A New Day Dawning Or Dark Clouds On The Horizon? The Potential Impact Of The Pyett Case

By Barry Winograd

More than three decades after the Supreme Court's decision in Alexander v. Gardner-Denver[1] erected a solid barrier between labor arbitration and the litigation of individual statutory discrimination claims by unionized workers, the justices will consider a case that effectively asks them to tear down that wall. The pending case, 14 Penn Plaza LLC v. Pyett,[2] has important implications in the field of labor and employment law, and for those who practice in the area.

1. The Pyett Case

In Summer 2003, three night security employees in a large New York City office building found themselves in new positions after the owner, the Pennsylvania Building Company, retained a new security subcontractor for some of the duties previously handled by the incumbent contractor. The new company, a non-union entity, was affiliated with the incumbent contractor, a unionized business. As part of the new arrangement, the employer reassigned the employees to different non-security positions as night porters and light duty cleaners. The workers, all over 50 years old and with decades of seniority, found that their new jobs were more physically demanding and less financially rewarding. They were not pleased, and looked to the union to address their grievances.

Barry Winograd, *an arbitrator and mediator based in Oakland, California, is a member of the National Academy of Arbitrators, and serves on the adjunct law school faculty at the University of California, Berkeley, and the University of Michigan.*

The three employees affected by the change were subject to a multi-employer collective bargaining agreement (CBA) negotiated by Local 32BJ of the Service Employees International Union (SEIU) with the real estate industry in New York City. The union is the longtime representative of building service workers - custodians, doormen, watchmen, and others - along the east coast.

Following the employee protest, a grievance was filed under the CBA. The grievance alleged that the CBA was violated by an improper transfer and reassignment arising from the new subcontract, and, subsequently, by the company's denial of a handyman assignment, resulting in a loss of pay and overtime. The grievance alleged as well that the workers were the victims of age discrimination.

The employees rejected the offer and moved forward with administrative filings and litigation in September 2004, alleging age discrimination under federal, state, and city law. Eventually, the labor arbitrator rejected the CBA issues.

Soon after the CBA arbitration began in February 2004, and before it ended a year later, the union had second thoughts about the scope of its case. According to the plaintiffs, the union advised them that their transfer and discrimination claims would not be advanced by the union in the CBA arbitration because the union had approved the new arrangement. Instead, only the handyman assignment and overtime issues would be pursued by the union. The workers were informed that their other claims could be presented individually before the CBA arbitrator, by their private counsel, and they (the workers) would pay arbitration fees separate from those incurred by the union and management. The employees rejected the offer and moved forward with administrative filings and litigation in September 2004, alleging age discrimination under federal, state, and city law. Eventually, the labor arbitrator rejected the CBA issues pressed by the union regarding the handyman assignment and overtime.

Facing litigation after its success in arbitration, the company moved to dismiss the litigation or, alternatively, to compel arbitration. In moving to compel, the company contended that the CBA's arbitration provision provided the exclusive means to redress the individual discrimination claims presented by the workers, and that the employer had provided substantial monetary benefits for the unionized workforce in the negotiations leading to the provision. The relevant portion of the CBA states:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer practices Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

The District Court, in June 2006, rejected the company's motion to dismiss, finding that the plaintiffs had alleged sufficient facts to state a claim on the merits. The court also denied the motion to compel arbitration, citing authority in the Second Circuit that adhered to the

Supreme Court's 1974 decision in *Alexander v. Gardner-Denver Co.*[3] Under that line of cases, a CBA arbitration cannot bar a separate lawsuit, by an individual, based on a statutory prohibition against discrimination. The Second Circuit affirmed, also relying on Supreme Court and circuit precedent. Among other salient points, the appellate court noted the potential conflict of interests between the individual workers and the union, if the latter was allied with management in approving the subcontracting arrangement with the new contractor.[4]

Following its loss in the Second Circuit, the defendant filed a petition for certiorari with the Supreme Court, which was granted in February 2008. The case will be argued in fall, 2008, with the decision likely to be handed down in 2009.

