was whether the state could compel "editors or publishers to publish that which 'reason' tells them should not be published." *Id.* at 256. The Court concluded that this would constitute an "intrusion into the function of editors." *Id.* at 258.

The Supreme Court has often emphasized the first amendment protection of "editorial judgment," *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*,

## II. INJUNCTIVE RELIEF

In 1932 Congress declared in the Norris-LaGuardia Act<sup>61</sup> that "[n]o court of the United States . . . shall have jurisdiction to issue any . . . injunction in a case involving or growing out of a labor dispute . . . ."<sup>62</sup> The events leading up to passage of the Act are well known.<sup>63</sup> Prior to Norris-LaGuardia, courts attempted to define the "allowable area of economic conflict" between labor and management<sup>64</sup> through application of both the Sherman Act<sup>65</sup> and the common law.<sup>66</sup> Judicial intervention in labor disputes, primarily through the device of injunctive relief, came to be regarded as intolerable.

Central to the outcry against "government by injunction" unquestionably was the perception that judicial involvement in labor disputes served only to benefit management at the expense of labor. Judges hostile to the nascent labor movement issued injunctions clamping a lid on virtually every form of collective action by employees, thereby severely interfering with union organizing efforts.<sup>67</sup> As the Supreme Court put it in *Boys Markets, Inc. v. Retail Clerks Local 770*:<sup>68</sup> "In the early part of this century, the federal courts generally were regarded as allies of management in its attempt to prevent the organization and strengthening of labor unions; and in this industrial struggle the injunction became a potent weapon that was wielded against the activities of labor groups."<sup>69</sup> In light of the poor record of the courts in the early

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413 U.S. 376, 391 (1973), and has stated that "[f]or better or worse, editing is what editors are for." *CBS v. Democratic Nat'l Committee*, 412 U.S. 94, 124 (1973). Thus, the *Tornillo* ruling with respect to newspapers and political candidates cannot automatically be extended to other contexts. Indeed, *Tornillo* does not even apply to the broadcast media. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-90 (1969); *FCC v. Pacifica Foundation*, \_\_\_ U.S. \_\_\_, 98 S. Ct. 3026, 3040 (1978).

The question of "reply rights" in the context of a union organizing campaign can readily be distinguished from *Tornillo* on two bases. First, the Supreme Court has recognized that because of "the economic dependence of employees on their employers," speech by employers is subject to special restraints necessary in order to effectuate the policies of the NLRA. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969). Second, on the same day that *Tornillo* was decided, the Court held that speech to a "captive audience" is likewise subject to restraints which would not otherwise be permissible. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 320 (1974).

<sup>61</sup> Ch. 90, 47 Stat. 70 (1932) (now codified at 29 U.S.C. §§ 101-115 (1976)).

<sup>62</sup> 29 U.S.C. § 101 (1976).

<sup>63</sup> See generally F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930) [hereinafter cited as FRANKFURTER & GREENE].

<sup>64</sup> The phrase is that of Judge Pound in *Stillwell Theatre, Inc. v. Kaplan*, 259 N.Y. 405, 412, 182 N.E. 63, 66 (1932).

<sup>65</sup> Ch. 647, 26 Stat. 209 (1890) (now codified at 15 U.S.C. §§ 1-7 (1976)). E.g., *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Loewe v. Lawlor*, 208 U.S. 274 (1908).

<sup>66</sup> E.g., *Vegeahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896).

<sup>67</sup> *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 250-51 (1970).

<sup>68</sup> 398 U.S. 235 (1970).

<sup>69</sup> *Id.* at 250.

labor cases, Congress understandably reached the conclusion that courts were institutionally ill-suited to fashion labor policy, and that the task of developing national labor policy should be assumed by the legislature rather than by the judiciary.<sup>70</sup>

Norris-LaGuardia was based, however, on more than a desire to curb the predilections of biased judges or to prevent judicial interference with organizing efforts. More fundamentally, in enacting Norris-LaGuardia Congress sought "to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital."<sup>71</sup> In the years leading up to the passage of Norris-LaGuardia, leading critics of the misuse of the labor injunction expounded the view that labor disputes constituted a form of economic competition which should be kept free of governmental interference.<sup>72</sup> In enacting Norris-LaGuardia, Congress adopted this view.<sup>73</sup> Thus, the basic premise of the Act is that labor disputes should be resolved through the exercise of the economic power at the disposal of the contending parties, rather than through governmental intervention. In short, Congress "was creating *laissez faire*, or economic free enterprise, for organized

<sup>70</sup> Comment, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 YALE L.J. 70, 74-76 & nn.37 & 40 (1960). The Supreme Court has stated that Norris-LaGuardia "was prompted by a desire . . . to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer." *Marine Cooks v. Panama S.S. Co.*, 362 U.S. 365, 369 n.7 (1960).

<sup>71</sup> *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 40 (1957).

<sup>72</sup> See, e.g., *Vegeahn v. Guntner*, 167 Mass. 92, 104-09, 44 N.E. 1077, 1079-82 (1896) (Holmes, J., dissenting). Justice Holmes maintained that the policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is done, not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade . . .

... I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term "free competition," we may substitute "free struggle for life." Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests.

*Id.* at 106-07, 44 N.E. at 1081.

Professor Frankfurter espoused the same philosophy.

Judged by authoritative utterances, contemporary society rests upon certain assumptions: that social progress depends upon economic welfare; that our economic system is founded upon the doctrine of free competition, accepting for its gains the costs of its ravages; that large aggregations of capital are not inconsistent with the doctrine of free competition, but are, indeed, inevitable and socially desirable; that the individual workers must combine in order thereby to achieve the possibility of free competition with concentrated capital.

FRANKFURTER & GREENE, *supra* note 63, at 203-04.

<sup>73</sup> S. REP. NO. 669, 72d Cong., 1st Sess. 6 (1932) (quoting *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921)).

labor as well as big business."<sup>74</sup> Accordingly, the Act decreed that the courts should not interfere with labor's efforts to exercise its protected rights—"first, the right of free association, and, second, the right to advance the lawful objects of association."<sup>75</sup>

Recognition of this broader purpose of Norris-LaGuardia—to establish a system in which labor disputes are resolved by the natural interplay of the competing economic forces of labor and capital rather than by the government—refutes any contention that the policies of the Act are less vital now that unions have gained a measure of strength, and federal judges presumably a measure of equanimity, beyond that existing in 1932. Despite the many developments in industrial relations which have occurred in this country since 1932, it remains the case that "the use of economic pressure by the parties to a labor dispute is not a grudging exception [under federal law]; it is part and parcel of the process of collective bargaining" established by our system of labor laws.<sup>76</sup> Certain forms of economic pressure—such as the secondary boycott—are, of course, expressly prohibited.<sup>77</sup> Nevertheless, with the exception of these specifically banned practices, Congress has left "weapon[s] of self-help" available as part of "the balance of power between labor and management expressed in our national labor policy."<sup>78</sup> As a result, legitimately employed strikes constitute an economic weapon implementing and supporting the principles of collective bargaining.<sup>79</sup>

Following passage of the Norris-LaGuardia Act, the question arose as to when a federal court may enter an injunction in a labor dispute despite the nonintervention policy established by Norris-LaGuardia. The answer began to emerge in 1957 in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co.*,<sup>80</sup> a case arising under the Railway Labor Act.<sup>81</sup> The Railway Labor Act established a system for resolving disputes over the meaning of collective bargaining agreements in the railroad industry. Under the statutory provisions, if the parties cannot reach an agreement, the dispute is resolved by the

<sup>74</sup> C. GREGORY, *LABOR AND THE LAW* 192 (1946) [hereinafter cited as GREGORY]. See also GREGORY at 186.

<sup>75</sup> H.R. REP. NO. 163, 52d Cong., 1st Sess. (1932).

<sup>76</sup> *NLRB v. Insurance Agents*, 361 U.S. 477, 495 (1960).

<sup>77</sup> See National Labor Relations Act, § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976). Injunctions are expressly authorized in such cases by sections 10(h) and 10(l) of the NLRA, 29 U.S.C. §§ 160(h), (l) (1976). In addition, injunctions are expressly authorized in "national emergency" strikes by § 208(b) of the Taft-Hartley Act, 29 U.S.C. § 178(b) (1976).

