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Enjoining Employers Pending Arbitration—From M-K-T to Greyhound and Beyond

William T. Payne†

Status quo orders are injunctions sought by unions under the NLRA and the RLA to prevent an employer from initiating certain changes, such as moving a plant to a new location or changing employees’ work schedules, until an arbitrator has determined whether or not the collective bargaining agreement allows the employer to make such changes. The author of this article argues that, in their consideration of status quo orders, both courts and commentators have failed to deal adequately with the M-K-T case. The author asserts that the rationale of M-K-T is applicable to status quo orders sought under the NLRA; and that a union, therefore, generally cannot make a sufficient showing of “irreparable harm” unless the harm is likely to have a deleterious effect upon the arbitration process itself. Further, he contends that unions should have to show only that the dispute is arbitrable, not that the union will win on the merits. The author then examines BUFFALO FORGE to determine whether or not the Supreme Court does in fact disapprove of the issuance of status quo orders generally, and he concludes that under certain specified conditions status quo orders will continue to be available.

I

The Problem

The typical collective bargaining agreement contains a promise by the union not to strike which is given in exchange for the employer’s promise to arbitrate grievances. If the union breaks its promise by striking over an arbitrable issue, the employer can obtain an injunction against the strike.¹ Conversely, if the employer refuses to arbitrate a

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¹ At one time it was believed that the issuance of such injunctions violated the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-110, 113-115 (1976). In 1957, however, in Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co., 353 U.S. 30 (1957), the Supreme Court ruled that such an injunction may be granted in an employer’s suit brought under the Railway Labor Act, 45 U.S.C. §§ 151-88 (1976), without violating the anti-injunction provision. Thirteen years later, the Court authorized the issuance of the same type of an injunction...
dispute arising out of allegedly improper changes in working conditions, the union may obtain a judicial order compelling arbitration.\(^2\) But in many situations such orders to arbitrate will not be sufficient to compel the employer to live up to its side of the bargain. The employer might institute changes before the arbitral process is complete, and these changes may be so substantial that a subsequent arbitration award in the union's favor would be no more than a "hollow formality."\(^3\) The most common example is when an entire plant is shut down and moved to a distant location. If the move occurs before the dispute is arbitrated, it is unlikely that the original plant will be ordered to reopen.\(^4\)

In such situations the union understandably seeks more than an injunction to compel the employer to arbitrate. It seeks to enjoin the employer from putting the changes into effect pending the outcome of arbitration. If such an injunction is issued, the contemplated changes may be made only after the arbitrator determines that the employer's plans are not a contract breach.

These types of injunctions or "status quo orders" were authorized by the Supreme Court in 1960 in *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co.*,\(^5\) a case decided under the Railway Labor Act.\(^6\) The company involved in the dispute over crew cutbacks obtained an injunction against a union's strike that breached the contract's no-strike clause. The district court, however, conditioned the enforcement of the injunction upon the employer's preservation of the status quo in working conditions pending the outcome of arbitration.\(^7\) The Supreme Court held that on the facts of the case the status quo order was appropriate. Subsequently, unions have sought and obtained, independently of any suits by employers to enjoin strikes, injunctions to maintain the status quo pending arbitration\(^8\) under both the Railway Labor Act and section 301 of the Taft-Hartley Amend-

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\(^2\) See text accompanying note 54 infra.


\(^4\) 363 U.S. 528 (1960) (hereinafter cited as *M-K-T*).


\(^6\) 363 U.S. at 530.

\(^7\) *E.g.*, Railroad Yardmasters v. St. Louis-San Francisco Ry., 231 F. Supp. 986 (N.D. Tex. 1964), appeal dismissed per curiam, 345 F.2d 18 (5th Cir. 1965), rev'd and remanded 347 F.2d 983 (5th Cir. 1965).
ments to the Labor-Management Relations Act.\textsuperscript{9}

Commentators who have dealt with independent status quo orders have, surprisingly, neglected to consider the \textit{M-K-T} decision.\textsuperscript{10} This neglect apparently stems from the fact that \textit{M-K-T} was decided under the Railway Labor Act, while many status quo orders are sought by unions pursuant to section 301 of the Taft-Hartley Act.\textsuperscript{11} But as will be argued in this article, the Supreme Court has shown an increasing tendency to perceive the Acts as having a similar policy basis; consequently, cases decided under one Act are often found to be persuasive when the Court decides the analogous question under the other Act.\textsuperscript{12} The \textit{M-K-T} case should thus provide guidance as to the propriety and standards for issuance of status quo orders.

Failure to consider the \textit{M-K-T} case has led commentators to assume that the Supreme Court has never expressed its view concerning the propriety of this type of injunction or developed guidelines governing its issuance.\textsuperscript{13} They therefore focus their attention on certain dicta of Supreme Court opinions dealing with injunctions against unions, such as \textit{Boys Markets, Inc. v. Retail Clerks Local 770},\textsuperscript{14} a case authorizing injunctions against unions striking in breach of their no-strike clauses.

Although some lower courts deciding cases under section 301 have relied on the \textit{M-K-T} case,\textsuperscript{15} most courts, like the commentators, have

\textsuperscript{9} Labor Management Relations Act, \S 301, 29 U.S.C. \S 185 (1976).
\textsuperscript{11} Labor Management Relations Act \S 301(a), 29 U.S.C. \S 185(a) (1976). However, injunctions against employers under this Act were enforced both before and after injunctions against unions were approved in \textit{Boys Markets}. See, e.g., Local Div. 1098, Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Eastern Greyhound Lines, 225 F. Supp. 28 (D.D.C. 1963), (before); and Lever Bros. Co., Inc. v. Chemical Workers Local 217, 554 F.2d 115, 123 (4th Cir. 1976) (after).
\textsuperscript{12} For example, the Supreme Court relied on the \textit{Chicago River} case in deciding the \textit{Boys Markets} case. See also note 79 infra.
\textsuperscript{13} For example, the concluding sentence of Comment, \textit{supra} note 10, states that "the Supreme Court has not directly confronted the issues presented by actions to enjoin employers pending arbitration."
\textsuperscript{14} 398 U.S. 235 (1970).
simply failed to consider the guidelines set forth in *M-K-T*. Partly as a result of this common oversight, lower courts have developed their own standards for determining when status quo orders can properly be issued. These standards, which vary from circuit to circuit, often are at odds with the *M-K-T* decision.

An inconsistency has arisen, for example, in the standard used by the courts to determine whether a dispute is arbitrable. This determination is critical, for if the dispute is not arbitrable, then the court obviously cannot issue an injunction pending arbitration. Some recent decisions suggest that a union must do *more* than show that the dispute is arbitrable. These decisions have held that before a status quo order will be granted, the union must show "some likelihood" that it will be successful on the merits in arbitration. In other cases, injunctions have been granted as long as the judge decides that the dispute is for the arbitrator.

Courts, as well as commentators, have also espoused conflicting standards for determining when potential harm to the union is sufficiently "irreparable" to issue an injunction and for balancing the relative injury to each party. For example, in some cases the irreparable harm must consist of a loss of many jobs, while in others changes as small as an alteration in work schedules or an elimination of a ten-minute wash-up period will suffice. This confusion stems in large part from the failure to recognize that the *M-K-T* case should be regarded as the starting point in defining this standard, and that *M-K-T* requires that the potential harm to the union be so irreparable that it would interfere with and frustrate the arbitral process.

The propriety of status quo orders in general has been seriously questioned as a result of the implications of certain statements made in *Buffalo Forge Co. v. United Steelworkers*. There the Supreme Court, per Justice White, held that a *Boys Markets* injunction could not be issued against a sympathy strike where the underlying dispute which

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caused the strike was not subject to the arbitration clause of the collective bargaining agreement. In such situations, the strike is not the result of a dispute as to the striker's own contract. Therefore, since the strike in Buffalo Forge was not over an arbitrable issue, the courts held that an injunction was not authorized under the "narrow" holding of the Boys Markets case.

While the specific holding of Buffalo Forge seems to follow logically from the language of Boys Markets, Justice White was not content to rely solely upon that language. He proceeded to make additional arguments which may imply a disapproval of all status quo orders. He warned that if an injunction could issue here, just because the union's strike was itself an arbitrable dispute, then in many other arbitrable disputes a court would be able to "issue injunctions so as to restore the status quo, or to otherwise regulate the relationship of the parties pending exhaustion of the arbitration process." This result was considered undesirable since it would "make the Courts potential participants in a wide range of arbitrable disputes . . . for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator."

It is easy to conclude that this language was directed specifically at suits by unions to maintain the status quo. In fact, several commentators and two courts have stated or implied that Buffalo Forge may

23. Id. at 407.
24. Id. at 404-05.
25. Id. at 406-07.
26. Id. at 406.
27. The Boys Markets Court was careful to point out that its holding created a narrow exception to the anti-injunction provisions of the Norris-LaGuardia Act and it adopted the following rule from the Sinclair dissent:

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. 398 U.S. at 254 (first emphasis added).

28. 428 U.S. at 410.
29. Id. at 410-11.
30. Comment, supra note 10, 91 HARV. L. REV. 715, 720 (1978) (asserting that "[t]he reasoning of Buffalo Forge, when applied to employers, would . . . appear to subject employers to Boys Markets injunctions only for lockouts or other actions that are motivated by labor disputes," and that plant transfers are generally motivated by "economic reasons" rather than "labor disputes"); Note, The Supreme Court—1975 Term, 90 HARV. L. REV. 56 (1976) (The author asserts that the "line of lower court precedent" which authorizes status quo orders "clearly" violates federal labor policies, and, as stated in Buffalo Forge, "would lead to massive judicial involvement in labor disputes." Id. at 252-53 and nn.47 and 48. The author overlooks the fact that such injunctions were authorized by the Supreme Court in the M-K-T case); Gould, On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge, 30 STAN. L. REV. 533 (1978) (The author states that "if Buffalo Forge stands for less judicial interference with the collective bargaining agreement, then arguably the problems posed by the sympathy-strike question may be posed by other disputed contractual provisions in the context of a union plea for injunctive relief. Organized labor therefore may have lost more than it gained by the prohibition against enjoining sympathy strikes pending arbitration." But the author argues against such an interpretation and, in any case, as-
preclude unions from obtaining status quo orders in virtually all situations. This interpretation becomes more plausible in light of the Supreme Court's treatment of *Amalgamated Transit Union Div. 1384 v. Greyhound Lines, Inc.*, a recent case which originated in the Ninth Circuit. In its original opinion the court of appeals affirmed the issuance of an injunction against an employer's change in work schedules pending the arbitrator's resolution of the issue. The Supreme Court vacated the decision and remanded "for further consideration in light of *Buffalo Forge* . . . ." On remand, the Ninth Circuit reversed itself and the district court's issuance of the status quo order. Stating that the "reasoning [of *Buffalo Forge*] applies to the facts of this case," the court held that an injunction would be appropriate only in cases where employers have made express or implied in fact promises to maintain the status quo pending arbitration. If the other circuits choose to interpret *Buffalo Forge* in this manner, status quo orders will almost never be issued since collective bargaining agreements rarely contain explicit employer promises to maintain the status quo. However, despite *Greyhound* and the opinions of several commentators who interpret *Buffalo Forge* as severely limiting the issuance of status quo orders, other post-*Buffalo Forge* decisions have rejected arguments by employers that the Supreme Court's opinion was meant to be a general disapproval of this type of injunction.

This article will begin with an examination of the background and historical development of status quo orders and the rationale for allowing them by focusing on the *M-K-T* case. The next section will survey the prerequisites for obtaining an injunction to maintain the status quo. Finally, the propriety of status quo orders in light of *Buffalo Forge* will be considered.

This article concludes that status quo orders are often necessary to enforce employer promises to arbitrate and to prevent serious harm to

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32. 529 F.2d 1073 (9th Cir. 1976), *vacated and remanded* 429 U.S. 807 (1976), *rev'd* 550 F.2d 1237 (9th Cir. 1977).
33. 529 F.2d 1073 (9th Cir. 1976).
34. 429 U.S. 807 (1976) (mem.).
36. *Id.* at 1239.
37. *See* text accompanying notes 122 to 125 infra.
the arbitral process as well as to the employees; that the recent require-
ment that the union show some likelihood of success in arbitration is an
unwarranted restriction on status quo orders since it allows judges to
delve into issues which are reserved for arbitrators; that the \textit{M-K-T}
case, although it was decided under the RLA, set forth the appropriate
guidelines governing the "irreparable harm requirement" (that is, that
it must be so irreparable that it threatens the arbitral process); that
lower courts deciding cases under the NLRA should follow these
guidelines; and that the dicta in \textit{Buffalo Forge} is consistent with \textit{M-K-T}
and should not be read as a total disapproval of the use of this type of
injunctive device.

\textbf{II}

\textbf{Background And Rationale}

\textit{A. The M-K-T Case}

The dispute in \textit{Brotherhood of Locomotive Engineers v. Missouri-
Kansas-Texas Railroad Co.}\textsuperscript{39} began when the railroad purchased long-
range diesel locomotives to replace the older steam engines and issued
General Orders which would have doubled the length of the freight
runs, thereby eliminating the jobs of two of the five freight crews and
changing the home terminals of the remaining crews.\textsuperscript{40} The unions
protested the General Orders, and then called a strike when the
changes were put into effect. Since the unilateral changes and the strike
constituted a "minor dispute" as that term is used in the RLA,\textsuperscript{41} the

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\textsuperscript{39} 363 U.S. at 528.
\textsuperscript{40} Id. at 529.
\textsuperscript{41} "Minor" disputes, over which the National Railroad Adjustment Board has exclusive
jurisdiction, may be contrasted with "major" disputes:

["Major" disputes are those] over the formation of collective agreements or efforts to
secure them. They arise where there is no such agreement or where it is sought to change
the terms of one, and therefore the issue is not whether an existing agreement controls
the controversy. They look to the acquisition of rights for the future, not to the assertion
of rights claimed to have vested in the past.

