Marquette Sports Law Review

Volume 31 | Issue 2 Article 5

2021

Game On: The Epic Battle Between the FAA and the NLRA in Professional Sports After *Epic Systems Corp. v. Lewis*

Kurt McWilliams

GAME ON: THE EPIC BATTLE BETWEEN THE FAA AND THE NLRA IN PROFESSIONAL SPORTS AFTER *EPIC SYSTEMS CORP. V. LEWIS*

KURT MCWILLIAMS*

INTRODUCTION

Choices which best suit the goals and aspirations of the individual are a fundamental condition of freedom.[1] That includes making promises or agreements and being bound by them. It naturally follows that parties should also be free to resolve their contractual disputes by a means of their choosing, like arbitration. In the employment sector the hurdle to "liberty to contract" comes from the unequal bargaining power enjoyed by employers versus the potential employee.

Professional sports are particularly vulnerable to bargaining power disparity as there is generally one league, per sport, with a fixed number of teams.[2] The number of players that can play in any given season is therefore finite.[3] This supply/demand imbalance gives team owners power when dealing with athletes and player unions. If the oversupply of talented athletes was not enough, players have a limited time window in which they can perform at the highest competitive level. The average NFL career for example is between three to five

* Kurt McWilliams is a cum laude 2020 graduate of South Texas College of Law Houston. Kurt also has degrees in Polymer Science from the University of Southern Mississippi (B.Sc.) and Organic Chemistry from Texas A&M University (Ph.D.). Kurt has enjoyed a successful career as an innovator, research scientist, R&D leader, and Patent Agent. Kurt has initiated and collaborated on projects around the globe including research programs, business management, market development, and capital expenditures. Kurt looks to help entrepreneurs and companies manage their technical and IP portfolios and would like to extend this to individual brand and performance property rights. A truism in golf and life is that "you can't hit them all bad, keep striving for victory" unless someone invents a golf ball that lowers your handicap by seven shots.

1. CLAUDE D. ROHWER & ANTHONY M. SKROCKI, CONTRACTS IN A NUTSHELL 2 (7th ed. 2010).

2. NBA – 30 teams, NFL – 32 teams, MLB – 30 teams, NHL – 31 teams, WNBA – 12 teams, NWSL – 10 teams.

3. Maximum number of players allowed per league including supplemental or practice squads, NBA – 480 players, NFL – 1,760 players, MLB – 1,200 players, NHL – 731 players, WNBA – 144 players, NWSL – 234 players.

years.[4] Sitting out a single season can reduce the earning potential of an NFL player by twenty to thirty-three percent. This ticking clock puts the athlete at a further disadvantage with respect to employment bargaining power.

To restore the balance, employees can band together and collectively bargain for better wages, benefits, working conditions, etc. Collective bargaining agreements between player associations and leagues are present in most professional sports.[5] These agreements rely heavily on arbitration[6] to resolve disputes. Collective bargaining[7] and arbitration[8] are enshrined in law to encourage parties to aspire to their "better natures" and provide a recourse when they do not.[9] It is the collaboration of these two statutes that has driven labor law since the 1930's. The Supreme Court in 1964 stated in *Carey* that "the underlying objective of the National Labor Relations [Laws] is to promote collective bargaining agreements and to help give substance to such agreements through the arbitration process." [10]

Carey might have signaled the golden age of harmony between the Federal Arbitration Act (FAA)[11] and National Labor Relations Act (NLRA).[12] The Supreme Court itself proclaims a duty to "interpret Congress's statutes as a harmonious whole rather than at war with one another."[13] Expansion of territory by the judiciary and administrative agencies made it inevitable that conflict would arise. This paper will explore the evolution of the FAA and NLRA from bosom buddies to perpetual combatants and its potential impact on professional sports. Much like the demise of the Mega-Powers[14] in 1989 perhaps the FAA, a.k.a. Hulk Hogan, and NLRA, a.k.a. Randy "The Macho Man" Savage, were never meant to be friends.

---

4. Christina Gough, *Average Length of Player Careers in the NFL*, STATISTA (Sept. 10, 2019), https://www.statista.com/statistics/240102/average-player-career-length-in-thenationalfootballlength/#league/#:~:text=According%20to%20the%20source%2C%20the,for%20players%20across%20the%20NFL.

5. Professional Golfers of America Tour, Ladies Professional Golf Association, National Women's Soccer League, MMA, Boxing, Professional Wrestling do not operate under collective bargaining agreements.

6. Michael Hayes, *'Hey, We Were Here First!': Union Arbitration and the Federal Arbitration Act*, 70 SYRACUSE L. REV. 991 (2020) (citing statistics estimating ninety-nine percent of all major union-employer collective bargaining agreements resolve disputes with binding arbitration).

7. *See* Federal Labor Relations Act, 29 U.S.C.S § 157 (2021).

8. *See* Federal Arbitration Act, 9 U.S.C. § 2 (2021).

9. ROBERT A. HEINLEIN, *THE NOTEBOOKS OF LAZARUS LONG* 64 (1978) ("Never make your appeal to a man's better nature; he may not have one") (ebook).

10. *See* Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 265, 274 (1964) (Both the majority and dissent agreed to this sentiment).

11. *See* Federal Arbitration Act, 9 U.S.C. § 1 (2021).

12. *See* Federal Labor Relations Act, 29 U.S.C.S. § 151 (2021).

13. EPIC Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).

14. The Mega-Powers was a World Wrestling Federation team duo composed of Hulk Hogan and Randy "Macho Man" Savage. The duo was formed in 1987 and participated in tag team and individual events. As part of the ongoing performance scripts the partners provided mutual aid and assistance, until ultimately disbanding in 1989 due to internal jealousy and distrust. *See The Mega Powers*, Fandom, https://prowrestling.fandom.com/wiki/The_Mega_Powers (last visited Mar. 27, 2021).

I. EXPANSION OF FAA TO EMPLOYMENT CONTRACTS

The FAA[15] was born in 1925 when Congress codified their wish for parties to resolve commercial differences via arbitration. Congress instructed federal courts to uphold arbitration clauses as written by the parties, and the decisions resulting from them.[16] The FAA included two key prongs, the first that arbitration was applicable to commercial transactions defined as interstate commerce[17] and the second that enforcement of arbitration could be voided if the contract itself was revocable, a "saving clause."[18] The FAA does not cover "employment contracts"[19] for seamen, railroad, or any other class of workers engaged in interstate commerce.[20] However, the application of the FAA to employment contracts has been with us since 1957 in *Lincoln Mills*[21] and most recently confirmed in 2018 with *EPIC Systems Corporation.*[22] Over time the resistance to excluding arbitration from employment contracts has eroded.[23] A case in point is *Gilmer*.[24]

II. GILMER

The *Gilmer* Court concluded that the requirement of arbitration imposed by a third party was not in violation of the FAA employment agreement exclusion.[25] Arbitration was not part of the employment agreement between the employee and employer but rather a condition of professional registration with the New York Stock Exchange (NYSE). The NYSE bound both parties to resolve any "dispute, claim or controversy" between them via arbitration.[26] The Court determined that this includes contractual and statutory issues.[27] The

15. Federal Arbitration Act, 9 U.S.C. § 2 (2021).

16. *See generally id.*

17. Federal Arbitration Act, 9 U.S.C. § 1 (2021).

18. Federal Arbitration Act, 9 U.S.C. § 2 (2021).

19. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 541 (2019) (defining employment contracts as "Congress used the term 'contracts of employment' in a broad sense to capture any contract for the performance of *work* by *workers*").