<sup>78</sup> *Lodge 76, Machinists v. Wisconsin Employment Relations Bd.*, 427 U.S. 132, 146 (quoting *Teamsters v. Morton*, 377 U.S. 252, 259-60 (1964)). It should be noted that the policy favoring the resolution of labor disputes through the use of economic force rather than through governmental intervention has been invoked by employers at least as often as it has been invoked by unions. See *Lodge 76, Machinists, supra*, at 147 (citing *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 109 (1970); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965)).

<sup>79</sup> *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234 (1963).

<sup>80</sup> 353 U.S. 30 (1957).

<sup>81</sup> Ch. 347, 44 Stat. 577 (1926) (now codified at 45 U.S.C. §§ 151-188 (1976)).

National Railroad Adjustment Board, whose awards are final and binding upon both parties to the dispute.<sup>82</sup> Resort to the Board is mandatory.<sup>83</sup>

In *Chicago River*, the Supreme Court was required to determine whether federal courts could compel compliance with the provisions of the Railway Labor Act by enjoining a union from striking where such strikes would "defeat the jurisdiction of the Adjustment Board."<sup>84</sup> In concluding that *Norris-LaGuardia* should not be construed to ban such an injunction, the Court reasoned as follows:

[In *Norris-LaGuardia*] Congress acted to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital. Rep. LaGuardia, during the floor debates on the 1932 Act, recognized that the machinery of the Railway Labor Act channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them. Such controversies, therefore, are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative.<sup>85</sup>

Accordingly, the *Chicago River* Court held that an injunction could be entered to prevent a strike from defeating the jurisdiction of the Adjustment Board,<sup>86</sup> despite the provisions of *Norris-LaGuardia*, because that Board constituted an alternative to the use of economic force in resolving labor disputes which justified depriving the union of the strike weapon.

Soon after the Court's decision in *Chicago River*, the question arose whether the Court's holding applied to other industries where, in the absence of statutorily-mandated arbitration, voluntary arbitration had been established by collective bargaining agreement. This question was complicated by several actions which Congress took in passing the Taft-Hartley Act in 1947.<sup>87</sup> First, in section 301(a) of Taft-Hartley, Congress for the first time authorized federal courts to entertain suits to enforce collective bargaining agreements.<sup>88</sup> Second, Congress rejected a proposal that the *Norris-LaGuardia* prohibition against injunctions be lifted to allow federal injunctive relief to enforce collective bargaining agreements.<sup>89</sup> Finally, Congress declared that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for

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<sup>82</sup> 45 U.S.C. § 153, First (m) (1976).

<sup>83</sup> *Chicago River*, 353 U.S. at 34-35.

<sup>84</sup> *Id.* at 39.

<sup>85</sup> *Id.* at 40-41 (footnotes omitted).

<sup>86</sup> *Id.* at 42. See also *Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co.*, 363 U.S. 528, 531 (1960), in which the Court described *Chicago River* as having turned on "the superseding purpose of the Railway Labor Act to establish a system of compulsory arbitration for this type of dispute, a purpose which might be frustrated if strikes could not be enjoined during the consideration of such a dispute by the Board."

<sup>87</sup> Labor Management Relations Act, ch. 120, 61 Stat. 156 (1947) (now codified at 29 U.S.C. §§ 171-187 (1976)).

<sup>88</sup> 29 U.S.C. § 185(a) (1976).

<sup>89</sup> See *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 409 (1976); HOUSE CONF. RPT. NO. 510, 80th Cong., 1st Sess. 66 (1947); 93 CONG. REC. 6445-46 (1947).

settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."<sup>90</sup>

In 1957 the Supreme Court began the task of accommodating section 301 of Taft-Hartley with the anti-injunction provisions of Norris-LaGuardia. In *Textile Workers v. Lincoln Mills*,<sup>91</sup> the Court ruled that under section 301 a court may order specific performance of a commitment to arbitrate, Norris-LaGuardia notwithstanding.<sup>92</sup> Three years later, in the *Steelworkers Trilogy*,<sup>93</sup> the Court held that where an employer and a union have agreed to arbitrate grievances, a party refusing to arbitrate should be compelled to do so unless the grievance in question is clearly excluded from the parties' arbitration commitment.<sup>94</sup> Further, the *Steelworkers* Court held that the award of an arbitrator is entitled to deference and should be judicially enforced unless the award is clearly unfaithful to the terms of the agreement.<sup>95</sup> This group of decisions established voluntary arbitration as a favored child of the national labor policy. Nonetheless, it remained to be seen whether the Court would grant voluntary arbitration agreements the same protection from jurisdiction-defeating strikes as the *Chicago River* Court afforded the compulsory arbitration mechanism of the Railway Labor Act.

The Court first squarely addressed the issue of the applicability of *Chicago River* outside the Railway Labor Act context in a 1962 case, *Sinclair Refining Co. v. Atkinson*.<sup>96</sup> In *Sinclair*, a majority of the Court, relying heavily on Congress' refusal to modify Norris-LaGuardia at the time it enacted section 301 of Taft-Hartley, concluded that despite the existence of an arbitration agreement and a no-strike clause, Norris-LaGuardia foreclosed the issuance of an injunction against a strike.<sup>97</sup> Three Justices, however, drew a more specific lesson from the congressional actions in 1947.<sup>98</sup> While agreeing that Norris-LaGuardia is controlling where the question of enforcing a contractual no-strike obligation stands alone,<sup>99</sup> the three dissenters maintained that the strike in *Sinclair* was enjoined because it threatened the public policy favoring arbitration. In their view, injunctions were not "barred against strikes over

<sup>90</sup> 29 U.S.C. § 173(d) (1976).

<sup>91</sup> 353 U.S. 448 (1957).

<sup>92</sup> *Id.* at 458-59.

<sup>93</sup> *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>94</sup> *Warrior*, 363 U.S. at 582-83.

<sup>95</sup> *Enterprise Wheel*, 363 U.S. at 596-99.

<sup>96</sup> 370 U.S. 195 (1962).

<sup>97</sup> *Id.* at 203, 214.

<sup>98</sup> Justice Brennan dissented, joined by Justices Douglas and Harlan. *Id.* at 215.

<sup>99</sup> *Id.* at 225. Justice Brennan stated that there is no general federal anti-strike policy; and although a suit may be brought under § 301 against strikes which, while they are breaches of private contracts, do not threaten any additional public policy, in such cases the anti-injunction policy of Norris-LaGuardia should prevail.

*Id.*



grievances which have been routed to arbitration by a contract specifically enforceable against both the union and the employers."<sup>100</sup> Rather, the dissenters reasoned, "enforced adherence to such arbitration commitments has emerged as a dominant motif in the developing federal law of collective bargaining agreements."<sup>101</sup> The dissenters concluded, therefore, that a strike in breach of a collective bargaining agreement may be enjoined where it is "over a grievance which both parties are contractually bound to arbitrate."<sup>102</sup>

*Sinclair* was an extremely controversial decision.<sup>103</sup> Just eight years later, in *Boys Markets, Inc. v. Retail Clerks Local 770*,<sup>104</sup> the Supreme Court overruled *Sinclair* and adopted the views of the *Sinclair* dissenters. The *Boys Markets* Court specifically stated "that the dissenting opinion in *Sinclair* states the correct principles concerning the accommodation necessary between the seemingly absolute terms of the Norris-LaGuardia Act and the policy considerations underlying § 301(a)."<sup>105</sup> In addition, the *Boys Markets* Court held that the principles established in *Chicago River* were equally applicable where a voluntary arbitration agreement is in effect.<sup>106</sup> In so holding, the Court emphasized that the policies embodied in Norris-LaGuardia may be subordinated to "an overriding interest in the successful implementation of the arbitration process."<sup>107</sup> Accordingly, the *Boys Markets* Court adopted the standards set out in the *Sinclair* dissent.<sup>108</sup>

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<sup>100</sup> *Id.* at 224-25.

<sup>101</sup> *Id.* at 225.

<sup>102</sup> *Id.* at 228.

<sup>103</sup> Shortly after the decision was rendered, a special report on the *Sinclair* issue was published by the Labor Relations Law Section of the American Bar Association. Report of Special *Atkinson-Sinclair* Committee, ABA LABOR RELATIONS LAW SECTION 226 (1963). In that report, the neutral members of the "Special *Atkinson-Sinclair* Committee" recommended that *Sinclair* be overruled to permit injunctions against breach-of-contract strikes, but only where the dispute underlying the strike is arbitrable. *Id.* at 241-42.

<sup>104</sup> 398 U.S. 235 (1970).