2. Supreme Court Precedent

Three Supreme Court decisions are at the center of the *Pyett* case. The first, chronologically, is *Gardner-Denver,* which concerned a discharge for poor performance. That case originated in a union's challenge to an employee's discharge under a labor-management CBA. Although a race discrimination claim had been mentioned during the proceeding, it was not the focus of the case, nor was it discussed in the arbitrator's award. While the arbitration was pending, the employee sought relief in court under federal anti-discrimination law. The arbitrator found that the employee was fired for just cause. Armed with the arbitrator's ruling, the employer urged that the lawsuit was barred by an election of the arbitral remedy, and that it should be dismissed.

The Supreme Court rejected the employer's claim, as well as alternative theories of estoppel and waiver, concluding that lawsuits based on federal discrimination statutes could not be waived in arbitration proceedings that involve different parties and interests.5 The Court's opinion expressed concern about potential conflicts between unions and members, and about the importance of the availability of statutory recourse that is independent of labor-management arbitrations. The Court viewed labor arbitration as an inadequate procedural forum for the vindication of discrimination claims. In one phrase that captures the essence of the Court's view, it stated that labor arbitration deals primarily with "the law of the shop, not the law of the land."6 Soon after the *Gardner-Denver* came down, its controlling principle was extended by the Court to statutory lawsuits involving the Fair Labor Standards Act and civil rights claims under 42 U.S.C. Section 1983.7

In one phrase that captures the essence of the Court's view, it stated that labor arbitration deals primarily with "the law of the shop, not the law of the land."

In 1991, the Supreme Court issued a decision, *Gilmer v. Johnson/Interstate Lane Corp.*,[8] which cast a shadow over the viability of *Gardner-Denver* as precedent. The *Gilmer* case was initiated by a stock broker who alleged that his termination was based on age discrimination. To work in the securities industry, the plaintiff signed a standardized stock exchange registration form providing that all disputes would be subject to arbitration. He did not have a separate employment agreement with the defendant. The court concluded that arbitration could be compelled.

In arriving at this result, the *Gilmer* Court drew upon decisions it issued in the 1980's which required arbitration of statutory claims under adhesion contracts and arbitration of traditional commercial disputes, thereby expanding the preemptive reach of the Federal Arbitration Act (FAA).[9] Finding no bar in the age discrimination laws to arbitration of statutory claims, the court reasoned that the FAA's mandate was paramount. However, in responding to several criticisms about arbitration, the *Gilmer* emphasized that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."[10]

But what about the continued viability of *Gardner-Denver*? To answer this question, the *Gilmer* Court distinguished the earlier case in the final portion of the decision. Essentially, the court observed that *Gardner-Denver* involved a labor arbitration dispute under a CBA, not a non-union arbitration arising under the FAA.[11]

The *Gilmer* court's distinguishing of *Gardner-Denver* did not provide a clear resolution of the emerging tension in the arbitration field, between the separate domains of labor and employment arbitration under the FAA. The tension was visited in 1998 in *Wright v. Universal Maritime Serv. Corp.*,[12] the third important case in the background of *Pyett*.

In *Universal Maritime*, the court was asked to compel, in a CBA labor arbitration, a statutory disability discrimination claim brought by a longshoreman who was barred from returning to work, after he settled a workplace injury compensation case. The relevant labor agreement had a provision which, in general terms, banned discrimination. In deciding the case, the court acknowledged the tension between *Gardner-Denver* and *Gilmer*, but concluded it need not reach the question of whether a union could essentially negotiate a waiver of an individual's right to go to court.

The court's restraint in *Universal Maritime* was premised on two considerations. One was that the case involved claims external to the CBA. Given the external nature of the claims, the court rejected a "presumption of arbitrability" that otherwise attaches to labor arbitration cases, following the court's seminal decisions in 1960 in the Steelworkers Trilogy.[13] A second consideration for the court was that, assuming a union-negotiated waiver of individual access to the courts is permitted, the waiver must be clear and unmistakable, whereas the language of the CBA in *Universal Maritime* was not.[14]

3. Positions Before the Court

In *Pyett*, the defendant employer maintains that *Gilmer* and *Universal Maritime* should be extended to approve the unequivocal waiver it contends was negotiated by SEIU and the multi-employer real estate industry board. If the court adopts this reasoning, the company urges that, under the FAA, arbitration should be enforced and judicial relief in a civil lawsuit should be barred. If the defendant's view prevails, the court will, in effect, overrule that portion of *Gardner-Denver* precluding a union waiver of individual recourse to the courts for enforcement of statutory rights.[15]

