Berkeley Journal of Entertainment and Sports Law

Volume 6 | Issue 1 Article 11

6-30-2017

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Link to publisher version (DOI)
http://dx.doi.org/https://dx.doi.org/10.15779/Z38T43J248

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DOI: https://dx.doi.org/10.15779/Z38T43J248

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INTRODUCTION

Tom Brady is arguably the best quarterback in the history of American football.[1] Although he was a mediocre college player, beginning his career at the University of Michigan,[2] his sixteen-year professional career, which began on Thanksgiving Day 2000,[3] has been spectacular. Despite being a sixth-round draft choice,[4] Brady has a record 25 post season wins and only 9 losses.[5] Brady has a career total 456 touchdown passes (fourth all-time),[6] fifteen of which occurred during Super Bowls.[7] He also has 50 touchdown passes in a season (second all-time).[8] He has two National Football League (NFL) most valuable player (MVP)

1. *11 Reasons Tom Brady Might Be the Greatest Quarterback Ever*, CBSSports.com, http://cbssports.com/nfl/photos/11-reasons-why-brady-might-be-the-greatest (last visited Sep. 28, 2016). This article has updated data used in this news story.

2. *Tom Brady*, Biography.com http://www.biography.com/people/tom-brady-259541" \l "early-athletic-career" (last updated Feb. 6, 2017).

3. Bob Hohler, *Tom Brady's Humble Beginnings Here Had Hints of Greatness*, THE BOSTON GLOBE, Feb. 1, 2017, https://www.bostonglobe.com/sports/patriots/2017/02/01/tom-brady-humble-beginnings-here-had-hints-greatness/B7M0Js7WLvGeQS3rLTAAgK/story.html.

4. *Tom Brady*, Biography.com, *supra* at note 3.

5. *Tom Brady*, ProFootballReference.com, http://www.pro-football-reference.com/players/B/BradTo00/gamelog/post/ (last visited Mar. 7, 2017).

6. *NFL Passing Touchdowns Career Leaders*, ProFootballReference.com, http://www.pro-football-reference.com/leaders/pass_td_career.htm (last visited Mar. 9, 2017).

7. Jeremy Bergman, *At Least 30 Records Set or Tied in Super Bowl LI*, Nat'l Football League (Feb. 6, 2017), http://www.nfl.com/news/story/0ap3000000783986/article/at-least-30-records-set-or-tied-in-super-bowl-li (last visited Mar. 9, 2017).

8. *NFL Passing Touchdowns Single-Season Leaders*, ProFootballReference.com,

awards[9] and a record four Super Bowl MVP awards.[10] He owns the Super Bowl passing yards and single-game completions records, with 466 yards on 43 completed passes in Super Bowl LI,[11] and has a career high 43 single-game completions (he is tied for second all-time).[12] He has led the Patriots to a record 14 AFC Division titles.[13] The Patriots have never had a losing season since Tom Brady has been their starting quarterback.[14]

Tom Brady elicits strong feelings of love from his fans, and equally strong feelings of hatred from nonfans. These polarized feelings have facilitated divided opinions about the Deflategate scandal; the strongest of which called for the punishment of Tom Brady, the Patriots, and some Patriots' officials for allegedly cheating in a playoff game. This article is not about the merits and demerits of that case. This article instead explains why, regardless of the merits of that case, NFL Commissioner Roger Goodell failed to execute industrial due process and industrial equal protection, to which Brady was entitled.

Part I of this Article provides factual background necessary for understanding this case. This background includes: the procedural history of the case, including the Pash/Wells investigation; the grievance-arbitration proceedings; and the eventual court review of the arbitration proceedings. Part II starts with a brief history of general labor arbitration. It then compares the typical grievance-arbitration mechanism with the procedures found in the NFL Player's Association's (NFLPA) collective-bargaining agreement. Special attention is spent on the NFL-NFLPA's Article 46 procedures because those procedures were invoked in the Deflategate arbitration. Deflategate is one example of how the NFLPA's labor arbitration rules (specifically Article 46) facilitates the immediate escalation of certain types of grievances to the highest level of authority which may violate players' due process and rights to equal protection.

Part III focuses on the en banc appellate review portion of the Deflategate case. Part III A discusses the standards for obtaining en banc review in the courts

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http://www.pro-football-reference.com/leaders/pass_td_single_season.htm (last visited Mar. 9, 2017).

9. *AP NFL Most Valuable Player Winners*, ProFootballReference.com, http://www.pro-football-reference.com/awards/ap-nfl-mvp-award.htm (last visited Mar. 9, 2017).

10. *Super Bowl Most Valuable Player Winners*, ProFootballReference.com, http://www.pro-football-reference.com/awards/super-bowl-mvp-award.htm (last visited Mar. 9, 2017).

11. Rob Goldberg, *Tom Brady Breaks Super Bowl Single-Game Record for Passing Yards, Completions*, Bleacher Report (Feb. 5, 2017), http://bleacherreport.com/articles/2691410-tom-brady-breaks-super-bowl-single-game-record-for-passing-yards-completions.

12. *NFL Passes Completed Single Game Leaders*, ProFootballReference.com, http://www.pro-football-reference.com/leaders/pass_cmp_single_game.htm (last visited Mar. 7, 2017).

13. *New England Patriots Team Records, Leaders and League Ranks*, ProFootballReference.com, http://www.pro-football-reference.com/teams/nwe/ (last visited Mar. 9, 2017).

14. *Id.*

of appeal. Part III B discusses the labor law principles necessary for resolving Deflategate. This section focuses on the eponymous Steelworkers Trilogy – a series of three grievance-arbitration cases involving the United Steelworkers union decided on the same day over a half-century ago. From those cases, I distill ten principles of labor arbitration, and three values underlying grievance-arbitration, industrial peace, participation, and fairness. In Part III C, I detail the Second Circuit's decision, and explain how the court's decision to uphold Commissioner Goodell's arbitration decision conflicts with the Steelworkers Trilogy.