<sup>105</sup> *Id.* at 249 (footnote omitted).

<sup>106</sup> *Id.* at 252.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 254. In determining the availability of injunctive relief, the *Boys Markets* Court set forth the following standards, as enunciated in the *Sinclair* dissent:

A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.

*Id.* at 254 (quoting *Sinclair*, 370 U.S. at 228) (emphasis in original).

One clear and consistent principle emerges from *Chicago River*, the *Sinclair* dissent, and *Boys Markets*—an injunction cannot be granted in a labor dispute merely because a contractual undertaking, such as a no-strike commitment, has been violated. However, where a mechanism has been established—either by statute or by agreement—to resolve disputes through arbitration rather than through economic force, the policy favoring arbitration justifies the issuance of an injunction in one “narrow” case: when a union, by striking over an arbitrable grievance, attempts to deprive the employer of his right to have the dispute resolved by arbitration.<sup>109</sup>

After *Boys Markets*, the question arose whether the narrow exception to the Norris-LaGuardia anti-injunction policy established by *Chicago River* and *Boys Markets* is applicable to sympathy strikes. Sympathy strikes, such as a refusal to cross another union’s picket line, differ from other strikes in one respect which is critical to the question of injunctive relief—they generally do not arise out of grievances which are subject to the arbitration machinery agreed upon by the parties. Hence, sympathy strikes generally do not represent an effort to deprive the employer of the right to have a dispute resolved by arbitration.

The applicability of Norris-LaGuardia to sympathy strikes is beyond question. In enacting Norris-LaGuardia, Congress intended to stake out a broad “area of economic conflict that had best be left to economic forces and the pressure of public opinion.”<sup>110</sup> Overruling judicial opinions which had sought to define narrowly an area of legitimate union self-interest in which the use of economic force was considered to be allowable,<sup>111</sup> Congress declared in Norris-LaGuardia that no injunction could issue in “any controversy concerning terms and conditions of employment, . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee,” or against any participant in such a dispute who has a “direct or indirect interest therein.”<sup>112</sup> The Act thus protects sympathetic action directed at improving the lot of other workers.<sup>113</sup> As the Supreme Court stated only last Term, Norris-LaGuardia protects the “right of wage earners to or-

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<sup>109</sup> *Id.* at 252-53.

<sup>110</sup> *United States v. Hutcheson*, 312 U.S. 219, 231 (1941).

<sup>111</sup> See *id.* at 230-31 (discussing *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921)). See also FRANKFURTER & GREENE, *supra* note 63, at 215-16.

<sup>112</sup> 29 U.S.C. § 113 (1976); see 29 U.S.C. § 109 (1976).

<sup>113</sup> That sympathy strikes come within the protection of Norris-LaGuardia has been clear since the Supreme Court’s 1938 decision in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938). The New Negro Alliance was a corporation “composed of colored persons, organized for the mutual improvement of its members and for the promotion of civic, educational, benevolent, and charitable enterprises.” *Id.* at 555. The organization picketed a chain of grocery stores after the owner rejected the Alliance’s demands that it employ blacks. The picketing members of the Alliance themselves did not desire employment with the stores. Rather, the picketing clearly was designed to benefit blacks in general. The Court, relying on 29 U.S.C. § 113, held that Norris-LaGuardia prevented the Alliance’s action from being enjoined. 303 U.S. at 560.

ganize and to act jointly in questions affecting wages, conditions of labor, and the welfare of labor generally."<sup>114</sup>

In 1976 the Court affirmed the protection of Norris-LaGuardia for sympathy strikes in *Buffalo Forge Co. v. United Steelworkers*.<sup>115</sup> The Court held that the lower court properly found itself without jurisdiction to grant injunctive relief against a unit of production and maintenance (P & M) employees who refused to cross a picket line established by a unit of office and technical (O & T) employees working at the same location.<sup>116</sup> The P & M and O & T employees in *Buffalo Forge* were represented by separate Steelworkers locals. The O & T strike had been sparked by the employer's resistance to negotiating an initial collective bargaining agreement for the O & T local.<sup>117</sup> The collective bargaining agreement in effect between the employer and the striking P & M local contained a broad no-strike clause.<sup>118</sup> This clause, however, did not expressly refer to sympathy strikes, and the union contended that the clause did not forbid such strikes. Additionally, the agreement contained a broad commitment to arbitrate certain disputes.<sup>119</sup> Although the question whether the union's sympathy strike violated the no-strike clause was an arbitrable dispute, the issue underlying the sympathy strike—the desire of the P

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<sup>114</sup> *Eastex, Inc. v. NLRB*, — U.S. —, 98 S. Ct. 2505, 2512 n.14 (1978) (quoting S. REP. NO. 163, 72d Cong., 1st Sess 9 (1932)) (emphasis by the Court). While the area of permissible union activity has been narrowed in some respects since 1932, see, e.g., the secondary boycott provisions of Taft-Hartley, sympathy strikes remain protected activity, not only under Norris-LaGuardia, but under the NLRA as well. See *Eastex*, 98 S. Ct. at 2512 n.13 (citing with approval *Redwing Carriers, Inc.*, 137 N.L.R.B. 1545, 1546-47, 50 L.R.R.M. 1440, 1440-41 (1962), *enforced sub nom. Teamsters Local 79 v. NLRB*, 325 F.2d 1011, 54 L.R.R.M. 2707 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964)). Indeed, the language of § 7 of the NLRA was modeled after that found in § 2 of Norris-LaGuardia. See *Eastex*, 98 S. Ct. at 2512 n.14. As the *Eastex* Court stated:

The "employees" who may engage in concerted activities for "mutual aid or protection" are defined by § 2 (3) of the Act, 29 U.S.C. § 152 (3) to "include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise. . . ." This definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own. In recognition of this intent, the Board and the courts long have held that the "mutual aid or protection" clause encompasses such activity. . . .

. . . The 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of "mutual aid or protection" as well as for the narrower purposes of "self-organization" and "collective bargaining."

*Eastex*, 98 S. Ct. at 2511-12 (footnotes omitted).

<sup>115</sup> 428 U.S. 397 (1976).

<sup>116</sup> *Id.* at 403-04, 412-13.

<sup>117</sup> See *id.* at 399-404.

<sup>118</sup> *Id.* at 399 & n.1.

<sup>119</sup> *Id.* at 399-400 & n.2.

& M local to support the O & T local in the latter's contract efforts—was not arbitrable.<sup>120</sup> The P & M local agreed to submit the issue whether the sympathy strike was in breach of contract to arbitration and to abide by the award. The employer chose to ignore the offer to arbitrate, however, and sought an injunction against the sympathy strike, claiming, ironically, that injunctive relief was necessary in aid of arbitration.<sup>121</sup>

The Supreme Court rejected the employer's contention that the sympathy strike should have been enjoined pending an arbitrator's ruling as to whether the strike was in breach of contract.<sup>122</sup> Notwithstanding the five to four split of the *Buffalo Forge* Court and the curious alignment of the Justices,<sup>123</sup> the decision, in my view, flows inexorably from the principles established in the Court's earlier rulings. A contrary result would have upset long-established doctrines regarding the role of the federal courts in labor disputes.

The key to the Court's ruling in *Buffalo Forge* was recognition of the principle, clearly enunciated in *Chicago River* and *Boys Markets*, that injunctions are permitted only where they are "essential to carry out promises to arbitrate and to implement the private arrangements for the administration of the contract."<sup>124</sup> While striking over an arbitrable dispute interferes with and frustrates the arbitral process,<sup>125</sup> the arbitral process is not frustrated by a strike which does not concern an arbitrable issue and, therefore, which does not seek to bypass arbitration.<sup>126</sup> A claim that the strike is in breach of contract does "not in itself warrant an injunction,"<sup>127</sup> because "the Court has never indicated that the courts may enjoin actual or threatened contract violations despite the Norris-LaGuardia Act."<sup>128</sup> To the contrary, all of the Justices who participated in *Sinclair* and *Boys Markets* recognized that, in light of Congress' refusal to modify Norris-LaGuardia in 1947 when enacting section 301(a) of Taft-Hartley, an injunction cannot be issued merely because a party has breached a collective bargaining agreement—whether the breach is of the no-strike clause or of any other provision.<sup>129</sup> The only collectively-bargained commitment which can form the predicate for an injunction is an agreement to arbitrate a dispute, because this provision alone provides a "reasonable alternative" to the use of economic force.<sup>130</sup>

Thus, it is quite beside the point to complain, as Mr. Kramer does, that unless a no-strike agreement can be enforced by injunctive relief, an employer

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<sup>120</sup> See *id.* at 404-05.