[A dispute which is classified as "minor"], however, contemplates the existence of a
collective agreement already concluded or, at any rate, a situation in which no effort is
made to bring about a formal change in terms or to create a new one. The dispute relates
either to the meaning or proper application of a particular provision with reference to a
specific situation or to an omitted case. In either case the claim is to rights accrued,
not merely to have new ones created for the future.

Railway Labor Act—Major and Minor Disputes, 31 J. Air Law & Com. 371 (1965).}

"Minor" disputes are obviously analogous to disputes over the interpretation of an existing
collective bargaining agreement, in which the parties are under the jurisdiction of the NLRA.

It should be noted that the procedures prescribed for the resolution of "major" disputes (set
forth in §§ 5, 6 & 10 of the RLA, and 45 U.S.C. §§ 155, 156 and 160) explicitly provide for em-
ployer's maintenance of the status quo while the parties are trying to settle the dispute through
renegotiation. \textit{See, e.g., Seafarers Int'l Union v. Bd. of Trustees, Galveston Wharves, 400 F.2d
320 (5th Cir. 1968) ("These 'freeze' or 'cooling off' provisions, read together, cover the duration of

\textit{...}
railroad submitted the dispute to the statutorily-created arbitration body, the National Railroad Adjustment Board, and obtained an injunction against the strike pending the outcome of arbitration. 42 The district court, however, conditioned the issuance of the injunction upon the railroad's restoration of the jobs and working conditions that were in effect prior to the railroad's announcement of the General Orders, 43 or alternatively, upon the railroad's payment to the adversely affected employees of the wages they would have received had the orders not been issued. 44

The court of appeals vacated the conditions placed upon the injunction, 45 reasoning that the imposition of conditions of this character involved a preliminary judgment on the merits of a "minor dispute," the resolution of which is committed to the exclusive jurisdiction of the Adjustment Board.

The Supreme Court, per Chief Justice Warren, relying upon the traditional principles of equity, reversed the court of appeals and reinstated the district court's conditions for the issuance of the injunction:

If the District Court is free to exercise the typical powers of a court of equity, it has the power to impose conditions requiring maintenance of the status quo. Conditions of this nature traditionally may be made the price of relief when the injunctive powers of the court are invoked and the conditions are necessary to do justice between the parties. . . . "It is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all whose interest the injunction may affect." Inland Steel Co. v. United States, 306 U.S. 153, 157. 46

The Court found this form of temporary equitable relief particularly appropriate in labor disputes subject to resolution by arbitration. Chief Justice Warren conceded to the court of appeals that the district court must make some examination of the merits of the disputes before major dispute proceedings.")]; Comment, Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes, 60 COLUM. L. REV. 381, 388 n.50 (1960).

42. Such injunctions were authorized in 1957 in Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., 353 U.S. 30 (1957). See note 1 supra.

43. 363 U.S. at 530.

44. Id.

45. Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co., 266 F.2d 335 (5th Cir. 1959).

46. 363 U.S. at 531-32. The court was influenced by the well-established principle that "he who seeks equity must do equity," and cited 2 POMEROY, EQUITY JURISPRUDENCE 57-59 (5th ed. 1941); 1 STORY, EQUITY JURISPRUDENCE, §§ 69-76 (14th ed. 1918). It also recognized that an order to maintain the status quo is a traditional equitable device. Id. See also Central Kentucky Natural Gas Co. v. Railroad Comm'n. 290 U.S. 264, 271 (1933); Comment, Developments in the Law—Injunctions, 78 HARV. L. REV. 994, 1058 (1965).

Harlan, J., and Stewart, J., agreed that the district court had the power to condition an injunction upon the employer's maintenance of the status quo, but the two Justices would have remanded for consideration of the railroad's contention that the District Court abused its discretion in finding the balance of convenience in favor of the unions. Otherwise, the opinion of the Court was unanimous.
issuing a status quo order. While it is clear that this examination must include at least a cursory reading of the contract provisions to determine if the dispute is arbitrable, the Court implies that the district court judge can fulfill his or her function with little or no interpretation of the contract. Rather than construing the contract, the district judge is to weigh the merits and decide whether irreparable injury is threatened.

In sum, the issuance of status quo orders does not encroach upon the jurisdiction of the arbitrator, since the judge's examination of the dispute is "so unlike that which the Adjustment Board will make of the merits of the same dispute, and is for such a dissimilar purpose, that it could not interfere with the later consideration of the grievance by the Adjustment Board." The Court asserts that a status quo order imposed for the benefit of the union, rather than interfering with the arbitrator's decision, actually preserves the integrity of the arbitral process and the jurisdiction of the Adjustment Board. Unfortunately, the exact meaning of "preserv-

47. "[T]he district judge was quite aware that it was not his function to construe the contractual provisions upon which the parties relied. . . ." 363 U.S. at 533. The Court approved a statement made by the judge during the initial proceedings that he was "without power to construe that contract." 363 U.S. at 533 n.5.

48. Id. at 533-34.

49. Id. at 534.

50. Id. In other contexts, courts have issued status quo orders pending their own resolution of the merits in order to preserve their own jurisdiction, as contrasted with that of the arbitrator. See Local 328, Teamsters v. Armour and Co., 294 F. Supp. 168 (W.D. Mich. 1968) (enjoining the closing of a distribution plant pending trial of a union's section 301 suit, stating: "this Court should have the same authority to preserve its jurisdiction and maintain the status quo while it resolves an issue as to the interpretation of the contract as would be afforded to a group of arbiters empowered to do the same thing." 294 F. Supp. at 172. One commentator and one court have mistakenly cited this case as one involving arbitration. Gould, supra note 30, at 555 n.127; Texaco Independent Union v. Texaco Inc., 98 L.R.R.M. 2128 (W.D. Pa. 1978)). See also, Local 228, Int'l Alliance of Theatrical Stage Employees v. Gayety Theatres, 87 L.R.R.M. 3020 (N.D. Ohio 1974) (enjoining firings pending trial of section 301 suit); Johnson v. Goodyear Tire & Rubber Co., 349 F. Supp. 3, 8 (S.D. Tex. 1972) (employer enjoined by union from unilaterally annulling a seniority provision, which was attacked in a separate cause of action by minority employees as racially discriminatory, pending trial on the merits of the two causes of action).

For a case in which a status quo order was issued pending final determination "by agreement, or before the National Labor Relations Board, or through the procedures set out in the [union’s] constitution, or by other peaceful means," see Retail Wholesale & Dept. Store Union Local 28 v. American Bakers Co., 305 F. Supp. 624, 627 (W.D.N.C. 1969).

Three additional cases grew out of a nationwide "sick-out" in 1970 by air traffic controllers which was allegedly in violation of 5 U.S.C. § 7311, as a strike against the government. The employer, the Federal Aviation Administration, obtained temporary injunctions against the strike in three district courts, but all three injunctions were accompanied by orders forbidding the F.A.A. from taking disciplinary action against the strike leaders pending trial of the suit for a permanent injunction. Two out of the three courts of appeals affirmed the conditions, citing M-K-T as authority, while the third reversed the conditions, claiming that interference with the F.A.A.'s disciplinary proceedings would violate the doctrine of separation of powers. Compare United States v. Moore, 427 F.2d 1020 (10th Cir. 1970) and United States v. Plasch, 75 L.R.R.M. 2230 (7th Cir. 1970), with United States v. PATCO, 438 F.2d 79 (2nd Cir. 1970).

There is reason to believe, however, that the Moore and Plasch courts were motivated by
ing” or “protecting the arbitral process” was never spelled out in M-K-T, nor has the phrase been satisfactorily defined in the subsequent cases arising under both the RLA and the NLRA. Instead, the courts tend to speak in conclusory terms, stating that in the particular fact situation before them, the employer’s changes will render the arbitral process “futile and ineffective” or make it a “hollow formality” if the changes are put into effect before the arbitrator makes a decision.

The M-K-T Court does give some indication of why it believes arbitration will be defeated if the status quo order is not issued:

It is not difficult to perceive how the conditions imposed in this case could be deemed to serve to protect the jurisdiction of the Board. The dispute out of which the controversy arose does not merely concern rates of pay or job assignments, but rather involves the discharge of employees from positions long held and the dislocation of others from their homes. From the point of view of the employees, the critical point in the dispute may be when the change is made, for, by the time of the frequently long-delayed Board decision, it might well be impossible to make them whole in any realistic sense. If this be so, the action of the district judge, rather than defeating the Board’s jurisdiction, would operate to preserve that jurisdiction by preventing injury so irreparable that a decision of the Board in the union’s favor would be but an empty victory.

The Court does not really explain why “it might be impossible to make [the employees] whole in any realistic sense” or why “a decision . . . in the union’s favor would be but an empty victory.” The best explanation seems to be that in such situations the arbitrator’s award might be influenced by the magnitude of the employer’s changes. For example, when an employer has already moved a plant at great expense and laid off its employees, it is unlikely that the arbitrator will order the employer to dismantle its new operations and reopen the old plant. Such a remedy would be viewed as “economic waste,” or as factors other than those stated in M-K-T. It appears that the only practical way in which the district judges could get the strikers to obey the injunction and return to work was to assure them that they would not be punished while the case was pending. United States v. Plasch, 75 L.R.R.M. at 2232.


53. 363 U.S. at 534.

54. E.g., Ex-Cell-O Corp., 60 Lab. Arb. 1094, 1100 (1973) (Sembower, Arb.). But see Selb
having the effect of unjustifiably forcing the employer to "unscramble the omelet." The arbitrator might simply find for the employer while silently agreeing with the union's interpretation of the contract, or find for the union but apologetically deny the remedy of reinstatement. In this type of case, not only would the employer's action interfere with the arbitrator's decision, but it would also be tantamount to a repudiation of the contract. The extraordinary equitable relief of an injunction would therefore be necessary both to protect the arbitral process and to force the employer to live up to its contractual obligations.

It is true that the changes in M-K-T were not so drastic and irreversible as those hypothesized above. Nevertheless, premature imposition of the changes would have meant the discharge of some employees and "the dislocation of others from their homes." If the arbitrators of the Adjustment Board would have decided the case long after the affected employees had adjusted to the dislocations and discharges (i.e., settled in new homes and/or acquired new jobs) and long after the employer had put the changes into effect, it is unlikely that the Board would have imposed the status quo ante even upon a finding that the employer was in breach of the agreement.

In any case, the Court did not believe that the district judge's balancing of the relative harms was clearly erroneous:

It is true that preventing the Railroad from instituting the change imposed upon it the burden of maintaining what may be a less efficient and more costly operation. The balancing of these competing claims of

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Mfg. Co., 37 Lab. Arb. 834 (1961) (Klamon, Arb.) (ordering the company to return all machinery and jobs to the original location).

An analogous situation is an employer's transfer of facilities with the purpose of chilling unionism—the so-called "runaway-shop." The remedy ordered by the National Labor Relations Board will almost never require the employer to return the facilities to the original location. E.g., Sidele Fashions, Inc., 133 N.L.R.B. 547 (1961), aff'd, 305 F.2d 825 (2nd Cir. 1962); Burroughs Corporation, 214 N.L.R.B. 571 (1974) (affirming an Administrative Law Judge's finding that a plant closing was illegal but reversing the remedy which would have required the employer to reopen the plant, noting that the Board is usually "reluctant to order the resumption of operations" and that "such a requirement is excessively burdensome." Id).

55. The judicial reluctance to force companies which have already carried out complex business rearrangements to undo these arrangements—i.e., to "unscramble the omelet"—has its roots in various merger cases decided under the antitrust laws. See Sullivan, Law of Antitrust 672-75 (1977). This "omelet analogy" has been used by at least one judge presiding in a case involving a status quo order. Local 1098, Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees v. Eastern Greyhound Lines, 225 F. Supp. 28, 31 (D.D.C. 1963).

56. Of course, if the arbitrator's award is so obviously erroneous as to indicate that he or she has exceeded his or her authority, a reviewing court will set aside the award. See Torrington Co. v. Metal Products Workers Local 1645, 362 F.2d 677 (2d Cir. 1966).

57. Perhaps this factor explains why the district judge imposed the "intermediate remedy" of allowing the railroad to choose between restoring the status quo or paying the affected employees "the wages they would have received had the orders not been issued." 363 U.S. at 530. See also text accompanying note 174 infra.

58. Id. at 534.
irreparable hardship is, however, the traditional function of the equity court the exercise of which is reviewable only for abuse of discretion.\(^5\)

It should be emphasized that the *M-K-T* decision requires the union seeking a status quo order to show more than irreparable harm. A careful reading of the opinion and subsequent cases leads one to conclude that the potential harm must be “so irreparable” that it would interfere with the arbitral process.\(^6\) The Court distinguished the relatively drastic changes that the railroad was seeking to effectuate from less serious changes in “rates of pay or job assignments.”\(^6\) Yet the imposition of even these less serious changes in working conditions prior to arbitration will often cause injury that is at least arguably irreparable.\(^6\) This is true because arbitrators generally do not calculate their awards for breach of a collective bargaining agreement on the basis of how much has been lost, as do courts and juries in tort cases. Rather, the arbitrator looks only to the remedies authorized by the collective bargaining agreement,\(^6\) which frequently are insufficient to “make the employees whole.” But even though “irreparable” harm is suffered before the arbitrator’s decision in these situations, it cannot be said that the harm is “so irreparable” that it interferes with the arbitral process.

