III. FIFTY YEARS AFTER THE *STEELWORKERS TRILOGY*: SOME NEW QUESTIONS AND OLD ANSWERS

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I appreciate the opportunity to comment both on Bill Gould's thoughtful remarks and to address some of the issues presented since the *Steelworkers Trilogy*[1] was decided a half century ago. It is also nice to be back addressing this group; my last visit was some twenty-five years ago.[2]

My comments today will be directed to the following points. First, how I see the practical impact of the Supreme Court's opinion in *Pyett*.[3] Second, how the *Trilogy*'s reliance on Section 301 of the Labor Management Relations Act,[4] rather than the Federal Arbitration Act (FAA)[5] led to the development of a significant line of cases whose place in labor jurisprudence remains intact. Third, how I see the legal impact of *Pyett* and, in particular, the interplay between Section 301 and the FAA, on the scope of judicial review. I close with a few personal comments based on my forty years of practice as to the state of labor arbitration from a management lawyer's perspective.

Pyett

Bill raises many interesting and important questions about *Pyett*. I, too, think *Pyett* raises a number of issues that will need addressing in the years to come, but I'm uncertain as to its immediate practical impact on employers, unions, employees, and arbitrators. For one, the Court recognized that "federal antidiscrimination rights may not be prospectively waived."[6] This suggests an important limit on the reach of the holding. Indeed, the Court made clear it was not deciding whether a union's control over the labor arbitration process operated as a substantive waiver of

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[1] *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

[2] Andrew Kramer, PROCEEDINGS OF THE 38TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS, Walter J. Gershenfeld ed. (Washington, DC: BNA Books 1986), at 149.

[3] *14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456 (2009).

[4] 29 U.S.C. § 185.

[5] 9 U.S.C. § 1 *et seq.*

[6] 129 S. Ct. at 1469.

the Age Discrimination in Employment Act (ADEA)[7] rights being asserted.[8] That issue would arise where a union does not press a grievance raising statutory discrimination claims to arbitration and would not allow the grievant to do so on his or her own.[9] In *Pyett*, this issue had not been squarely raised and the record was unclear on the extent to which the plaintiffs could have proceeded to arbitration on their own.

The decision in *Pyett* will require unions to consider how they can accommodate control of the grievance/arbitration process to employees in cases involving statutory claims. If the union possesses control over what gets submitted to arbitration, is it likely that the union will let an employee decide in all cases involving statutory claims to have those cases submitted to arbitration? One might doubt how far unions might go in this regard. Also, will employers agree to allow for special rules to be placed into effect with such cases? That is another very open question.

These concerns, first raised in *Gardner-Denver*[10] over the union's control of the way in which grievances are presented are likely to be dealt with through duty of fair representation (DFR) cases or charges against the union for discriminatory treatment. The majority in *Pyett* viewed any conflict of interest issue as one for Congress to decide and that the argument itself "proves too much."[11] For the majority, the fact that there is a DFR responsibility and that the union would be liable itself for age discrimination claims was enough to show that "Congress has provided remedies for the situation where a labor union is less than vigorous in defense of its members' claims of discrimination under the ADEA."[12]

But the Court did not resolve the issue, leaving commentators to wonder whether the concerns identified in *Gardner-Denver* about the union's control over the grievance process survive

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[7] 29 U.S.C. § 621 *et seq.*

[8] 129 S. Ct. at 1474.

[9] *See* Kravar v. Triangle Servs., Inc., No. 06-7858, 2009 WL 1392595, at *3 (S.D.N.Y. May 19, 2009) (finding arbitration agreement unenforceable under *Pyett* because union's refusal to arbitrate employee's disability discrimination claims "operated as a waiver over Ms. Kravar's substantive rights"); *see also* Borrero v. Ruppert Housing Co., Inc., No. 08-5869, 2009 WL 1748060, at *2 (S.D.N.Y. June 19, 2009) (citing *Kravar* for the proposition that "if Borrero is prevented by the Union from arbitrating his claims, the CBA's arbitration provision will not be enforceable"). I question this result. *See infra* notes xx-xx and accompanying text.

[10] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974).

[11] 129 S. Ct. at 1472.

[12] *Id.* at 1473.

Pyett,[13] and lower courts to decide whether to enforce arbitration agreements when the union has refused to press the grievance to arbitration. In *Kravar,*[14] the Southern District of New York denied enforcement of an arbitration agreement because the union had refused to arbitrate an employee's disability discrimination claims. In deciding that the arbitration agreement was unenforceable under *Pyett* because it amounted to a substantive waiver of the employee's statutory rights, the court did not mention, let alone discuss, the effect of the availability of a DFR and/or discrimination claim against the union for refusing to press the employee's disability claims to arbitration. I question whether this result can be reconciled with *Pyett's* reasoning that "[g]iven this avenue that Congress has made available to redress a union's violation of its duty to its members, it is particularly inappropriate to ask this Court to impose an artificial limitation on the collective-bargaining process."[15] I also question whether the court erred in equating the union's decision not to arbitrate the employee's disability discrimination claims to a waiver of the employee's substantive right to be free from disability discrimination. The court found a substantive waiver because "[t]he CBA here operated to preclude Ms. Kravar from raising her disability-discrimination claims in *any* forum."[16] But that assumes that employees represented by a union have an absolute right to have all of their allegations of discrimination presented to an adjudicatory forum, an assumption the Supreme Court arguably rejected in *Pyett.*[17] While a stronger case for finding substantive waiver could be made where there has been a judicial finding that the employee is likely to succeed on the merits,[18] the court made no such finding in *Kravar* and found a substantive waiver even though the employer was willing to arbitrate the employee's claims.[19] In light of *Pyett*, it seems to me that absent some showing of likelihood of success, there are compel-

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[13] *See* Mark Berger, *A Step Too Far:* Pyett *and the Compelled Arbitration of Statutory Claims Under Union-Controlled Labor Contract Procedures,* 60 SYRACUSE L. REV. 55, 84 (2009) ("Whether this factor has continuing validity after *Pyett* is not entirely clear.").