<sup>121</sup> See *id.* at 401 n.3, 410.

<sup>122</sup> *Id.* at 412-13.

<sup>123</sup> The opinion of the Court was written by Justice White, joined by the Chief Justice and Justices Stewart, Blackmun, and Rehnquist. Justice Stevens dissented, joined by Justice Brennan, the author of *Boys Markets*, and Justices Marshall and Powell.

<sup>124</sup> 428 U.S. at 411.

<sup>125</sup> *Id.* at 407.

<sup>126</sup> *Id.* at 412.

<sup>127</sup> *Id.* at 409.

<sup>128</sup> *Id.*

<sup>129</sup> See *Boys Markets*, 398 U.S. at 249-51, 255-56 (Black, J., dissenting); *Sinclair*, 370 U.S. at 205, 224 (Brennan, J., dissenting).

<sup>130</sup> See text at note 109 *supra*.

will not receive "the benefit of his bargain," or to contend that Norris-LaGuardia cannot possibly be violated by an injunction simply compelling a union to carry out a voluntarily agreed upon commitment.<sup>131</sup> Leaving aside the thorny question whether the sympathy action in *Buffalo Forge* was in fact a breach of contract,<sup>132</sup> the important point is that under Norris-LaGuardia, injunctions are not available merely to protect the contractual expectations of employers and unions. As the Court recognized in *Buffalo Forge*, to disregard this point would lead to the authorization of injunctions in a wide range of situations in which, for good reason, injunctions thus far have been unavailable.<sup>133</sup> If injunctions were available simply to enforce contractual agreements, then whenever a union believed an employer violated a contractual

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<sup>131</sup> Kramer, *supra* this issue, text at notes 92-93. See also *Buffalo Forge*, 428 U.S. at 415-19 (Stevens, J., dissenting); Gould, *On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge*, 30 STAN. L. REV. 533, 546-47 (1978).

<sup>132</sup> If courts were allowed to enjoin strikes over nonarbitrable matters, in many cases injunctions would prevent lawful activity—a result which would be antithetical to the policies of Norris-LaGuardia. Unless a no-strike clause expressly prohibits such strikes, it generally cannot be assumed that sympathy strikes violate even a broadly worded no-strike clause. In *Buffalo Forge*, as the Court stressed, the union denied that its no-strike commitment applied to sympathy strikes. 428 U.S. at 405. The Court contrasted this situation with *Boys Markets* where the strike clearly violated a no-strike clause. *Id.* at 406. I think the better position is that sympathy strikes should be assumed *not* to violate a no-strike clause unless the clause expressly prohibits such strikes. The Supreme Court has stated that, absent evidence to the contrary, "the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 382 (1974). Thus, a no-strike clause ordinarily should not be construed to apply to matters which are outside the agreement to arbitrate. In addition, since the right to engage in a sympathy strike is protected by section 7 of the NLRA, that right should not be deemed to have been waived except by express and unambiguous language. *Local 18, Operating Engineers (Davis-McKee, Inc.)*, 238 N.L.R.B. No. 58, 99 L.R.R.M. 1307 (1978).

This points to an additional reason why the *Buffalo Forge* result is sound. Since a strike over a matter which is not arbitrable should ordinarily be considered not to violate a no-strike clause, before a court could properly conclude that an injunction should issue against such a strike, the court would have to analyze bargaining history, industry practice, and other relevant factors in order to determine whether the parties intended by their contract to prohibit the strike. As the *Buffalo Forge* majority recognized,

this would . . . involve hearings, findings, and judicial interpretations of collective-bargaining contracts. It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and it is difficult to believe that the arbitrator would not be heavily influenced or wholly pre-empted by judicial views of the facts and the meaning of contracts . . . .

428 U.S. at 412. Thus, courts inevitably would enjoin activity which arbitrators would have found not to be in breach of contract. Consider, for example, the conduct which was held to violate a no-strike clause in *National Rejectors Industries v. United Steelworkers*, 562 F.2d 1069, 1074-75, 96 L.R.R.M. 2120, 2124 (8th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978). As is well recognized, once concerted activity has been enjoined, it seldom can be revived. See *Buffalo Forge*, 428 U.S. at 412; FRANKFURTER & GREENE, *supra* note 63, at 201.

<sup>133</sup> 428 U.S. at 410.

provision, the union could seek an injunction requiring the employer to restore the *status quo* pending arbitration of the validity of the employer's action. To be sure, such injunctions should be available to unions in some circumstances, particularly when an employer has taken action which defeats the possibility of meaningful arbitration of a dispute.<sup>134</sup> I doubt, however, that Mr. Kramer would agree that injunctions should issue to forestall an employer's contract breach where the breach does not frustrate the arbitration process.

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<sup>134</sup> In a well-reasoned opinion, *Lever Bros. Co. v. Chemical Workers*, 554 F.2d 115, 95 L.R.R.M. 2438 (4th Cir. 1976), the Fourth Circuit affirmed an injunction preventing an employer from transferring its plant from Maryland to Indiana pending arbitration of the validity of the relocation. The court stressed that if the plant were relocated before the arbitrator had a chance to rule, the arbitrator would be presented with a *fait accompli* which he would be virtually powerless to undo. Thus, an injunction was proper to prevent "the injury which would occur to the arbitral process if the permanent transfer of the plant was permitted in this case pending arbitration." *Id.* at 122, 95 L.R.R.M. at 2443 (addendum to opinion). The Fourth Circuit has subsequently applied *Lever Bros.* to affirm an injunction preventing an employer from continuing to partially liquidate its business pending arbitration of the validity of its actions. *Teamsters Local 71 v. Akers Motor Lines, Inc.*, 582 F.2d 1336, 99 L.R.R.M. 2601 (4th Cir. 1978). The court explained that

[*Lever Bros.*] was consistent with the underlying rationale of *Buffalo Forge*, that the process of arbitration is preferred and the jurisdiction of the arbitrator is to be protected. The lynchpin of *Buffalo Forge* was the Court's finding that the sympathy strike at issue would not frustrate the arbitration process. The lynchpin of *Lever Brothers* was our finding that relocation of the plant would have precisely that effect.

582 F.2d at 1341, 99 L.R.R.M. at 2604-05.

The Second and Ninth Circuits have adopted approaches to the question of injunctions against employers which differ from that of the Fourth Circuit. In *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 85 L.R.R.M. 2516 (2d Cir. 1974), a pre-*Buffalo Forge* decision, the Second Circuit did not appear to consider the question as turning on whether an injunction is necessary to preserve the viability of arbitration. Instead, the court assumed that an injunction could issue if the provisions of § 7 of Norris-LaGuardia, 29 U.S.C. § 107 (1976), were satisfied, and if the union satisfied the "ordinary principles of equity," including a likelihood of success on the merits—a factor rejected in *Akers Motor Lines*, 582 F.2d at 1342, 99 L.R.R.M. at 2605, and not mentioned in *Boys Markets* or *Buffalo Forge*. See *Hoh*, 491 F.2d at 560-61, 85 L.R.R.M. at 2519-20.

In *Transit Union, Div. 1384 v. Greyhound Lines, Inc.*, 550 F.2d 1237, 95 L.R.R.M. 2097 (9th Cir. 1977), a case which had been remanded for reconsideration in light of *Buffalo Forge*, the Ninth Circuit held that an injunction directing an employer to preserve the status quo pending arbitration could not issue because the employer had made no promise to do so. The court stated that such a promise "would be to Greyhound what an undertaking not to strike would be to a union." *Id.* at 1238, 95 L.R.R.M. at 2098. While the court's premise can be questioned, see Gould, *supra* note 131, at 558-60, the *Greyhound* decision may not actually conflict with *Lever Bros.* The Ninth Circuit indicated that a commitment to preserve the status quo might be implied in a case where the alteration of the status would "frustrate and interfere with the arbitral process." 550 F.2d at 1238-39, 95 L.R.R.M. at 2098. Since the *Greyhound* case did not involve such a situation, but rather a dispute over work schedules, the case is easily distinguished from *Lever Bros.* and *Akers Motor Lines*, as the Fourth Circuit has noted. See *Akers Motor Lines*, 582 F.2d at 1341, 99 L.R.R.M. at 2604.

