Boys Markets Injunctive Relief: Applying to Enjoin a Union Strike

A Practical Guidance® Practice Note by Tony W. Torain II, Polsinelli PC

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This practice note focuses on the steps unionized employers may take under Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970) (*Boys Markets*) to apply for injunctive relief in federal court when faced with an unlawful union strike. The practice note covers the process of applying for preliminary injunctive relief in federal court under *Boys Markets* and best practices for obtaining *Boys Markets* preliminary injunctive relief.

This practice note covers:

- Preliminary Injunctive Relief
- The Boys Markets Case
- Process of Applying for Injunctive Relief in Federal Court under Boys Markets
- Best Practices for Obtaining Boys Markets Preliminary Injunctive Relief

For more information on *Boys Markets*, injunctive relief, and unlawful union activities, see Boys Markets Circuit Court Standards Chart, Complaint for Boys Markets Injunctive Relief, Order to Show Cause for Boys Markets Injunctive Relief, LMRA Section 301: Claims Alleging Breach of the CBA, Injunctions and Other Legal Remedies for Unlawful Union Activity, and Economic Weapons for Unions and Employers: Determining the Scope of Permitted Activities.

Preliminary Injunctive Relief

Generally, unionized employers must prepare and file the necessary documents quickly to ensure that any request for preliminary injunctive relief is made timely with sufficient factual support justifying the need for the relief. Employers usually prepare to file for injunctive relief when there are rumors or credible threats of an unlawful union strike.

Under the Norris-LaGuardia Act of 1932, 29 U.S.C. § 101 et seq., Congress prohibited federal courts from granting injunctive relief to prevent unions from engaging in various actions, including strikes. In *Boys Markets*, however, the Supreme Court concluded that the Norris-LaGuardia Act does not prohibit a federal court from issuing an injunction in situations where the employer and the union have a mechanism for submitting grievances to arbitration in the governing collective bargaining agreement, and the court determines that the union's violation of the anti-strike provision in the collective bargaining agreement will cause the employer irreparable harm.

The Norris-LaGuardia Act

In 1932, Congress passed the Norris-LaGuardia Act of 1932, 29 U.S.C. § 101 et seq. (the Act) (statute) to enhance the ability of the workforce to organize and reduce the influence of the federal judiciary on labor disputes. The Act limits the cases in which a federal court has jurisdiction to issue a "restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute . . . ." Id.

Section 104 of the Act also prohibits injunctions against a person "participating or interested in" a labor dispute who engages in any of nine specific actions, the first of which is "ceasing or refusing to perform work or to remain in any relation of employment." Accordingly, prior to *Boys Markets*, the Supreme Court interpreted the statute to prevent federal courts from enjoining labor organizations from striking.

The Boys Markets Case

In Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962), the Supreme Court held that the anti-injunction provisions of the Norris-LaGuardia Act preclude a federal district court from enjoining a strike in breach of a no-strike provision in a collective bargaining agreement containing an arbitration provision that covers the grievance giving rise to the strike. The Supreme Court overruled *Sinclair* in *Boys Markets*.

Facts of Boys Markets, Inc. v. Retail Clerks Union

In Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970), the employer and the union were parties to a collective bargaining agreement requiring all disputes regarding the application of the agreement to be submitted to arbitration. In addition to the arbitration provision, the collective bargaining agreement contained a prohibition against the parties from engaging in any "work stoppage, lockout, picketing or boycotts." A dispute arose between the parties when a supervisor and other nonunion employees rearranged frozen food inventory in the store. A union representative demanded that all the frozen food items be removed and replaced by union employees. When the employer refused to agree to the demand, the union called a strike and picketed the store.

The employer filed a complaint in California state court, seeking a temporary restraining order, a preliminary, and permanent injunction, and specific performance of the arbitration provisions in the collective bargaining agreement. The California state court granted the request for a temporary restraining order, and the union removed the case to the U.S. District Court for the Central District of California. The federal district court granted the request for the injunction and compelled arbitration. Relying on *Sinclair*, the U.S. Court of Appeals for the Ninth Circuit reversed the decision of the district court.

Supreme Court Holding in Boys Markets

The Supreme Court concluded that in cases where the union's grievance is subject to arbitration under the collective bargaining agreement and the district court concludes that the union's violations of the no-strike clause are causing the employer irreparable injury, the Norris-LaGuardia Act does not bar a district court from granting injunctive relief. In so holding, the Court emphasized the view that arbitration is an effective method of resolving labor disputes. In addition, the Court did not find its holding to conflict with the policy of the Act because the union freely agreed to arbitration as a mechanism for settling disputes in the collective bargaining agreement.