[14] 2009 WL 1392595.

[15] 129 S. Ct. at 1473.

[16] 2009 WL 1392595, at *3 (emphasis in original).

[17] *See* 129 S. Ct. at 1472–73 ("It was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands.").

[18] *See* Berger, *supra* note 13, at 83–84 (noting that "merit is not the sole determinant of whether a union has breached its duty of fair representation" and thus a union's refusal to arbitrate a meritorious claim may "not violate the duty of fair representation").

[19] 2009 WL 1392595, at *4.

ling reasons for an employee's remedy in such cases to be a DFR and/or discrimination charge against the union.

This discussion, however, might well be academic if employers and unions are not likely to negotiate express *Pyett*-type clauses that empower the arbitrator to decide discrimination issues in accordance with federal or state statutory law. Most unions, I speculate, will choose to avoid the DFR snarl by simply not going down this path. And if employers cannot be assured of true finality—unless employees can take every statutory claim to arbitration—it is not clear employers will see it in their interest to seek such clauses.

The *Pyett*-type arbitration clause is not, in my experience, the typical clause found in many agreements. Most, in my experience, are general in nature and will not satisfy the Court's test for express waivers of the right to go to court. While the Court noted that "*Gardner-Denver* and its progeny" did not control in a case where, as in *Pyett*, the arbitration provision "expressly covers both statutory and contractual discrimination claims,"[20] does this also mean a general nondiscrimination clause without particular reference to certain statutes and remedies available will likewise be enforced? The Court's earlier decision in *Wright*[21] suggests otherwise, but one cannot now be certain as to how this question will evolve.[22]

With limited exceptions, most courts after *Gardner-Denver* did not utilize the factors set out by the Court on how much weight to give an arbitration award dealing with statutory claims.[23] This is probably unfortunate. A large part of this, however, was because employers and unions no longer believed, in light of *Gardner-Denver*, that they could successfully channel such cases in a way

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[20]129 S. Ct. at 1469.

[21]Wright v. Universal Maritime. *Serv. Corp.*, 525 U.S. 70 (1998).

[22]*Pyett* found that "[t]his Court has required only that an agreement to arbitrate statutory antidiscrimination claims be 'explicitly stated' in the collective-bargaining agreement." 129 S. Ct. at 1465 (quoting *Wright*, 525 U.S. at 80). While the nondiscrimination clause in *Pyett* expressly listed by name specific federal, state, and local antidiscrimination laws subject to the grievance and arbitration procedure, *see id.* at 1461, it remains to be seen whether a more generally worded agreement would suffice. *See Catrino v. Town of Ocean City*, No. 09-505, 2009 WL 2151205, at *4 (D. Md. July 14, 2009) ("Nowhere in the CBA does it express *or imply* that claims based on federal statutes must be arbitrated.") (emphasis added), *vacated on other grounds*, No. 09-505, 2009 WL 3347356 (D. Md. Oct. 14, 2009). Another open issue is the enforceability of an agreement to arbitrate statutory antidiscrimination claims where the agreement limits the arbitrator's remedial powers. The clause in *Pyett* provided that "Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination." 129 S. Ct. at 1461. Would the result have been the same if the clause did not contain that language? Would it have made a difference if the arbitrator's remedial authority had been circumscribed? These issues need to be fleshed out by the courts.

[23]415 U.S. at 60 n.21.

that would not result in duplicative proceedings. One might now require exhaustion even where there is less than a full blown *Pyett*-type nondiscrimination clause, and then evaluate in the event of a challenge whether to support the award. Again, whether this can work under a *Pyett/Wright* analysis is today an open question. It would, however, allow for claims to be heard in an expeditious and less costly fashion.

While the practical impact of *Pyett* on the arbitration of discrimination claims remains to me uncertain, it does raise several other issues which will have particular significance and which put the *Trilogy* in a different perspective. If, however, I prove to be wrong and *Pyett*-type cases become more commonplace, then there is a need to consider that given today's landscape of employment discrimination laws which cover a myriad of statutes, regulations, and practices that are a far cry from the barren landscape in 1960, do we have confidence that those deciding such cases will have the requisite experience? Perhaps to a majority of the Supreme Court that is not a worry, but for the parties and their representatives, it is critical that if labor arbitrators will be dealing with a wide array of statutory claims, then the arbitrator must have an informed view of the applicable law and experience in handling these disputes. This itself raises both legal and practical questions, questions that the Academy and all interested parties should be focused on.