20. Federal Arbitration Act, 9 U.S.C. §1 (2021) (stating it was due to pressure from labor unions that the employment contract exception was included. Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448, 467-468 (1957) (Frankfurter, J., dissenting)).

21. *See* Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448, 449 (1957).

22. EPIC Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1616 (2018).

23. *See* Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448, 467-68 (1957) (Frankfurter, J., dissenting). Examples include: the exception applied only to transportation workers; the absence of congressional action to reverse extension of FAA to employment contracts; Congress did specifically modify EEOC to add arbitration.

24. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

25. *See id.*

26. *Id.* at 23 (stating the parties never raised the FAA employment contract exception during litigation, so the court was not compelled to rule on it).

27. *Id.* at 24 (stating the Court established that arbitration was suitable for resolution of substantive issues unless Congress expressly precluded the enforcement via the text, legislative history, or underlying purpose).

attenuation of the arbitration requirement from the employment relationship was determined to be enough to avoid the FAA exemption.

The dissent was unmoved by the distinction of third-party action compelling arbitration. An employment agreement is an employment agreement, and as such, is exempt from FAA coverage.[28] The dissent would prefer to exempt from FAA protection employment agreements that are conditioned upon acceptance of arbitration as the means to settle employment disputes. The dissent felt that an employee in those cases should be allowed to pursue grievances, contractual or statutory, in a judicial forum.[29] The dissent further reminded us that earlier courts had found no difference between collectively or individually bargained employment contracts with respect to FAA exemption.[30] At this moment in time, represented and non-represented worker employment contracts were considered the same in effect.

Throughout the history of the case, the animus toward arbitration was on full display. The Court devoted two and a half pages[31] rebutting the perceived limitations of arbitration as a process and the competency of arbitrators. The Court corrected its prior decision in *Gardner-Denver Co.* in which the Court had expressed that arbitration of statutory claims was inferior to judicial resolution.[32] The decision in *Gilmer* reinforces the premise that arbitration is an equivalent forum for resolution of both contractual and statutory claims.[33]

That is not to say that arbitration is a replacement for judicial processes. Arbitration can only handle controversies arising out of the contract, like a refusal to perform in whole or part, or a written agreement to submit to arbitration related to an ongoing controversy.[34] The arbiter's power is exclusively granted and limited by the agreement entered into by the parties.[35] Arbitration can handle complex issues and larger classes of parties,[36] but that does not mean that arbiters are able to entertain legal theories outside of the scope of authority. The important aspect of *Gilmer* was that arbitration clauses in employment contracts would be held enforceable under the FAA. At the time

28. *Id.* at 40 (Stevens, J., dissenting).

29. *See Id.* at 41-42 (Stevens, J., dissenting).

30. *Id.* at 41 (Stevens, J., dissenting) (stating that the Court in *Lincoln Mills* had never explicitly ruled that the FAA exemption for employment contracts was binding on individual or collectively bargained employment contracts. But it also did not overrule the 5th Cir. which had determined that the exemption precluded employment agreements from FAA coverage).

31. *Gilmer*, 500 U.S. at 30–32 (Stevens, J., dissenting).

32. *Id.* at 34, n. 5 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 (1974)).

33. *Id.* at 30 (going further the Court said that a party does not lose the substantive rights afforded by a statute if it resolves the conflict via arbitration (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634, (1985))).

34. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 262 (2009).

35. *Id.* at 263 (citing Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 744 (1981)).

36. Brief for National Academy of Arbitrators as Amici Curiae Supporting Respondents, EPIC Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (2017 U.S. S. Ct. Briefs LEXIS 2838) (describing the ability of arbitration to handle class or collective arbitrations dealing with substantive law and contractual issues).

of *Gilmer* in 1991, most employment contracts that contained arbitration clauses were collective bargaining agreements. These were made possible by the passage of two key statutes, the Norris-LaGuardia Act (NLGA) [37] and the National Labor Relations Act (NLRA).[38]

III. ENTER THE NLRA

At the time of FAA passage there was no federal protection for the formation of unions or collective bargaining. This changed with the passage of the NLGA[39] in 1932 and completed with the NLRA[40] in 1935. These statutes opened the door for employees to form labor organizations and collectively bargain for better wages, benefits, and working conditions. The NLRA policy rationales included reducing the number of strikes and work stoppages, which directly impacted the flow of commerce within the United States.[41] Low worker productivity had the effect of raising consumer prices and curtailing supply which was especially crippling to New Deal[42] attempts to offset the great depression.

Once collective bargaining began to take hold, it was inevitable that the resolution of employment contract issues would be settled by non-judicial means. While there was no express condition for arbitration mentioned in the 1935 Act, the Act did encourage "practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions . . . ."[43] The evolution in labor law was leading collective bargaining agreements to allocate more and more of the potential disputes to alternative resolution procedures, like arbitration.

Collective bargaining agreements usually require individual employees to submit issues and grievances to the union. The union collates and decides which issues have merit and presents them individually or collectively to the employer for resolution. Many contracts require mediation as a first step, followed by arbitration, and then filing a complaint with an appropriate regulatory agency.

37. Norris-LaGuardia Act, 29 U.S.C. §101 (2021).
38. National Labor Relations Act, 29 U.S.C. §151 (2021).
39. *See* Norris-LaGuardia Act, 29 U.S.C. §101 (2021).
40. *See* National Labor Relations Act, 29 U.S.C. §151 (2021).
41. *Id.*
42. *See generally* Emergency Banking Act, Pub. L. 73-1, 48 Stat. 1 (1933); Banking Act of 1933, Pub. L. 73-66, 48 Stat. 162; Federal Emergency Relief Act (FERA), Pub. L. 72-302, 47 Stat. 709 (1932); National Industrial Recovery Act (NIRA), Pub. L. 73-67, 48 Stat. 195 (1933); Social Security Act of 1935, Pub. L. 74-271, 49 Stat. 620; Fair Labor Standards Act, Pub. L. 75-718, 53 Stat. 1060 (1938); *Federal Deposit Insurance Corporation*, HISTORY.COM (Aug. 21, 2018), https://www.history.com/topics/great-depression/history-of-the-fdic; *Works Progress Administration (WPA)*, HISTORY.COM (Jun. 10, 2019), https://www.hi story.com/topic s/great-depre ssion/works-progress-administration.
43. National Labor Relations Act, 29 U.S.C. §151 (2021).

In shop environments, grievances could also be addressed real time with the employer through an appointed shop steward.