I. DEFLATEGATE

A. The Scandal: The Patriots' 2015 AFC Championship Victory Is Tainted by Quarterback Tom Brady's Use of Underinflated Balls During that Game[15]

The New England Patriots entered the 2014-2015 playoff season as American Football Conference (AFC) East Champions with a 12-4 regular season record.[16] After defeating the Baltimore Ravens in a close 35-31 game, the Patriots proceeded to the AFC Championship Game. That game would determine which team would advance to Super Bowl XLIX. On January 18, 2015, the Patriots played the Indianapolis Colts at the Patriots' home stadium, Gillette Stadium, in Foxborough, Massachusetts, for the AFC title.[17] The weather ranged from overcast to mostly cloudy with some light rain; winds from the Southeast ranged from 15 to nearly 20 miles per hour; the temperature fell between 51º – 52º F.[18]

During the second quarter, Colts linebacker D'Qwell Jackson intercepted a pass thrown by Patriots' quarterback Tom Brady. Sensing that the ball was underinflated, Jackson brought the ball to the sideline and confirmed that it was below the allowed minimum pressure of 12.5 pounds per square inch. The Colts informed NFL officials, who tested the game balls with two different gauges at

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15. The facts in this background section are taken primarily from the following sources: Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527 (2d Cir. 2016) (*NFL Mgmt. Council v. NFLPA II*); Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449 (S.D.N.Y. 2015) (*NFL Mgmt. Council v. NFLPA I*), *rev'd*, 820 F.3d 527 (2d Cir. 2016); *See* PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, INVESTIGATIVE REPORT CONCERNING FOOTBALLS USED DURING THE AFC CHAMPIONSHIP GAME ON JANUARY 18, 2015, p.2 (written by T. Wells, B. Karp, L. Reisner), May 6, 2015, hereinafter the Wells Report. (Joint Appendix II, p. 92).

16. *2014 NFL Standings & Team Stats*, ProFootballReference.com, http://www.pro-football-reference.com/years/2014/ (last visited on May 8, 2017).

17. Jeff Gray, *AFC Championship 2015: Schedule, Game Time, and More for Colts vs. Patriots, SBNation (*Jan. 11, 2015), http://www.sbnation.com/nfl/2015/1/11/7529407/2015-afc-championship-schedule-time-colts-patriots.

18. *East Foxboro MA Hourly Weather Data for January 18, 2015,* FriendlyForecast.com, http://www.friendlyforecast.com/usa/archive/archive.php?region=MA&id=156489&date=20150118000000&sort=hour (last visited Nov. 5, 2016).

halftime. All four of the Colts balls tested within the permissible range between 12.5 and 13.5 psi on at least one of the gauges; all eleven of the Patriots balls measured below 12.5 psi on both gauges.[19] NFL officials inflated all game balls to the appropriate pressure to start the second half of the game.

The teams entered the third quarter with the Patriots leading the Colts, 17–7. Tom Brady and the Patriots had a great second half. The Patriots scored 21 points in the third quarter, 7 additional points in the fourth quarter, and shut out the Colts in both quarters.[20] The Patriots defeated the Colts, 45–7, to advance to the Super Bowl, where the Patriots ultimately defeated the Seattle Seahawks, 28–24.[21]

B. Investigation of the Complaint

1. The Pash/Wells Investigation: The NFL Hires Outside Counsel To Investigate; Counsel Concludes that Patriots Equipment Officials Tampered with Game Balls and that Brady Was Generally Aware of the Ball Tampering Scheme

The following week, the NFL retained the law firm, Paul, Weiss, Rifkind, Wharton & Garrison to conduct an independent investigation into the alleged improper ball tampering. Paul Weiss Attorney Theodore V. Wells, Jr. and NFL Executive Vice President and General Counsel Jeff Pash co-led the investigation. The Wells Report, a 139-page document detailing the investigation's findings, was released on May 6, 2015.[22] The report concluded that it was "more probable than not" that two Patriots equipment officials, Jim McNally and John Jastremski, had "participated in a deliberate effort to release air from Patriots game balls after the balls were examined by the referee."[23] The report explained that natural causes such as weather conditions could not completely account for the change in ball pressure when measured before the game and when measured at halftime.[24] Further, the investigation uncovered electronic communications in

19. *NFL Mgmt. Council v. NFLPA II*, 820 F.3d 527, 532-33 (2d Cir. 2016); *NFL Mgmt. Council v. NFLPA I*, 125 F. Supp. 3d 449, 453–54 (S.D.N.Y. 2015).

20. *Game Center: Play by Play*, Nat'l Football League, http://www.nfl.com/gamecenter/2015011801/2014/POST20/colts@patriots#menu=gameinfo&tab=analyze&analyze=playbyplay (last visited Nov. 6, 2016).

21. Jeff Gray, *Super Bowl 2015 Final Score for Patriots vs. Seahawks: 3 Things We Learned from New England's 28-24 Win*, SBNation, Feb. 1, 2015, http://www.sbnation.com/nfl/2015/2/1/7960971/seahawks-patriots-2015-super-bowl-xlix-results-final-score.

22. NFL Mgmt. Council v. NFLPA II, 820 F.3d at 533; *NFL Mgmt. Council v. NFLPA I*, 125 F. Supp. 3d at 453–54.

23. *See* PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, INVESTIGATIVE REPORT CONCERNING FOOTBALLS USED DURING THE AFC CHAMPIONSHIP GAME ON JANUARY 18, 2015, p.2 (written by T. Wells, B. Karp, L. Reisner), May 6, 2015, hereinafter the Wells Report. (Joint Appendix II, p. 92)

24. *See* Wells Report at 9-13. (Joint Appendix II, pp. 104-108)

which McNally referred to himself as the "'deflator.'"[25] According to the Wells Report, shortly before the game started, McNally moved the balls from the locker room to a single-toilet bathroom, locked the door, and used a needle to deflate the game balls before bringing the deflated balls to the playing field.[26]

The Wells Report found that Brady's role in the ball-tampering scheme was more attenuated. Although the Report concluded that Brady was "generally aware of [McNally's and Jastremski's] inappropriate activities," it did not find that Brady himself participated in or directed any activities related to ball tampering.[27] The Report further observed that Brady's performance improved after the balls were re-inflated, noting:

Brady's performance in the second half of the AFC Championship Game—after the Patriots game balls were re-inflated—improved as compared to his performance in the first half. Specifically, in the first half, he completed 11 of 21 passes for 95 yards and one touchdown, and in the second half, he completed 12 of 14 passes for 131 yards and two touchdowns.[28]

The Report made no findings, however, regarding the competitive effect that the ball tampering had on the game.