The *Trilogy* and the Industrial Peace Rationale

During the early part of the last century federal courts used their equity powers to intervene in labor disputes. Such intervention consisted, *inter alia*, of the issuing of restraining orders which enjoined union activity in exceedingly broad and uncertain terms.[24] Since the utilization of injunctive relief impeded employee organizational activity and since few procedural safeguards were followed in issuing injunctive orders, Congress responded by enacting the Norris-LaGuardia Act in 1932.[25]

The Norris-LaGuardia Act embodied a clear congressional policy against the intervention of federal courts in labor disputes. The abuses giving rise to this Act generally involved cases where

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[24] *See* FELIX FRANKFURTER AND NATHAN GREENE, THE LABOR INJUNCTION (1930); *Milk Wagon Drivers' Union, Local 753 v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91, 100–03 (1940).

[25] 29 U.S.C. § 101 *et seq.*

union organizational strike activity was being halted as a result of the intrusion of federal courts. Section 4 of the Norris-LaGuardia Act was designed to halt this intrusion, and it represented "the culmination of a bitter political, social and economic controversy extending over half a century."[26] This controversy, however, was far removed from the question of enforcing collective bargaining agreements through injunctive relief.

Indeed, at the same time Congress was noting the "abuses of judicial power," collective bargaining agreements were treated as unenforceable in the United States.[27] Similarly, until 1925 and the passage of the FAA, federal courts took the view that executory contracts to arbitrate were not enforceable. Well after the passage of the FAA, it was unclear whether arbitration clauses in collective bargaining agreements could be enforced through that law.

In *Textile Workers Union of America v. Lincoln Mills*,[28] the Supreme Court was faced with the issue of whether a federal court could require an employer to arbitrate disputes arising under a collective bargaining agreement. At the core of the case was whether Section 301 was merely jurisdictional or whether it allowed the courts to fashion a federal common law with respect to the enforcement of collective bargaining agreements.

Finding that Section 301 permitted the creation of a substantive body of federal law, the Supreme Court went on to hold that the Norris-LaGuardia Act did not prohibit the specific enforcement of a contractual duty to arbitrate disputes arising under collective bargaining agreements. Rejecting the argument that the anti-injunction proscriptions of the Norris-LaGuardia Act barred such relief, the Court noted that the enforcement of a duty to arbitrate was not "part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed."[29]

Of interest to today's discussion is that in dissent Justice Frankfurter took notice of the FAA, something that the majority in *Lincoln Mills* had not discussed. The union in *Lincoln Mills* offered the FAA as an alternative basis, but relied primarily on Section 301

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[26] *Milk Wagon Drivers' Union*, 311 U.S. at 102.

[27] S. Rep. No. 163, 72nd Cong., 1st Sess. 8. *See* John Rogers Commons and John B. Andrews, *Principles of Labor Legislation*, 118 (1920); William Gorham Rice, Jr., *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572–74 (1931).

[28] 353 U.S. 448 (1957).

[29] *Id.* at 458.

given the uncertain application of the FAA to labor agreements.[30] While the union suggested that should the Court look to the FAA it would find that Congress had not exempted all labor arbitration from its coverage, its primary reliance was on Section 301.

In dissent, Justice Frankfurter believed that the Court's "silent treatment" of the FAA was an implied recognition, one he would make explicit, that the FAA did not allow courts to enforce arbitration agreements in labor contracts. Judicial intervention in the view of Justice Frankfurter was inappropriate and "ill-suited to the special characteristics of the arbitration process," and looked for support from the words of Harry Shulman, who suggested that if arbitration breaks down, "might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions."[31] To the same end, there was a question of how the FAA Section 1 exclusion applied to collective bargaining agreements.

Three years after *Lincoln Mills*, the Supreme Court fashioned this federal common law in the *Trilogy*.[32] Establishing arbitration as "a kingpin of federal labor policy"[33] the Court created a broad general presumption in favor of arbitrability:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[34]

The Court established this standard as a general proposition, but the Supreme Court recently in *Granite Rock Co. v. IBT*[35] seemingly viewed the presumption as not being as broad as the language that Justice Douglas suggested or as broad as it has been construed by courts since the *Trilogy*.

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[30] *See* David E. Feller, *End of the Trilogy: The Declining State of Labor Arbitration,* 48 ARB. J., Sept. 1993, at 18, 19 (discussing union reliance primarily on § 301 "because of the hostility of the courts to arbitration under the FAA. As a back-up [the union] also argued that the exclusion in Section 1 of the FAA of contracts of employment applied only to individual contracts and was inapplicable to collective bargaining agreements."); Pet'r Br., *Lincoln Mills*, 1957 WL 87026, at *7–11 (Jan. 22, 1957).

[31] *Lincoln Mills*, 353 U.S. at 463; Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955).

[32] United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960).

[33] Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 226 (1962), *overruled in part by* Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).

[34] United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. at 582–83.

[35] 130 S. Ct. 2847, No. 08-1214, 2010 WL 2518518 (June 24, 2010).

In *Granite Rock*, the Court was presented with a case arising under Section 301 where the employer sought injunctive relief and damages because of an alleged breach of a no-strike clause. The principal issue was when was the collective bargaining agreement ratified and who should decide that issue, a court or an arbitrator. Depending on the date of ratification, the strike was either in violation of the no-strike clause or not covered because of a contractual hiatus.

The Ninth Circuit held that the dispute was arbitrable because the arbitration clause covered strike claims, that the policy favoring arbitration meant that "any ambiguity about the scope of the parties' arbitration clause be resolved in favor of arbitrability," and that since the employer brought suit under the contract, it had, as a result, consented to arbitrate the ratification date dispute.[36] The Supreme Court reversed.