In the professional sports arena, the NLRA changed the relationship dynamic between athletes and team owners. Prior to collective action, team owners as employers were under no pressure to deal with players consistently or fairly.[44] For instance, owners could contract two players of similar performance levels with entirely different compensation schemes. Major stars of the game received slightly better treatment, but the journeyman player worked without contract minimums, or guarantees.[45] Like many employers of their day, the owners were reluctant to provide fundamental benefits like proper safety equipment, medical insurance, and pensions unless forced to do so.[46] The NLRA changed that by expressly defining "unfair labor practices" exposing owners and leagues to fines and sanctions.[47]

Players unions and associations began to utilize arbitration to resolve contractual issues and grievances arising under the collectively bargained agreements. Many of these agreements contain alternate arbitration pathways depending on the type of dispute.[48] In the NBA collective bargaining agreement there is an express arbitration procedure by which an issue can be heard within

---

44. *See* Cym H. Lowell, *Collective Bargaining and the Professional Team Sport Industry*, 38 L. & CONTEMP. PROBS. 3 (1973) (commenting on the improvement that collective bargaining brought to professional sports. The bare-bones benefits received was compounded by owners viewing players as property for use as they saw fit. The dreaded "reserve clause" under which the careers of players could be at the mercy of capricious owners who would routinely blacklist or freeze out players. Okay that behavior still exists. The idea that players could oppose owner actions or force them to act reasonably was hard to conceive prior to the NLRA).

45. *See generally* Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267 (2008).

46. *See generally OSHA Celebrates 40 Years of Accomplishments in the Workplace*, U.S. DEPT'T OF LAB., https://www.osha.gov/osha40/OSHATimeline.pdf (last visited Feb. 20, 2021) (Occupational Safety and Health Administration (OSHA) established safety standards – 1971); Aaron E. Carroll, *The Real Reason the U.S. Has Employee-Sponsored Health Insurance*, N.Y. TIMES (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/upshot/the-real-reason-the-us-has-employer-sponsored-health-insurance.html (National War Labor Board provides a tax exemption for employee provided health insurance – 1942); Internal Steven A. Bank, *Revenue Act of 1954*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/history/encyclop edias-almanacs-transcripts-and-maps/internal-revenue-a ct-1954 (last visited Mar. 27, 2021) (Revenue Act established tax exemptions for employer provided pensions – 1954).

47. National Labor Relations Act, 29 U.S.C. §151 (2021).

48. *See e.g., Collective Bargaining Agreement between National Hockey League and National Hockey League Players' Association*, NHLPA (Set. 16, 2012), https://www.nhlpa.com/the-pa/cba [hereinafter NHL CBA] (describing the NHL CBA's salary, impartial and system arbitration procedures); *Collective Bargaining Agreement*, NBPA (Jan. 19, 2017), https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf [hereinafter NBA CBA] (stating the NBA utilizes impartial, system and an expedited arbitration procedure); *Collective Bargaining Agreement*, NFLPA (Aug. 4, 2011), https://nflpaweb.blob.core.windows. net/media/Default/PDFs/2011%20CBA%20Updated%20with%20Side%20Letters%20thru%201-5-15.pdf [hereinafter NFL CBA] (stating the NFL uses a benefits, impartial and system arbitration path); *Collective Bargaining Agreement between Major League Soccer and Major League Soccer Players Union*, MLSPA, https://s3.amazonaws.com/mlspa/Collective-Bargaining-Agreement-February-1-2015.pdf?mtime=20180213190926 [hereinafter MLS CBA] (stating the MLS uses a single arbitration procedure for all disputes); *2017-2021 Basic Agreement*, MLBPA, https://www.mlbplayers.com/cba [hereinafter MLB CBA] (last visited Mar. 7, 2021).

24 hours of a grievance being filed.[49] The requirement for employees to use contractually mandated dispute resolution in collective bargaining agreements has not been without challenge.

IV. PYETT (STATUTORY CLAIMS)

The court in *Pyett*[50] faced a situation like *Gilmer*[51] in which a worker challenged the arbitration requirement of an employment contract. In this case the employee was covered by a collective bargaining agreement. The lower courts held that a collective bargaining agreement could not waive an individual's rights to seek a judicial forum for statutory claims.[52] The lower courts were not sure if *Gilmer* had superseded a prior holding in *Gardner-Denver* with respect to collective bargaining agreements.[53]

The NLRA[54] provides that an individual can be represented in all matters[55] by the "labor organization."[56] In *Pyett*, the court determined that the use of arbitration was "part and parcel of the collective bargaining process itself"[57] and that a statutory grievance[58] was no different than any other grievance to be addressed. The court could find nothing in the law that suggested a distinction between individually or collectively bargained agreements on the permissibility of arbitration clauses.[59] The court did suggest that if the parties wished to arbitrate statutory claims it should be "explicitly stated"[60] in the collective bargaining agreement.

---

49. NBA CBA, *supra* note 48.

50. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).

51. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

52. Pyett v. Pa. Bldg. Co., 2006 U.S. Dist. LEXIS 35952 (S.D.N.Y. May 31, 2006); Pyett v. Pa. Bldg. Co., 498 F.3d 88 (2d Cir. 2007).

53. *See Pyett*, 498 F.3d at 92.

54. National Labor Relation Act 29 U.S.C §152(5), §2(5) (2021) (stating the freedom to contract is one of the fundamental policies of the NLRA).

55. *14 Penn Plaza LLC.*, 556 U.S. at 274–75, 279 (Stevens, J., dissenting) (voicing concerns that the reversal of *Gardner-Denver* would negatively impact individual employees' rights to bring statutory claims against employers. The central thrust is a discomfort with collective bargaining as it subordinates the rights of the individual with respect to the best interests of the collective. The dissent further suggested that stare decisis provides that an individual may waive their rights in an employment contract, but not in a collectively bargained agreement (Souter, J. citing Wright v. Universal Maritime Service Corp., 525 U.S. 70, 80 (1998))).

56. National Labor Relation Act 29 U.S.C §152(5), §2(5) (2021) (defining the NLRA as "any organization of any kind, or an agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions or work"). For professional athletes, the collective bargaining is done by player associations and not traditional unions. Even though the associations are recognized by traditional unions like the AFL-CIO or Teamsters.

57. *14 Penn Plaza LLC.*, 556 U.S. at 256 (citing Textile Workers v. Lincoln Mills of Ala., 353 U.S. 448 (1957)).

58. *Id.* at 251 (stating *Pyett* was an age discrimination case under the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 621 (2000)).

59. *Id.* at 258.

60. *Id.* at 258.

V. TAG IN ANOTHER COMBATANT – NATIONAL LABOR RELATIONS BOARD

Pyett seemed to close the door on challenges to FAA enforcement of arbitration clauses in employment contracts. Not so fast, in 2012 the NLRB began invalidating individualized arbitration clauses per Section 7 of the NLRA.[61] Two rationales were offered, the first was a right of employees "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[62] The NLRB reasoned that "mutual aid or protection" included the efforts of an employee to *pursue*[63] class action suits for similarly situated employees.[64] The second was that an arbitration clause that "explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful."[65] The Board has applied this to arbitration clauses which "when reasonably interpreted"[66] would lead an employee to believe that only arbitration can be used to pursue disputes against the employer.