In my view, the Fourth Circuit's approach is the proper one, and flows directly from *Boys Markets* and *Buffalo Forge*. Injunctions against employers should not be is-

Yet, the rationale of the dissent in *Buffalo Forge* would lead to precisely that result. Although the dissent candidly recognized that a sympathy strike does not frustrate the arbitration process,<sup>135</sup> the dissent nevertheless could see no reason not to enjoin a strike which is in breach of contract, at least where the breach is clear. Viewing the arbitration process as a present agreement to remove future contractual ambiguities, the dissent concluded that "if the specific situation is foreseen and described in the contract itself with such precision that there is no need for interpretation by an arbitrator, it would be reasonable to give the same legal effect to such an agreement prior to the arbitrator's decision."<sup>136</sup> Obviously, this reasoning would authorize injunctions not only against breaches of a no-strike clause, but against any "unambiguous" breach of contract. At bottom, then, the *Buffalo Forge* ruling cannot be disputed in principle unless one adopts the view that injunctions should be available to remedy *any* breach—or at least any "unambiguous" breach—of a collective bargaining agreement. That view was rejected by Congress in 1947,<sup>137</sup> and few would advocate it today.

It may be argued that a no-strike clause can be distinguished from other provisions of a collective bargaining agreement in that the no-strike clause is the "quid pro quo" for the arbitration clause. Justice Stevens adopted this view in his *Buffalo Forge* dissent, arguing that the absence of an injunctive remedy against sympathy strikes will "frustrate the . . . basic policy of motivating employers to agree to binding arbitration by giving them an effective 'assurance of uninterrupted operation during the term of the agreement.'"<sup>138</sup> But whatever may be the validity of the notion of a "quid pro quo" relation-

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sued simply because a contract has been violated, but, where the employer's actions would defeat the possibility of meaningful arbitration of a dispute, an injunction restoring the status quo is called for. One situation in which this prerequisite will generally be met is a case in which an employer proposes a major change in operations which would confront an arbitrator with a *fait accompli*, as in *Lever Bros.* and in *Akers Motor Lines*. Another illustration, among several which could be cited, is where the employer's action would endanger the health or safety of employees. See *Texaco Independent Union v. Texaco, Inc.*, 452 F. Supp. 1097, 99 L.R.R.M. 2147, 2148 (W.D. Pa. 1978), and cases cited therein.

In addition, when an employer obtains a *Boys Markets* injunction against a strike, a court has clear authority to require the employer to preserve the status quo, as a condition to granting the injunction. See *Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co.*, 363 U.S. 528, 534-35 (1960).

<sup>135</sup> 428 U.S. at 423-24 (Stevens, J., dissenting).

<sup>136</sup> *Id.* at 426 (footnote omitted). Justice Stevens further stated:

In this case, the question whether the sympathy strike violates the no-strike clause is an arbitrable issue. If the court had the benefit of an arbitrator's resolution of the issue in favor of the employer, it could enforce that decision just as it could require the parties to submit the issue to arbitration. And if the agreement were so plainly unambiguous that there could be no bona fide issue to submit to the arbitrator, there must be the same authority to enforce the parties' bargain pending the arbitrator's final decision.

*Id.*

<sup>137</sup> See text at note 89 *supra*.

<sup>138</sup> *Buffalo Forge*, 428 U.S. at 424 (Stevens, J., dissenting).

ship between no-strike clauses and arbitration clauses, absolutely no basis exists for believing that employers will lose their motivation to agree to arbitration procedures if they cannot obtain injunctive relief against sympathy strikes. The division of courts concerning the enjoinability of sympathy strikes prior to *Buffalo Forge* clearly indicates that employers could not have assumed with any confidence that sympathy strikes could be enjoined.<sup>139</sup> Yet this uncertainty did not dissuade employers from agreeing to arbitration provisions.

I am convinced that employers will not lose their motivation to negotiate arbitration provisions merely because, after *Buffalo Forge*, the uncertainty was resolved against the enjoinability of sympathy strikes. To the contrary, the obtaining of a union's commitment not to strike over *arbitrable* grievances, enforceable by injunction, coupled with the stability and the considerable additional advantages which arbitration brings to any employer, are more than enough "quid" for the "quo" of the employer's agreement to arbitrate grievances. In my experience, almost all employers welcome a grievance arbitration mechanism as a means of improving employee trust and morale, and as a method of directing employee dissatisfaction with management decisions into nondestructive channels. It may well be that some employers would not agree to arbitrate disputes while at the same time leaving a union free to strike over those disputes; but that is a far cry from assuming that employers will not agree to arbitrate unless they are assured that even sympathy strikes over nonarbitrable matters may be enjoined. Such an assumption would be based on a conception of arbitration as the "ultimate concession" by an employer—a conception which is not accurate today, if it ever was.

Furthermore, it should be emphasized that where a sympathy strike is in fact a breach of the collective bargaining agreement, an employer has a number of remedies available. Assuming—as in *Buffalo Forge*—that the legality of the strike is an arbitrable issue, the employer can compel the union to arbitrate that issue.<sup>140</sup> If the arbitrator rules in the employer's favor, he has the power to order appropriate relief as provided by the contract between the parties. In addition, the arbitrator's award, if disobeyed, may be enforced in federal court.<sup>141</sup> During the period prior to the implementation of the arbitrator's ruling—a period which need not be long, especially if the parties have agreed to contract language requiring expeditious handling of such grievances<sup>142</sup>—an employer retains the prerogative to take appropriate dis-

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<sup>139</sup> See 428 U.S. at 404 n.9. It must be remembered that *Buffalo Forge* did not announce an unanticipated rule contrary to prior labor and management assumptions. As far back as 1963, the neutral members of the Special *Atkinson-Sinclair* Committee expressly stated that injunctions should be permitted only where a strike is over an arbitrable grievance. See note 103 *supra*. As we have seen, the requirement of arbitrability was also an integral part of the rationale of *Boys Markets*. See generally text and notes 104-09 *supra*.

<sup>140</sup> See *Lincoln Mills*, 353 U.S. at 458-59; see text and notes 91-92 *supra*.

<sup>141</sup> See *Buffalo Forge*, 428 U.S. at 405.

<sup>142</sup> The union members of the Special *Atkinson-Sinclair* Committee of the ABA Labor Law Section recommended the negotiation of such language in their 1963 Report. ABA LABOR RELATIONS LAW SECTION, *supra* note 103, at 239. Many unions would be willing to agree to provisions providing for expedited arbitration of alleged viola-



disciplinary action, including discharge, against those employees engaged in a sympathy strike he deems to be unlawful, subject, of course, to challenge in the grievance procedure. Finally, the employer can institute a section 301 damage action. Consequently, sympathy strikes do not present unreasonable problems for employers, and there is no reason to legislatively overrule the sound decision in *Buffalo Forge*.

A more difficult question is raised by certain activities not authorized by a union, i.e., "wildcat" strikes and "stranger picketing." Employers have complained that such activity has reached epidemic proportions in some sectors, primarily the coal mining industry. In many cases, the courts have expressed the same concern,<sup>143</sup> and quite often these hard cases have made bad law.<sup>144</sup>

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tions of a no-strike clause, at least if management would agree to similar treatment of certain categories of grievances, such as those alleging serious violations of a safety and health clause, discharge cases, and disputes regarding contracting out work.

<sup>143</sup> See, e.g., *Republic Steel Corp. v. United Mine Workers*, 570 F.2d 467, 479-80, 97 L.R.R.M. 2836, 2844-45 (3d Cir. 1978).

<sup>144</sup> An example is the *Eazor Express* doctrine, which holds a union liable for failing to fulfill an implied obligation to use "every reasonable means" to bring an end to an unauthorized strike. See *Eazor Express, Inc. v. Teamsters*, 520 F.2d 951, 959, 89 L.R.R.M. 3177, 3183 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976); *United States Steel Corp. v. United Mine Workers*, 534 F.2d 1063, 1072-74, 91 L.R.R.M. 3031, 3037-40 (3d Cir. 1976) (*U.S. Steel I*); *Republic Steel Corp. v. United Mine Workers*, 570 F.2d 467, 477-80, 97 L.R.R.M. 2836, 2843-45 (3d Cir. 1978). *Contra*, *Southern Ohio Coal Co. v. United Mine Workers*, 551 F.2d 695, 701, 94 L.R.R.M. 2609, 2612 (6th Cir. 1977); *Carbon Fuel Co. v. United Mine Workers*, 582 F.2d 1346, 1350-51, 99 L.R.R.M. 2520, 2522-23 (4th Cir. 1978). The misguided nature of the *Eazor Express* doctrine is clearly demonstrated in *Whitman, Wildcat Strikes: The Unions' Narrowing Path to Rectitude*, 50 IND. L. REV. 472 (1975), and in 89 HARV. L. REV. 601 (1976).