Relying on, *inter alia, Warrior & Gulf,* the union argued that the presumption of arbitrability required that the ratification question be submitted to arbitration. The Court's view of *Warrior & Gulf* was different:

> Although *Warrior & Gulf* contains language that might in isolation be misconstrued as establishing a presumption that labor disputes are arbitrable whenever they are not expressly excluded from an arbitration clause, 363 U.S., at 578–582, the opinion elsewhere emphasizes that even in LMRA cases, "courts" must construe arbitration clauses because "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.*, at 582 (applying this rule and finding the dispute at issue arbitrable only after determining that the parties' arbitration clause could be construed under standard principles of contract interpretation to cover it.)
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> Our use of the same rules in FAA cases is also unsurprising. The rules are suggested by the statute itself. Section 2 of the FAA requires courts to enforce valid and enforceable arbitration agreements according to their terms. And §4 provides in pertinent part that where a party invokes the jurisdiction of a federal court over a matter that the court could adjudicate but for the presence of an arbitration clause, "[t]he court shall hear the parties" and "direc[t] the parties to proceed to arbitration in accordance with the terms of the agreement" except "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue," in which case "the court shall proceed summarily to the trial thereof." 9 U.S.C. §4.

Id. at *9 n.8.

[36] *Id.* at *7.

The points made in this footnote are important. First, it is clear that the rules of construction with respect to arbitrability questions are no different under Section 301 than under the FAA. Second, the Court went on to suggest that if there is not clear evidence that a dispute is covered by the arbitration clause, the issue of arbitrability will be for the courts to decide. Whether this language will provoke more challenges to the arbitrability of disputes or be tempered in future cases is open to question, but it will certainly allow for more challenges to be maintained in the courts. Finally, it is interesting to note that the Court found no meaningful tension between the fact that a court in a Section 301 breach of contract case would be determining arbitrability as to when the agreement was ratified.

After the *Trilogy*, arbitration became the primary vehicle to promote industrial peace. In fact, to me it was the focus on industrial peace which not only informed the rationale of the *Trilogy* but also the later accommodation of Section 301 with Norris-LaGuardia. This accommodation has impacted the ability to contest that the scope of certain grievance/arbitration clauses should be narrowly interpreted.[37] Courts are much more likely to find that parties have agreed to submit a broad array of disputes to arbitration because of the presumption established in the *Trilogy*, but, as noted *supra*, that now might not be the case given the *Granite Rock* decision. Thus, arbitration provided the means to expeditiously settle disputes and federal courts were instructed not to thwart the utilization of this process by narrowly construing grievance and arbitration clauses.

By making arbitration an integral aspect of the federal common law of labor relations it was inevitable that questions would arise concerning what remedies an employer was entitled to if a union chose to ignore the arbitral process and engaged in a strike over a matter subject to resolution through that process. Since the bringing of a damages action or discipline might tend to exacerbate relations between an employer and union and since such actions did nothing to immediately end the strike activity, attention turned to the permissibility of injunctive relief under Section 301.[38] Again, had the Court initially in *Lincoln Mills* looked at

[37] *See, e.g.,* Buffalo Forge Co. v. United Steelworkers of Am., AFL-CIO, 428 U.S. 397, 410–11 (1976).

[38] *See, e.g.,* Sinclair Refining, 370 U.S. 195; Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).

the FAA as the source of enforcement or vacation of arbitration awards, one can wonder how the law might have emerged.

The utilization of injunctive relief under the Railway Labor Act[39] had already been approved by the Court. In *Brotherhood of Railroad Trainmen v. Chicago River &Indiana Railroad,*[40] the issue was whether injunctive relief was appropriate in a case where a union struck over a "minor dispute" subject to arbitration under the Railway Labor Act. Rejecting the argument that the Norris-LaGuardia Act precluded the issuance of injunctive relief, the Court held that the important policy of peacefully settling disputes through a statutorily mandated arbitration procedure would be "imperiled if equitable remedies were not available to implement it. . . ."[41]

Notwithstanding its decisions in the *Steelworkers Trilogy* and *Chicago River,* the Supreme Court, in its first pass in *Sinclair,*[42] held that the Norris-LaGuardia Act prohibited the issuance of injunctions against strikes over arbitrable grievances. The *Sinclair* decision was generally attacked as undermining the effectiveness of the arbitration process, but also approved by others as an appropriate reading of Norris-LaGuardia.[43]

Sinclair was troublesome from several perspectives. First, just before the ruling in *Sinclair,* the Court had held that the agreement to arbitrate *implied* an agreement not to strike over disputes subject to the arbitral process.[44] Second, the failure to accommodate Section 301 with the Norris-LaGuardia Act was inconsistent with the approach adopted earlier in *Chicago River.*[45] Certainly the fact that the arbitration procedures in one case were statutory and in the other contractual did not change the already established national labor policy of having disputes pursued through such procedures. Also, some employers had gone to state court to seek injunctions, which were not barred under any state law analogue to Norris-LaGuardia, resulting in removal petitions by unions to federal court where Norris-LaGuardia applied—a difficulty addressed in the Court's *Avco* decision.[46] Thus, the result in

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[39]45 U.S.C. § 151 *et seq.*

[40]353 U.S. 30 (1957).