2. *Remedy: NFL Commissioner Roger Goodell Appoints Executive Vice President Troy Vincent to Determine Disciplinary Action Based on the Wells Report*

NFL Commissioner Roger Goodell appointed NFL Executive Vice President of Football Operations, Troy Vincent,[29] to discipline Brady.[30] In a letter dated May 11, 2015, Vincent announced the disciplinary actions Brady would face based on the findings of the Wells Report.[31] Vincent's letter stated: "the [Wells Report] established that there is substantial and credible evidence to conclude you were at least generally aware of the actions of the Patriots' employees involved in the deflation of the footballs and that it was unlikely that their actions were done without your knowledge."[32] Vincent also cited Brady's "failure to cooperate fully and candidly with the investigation, including by refusing to produce any relevant electronic evidence (emails, texts, etc.) despite being offered extraordinary safeguards by the investigators to protect unrelated

25. *See* Wells Report at 13. (Joint Appendix II, p. 108)
26. *See* Wells Report at 56-62. (Joint Appendix II, pp. 151-157).
27. *See* Wells Report at 122. (Joint Appendix II, p. 217).
28. *See* Wells Report at 122, n.73. (Joint Appendix II, p. 217).
29. NFL, THE NFL OPS TEAM, http://operations.nfl.com/football-ops/the-nfl-ops-team/ (last visited Nov. 6, 2016).
30. Mike Reiss, *NFLPA Asks Roger Goodell To Step Aside As Arbitrator in Tom Brady's Appeal*, ESPN, May 15, 2015, http://www.espn.com/boston/nfl/story/_/id/12891908/nflpa-asks-roger-goodell-step-aside-arbitrator-new-england-patriots-quarterback-tom-brady-appeal .
31. Letter from Executive Vice President Troy Vincent, Sr., to Tom Brady, p.1. (May 11, 2015), hereinafter *May 11 Letter*. JA II 329.
32. *Id*.

personal information."[33] Vincent concluded that Brady's conduct, as set forth in the Wells Report, "constitute[s] conduct detrimental to the integrity of and public confidence in the game of professional football. The integrity of the game is of paramount importance to everyone in our League, and requires an unshakable commitment to fairness and compliance with the playing rules."[34] Vincent imposed a four-game suspension without pay.[35]

3. Administrative Appeal and Arbitration: The NFLPA Appealed; Commissioner Goodell, Who Served as Appellate Arbitrator, Upheld the Discipline on Different Grounds

The NFLPA appealed Brady's discipline under the agreed-upon procedures set forth in the NFL-NFLPA collective-bargaining agreement, which permits appeals directly to the Commissioner.[36] Goodell appointed himself to serve as the appellate arbitrator.[37] After a hearing, Goodell issued a 20-page affirmation of the disciplinary decision.[38] Goodell affirmed the suspension on different grounds that were not part of the Wells Report or the disciplinary order. Specifically, Goodell affirmed the suspension by finding that Brady (1) "participated in a scheme to tamper with the game balls after they had been approved by the game officials for use in the AFC Championship Game" and (2) "willfully obstructed the investigation by, among other things, affirmatively arranging for destruction of his cellphone knowing that it contained potentially relevant information that had been requested by the investigators."[39] Goodell concluded that "this indisputably constitutes conduct detrimental to the integrity of, and public confidence in, the game of professional football."[40]

C. Court Review

1. The NFL Management Council Asked the District Court to Confirm Goodell's Arbitration Award; the NFLPA Asked the Court to Vacate that Award

The NFL Management Council filed a complaint under Section 301 of the Labor Management Relations Act[41] in the United States District Court for the Southern District of New York seeking to confirm the July 28 Arbitration

33. *Id*.
34. *Id*.
35. *Id.* at 2.
36. CBA, *infra* note 77 at art. 44, §§ 1(a), 2(a).
37. *Id.*
38. Roger Goodell, *Final Decision on Article 46 Appeal of Tom Brady*, Jul. 28, 2015, hereinafter "July 28 Arbitral Award."
39. *Id.* at 13.
40. *Id.*
41. 29 U.S.C. § 185 (1947).

Award.[42] The NFLPA filed an answer and counterclaim under LMRA Section 301 and Section 10 of the Federal Arbitration Act[43] to vacate the July 28 Arbitration Award.[44] Judge Richard M. Berman vacated the arbitral award,[45] holding that the award was legally deficient because, among other things, Brady received "inadequate notice" that the alleged misconduct was punishable by suspension rather than fines.[46] In particular, the court concluded that the collectively bargained penalty schedule—including the provision that "*[f]irst offenses will result in fines*"—put Brady "on notice that equipment violations . . . could result in fines."[47] The court further held that the manner in which the proceedings were conducted were fundamentally unfair.

2. The NFL Appealed the District Court's Order to the Second Circuit, which Reversed the Lower Court and Reinstated the Arbitral Award; the Second Circuit denied the Patriots' and Brady's Petition for Rehearing

The United States Court of Appeals for the Second Circuit (2-1) reversed the district court and reinstated the arbitral award.[48] The majority held that Goodell did not exceed his authority as an appellate arbitrator by upholding the suspension on new grounds, namely, Brady's destruction of his cell phone, because "[n]othing in Article 46 [of the Collective Bargaining Agreement (CBA)] limits the authority of the arbitrator to examine or reassess the factual basis for a suspension."[49] The court added that although Commissioner Goodell upheld the suspension on new grounds, he "did not increase the punishment as a consequence of the destruction of the cell phone—the four game suspension was not increased. Rather, the cell phone destruction merely provided further support for the Commissioner's determination that Brady had failed to cooperate, and served as the basis for an adverse inference as to his participation in the scheme to deflate footballs."[50] The court denied the Patriots' and Brady's petition for rehearing en banc.

42. Compl., NFL Mgmt. Council v. NFLPA, 820 F.3d 527 (2d Cir. 2016) Docket No. 1:15-cv-05916-RMB-JCF (filed Jul. 28, 2015).
43. 9 U.S.C. § 10 (2013).
44. NFL Mgmt. Council, *supra* note 42 (Amended Answer and Counterclaim).
45. NFLPA I, 125 F. Supp. 3d at 453–54.
46. *Id.* at 463.
47. *Id.* at 468 (emphasis and bold in the original).
48. *NFL Mgmt. Council v. NFLPA II*, 820 F.3d 527 (2d Cir. 2016).
49. *Id.* at 541.
50. *Id*.

II. GRIEVANCE-ARBITRATION PRINCIPLES

A. A Brief History of the Rise of Grievance-Arbitration as the Favored Mechanism for Resolving Labor Disputes

1. Problem One: Unions Lacked Legal Capacity, Which Led to Unjust Court Verdicts

For over a century, U.S. unions could not sue or be sued in federal or state court, because they did not have legal capacity. This resulted in several unjust results, in which union members were held personally liable for the unlawful actions of their unions.[51] For example, in *Loewe v. Lawlor*,[52] popularly known as the Danbury Hatters case, the Supreme Court held that members of a local union affiliated with the United Hatters Union (UHU)[53] violated the Sherman Antitrust Act.[54] The violation occurred when the UHU leadership convinced Loewe's retailers, wholesalers, and customers (i.e., third-party neutrals) to boycott Loewe to put economic pressure on Loewe in hopes that the strike would force it to recognize the UHU Local. Although the lower court dismissed the case, the Supreme Court reversed and remanded for further proceedings.[55]

This resulted in two subsequent trials. The judge directed a verdict for Loewe in the first trial, sending the question of damages to the jury, which assessed damages at $74,000; those damages trebled under the Sherman Act, amounting to $232,240, including interest and costs.[56] On appeal, the Second Circuit held that the court should have sent the liability question to the jury and remanded for a new trial.[57] The second trial resulted in a jury verdict for Loewe

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51. These results are particularly unjust for three reasons. First, although the union's conduct was unlawful under the law of that time, in many instances, the union's conduct would be lawful today. Second, even if we agree that the union's conduct should be unlawful and remains unlawful under today's standards, individual workers (all of whom were members of the working class) had no legal way of shielding themselves from personal liability. This is in distinct contrast with the rule that we now think is fair, which rule limits liability to the extent of the person's investment. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 CHI. L. REV. 89, 89–90 (1985) (explaining that the "rule of limited liability means that the investors in the corporation are not liable for more than the amount they invest," that "[l]imited liability is not unique to corporations," and that the "instances of 'unlimited' liability are few"). This treatment of unions contrasts with shareholders who generally are not liable for the actions of the corporations in which they hold stock.