Most post-*M-K-T* judicial decisions\(^6\) and scholarly commentaries\(^6\) which have dealt with the issues involved in the granting of status quo orders have failed to recognize this distinction between “irreparable harm” and “harm so irreparable” that it threatens the arbitral process. However, the results if not the analysis of post-*M-K-T* cases have generally been consistent with the *M-K-T* decision. When employer changes are not very extensive (e.g., when “rates of pay or job assignments” are involved), courts have usually denied injunctive relief. But in so doing these courts have simply said that these less serious changes were not the type that cause “irreparable harm.”\(^6\)

The fact situations and rationales of post-*M-K-T* cases, as well as the continuing lack of precision in the application of the “irreparable

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59. *Id.* at 534-35.
60. See Section I, part c, infra.
61. 363 U.S. at 534.
62. *See e.g.*, Letter Carriers, Branch 352 v. U.S. Postal Service, 88 L.R.R.M. 2678 (S.D. Iowa 1975) (elimination of 10-minute wash-up period found to be potential cause of irreparable harm) and text accompanying notes 157 to 161, infra.
63. *See text accompanying notes 157-159 infra.*
65. *E.g.*, Gould, note 30 *supra* at 553-54 & n.120; Comment, *supra* note 10 at 495-99.
harm" requirement, will be examined later in this article.\textsuperscript{67}

B. Independent Status Quo Orders

Although the \textit{M-K-T} Court did not reach the issue of whether a union could obtain a status quo order independently of any suit by the employer to enjoin a strike,\textsuperscript{68} lower courts quickly applied the reasoning of \textit{M-K-T} in these situations.\textsuperscript{69} At first glance, it may appear that it does not necessarily follow from \textit{M-K-T} that unions may obtain "independent" status quo orders. Where the union is being enjoined from striking, doctrinal support for conditioning the injunctive relief upon maintenance of the status quo can be found in the law of equity,\textsuperscript{70} as the Supreme Court recognized in \textit{M-K-T}.\textsuperscript{71} Where independent orders are sought, this doctrinal support is unavailable and the granting of such relief becomes harder to justify. However, in cases where the union does not strike, the employer still benefits from the fact that no-strike clauses are enforceable in equity. The availability of these anti-strike injunctions is often what deters the union from striking.\textsuperscript{72} Thus, equitable grounds remain for issuance of an independent status quo order.

Furthermore, it would be anomalous for district courts to favor unions in breach of their no-strike clauses by granting them status quo orders, while refusing to grant such orders for unions which choose not to strike. The effect of such a policy would be to force the union to resort to a strike or threatened strike before it could obtain an injunction maintaining the status quo.\textsuperscript{73} As the Second Circuit has stated, a policy would "encourage unions to take insincere strike votes to provoke the carrier into seeking an injunction, hoping that the district

\textsuperscript{67} See text accompanying notes 156 to 200 infra.
\textsuperscript{68} 363 U.S. at 531 n.3.
\textsuperscript{70} See note 46 supra.
\textsuperscript{71} 363 U.S. 528, 531-32 and n.4 (1960).
\textsuperscript{72} Prior to the decision in \textit{Boys Markets}, which held that anti-strike injunctions were permissible, employers could bring civil actions for damages caused by the strike. However, these suits were rarely brought since employers frequently agreed not to sue as part of the strike settlement. See \textit{Boys Markets, Inc. v. Retail Clerks Union}, Local 770, 398 U.S. 235, 248 and n.17 (1970). Where anti-strike injunctions are issued, strikers may be held in contempt for disobeying court orders and are subject to criminal penalties, including jail and fines—sanctions which have deterrent effect on unions contemplating strike action.
court will deem retention of the status quo proper.”  

In addition, when the union strikes or threatens to strike and the employer does not sue for an injunction, it can be argued that he or she has “waived” the effect of the no-strike clause. And since status quo orders are available only because of the enforceability of the no-strike clause—or so the argument would go—such orders would not be available where the employer does not seek an injunction and the union is free to strike. But in these situations it is not quite accurate to say that the effect of the no-strike clause is “waived.” Presumably, if the union does go out on strike, the employees will lose their protected status since they are in breach of the clause, and they may therefore be fired. Moreover, the employer can probably still bring a section 301 suit for damages even if an injunction is not sought.

In order to avoid these unfortunate consequences and the excess litigation which would result after the unavailability of a status quo order has forced a union to strike, district courts should and have allowed such orders even where there is no strike, threatened strike or employer’s suit for equitable relief. In any case, whether or not the no-strike clause is “waived,” the principal rationale for issuance of M-K-T injunctions still applies in these situations; the union is still seeking to protect the arbitral process.

C. The Railway Labor Act and the National Labor Relations Act

In discussing the M-K-T case, it is important to explore why the reasoning of the case, which technically applies only to RLA suits, is also applicable to suits brought under section 301 of the Taft-Hartley Amendments to the NLRA.

In recent years, the Supreme Court, recognizing that a uniform national labor policy is desirable, has treated the policies behind each of the Acts as very similar, even though the RLA is tailored to cover a particular industry while the NLRA is much more general in scope. Consequently, in developing a substantive body of law for the enforcement of collective bargaining agreements pursuant to section 301, the Supreme Court has frequently relied upon its experience in administering the RLA. Similarly, in interpreting the provisions of the RLA, the court has looked to cases decided earlier under the NLRA. For the

77. See note 69 supra. In fact, in recent years most status quo orders have been brought independently, rather than as counterclaims to employers’ suits for injunctive relief.
78. For example, the Court has brought the law relating to a union’s breach of its duty of fair representation under the RLA into substantial conformity with that of the NLRA, even
purpose of this discussion, the most important instance of this reliance was the decision in *Boys Markets*, where the Court authorized section 301 injunctions against unions which breached their no-strike clauses. The Court there looked to its previous judicial construction of the RLA in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, an RLA case which authorized analogous injunctions. In *Boys Markets*, the Court specifically concluded that the reasoning of that case was applicable in NLRA suits. This express approval of the *Chicago River* rationale in NRLA cases seems to imply approval of the *M-K-T* rationale in NRLA cases. As a result of applying RLA cases by analogy to suits brought pursuant to section 301, the remedies under both the RLA and section 301 have become very similar, even though the RLA contains intricate, mandatory arbitration procedures while section 301 appears to be a "bare grant of federal jurisdiction."

The growing reliance on arbitration by parties in all industries—whether under the jurisdiction of the NLRA or the RLA—has been the most important factor behind this judicially imposed merger of the two statutes. It is true that for parties whose activity is governed by the RLA, the arbitral process is statutory, while for those who are governed by the NLRA, arbitration is wholly private and voluntary. But even though arbitration under the NLRA is a voluntary matter, it has become extremely widespread. Shortly after the experience with arbitration during World War II and the passage of section 301 of the Taft-Hartley Act in 1948, contracts containing no-strike clauses and


80. *Boys Markets*, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 252 (1970) ("The principles elaborated in *Chicago River* are equally applicable to the present case").

81. See Gould, supra note 10, at 239-41. Further support for the proposition that the *Boys Markets* decision implicitly adopted the *M-K-T* rationale for NLRA cases appears in Gateway Coal Co. v. U.M.W., 414 U.S. 368, 387 (1974). In holding that a *Boys Markets* injunction had been properly issued, the Court affirmed the district court's conditioning of this relief upon the employer's maintenance of working conditions as they existed before the strike. Two foremen, whom the union believed to be safety risks, could not be reinstated by the employer until the dispute was resolved through arbitration. *Id.* at 387.

82. Feller, supra note 78, at 718: "Starting with only a bare grant of federal jurisdiction over suits for breach of agreements between unions and employers in the case of section 301, and without even statutory recognition that a labor agreement is a contract in the case of the Railway Labor Act, the Court has created and defined a set of substantially identical remedies and limitations under both."

83. 45 U.S.C. § 152 (1976). This section first sets out arbitration procedures for disputes arising over the interpretation of an existing collective bargaining agreement. These so-called "minor disputes" are discussed more fully in note 41 supra.

arbitration procedures became more commonplace. Courts eventually recognized that a strong federal policy existed in favor of arbitration. This policy is supported by widely-held beliefs that arbitrators are more competent than courts to interpret labor contracts and to resolve disputes, and that the arbitral process contributes to the maintenance of labor peace. In 1957, relying on this policy, the Supreme Court, in *Textile Workers Union v. Lincoln Mills*, held that a district court may compel an employer to arbitrate a grievance. Three years later the *M-K-T* case further underscored the importance of the arbitration process, holding that an injunction against an employer to maintain the status quo pending arbitration is proper if it is necessary to protect the arbitral process.

In light of *Lincoln Mills*' endorsement of arbitration and *M-K-T*'s focus on protecting the arbitral process, district court judges naturally found it difficult not to come to the same conclusion as the *M-K-T* Court in lawsuits in which unions sought status quo orders under section 301. An early example of a district court case which arose in this context was *Local 1098 v. Eastern Greyhound Lines*, decided in 1963. In that case the company sought to remove its repair and maintenance operations from Washington, D.C. to Chicago. The union sought and obtained an injunction to prevent the move until the completion of an arbitration proceeding between the parties determining whether under the collective bargaining agreement the company had a right to carry out its plan. The Court relied heavily upon *Lincoln Mills* and followed the "protecting arbitration" rationale of *M-K-T*:

It has been held by the Supreme Court in [*Lincoln Mills*] that the courts

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85. In 1945, 10% of all collective bargaining agreements contained arbitration procedures and no-strike clauses. In 1961-62, 94% of the agreements contained these provisions. Feller, supra note 78, at 745-47.
87. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-97 (1960). But see Feller, *Arbitration: The Days of its Glory are Numbered*, 2 INDUS. REL. L.J. 97, 98 (1977): "Clearly an ad hoc arbitrator, who comes in to decide a grievance in a particular shop which he has never seen before and may never see again, has no special knowledge of the 'common law' of that shop."
88. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960) ("... arbitration is a substitute for industrial strife. ... ").
89. 353 U.S. 448 (1957).
91. Id.
92. Id.
may grant specific performance of a covenant in a contract between a labor union and an employer to arbitrate grievances. While here both sides are undertaking to arbitrate, the complaint here seeks to make this arbitration effective. If the Court has power to order specific performance of such a covenant, it has collateral power to take steps that would prevent rendering the result of arbitration futile and ineffective.93

Eastern Greyhound has been cited as authority in later cases where status quo orders have been sought pursuant to section 301 of the Taft-Hartley Act.94 While Eastern Greyhound itself did not cite M-K-T, other courts presiding in section 301 suits have done so.95

D. The Norris-LaGuardia Act

At one time, the anti-injunction provisions of the Norris-LaGuardia Act seemed to be a potential obstacle to the issuance of status quo orders.96 The M-K-T Court, of course, had no problems with this issue, since injunctions against railroad unions under the RLA had been authorized three years before in the Chicago River case. For the M-K-T Court, imposing conditions on these injunctions on behalf of unions therefore seemed consistent with “traditional equitable considerations.”97 On the other hand, judges presiding in the early NLRA cases such as Eastern Greyhound had no such precedent to guide them, since the NLRA counterpart of a Chicago River injunction was not authorized until 1970 in the Boys Markets case.

In fact, the 1962 decision in Sinclair Refining Co. v. Atkinson98 created much uncertainty as to the propriety of status quo orders in NLRA cases. There the Supreme Court held that an injunction could not be issued against a union’s strike in breach of a no-strike clause on

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93. Id. at 31 (emphasis added).
95. See note 15 supra.
96. Although the issuance of status quo orders is not among the specific abuses of judicial power listed in section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1976), such orders would seem to be forbidden by Section 7, 29 U.S.C. § 107 (1976), which prohibits the issuance of “a temporary or permanent injunction in any case involving or growing out of a labor dispute” unless certain procedural requirements (discussed in Part III of this article) are met. The issuing judge must also find, inter alia, “that unlawful acts have been threatened or will be committed unless restrained or have been committed and will be continued unless restrained,” 29 U.S.C. § 107 (1976) (emphasis supplied)—a condition which will almost never be met in the typical status quo order case.
97. 363 U.S. at 535.
the grounds that such an injunction would violate the Norris-La Guardia Act. Even though the *Sinclair* holding rested on the specific provisions of section 4 of the Act, and any application of the Act to status quo orders would have to be based on section 7, *Sinclair* arguably prohibited the issuance of these injunctions. One could argue that if an employer is forbidden by the Act from enjoining a strike in breach of a no-strike clause pending arbitration, a union should not be allowed to enjoin changes in working conditions pending arbitration. By and large, however, the district court judges rejected this argument.

The discussion of the Norris-LaGuardia Act in *Lincoln Mills* was undoubtedly a strong influence upon these judges in their decisions to reject these implications of *Sinclair*. In that case Justice Douglas, writing for the majority, held that the Act does not forbid an injunction ordering an employer to comply with an arbitration clause, since "[t]he failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed." *Eastern Greyhound* and subsequent

99. *Id.* at 203.

100. *See note 96 supra.*

101. While rejecting the employer's argument that section 7 of the Act wholly precludes the issuance of status quo orders, courts have begun to apply the procedural requirements of section 7 before granting such injunctions. *See*, e.g., *Hoh v. Pepsico*, Inc., 491 F.2d 556, 560 (2nd Cir. 1974); *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973). *See text accompanying note 115 to 121 infra.*

102. One court, while finding *Lincoln Mills* controlling, found it difficult to reconcile that case with *Sinclair*:

"It is a little difficult to read the *Lincoln Mills* case in 1957 and then to read *Sinclair* . . . in 1962. As a matter of fact, this Court only reaches the conclusion that it is impossible to put the two together." Teamsters Local 328 v. Armour and Co., 297 F. Supp. 168, 171 (W.D. Mich. 1968).