[41]Boys Mkts., Inc., 398 U.S. at 252 (explaining the Court's rationale in *Chicago River*).

[42]370 U.S. 195 (1962).

[43]*See* Herbert G. Keene, Jr., *The Supreme Court, Section 301 and No-Strike Clauses: From* Lincoln Mills *to* Avco *and Beyond,* 15 U. ILL. L. REV. 32 (1969); Benjamin Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions,* 63 COLUM. L. REV. 1027 (1963).

[44]Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

[45]William B. Gould, *On Labor Injunctions, Unions and the Judges: The* Boys Markets *Case,* THE SUPREME COURT REV. 215, 238–39 (P. Kurland ed., 1970).

[46]Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968).

Sinclair was wholly unsatisfying from the perspective of ensuring that disputes would be channeled through agreed upon procedures and ran counter to the theme of industrial peace running through the *Trilogy*.[47]

Enforcing the Agreement to Arbitrate: *Boys Markets* and Its Progeny

The opportunity to reconsider *Sinclair* came in *Boys Markets*.[48] Following the approach taken in *Chicago River*, the Court "accommodated" the provisions of the Norris-LaGuardia Act to the provisions of Section 301 and reversed *Sinclair*.

At its core *Boys Markets* represented another victory for the arbitral process and extended the reach of Section 301 relief. Throughout the decision is repeated emphasis that the holding in *Sinclair* "undermined the effectiveness of the arbitration technique" and "frustrates realization of an important goal of our national labor policy."[49]

After *Boys Markets*, the Court continued on a path to utilize Section 301 to promote the arbitral process. For example, in *Gateway Coal Co. v. United Mine Workers of America*,[50] the Supreme Court dealt with the question of how the *Steelworkers Trilogy* presumption of arbitrability applied to a strike over safety issues. The Third Circuit in *Gateway* had held that injunctive relief was inappropriate where a strike was called to protest alleged safety hazards at one of Gateway's mines. In the eyes of the Third Circuit the federal policy favoring arbitration did not extend to safety disputes and in light of Section 502 of the Labor Management Relations Act[51] there was a policy against requiring the compulsory arbitration of such disputes. The Supreme Court reversed. At the outset the Court laid to rest any question concerning the appropriateness of

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[47] In an effort to afford some relief to employers, lower courts held that *Sinclair* did not prohibit the enforcement of an arbitrator's award directing a union to cease striking in violation of a no-strike clause. New Orleans S.S. Ass'n v. Gen. Longshoreworkers, 389 F.2d 369 (5th Cir. 1968). The Court subsequently in Buffalo Forge, 428 U.S. at 405, noted that in the cases alleging violation of no-strike clauses there could be "an injunction to enforce the arbitral decision."

[48] *Boys Mkts.*, 398 U.S. 235.

[49] *Id.* at 241, 252.

[50] 414 U.S. 368 (1974).

[51] 29 U.S.C. § 143. This section provides in relevant part that "nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter." *Id.*

applying the *Trilogy* presumption in favor of arbitration to a *Boys Markets* case.

In *Gateway*, the Court went on to hold that the absence of an express no-strike clause did not bar the issuance of injunctive relief. Relying on its earlier decision in *Local 174, International Brotherhood of Teamsters v. Lucas Flour Co.*,[52] the Court held that the duty not to strike should be implied contemporaneously with the specific agreement to arbitrate. The Court rejected the argument that Section 502 prohibited the issuance of an injunction since it found no objective evidence demonstrating the existence of "abnormally dangerous conditions for work" in that particular case.

After *Boys Markets* the next major area of controversy developed over whether injunctive relief was appropriate in sympathy strike situations where employees honored the picket line of another union. This controversy was also taking place under the National Labor Relations Act (NLRA).[53] Some courts held that the issue of whether employees violate their collective bargaining agreement by honoring another union's picket line is an arbitral dispute and, therefore, *Boys Markets* injunctive relief is appropriate.[54] Other courts taking a narrower view held that such strikes are not "over a grievance" as such and injunctive relief is inappropriate.[55] This dispute was settled by the Supreme Court in *Buffalo Forge*.

In *Buffalo Forge*, the Court divided 5–4 over the propriety of injunctive relief in sympathy strike situations. Justice White, writing for the majority, held that injunctive relief was not appropriate and that *Boys Markets* "plainly does not control" the sympathy strike situation since the "strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain."[56] In the view of the majority, to grant injunctions in such cases would thrust federal courts into the arena of contract interpretation—a role reserved to arbitrators. For the Court, *Boys Markets* carved out only a limited exception

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[52]369 U.S. 95 (1962).

[53]29 U.S.C. §§ 151 *et seq.; see* Buffalo Forge Co., 428 U.S. at 404 n.9 (collecting cases); Gary-Hobart Water Corp., 210 N.L.R.B. 742 (1974), *enforced,* 511 F.2d 284 (7th Cir. 1975); NLRB v. CWA, AFL-CIO, No. 71 5302, 1971 WL 878 (S.D.N.Y. Dec. 13, 1971) (granting injunction under Section 10(j) of NLRA).

[54]*See, e.g.,* NAPA Pittsburgh, Inc. v. Auto. Chauffeurs, Local 926, 502 F.2d 321 (3d Cir. 1974); Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209 (4th Cir. 1973).