52. *Loewe v. Lawlor*, 208 U.S. 274 (1908).

53. The UHU was itself an affiliate of the American Federation of Labor (AFL).

54. 15 U.S.C. § 1 (2013). The Sherman Antitrust Act made unlawful "combinations in the form of trust or otherwise, or conspiracy in restraint of trade." Although intended to break up as anticompetitive trusts, monopolies or businesses with significant market power, the Act was soon applied to union. This case represents the first time the Court applied the Sherman Act to labor unions. *See* Ralph A. Newman, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L. J. 267, 277–78 (1946).

55. 208 U.S. 274.

56. Lawlor v. Loewe, 187 F. 522, 523 (2d Cir. 1911).

57. *Id.* at 527.

in the amount of $252,130 (amount trebled, plus interest and costs), which the Second Circuit affirmed.[58] The case made its way, once again, to the Supreme Court, which affirmed.[59] Union members were personally liable for the amount awarded. Think about that. Workers attempting to improve their conditions were forced to pay treble damages to the very employer that was exploiting them, largely due to the unjust laws relating to union members.

2. Problem Two: State Common Law Governs Contract-Enforcement, Meaning that Enforcement of Collective-bargaining Agreements Was Subject to Non-uniform Legal Principles and Potentially Inconsistent Results

With regard to the substantive law, state law, rather than federal, typically controls contract-enforcement cases. The common law of contract varied from state to state; therefore, there were no uniform legal principles and the enforceability of collective-bargaining agreements and the rights and remedies available were potentially inconsistent.[60]

3. Problem Three: Although Unions Helped Significantly in the War Effort When They Supported Wartime Production by Encouraging Labor Peace through the Grievance Process, the Unamended NLRA Encouraged Conflict Resolution through Industrial War Such as Strikes

During World War II, unions and the grievance procedures, in particular, became increasingly important. Grievance procedures diminished work stoppages, which was essential to sustain wartime production. Indeed, "[b]y war's end . . . the basic structure of today's common arbitral system was in place."[61] This structure included "a multistep grievance process which had the effect of transferring authority from shop floor leaders to the union hierarchy."[62] Under this system, rather than basing rights "upon tradition or custom," they were based "upon the contract and arbitral case law, a process paralleling the 'rule of law' in society."[63] Equally important, and in direct contravention to the by-then entrenched at-will default rule, "[d]ischarge or discipline could only be for 'just cause.'"[64] Finally, the grievance system served as a substitute for self-help by forcing grievants, in most circumstances, to obey supervisory orders while their grievance was being processed.[65]

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58. Lawlor v. Loewe, 209 F. 721, 728 (2d Cir. 1913), *aff'd*, 235 U.S. 522 (1915).

59. Lawlor v. Loewe, 235 U.S. 522, 537 (1915).

60. *See, e.g.*, Ralph A. Newman, *The Closed Union and the Right to Work*, 43 COLUM. L. REV. 42, 45-49 (1943).

61. James B. Atleson, *Labor and the Wartime State: Labor Relations and Law During World War II* 70 (1998).

62. *Id*.

63. *Id*.

64. *Id*.

65. *Id*.

B. Congress Enacted the Taft-Hartley Act, in Part, To Resolve These Problems

Congress, witnessing the importance of industrial peace for maintaining production, remedied the union's legal status problem in 1947. Section 301(b) provides that any "labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States."[66] Section 301, as interpreted by the Supreme Court in *Textile Workers v. Lincoln Mills*,[67] cured the union's common law problem of not being allowed to sue or be sued. This put unions on par with the employer's legal status and limited liability to the union's assets. Section 301 allowed unions to be treated on par with corporations and eliminated the unjust results of cases such as *Loewe v. Lawlor*.[68] Section 301(b) also remedied the unjust results that occurred in cases such as *Loewe*, by making judgments against unions only enforceable against the institution and not its members.[69]

Section 301(a) solved the common-law problem of substantive inconsistency by conferring subject-matter jurisdiction on federal courts to hear contract disputes.[70] Accordingly, this section makes collective-bargaining-agreement disputes between employers and unions a federal question. This provision thus requires federal courts to develop and apply a federal common law of contract rules, fashioned from national labor law policy, only borrowing from state rules when compatible with federal policy, and absorbing them into the body of federal law governing collective-bargaining agreements.[71] Although Section 301 cases may be brought in either state or federal court,[72] a state court deciding a case under Section 301 must apply the federal common law rather than state law.[73]

The Court developed several additional legal principles to clarify Section 301. For example, in *Smith v. Evening News Association*,[74] the Court held that individuals (as opposed to unions or employers) alleging injury from collective-

66. 29 U.S.C. § 185(b) (2012).

67. *See* 353 US 448 (1957).

68. Section 301(c) and (d)facilitate personal jurisdiction and service of process on unions.

69. "Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." 29 U.S.C. § 185(b).

70. "Suits for violation of contracts between an employer and a labor organization representing employees. . . , or between any such labor organizations, may be brought in any district court, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a).

71. *See* Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1484 (1959).

72. *See* Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

73. *See* Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95, 102–03 (1962) (applying federal common law in a case where the employer sued for damages in state court after the union called a strike in violation of the collective-bargaining agreement).

74. 371 U.S. 195, 200 (1962).

bargaining-agreement violations may bring Section 301 suits. Shortly thereafter, the Court held that, in individual actions under Section 301, absent a breach of the union's duty of fair representation, the grievance machinery must be exhausted before courts have jurisdiction to hear alleged contract violations.[75]

The overarching purpose of Section 301 is to facilitate industrial peace by encouraging peaceful conflict resolution through the grievance-arbitration mechanism. Section 301 thereby gives unions and workers the power to go to court in three types of cases. First, it empowers courts to compel arbitration in cases where the employer refuses to arbitrate the dispute because, it claims, the collective-bargaining agreement has expired, was invalid from the outset, or does not cover these employees. In such cases, the union can force the employer, via Section 301 proceedings, to arbitrate after convincing the court that there is a valid applicable collective-bargaining agreement. Second, it empowers courts to enforce arbitration awards in cases where the employer refuses to comply with that award, upon the union's application to enforce that award in a Section 301 lawsuit. Third, it empowers courts to review union breaches of collective-bargaining agreements.