103. 353 U.S. at 458. The overall purpose of the Act was to protect employees—not employers—from the abuses of judicial power. Section 2 of the Act provides:

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

cases dealing with status quo orders under the NLRA adopted this reasoning and expanded its application to orders maintaining the status quo pending arbitration. This expansion was thought to be permissible since status quo orders can be characterized as just a certain type of injunction forcing the employer to arbitrate.

Further, the overruling of Sinclair in Boys Markets was interpreted as a legitimation of these injunctions against employers. As a result, post-Boys Markets courts have issued status quo orders with more confidence. Judges presiding in these cases frequently point out that since employers can now get anti-strike injunctions, access to the courts should not be a “one-way street.” Moreover, the Boys Markets Court, in holding that a district court may enjoin a union from striking in breach of a no-strike clause, emphasized the desirability of protecting the arbitral process.

E. Application of Boys Markets to Status Quo Orders

The Boys Markets case also adopted a set of principles from the dissenting opinion in Sinclair “for the guidance of the district courts in determining whether to grant injunctive relief.” Among them were the requirements that the grievance be arbitrable and that the employer be ordered to arbitrate as a condition of granting the relief. Also, the district court must 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 continue; whether they have caused or will cause irreparable injury to the employer; and whether the employer


[T]he action before the Court here is a form of an attempt to force specific enforcement of an arbitration clause because what it seeks to do is to protect and safeguard the situation in such a manner that the award when and if made will be effective and not futile.

107. The fact remains that the effectiveness of [arbitration] agreements would be greatly reduced if injunctive relief were withheld. Indeed, the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures. This basic purpose is obviously undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate.
108. 398 U.S. at 249 (emphasis supplied).
109. Id.
will suffer more from the denial of an injunction than will the union from its issuance.¹¹⁰

Post-Boys Markets cases dealing with injunctions against employers have cited and adopted these prerequisites practically unchanged.¹¹¹ It should be noted, however, that this reliance on Boys Markets is unnecessary and often improper. As previously indicated, M-K-T established that the harm threatened in status quo order cases must be more than simply "irreparable."¹¹² And although the other Boys Markets prerequisites are substantially the same as those used for injunctions against employers, the same set of requirements can be found in the language of the M-K-T decision and other status quo order cases which relied upon the "ordinary requirements of equity."

The point is that although the requirements themselves are substantially the same, there may be some danger in using Boys Markets as a guide in cases involving status quo orders. If the courts disregard the historical origin of status quo orders, that is, the M-K-T case, and forget that the rationale behind them is somewhat independent of the rationale of Boys Markets injunctions,¹¹³ then the future of status quo orders will be unduly influenced by future cases which deal only with Boys Markets injunctions. Theoretically, even if the Boys Markets decision were reversed, status quo orders would remain a legitimate method which unions may employ to prevent arbitration from becoming "futile and ineffective." These considerations will be relevant to the discussion in Part IV of this article concerning the effects of Buffalo Forge on status quo orders. Before proceeding to that discussion, however, the prerequisites for obtaining a status quo order will be examined in greater detail.

### III

### PREREQUISITES

#### A. Procedural Requirements

It has become fairly well-settled law in recent years that a union

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¹¹⁰ Id.
¹¹² 363 U.S. 528, 534 (1960). The harm must affect the arbitrable process. In Boys Markets cases, it is likely that the harm to the employer must also affect the arbitrable process, especially in light of Buffalo Forge. However, all strikes over arbitrable issues would likely be held to affect the arbitrable process since the striking union is usually trying to force the employer to relent on an issue which is for the arbitrator. In cases involving injunctions against employers, the effect on the arbitrable process is different yet more severe. See last paragraph of note 230 infra.
¹¹³ A contrary view is expressed in Simon, supra note 30, at 317: "Ideally, ancillary relief to maintain the status quo pending arbitration should be equally available to both employers and unions under the conditions set forth in Boys Markets. . . ."
seeking a status quo order must comply with a set of procedures which are derived from section 7 of the Norris-LaGuardia Act, as well as

114. 29 U.S.C. § 107 (1976), which states:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, has herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law, and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Although not all courts apply the procedural requirements of section 7, some courts have adopted them to the extent they are consistent with the policies of section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976). See Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, 471 F.2d 872, 876 (6th Cir. 1972): "The fact that this case involves an injunction against the employer does not mean that the District Court was free to ignore the procedural mandates set forth in § 7 of the Norris-LaGuardia Act..."; Hoh v. Pepsico, Inc., 491 F.2d 556, 560 (2nd Cir. 1974): "We see no inconsistency with § 301 in such provisions of § 7 as those which prohibit the issuance of an injunction except after hearing the testimony of witnesses in open court and demand a finding, on the basis of such testimony, that 'as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief'..."; Amalgamated Transit Union Div. 1384 v.
from Rule 65 of the Federal Rules of Civil Procedure. Both allow


Prior to Boys Markets, at least one court held that the Norris-LaGuardia Act was wholly inapplicable in these situations. Local Div. 1098, Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees v. Eastern Greyhound Lines, 225 F. Supp. 28, 31 (D.D.C. 1963). See also a post-Boys Markets decision involving an injunction against a strike in which then Judge Stevens indicated that all of the procedural requirements of § 7 may be inapplicable. Associated Gen. Contractors v. Illinois Conference of Teamsters, 486 F.2d 972, 975-76 n.8 (7th Cir. 1973).

For a brief discussion of the application of these procedures, see Smith, The Supreme Court, Boys Markets Labor Injunctions, and Sympathy Work Stoppages, 44 U. Chi. L. Rev. 321, 346 n.106 (1977).

115. Fed. R. Civ. P. 65 provides:

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. . .

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained, and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.
injunctions to be issued only after notice to the adverse party, and require that the judge's orders specifically state the acts prohibited. Both require a hearing, although there is authority which favors dispensing with the "live testimony" requirement of section 7 if the undisputed facts weigh heavily in favor of the union.

Rule 65(b) and section 7 contain differing time limits during which a temporary restraining order is effective, and the law is unclear as to which provision should govern—the ten-day period allowed by Rule 65(b) or the five-day period of section 7. Both provisions require the moving party to file a bond to cover any damages resulting from wrongful issuance of an injunction. However, an injunction will apparently be considered "wrongfully" or "improvidently" issued only if an appellate court so rules by reversing a district court's decision, not merely because the union eventually loses in arbitration.

B. Arbitrability

The dispute which prompts the union to seek the injunction must, of course, be arbitrable. Since the primary purpose of a status quo or—
order is to protect the arbitral process, an employer should not be enjoined from making changes unless he or she contractually agreed to arbitrate the resulting dispute.

Initially, the union must show that the employer at least implicitly agreed to maintain the status quo pending arbitration. In most of the cases in which a status quo order is sought, the collective bargaining agreement will not contain an explicit promise by the employer to maintain the status quo pending arbitration of disputes. Instead, the union will allege that the proposed change is a breach of some more commonplace provision which gives rise to an implied promise to maintain the status quo. The union would argue that the employer agreed to arbitrate and not to engage in "self-help" which would render the arbitral process a hollow formality, and, therefore, implicitly agreed to subject itself to court orders issued for the purpose of protecting arbitration.

Among the clauses relied upon to imply a promise to maintain the status quo are: employer promises to have all work done by local union employees during the course of the contract;\textsuperscript{122} "successorship clauses" in which an employer agrees that it will not sell its facilities unless, as a condition of the sale, the successor employer assumes the obligations under the existing collective bargaining agreement;\textsuperscript{123} promises to disclose certain information before removing a plant;\textsuperscript{124} requirements that the parties come to a mutual agreement before changes are put into effect;\textsuperscript{125} general safety provisions;\textsuperscript{126} and provisions designed to pre-


\textsuperscript{124} See e.g., Lever Bros. Co. v. Chemical Workers Local 217, 554 F.2d 115, 120 (4th Cir. 1976) (affirming the lower court's order enjoining transfer of a plant, even though the arbitrator himself could not have halted the transfer but could have only ordered certain information to be disclosed). But see Hoh v. PepsiCo, Inc., 491 F.2d 556 (2d Cir. 1974) (denying injunction because of failure to show "some likelihood of success"); Bakery Workers Local 464 v. Hershey Chocolate Corp., 245 F. Supp. 148 (M.D. Pa. 1965) (denying injunction because of failure to show "irreparable harm").


serve seniority rights.\footnote{127} Courts have generally not been persuaded, however, by a union's claim that a transfer of operations constitutes an impermissible "lockout."\footnote{128}

While the foregoing provisions may serve as the basis for a status quo order, an explicit promise by the employer not to make contested changes until resolution of the issue through arbitration would seem to be the most desirable provision from the union's point of view. However, being consistent with the M-K-T rationale and Buffalo Forge, a court could not remedy even a breach of this explicit "status quo" clause with the issuance of an injunction unless the breach threatens to cause the union harm so irreparable that it would interfere with the arbitral process.\footnote{129}

Related to the requirement that a judicially enforceable promise to maintain the status quo can be inferred from the agreement is the requirement that the union show the dispute to be arbitrable. Recent decisions have raised a question, however, concerning the extent to which a union must go beyond showing that the dispute is arbitrable. In particular, to what extent does the union have to show that it has a good chance of prevailing on the merits before the arbitrator? In earlier cases, status quo orders were issued upon very minimal examination of the union's probable success—so minimal, in fact, that the contract provisions were not even discussed in the opinions for fear that such a discussion would be an improper evaluation of the merits as well

(1974) (affirming the status quo order which was attached to a Boys Markets injunction against a strike over a safety dispute).


\footnote{128} See e.g., Hoh v. PepsiCo, Inc., 491 F.2d 556, 561 (2d Cir. 1974) (rejecting such a claim because the Supreme Court has recognized the difference between a "complete liquidation of a business" and a "lockout used as a temporary economic weapon in a labor dispute"); Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 274 (1965).


For a case which implies that a "status quo clause" will always enable the union to obtain a status quo order, see Amalgamated Transit Union Div. 1384 v. Greyhound Lines, 550 F.2d 1237, 1238 (9th Cir. 1977). Some language in \textit{Detroit Newspaper}, 471 F.2d at 877, has apparently been interpreted as advocating absolute prohibition of status quo orders. \textit{See} Pressmen's Union No. 9 v. Pittsburgh Press Co., 479 F.2d 607, 611 (3d Cir. 1972). The Fourth Circuit said in \textit{Detroit Newspaper}: "Like the other phases of the dispute [including the applicability of the 'status quo clause'], we hold the matter of injury to the Union is an issue for determination by the arbitrator." 471 F.2d at 877. However, almost the entire opinion is a criticism of the District Court's failure to correctly balance the equities, and the above statement should not be interpreted as saying that in such cases the arbitrator is the only person entitled to weigh the equities and maintain the status quo. Later in the opinion, the Court says: "[W]e do not hold that an injunction could never issue under a 'status quo' provision. We hold merely that the injunction was not issued properly under the facts of this case, where the necessary prerequisites have not been met." \textit{Id.} at 877-78.
as an improper influence on the arbitrator. Some more recent decisions have adopted a similar approach, most notably the original opinion in *Amalgamated Transit Union Division 1384 v. Greyhound Lines* and the even more recent case of *Lever Brothers Co., Inc. v. Chemical Workers Local 217*. Although these later cases contain some brief mention of the specific contractual provisions relied upon by the unions, the unions were not required to show probability of success on the merits.

In *Greyhound* the union had only to demonstrate the existence of "a genuine dispute with respect to an arbitrable issue" and that the position to be espoused in arbitration "is sufficiently sound to prevent the arbitration from becoming a futile endeavor." The *Lever Brothers* Court agreed with the Ninth Circuit's reasoning in the original *Greyhound* opinion, and reaffirmed its agreement in an addendum opinion even after the Ninth Circuit reversed itself. The court of appeals in *Lever Brothers* held that the district court properly enjoined the transfer of the employer's plant pending arbitration upon a showing by the union that the dispute was for the arbitrator.

In reaching its decision, the *Lever Brothers* court expressed its disapproval of the rule adopted by the Second Circuit in Judge Friendly's opinion in *Hoh v. Pepsico, Inc.* That case held that the requirement of "some likelihood of success," derived from the "ordinary principles of equity" mentioned in the *Sinclair* dissent and prescribed in *Boys*

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130. Local 1098, Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Eastern Greyhound Lines, 225 F. Supp. 28, 30 (D.D.C. 1963) ("The Court is not going to discuss the particular provisions on which the plaintiff relies as precluding the defendant from proceeding with the proposed move. That is a matter entirely for the decision of the arbitrators and any discussion by the Court of this question would not only be irrelevant but might perhaps prejudice or influence the arbitrators"); Auto Workers v. Seagrave Fire Apparatus Dir., 56 L.R.R.M. 2874, 2876 (E.D. Ohio 1964).

131. 529 F.2d 1073 (9th Cir.), vacated and remanded on other grounds, 429 U.S. 807 (1976).

132. 554 F.2d 115 (4th Cir. 1976), noted in 91 HARV. L. REV. 715 (1978).

133. 529 F.2d at 1078. In the second *Greyhound* decision, the Ninth Circuit reversed itself, implying that regardless of the union's showing of probable success on the merits, a status quo order cannot be issued since a promise by the employer to maintain the status quo pending arbitration can rarely be implied. 550 F.2d 1237, 1238-39.