The employer asserts that if Gardner-Denver continues to be read as a complete ban on waivers, unions increasingly will be on the margins when it comes to statutory claims, with individuals bypassing the exclusive representative in judicial proceedings

According to the employer, such a decision will resolve the tension between the *Gardner-Denver* and *Gilmer* decisions, in a manner consistent with the trend of Supreme Court doctrine favoring arbitration under the FAA. Additionally, the employer argues, there will be a positive effect for individual workers, who otherwise might have difficulty finding counsel to pursue civil rights claims, by enhancing a union's opportunity to handle statutory claims on their behalf. In contrast, the employer asserts that if Gardner-Denver continues to be read as a complete ban on waivers, unions increasingly will be on the margins when it comes to statutory claims, with individuals bypassing the exclusive representative in judicial proceedings or being subject to individual arbitration agreements adopted by employers.

The defendant has also emphasized that the union's authority is not absolute under a negotiated provision covering statutory claims. As in *Pyett*, if the union declines to handle the case, the employer argues that the arbitration option can be extended to the affected individual, who can hire a private attorney to take the case forward to arbitration. In addition, the defendant contends that, if the union blocks such recourse, individu-

als can seek relief against the union through a duty of fair representation lawsuit that challenges either the union's unwillingness to press the case, or its refusal to consent to private arbitration.

Responding to the defendant's call for a change in judicial doctrine, plaintiffs argue that preserving *Gardner-Denver* will protect individual civil rights from being subordinated to union objectives, either in negotiations or in the enforcement of collective bargaining agreements. Plaintiffs contend that, through continued adherence to established labor and employment law distinctions confirmed in Supreme Court precedent, the individual and minority statutory rights of the plaintiffs will not be dependent on majority interests. The plaintiffs urge that this concern is particularly apt in *Pyett*, where the union agreed to the subcontracting arrangement that led to reassignment of the plaintiffs, and, thereafter, withdrew the transfer and age discrimination claims from the arbitration process.

An initial issue is whether a waiver of an individual's right to seek relief in court is a mandatory subject of bargaining, merely permissive, or a prohibited subject of bargaining.

Consistent with this argument, plaintiffs maintain that individuals should not be forced to participate in arbitrations where the forum and the arbitrator are selected and controlled by the union and the employer. While plaintiffs acknowledge that unions can waive collective, economic, interests of employees, they urge that waivers of individual civil rights claims are beyond the union's authority as a bargaining agent. Nor, according to the plaintiffs, should they be obliged to shoulder the not-so-easy burden of proving a breach of the duty of fair representation, as a precondition to pursuing a claim against the employer. The plaintiffs in *Pyett*, in fact, filed a complaint in 2004 alleging that their union breached its representation duty, but dropped the case as they moved forward with their separate discrimination lawsuit against the company.

In the final analysis, the plaintiffs maintain that the CBA in *Pyett* only gave the union, not the individual workers, a right to pursue statutory age discrimination claims in arbitration, since it is the union alone that controls access to the arbitration machinery. In plaintiffs' view, there was no waiver of their individual right to seek judicial relief that was either negotiated by the union, or agreed to by the affected workers. Plaintiffs reinforce their argument by reference to the special rule for individual waivers under federal age discrimination law, and to the right to jury trial protected by statute.[16]

It remains to be seen which argument will prevail. Predictions aside however, there are several intriguing issues that could potentially emerge from *Pyett* regarding the labor relations doctrine as we know it. The Court will need to decide how to analyze the Pyett dispute, may alter the manner in which labor agreements are negotiated and disputes are resolved.