VI. IS CLASS ACTION AN NLRA RIGHT?

The pivotal case involved an employee working as a construction superintendent for D.R. Horton who, as a condition of employment, signed a Mutual Arbitration Agreement (MAA). The MAA contained two passages that were particularly troubling to the NLRB. The first was for employees "to submit all employment related disputes and claims to arbitration"[67] and the second that the arbitrator "may hear only Employee's individual claims and does not have the authority to fashion a proceeding as a class or collective action . . . ."[68] The NLRB determined that the limitation of arbitration to individual claims would foreclose an employee's right to provide "mutual aid or protection" as preserved in Section 7.[69] Furthermore, any employment contract that violated Section 7 would be illegal and unenforceable.[70] An illegal contract is not eligible for FAA protection due to the "saving clause" of the FAA.[71]

61. In re D.R. Horton, Inc., 357 NLRB 2277 (N.L.R.B. Jan. 3, 2012).
62. Federal Labor Relations Act, 29 U.S.C.S § 157 (2021).
63. Murphy Oil USA, Inc., 2015 NLRB 774 (N.L.R.B. Oct. 26, 2015).
64. *In re D.R. Horton, Inc*., 357 NLRB at 2286.
65. E. A. Renfroe & Co., 2019 NLRB LEXIS 710 (N.L.R.B. Dec. 16, 2019).
66. Boeing Co., 2017 NLRB LEXIS 634 (N.L.R.B. Dec. 14, 2017).
67. *In Re D.R. Horton, Inc*., 357 NLRB at 2278.
68. *Id.* at 2291.
69. *Id.* at 2283.
70. *Id.* at 2286.
71. *See* D.R. Horton, Inc. v. NLRB, 737 F.3d 348, 358 (5th Cir. 2013).

The Fifth Circuit ultimately refused to affirm the Board's decision and ruled that access to class action suits are not substantive rights but procedural ones.[72] The court referenced numerous rulings[73] that provided no substantive right to proceed collectively. Class action attorneys may wish for a substantive right of clients to file a class action, but the Fifth Circuit could not find one. The NLRB continued this reasoning in similar cases, some of which were affirmed by other circuits[74] setting the stage for the battle royal, *EPIC Systems Corporation.*

VII. THE SHOWDOWN, *EPIC SYSTEMS CORP.*

EPIC Systems Corporation[75] encompassed three cases, *Ernst & Young, LLP v. Morris,*[76] *Murphy Oil USA, Inc. v. NLRB*[77] and *Lewis v. EPIC Systems, Corp.*[78] The question was if an employee has a right to class or collective action if they agreed to be bound by individual arbitration?[79] The employees alleged job misclassification[80] and wished to recover lost overtime payments via class action.[81] When large employers are involved, class action suits can result in big settlements and fees for attorneys. In contrast, individualized arbitration disputes are smaller and less attractive as fee generators.[82]

---

72. *Id.* at 359.

73. *Id.* at 357–58 (citing AmChem Prods., Inc. v. Windsor, 521 U.S. 591, 612-613 (1997); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332 (1980); Reed v. Fla. Metro. Univ. Inc., 681 F.3d 630, 643 (5th Cir. 2012); Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991); Carter v. Countrywide Credit Indus. Inc., 362 F.3d 294, 298 (5th Cir. 2004); Adkins v. Labor Ready, Inc., 303 F.3d 496, 506 (4th Cir. 2002); Kuehner v. Dickinson & Co., 84 F.3d 316, 319-320 (9th Cir. 1996)).

74. The Seventh and Ninth Circuits endorsed and affirmed the actions of the NLRB in granting class action as a statutory right. *See* Stephanie Greene & Christine Neylon O'Brien, *EPIC Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreement--#TimesUp on Workers' Rights*, 15 STAN. J. C.R. & C.L. 43 (2019).

75. EPIC Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

76. Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016).

77. Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015). Interestingly, the procedural history of Murphy Oil USA, Inc. is a doppelganger of D.R. Horton, Inc. v. NLRB, 737 F.3d 348 (5th Cir. 2013). The NLRB repeated its ruling that the agreement to individualized arbitration foreclosed collective action in violation of Section 7 of the NLRA. *Murphy Oil USA, Inc.*, 808 F.3d 1013. The NLRB then petitioned the Fifth Circuit of Appeals to review the petition *en banc* to overrule its decision in *D.R. Horton*. *Id.* The Fifth Circuit of Appeals was "disinclined to acquiesce to their request." *Id.*; PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003).

78. Lewis v. EPIC Sys. Corp., 823 F.3d 1147 (7th Cir. 2016).

79. Numerous circuits followed the Fifth Circuit's lead in *D.R.Horton*: *see* Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1336 (11th Cir. 2014), *cert. denied*, 573 U.S. 948 (2014); Richards v. Ernst & Young, LLP, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013), *cert. denied*, 574 U.S. 932 (2014); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053–55 (8th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013).

80. *See* Blake R. Bertanga, *The "Miscellaneous Employee": Exploring the Boundaries of the Fair Labor Standards Act's Administrative Exemption*, 29 HOFSTRA LAB. & EMP. L. J. 485 (2012).

81. *Id.* at 497.

82. EPIC Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1647 (2018) (Ginsburg, J., dissenting).

Class actions of this type are not new. It was estimated that in the early 2000's employers were spending nearly $2 billion a year in job classification class-action settlements.[83] This might lead one to believe that employers are villains,[84] but the classification of jobs exempt from wage and overtime regulations is statutory.[85] The exempt classifications are fixed while the wage basis of employees is continually changing. Almost 11 million service sector jobs were added prior to the 2004 revamp that met the antiquated exempt categories. These employees would have traditionally been subject to wage and overtime regulations.

Newton's third law of motion defines that "for every action . . . there is an equal [but] opposite reaction."[86] In response to the onslaught of class action suits, employer's began requiring employees to agree to individualized arbitration as a condition of employment. Represented workers have long used arbitration to settle grievances and contractual disputes. For non-represented workers, especially lower-level executive, administrative and professional workers this was a new development.

To offset the use of individualized arbitration the NLRB and the dissent in *EPIC Systems Corporation* wished to expand the NLRA to include class action under the "mutual aid or protection" umbrella. Invalidating[87] individualized arbitration in favor of class action could overcome the perceived reluctance of lawyers[88] to take low fee cases.[89] A right to class action was already in the Federal Labor Standards Act (FLSA)[90] permitting employees to collectively

83. Bertanga, *supra* note 81, at 498 (citing Mark Wilson, *Omnibus Spending Bill Provisions Pt. I: New Overtime Law to End Pay for Up to 8 Million Workers*, DEMOCRACY NOW (Jan. 22, 2004), https://www.democracynow.org/2004/1/2 2/omnibus_spending_bill_provisions_pt_i).

84. *See EPIC Sys. Corp.*, 138 S. Ct. at 1633. It is true that in some cases an employer will classify employees incorrectly to avoid labor costs, but that it is partly due to the legislative branch not updating the categories on regular basis.

85. 29 U.S.C.A. § 213 (2021).

86. NASA, *Newton's Third Law: Applied to Aerodynamics*, GLENN RSCH. CTR., https://www.grc.nasa.gov/WWW/K12/airplane/newton3.html#:~:text=His%20third%20law%20states%20that,opposite%20force%20on%20object%20A (last visited Feb. 24, 2021) (citing Issac Newton, Principia Mathematica Philosophiae Naturalis (1686)).

87. *EPIC Sys. Corp.*, 138 S. Ct. at 1646. The dissent sees the NLRA as "an implied repeal" of the FAA in the event of conflict between the two statutes. *Id.*

88. Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 553 (S.D.N.Y. 2011) (citing Caban v. J.P. Morgan Chase & Co., 606 F. Supp. 2d 1361, 1371 (S.D. Fla. 2009)) ("Sutherland's only option in pursuing her individual claim is thus to retain an attorney on a contingent fee basis. But just as no rational person would expend hundreds of thousands of dollars to recover a few thousand dollars in damages, 'no attorney (regardless of competence) would ever take such a case on a contingent fee basis'").