135. 491 F.2d 556 (2d Cir. 1974).
Markets,136 means “not simply some likelihood of success in compelling arbitration but in obtaining the award in aid of which the injunction is sought.”137 In other words, a status quo order will not issue unless the union shows that it has a good chance of succeeding in arbitration.138

In light of both precedent and policy considerations, the Lever Brothers approach to this problem is sounder than that taken in Hoh. M-K-T, the one case in which the Supreme Court squarely considered the issue of arbitrability,139 contains no indication that the trial court was required to find “some likelihood of success” on the merits before issuing the order. In fact, the Supreme Court may have actually implied its disapproval of such a requirement when it commended the trial judge for being scrupulous in avoiding encroaching upon the jurisdiction of the arbitrator.140

The Lever Brothers approach also seems more consistent with the policy of liberal construction of arbitration agreements, under section

137. This strict standard has been followed by district courts in the Second Circuit. See e.g. Distillery Workers Local 1 v. Hiram Walker-W. A. Taylor Distribrs., Inc., 88 L.R.R.M. 3127, 3131 (S.D.N.Y. 1975), aff'd 90 L.R.R.M. 2889; Communication Workers v. Western Elec. Co., 430 F. Supp. 969, 976 (S.D.N.Y. 1977) (both cases acknowledging that the Supreme Court has never specifically mentioned this requirement and that it was simply added by the Second Circuit Court of Appeals).

Outside the Second Circuit, one court has applied a rule similar to that of Hoh, though Hoh was not cited. United Steelworkers v. Blaw-Knox Foundry & Mill Mach., Inc., 319 F. Supp. 636, 641 (W.D. Pa. 1970) (“[T]he Court concludes that there is a reasonable likelihood that [the union] will prevail on the merits of the grievances in arbitration”). See also IUE v. Radio Corp. of America, 77 L.R.R.M. 2201, 2203 (D.N.J. 1971) (“Although the merits of the dispute are not for this Court to evaluate, it is discernible that the Union's claim is not frivolous and that it has a good likelihood of prevailing at the pending arbitration proceedings”); Texaco Independent Union v. Texaco, Inc., 98 L.R.R.M. 2128 (W.D. Pa. 1978) (saying that the union must show “probable success on the merits,” but unclear as to whether this means on the merits of the claim itself or on the merits of the assertion that the dispute is for the arbitrator).

138. In his discussion of Hoh, one commentator has overlooked the fact that M-K-T is valuable precedent on the issue of arbitrability. Gould, supra note 30, at 555 (“Prior to Buffalo Forge, the basic question of whether to apply the equity standard to the merits of arbitrability or to the underlying dispute proved somewhat confusing to courts having only Lincoln Mills and the Steelworkers Trilogy as precedents.”)

139. 363 U.S. at 533.
140. In particular, the Court approved of the following comment made by the trial judge at one stage of the initial proceeding:

We have not analyzed the contract because it is useless for us to analyze it because regardless of what conclusion we reach about the provisions of that contract we have no right to enforce its provisions or deny its provisions. Those conditions can be determined only by the Railroad Adjustment Act. . . . This Court is without power to construe that contract, which [the unions] claim has been broken by the company.

Id. at 533 n.5. The fact that this same concern about judicial examination of the merits was expressed in Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 410-11 (1976), would seem to indicate that the Supreme Court would prefer the standard used in Lever Brothers to that announced in Hoh—notwithstanding apparent arguments to the contrary advanced by the employer in the Lever Brothers case at 554 F.2d 115, 121 n.11.
301 of the Taft-Hartley Act. For example, the Supreme Court held in *United Steelworkers v. Warrior & Gulf Navigation Co.* that a district court must order an employer to arbitrate a dispute unless it can be said with "positive assurance" that the dispute is not arbitrable, regardless of the judge's personal opinion of the union's claim. Considering this strong policy in favor of avoiding judicial examination of the merits, it would seem improper to require a court to determine whether a union has shown some "likelihood of success on the merits in arbitration" when the union seeks injunctive relief to prevent the arbitral process from becoming "futile and ineffective."

Admittedly, however, the "presumption of arbitrability" which was applied by the Supreme Court in the *Steelworkers Trilogy* should not be applied where parties seek *Boys Markets* injunctions or status quo orders. Such a presumption would be improper since an injunction is a much more serious judicial intrusion into a labor dispute than is an order to arbitrate. To the extent that the *Lever Brothers* Court applied this presumption, its reasoning seems incorrect. Instead of employing the *Trilogy's* very strong presumption of arbitrability—as some courts have done in *Boys Markets* situations—courts should ask whether the union is likely to succeed

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143. See note 86 supra.
145. See *Kroner, Interim Injunctive Relief Under the Railway Labor Act: Some Problems and Suggestions*, 18th ANNUAL NYU CONFERENCE ON LABOR 179, 183 (1966) (calling the injunction an "awesome device"); 91 HARV. L. REV. at 721.

*In Gateway Coal Co. v. U.M.W.*, 414 U.S. 368, 377-79 (1974), the Court may have authorized application of the *Steelworkers* presumption of arbitrability in a case in which an employer sought a *Boys Markets* injunction. The case has been so interpreted. *Developing Labor Law*, 1971-75 SUPP., at 258; Simon, supra note 10, at 325 n.24. One commentator, however, believes that the passage is not unambiguous and should not be interpreted as adopting the same presumption used in the *Steelworkers Trilogy*:

[In *Gateway Coal*, the] Court cited the presumption of arbitrability to contradict the argument that public policy disfavors arbitration of safety disputes. The Court had already held that the only possible interpretation of the contractual language was that the dispute was arbitrable. *Id.* at 376. In addition, the Court found no express exception to the broad arbitration clause. *Id.* at 380 n.10. Thus it is not clear how the Court intended the presumption to be applied in such a case. *Buffalo Forge* interpreted *Gateway Coal* to be based on a determination "that the dispute was arbitrable." 428 U.S. at 408 n.10.

91 HARV. L. REV. 715, 723 n.46.
in its contention that its claims are subject to arbitration and should probably make the union bear the burden of showing probable arbitrability.\textsuperscript{149}

Although the \textit{Hoh} Court correctly recognized that the strict presumption of arbitrability should not apply when injunctions are sought,\textsuperscript{150} the standard of “some likelihood of success” it adopted in place of the presumption contravenes the spirit of the \textit{Steelworkers Trilogy}. The Court felt that the \textit{Trilogy} did not “extend to the grant of ancillary relief” since “[i]t would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitrable was plainly without merit.”\textsuperscript{151}

The Court incorrectly assumes that high cost to the employer justifies judicial examination of the merits, for it failed to consider that the judge will take into account whether the costs are too high when balancing the potential harms.\textsuperscript{152} The above-quoted passage also indicates that the \textit{Hoh} Court failed to recognize that collective bargaining agreements frequently contain unclear and conflicting provisions—the interpretation of which is often deliberately left to the arbitrator.\textsuperscript{153} It is quite conceivable that even though a judge interpreting such provisions finds that the union failed to show “some likelihood of success,” an arbitrator interpreting the same contract will later find for the union on the merits.\textsuperscript{154} But in such cases, if a status quo order has been de-

\textsuperscript{148} This was the standard applied in Amalgamated Food Employees Local 590 v. National Tea Co., 346 F. Supp. 875 (W.D. Pa. 1972), remanded, 474 F.2d 1338 (3d Cir. 1972). The Court issued a status quo order since the union was “likely to succeed” in its contention that “all or some of the claims . . . are subject to arbitration.” The Court still adhered to the spirit of the \textit{Steelworkers Trilogy} by refraining from expressing “any thoughts on the ultimate outcome of the arbitration since these matters are for the arbitrator.” \textit{Id.} at 881.

\textsuperscript{149} \textit{See Comment, supra note 10, 91 \textit{HARV. L. REV.} at 722.}

\textsuperscript{150} \textit{Hoh v. PepsiCo, Inc.}, 491 F.2d 556 (2d Cir. 1974).

\textsuperscript{151} \textit{Id.} at 561.

\textsuperscript{152} Some cases also suggest that a judge may adopt an intermediate solution by accelerating the arbitration process when large costs are at stake. \textit{See note 176 infra.}

\textsuperscript{153} \textit{See Shulman, Reason, Contract and Law in Labor Relations}, 68 \textit{HARV. L. REV.} 999, 1004 (1955). Believing themselves incompetent to interpret such conflicting provisions, some courts that follow the \textit{Hoh} approach have looked to other proceedings in order to determine whether the union has “some likelihood of success.” \textit{E.g.}, Independent Workers Local 1 v. General Dynamics Corp., 76 L.R.R.M. 2540, 2541 (W.D.N.Y. 1970) (concluding that the union probably would not succeed in arbitration after noting that the Regional Director declined to issue a complaint in an unfair labor practice proceeding before the National Labor Relations Board); IUE v. Radio Corp. of America, 77 L.R.R.M. 2201, 2203 (D.N.J. 1971) (looking to previous arbitration awards involving disputes similar to the one presented); \textit{Hoh v. PepsiCo, Inc.}, 491 F.2d 556, 561 n.9 (2d Cir. 1974) (same).

\textsuperscript{154} As an example of how easily a court and an arbitrator can reach different conclusions in interpreting the same contract, \textit{see Enterprise Wheel & Car Corp. v. United Steelworkers}, 269 F.2d 327 (4th Cir. 1959), \textit{rev’d}, 363 U.S. 593 (1960). The arbitrator had reinstated with back pay several employees who had walked off the job in protest and had subsequently been fired. The court of appeals refused to enforce the award, claiming that the contractual provisions clearly gave
nied the arbitrator's award will come too late, and damage to the arbitral process will have already occurred. The union will therefore be effectively deprived of its bargain. 155

C. Irreparable Harm and Balancing the Equities

As was spelled out in *M-K-T* and in later cases relying on both *M-K-T* and on *Boys Markets* to obtain a status quo order, a union must show that it will suffer serious irreparable injury and that it will be harmed more from the denial of the injunction than will the employer from its issuance. Preliminarily, it should be noted that these inquiries by courts of equity obviously involve a great deal of discretion. Many factors, including some unarticulated ones, seem to influence the outcome of the cases. 156 These extraneous factors, as well as the confusion which results from the peculiar nature of the irreparable-harm requirement applied in these cases (i.e., the threat to the arbitral process),

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155. In Comment, *supra* note 10, 82 DICK. L. REV. 487, the author concludes that "requiring a showing of some likelihood of success before issuing injunctive relief does not threaten to deprive a union of its benefit of the bargain..." *Id.* at 494. This conclusion, however, is based upon the erroneous belief that the judge's consideration of the merits "would not be dispositive of the underlying grievance, nor would it be likely to affect the arbitrator's determination..." *Id.* Just the opposite is true: if the "irreparable harm" requirement for this type of injunction is applied correctly, then, by definition, the arbitral process is likely to be affected. See section II, part C of this article.

156. One possible "unarticulated factor" is judicial deference to management prerogatives, regardless of whether the union makes the required showing. Kroner, *supra* note 145, at 183 ("The injunction is an awesome device when it is used to make business decisions...". It is this consideration which explains why there are not many more reported cases where [status quo orders are] granted; it is the unarticulated factor in this area.) See also Gould, *supra* note 10, at 242-43, 249.

Courts are also influenced by the behavior of the parties up to the time of the litigation. The fact that the union delayed in filing a grievance or expressed no desire to expedite arbitration may influence the judge's decision not to grant a status quo order. Hoh v. Pepsico Inc., 491 F.2d 556, 561 (2d Cir. 1974); Independent Workers Local 1 v. General Dynamics Corp., 76 L.R.R.M. 2540, 2541 (W.D.N.Y. 1970) (court influenced by fact that union was informed of the company's plans many times in the months preceding the closing date, but union failed to file a grievance). But see Communication Workers v. Western Elec. Co. Inc., 430 F. Supp. 969, 980 n.32 (S.D.N.Y. 1977) (employer had not "announced" the impending transfer, but rather had "indicated the possibility" of such transfers); Technical, Office & Professional Workers Local 757 v. Budd Co., 345 F. Supp. 42, 47 (E.D. Pa. 1972) ("The Union's delay... does not reach the level which would tip the scale of conveniences and cause this Court to deny a preliminary injunction.")

The employer's lack of interest in expedited arbitration, or conduct which indicates bad faith, may likewise influence the judge's decision. IUE v. Radio Corp. of America, 77 L.R.R.M. 2201, 2203 (D.N.J. 1971); Amalgamated Food Employees Local 590 v. National Tea Co., 346 F. Supp. 875, 883 (W.D. Pa. 1972), *remanded* 474 F.2d 1338 (3d Cir. 1972) (employer was engaged in a "race against the law" to complete the closing of its chain of food stores before the issue could be resolved through arbitration).

make it difficult to extract a definite set of standards from the apparently irreconcilable decisions. Nevertheless, some general guidelines can be discerned.

As previously indicated, harm which is “irreparable” is very often suffered by employees while arbitration is pending, because arbitrators generally award only the requisite contractual relief rather than the actual tort damages.\(^{157}\) For example, the typical remedy for improper discharge is reinstatement and back pay. Unless the parties so specify, agreements do not allow for payment of interest or for compensation for expenses incurred by the employee in seeking other employment.\(^{158}\) If an employee is injured in an accident pending arbitration of a dispute arising out of an employer’s improper imposition of unsafe working conditions, the arbitrator will correct the unsafe conditions but will not award damages to the injured employee.\(^{159}\) Suppose that in another case the employer breaches the agreement by changing the vacation schedules of his or her workers. The changes cause an employee to suffer “damage of an entirely predictable kind: the deposit he paid on a vacation cabin was lost, the schedules of his wife and children had to be rearranged, and he was generally subjected to considerable inconvenience.”\(^{160}\) On these facts, the arbitrator would declare that the employer has violated the agreement, but, in the absence of a specific contractual provision so authorizing, would probably not award damages.\(^{161}\)

These examples illustrate that while employees will often suffer “irreparable harm” while arbitration is pending, the existence of such harm by itself does not justify the issuance of an injunction maintaining the status quo. The M-K-T Court emphasized that the policy be-

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158. Unlike courts, grievance arbitrators are not externally imposed agencies engaged in assessing damages for breach of a promise. They are agents of the parties usually restricted to the determination of disputed issues of agreement and application. One of those issues is the remedy to be applied when management, in exercising its right to direct the working forces, has not complied with the agreed-upon rules limiting its action. Although many labor arbitrators are lawyers and hence tend to use damage terminology more appropriate for judicial processes, they do not usually award damages in accordance with legal principles exterior to the agreement. Rather they only apply the remedial principles expressed or implied within it. And, typically, collective bargaining agreements do not provide for damages but only for specific performance.