[55]*See, e.g.,* Amstar Corp. v. Amalgamated Meat Cutters & Butcher Workmen, 468 F.2d 1372, 1373 n.2 (5th Cir. 1972); Buffalo Forge Co. v. United Steelworkers of Am., 517 F.2d 1207, 1211 (2d Cir. 1975), *aff'd,* 424 U.S. 906 (1976), *and order aff'd*, 428 U.S. 397 (1976).

[56]*Buffalo Forge Co.,* 428 U.S. at 406–08.

from Norris-LaGuardia; injunctions are not available for every strike in violation of a contractual promise but only where the union's purpose in striking was to put pressure on the arbitrator to rule in its favor on an underlying grievance. Part of the Court's reasoning is the assumption that the availability of arbitration to test the legality of the sympathy strike was a sufficient remedy for the employer.

The majority's position was squarely attacked in the dissenting opinion written by Justice Stevens. Justice Stevens noted that it was wrong for the majority to state that the strike did not deprive "the employer of his bargain." Conversely, Justice Stevens noted that if the strike violates the no-strike clause in the collective bargaining agreement the employer's agreement to arbitrate is being undermined.

The dissent in *Buffalo Forge* rejected the majority's literal interpretation of the Norris-LaGuardia Act. Justice Stevens noted that the concerns which prompted passage of the Norris-LaGuardia Act were not applicable to a situation where a court was dealing with the enforceability of an agreement not to strike. Again, the theme of enforcing industrial peace through Section 301—albeit here in dissent:

> Like the decision in *Boys Markets*, this opinion reflects, on the one hand, my confidence that experience during the decades since the Norris-LaGuardia Act was passed has dissipated any legitimate concern about the impartiality of federal judges in disputes between labor and management, and on the other, my continued recognition of the fact that judges have less familiarity and expertise than arbitrators and administrators who regularly work in this specialized area. The decision in *Boys Markets* requires an accommodation between the Norris-LaGuardia Act and the Labor Management Relations Act. I would hold only that the terms of that accommodation do not entirely deprive the federal courts of all power to grant any relief to an employer, threatened with irreparable injury from a sympathy strike clearly in violation of a collective bargaining agreement, regardless of the equities of his claim for injunctive relief pending arbitration.[57]

The views of Justice Stevens are well-founded. The question of whether employees can honor a picket line is clearly, as the majority in *Buffalo Forge* recognized, a subject for arbitral determination. Requiring an employer to go first to arbitration and allow a work stoppage to continue frustrates not only the arbitral process but makes virtually meaningless the union's agreement not to strike.

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[57] *Id.* at 432.

Granting injunctive relief, along the lines suggested in Justice Stevens' dissent, promotes the very policies which led the Court in *Boys Markets* to accommodate Section 301 with Section 4 of the Norris-LaGuardia Act.

One might have thought that after *Buffalo Forge* the propriety of issuing any status quo injunction would have come into serious doubt. After all, the Court in *Buffalo Forge* rejected the notion that a federal district court was free to enjoin the alleged breach of a no-strike clause pending an arbitrator's construction of the clause. The Court indicated that in such a case the employer should first proceed to arbitration and the court can then enforce the award.

If injunctive relief is wrong in a sympathy strike case, it would seem such relief should be similarly inappropriate in the case where there is an attempt to maintain the status quo. In both situations courts are being asked to enjoin certain action pending an arbitrator's determination that such action is proper or improper under the terms of the collective bargaining agreement. The issue before the arbitrator relates to the propriety of the very action being enjoined. In the *Buffalo Forge* case it was the strike; in a status quo case (sometimes dubbed a "reverse *Boys Markets*" case) it is the proposed change of the employer.

Following the rationale of the *Buffalo Forge* majority, one could conclude that injunctive relief to preserve the status quo falls outside the area of accommodation adopted in *Boys Markets*. Under *Buffalo Forge* the union will be receiving the benefit of its bargain by having the opportunity to go to arbitration and have that award enforced. For a court to grant injunctive relief is giving the union more than it bargained for and would require a preliminary determination of the merits of the dispute. These are the very infirmities listed by the majority in *Buffalo Forge*.[58]

The law on this point, however, has not gone in that direction. Status quo injunctive relief has continued to be granted where other equitable factors are also present.[59] The lower courts have reasoned that "a union may obtain a *status quo* injunction against an employer when the employer's action has the effect of frustrating the arbitral process, or rendering it a 'hollow formality.'"[60] It

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[58] *See id*. at 409–13.

[59] *See, e.g.*, Niagara Hooker Employees Union v. Occidental Chem. Corp., 935 F.2d 1370, 1378 (2d Cir. 1991); Gulf Coast Indus. Workers' Union v. Exxon Corp., 712 F.2d 161, 164–65 (5th Cir. 1983).

[60] *Niagara Hooker Employees Union*, 935 F.2d at 1377 (quoting Lever Bros. v. Int'l Chem. Workers Union, Local 217, 554 F.2d 115, 123 (4th Cir. 1976)).

is difficult to square this reasoning with *Buffalo Forge*, which specifically found that the issuance of "injunctions so as to restore the status quo…would cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes under the many existing and future collective-bargaining contracts, not just for the purpose of enforcing promises to arbitrate, which was the limit of *Boys Markets*, but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator."[61] Like the result in *Buffalo Forge*, these cases have become part of what parties understand awaits them when dealing with particular issues, and as a result, form a body of law that one, at least at this time, can generally anticipate in certain types of disputes.