4. Issues Posed in Pyett

The first fundamental question is whether *Pyett* be analyzed as a dispute arising under the FAA or under Section 301 of the Labor-Management Relations Act?[17] Section 301 has been applied to enforce arbitration under collective bargaining agreements, dating back a half-century, when it was generally thought that the FAA excluded employment agreements from coverage.[18] This distinction about the special nature of a CBA was reinforced in *Garnder-Denver*, and left intact in *Gilmer*, but was cast into doubt by the court's decision several years ago in *Circuit City v. Adams* favoring an expansive application of the FAA.[19]

Why does the jurisdictional basis matter? Simply stated, Section 301 has spawned nearly 60 years of jurisprudence affecting labor-management relations and the U.S. model of industrial self-government, including a national body of law which has guided the interpreta-

tion of bargaining agreements in federal and in state courts. When it comes to employment claims in the unionized context, the FAA not only lacks this doctrinal history as an independent basis for federal court jurisdiction, but the FAA is deferential to state law determinations of contract invalidity.[20]

Another question concerns the impact *Pyett* may have on the well-established machinery for negotiating labor agreements and for dispute resolution. An initial issue is whether a waiver of an individual's right to seek relief in court is a mandatory subject of bargaining, merely permissive, or a prohibited subject of bargaining. In one case, *Air Line Pilots Ass'n, Int'l v. Northwest Airlines Inc.*,21 the appellate court reasoned that, under the "no waiver" holding of *Gardner-Denver*, a union lacked authority to negotiate in this area. Although the appellate court referred to *Gardner-Denver* as a "firewall" protecting individual statutory rights, it declined to determine whether a waiver could be a permissive subject of bargaining.[22]

The National Labor Relations Board (NLRB) has expressed an opposing view on the negotiations of labor agreements, concluding that parties must bargain over arbitration procedures for individual employee statutory claims. In *Utility Vault Co.*,[23] the Board concluded that the employer engaged in unlawful unilateral action, and bypassed the union as the bargaining agent, by imposing a mandatory arbitration plan for individuals.

If, in the end, the topic of arbitration for individual employee statutory claims is deemed to be a mandatory subject, an issue not directly raised in *Pyett*, would this mean that an employer proposal regarding such arbitrations could be imposed under federal labor law, as an aspect of an employer's last best offer following bargaining impasse? At present, an arbitration clause that binds a union cannot be imposed after impasse, in keeping with an employer's inability to impose a no-strike provision, but different considerations may apply to the waiver of an individual's right to go to court.[24]

Another potential ramification for the field of labor law, although not specifically related to arbitration, concerns longstanding limits on union waivers of individual statutory rights under the NLRA. In the landmark case of *NLRB v. Magnavox Co. of Tennessee*,[25] the court rejected a union's waiver, in a CBA, of the right to use an in-plant bulletin board for the distribution of union-related messages. The court found that individual communication rights, for or against the union, were basic rights under the NLRA that could not be bargained away.

The difference between the two situations, one involving collective representational interests and the other involving personal claims, suggests that the court's decision in *Pyett* could open the door to a union's negotiation of other individual, non-union rights beyond the pending case.

In a later decision, *Metropolitan Edison Co. v. NLRB*,[26] the court refined its waiver analysis by concluding that punishment of individual union officials, in a strike situation, could not exceed that of other culpable workers, at least in the absence of a clear and unmistakable waiver by the union. The employer in *Pyett* relies on *Metropolitan Edison* as support for its contention that the union waived an individual right to pursue statutory discrimination claims in court. The difference between the two situations, one involving collective representational interests and the other involving personal claims, suggests that the court's decision in *Pyett* could open the door to a union's negotiation of other individual, non-union rights beyond the pending case.

Assuming these legal hurdles are resolved, will unions feel heightened pressure to negotiate waivers, possibly in response to monetary inducements, as the company maintains took place in *Pyett*? Will unions find themselves in

conflict with individual claimants, prompting unions to refrain from handling statutory discrimination claims? In the Second Circuit's view in *Pyett*, a conflict may have been present for the union because it approved an arrangement bringing in the new security contractor. According to the plaintiffs, this was the reason given by the union for declining to arbitrate the transfer and age discrimination claims once arbitration was underway.

Related to these potential issues, if waivers are negotiated, or if the language of an existing non-discrimination CBA clause is broadly interpreted as a waiver, will unions turn increasingly to attorneys as their representatives to offset apprehension about duty of fair representation claims?[27] If so, would this trend result in pre-hearing discovery and other formalized trappings of litigation which are now largely absent in labor arbitrations, thereby requiring a transformation of the current CBA arbitration system? In urging reliance on the duty of fair representation, as a check on union case-handling, the employer in *Pyett* observes that an aggrieved worker can gain the full range of relief that is available in litigation. Ultimately, the prospect of shared union liability actually may be a disincentive to the negotiated outcome sought by the employer, and could prompt some unions to insist on no-waiver caveats in the CBA.