C. Comparison of the Typical Grievance-Arbitration Clause and the Grievance-Arbitration Mechanisms Employed in the NFL-NFLPA CBA

1. The Typical Grievance-Arbitration Clause Requires Layered Review Designed To Encourage Communication and Settlement at the Lowest Level of Authority

Where private-sector workers are represented by a union, workplace disputes are nearly always governed by the grievance-arbitration mechanism to which the parties agreed under the collective-bargaining agreement. Because these procedures are contractual, the precise mechanics of the grievance structure vary based on the terms of the specific agreement. The typical grievance-arbitration clause creates a multi-step procedure culminating in arbitration. These multi-step contracts create layers of review designed to encourage communication and settlement at the lowest level. In step one, the union presents the grievance to the lowest level supervisor who has authority to settle the dispute, usually the grievant's supervisor. If the parties are unable to resolve the grievance at step one, the grievance may proceed to step two, where it is presented to a manager, typically the step one supervisor's supervisor. Absent resolution, this process may continue for one more step. In the final step, the grievance is presented to a high-level manager such as the Director of Human Resources. If the grievance remains unresolved at this point, the union (not management and not the individual grievant) has the option of taking the

75. *See* Vaca v. Sipes, 386 U.S. 171, 186 (1967).

grievance to arbitration.[76]

The collective-bargaining agreement between the NFL and the NFL Players' Association (NFLPA) devotes several articles to the permitted grievance mechanism.[77] The main grievance procedures are described in Article 43, Non-injury Grievance,[78] and Article 44, Injury Grievance.[79] Grievances under these articles are filed and answered at step one. If those grievances are not resolved to the grievant's satisfaction, they may move directly to arbitration. Accordingly, these grievance articles provide for an abbreviated version of the multi-stepped grievance process common in U.S. collective-bargaining agreements.

2. The Regular Grievance-Arbitration Clauses of the NFL-NFLPA Collective-Bargaining Agreement Were Not Applicable; the Commissioner Invoked Article 46, which Immediately Escalates Disputes over Alleged Conduct Detrimental to the Game of Football to the Highest Level of Authority

Articles 43 and 44, which work like an accelerated grievance process taking a grievance from step one to arbitration, apply to all injury and noninjury grievances. At first blush, that would seem to describe the entire universe of grievances. But the parties here carved out a special procedure under Article 46 for grievances involving "conduct detrimental to the integrity of, or public confidence in, the game of professional football."[80] There is no question that the normal rules of labor law would apply to the accelerated grievance procedures under Articles 43 and 44. It is also undisputed that the Deflategate dispute triggered Article 46 grievance procedures rather than Articles 43 or 44. The question becomes: Is there something special about labor disputes that involve Article 46 conduct, such that well-settled labor principles should not apply in these circumstances? The answer to that question is no. Relatedly, did the Article 46 procedures as applied to the Deflategate dispute, violate those labor principles? The answer to that question is yes.

D. Deflategate's Article 46 Review

To understand how Article 46 procedures as applied to Deflategate violated well-settled labor principles, it is necessary to understand how Article 46 works. As explained above, Section 1(a) provides a different and "exclusive" procedure

76. For a discussion of how the grievance-arbitration steps work, P. SECUNDA, A. LOFASO, J. SLATER, & J. HIRSCH, MASTERING LABOR LAW 272-73 (2014).

77. National Football League Collective Bargaining Agreement (Aug. 4, 2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf [hereinafter CBA]. The NFL Management Council and the NFLPA negotiated the agreement on behalf of the NFL member football clubs and the players, respectively. *See* Complaint, NFLMC v. NFLPA, No. 1:15-cv-05916-RMB, ¶¶ 3-4, filed Jul. 28, 2015; Joint Appendix vol. I, p. 29.

78. CBA art. 43.

79. CBA art. 44.

80. CBA art. 46.1(a).

by which "[a]ll disputes . . . involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football."[81] That process mandates that "the Commissioner . . . promptly send written notice of his action to the player, with a copy to the NFLPA. Within three (3) business days following such written notification, the player affected thereby, or the NFLPA with the player's approval, may appeal in writing to the Commissioner."[82]

Additionally, Section 2(a) of that Article permits the Commissioner to "serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion."[83] Article 46 thereby provides for a special procedure in cases where the Commissioner himself has disciplined a player "for conduct detrimental to the integrity of, or public confidence in, the game of professional football." That procedure requires the Commissioner to promptly send written notice of the disciplinary action to the player with a copy to the NFLPA and grants the player the right to appeal in writing to the Commissioner within three days of receipt of that notice. The parties agree that the Commissioner himself may serve as hearing officer.

Here, Commissioner Goodell disciplined Tom Brady in accordance with Article 46's procedures. Indeed, Brady received more "process than was due" under the Article insofar as Goodell ordered an independent investigation of the circumstances surrounding Deflategate. After the investigation was completed, Goodell's designee, Troy Vincent, sent Brady a disciplinary letter under the Commissioner's authority announcing a four-game suspension. Thereafter, Brady timely appealed that decision and Goodell appointed himself hearing officer for the appeal. Goodell affirmed the suspension albeit on additional grounds.

Now, we are left with a conundrum of understanding Brady's bases for appeal. As discussed above, Brady and the NFLPA argued, among other things, that Brady was denied sufficient notice that such a violation, essentially an equipment violation, could result in a suspension without pay. While the district court judge was convinced that Brady received "inadequate notice" that the alleged misconduct was punishable by suspension rather than fines,[84] the appellate court concluded that Goodell did not exceed his authority in affirming this punishment or in bolstering the reasons for the punishment with additional evidence. The answer to this question lies in (1) the standards for obtaining en banc review and (2) whether the Second Circuit's opinion conflicted with mandatory authority and/or whether the case presented a question of exceptional importance. The Second Circuit's opinion conflicted with mandatory authority and presented a question of exceptional importance.

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81. *Id*.
82. *Id*.
83. CBA art. 46, § 2(a).
84. NFL Mgmt. Council v. NFLPA I, 125 F. Supp. 3d at 463.