159. Id. at 783 ("I have found no arbitration award under the usual form of agreement granting damages to an injured employee . . . .")

160. Id. at 784.

161. Id. In comment, supra note 10, 82 DICK. L. REV. at 498 n.68, the author overlooks the fact that these types of damages may occur and yet not be remedied by the arbitrator’s award.
hind allowing status quo orders was "protecting arbitration." To promote this policy, a status quo order need be issued only when the union shows that the harm threatened is "so irreparable" that it affects the arbitral process.

In practice, a union is usually able to make this showing only in cases where the employer dismantles an existing facility and transfers operations to a distant location. Where it is likely that jobs will be permanently lost, the clear majority of courts have granted the requested relief if the other requirements, such as arbitrability, were met. The jobs would be lost permanently because the arbitrator would undoubtedly be influenced by the employer's substantial investment in a business rearrangement which had already been put into effect. Although it is conceivable that an arbitrator would grant the remedy of specific performance after finding for the union, it is unlikely that an arbitrator would require the employer to dismantle the new operations, return to its original plant, reinstate the employees and award them back pay.

163. Id.
166. Lever Bros. Co., Inc. v. Chemical Workers Local 217, 554 F.2d 115, 122 (4th Cir. 1976) ("Had there not been an injunction pending arbitration to preserve the status quo, the employees at the Baltimore plant would have been totally and permanently deprived of their employment, and, . . . if the union prevailed at the arbitration, would have had a double burden of convincing the company not only not to move. . . . but to return the plant" (emphasis in original)). The Lever Brothers Company in Baltimore did not actually move its entire plant. Rather it moved only its "hard soap" production operations to an already existing facility in Indiana, thus putting a number of employees out of work. Reported in a telephone conversation with an unnamed personnel official at Lever Brothers on November 17, 1978.
Compensation for the wronged employees would therefore be limited to monetary awards of back pay, which would be inadequate in these cases. Upon discharge, employees would lose pension and seniority rights. Courts have recognized that such losses can not be restored by the arbitrator's monetary award.\textsuperscript{6} Perhaps the strongest argument for allowing injunctive relief in these situations is that denial of relief will cause great suffering to the families of those persons thrown out of work by the employer's alleged breach.\textsuperscript{168} Those who lose their jobs, especially those who have held the same job for a number of years and are accustomed to being the "breadwinners" may suffer psychological and emotional problems.\textsuperscript{169} Being forced to join the welfare rolls or to look for another position—one in which the employee would be among strangers and at the bottom of the seniority list—add to the "pain and suffering" damages that will never be recovered.

With all of these losses at stake for the employees, it seems hard to imagine a situation involving a plant closing in which the employer's potential harm from delaying the plant closing pending arbitration would "outweigh" that of the employees, for any harm suffered by the employer will be economic in nature; but the \textit{M-K-T} decision does require that the employer's harm be taken into account and that the injunction be denied if the judge finds the balance of the "competing claims of irreparable hardship" in the employer's favor.\textsuperscript{170} In any case, this determination will very often turn on the personal values of the individual judge which may influence how he or she chooses to charac-

\textsuperscript{6} The author of Comment, \textit{supra} note 10, \textit{Dick. L. Rev.} at 497, adopts the view that arbitrators award tort damages—notwithstanding the view of Professor Feller set forth in note 157, \textit{supra}—and believes that arbitrators will order the "return of transferred work when such awards are necessary to remedy an employer's breach of the agreement and return the status quo." It thus appears to be impossible for a union to make a showing of "irreparable harm."


\textsuperscript{169} R. \textit{Wilcock} \& W. \textit{Franke}, \textit{Unwanted Workers} 82-86 (1963).

terize the interests at stake. Some courts are reluctant to interfere with what might be seen as "basic management decisions," even though such "interference" is authorized by the contract and even though jobs are at stake. The fact that the employer has invested a large sum of money in a given business rearrangement will usually influence the court.

Any attempt to extract concrete guidelines from the decisions is further frustrated by the various intermediate solutions which are imposed when a judge concludes that both sides have much at stake and that the equities do not weigh heavily in favor of either party. One such intermediate solution was imposed at the district court level in the M-K-T case itself. The status quo order did not actually require the defendant-railroads to restore their previous way-freight terminals. Rather, the defendants were given the choice between "(1) restor[ing] the situation as it existed prior to the [changes], or (2) pay[ing] the employees adversely affected by the orders, the wages they would have received had the orders not been issued." Another court chose to require the employer to post a large bond "to guarantee and secure an award to the [employees], should the arbitrator find in their favor, rather than issue a status quo order. The parties may be ordered to expedite arbitration of the dispute so that a decision will be reached before the irreversible changes are put into effect or irreparable harm is suffered."

171. See Kroner, supra note 145.
173. Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas R.R. Co., 363 U.S. 528, 530 (1960). See also Amalgamated Food Employees Local 590 v. National Tea Co., 346 F. Supp. 875, 883 (W.D. Pa.), remanded 474 F.2d 1338 (3d Cir. 1972) (giving employer "choice of either keeping the stores open and employing these workers or closing the stores and keeping them on the payroll pending arbitration.")
174. 363 U.S. at 530.
176. Communication Workers v. Western Elec. Co., 430 F. Supp. 969, 980 (S.D.N.Y. 1977): In this proceeding, the Court, sitting as a chancellor of equity, is armed with the chancellor's "invisible but flexible wand ... and may ... consider what, if any, appropriate instructions may be given to the parties at the present time, even if the relief prayed for by the Union is denied. It is apparent that an expedited arbitration is essential in this matter ... . The parties will thus be directed to proceed to arbitration forthwith. See also, Professional Workers Local 757 v. Budd Co., 345 F. Supp. 42, 48 (E.D. Pa. 1972) (ordering expedited arbitration and maintenance of the status quo); Southwestern Bell Tel. Co. v. Communication Workers, 343 F. Supp. 1165, 1172 (S.D. Tex. 1972) (conditioning issuance of Boys Markets injunction on maintenance of status quo and ordering expedited arbitration); American Tel. & Tel. Co. v. Communication Workers, 75 L.R.R.M. 2178, 2180 (S.D.N.Y. 1970) (ordering parties to select an arbitrator immediately and to require arbitrator to render decision within six days); Gould, supra note 156, at 253, and Smith, supra note 114, at 346-47 (both advocating the issuance of court orders requiring expedited arbitration). There is authority, however, that "expe-
Other than plant relocations and shut-downs which cause permanent job loss, there are probably no employer changes which threaten to cause irreparable harm that will affect the arbitral process. It is understandable, therefore, that courts often refuse to grant status quo orders unless permanent job loss is involved.\textsuperscript{177} In some situations, however, the refusal to grant an injunction is clearly inequitable even though the potential harm does \textit{not} threaten arbitration. To take an obvious example, changes which give rise to safety and health hazards do not affect the arbitral process even if injuries are incurred pending arbitration.\textsuperscript{178} But surely the case for granting an injunction when lives are at stake is as compelling as for when jobs are at stake.

In any case, there is both statutory authority\textsuperscript{179} and arbitral precedent which may justify making every effort—including the granting of equitable relief—to prevent occupational injuries, even if such efforts involve a departure from the usual rule that injunctions cannot be issued unless irreparable harm to the arbitral process is threatened. Although the general understanding among arbitrators is that an employee must obey orders even though he or she has filed a grievance and considers the orders to be a violation of the collective bargaining agreement, the employee is not required to follow such orders if they would jeopardize his or her safety.\textsuperscript{180} But under the usual agreement, a worker refusing to work under such circumstances risks being discharged and out of work temporarily even if the employer is in breach. Rather than force the employee to decide between the inconvenience of temporary discharge (or permanent discharge if the arbitrator finds for the employer) on the one hand, and working under what he or she considers to be dangerous conditions on the other, courts would be justified arbitration" is not a remedy which a court may grant. Teamsters Local 71 v. Akers Motor Lines, Inc., 99 L.R.R.M. 2601, 2606 (4th Cir. 1978).


\textsuperscript{178} See text accompanying note 159 \textit{supra}.

\textsuperscript{179} \S 502 of the LMRA, 29 U.S.C. \S 143 (1976). Also, a provision of OSHA allows an employee to refuse to work when doing so would involve exposure to unnecessary danger. Marshall v. Whirlpool, (6th Cir. 1979).

\textsuperscript{180} Feller, \textit{supra} note 78, at 738.
tified in temporarily enjoining allegedly unsafe changes in working conditions.

This very issue was presented in *United Steelworkers v. Blaw-Knox Foundry & Mill Machinery, Inc.* In that case an employer cut back hours by reducing the size of a work crew on one shift from seven to four men, allegedly in breach of contract. One of the duties of the employees was to watch for the possible occurrence of "run-outs," in which molten steel would seep out of a hole in the open hearth furnace and onto the floor. In the event of such incidents, the employees were to direct the flow of the molten steel into pits or to plug the hole with sand. A management official conceded at the hearing that the reduction in personnel may cause safety problems. The district court ordered the employer to return to the original schedule pending arbitration since the safety of the employees was in jeopardy.

Other instances in which the arbitral process is not threatened, but substantial employee interests are nevertheless at stake, could occur when employers subcontract out new projects or institute technological changes. Both of these types of changes deprive the union of job opportunities, even though they do not cause immediate layoffs and probably do not affect the arbitral process. Even less severe changes, such as an improper transfer or a reduction in working hours, may irreparably injure the union by demoralizing its membership. But issuing a status quo order which would enjoin changes of this sort seems

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182. Id. at 639.
183. Id. at 641.
184. Id.
185. Id. In so holding, however, the court seemed to be applying a standard which would allow status quo orders whenever an injury suffered while arbitration is pending is not compensated by the arbitrator's award.
186. E.g., IUE v. Radio Corp. of America, 77 L.R.R.M. 2201, 2203-04 (D.N.J. 1971) (subcontracting of work enjoined even though employees are not faced with immediate layoff, since loss of job opportunities are "incalculable and cannot be measured in dollars and cents"); IBEW Local 278 v. Jetero Corp., 88 L.R.R.M. 2182, 2183 (S.D. Tex. 1972), aff'd and remanded on other grounds, 496 F.2d 661 (5th Cir. 1974) (refusing to enjoin subcontracting because of "hardship and injustice" it would cause to employer).
187. Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, 471 F.2d 872, 877 (6th Cir. 1972) ("probable loss of overtime" and employees' loss of confidence in union representatives do not constitute irreparable harm).
188. See, e.g., Pittsburgh Newspaper Printing Pressmen's Union No. 9 v. Pittsburgh Press Co., 479 F.2d 607 (3d Cir. 1973). In this case, the employer cut back the number of hours worked by the employees. The unions argued that such cut-backs constitute irreparable harm since (1) employees given shorter work weeks were likely to leave the profession and, even, the Pittsburgh area; (2) the [cut-back] would also entail loss of apprenticeships; (3) prospective pressmen and typographers would be discouraged from entering the trade; and (4) the union's pension fund would suffer loss from loss of work shifts.

The court rejected these arguments, stating that in most cases cited by the union as authority for granting status quo orders, "employees were about to lose their jobs, a situation quite different from the present case. . . ." Id. at 610. See also, Communication Workers v. Western Elec. Co.,
inconsistent with the rule of *M-K-T* that such injunctions be issued only to protect the arbitral process. Moreover, the Supreme Court’s dicta in *Buffalo Forge*, as well as its memorandum decision vacating *Greyhound I*, may have been directed specifically at these situations which involve less severe changes.  

Whether or not it is desirable to enjoin only those changes that affect the arbitral process depends upon how many restrictions on "management prerogatives" one believes a court should infer from the arbitration clause. Specifically, one must ask whether the arbitration clause implies a judicially enforceable promise by the employer, akin to the union's no-strike clause, binding the employer to maintain the status quo pending arbitration in cases where the union will suffer "irreparable" harm. The common understanding is probably that the arbitration clause implies no such promise.

Courts generally concede that, under our system, management has an absolute right to discharge and to control the working lives of its employees. But in exchange for the union’s agreement to contractually limit its right to disrupt management decisions by use of the strike weapon, management limits its rights by agreeing to arbitrate disputes. At least one court has explicitly said that the arbitration agreement imposes a duty on the employer to arbitrate a disputed change before putting the plan into effect. By "acting first and arbitrating later," said the court, the employer was putting the "cart before the horse."
If an arbitration agreement always imposed a duty to arbitrate first, then status quo orders could conceivably be issued whenever a union takes a grievance to arbitration, and employees stand to suffer irreparably while arbitration is pending. But such a procedure has never been the standard practice, nor has it been the expectation of the parties to the usual collective bargaining agreements. The very fact that the arbitrator is not expected to award tort damages is an indication that the suffering of irreparable harm in these cases involving less severe changes is considered to be just one of the consequences of being in the subordinate role of the worker. As one commentator has stated, the “conventional wisdom” under our system is that “management has the authority to move first and that it is the union’s function to challenge but not to interfere with a decision before it is made.”