For an overview of the standards that courts in each federal circuit will apply when determining whether to enjoin strike activity, see Boys Markets Circuit Court Standards Chart.

Process of Applying for Injunctive Relief in Federal Court under Boys Markets

To seek injunctive relief in federal court, an employer must first file an action in the appropriate district court. Employers generally seek injunctive relief in addition to a remedy for breach of the collective bargaining agreement under Section 301 of the Labor Management Relations Act (LMRA) (29 U.S.C. § 185). See LMRA Section 301: Claims Alleging Breach of the CBA. For emergency relief, an employer should file an application for a temporary restraining order (TRO). If the court grants the application, the union is enjoined from striking until the court has a hearing to determine whether injunctive relief is warranted during the pendency of the litigation. Injunctive relief pending litigation is called a "preliminary injunction."

Rule 65 of the Federal Rules of Civil Procedure (Rule 65) permits a court to grant a TRO without notice to the union. In that case, the employer generally files an affidavit or verified complaint alleging specific facts that "clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition," and the attorney for the moving party must certify in writing efforts to notify the adverse party and why the court should not require notice. The court can only grant a preliminary injunction with notice to the adverse party.

An employer must prepare and file with the court the following documents:

- Complaint
- Motion/application
- Memorandum of law in support
- Order to show cause
- Affidavits/declarations in support
- Proposed order

The Complaint

Employers seeking *Boys Markets* injunctive relief file for the injunctive relief as part of a lawsuit. Accordingly, employers must prepare a complaint to initiate the lawsuit and include the request for preliminary injunctive relief in the complaint. Although most federal courts prefer that employers file a separate motion or application for a TRO and/or preliminary injunction, employers should also include the request for injunctive relief in the complaint. In addition to meeting the normal pleading standards under the Federal Rules of Civil Procedure, the complaint must allege sufficient facts to persuade the court that the employer will suffer irreparable harm from the strike if the court does not grant the injunction.

The complaint should quote the relevant portions of the collective bargaining agreement, including the arbitration and no-strike provisions. It should also set forth the facts leading up to the strike. In addition, the complaint should include all attempts the employer has made to resolve the dispute in accordance with the collective bargaining agreement to show the court that injunctive relief is necessary. Furthermore, the complaint should ask the court to compel arbitration in accordance with the parties' collective bargaining agreement.

Verified Complaint

If the employer seeks a TRO without notice to the union (ex parte), the complaint must be verified or supported by an affidavit under Rule 65. If the employer seeks a TRO with notice to the union and/or a preliminary injunction, the complaint does not have to be verified. Although the rules do not require it, employers should consider filing a verified complaint whenever the employer seeks injunctive relief.

A verified complaint must contain a "verification" document at the end, in which an employer representative verifies that the allegations in the complaint are true and correct. Like an affidavit, the verification sets forth the basis for the representative's personal knowledge of the facts alleged in the complaint.

At the end of the verification, the employer should include the language for unsworn declaration found in 28 U.S.C. § 1746, which provides "I verify under the penalty of perjury that the foregoing is true and correct. Executed on (date)." The employer representative must sign and date the verification. The employer must carefully review the complaint to ensure that the facts are true and correct, and that the employer has evidentiary support for the claims made in the complaint before signing the verification and filing the complaint.

To bolster the request for injunctive relief, employers generally attach affidavits in support of the factual allegations made in the complaint. A verified complaint adds credibility to the claims because the employer representative verifies the claims under penalty of perjury and transforms the complaint into a functional affidavit. Employers should consider filing verified complaints whenever they seek to enjoin a union strike. Alternatively, employers can submit a separate affidavit in support of the request for injunctive relief.

For a sample verified complaint, see Complaint for Boys Markets Injunctive Relief.

The Motion or Application

In addition to filing the verified complaint, an employer must file a motion (or application) for a TRO and preliminary injunction. The motion should clearly state the request for relief and be supported by a memorandum of law. Furthermore, an employer generally provides an order to show cause for why the court should not grant preliminary injunctive relief as part of the motion. Employers should include the order to show cause in the proposed order granting injunctive relief. For more information on orders to show cause, see the subsection below called "Order to Show Cause."