III. *EN BANC* REVIEW

A. Standards for Obtaining En Banc Review

En banc review is a special type of appellate court review, in which all the circuit judges in active service may rehear a case. En banc review is disfavored and is not ordered unless "[a] majority of the circuit judges who are in regular active service and who are not disqualified . . . order that an appeal . . . be . . . reheard by the court of appeals en banc." Appellate judges will not order such review unless they are convinced that:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.[85]

To secure en banc review, the petitioner must show one of two circumstances. First, that "the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed"[86] The purpose here is to show that "consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions."[87] Second, that "the proceeding involves one or more questions of exceptional importance."[88] For example, "a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue."[89]

Brady, the NFLPA, and the amici who filed briefs in support of Brady argued that the panel decision conflicted with mandatory authority and that the case involved a question of exceptional importance. To understand that argument, we turn to the significant labor law principles that govern this case, how the court applied them, how they were applied incorrectly, and why the conflict with those cases creates a question of exceptional importance.

B. Labor Law Principles Necessary to Resolving Deflategate[90]

1. The Steelworkers Trilogy

The Steelworkers Trilogy is a series of three cases – *American*

85. FED. R. APP. P. 35(a).
86. FED. R. APP. P. 35(b)(1)(A).
87. *Id.*
88. FED. R. APP. P. 35(b)(1)(B).
89. *Id.*
90. *See generally* Brief of U.S. Labor Law and Industrial Relations Professors as Amicus in Support of Petition for Panel Rehearing and Rehearing En Banc, NFL Mgmt. Council v. NFLPA, Docket Nos. 15-2801, 15-2805 (2d Cir. filed May 31, 2016) (citing Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960)).

Manufacturing Company,[91] *Warrior and Gulf Navigation Company*,[92] and *Enterprise Wheel and Car Corporation.*[93] The triad was decided on the same day in 1960 and all three constituent cases involved the United Steelworkers of America.[94] Through these cases, the Supreme Court determined the scope of an arbitrator's power; that is, the authority vested in arbitrators to hear and decide cases by interpreting, applying, and enforcing contractual language in collective-bargaining agreements.

a. Steelworkers v. American Manufacturing Company: In Section 301 Motion to Compel Arbitration, Courts Are Limited to Determining Whether the Dispute Is Arbitrable

American Manufacturing Company rendered the legal principle that limits a court's ability to determine whether the case is substantively arbitrable in Section 301 motion-to-compel-arbitration cases. By substantive arbitrability, the court meant governed by the contract and capable of review by an arbitrator. In that case, the parties agreed to a broad arbitration clause. The parties agreed to arbitrate "any dispute" arising from the "meaning, interpretation and application" of the agreement.[95] Employee Sparks, who had taken a leave of absence from work resulting from an injury, sued the company for compensation benefits. This case settled after Sparks' physician opined "that the injury had made him 25% permanently partially disabled."[96] Shortly after Sparks returned to work, the union filed a grievance demanding that Sparks be returned to his original job based on his seniority with the company, in accordance with a collective-bargaining provision, "fully recognize[ing] the principle of seniority as a factor in the selection of employees for [positions] where ability and efficiency are equal."[97]

When the employer refused to arbitrate the dispute, the union brought a Section 301 suit to compel arbitration. The United States District Court for the Eastern District of Tennessee dismissed the case, holding that the settlement

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91. United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960).

92. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

93. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

94. *See* Harry H. Wellington, *Judicial Review of the Promise to Arbitrate*, 37 N.Y.U. L. REV. 471 (1962).

95. The agreement provided:

> 'Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement . . . may be submitted to the Board of Arbitration for decision. * * * 'The arbitrator may interpret this agreement and apply it to the particular case under consideration but shall, however, have no authority to add to, subtract from, or modify the terms of the agreement . . .'The decision of the Board of Arbitration shall be final and conclusively binding upon both parties, and the parties agree to observe and abide by same. * * *'

Am. Mfg. Co., 363 U.S. at 565 n.1 (1960) (quoting the parties collective-bargaining agreement).

96. *Id.* at 566 (internal quotation marks omitted).

97. *Id.* at 565–66 n.3.

estopped Sparks from seeking reinstatement on the basis of seniority. The Sixth Circuit, affirming the district court, characterized the dispute as "'a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement.'"[98] The Supreme Court reversed, explaining that, "the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious."[99] Indeed, courts must compel arbitration of all cases that are arbitrable (governed by the contract) regardless of the merits.

American Manufacturing Company embodies the legal principle that reviewing courts "have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim."[100] Rather, the court's function "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."[101] In this way, courts will not "deprive [the parties] of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."[102]

b. Steelworkers v. Warrior and Gulf Navigation Company: Grievance-Arbitration Promotes Industrial Peace through Industrial Self-governance

Warrior and Gulf Navigation Company reinforced the Court's holding in *American Manufacturing Company*. Here, the parties' collective-bargaining agreement contained a no-strike clause, a no-lockout provision, and a broad grievance-arbitration clause. The CBA also contained a broad management rights clause.[103] In particular, the parties agreed to resolve "differences [that]

98. *Id.* at 566.
99. *Id.* at 567.
100. *Id.* at 568.
101. *Id.*
102. *Id.*
103. The grievance-arbitration clause stated in pertinent part:
"Issues which conflict with any Federal statute in its application as established by Court procedure or *matters which are strictly a function of management shall not be subject to arbitration under this section*.
"*Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner*:
"A. For Maintenance Employees:
"First, between the aggrieved employees, and the Foreman involved;
"Second, between a member or members of the Grievance Committee designated by the Union, and the Foreman and Master Mechanic.
"Fifth, *if agreement has not been reached the matter shall be referred to an impartial umpire for decision*. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Conciliation Service for suggestion of a list of umpires from which selection shall be made. The decision of the umpire will be final."

arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement" through the grievance-arbitration machinery.[104] Nonetheless, the parties also agreed that, "matters which are strictly a function of management shall not be subject to arbitration under this section."[105] A grievance arose over the employer's practice of contracting out bargaining-unit work (work typically done by workers represented by the union). The employer refused to settle the grievance and refused the union's request for arbitration. In a Section 301 action to compel arbitration, the United States District Court for the Southern District of Alabama dismissed the case holding that the parties' collective-bargaining agreement did not "confide in an arbitrator the right to review the [employer's] business judgment in contracting out work."[106] The Fifth Circuit affirmed on grounds that the union had failed to obtain a provision prohibiting contracting out work during contract negotiations.[107]

The Supreme Court reversed. The Court developed the theory underpinning labor arbitration. Unlike commercial arbitration, where arbitration serves as a substitute for litigation, "[labor] arbitration is the substitute for industrial strife. . . . [A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."[108] The Court further explained that a collective-bargaining agreement, which states the parties' rights and duties, "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."[109] The Court further explained that because the agreement "covers the whole employment relationship," it establishes "a new common law—the common law of a particular industry or of a particular plant."[110] The Court thereby recognized that a "collective bargaining agreement is an effort to erect a system of industrial self-government."[111] It contrasted the labor agreement with the typical contractual relationships into which parties "voluntarily" enter. The Court pointed out that, with regard to the labor agreement, the "choice is generally not between entering or refusing to enter into a relationship . . . Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each

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United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 576–77 (1960) (quoting the parties collective-bargaining agreement) (emphasis added).