Whether this policy can be called “wisdom” and whether this undemocratic and authoritarian way of dealing with the work force is socially desirable is probably not relevant to the issue of whether or not judges should be allowed to issue status quo orders. The fact remains that this policy of not allowing courts to interfere with “basic management decisions” comports with standard practice and is probably what both the employer and the union (but not necessarily the workers) presently expect from the collective bargaining agreement. And since injunctive relief should be issued only if it is at least implicitly authorized by the agreement, status quo orders are probably improper where changes that do not affect the arbitral process are put into effect.

In the long run, if an employer is to be precluded from making these less severe changes before the dispute is decided in arbitration, employees should probably look to the collective bargaining process rather than to the judiciary. The employees, if they want to gain greater control over these day-to-day operations, should pressure their representatives into having explicit “status quo clauses” inserted into

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194. However, in other countries, most notably Great Britain, West Germany, Sweden and Yugoslavia, workers have much more input into what in this country are called “basic management decisions.” Yet even in those countries the degree of “industrial democracy” is thought to be far from adequate. See generally Hunniius, Garson & Case, Workers’ Control (1973).

195. The fact that employees frequently engage in wildcat strikes rather than arbitrate when the employer makes certain changes which are perceived to be in violation of the contract is an indication that many of the rank-and-file reject the assumptions of management and union officials. See generally, Atlasen, Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience, 34 Ohio St. L. J. 750, 793-809 (1973).

196. Injunctions to maintain the status quo pending arbitration of safety disputes, however, can be justified on other grounds. See text accompanying notes 179-185 supra.
their agreements. These provisions would allow workers to refuse to obey orders that pertain to certain improper changes.\textsuperscript{197} Some such provisions have already been put into effect,\textsuperscript{198} especially where changes involving safety are concerned. From the worker's point of view, the ideal provision would explicitly make these promises to maintain the status quo enforceable in court. Another solution would be to provide for the imposition of penalties\textsuperscript{199} on the breaching employer—penalties which would more than compensate the employees for any harm suffered. Another alternative to using the status quo order for stopping these relatively minor changes might be the retention of the right to strike over certain issues. Although, in recent history union negotiators have very rarely succeeded in retaining such a right, there does appear to be a substantial segment of rank-and-file workers who would favor such a retention.\textsuperscript{200}

Alternatives such as the negotiation of “status quo clauses” or regaining the right to strike, would shift some day-to-day decision-making power into the hands of the workers, and would help erode the common understanding that management is entitled to “act first and arbitrate later.” But it must be pointed out that these alternatives by themselves generally will not be enough to help a union where an employer shuts down an entire operation. A strike would probably be futile\textsuperscript{201} and a promise to maintain the status quo would most likely be ignored by the employer if large costs are at stake. It is for these reasons that a court should intervene in these situations and issue a status quo order, for failure to do so would undoubtedly render the arbitral process “futile and ineffective.”

\textsuperscript{197} E.g., Agreement Between United States Steel Corporation and the United Steelworkers of America, dated August 1, 1971, and effective August 1, 1971-August 1, 1974, at 117 (safety); Pacific Coast Longshore Contract Between International Longshoremen's and Warehousemen's Union and Pacific Maritime Association, effective July 1, 1973-July 1, 1975, at 65 (“Longshoremen on cargo handling operations shall not be required to work when in good faith they believe that to do so will result in onerous work load.”)

\textsuperscript{198} Id.

\textsuperscript{199} One agreement, for example, provides that if supervisors violate the contract by working, the company will have to pay the employee who would have worked double wages for every hour or partial hour that the supervisor works, with a minimum of two hours double pay, whether or not actual damages were suffered. Agreement between United States Steel Co. and United Steelworkers of America (exp. 1974), \textit{supra} note 198, § 2A, R 2.5. Cited in Feller, \textit{supra} note 78, at 787-88 and notes 487, 490.

\textsuperscript{200} For example, a very vocal group among the mine workers who struck during the winter of 1977-78 was a group demanding the right to strike. 110 \textit{Time Magazine} at 14, Dec. 19, 1977. \textit{See generally}, Atleson, \textit{supra} note 195.

\textsuperscript{201} In Local 13, Int'l Fed'n of Professional and Technical Eng'rs v. General Elec. Co., 531 F.2d 1178 (3d Cir. 1976), the parties “specifically agreed” to exclude the issue of work transfer from arbitration and to allow the union to strike rather than arbitrate. \textit{Id.} at 1184. The fact that the union sought (unsuccessfully) to obtain a status quo order rather than striking indicates that it believed such a strike would be futile since the employer was closing operations anyway.
IV

BUFFALO FORGE

The dispute in *Buffalo Forge Co. v. United Steelworkers*\(^{202}\) began when the office clerical-technical (O&T) employees at the Buffalo Forge Company went on strike while trying to negotiate their first contract.\(^{203}\) A sister local made up of production and maintenance (P&M) employees under a separate contract refused to cross the O&T picket line.\(^{204}\) The company asserted that a sympathy strike violated the broad no-strike clause\(^{205}\) contained in the P&M employees' contract. The union refused to obey, asserting that the no-strike clause did not cover sympathy strikes. The company then sought a *Boys Markets* injunction against the strike, pending arbitration.\(^{206}\) The union conceded that the legality of the sympathy strike was an arbitrable issue,\(^{207}\) and that it would have to abide by the arbitrator's decision. However, the union opposed the request for injunctive relief, since the strike was not over an underlying issue, such as the P&M employees' own working conditions, which was subject to arbitration. The district court judge agreed\(^{208}\) with the union that it was precluded from issuing an injunction since the employees' strike was not over an "arbitrable grievance" and hence not within the "narrow" exception to the anti-injunction provisions of the Norris-LaGuardia Act established in the *Boys Markets* case.\(^{209}\) The Second Circuit affirmed,\(^{210}\) as did the Supreme Court in a five-to-four decision.\(^{211}\)

The result in *Buffalo Forge* follows logically from the requirement of *Boys Markets* that a strike cannot be enjoined unless it is over a dispute which is subject to arbitration. In fact, most of the *Buffalo Forge* opinion is a discussion of this requirement and the fact that it was not met in this context. The Court concluded that:

*Boys Markets* plainly does not control this case. The District Court found, and it is not now disputed, that the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract. The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; neither its causes nor the issues underlying it was subject to the


\(^{203}\) *Id.* at 400.

\(^{204}\) *Id.*

\(^{205}\) *Id.* at 399 n.1.

\(^{206}\) *Id.* at 401-02.

\(^{207}\) *Id.* at 402.

\(^{208}\) Buffalo Forge Co. v. United Steelworkers of America, 386 F. Supp. 405 (W.D.N.Y. 1974).

\(^{209}\) 428 U.S. at 402-03.

\(^{210}\) 517 F.2d 1207 (2d Cir. 1975).

\(^{211}\) 428 U.S. at 413.
settlement procedures provided by the contract between employer and respondents. The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or depriving the employer of his bargain.212

The Court was not content, however, to rest its holding upon the requirement that the strike be over an arbitrable dispute and the policy of protecting the arbitral process of the Boys Markets case. It added certain statements which seem to be directed specifically at suits by unions to maintain the status quo pending arbitration. The Court stated that if an injunction were allowed in this case, in the appropriate circumstances a court might:

... enjoin any other alleged breach of contract pending exhaustion of the applicable grievance and arbitration provisions even though the injunction would otherwise violate one of the express provisions of § 4 [of the Norris-La Guardia Act]. The Court in such cases would be permitted, if the dispute was arbitrable, to hold hearings, make findings of fact, interpret the applicable provisions of the contract and issue injunctions so as to restore the status quo or to otherwise regulate the relationship of the parties pending exhaustion of the arbitration process.213

A footnote to this passage expressed fear that the issuance of injunctions in such cases might "embroil the district courts in massive preliminary injunction litigation."214 While the above passage literally applies only to injunctions against unions,215 it most certainly was directed at status quo orders sought by unions, and may even be a disapproval of the line of cases dating back to the M-K-T decision.

Such an interpretation is plausible in light of the judicial treatment of the recent Greyhound case,216 which originated in the Ninth Circuit. The employer, a bus company, notified the union that in two months it planned to change the work cycles of certain drivers. The employees, instead of continuing to work their existing cycles of six days on, three

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212. Id. at 407-08 (emphasis in original).
213. Id. at 410 (emphasis supplied).
214. Id. at 411 n.12. The Court's only support for this assertion was some data from the Bureau of Labor Statistics which showed that "more than 21 million workers in the United States were covered under more than 150,000 collective bargaining agreements." Id. In Boys Markets contexts, commentators have argued that this fear of excess litigation is unfounded. Smith, supra note 114, at 336 n.66, 346; Gould, supra note 156, at 251. At least one post-Buffalo Forge court has made this "massive preliminary injunction litigation" argument. In UMW Dist. 2 v. Rochester & Pittsburgh Coal Co., 416 F. Supp. 74 (W.D. Pa. 1976), the court said that if an injunction were allowed in this dispute over supervisors working, courts could be called upon to issue an injunction for almost every routine grievance. Id. at 77.
215. The injunctions referred to are ones that would "otherwise violate ... the express provisions of § 4 [of the Norris-La Guardia Act]." Section 4 applies only to injunctions against unions. If injunctions against employers are prohibited by the Act, section 7 would be the operative provision.
days off, or four days on, three days off, would be required to work a straight weekly regimen of five days on and two days off.217 The union objected that such a change was barred by a contract provision218 which required that schedule changes not be put into effect without mutual agreement. The employer claimed that the provision authorized the proposed changes and agreed to submit the dispute to arbitration.219 Rather than proceed to arbitration, the union sued and obtained a status quo order.220 The Ninth Circuit affirmed the issuance of the injunction, stating that the position which the union would espouse in arbitration was “sufficiently sound” to meet the threshold of arbitrability required by Boys Markets,221 and that the trial court’s finding of irreparable injury was not “clearly erroneous.”222

The Supreme Court, which had in the meantime decided Buffalo Forge, vacated the Ninth Circuit’s decision and remanded “for further consideration in light of Buffalo Forge . . . .”223 On remand, the Ninth Circuit reversed itself224 and held that the status quo order was improperly issued. In reversing, the court stated that in interpreting a collective bargaining agreement for the purpose of determining whether a status quo order is proper, “[o]rdinarily there will exist no . . . necessity to imply a duty [on the part of an employer] to preserve the status quo.”225 The union’s petition for certiorari was subsequently denied.226

It is difficult to predict what Buffalo Forge and Greyhound mean for the future of status quo orders. Contrary to the implications of statements made by several commentators,227 it seems highly unlikely that these cases represent disapproval of the entire body of law discussed in this article, dating back to the M-K-T case. It is difficult to believe that the Supreme Court would overturn this long line of precedent by simply issuing a memorandum opinion which refers a circuit court to certain dicta which could conceivably apply to status quo orders.228 Certainly, the facts and policies behind the Buffalo Forge opin-

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217. *Id.* at 1075.
218. *Id.* at 1075 n.1.
219. *Id.* at 1075.
220. *Id.*
221. *Id.* at 1077-78.
222. *Id.* at 1078.
225. *Id.* at 1239.
227. See note 30 *supra*.
228. In refuting an employer’s argument that by vacating *Greyhound I* the Supreme Court overruled all status quo order cases, one court observed:

When the Supreme Court remands a decision for reconsideration in light of an opinion
tion are so different from cases where injunctions are sought against employers\textsuperscript{229} that it is hard to imagine how the \textit{Buffalo Forge} holding—without the above cited dicta—could have any effect on status quo orders.\textsuperscript{230} \textit{Buffalo Forge}, after all, involves considerations that do not apply to situations in which injunctions against employers are sought.\textsuperscript{231} For example, there is a line of authority which indicates that

\begin{quote}
which was not in existence at the time the court of appeals made its decision, it takes no position on the merits of the case. Lever Bros. Co. v. Chemicals Workers Local 217, 554 F.2d 115, 121 (4th Cir. 1976).
\end{quote}

\textsuperscript{229} See the last paragraph of note 230 infra.

\textsuperscript{230} The author of the comment, supra note 10, 91 HARV. L. REV. at 719, has suggested that the narrow holding of \textit{Buffalo Forge} does have such effect. The author contends that \textit{Buffalo Forge} requires that, in all cases involving \textit{Boys Markets} injunctions and status quo orders, the court "delve beneath the surface disagreement about contract interpretation, to see whether the underlying dispute is one the parties have agreed to arbitrate." The author then attempts to apply this standard to Lever Bros. Co., Inc. v. Chemical Workers Local 217, 554 F.2d 115 (4th Cir. 1976), a case in which a union was successful in obtaining a status quo order:

\begin{quote}
[It is not at all clear that any labor dispute underlies the employer's transfer of operations. The union did not claim that the transfer was motivated by a labor dispute, and the employer advanced economic reasons for the move. Thus, the transfer may be equated to the \textit{Buffalo Forge} strike; "neither its causes nor the issue underlying it was subject to the settlement procedures ...."] [\textit{Buffalo Forge Co. v. United Steelworkers}, 428 U.S. 397, 407-08 (1976)]. True, Lever Brothers' transfer was allegedly in breach of contract, and the legality of the transfer was arguably arbitrable; but there was an arbitrable alleged breach in \textit{Buffalo Forge}, and that did not warrant an injunction. The reasoning of \textit{Buffalo Forge}, when applied to employers, would therefore appear to subject employers to \textit{Boys Markets} injunctions only for lock-outs or other actions that are motivated by labor disputes. \textit{Id.} at 720. (Emphasis in original, footnotes omitted.)
\end{quote}

Recognizing that such a result would be undesirable, the author suggests that in cases where an employer's unilateral actions threaten to circumvent arbitration or render it a "hollow formality," a court might "regard the transfer itself as the underlying issue of the labor dispute." \textit{Id. See also} Brief of Respondent in Opposition to Certiorari at 15, first footnote, Amalgamated Transit Union Div. 1384 v. Greyhound Lines 550 F.2d 1237 (1977) ("The [union's] Petition says that the events which caused the sympathy strike in \textit{Buffalo Forge} were not subject to arbitration. .... The economic causes of Greyhound's decision to change the work cycle were equally not subject to arbitration" (emphasis supplied)).