Similarly, several courts have undertaken to limit the force of *Buffalo Forge* by suggesting that a sympathy strike may be enjoined if the strike which "triggered" the sympathy strike was over an arbitrable grievance, even though the sympathy strikers are not themselves under any obligation to arbitrate that grievance or any other matter giving rise to the sympathy strike. The Third Circuit appeared to reject such an approach in *United States Steel Corp. v. United Mine Workers*, 548 F.2d 67, 73-74, 94 L.R.R.M. 2049, 2053-54 (3d Cir. 1976) (*U.S. Steel II*), but subsequently viewed the issue as open in *Republic Steel Corp. v. United Mine Workers*, 570 F.2d 467, 476-77, 97 L.R.R.M. 2836, 2842-43 (3d Cir. 1978). Both the Sixth and Seventh Circuits have rejected the availability of an injunction against a sympathy strike despite claims that the "triggering" strike involved an arbitrable grievance. Nevertheless, both courts indicated that an injunction could have issued if the sympathy strikers were shown to have adopted the arbitrable grievances, and the goals of the unlawful strike, "as their own." See *Ziegler Coal Co. v. Local 1870, United Mine Workers*, 566 F.2d 582, 585, 96 L.R.R.M. 3360, 3363 (7th Cir. 1977); *Southern Ohio Coal Co. v. United Mine Workers*, 551 F.2d 695, 703, 94 L.R.R.M. 2609, 2613-14 (6th Cir. 1977). The Fourth Circuit has affirmed the issuance of an injunction against a sympathy strike where the "triggering" strike and the sympathy strike involved the same bargaining agreement and bargaining unit, and an arbitration award involving one of the striking locals would have affected the other. *Cedar Coal Co. v. United Mine Workers*, 560 F.2d 1153, 1171-72, 95 L.R.R.M. 3015, 3030 (4th Cir. 1977).

These decisions miss the point of *Buffalo Forge*. If the sympathy strikers are not themselves evading an obligation to arbitrate a dispute with their employer, under *Buffalo Forge* no basis exists for granting an injunction simply because the sympathy strike was triggered by a strike over an issue which another union was obligated to

Considerable congressional attention was focused on this problem during the consideration of the labor law reform bills last year. The Senate Committee on Human Resources stated:

[I]n order to promote industrial peace, action [is] required to provide an added remedy against the debilitating illegal work stoppages which have in particular plagued the coal fields of Appalachia. These work stoppages do not arise in the course of or in response to an economic strike following the expiration of a collective bargaining agreement, or other union authorized concerted activity.<sup>145</sup>

The Committee proposed legislation which would have empowered the courts to enjoin concerted refusals to work, in breach of contract, where the refusals are a response to any picket line other than one set up by a union to further its position in a labor dispute. In addition, the bills would have permitted injunctions against unauthorized breach of contract strikes, where union picketing over a labor dispute is not involved.<sup>146</sup>

The theory of these provisions was that "unauthorized activity undermines industrial peace and the majority rule principle of the NLRA," and that in such circumstances "the policies of the Norris-LaGuardia Act are not threatened by providing equitable remedies for concerted activities in breach of contract."<sup>147</sup> That is to say, where a contract is in force, work stoppages called by a union in furtherance of its position in a labor dispute occupy a distinctly different status in our system of collective bargaining than do work stoppages which are not authorized by a union and which are not in response to a picket line set up by a union.

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arbitrate. Of course, where the "triggering" strike in fact is over an arbitrable issue and in breach of contract, and the other *Boys Markets* prerequisites are present, the triggering strike may be enjoined. Additionally, it has been suggested that in appropriate circumstances such an injunction could prohibit sympathetic activity against the employer affected by that strike on the part of "persons in active concert and/or participation with" the strikers, provided those persons have notice of the injunction, pursuant to FED. R. CIV. P. 65(d), and provided that the requirements of §§ 7 and 9 of Norris-LaGuardia, 29 U.S.C. §§ 107, 109, are met. See generally *Bituminous Coal Operators Ass'n v. United Mine Workers*, 585 F.2d 586, 598-99, 99 L.R.R.M. 2612, 2621-22 (3d Cir. 1978). But there is simply no basis, under *Buffalo Forge*, to enjoin any activity which could not properly be reached by an injunction against the "triggering" strike.

<sup>145</sup> S. REP. NO. 628, 95th Cong., 2d Sess. 33 (1978).

<sup>146</sup> S. 2647, 95th Cong., 2d Sess. § 13, 124 CONG. REC. S7528 (daily ed. May 16, 1978). The full text of the injunctive relief provision of S. 2467 may be found at Kramer, *supra* this issue, note 94. The legislation passed by the House also contained a provision dealing with injunctions against unauthorized activity, which differed substantially from the Senate bill. H.R. 8410 permitted an injunction against "any person not authorized by a representative of the employees of the employer being struck or picketed," to prevent that person from "engaging in, or inducing or encouraging any employee of the employer to engage in, conduct in breach of [a no-strike] agreement . . . . Under H.R. 8410, such an injunction could be issued only on petition of the NLRB. H.R. 8410, 95th Cong., 1st Sess. § 12, 123 CONG. REC. H10710 (daily ed. Oct. 6, 1977). The full text of the injunctive relief provision of H.R. 8410 may be found at Kramer, *supra* this issue, note 95.

<sup>147</sup> S. REP. NO. 628, 95th Cong., 2d Sess. 33 (1978).

*Authorized* strikes are part and parcel of our system of free collective bargaining; as the Supreme Court has stated, the strike weapon "implements and supports the principles of the collective bargaining system."<sup>148</sup> *Unauthorized* strikes and stranger picketing, in contrast, are likely to impede the collective bargaining system, since they are contrary to "the principle of majority rule" which is "[c]entral to the policy of fostering collective bargaining."<sup>149</sup> For these reasons, the Senate Committee concluded that injunctions against wildcat strikes and stranger picketing would not represent as great a threat to the policies of Norris-LaGuardia as injunctions restraining work stoppages called by a union, or picket lines set up by a union.

While proposing broader availability of injunctions against stranger picketing and wildcat strikes, the Senate Committee emphatically refused to overrule *Buffalo Forge*, stating that the Supreme Court's decision represents a "careful accommodation" between the policies of Norris-LaGuardia and those of the NLRA.<sup>150</sup> The Senate Committee's approach to dealing with the strike injunction issue may present a framework for further exploration of this area. Any proposals for increased use of the labor injunction should be directed at the precise problems sought to be addressed—stranger picketing and wildcat strikes—without adversely affecting other areas of lawful conduct or concerted activities. As so delimited, the central policies of Norris-LaGuardia are not so strongly at stake. By contrast, proposals aimed at *Buffalo Forge* would go to the heart of Norris-LaGuardia and would abandon the basic principles of that statute.

### III. MAKE-WHOLE REMEDY

A major weakness of the National Labor Relations Act lies in its failure adequately to protect the right of workers to organize. Indeed, much of the testimony before the House Subcommittee on Labor Management Relations and the Senate Subcommittee on Labor focused on the abuse of employee rights to freely organize and to select collective bargaining representatives.<sup>151</sup> But the right to organize, while unquestionably central to the policies of the Act, is not the only right which Congress has viewed as indispensable to employees. Rather, the fundamental purpose of the Act is to enable employees not only to combine and to elect representatives, but "*to bargain collectively* through [those] representatives of their own choosing."<sup>152</sup> Organi-

<sup>148</sup> NLRB v. Erie Resistor Corp., 373 U.S. 221, 234 (1963).

<sup>149</sup> Emporium Capwell v. Western Addition Community Organization, 420 U.S. 50, 62 (1975). In addition, as the Court recognized in *Emporium*, "a union . . . has a legitimate interest in presenting a united front . . . and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests." *Id.* at 70.

<sup>150</sup> S. REP. No. 628, 95th Cong., 2d Sess. 33 (1978).

<sup>151</sup> For example, see *Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 741 n.1 (1976) (statement of Nicholas A. Zonarich).