104. *Id.* at 576–77.

105. *Id*.

106. United Steelworkers v. Warrior & Gulf Navigation Co., 168 F. Supp. 702, 705 (S.D. Ala. 1958), *aff'd*, 269 F.2d 633 (5th Cir. 1959), *rev'd sub nom*. United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

107. United Steelworkers v. Warrior & Gulf Navigation Co., 269 F.2d 633, 636 (5th Cir. 1959), *rev'd sub nom*. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

108. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

109. *Warrior & Gulf,* 363 U.S. at 578–79 (citing Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1004–1005).

110. *Id.*

111. *Id.* at 580.

and every matter subject to a temporary resolution dependent solely upon the relative strength" of the parties.[112] Drawing upon the writings of Dean Shulman, the Court added:

> Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is . . . 'a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.' . . . Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators.[113]

The Court drew another contrast between commercial arbitration (which the parties utilize when there is a breakdown in the parties' working relationship) and labor arbitration when it recognized that "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government."[114] Labor arbitration is, the Court added, "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."[115]

In effect, labor arbitration is an extension of the collective-bargaining process: "The processing of disputes through the grievance machinery is . . . a vehicle by which meaning and content are given to the collective bargaining agreement."[116] Labor arbitration when used correctly may strengthen the parties' relationship, rather than serve as a mechanism for broken relationships, as is the case in commercial arbitration.

c. Steelworkers v. Enterprise Wheel and Car Company: Arbitration Awards Are Final and Binding; Post-arbitral Court Review Is Limited to Whether the Arbitration Award Draws Its Essence from the Contract

Enterprise Wheel and Car Company presented the question of court review of the post-arbitration case. Here, the parties submitted a wrongful-discharge dispute to arbitration. The arbitrator ordered the employer to reinstate the eleven aggrieved employees to their former positions and awarded backpay, except for

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112. *Id.*

113. Warrior & Gulf Navigation Co., 363 U.S. at 580–81 (citing Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1005).

114. *Warrior & Gulf*, 363 U.S. at 581.

115. *Id.*

116. *Id.*

a ten-day suspension period, less amounts received for other employment.[117] The employer refused to abide by the arbitral award, resulting in this Section 301 action. The United States District Court for the Southern District of West Virginia ordered specific performance of the arbitration order. The court rejected the employer's jurisdictional arguments. The court also rejected the employer's argument that the award was invalid because (1) the award itself was indefinite and incomplete and (2) the arbitrator exceeded his authority in ordering backpay beyond the collective-bargaining agreement's expiration date. In rejecting the arbitrator's authority argument, the court relied on *Lincoln Mills*,[118] where the Supreme Court held that federal courts must fashion the substantive law in Section 301 cases "from the policy of our national labor laws." The District Court explained that "[t]he arbitrator's decision requiring [the employer] to reinstate employees and reimburse them for back pay past the termination date of the contract is in keeping with the policy of our labor laws under the [NLRA]."[119] The Fourth Circuit modified the award by disallowing backpay beyond the labor agreement's expiration date and voiding the arbitrator's order of reinstatement.[120]

The Supreme Court reversed, in pertinent part, thereby upholding the arbitral award with one minor modification. Focusing on the finality and binding nature of an arbitration order, the Court explained that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."[121]

The Court also explained the significant role that the arbitrator plays in resolving these disputes:

> [A]rbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.[122]

The Court proceeded to describe limits on the arbitrator's role in interpreting, applying, and enforcing the collective-bargaining agreement, noting that the arbitration "award is legitimate only so long as it draws its essence from

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117. United Steelworkers v. Enter. Wheel & Car Corp., 168 F. Supp. 308, 309 (S.D.W. Va. 1958), *modified*, 269 F.2d 327 (4th Cir. 1959), *rev'd in part*, 363 U.S. 593 (1960).

118. *See* 353 U.S. 448, 456 (1957).

119. United Steelworkers v. Enter. Wheel & Car Corp., 168 F. Supp. 308, 313 (S.D.W. Va. 1958), *modified*, 269 F.2d 327 (4th Cir. 1959), *rev'd in part*, 363 U.S. 593 (1960).

120. Enter. Wheel & Car Corp. v. United Steelworkers, 269 F.2d 327, 330 (4th Cir. 1959), *rev'd in part*, 363 U.S. 593 (1960).

121. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960); *see also Lincoln Mills*, 353 U.S. at 456.

122. *Enter. Wheel & Car Corp.*, 363 U.S. at 596.

the collective bargaining agreement":

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, *an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice*. He may of course look for guidance from many sources, yet *his award is legitimate only so long as it draws its essence from the collective bargaining agreement*. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[123]

The Court modified the order, instructing the lower court to remand the case to the arbitrator to liquidate the backpay award. The Court effectively affirmed the district court's enforcement of the arbitral award as liquidated.

Enterprise Wheel and Car Company affirms an important principle set forth in *Lincoln Mills*: "One of the rules embodied in this federal law of collective-bargaining agreements is that an agreement to arbitrate disputes arising under the agreement is binding and enforceable by a decree for specific performance."[124] *Enterprise Wheel and Car Company*'s significance goes well beyond its holding, however, by decreeing the roles of the arbitrator and reviewing court, and the relationship between the two. The arbitrator's role is "to interpret and apply the collective bargaining agreement."[125] In fulfilling this role, the arbitrator must "bring his informed judgment to bear. . . to reach a fair solution" to a labor "problem."[126] When the arbitrator fulfills this role faithfully, he or she becomes an "indispensable agen[t] in a continuous collective bargaining process."[127] In "settl[ing] disputes," the arbitrator must search for a "solution" using "knowledge of the custom and practices of . . . a particular industry as reflected in particular agreements."[128] While the reviewing court's power is confined, it retains the power to void the arbitrator's decision where "his award" does not "draw[] its essence from the collective bargaining agreement."[129] Where the arbitrator fails to faithfully discharge that obligation—which is to bring informed judgment, industry-specific knowledge, and plant-level custom as reflected in management-labor agreements in fashioning a solution to a labor dispute—

123. *Id.* at 597 (emphasis added).
124. Cox, *supra* note 71, at 1484.
125. *Enter. Wheel & Car Corp.*, 363 U.S. at 597.
126. *Id. at* 597.
127. *Id.* at 596.
128. *Id.*
129. *Id.* at 597.

courts "have no choice but to refuse enforcement of the award."[130] Simply put, the relationship between the reviewing court and the arbitrator is that of watchdog; the court is there to ensure that the arbitrator has faithfully executed his or her duty of trust with respect to all parties to the collective-bargaining agreement. The watchdog must ensure that the arbitrator does not accept a request for arbitration simply to "dispense his own brand of industrial justice."