All of this background shows how important Section 301 has been to the development of national labor policy. Would there have been *Boys Markets* if the Court in *Lincoln Mills* or the *Trilogy* had used the FAA—a statute passed seven years before Norris-LaGuardia? Would there have been the view that an agreement to arbitrate enforced under the FAA provided the basis for an implied no-strike clause? It is, of course, possible that the results would have been the same since the decision in *Lincoln Mills* viewed Section 301 from an industrial peace perspective. Moreover, for many years after the *Trilogy* there was no reason to believe that the Court would support the application of the FAA in a collective bargaining setting.[62] Thus, the fact that the Court in *Pyett* relied on the FAA raises the question as to what, if any, meaningful difference there is in the route one takes to challenge or enforce an award.

Scope of Review

One of the important issues raised by Bill is, given *Pyett*, how do we not pit the FAA against Section 301 and the body of law developed since the *Trilogy*? *See, Granite Rock v. IBT, supra* at note 35 ff., 10–12. First, Bill refers to a statement by one of my former partners who is now on the Sixth Circuit, that one out of four arbitration awards challenged in federal court gets reversed. I don't know what data Jeff Sutton was looking at, but to me and most

[61] 428 U.S. at 410–11.

[62] Stephen L. Hayford, *The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration,* 21 BERKELEY J. EMP. & LAB. L. 521, 569–70 (2000); Feller, note 30, *supra.*

management attorneys, the view is that it is extremely difficult to overturn an award, and my odds wouldn't be close to a 25 percent success rate. The FAA seemingly presents an even narrower focus for challenge to an award.

Bill goes on to note that the FAA is a better foundation than Section 301 in many respects (noting speed and procedural benefits). There is no question it presents a speedy route to enforcement of an award. For me, the critical issue—an issue Bill also notes—concerns scope of review. Here I think it gets interesting on a number of different levels.

The FAA provides expedited review to confirm, vacate, or modify arbitration awards.[63] In *Hall Street Associates v. Mattel, Inc.*,[64] the Supreme Court viewed Sections 9–11 of the FAA "as substantiating a national policy favoring arbitrations with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[65] The Court's reasoning suggests that under the language for vacating an award in Sections 10 and 11 of the FAA, a manifest disregard of law would not be an independent ground to vacate. Since the decision in *Hall Street Associates,* lower courts have confronted the question of whether the Court shut the door entirely on utilizing manifest disregard of the law under the FAA. Some courts have held that the manifest disregard doctrine does not survive,[66] while others have held that it survives as being part of Section 10 of the FAA.[67] This issue, as noted later, will be part of the debate as to the review of awards in light of *Pyett.*

It is important that the Court in *Hall* noted that "[t]he FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable."[68] Does this mean an employer or union might use Section 301 if in fact review standards are different in *Pyett* related cases? In fact, as noted later, I do not see why the "common law" under Section 301 would not be part of cases where the FAA might also be implicated.

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[63]9 U.S.C. §§ 9–11.
[64]552 U.S. 576 (2008).
[65]*Id.* at 588.
[66]Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 124 n.3 (1st Cir. 2008); Prime Therapeutics LLC v. Omnicare, Inc., 555 F. Supp. 2d 993, 999 (D. Minn. 2008).
[67]Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008), *rev'd,* 130 S. Ct. 1758 (2010).
[68]*Hall Street Assocs.,* 552 U.S. at 590.

Earlier the Court in *Misco*[69] had implied in a footnote that the FAA might not apply to labor arbitrations but that courts looked to it for guidance in reviewing awards under Section 301.[70] On the other hand, without discussing *Misco*, the Court in *Pyett* seems to be applying the FAA as a basis for enforcing an arbitration agreement in a labor contract. Perhaps this feature of *Pyett* is limited to statutory discrimination cases. If the FAA does not apply in routine labor arbitration cases, however, does its narrow scope of review of arbitration awards apply also in labor contract cases otherwise governed by the *Trilogy* (where the Court developed its view of judicial deference and review without any mention of the FAA)? For example, *Misco* was a public policy case, but does *Hall* now further limit such challenges under the FAA?

This is not an academic discussion. A recent case helps highlight these issues. In *Globe Newspaper*,[71] an employer sought to vacate a portion of an interest arbitration award. The part being attacked was the provision requiring that the successor agreement be determined again by interest arbitration, something that had been part of many predecessor agreements. The Globe's position, raised later in the arbitration, was that interest arbitration is a nonmandatory subject of bargaining and could not be lawfully imposed on an unwilling party, even in the context of an interest arbitrator's deciding the contents of a renewal agreement.

The action was brought under Section 301, not the FAA. This was important to the district court, which noted that an award could be vacated if it was found to violate "public policy."[72] The Court noted that under *Hall* manifest disregard of the law was not enough to vacate, but under 301 that was not necessarily the case.[73] The judge in *Globe Newspaper* was of the view that under Section 301, an award which violated public policy can be vacated—something that the Court noted the holding in *Hall* may well leave open under the FAA.[74] One can imagine future cases focused on whether public policy challenges to labor arbitration awards, recognized both in *Misco* and *Eastern Associated Coal*,[75] have continued relevance if the first party into court invokes the FAA rather than

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[69] United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987).
[70] *Id.* at 40 n.9.
[71] Globe Newspaper Co. v. Int'l Ass'n of Machinists, Local 264, 648 F. Supp. 2d 193 (D. Mass. 2009).
[72] *Id.* at 197.
[73] *Id.* at 197 n.5.
[74] *Id.*
[75] E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57 (2000).