Beyond these considerations, if waivers are negotiated but a union declines to take a case forward, are individuals obliged to follow the CBA's arbitration procedure, or should they be free to litigate? If the former, individuals might confront the financial burdens of pursuing the case in arbitration, a prospect faced by the workers in *Pyett* who were advised they could arbitrate at their own expense. Alternatively, if employees are free to seek relief in a judicial forum, will an employer have traded something of value in labor negotiations, but received an empty promise in return?

Perhaps the worst case scenario for an individual claimant is to have neither union representation, nor an opportunity to litigate or arbitrate, at least not without a time-consuming, expensive, and difficult lawsuit against the union for breach of the duty of fair representation. In this scenario, if the union's action is not deemed to have been arbitrary, discriminatory, or in bad faith - a demanding test under federal law - there is a risk not only of individual claims being set aside for valid union reasons, but, from an overall societal perspective, of the salutary benefits of civil rights legislation being undermined.

Apart from the concerns noted, ultimately there is a question regarding judicial review. Under Section 301, the scope of judicial review is greatly restricted based on the decision in *Enterprise Wheel Corp.*,[28] the last chapter in the Steelworkers Trilogy.[29] In the court's historic view, the arbitrator's award should be confirmed as long it draws its "essence" from the bargaining agreement. Under the FAA, judicial review also is restricted, as the Supreme Court affirmed in a decision in the past term.[30]

The potential problem that emerges, however, concerns judicial review of statutory claims after an arbitration decision is rendered. This follows from the Supreme Court's rationale, as expressed in *Gilmer*, that compelling arbitration of individual claims represents a change in the forum hearing the case, not a change in the substantive law governing the claim. Doubt about the effectiveness of this conceptual underpinning arises in the collective bargaining context. In reviewing CBA arbitrations, a court must balance a labor-management interest in arbitration finality, relatively free from appellate scrutiny, with a competing interest in ensuring that individual civil rights are not sacrificed by excessive deference to majority interests. An arbitrator's ruling on such competing claims not only puts strains on union representation, but begs the question of the proper role of appellate review when statutory claims are bundled into CBA adjudications.

While a grant of certiorari often signals that a change in judicial doctrine is on the way, this is not always the case. In *Pyett*, the Supreme Court has the option of leaving well enough alone. As applied, *Gardner-Denver* has worked remarkably well for more than 30 years.

Under the present law, unions can press discrimination claims, choosing carefully those

discrimination grievances it wishes to advance, in order to insure consistency with broader collective interests. Employers, in turn, can cite *Gardner-Denver's* green light to rely on the record of the hearing, and a persuasive labor arbitration award, to argue in court that an arbitrator's findings and decision should be given great weight, and that a plaintiff's case is not deserving of recovery.[31] This is not the same as having a single forum for all claims, whether they are an individual's or those of the union, but providing for admissibility and weight to the arbitrator's decision in a second arena affords a measure of practical protection for an employer that feels set upon by an unjust claim.

Another level of protection also exists for employers under the preemption doctrine that has emerged as an aspect of federalized labor relations under Section 301. In this respect, the Supreme Court has reasoned that, when the interpretation of a CBA provision is required to resolve an individual's statutory claim, separate litigation in a judicial forum will be set aside, or at least held in abeyance, while the grievance procedure is exhausted.[32]

Consideration of these well-developed areas of labor law could be timely. In the most recent term of the Supreme Court, the viability of alternative or multiple remedies was reaffirmed, with the court observing, in a quote from *Gardner-Denver*, that, as to employment discrimination law, "'legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies.'"[33]

In the next year, we will see whether a court majority often viewed as "conservative" will stay the long-established course, or whether it will opt for a major change in the law, with years if not decades of questions left to answer. ■

ENDNOTES

1 415 U.S. 36 (1974).