The motion should also include supporting affidavits or declarations. Employer witnesses with personal knowledge of the events leading up to the strike should provide the affidavits or declarations. In addition, the motion should include a proposed order explicitly stating the terms of injunctive relief. The motion should include a request for a hearing on evidentiary matters. Federal courts cannot grant a preliminary injunction under Rule 65 without notice to the adverse party. Many courts require an evidentiary hearing on an employer's request for a preliminary injunction. Accordingly, employers should request a hearing in the motion and be prepared to submit evidence at a hearing in support of the request for injunctive relief.

Memorandum of Law in Support

Although Rule 65 does not require a memorandum of law to support a request for *Boys Markets* injunctive relief, employers should always include it. The memorandum of law sets forth the legal and factual arguments in support of the request for injunctive relief to assist the court in determining the need for relief. In the memorandum, the employer can highlight cases in which the court previously granted similar relief and sufficiently argue that the relief is necessary before a hearing on the motion. Alternatively, the employer will have an opportunity to make its case in writing if the court does not schedule a hearing on the motion.

The local rules of the federal court may require employers to submit a memorandum of law in support of a motion for a preliminary injunction. Employers should always review the local rules or any applicable standing orders of the court to determine the requirements for submitting motions.

The memorandum of law should contain a detailed statement of facts that explicitly describes the events leading to the strike and that quotes the relevant portions of the collective bargaining agreement. The employer should draft the statement of facts in a way that clearly shows the necessity of injunctive relief in view of the improper strike.

Additionally, the employer should include all facts demonstrating its efforts to resolve the dispute in accordance with the collective bargaining agreement, including any demands for arbitration. Employers should support the factual assertions made in the statement of facts with citations to the verified complaint and supporting affidavits or declarations.

After the statement of facts, the memorandum of law should note the applicable legal standard for injunctive relief under *Boys Markets*. For injunctive relief under *Boys Markets*, the employer must show:

- The likelihood that the employer will succeed on the merits of the lawsuit
- The irreparable injury that the employer will experience as a result of the strike
- A balance of the harm that the employer will experience without the injunction against the harm the union will experience if the court grants the injunction –and–
- The public policy implications if the court grants the injunction

In cases involving a request for a TRO, the employer must also demonstrate the need for immediate injunctive relief. If the employer requests relief for a threatened future strike (a Prospective Injunction), the employer must show the likelihood of a potential strike and resultant irreparable harm. While a few circuits allow injunctions against future strikes, those courts grant this relief narrowly and limit the relief to the issues leading to the current controversy. Triangle-PWC, Inc. v. Loc. Union 1051 of Int'l Bhd. of Elec. Workers, 543 F. Supp. 1068, 1070 (N.D.W. Va. 1982) (citing Latas Libby's Inc. v. United Steelworkers, 609 F.2d 25, 31 (1st Cir. 1979)).

Order to Show Cause

Employers generally file an order to show cause for why a court should not grant a preliminary injunction when filing for a TRO and preliminary injunction. Employers must never include an order to show cause with a request solely for a preliminary injunction without a TRO. The order to show cause serves as informal notice to the adverse party and should be included with the proposed order requesting a TRO. In cases where the employer only seeks a preliminary injunction, the employer must file a notice of motion instead of an order to show cause as required by the applicable local rules.

Employers strategically use the order to show cause to avoid the mandatory requirement that a written motion and notice of hearing be filed 14 days before the hearing in Federal Rule of Civil Procedure 6(c) (Rule 6(c)). Exceptions to the 14-day requirement in Rule 6(c)(1) include:

1. Cases in which the motion may be heard ex parte
2. Circumstances in which the rules provide a different time –and–
3. Cases in which a court, which a party may request ex parte, establishes a different time

In the order to show cause, the court may shorten the time to address the application for TRO and preliminary injunction under exception (3).

For an order to show cause to accompany a verified complaint, see Order to Show Cause for Boys Markets Injunctive Relief.

Affidavits and Declarations in Support

Rule 65 requires parties seeking an ex parte TRO to allege specific facts in an affidavit or verified complaint showing immediate and irreparable injury, loss, or damage. In addition, the attorney for the employer can affirm all

attempts made to contact the adverse party in an affidavit, satisfying the certification requirement in Rule 65(b)(1)(B). Although Rule 65 only requires an affidavit in ex parte cases, employers should consider obtaining affidavits or declarations from potential witnesses to the dispute giving rise to the strike and filing the affidavits with the motion in any case in which the employer seeks injunctive relief. The affidavits will add further support for the request for relief.