89. SAMUEL ESTREICHER & JOY RADICE, BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA, Preface (2016) (ebook) (postulating that persons making less than $50,000 USD per year would not be able to afford legal representation for claims such as: nonfatal medical malpractice, non-class action employment disputes, minor housing disputes, wills and guardianships, divorces, child custody, warranty consumer claims, bankruptcy, denied governmental claims, veterans seeking mental health or medical assistance from the VA, immigrants seeking asylum) (emphasis added).

90. Federal Labor Standards Act 29 U.S.C.S §§ 201-19 (2021).

recover lost wages. It seems a drastic action to create an additional NLRA right just to allow attorneys to recover higher fees.

The dissent made a curious comment that the opportunity cost for selecting arbitration is unfavorable when compared to judicial remedies.[91] This was based on figures provided in a parallel case involving *Ernst & Young*.[92] The plaintiff entered into the record, uncontested by the defendant, an arbitration cost estimate of $160,000 for attorney's fees, costs of $6,000, and an expert in accountancy which may exceed $33,500.[93] What? The plaintiff's case was for an overtime loss of roughly $1,867.02.[94] The Plaintiff went further to complain that an award of fees was at the discretion of the arbitrator and therefore unreasonable. Discretion of a judge seems to be preferred to that of an arbitrator.

A typical arbitration costs[95] between $1,000 to $3,000 dollars for costs and share of arbitrator's fees.[96] One would hope that attorney's fees for a single arbitration are no more than the arbiter's fees, but that still places the breakeven cost of arbitration at around $6,000. This scenario favors the employer until the value of the worker's individual claim exceeds the breakeven point. This is true of both arbitration and judicial action. Collective action spreads the costs over more contributors reducing the energy barrier to initiate dispute resolution. Once a critical mass of workers claims is reached, the balance shifts in the workers' favor to obtain fair settlement.

It is safe to pose that arbitration is more economical than judicial relief, and collective action has a higher return on investment than individual suit.[97] The best possible outcome for workers would be collective arbitration. This is the model unions have been using for decades to resolve workplace disputes. The dissent in *EPIC Systems Corporation* parroting the NLRB advocated instead for contingent representation of a class action and a judicial forum where fee shifting provisions were in place.

Judicial class action would seem to be a panacea for employees to obtain justice. A better description would be that it deters employers from engaging in or repeating the practice in the future. Judicial class action doesn't always provide relief for affected employees. In *Hobon*,[98] delivery drivers for Pizza Hut filed a class action under the FLSA to recover unpaid delivery expenses. The

91. *EPIC Sys. Corp.*, 138 U.S. at 1636, 1647 (Ginsburg, J., dissenting).

92. *Sutherland*, 768 F. Supp. 2d at 547.

93. *Id.* at 551–52.

94. *Id.*

95. *See generally* Paul Stephan, *Nothing to Say for the FAA: Why Arbitration Does Not Offer Unparalleled and Mutual Benefits*, UNIV. OF MEM. L. REV., Forthcoming, 42-43 (Feb. 1, 2020).

96. *See* A. Michael Froomkin, *ICANN's Uniform Dispute Resolution Policy'—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 676 (2002).

97. Keith N. Hylton, *The Economics of Class Actions and Class Action Waivers*, 23 SUP. CT. ECON. REV. 305, 308 (2015).

98. Hobon v. Pizza Hut of Southern WI, Inc., No. 17-cv-947-slc, 2019 WL 3765832, at *1 (W.D. Wis. Aug. 9, 2019).

class action was handled by a single law firm that ultimately negotiated a settlement of $500,000, to which $195,613 was paid in attorney's fees and costs.[99] The individual drivers received $144.03 as compensation, is that justice? Who really benefitted from the action?

In the *EPIC Systems Corporation* majority opinion, the Court reiterated that the purpose of the FAA was to provide parties with a method to resolve contractual disputes without resorting to judicial action.[100] At the heart of the disagreement is whether the NLRA can be used to deem an employment contract unconscionable,[101] or revocable[102] and subject to the saving clause of the FAA. The Court suggested that the conditions for revocation or illegality of a contract were limited to generally applicable defenses of fraud, duress, or unconscionability.[103] The Court settled on what is not included are "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[104] It would be odd to say that an arbitration clause renders the contract illegal, thus exempting it from the Act that says the arbitration clauses are legal. Nice try.

VIII. *EPIC SYSTEMS CORP.* AND UNCONSCIONABILITY

Justice Thomas in concurrence[105] thought that unconscionability was resolved in earlier cases like *American Express*[106] and *Concepcion*[107]. The saving clause is limited to defenses that may be invoked related to contract formation, not public policy issues that render a contract illegal. This public policy argument is still being used to invalidate arbitration provisions in employment contracts. In a state law case, *Ramos*, a California Appeals Court ruled that in California, class action waivers can be unconscionable in employment contracts.[108] It was acknowledged that *Concepcion* established the preemption of the FAA and overruled a California law banning class action waivers in consumer contracts. What was distinguished was that *Concepcion* never referenced employment contracts or overruled the leading case in California, *Armendariz.*[109] As such the California court viewed mandatory

99. *Id.*

100. *See* EPIC Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018).

101. *Id.* at 1622 (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).

102. *See* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1018 (5th Cir. 2015).

103. *EPIC Sys. Corp.*, 138 S. Ct. at 1616 (2018) (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).

104. *Id.* at 1622.

105. *Id.* at 1632–33.

106. *Id.* at 1632 (citing Am. Express Co., v. Italian Colors Rest., 570 U.S. 228, 239 (2013) (Thomas, J., concurring)).

107. *Id.* at 1633 (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 353 (2011) (Thomas, J., concurring)).

108. Ramos v. Superior Court, 239 Cal. Rptr. 3d 679, 691-95 (Cal. App. 5th 2018).

109. *See generally* Armendariz v. Found. Health Psychcare Serv., Inc., 6 P.3d 669 (Cal. 2000).

arbitration clauses covering statutory claims in employment contracts unconscionable. Wait, wasn't this covered in *Pyett*?

The California courts view employment contracts as contracts of adhesion unless the potential employee can negotiate the terms.[110] *Gilmer* established that unequal bargaining power is not a sufficient reason to hold that arbitration clauses in employment contracts are never enforceable.[111] Collective bargaining agreements can be viewed as contracts of adhesion like any other employment contract.[112] To be fair, there is value in having collective negotiating power and comfort in "better the devil you know than the devil you don't."[113] But for the employee to earn a paycheck they must accept the terms of the agreement whether collectively bargained for or not.[114] This is especially true of workers who are hired during the term of the collective agreement as they neither participated in its creation or ratification.

A similar approach succeeded in *Ziglar* in which a clause to arbitrate was invalidated under Arizona employment laws.[115] The clause was deemed unconscionable because it did not specifically allow for treble damages, attorney's fees, costs, or hardship cost reduction as permitted under Arizona wage statutes and judicial procedures.[116] Once more it was posited that the attorney's fees for arbitration would be insurmountable for an individual employee to bear without fee shifting. In Arizona, the arbitration clause must incorporate every aspect of state employment law and judicial procedure. Is this really going to make arbitration more effective? This is a "ticky tack"[117] whistle on an NBA player for hand checking, it may be true but was the foul necessary?

Overall, *EPIC Systems Corporation* did not have a profound effect on professional sports. Team sports are predominantly covered by collective bargaining agreements or athletes are represented by players associations.