2 Pyett v. Pennsylvania Building Co., 498 F.3d 88 (2d Cir. 2007), cert. granted sub. nom. 14 Penn Plaza LLC v. Pyett, 128 S.Ct. 1223 (2008). The facts considered in this article are drawn from the appellate decision, and from briefs and the litigation record filed with the Supreme Court. The author contributed to preparation of an *amicus* brief in *Pyett* that was filed by the National Academy of Arbitrators. The views expressed in this article are solely those of the author, and not the Academy's.

3 Pyett v. Pennsylvania Bldg. Co., 2006 WL 1520517 (SDNY (2006), citing Granados v. Harvard Maintenance,Inc. 2006 WL 435731 (SDNY 2006), relying on Fayer v. Town of Middlebury, 258 F.3d 117 (2d Cir. 2001), and Rogers v. New York Univ., 220 F.3d 73 (2d Cir. 2000).

4 Pyett v. Pennsylvania Bldg. Co., supra, 498 F.3d at 94, n. 5.

5 Gardner-Denver, supra, 415 U.S. at 49-51.

6 Id., 415 U.S. at 57.

7 See Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981); McDonald v. West Branch, 466 U.S. 284 (1984).

8 500 U.S. 20 (1991).

9 The FAA is codified at 9 U.S.C. Section 1, et seq. See, e.g., Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Moses H. Cone Mem'l Hosp. V. Mercury Constr. Corp., 60 U.S. 1 (1983). The scholarly literature analyzing the evolution of the court's FAA case law reflects divergent views, including sharp criticism (Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted By Congress*, 34 Fla. St. U. L. Rev. 99 (2006), as well as articles seeing a potential beneficial influence on arbitration overall, including labor arbitration (Gould, *Kissing Cousins? The Federal Arbitration Act and Modern Labor Arbitration*, 55 Emory L. J. 609 (2006); Hayford, *The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 Berkeley J. Emp. Lab. L. 521 (2000)).

10 Gilmer, 500 U.S. at 26, quoting Mitsubishi Motors, supra n. 10, 473 at 628.

11 Id., 500 U.S. at 33-35. *Gilmer* also found that the plaintiff was not subject to an employment agreement, only a registration statement. (Id., 500 U.S. at 25, n. 2.) Given this, the court did not reach the issue of whether, as an employee, the plaintiff was excluded from coverage under the FAA. (9 U.S.C. Sec. 1.) A decade later, this separate issue was resolved with a broad reading of the FAA affirming jurisdiction over employees other than those in the transportation field in Circuit City Stores, Inc. v. Adams, 532 U.S 105 (2001).

12 525 U.S. 70 (1998).

13 Id., 525 U.S. at 77-79. The Trilogy cases are United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 595 (1960). In declining to apply the presumption of arbitrability under the CBA, the court in *Universal Maritime* also declined to consider whether a comparable presumption under the FAA governed since that statutory basis was not advanced. (Universal Maritime, supra, 525 U.S. at 395, n. 1.) The court's reticence to rework and merge the different arenas of labor arbitration and civil employment arbitration is in keeping with the bedrock difference between the two addressed in *Warrior & Gulf*, with the former a "substitute for industrial strife," and the latter a "substitute for litigation." (Warrior & Gulf, supra, 363 U.S. at 578.)

14 Universal Maritime, supra, 525 U.S. at 80.

15 Defendant also finds support for its view of waiver of a non-arbitration forum in the Supreme Court's recent decision in Preston v. Ferrer, 128 S.Ct. 978 (2008). In Preston, arbitration of a talent agency fee preempted a state agency's administrative jurisdiction. One leading labor law expert argues that unions are in a better position to negotiate meaningful arbitration relief than are individual employees subject to mandatory arbitration agreements. See St. Antoine, *Gilmer in the Collective Bargaining Context*, 16 Ohio St. J. on Disp. Resol. 491, 503-505 (2001).

16 29 U.S.C. Sections 626(f)(1), 626(c)(2).

17 29 U.S.C. Section 301. Section 301 was included as part of the 1947 Taft-Hartley amendments to the National Labor Relations Act (NLRA), 29 U.S.C. Section 158, et seq.