The affiants should have personal knowledge of the dispute giving rise to the strike to provide sufficient context for the request for injunctive relief. In addition, the affidavit should provide specific facts to show the irreparable harm that will result from the strike without injunctive relief. Federal courts have concluded that unverified pleadings do not sufficiently demonstrate the need for injunctive relief.

The employer has the burden of producing a sufficient factual basis for the need for injunctive relief by providing proof beyond "unverified allegations in the pleadings." See Imagine Medispa, LLC v. Transformations, Inc., 999 F. Supp. 2d 862, 868–69 (S.D.W. Va. 2014). Given the extraordinary nature of injunctive relief, employers should include sworn affidavits with its request for a TRO and preliminary injunction to meet its heightened burden.

Proposed Order

Most courts encourage the inclusion of proposed orders with any motion. Some local rules require moving parties to include a proposed order. See Local Rule 105.1 (D. Md.). A proposed order allows the court to clearly determine the relief sought in a form that the court can grant by simply signing. In addition, a proposed order provides the moving party an opportunity to establish the terms of the order and include the specific parameters of the relief sought.

Employers preparing a proposed order for injunctive relief should ensure that the order complies with Rule 65(d) and include:

- The reasons why the order was issued
- The specific terms of the relief –and–
- The specific acts restrained and required without referring to the complaint or any other document

The proposed order for *Boys Markets* relief should specifically state the injunctive relief requested and include a section compelling the parties to arbitrate the grievance in accordance with the terms of the collective bargaining agreement, in addition to enjoining the strike. In cases in which the employer seeks a TRO, the proposed order generally includes the order to show cause. Employers should also include a brief description of facts showing the standards for *Boys Markets* injunctive relief and why the employer should receive such relief. Although it is not required, providing a brief description to support the right to relief allows the court to assess a concise version of the employer's rationale for its right to an injunction.

Security or Bond

Rule 65(c) requires the moving party to post "security in an amount that the court deems proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." In other words, the employer must submit a bond to cover the union's costs and damages if the TRO or injunction was improperly granted. Despite the language of the Rule, some courts have found the security requirement to be within the court's discretion. See Roth v. Bank of the Commonwealth, 583 F.2d 527 (6th Cir. 1978), on remand, certiorari granted 440 U.S. 944 (1979), certiorari dismissed 442 U.S. 925 (1979). However, the employer should include a placeholder for a bond amount in the proposed order in case the court makes its granting of the injunction contingent on the posting of a bond.

Employers should raise the bond at a hearing to ensure the judge at least considers it. In Roth, 584 F.2d at 539, the Sixth Circuit concluded that while the issue of whether to require a bond was within the district court's discretion, the district court erred by failing to consider the issue of whether to require a bond. Accordingly, the Sixth Circuit vacated the district court's injunction. To avoid a similar result, employers should raise the issue of the bond in the proposed order or as otherwise required by the applicable local rules.

Expedited Discovery

In certain cases, the employer may want to conduct expedited discovery to obtain additional information in support of its request for *Boys Markets* injunctive relief. Federal Rule of Civil Procedure 26(d) allows the court to modify the discovery schedule. Employers can request that the court allow limited discovery before a hearing on the preliminary injunction.

Due to the short time between the granting of the TRO and the hearing on the preliminary injunction, employers that wish to conduct limited discovery prior to the hearing should file a motion for expedited discovery with the complaint and accompanying documents. In addition, employers should limit requests for discovery to issues necessary for determining the need for injunctive relief.

The employer should ensure that any request for discovery allows each party to conduct limited discovery and includes specific deadlines.

Strikes Not Subject to Boys Markets Relief

Courts generally cannot grant *Boys Markets* relief in cases where certain members of the union decide to strike without the approval of the union. Wildcat strikes occur when a segment of the bargaining unit strikes without sanction from the union. Because the union did not approve the strike, the court cannot enjoin the union unless evidence exists to show that the union is responsible for the wildcat strike.