---

110. *Ramos*, 239 Cal. Rptr. 3d at 691 (describing how collectively bargained agreements are exempted, they are perceived to be negotiated on equal terms).

111. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991).

112. *Id.* at 36 (Stevens, J., dissenting) (citing Hearing on S. 4213 and S.4214, Subcommittee on the Judiciary, 67th Cong., 4th Sess., 9 (1923). The dissent in Gilmer quoted Senator Walsh who stated that "It is the same with a good many contracts of employment. A man says 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it").

113. *The Phrase Finder*, PHRASES.ORG, https://www.phrases.org.uk/bulletin_b oard/5/messages/791.html (Last visited Mar. 5th, 2021) (stating that the phrase has been attributed to R. Taverner, Collection of Irish Proverbs, 1539).

114. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 275 (citing Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 744, (1981) The dissent reiterated the concern that collectively bargained terms benefit the majority and may not serve the interests of an individual employee. In that scenario it doesn't matter to that employee how the bargain was struck; the result is the same "take it or leave it." *Id.*

115. Ziglar v. Express Messenger Sys. Inc., 2019 U.S. Dist. LEXIS 34951.

116. *Id.*

117. A ticky tack foul is a basketball term to describe an unnecessary foul called by the referee. The purported foul did not disrupt game play or involve significant contact between players.

Individual sport athletes are considered independent contractors[118] and outside the scope of the NLRA. The independent contractor designation also applies to many of the support staff and vendors used to stage athletic events. Professional sport operates with a significant portion of the labor pool outside the scope of the battle between the FAA and NLRA. What *EPIC Systems Corporation* did was challenge the NLRB to find alternative rationales to invalidate employment contracts.

IX. DO ARBITRATION CLAUSES NEED DISCLAIMERS?

Apparently so. Since the demise of the Section 7 class action right in *EPIC Systems Corporation* the NLRB has emphasized the importance of the second *D.R. Horton* invalidation theory. An arbitration clause can be invalidated for not informing the employee of administrative law options available to them. If the Board feels that the language misleads employees into thinking that arbitration "restricts employee access to the Board and its processes,"[119] then it violates Section 7 of the NLRA. The arbitration clause is deemed invalid and unenforceable. Since *EPIC Systems Corporation* NLRB judges have issued more than 20 opinions[120] invalidating arbitration clauses using this approach.[121]

Gilmer established that a clause that *forbids* filing an administrative agency action is invalid.[122] The murky view is when arbitration clauses are facially

118. *See* Vincent Salminen, *UFC Fighters Are Taking a Beating Because They Are Misclassified as Independent Contractors. An Employee Classification Would Change the Fight Game for the UFC, Its Fighters, and MMA*, 7 PACE INTELL. PROP. SPORTS & ENT. L. F. 193 (2017).

119. Hooters Ontario Mills, 2020 NLRB LEXIS 151, at *1 (N.L.R.B. May 6, 2020).

120. *See, e.g.*, *id.*; *see, e.g.*, IIG Wireless, Inc., 2020 NLRB LEXIS 223 (N.L.R.B. Apr. 30, 2020); Aryzta, LLC, 2020 NLRB LEXIS 256 (N.L.R.B. Apr. 13, 2020); Dynamic Nursing Servs., Inc., 2020 NLRB LEXIS 136 (N.L.R.B. Mar. 27, 2020); Countrywide Fin. Corp., 2020 NLRB LEXIS 27 (N.L.R.B. Jan. 24, 2020); Bloomingdale's Inc., 2020 NLRB LEXIS 19 (N.L.R.B. Jan. 21, 2020); Haynes Bldg. Servs., LLC, 2019 NLRB LEXIS 737 (N.L.R.B. Dec. 23, 2019); CBRE, Inc., 2019 NLRB LEXIS 735 (N.L.R.B. Dec. 16, 2019); E.A. Renfroe & Co., 2019 NLRB LEXIS 710 (N.L.R.B. Dec. 16, 2019); Uber Techs. Inc., 2019 NLRB LEXIS 716 (N.L.R.B. Dec. 12, 2019); Kelly Servs. Inc., 2019 NLRB LEXIS 705 (N.L.R.B. Dec. 12, 2019); Private Nat'l Mortg. Acceptance Co. LLC, 2019 NLRB LEXIS 684 (N.L.R.B. Dec. 9, 2019); Keiser Univ., 2019 NLRB LEXIS 669 (N.L.R.B. Nov. 27, 2019); Four Seasons Healthcare & Wellness Ctr., LP, 2019 NLRB LEXIS 654 (N.L.R.B. Nov. 21, 2019); Planet Beauty, 2019 NLRB LEXIS 551 (N.L.R.B. Oct. 8, 2019); Cedars-Sinai Med. Ctr., 2019 NLRB LEXIS 542 (N.L.R.B. Sept. 30, 2019); Prime Healthcare Paradise Valley, LLC, 2019 NLRB LEXIS 351 (N.L.R.B. Jun. 18, 2019); GC Servs. Ltd. P'ship, 2019 NLRB LEXIS 187 (N.L.R.B. Mar. 19, 2019); Concord Honda, 2019 NLRB LEXIS 166 (N.L.R.B. Mar. 7, 2019); We Work Cos. Inc., 2019 NLRB LEXIS 155 (N.L.R.B. Mar. 1, 2019); Hobby Lobby Stores, Inc., 2019 NLRB LEXIS 17 (N.L.R.B. Jan. 2, 2019); Applebee's, 2018 NLRB LEXIS 611 (N.L.R.B. Dec. 4, 2018).

121. Ironically, the Board waits for an aggrieved employee to file an NLRA or FLSA action so it can invalidate the arbitration clause on the basis that the language of the clause leads the employee to believe they cannot file an NLRA or FLSA action.

122. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (resolving this issue in *Gilmer* when the Court pushed back on the idea that arbitration would undermine agency enforcement of statutory rights. "An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action").

neutral[123] and do not address issues beyond the clause itself.[124] The Board focuses on determiners like "any"[125] and "all" to extrapolate that the "reasonable interpretation"[126] of the clause by employees would be to prohibit access to the Board and its processes. The arbitration clauses that are found lawful have conspicuously displayed verbiage excepting agency action from arbitration.[127] This is a collateral strike on arbitration which skirts the direct assault prohibition penned in *EPIC Systems Corporation.*[128]

A quirky outcome of this approach is the possible effect on employment contracts including collective bargaining agreements. A survey of various professional sports collective bargaining agreements[129] reveals that arbitration clauses do not mention the NLRA or any administrative agency. There is no disclaimer language and "any" and "all" are used to describe the breadth of arbitration coverage. Are we to believe that represented workers are necessarily foreclosed from filing unfair labor practice actions? Of course not. Are these clauses going to be determined to be invalid, rendering arbitration unusable? No, because the NLRB views collective bargaining agreements as being valid and enforceable merely because they were collectively bargained.

This seems to create a diverging set of rights for represented and non-represented workers. It was established in *Pyett*[130] that an employee subject to

123. Boeing, 2017 NLRB LEXIS 634, 2 (N.L.R.B. Dec. 14, 2017) (stating if a work rule or employment contract clause does not "explicitly restrict" Section 7 rights, then it is considered facially neutral).