<sup>152</sup> 29 U.S.C. § 157 (1976) (emphasis added).

zation is only the first step in a process which should lead, through the medium of good faith bargaining, to a collective bargaining agreement. Unfortunately, experience has shown that just as the Act presently provides inadequate protection of the right to organize, in all too many cases the Act likewise fails to make meaningful the right of employees to bargain collectively toward a contract.

This reality is highlighted by a study conducted in 1975 by the Industrial Union Department (IUD) of the AFL-CIO. The IUD, which, among other things, maintains a coordinated organizing program, conducted a follow-up study of election victories achieved under the coordinated program. That study indicates that out of 148 certified election victories between 1963 and 1974, only 63 percent ultimately resulted in a collective bargaining agreement.<sup>153</sup> A similar study of all AFL-CIO election victories in 1970 yielded almost identical results.<sup>154</sup> I submit that these statistics cannot be explained away as the natural result of "hard bargaining." Instead, these figures indicate that bad faith bargaining has become a major stumbling block to the achievement of statutory objectives.

At the present time, if an employer refuses to bargain with a union and instead chooses to litigate whether his action violates the Act, his employees are not entitled to wages and benefits lost in the interim, even if the employer ultimately is found to have violated the law.<sup>155</sup> Without cost to himself, an employer can refuse to bargain solely to delay reaching an agreement with the union. No legal incentive compels an employer to recognize and to bargain with the union certified after a Board election. Thus, an employer can stall bargaining for months or years until an order is issued requiring him to do what he should have done originally—commence good faith negotiations. In the meantime, employees are denied the wages and benefits that they would have received had their employer bargained in a lawful manner. Not surprisingly, it appears that the weapon of "bad faith bargaining" increasingly is relied upon by employers to defeat the exercise of section 7 rights by employees. In 1959, the year of the last major amendments to the Act, approximately 1,300 refusal to bargain charges were filed under section 8(a)(5), representing 16 percent of all unfair labor practice charges. By 1976, section 8(a)(5) charges had increased over five-fold to 6,729 and represented approximately 30 percent of all charges filed.<sup>156</sup>

Clearly, action must be taken to stem this tide or the protections of the Act will continue to be meaningless in numerous situations. The law must be

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<sup>153</sup> A copy of this study is available in the author's files.

<sup>154</sup> See *Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 741 (1976) (statement of Nicholas A. Zonarich).

<sup>155</sup> See *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 109-10, 74 L.R.R.M. 1740, 1743 (1970); for a discussion of *Ex-Cell-O*, see text and notes 160-66 *infra*.

<sup>156</sup> The above data comes from unpublished NLRB statistics available, upon request, to the public. In 1959, 26.1 percent of charges filed were found to have merit. Since that time the merit factor has generally hovered around the 30.9 percent mark. Thus, the increase in unfair labor practice charges since 1959 is directly related to an increase in the number of unfair labor practices committed.

applied such that employers will be induced to bargain promptly and in good faith with the duly selected bargaining representative of their employees. The Board's approach to date has been totally unsatisfactory. Section 10(c) of the Act provides that the Board may issue orders requiring "such affirmative action . . . as will effectuate the policies of this [Act]." <sup>157</sup> Despite this broad congressional mandate, which, as the courts have repeatedly emphasized, <sup>158</sup> gives the Board wide discretion in fashioning adequate and effective remedies, the usual Board order in refusal to bargain cases consists only of a mandate to "cease and desist." Indeed, "Labor Board orders constitute in many situations no more than a 'slap on the wrist.' They are both too little and too late." <sup>159</sup> As a result, in this critical area, present Board remedies fail to effectuate the policies of the NLRA.

The Board itself has explicitly recognized the problem. In the Board's famous *Ex-Cell-O Corp.* decision, <sup>160</sup> the union sought and the trial examiner recommended that the Board order the employer to make the employees "whole" by fashioning a remedy whereby the employees would receive—in the form of backpay—an amount equal to the estimated increased benefits employees would have received had the employer bargained in good faith from the outset. <sup>161</sup> A three-member majority of the Board acknowledged that current Board remedies for violations of section 8(a)(5) <sup>162</sup> were inadequate, stating:

A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of 2 or more years in the fulfillment of a statutory bargaining obligation. It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative. It does not dissolve the inevitable employee frustration or protect the Union from a loss of employee support attributable to such delay. <sup>163</sup>

Nevertheless, the Board concluded that a make-whole remedy was not within the Board's power to grant. <sup>164</sup>

On appeal, the United States Court of Appeals for the District of Columbia, the only court which thus far has considered the availability of a make-whole remedy, disagreed with the *Ex-Cell-O* Board and expressly held that a

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<sup>157</sup> 29 U.S.C. § 10(c) (1976).

<sup>158</sup> *E.g.*, *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 175-77 (1973); *NLRB v. Lion Oil Co.*, 352 U.S. 282, 288 (1957).

<sup>159</sup> SUBCOMM. ON NATIONAL LABOR RELATIONS BOARD OF THE HOUSE COMM. ON EDUCATION AND LABOR, 87TH CONG., 1ST SESS., ADMINISTRATION OF THE LABOR MANAGEMENT RELATIONS ACT BY THE NLRB 1-2 (Comm. Print 1961).

<sup>160</sup> 185 N.L.R.B. 107, 74 L.R.R.M. 1740 (1970).

<sup>161</sup> *Id.* at 108, 74 L.R.R.M. at 1741.

<sup>162</sup> 29 U.S.C. § 158(a)(5) (1976).

<sup>163</sup> 185 N.L.R.B. at 108, 74 L.R.R.M. at 1741.

<sup>164</sup> *Id.* at 109-10, 74 L.R.R.M. at 1743. Two Board members dissented. *Id.* at 111, 74 L.R.R.M. at 1743.

make-whole remedy was within the Board's remedial powers.<sup>165</sup> Despite the court of appeals decision, however, the Board continues to assert that it lacks the power to order such a remedy.<sup>166</sup>

In the face of the Board's unwillingness to order make-whole remedies for section 8(a)(5) violations, labor reform bills H.R. 8410 and S. 2467 would have allowed the Board to grant such remedies under certain conditions.<sup>167</sup> The bills provided that where an employer unlawfully refuses to bargain for an initial contract, the Board would be authorized to compensate the employees for the delay. The compensation would equal the difference between the wages and fringe benefits received by the employees during the period of the delay, and a sum determined by the wages and fringe benefits received at the time the unfair labor practice began as multiplied by the percentage change in wages and other benefits stated in the Bureau of Labor Statistics' quarterly report of major collective bargaining settlements for the quarter in which the delay began.<sup>168</sup> Mr. Kramer, along with numerous other critics of the make-whole remedy, argues that the remedy is unacceptable because it is inexact or speculative.<sup>169</sup> In addition, Mr. Kramer argues that such a remedy would "set the floor" for future negotiations.<sup>170</sup> I disagree on both counts.

Mr. Kramer's objection that the make-whole remedy is speculative disregards a cardinal common law principle. This principle holds that one whose wrongful act precludes exact determination of the amount of damage cannot evade his duty to compensate for that damage because of the uncertainty caused by his own wrongdoing.<sup>171</sup> Thus, where a defendant's wrongful act prevents exact determination of the plaintiff's earnings and profits had the injury not occurred, it is settled that the defendant cannot plead uncertainty respecting the amount of the damages awarded. This rule was reviewed and approved by the Supreme Court in *Story Parchment Co. v. Paterson Parchment*

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<sup>165</sup> *Auto Workers v. NLRB (Ex-Cell-O Corp.)*, 449 F.2d 1046, 1050-53, 76 L.R.R.M. 2753, 2756-58 (D.C. Cir. 1971). See also *IUE v. NLRB (Tiidee Products)*, 426 F.2d 1243, 73 L.R.R.M. 2871 (D.C. Cir.), cert. denied, 400 U.S. 950 (1970); *Food Store Employees v. NLRB (Heck's Inc.)*, 433 F.2d 541, 74 L.R.R.M. 2109 (D.C. Cir. 1970); *Retail Clerks v. NLRB (Zinke's Foods)*, 463 F.2d 316, 79 L.R.R.M. 2984 (D.C. Cir. 1972).