In addition, a sympathy strike occurs when a union strikes in support of another union. In such cases, the union does not have a direct grievance against its employer. The Supreme Court has concluded that although a sympathy strike may violate a no-strike provision in a collective bargaining agreement, sympathy strikes do not arise from arbitrable grievances and *Boys Markets* injunctive relief cannot rectify them. See Buffalo Forge Co. v. United Steelworkers of Am., AFL-CIO., 428 U.S. 397 (1976).

Best Practices for Obtaining Boys Markets Preliminary Injunctive Relief

This section addresses key steps employers should take when seeking preliminary injunctive relief under *Boys Markets*.

Gather Facts and Act Quickly

Employers often become aware of potential strikes through rumors and other informal channels of information just before the union strikes. To adequately prepare to seek *Boys Markets* relief, employers must take credible threats of strikes seriously and prepare the documents in support of injunctive relief in advance. Adequate preparation in advance of a strike will allow the employer to file for a TRO promptly when the union strikes. Employers must quickly and thoroughly review the arbitration and no-strike provisions in a collective bargaining agreement and gather information regarding the dispute between the employer and union from witnesses with personal knowledge as soon as a credible threat of a strike arises.

Consult the Applicable Local Rules

Each federal district court has local rules establishing the court's requirements for processing cases. These federal district courts may have local rules that address its procedures for filing a motion for TRO and preliminary injunction. In addition to the requirements under Rule 65, employers must become familiar with the local rules that apply to *Boys Markets* relief and ensure they include all required documents in the submission to the court. When drafting the papers, employers should reserve enough time before filing to review the local rules several times to confirm that the papers comply.

Determine the Best Witnesses for Supporting Affidavits

During the fact-gathering process, employers should interview all witnesses with personal knowledge of the events giving rise to the strike and the dispute between the parties. After reviewing all the notes from the witness interviews, employers must determine best witnesses to offer affidavits in support of the *Boys Markets* relief. In addition, the employer's notes from the interviews may serve as the basis for the affidavits. The appropriate witnesses should have enough familiarity with the circumstances of the dispute to provide specific factual details regarding the interaction between the employer and the union to support the motion and memorandum in support. In addition, employers should determine the best person to verify the complaint. The person who verifies the complaint must be able to testify to all the allegations in the complaint.

Clearly Define the Relief Sought

In the verified complaint, motion, memorandum in support, and proposed order, the employer must clearly define the relief sought. General statements about complying with the collective bargaining agreement or the law will usually not suffice as appropriate *Boys Markets* relief. Employers must specifically request injunctive relief against the strike and ask the court to compel arbitration in accordance with the specifically identified provision in the collective bargaining agreement.

Highlight Facts Showing Irreparable Harm

As part of the fact-gathering process, employers must highlight critical facts demonstrating the employer's entitlement to *Boys Markets* relief, including all communications with the union about the dispute giving rise to the strike. In the verified complaint, motion,

and memorandum in support, employers should avoid including facts that are not material to the request for *Boys Markets* relief. The employer should emphasize any facts demonstrating irreparable harm to the employer resulting from the strike or potential strike to narrow the issues for the court.

Gather Information on the Judge

Employers should gather as much information as possible about the judge presiding over the preliminary injunction hearing. Details about the judge that employers should consider include:

- The judge's track record in granting or denying *Boys Markets* relief
- The judge's history of deciding labor law matters –and–
- Any history the judge has with unions or management

Evaluating the judge before the hearing will assist the employer in determining what information will best convince the judge to grant *Boys Markets* relief.

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Tony Torain is committed to providing reliable counsel to strategically solve client matters and address their litigation needs. He represents companies in connection with all types of employment and labor disputes, including wrongful discharge and claims based upon:

- The National Labor Relations Act
- Title VII of the Civil Rights Act
- The Americans with Disabilities Act
- The Age Discrimination in Employment Act
- The Family and Medical Leave Act
- The Fair Labor Standards Act
- The Occupational Safety and Health Act
- The McNamara-O'Hara Service Contract Act

Tony's experience includes regularly representing clients in arbitrations, unfair labor practice proceedings, strikes, union election campaigns, collective bargaining negotiations and strategic labor relations planning matters. In addition, Tony advises employers on employee separations and terminations, employee discipline, wage payment issues, compliance with federal and state statutes and regulations relating to the workplace, union avoidance strategies, strikes and how to effectively manage unionized workforces.

Tony also assists employers with the implementation and maintenance of effective affirmative action programs and represents government contractors before the Office of Federal Contract Compliance Programs (OFCCP).