124. *See generally* WARREN'S FORMS OF AGREEMENTS, *FORM 40.2.15 Executive Employment Agreement with Grant of Phantom Stock Options*, FORM 770-40.2.15, LEXIS; CALIFORNIA LEGAL FORMS TRANSACTION GUIDE, *Employment Agreements: Termination of Employment*, FORM 187-CL-85.120.11, LEXIS (Matthew Bender & Company, Inc.); *28 California Legal Forms--Transaction Guide § 85.551* (2020) Provision for Compulsory Arbitration of Matters in Dispute; WARREN'S FORMS OF AGREEMENTS FORM, *40.2.01 AT-WILL EMPLOYMENT AGREEMENT* (Matthew Bender & Company, Inc.); D. PATRICK O'REILLY & D. BRIAN KACEDON, DRAFTING PATENT LICENSE AGREEMENTS 327 (8th ed. 2015).

125. *Clauses*, AM. ARBITRATION ASS'N, https://adr.org/Clauses (last visited Mar. 5, 2020)(stating that the American Arbitration Association example clauses for arbitration use "any" as the determiner to describe controversies and claims, but does not mention other available remedies, it only focuses on arbitration. "Any controversy or claim arising out of or relating to this [employment application; employment ADR program; employment contract] shall be settled by arbitration administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof").

126. *Boeing*, NLRB at 7, 16 (discussing that the NLRB instituted an updated test to evaluate work rules that encumbered Section 7 rights. The first prong of the test is to determine if a rule when reasonably interpreted "would have no tendency to interfere with Section 7 rights and therefore no balancing of rights and justifications is warranted." It remains to be seen if this test will fare better than the previous *Lutheran Heritage Village-Livonia* test. After 15 years of implementation the NLRB had to finally admit it "defied all reasonable efforts to make it yield predictable results").

127. *See* Royal Motor Sales, 2020 NLRB LEXIS 294 (N.L.R.B. May 8, 2020); *see also* Wendy's Rest., 2019 NLRB LEXIS 510 (N.L.R.B. Sept. 11, 2019).

128. EPIC Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (determining that the FAA saving clause did not allow for "defenses that apply only to arbitration or that derive their meaning from the fact than an agreement to arbitrate is at issue").

129. NFL CBA, *supra* note 48; NBA CBA, *supra* note 48; MLS CBA, *supra* note 48; NHL CBA, *supra* note 48.

130. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 262 (2009).

collective bargaining can have their section 7 rights prospectively waived by the labor organization. The NLRB reiterated this position in *D.R. Horton*[131] by stating that the waiver of choice of dispute resolution was legal because it was collectively bargained for. Labor unions in their *EPIC Systems Corporation* amicus brief[132] expressed that non-represented workers cannot prospectively waive their statutory rights to collective adjudication. An individual employee cannot waive their rights, but a labor organization can? [133]

Professional sports cover both represented, mostly team, and non-represented, individual, participants. The rule seemingly provides that represented workers get "one bite of the apple" and are bound by the collective agreement.[134] Conversely, a non-represented worker can make an agreement and not be bound because the Board views individual employment contracts as contracts of adhesion needing a disclaimer.[135] Essentially an arbitration clause *sans* disclaimer is deemed invalid and unenforceable against non-represented workers, but the same clause applied to represented workers is valid? That doesn't feel right.[136]

Consider the case of DeMeco Ryans,[137] an NFL player bound by a collective bargaining agreement. Ryans was a player for the Philadelphia Eagles injured in a game against the Houston Texans. Ryans maintains that his injury was caused by the playing conditions of the field used by the Texans. This injury was career ending and Ryans filed a negligence action in the selection of an "unreasonably dangerous" artificial turf.[138] The case was dismissed in favor of arbitration as Ryans was subject to an arbitration clause in the NFL collective bargaining agreement.[139]

---

131. In re D.R. Horton, Inc., 357 NLRB 2277, 2287 (N.L.R.B. Jan. 3, 2012).

132. Brief for Ten Int'l Lab. Unions, Nat'l Emp. Law Project, and Nat'l Emp. Law. Ass'n as Amici Curiae Supporting Respondents, EPIC Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (Nos. 16-285, 16-300, and 16-307), 2017 LEXIS 2893 at 54.

133. *D.R. Horton*, 357 NLRB at 2286 (acknowledging that this question had already been addressed in *Pyett* when that court could see no "distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative").

134. *Id.* (arguing that once an employee has collectively bargained, they have effectively traded their rights, like the right to strike, in return for concessions from the employer, and the resulting employment contract satisfies the collective action elements of section 7 and like checking a box, the contract terms therefore must comply with the NLRA).

135. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 39 (1991) (Stevens, J., dissenting) (citing Hearing on S. 4213 and S.4214, Subcommittee on the Judiciary, 67th Cong., 4th Sess., 9 (1923), the dissent in Gilmer quoted Senator Walsh who stated that "It is the same with a good many contracts of employment. A man says 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it").

136. *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 275 (2009) (citing Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 744 (1981) (the dissent reiterated the concern that collectively bargained terms benefit the majority and may not serve the interests of an individual employee, and in that scenario it doesn't matter to that employee how the bargain was struck, the result is the same "take it or leave it").

137. Houston NFL Holding L.P. v. Ryans, 581 S.W.3d 900 (Tex. App. 2019).

138. *Id.* at 904.

139. *Id.* at 911; NFL CBA, *supra* note 48.

Contrast that with Randy Couture,[140] an MMA fighter wishing to switch promotors. Randy was under contract with Zuffa, known as UFC, that heavily favored the UFC with respect to most aspects of the contract.[141] Fighter contracts hold the championship belt for contracts of adhesion.[142] Randy renounced his affiliation with UFC and signed a new contract with a rival promotor HDNet MMA. UFC filed suit and demanded that Randy's contract term and the subsequent violation of the contract be heard in arbitration. The Texas court ruled that indeed the FAA required that the contract be submitted for arbitration prior to any judicial action.[143]

The interesting part would have been if Randy were an employee and not an independent contractor. As such, Randy could have filed an unfair labor action with NLRB, and under the Board's new line of reasoning, could have invalidated the arbitration clause for not containing an NLRB disclaimer. Randy would then have been able to file a judicial action free of the arbitration clause.

Let's not forget DeMeco Ryans. Coverage by a collective bargaining agreement would satisfy the NLRB "one bite of the apple" view. The NLRB would not review the arbitration clause to deem it invalid because the NLRB gives deference to the collective agreement.[144] If the UFC and NFL contracts both had the same arbitration clause it would be unenforceable for the UFC but binding for the NFL? This paradox would change Section 7 of the NLRA to protect a worker who "engages in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, *unless already represented by a labor organization or collective bargaining agreement.*" Of course, that is not what it says. In the end the category of worker, represented or non-represented, should mean less than ensuring equal treatment under the NLRA.

140. Zuffa, LLC v. HDNet MMA 2008 LLC, 262 S.W.3d 446 (Tex. App. 2008).

141. Jonathan Snowden, *The Business of Fighting: A Look Inside the UFC's Top-Secret Fighter Contract*, BLEACHER REP. (May 14, 2013), https://bleacherrepo rt.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract.

142. *See* Michael Conklin, *Two Classifications Enter, One Classification Leaves: Are UFC Fighters Employees or Independent Contractors?*, 29 S. CAL. INTERDISC. L.J 227 (2020).