18 Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448 (1957). Also see Id., 353 U.S. at 466-467 (Frankfurter, dissenting). While *Lincoln Mills* opened the door to judicial enforcement of an executory promise to arbitrate, the Steelworkers Trilogy in 1960, supra n. 14, narrowed the range of court intervention by strictly limiting judicial scrutiny of CBA's when deciding whether to compel arbitration, or when reviewing arbitration decisions. The seminal academic analysis of this development was written by one of the principal union advocates in the landmark cases. See Feller, *A General Theory of the Collective Bargaining Agreement*," 61 Cal. L. Rev. 664 (1973). Paradoxically, later in Professor Feller's career, he wondered whether the broad adoption of labor arbitration principles for FAA cases meant that the rationale for separate jurisdiction under

Section 301 no longer has the same force. See Feller, *Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards*, 19 Berkeley J. of Emp. & Lab. L. 296 (1998).

[19] See supra n. 12. Following *Circuit City*, appellate courts have continued to apply Section 301, rejecting application of the FAA to CBA cases given the court's silence on the issue. See, e.g., Int'l Ass'n of Machinists and Aero. Workers Local Lodge 2121 v. Goodrich Corp., 410 F.3d 204 (5th Cir. 2005); IBEW, Local Union No. 545 v. Hope Elec. Corp., 380 F3d 1084 (5th Cir. 2004); Coca-Cola Bottling Co. v. Local 812, United Bhd. of Teamsters, 242 F.3d 52 (2nd Cir. 2001).

[20] Moses H. Cone Mem'l Hosp., supra n. 10, 60 U.S. at 26, n. 32; 9 U.S.C. Section 2. In terms of arbitration under the FAA, a number of other questions that are beyond the scope of this article are presented if labor arbitration is subsumed within the still unfolding realm of employment arbitration in non-union cases. (See, e.g., Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 Employee Rts. & Employment Pol'y J. 363 (2007); Bales, *Beyond the Protocol: Recent Trends in Employment Arbitration*, 11 Employee Rts. & Employment Pol'y J. 301 (2007); Nolan, *Employment Arbitration After Circuit City*, 41 Brandeis L. J. 853 (2003).) The imperfect nature of the employment arbitration process post-*Gilmer* is ably summarized in the most exhaustive study yet undertaken, giving pause when considering wholesale application of employment arbitration procedures to labor arbitrations. (Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 Employee Rts. & Employment Pol'y J. 405 (2007).)

[21] 199 F.3d 477(D.C. Cir. 1998).

[22] Id., 199 F.3d at 484-485.

[23] 345 NLRB No. 4 (2005). The NLRB also has rejected employer-adopted arbitration plans that potentially interfere with protected rights involving Section 7 of the NLRA and the filing of unfair labor practice charges. See Bill's Electric, Inc., 350 NLRB No. 31 (2007); U-Haul of California, 347 NLRB No. 34 (2006).

[24] See, generally, Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991).

[25] 415 U.S. 322 (1974).

[26] 460 U.S. 693 (1983).

[27] See, generally, Vaca v. Sipes, 386 U.S. 171 (1967); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976). The fair representation duty is breached by union conduct that is arbitrary, discriminatory, or in bad faith, a rigorous standard of proof that is designed to shield a union's broad discretion to administer and negotiate CBAs. (Vaca, supra, 386 U.S. at 186; Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 77-78 (1991).)

[28] 363 U.S. 595 (1960).

[29] See, supra, n. 14.

[30] Hall St. Assocs. v. Mattel Inc., 128 S.Ct. 1396 (2008).

[31] Gardner-Denver, supra, 415 U.S. at 60, n. 21.

[32] See, e.g., Livadas v. Bradshaw, 512 U.S. 107, 121-124 (1994); also see Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1998); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). Interesting examples of Section 301 preemption being applied, or not, to statutory claims can be found in two decisions by Judge Richard Posner of the Seventh Circuit. See Jonites v. Exelon Corp., 522 F.3d 721, 726 (7th Cir. 2008); Tice v. American Airlines, Inc., 288 F.3d 313, 317-318 (7th Cir. 2002).

[33] CBOCS West, Inc. v. Humphries, 128 S.Ct. 1951, 1961 (2008), citing Gardner-Denver, supra, 415 U.S. at 47.