301. To me, there should be support given the *Trilogy* and its progeny for having Section 301 jurisprudence apply in such cases—independent of the FAA.

Finding that interest arbitration was a nonmandatory subject of bargaining, the court in *Globe* vacated the award as a violation of public policy. The district court held that "it would be incongruous to allow an interest arbitration provision to be imposed against either party's will through an arbitrator's decision."[76] The court relied on a number of cases holding interest arbitration to be a nonmandatory subject of bargaining.

The decision in *Globe* is a good place to explore the issues which I think will be evolving in light of *Pyett* and the possible increase in interest arbitration awards. While I do not think that EFCA[77] will pass, both GM and Chrysler, for example, in their most recent labor agreements have put in place interest arbitration. Again, while I don't think that there will be a rush by others for interest arbitration, the review of interest arbitration cases opens to me more questions than the majority of contractual cases.

As noted earlier, there is the question of whether in a case brought under the FAA, the court could consider public policy as grounds to vacate. Section 10 of the FAA sets out specific grounds for an award to be vacated.[78] No mention is made of public policy, but one might argue that an arbitrator exceeds his or her powers (a grounds for vacating) when violating a defined public policy. Indeed, the rationale of cases like *Stolt-Nielsen SA* in the Second Circuit supports this position.[79]

Second, what is the role of the courts in an interest arbitration case where the issue is whether an interest arbitrator can impose a nonmandatory term in the agreement under arbitration? Shouldn't that be a problem if under the NLRA it is an unfair labor practice to implement and/or strike over nonmandatory terms? Does the Board have any role?

For example, in *Globe* could the employer have filed a Section 8(b)(3)[80] charge and requested Section 10(j)[81] injunctive relief on the grounds that the union sought an award that was unlawful insofar as it was attempting to impose a nonmandatory

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[76] *Globe Newspaper Co.*, 648 F. Supp. 2d at 200.
[77] Employee Free Choice Act of 2009, S. 560, 111th Cong. (2009).
[78] 9 U.S.C. § 10.
[79] Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008), *rev'd,* 130 S. Ct. 1758 (2010).
[80] 29 U.S.C. § 158(b)(3).
[81] 29 U.S.C. § 160(j).

term? Are courts or the NLRB required to show the same deference to an arbitration award deciding whether an issue is a mandatory subject as to an award simply interpreting a contractual term? Or, if as envisioned under the EFCA, is that same deference owed in creating a contract? These are very serious and important questions.

All of this demonstrates that even after 50 years we can look forward to seeing the law evolve. There is little question that the foundation of the *Trilogy* remains in place. Courts presume that there is a strong presumption in favor of arbitration and that it takes a lot for an award to be overturned under Section 301. Advice is given against that backdrop.

Conclusion

Parties today, for many reasons, look at arbitration on a case-by-case basis. Most often they select from lists with names they don't know and look at a single result as evidence of success or failure. The view of labor arbitration that Harvard Law School Dean Harry Shulman wrote about 55 years ago might as well be in a foreign language for many of these individuals. That is unfortunate on a number of levels.

When the *Trilogy* was decided, it was seemingly a celebration of labor arbitration. In *Warrior & Gulf*, Justice Douglas made the point that the labor agreement was not a typical contract. Instead "it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."[82] The role of labor arbitration was defined in this fashion:

> Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.[83]

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[82] *Warrior & Gulf*, 363 U.S. at 578 (1960).
[83] *Id.* at 581.

The words of Justice Douglas speak of the view that labor arbitration and arbitrators were special, in contrast to their commercial law peers. They were doing something different in creating a "common law" of the shop and that using Section 301 vindicated this approach, making arbitration the "kingpin of our federal labor policy."[84] Indeed, these views led Yale Law School Dean Harry Wellington to critically comment that what the Court did hamstrung the ability of parties to meaningfully contract for something less than an "all-in" arbitration process.[85] The Court established a national highway for arbitration rather than parse the language of each contract, tending to push the process into a one-size-fits-all paradigm in order to keep the courts out as much as possible. How the *Granite Rock* decision might change its view of arbitrability is uncertain but is likely to produce litigation in the years ahead.

Today, however, we have *Pyett, Mitsubishi Motors Corp.*,[86] *Circuit City Stores*,[87] *Gilmer*,[88] and many other cases to look at. All of these cases not only make it clear that statutory claims may be the subject of enforceable arbitration agreements, but reject the view that arbitration is inferior to the judicial process and that arbitrators lack the competence to decide antitrust, Racketeer Influenced and Corrupt Organizations Act (RICO),[89] or ADEA claims. While labor arbitration may still have the characteristics described in *Warrior & Gulf,* the Supreme Court has moved on to the view that most other forms of arbitration are also to be supported under the FAA and that whatever pixie dust the labor arbitrator has, the RICO arbitrator has as well.

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[84] *Sinclair Refining*, 370 U.S. at 213.
[85] *See* HARRY H. WELLINGTON, LABOR AND THE LEGAL PROCESS 112 (1968).
[86] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).
[87] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
[88] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
[89] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*