The attempt to divide the dispute in \textit{Lever Brothers} into two parts—an "underlying dispute" and a "surface disagreement"—seems an unnecessarily strained application of \textit{Buffalo Forge}. The author fails to recognize that cases involving status quo orders date back to the \textit{M-K-T} case and that these cases require a somewhat different line of analysis than that used in \textit{Boys Markets} and \textit{Buffalo Forge}.

An employer who sues for a \textit{Boys Markets} injunction seeks to prevent the union from engaging in coercive conduct which is designed to settle an "underlying" issue. In contrast, in status quo order cases, the employer's conduct is typically not designed to force the union to submit in an "underlying" dispute. Rather it is usually intended to obviate the entire agreement, for example by moving a plant and severing relations with the union. In these cases, the employees will usually be fighting for their jobs while the union may be fighting for its life. The needs and concerns of employees seeking a status quo order are therefore different from those of an employer seeking a \textit{Boys Markets} injunction. This difference, which stems from the inherently imbalanced nature of the employer-employee relationship, requires that the courts apply different standards in the two types of cases.

\textsuperscript{231} See Gould, supra note 30, at 558-59 (asserting that there is a "glaring distinction between injunctions against employers and those against unions," and stating that one reason for this distinction is that the "issuance of injunctions against employers does not raise the fundamental
under section 7 of the NLRA\textsuperscript{232} sympathy strikes may be "protected activity,"\textsuperscript{233} and the Supreme Court has recognized that a premature injunction against this protected activity will very often have the effect of permanently halting the strike even when an arbitrator subsequently finds in favor of the union.\textsuperscript{234} By contrast, it can rarely, if ever, be said that an injunction against an employer's proposed business rearrangement pending arbitration will permanently block the employer's plans.\textsuperscript{235} In any case, subsequent decisions have rejected arguments advanced by employers that either the statements made in \textit{Buffalo Forge}\textsuperscript{236} or the Supreme Court's memorandum opinion in \textit{Greyhound}\textsuperscript{237} had the effect of disapproving of all status quo orders.

If \textit{Buffalo Forge} and \textit{Greyhound} are not in fact a disapproval of all status quo orders, it is still necessary to determine exactly what effect \textit{Buffalo Forge} did have on status quo orders.\textsuperscript{238} Some of the language concerns of \textit{Norris-LaGuardia as does the issuance of injunctions against strikes}). See also the last paragraph of note 230 \textit{supra}.

\textsuperscript{232} 29 U.S.C. § 157 (1976), which states:

\begin{quote}
Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . .
\end{quote}


\textsuperscript{234} \textit{Buffalo Forge Co. v. United Steelworkers}, 428 U.S. 397, 412 (1976) ("injunctions against strikes, even temporary injunctions, very often permanently settle the issue").

\textsuperscript{235} The facts of \textit{Lever Bros. Co. v. Chemical Workers Local 217}, 554 F.2d 115 (4th Cir. 1976) illustrate this point. The union obtained a preliminary injunction against plant relocation, but then lost in arbitration. When the injunction expired, the company relocated its facility. The only reason the employer brought suit to determine whether the injunction was wrongfully issued was to recover the injunction bond. \textit{Id.} at 117.

\textsuperscript{236} In \textit{Communication Workers v. Western Elec. Co.}, 430 F. Supp. 969, 977 (S.D.N.Y. 1977), the district court said the following:

\begin{quote}
Relying on the broad language which appears in the body of the \textit{Buffalo Forge} opinion, the Company in the case at bar contends that "injunctions against employers of the kind contemplated . . . can no longer be given. But I decline to extend the holding of \textit{Buffalo Forge} beyond the precise question presented, at least until I am directed by higher authority to do so."
\end{quote}

The courts in \textit{UMW Dist. 2 v. Rochester & Pittsburgh Coal Co.}, 416 F. Supp. 74 (W.D. Pa. 1976), and in \textit{Texaco Independent Union v. Texaco, Inc.}, 98 L.R.R.M. 2128 (W.D. Pa. 1968), both considered \textit{Buffalo Forge} relevant to status quo orders but did not state that it precluded any such injunctions.

\textsuperscript{237} In \textit{Lever Bros. Co. v. Chemical Workers Local 217}, 554 F.2d 115 (4th Cir. 1976), the Fourth Circuit rejected the employer's argument "that the issuance of a preliminary injunction to preserve the status quo pending arbitration is explicitly barred by the \textit{Buffalo Forge} doctrine [as clarified by the Supreme Court's memorandum opinion in \textit{Greyhound}] absent an actual agreement to preserve the status quo." \textit{Id.} at 122 (footnote omitted.)

\textsuperscript{238} This determination is especially difficult to make since the propriety of status quo orders was not an issue presented to the Court in \textit{Buffalo Forge}, and Justice White does not spell out his reasons for including the dicta dealing with status quo orders. Furthermore, this issue was not briefed by plaintiffs, defendants or any of the amici, nor was a single case concerning status quo
in the case suggests that the Supreme Court still favors the policy behind the \textit{M-K-T} case, and that it disapproves only of those decisions such as the Ninth Circuit's original opinion in \textit{Greyhound}, which have enjoined changes by an employer that do not interfere with the arbitral process.\footnote{One commentator seems to interpret the language of \textit{Buffalo Forge} which is directed at status quo orders as disapproving only injunctions against "routine employer breaches." \textit{The Supreme Court, 1975 Term}, 90 \textit{Harv. L. Rev.} 56, 253 and n.55 (1976).} The principal reason why the Court refused to allow an injunction against the sympathy strike was because "[t]he strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain."\footnote{428 U.S. at 408.} The purpose of \textit{Boys Markets} was said to be limited to "enforcing promises to arbitrate,"\footnote{Id. at 411.} and since a strike "over an arbitrable dispute would interfere with and frustrate the arbitral processes by which the parties had chosen to settle a dispute,"\footnote{Id. at 407.} such a strike could be enjoined. Immediately after the Court's seeming disapproval of certain injunctions against employers,\footnote{Id. at 410. The passage is quoted in the text accompanying note 213 \textit{supra}.} it stated that "such injunctions pending arbitration are [not] essential to carry out promises to arbitrate and to implement the private arrangements for the administration of the contract."\footnote{Id. at 411.} This language seems to suggest that the Court was reaffirming \textit{M-K-T} rather than expressing its disapproval of it.

The Ninth Circuit's reconsideration of its original \textit{Greyhound} decision after that decision was vacated by the Supreme Court also seems consistent with the \textit{M-K-T} rationale. Quoting the language of \textit{Buffalo Forge}, the Ninth Circuit states:

> The implication of a duty not to strike may be "essential to carry out promises to arbitrate." [cite to \textit{Buffalo Forge}]. Ordinarily there will exist no such necessity to imply a duty to preserve the status quo. \textit{In any event, it is clear that in this case the arbitration of the dispute will be unaffected by \textit{Greyhound}'s alteration of the status quo.}\footnote{Amalgamated Transit Union Div. 1384 v. Greyhound Lines, Inc. 550 F.2d 1237, 1239 (9th Cir. 1977) \textit{cert. denied} 98 S. Ct. 127 (1978) (emphasis supplied).}

By using the word "ordinarily" and by emphasizing that on the particular facts presented arbitration will be "unaffected," the Court implies that status quo orders would be proper in other circumstances such as

orders cited or discussed in the briefs. \textit{See} Briefs for Parties, 7848 United States Supreme Court Records, Docket \# 75-339 (Oct. Term 1975).
where the employer's changes threaten the arbitral process.\textsuperscript{246}

One can conclude, therefore, that neither \textit{Buffalo Forge} nor the Supreme Court's subsequent treatment of the \textit{Greyhound} case effectively overruled \textit{M-K-T}. Rather, the Supreme Court meant only to disapprove of an expansion of this type of injunctive relief which it believed would contravene national labor policy.

\section*{V \hspace{1em} CONCLUSION}

Within the relatively short period of time since arbitration has become an important method of settling labor disputes, status quo orders have proven to be a necessary and useful injunctive device for allowing a union to enforce an employer's promise to arbitrate. This type of injunction has its roots in the Railway Labor Act and in the Supreme Court's \textit{M-K-T} decision—a fact that has apparently been overlooked by recent writers on the subject.\textsuperscript{247} Even before \textit{Boys Markets}, the status quo order was further authorized by courts presiding in suits brought under the National Labor Relations Act.\textsuperscript{248} The standards for obtaining a status quo order, however, have never been clarified by the courts and, in fact, more uncertainty has been created by recent decisions.

One of the unresolved problems is the standard to be used for measuring arbitrability.\textsuperscript{249} Although a presumption of arbitrability—such as that prescribed by the \textit{Steelworkers Trilogy}—seems inappropriate in cases involving injunctive relief, the spirit of the \textit{Trilogy} as well as the language of \textit{Boys Markets} and \textit{Buffalo Forge} indicate that a requirement that the union show “some likelihood of success” \textit{on the merits} in arbitration is even more unacceptable since it

\textsuperscript{246} The court in the recent case of Texaco Independent Union v. Texaco, Inc., 98 L.R.R.M. 2128 (W.D. Pa. 1978), recognizes this implication. It concludes, as does \textit{Greyhound II}, that status quo orders are generally improper unless explicitly authorized by the collective bargaining agreement. But it also recognizes and approves of what it calls the “\textit{Lever Brothers} exception” to this rule, that injunctions are proper where the employer's actions threaten to render the arbitral process a “hollow formality.” \textit{Id.} at 2134.

Moreover, in its brief submitted to the court of appeals on remand and in its brief in opposition to the union's petition for certiorari, Greyhound acknowledged that an employer's conduct which interferes with the arbitral process may be enjoined, citing \textit{M-K-T}. Supplemental Brief for Appellant, at 8; Brief of Respondent in Opposition to Writ of Certiorari, at 8-9, Amalgamated Transit Union Div. 1384 v. Greyhound Lines, Inc., 550 F.2d 1237 (9th Cir. 1977). It further argued that \textit{M-K-T} was not applicable to the facts of the \textit{Greyhound} case since the change in work schedules “did not interfere with the arbitral process, but left it unaffected.” Brief of Respondent in Opposition to Writ of Certiorari, Amalgamated Transit Union Div. 1384 v. Greyhound Lines, Inc., \textit{supra}, at 11.

\textsuperscript{247} See note 10 \textit{supra}.

\textsuperscript{248} See notes 59 to 95 \textit{supra} and accompanying text.

\textsuperscript{249} See notes 123 to 155 \textit{supra} and accompanying text.
is an unwarranted restriction on the availability of status quo orders. The better approach would be to require the union to show a strong likelihood that the dispute is subject to arbitration.

Courts, frequently citing the *Boys Markets* opinion, state that a union is required to show "irreparable harm" before it may obtain an injunction. Policy considerations and precedent lead one to conclude that the requirement so stated is both an oversimplification and an understatement of what the union must show before an injunction will issue. The *M-K-T* case set forth the appropriate guidelines and should be followed. The union will frequently suffer "irreparable harm" while arbitration is pending. However, in many of these situations orders maintaining the status quo are inappropriate, since they are not within the expectation of the parties and the employer's changes are not so extensive that the arbitral process will be threatened if they are put into effect. To prevent irreparable harm in cases where an employer makes these less severe changes, unions should rely on collective bargaining and other private methods of settling disputes rather than on the courts.

At least implicitly the *M-K-T* Court recognized that status quo orders are improper where these less severe employer changes are involved. Even those decisions that hold that a showing of irreparable harm is all that is required have for the most part involved changes such as a transfer of an entire plant, which would have rendered the arbitral process "futile and ineffective."

Those few decisions which have allowed injunctions against changes that do not affect the arbitral process seem inconsistent with *M-K-T*. Moreover, the Court's decision in *Buffalo Forge* and its subsequent treatment of the *Greyhound* case suggest that those few decisions run counter to the federal labor law policies which preclude courts from deciding the merits of arbitrable disputes. The *Buffalo Forge* opinion, however, should not be read any more broadly than this. It should not be read as a total ban on status quo orders. The policy and precedent behind this type of injunctive relief is too strong and the per-

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250. See notes 157 to 161 *infra* and accompanying text.
251. Reference to these changes as "minor" or "less severe" during the course of this discussion does not mean that I regard them as "trivial" or "inconsequential." On the contrary, I believe that such changes can have very disruptive effects upon workers. See text accompanying notes 186 to 188 *infra*. By concluding that status quo orders are inappropriate in these situations, I am not suggesting that workers in this country hold too much decision-making power. I believe that quite the opposite is true. I am simply concluding that any real increase in the amount of workers' control will have to result from more activity and consciousness among workers themselves, rather than from judicial orders.
252. See text accompanying notes 186 to 200 *infra*.
253. See text accompanying note 61 *infra*.
254. See text accompanying note 66 *infra*.
255. See Part III *infra*. 
inent disapproving language of *Buffalo Forge* is too ambiguous and inapposite for that case to be interpreted in this manner.