<sup>166</sup> E.g., *Tiidee Products, Inc.*, 194 N.L.R.B. 1234, 1234, 79 L.R.R.M. 1175, 1177 (1972), modified and rehearing denied, 502 F.2d 349, 86 L.R.R.M. 2093 (D.C. Cir. 1974), cert. denied, 421 U.S. 991 (1975); *Heck's Inc.*, 191 N.L.R.B. 886, 888, 77 L.R.R.M. 1513, 1516 (1971); *J.P. Stevens & Co.*, 205 N.L.R.B. 1032, 1032-33, 84 L.R.R.M. 1092, 1093 (1973).

<sup>167</sup> H.R. 8410, 95th Cong., 1st Sess. § 8, 123 CONG. REC. H10676-77, H10702-06 (daily eds. Oct. 5-6, 1977); S. 2467, 95th Cong., 2d Sess. § 9, 124 CONG. REC. S7527 (daily ed. May 16, 1978). The full text of the make-whole provisions of H.R. 8410 and S. 2467 may be found at Kramer, *supra* this issue, note 117.

<sup>168</sup> *Id.* The award would not be premised on the parties reaching an agreement nor would it constitute an agreement between the parties. Instead, the payment by the employer would compensate solely for the period of illegal delay. Once bargaining in good faith commenced, the parties could freely write their own contract.

<sup>169</sup> Kramer, *supra* this issue, text at note 126.

<sup>170</sup> Kramer, *supra* this issue, text at note 127.

<sup>171</sup> See text at notes 172-77 *infra*.

*Paper Co.*<sup>172</sup> The Supreme Court reaffirmed the doctrine in *Bigelow v. RKO Radio Pictures, Inc.*,<sup>173</sup> stating that "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."<sup>174</sup>

In *International Union of Electrical, Radio and Machine Workers v. NLRB (Tüdee Products)*,<sup>175</sup> the United States Court of Appeals for the District of Columbia recognized the applicability of this fundamental principle to the formulation of remedies under the National Labor Relations Act, holding that:

A tribunal given the function of implementing national policy through compensatory remedies may not soundly refer to the difficulty in quantifying appropriate compensation as a justification for withdrawal and frustration of the policy, particularly where such an approach would operate only to reward the wrongdoer and to give him an advantage over a law-abiding competitor.<sup>176</sup>

In so holding, the court relied upon the Supreme Court's statement of the doctrine in *Bigelow*.<sup>177</sup> Thus, a make-whole remedy for a section 8(a)(5) viola-

<sup>172</sup> 282 U.S. 555, 565 (1931).

<sup>173</sup> 327 U.S. 251 (1946). In its recitation of the principal rule in *Bigelow*, *id.* at 264-65, the Supreme Court cited with approval the decision in *F.W. Woolworth Co. v. NLRB*, 121 F.2d 658, 8 L.R.R.M. 515 (2d Cir. 1941), where the Second Circuit upheld the Board's distribution of back pay among a large group of employees when it could not identify the specific employees entitled to recompense. 121 F.2d at 663, 8 L.R.R.M. 519.

<sup>174</sup> 327 U.S. at 265. The Court maintained that this principle was an ancient one, *Armory v. Delamirie*, 1 Strange 505, and is not restricted to proof of damage in anti-trust suits, although their character is such as frequently to call for its application. In cases of collision where the offending vessel has violated regulations prescribed by statute, see *The Pennsylvania*, 19 Wall. 125, 136, and in cases of confusion of goods, *Great Southern Gas & Oil Co. v. Logan Natural Gas & Fuel Co.*, 155 F.2d 114, 115; cf. *F.W. Woolworth Co. v. Labor Board*, 121 F.2d 658, 663, the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable. And in cases where a wrongdoer has incorporated the subject of a plaintiff's patent or trade-mark in a single product to which the defendant has contributed other elements of value or utility, and has derived profits from the sale of the product, this Court has sustained recovery of the full amount of defendant's profits where his own wrongful action has made it impossible for the plaintiff to show in what proportions he and the defendant have contributed to the profits. *Westinghouse Electric & Mfg. Co. v. Wagner Mfg. Co.*, 225 U.S. 604; *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251; see also *Sheldon v. Metro-Goldwyn Corp.*, 309 U.S. 390, 406.

327 U.S. at 265.

<sup>175</sup> 426 F.2d 1243, 73 L.R.R.M. 2870 (D.C. Cir. 1970).

<sup>176</sup> *Id.* at 1251, 73 L.R.R.M. at 2875. See also *Buncher Co.*, 164 N.L.R.B. 340, 65 L.R.R.M. 1139 (1967) and *American Fire Apparatus Co.*, 160 N.L.R.B. 1318, 63 L.R.R.M. 1151 (1966), *enforced*, 380 F.2d 1005, 65 L.R.R.M. 3082 (8th Cir. 1967).

<sup>177</sup> The *Tüdee* court stated:

[E]ven where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of

tion is entirely consistent with longstanding, judicially approved methods for computing liability and restoring the status quo. As noted, such a remedy clearly is necessary to make meaningful the right of employees to bargain collectively through representatives of their choosing.

Furthermore, I cannot accept Mr. Kramer's second criticism—that a make-whole remedy would set a floor for future negotiations. An employer would not be obligated to provide the make-whole amount in negotiations. Section 8(a)(5) only obligates an employer to bargain in good faith. If an employer does so, he is free to negotiate any level of wages whatsoever.

Finally, Mr. Kramer suggests that it is unjustifiable to enforce a make-whole remedy in cases where the employer's refusal to bargain is not based on a bad faith effort to delay recognition of the union and negotiation of a contract, but is instead a "technical" violation which the employer must commit so as to gain review of a Board certification order believed by the employer to be erroneous.<sup>178</sup> This objection is not sound. In my experience, the sad reality is that the vast majority of refusals to bargain fall in the category of bad faith stalling tactics rather than in the category of good faith efforts to obtain review of a certification order. Given the imprecision inherent in any good faith/bad faith distinction, a rule designed to exempt employers from make-whole liability in the small number of "good faith" cases would inevitably result, in practice, in denying the remedy in many of the far more numerous "bad faith" cases as well.

But even in a case where an employer's refusal to bargain is in fact based solely on a desire to obtain review of a certification which an employer reasonably believes to be erroneous, if a court ultimately determines that the employer's belief was mistaken, the consequences should fall on the employer, not on the employees and the union. This is true for two reasons. First, it is simply more equitable to place the risks attendant to a delay in bargaining on the employer who causes the delay by choosing to litigate, rather than to place those risks on the employees and the union who stand ready to bargain as called for by the Board certification, the issuance of which may itself have been long delayed. There is certainly nothing strange in the notion that a party who chooses to litigate the validity of an administrative order rather than to abide by the order must accept the risks of losing.<sup>179</sup> That principle

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the damage based on relevant data, and render its verdict accordingly. . . . Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

426 F.2d at 1251, 73 L.R.R.M. at 2875-76 (quoting *Bigelow*, 327 U.S. at 264-65).

<sup>178</sup> Kramer, *supra* this issue, text at notes 120-22. Direct review of Board certification orders is not available, and consequently the primary route by which employers may obtain review of a certification is to challenge the certification in defending a refusal to bargain charge. See *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964); *American Federation of Labor v. NLRB*, 308 U.S. 401, 409 (1940).

<sup>179</sup> See *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 618 (1966); cf. *Yakus v. United States*, 321 U.S. 414, 431-43 (1944).



is particularly applicable here, since the Supreme Court has noted that Congress deliberately chose to give Board certification orders immediate effect, and to allow employers to challenge such orders only by defending unfair labor practice cases, precisely because Congress did not want to subject unions to "the risk of impairment of strength by attrition and delay" which would result from permitting employers to delay effectuation of a certification order by pursuing direct review.<sup>180</sup>

The second reason why it is not unjust to place the risk of a make-whole remedy on an employer who seeks to challenge a certification is that under the formula which has been proposed, the make-whole remedy does not exact a penalty from the employer, but merely requires him to provide wages and benefits in an amount which is in the range of what he would likely have provided had bargaining taken place. This is certainly not an unfair risk. Thus, there is no reason to exempt "good faith" refusals to bargain from the reach of a make-whole remedy.

### CONCLUSION

The basic principles declared in the Wagner Act more than 40 years ago need no revision. The national policy must be today, as Congress then declared it to be, one of "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."<sup>181</sup> What is needed today is a mechanism by which those policies may be brought fully to life. The recent labor reform bills would have taken reasonable steps in that direction.

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<sup>180</sup> *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964).

<sup>181</sup> 29 U.S.C. § 151 (1976).

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VOLUME XX

NOVEMBER 1978

NUMBER 1

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