143. *Zuffa*, 262 S.W.3d at 451.

144. David Engstrom, *Florence St. John and the Unfinished Fight for Fair Employment*, STAN. LAW. MAG. (Nov. 16, 2017), https://law.stanford.edu/stanford-lawyer/articles/florence-st-john-and-the-unfinished-fight-for-fair-employment/. A female autoworker named Florence St. John was being paid less than men operating the same machinery in the same factory. The pay scales were established through collective bargaining and the union refused to address the disparity or support her grievance. She banded together with two dozen other women workers and filed a mutual action in federal court which was one of the first gender based "equal pay" victories. *Id.*

X. DO CONFIDENTIALITY CLAUSES VIOLATE THE NLRA?

Another creative route to invalidation involves discovery and settlement confidentiality language in arbitration clauses. In *Pfizer*,[145] an NLRB administrative law judge devoted over 140 pages to express their disdain with *EPIC Systems Corporation* and to create a new basis for rejection of mandatory arbitration. The arbitration clause contained language of individualized arbitration, plus an agreement to keep discovery information and the settlement confidential. The confidentiality clause excluded information specifically spelled out in Section 7 of the NLRA, like wages, hours, employment conditions, etc.[146] The Judge concluded that an employee cannot prospectively grant confidentiality and that confidentiality of settlements violates Section 7 of the NLRA. A Section 7 violation is immediately a Section 8 "unfair workplace" violation and void with respect to the NLRA.

The Judge ruled that workers have a statutory right to provide and "know of" settlements between similarly situated employees and the employer.[147] Yikes. The Judge believes that individual settlements are terms and conditions of employment, and as such the "*activity*" of sharing the information is covered substantively under Section 7. Even the Department of Labor general counsel advised[148] the judge that "Confidentiality provisions that confine themselves to information concerning matters disclosed in the arbitration hearing and relating to the arbitration do not significantly implicate Section 7 rights, and therefore, in conformity with *Epic*, such agreements should be enforced as written."[149]

The Judge exercised powers that the Judge believed were conveyed to the NLRB in section 10(a) of the NLRA.[150] Section 10(a) provides that the Board is empowered to prevent unfair labor practices and that power shall not be affected by any other means of adjustment or prevention established by law.[151] The interpretation is that the FAA cannot interfere with the Boards power to declare labor practices unfair.[152] That is correct, but the Board cannot declare anything it dislikes as an unfair labor practice. Time will tell if this avenue of arbitration invalidation gains traction.[153]

From a professional sports law perspective, this is a crucial development. Many of the disputes that arise between employers and players involve sensitive

145. Pfizer, Inc., 2019 NLRB LEXIS 199 (N.L.R.B. Mar. 21, 2019).
146. *Id.* at 5.
147. *See id.* at 123–124.
148. *Id.* at 33–34.
149. *Id.*
150. *Id.* at 33.
151. *Id.* at 32.
152. *Id.*
153. Cal. Commerce Club, Inc. & William J. Sauk., 2020 NLRB LEXIS 320 (N.L.R.B. Jun. 19, 2020) (determining that a confidentiality requirement in an arbitration clause was not invalid due to Section 7 of the NLRA).

details that the parties wish to keep secret. Owners and players are managing more than workplace behavior, they are managing the marketing and brand images of the league, team, and individual athletic personas. Publication of the gory details of the issues and the ultimate settlement could cost either side millions of dollars in future earnings from tickets, sponsors and endorsements. Athletes like Tiger Woods, Lance Armstrong, Maria Sharapova, Michael Vick, and Jason Giambi have lost large amounts revenue from personal endorsement deals due to personal tribulations made public. We can bet they would have preferred that those incidents were kept private.

Another example involves the collusion grievance and settlement between the NFL, Colin Kaepernick, and Eric Reid. The details of this settlement were not publicly disclosed as per a confidentiality agreement between the parties. Fellow union members do not know the details of the settlement, but as mentioned earlier, the NLRB will not view that as a Section 7 violation. They will view a prospective agreement to confidentiality of discovery and settlement by a non-represented employee as a violation.

CONCLUSION

After ninety-five years of FAA protection, arbitration is not well received by the judiciary or the NLRB. The Court has, like the Amphilogiai of ancient Greece, engaged in endless debate regarding the merits and legality of arbitration. The antagonists of this Vince McMahon[154] performance script repetitively denigrate the arbitration process and arbitrators. Their preference would be for all employment contracts to be open for judicial interpretation and revocation, except for collectively bargained agreements. Apparently, those employees are stuck with whatever dispute resolution process the agreement calls for.

The protagonists are not wholly sold on arbitration either. They begrudgingly accept bi-lateral arbitration as enforceable, but balk at cost effective multi-party arbitration. In *Lamps Plus, Inc.*[155] the Court described class arbitrations as so far removed from the ordinary understanding of bilateral arbitration that parties must expressly authorize their use. The Court further suggested that "[c]ourts may not infer from ambiguous agreement that parties

154. *See* Richard Hoy-Browne, *Historic Moments in Wrestling Part 6: Vince McMahon Admits Wrestling is Predetermined*, INDEP. (May 30, 2014), https://www.independent.co.uk/sport/general/wwe-mma-wrestling/historic-moments-wrestling-part-6-vince-mcmahon-admits-wrestling-predetermined-9461429.html. Vince McMahon is the Chief Executive Officer of World Wrestling Entertainment (WWE). McMahon was one of the first to admit that the matches were predetermined according to performance scripts for each wrestler. These scripts would involve performers winning, losing, making and breaking alliances. Performers would routinely move between heroic and villainous personifications of their characters. McMahon also started the XFL. *Id.*

155. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

have consented to arbitrate on a classwide basis."[156] Ironically, arbitration of multi-party claims[157] is at the heart of the collectively bargained dispute resolution process. It is not some novel, untested form of adjudication.

The reluctance of the courts and NLRB to accept employment arbitration falls on five issues. The first is that the FAA requires the court to give deference to the arbiter's findings and the arbitration outcome. The second is that arbitration is limited in scope by contract and is not amenable to novel legal theories. The third is that attorneys are not going to get rich pursuing individual arbitration claims. The negotiating position of individual claimants in settlements is weak when compared to class groups resulting in lower settlements and contingency fees. The fourth is that there is a divergence in the characterization of, and rights associated with collectively bargained versus individual employment contracts. And fifth, that an arbitration award forecloses subsequent action.

For the sports world, employment contracts either collectively or individually bargained, contain arbitration as the principle means of dispute resolution. This has opened avenues of contract interpretation, like salary and discipline, that would be woefully underserved in a judicial setting. Specifically, salary and discipline are time sensitive to the athlete due to the limited window for performance. The confidentiality of arbitration benefits athletes and owners alike as public opinion directly impacts endorsements and ticket sales. Sensitive issues like substance abuse, settlements, and injuries are best left to the management of the parties and not outside interests, like the media. Even with these benefits, the animus towards arbitration continues and sadly *EPIC Systems Corporation* does not resolve these underlying conflicts, the war rages on.

156. *Id.* at 1419.

157. Brief for National Academy of Arbitrators as Amici Curiae Supporting Respondents, EPIC Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (2017 U.S. S. Ct. Briefs LEXIS 2838) (describing the ability of arbitration to handle class or collective arbitrations dealing with substantive law and contractual issues).