2. *The Main Values Underlying Grievance-Arbitration Are Industrial Peace, Participation, and Fairness*

a. Industrial Peace

The grievance mechanism is used to encourage industrial peace through an inexpensive and speedy means for obtaining industrial justice. Indeed, industrial peace is such an important statutory value that reviewing courts will read a no-strike clause into any collective-bargaining agreement that contains a grievance-arbitration mechanism.[131] In the courts' view, the agreement to arbitrate is a quid pro quo for the no-strike clause. This means that a union must refrain from striking over any grievable or arbitrable subject no matter what the employer does, and the employer must arbitrate whatever dispute arises within the confines of the grievance-arbitration clause—even if the grievance is frivolous.[132]

The trade-off between grievance-arbitration and no-strike clauses cannot be overstated. Essentially, our national labor policy, which grants all employees the right to withdraw their labor, also allows unions to waive that right through contract even in cases where the parties do not expressly agree to a no-strike clause (so long as the disputes are grievable). This is true even though the right to strike is recognized by the international community as a human right.[133] Thus, under federal law, the right to strike is a collective right that can be exercised and

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130. *Id.*

131. *See* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 105 (1962) (observing that "a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare").

132. United Steelworkers v. Am. Mfg. Co., 363 U.S. 564, 568 (1960).

133. *See* European Social Charter of 1961 art. 6, *opened for signature* Oct. 18, 1961, ETS No.035 (recognizing the right to strike as an inherent part of "the effective exercise of the right to bargain collectively"); Keith Ewing, *The Right To Strike Is a Human Right*, THE GUARDIAN, Mar. 26, 2010, at https://www.theguardian.com/commentisfree/libertycentral/2010/mar/26/ba-strike-human-rights. Some experts, including the two ILO supervisory bodies, the ILO's tripartite Committee on Freedom of Association (CFA) and its Committee of Experts on the Application of Conventions and Recommendations (CEACR), have also derived the human right to strike from the fundamental right of association found in the ILO Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1233; the ILO Convention Concerning Freedom of Association and Protection of the Right to Organise Convention No. 87, July 9 1948, 68 U.N.T.S. 17; and the ILO Declaration of Philadelphia, May 10, 1944. *But see* Employers' Statement in the Committee on the Application of Standards of the International Labour Conference (June 4, 2012), http://www.uscib.org/docs/2012_06_04_ioe_clarifications_statement.pdf (contesting that the right to strike is a fundamental human right).

waived by a union. The union exerts discipline over the workforce by channeling workplace strife through the grievance-arbitration machinery. The strike is an economic weapon of last resort.

b. Procedural Justice: Justice as Participation

American Manufacturing Company instructs us in another policy behind this bold quid pro quo; airing workplace grievances, even if frivolous, is therapeutic. The therapeutic function of grieving serves as a valve that reduces tension in the workplace before the pressure builds to such a point as to create circumstances ripe for economic warfare. As Harvard Law Professor Frank Michelman famously pointed out, "[s]uch procedures seem responsive to demands for *revelation* and *participation*. They attach value to the individual's *being told why* the agent is treating him unfavorably and to his *having a part in the decision*."[134]

Workers, like all people, not only have an interest in the outcome of a dispute (to which they are a party), but also value the process by which the parties arrive at that outcome. Whether a decision is perceived as fair will often depend on who made the decision, under what criteria, and to what extent workers themselves had a voice in resolving the dispute. This is especially true when the resolution disfavors the worker. When workers can freely participate in a fair process in which their voice can be heard by a neutral arbitrator, workers are more likely to accept the arbitration results, even when the arbitral decision is averse to their interests.

Our vision for labor arbitration "is largely based on the description of a non-arbitrary and fair process contained in the famous Holmes lecture by Yale Law School Dean Harry Shulman."[135] Labor law compels employers to deal with employees,[136] through their "[r]epresentatives designated or selected,"[137] over "wages, hours, and other terms and conditions of employment."[138] This, has had the following two effects. First, employees have the right to participate in workplace determinations, a right secured by Section 7 of the National Labor Relations Act.[139] Second, society's acceptance of unions and collective

134. *See* Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* 18 NOMOS, DUE PROCESS 126, 127 (Ronald Pennock & John W. Chapman eds., 1997) (discussing informal procedures, not specifically grievance-arbitration).

135. Brief of U.S. Labor Law and Industrial Relations Professors as Amicus in Support of Petition for Panel Rehearing and Rehearing En Banc at 2-3, NFL Mgmt. Council v. NFLPA, Nos. 15-2801, 15-2805 (2d Cir. May 31, 2016) (citing Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960); and Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955)).

136. This duty emanates from the duty to bargain. *See* 29 U.S.C. § 158(a)(5) (2012).

137. *See* 29 U.S.C. § 159(a).

138. *See* 29 U.S.C. § 158(d); *see generally* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

139. *See* 29 U.S.C. § 157. That right is also secured by the correlative duty on the

bargaining has augmented "the employee's confidence and his sense of dignity and importance; where previously there may have been submission, albeit resentful, there is now self-assertion."[140]

Arbitration, as an extension of collective bargaining, also plays an important role in democratic societies. As Justice Louis Brandeis explained, collective bargaining is "the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."[141]

c. Corrective Justice as Fairness

The right to participate in decision-making that affects one's work life is an important aspect of industrial justice.[142] But arbitration also allows for corrective justice through a fair procedure. The participants in the grievance process accept the result not only because the process is fair but the decision is fair as well. And the decision is fair because an experienced and neutral expert has listened to both sides and formulated an opinion as to whether one of the parties acted in breach of contract or otherwise acted in an unlawful manner.

3. Summary of the Labor Arbitration Principles Underlying the Steelworkers Trilogy, its Forerunners, and its Progeny

In summary, the Steelworkers Trilogy, its forerunners, and its progeny define the scope of an arbitrator's power in relation to a reviewing court's power.

Principle one: Section 301 creates a federal cause of action for breach of collective-bargaining agreements. Although Section 301 law suits are primarily breach of contract claims, courts hearing these cases must not apply state contract law. Instead federal courts must develop and apply a federal common law of contract rules fashioned from national labor law policy, only borrowing from state rules where compatible with federal policy, and absorbing them into the body of federal law governing collective-bargaining agreements.[143]

Principle two: Arbitrators, not courts, are primarily responsible for interpreting the collective-bargaining agreement and applying its terms to the dispute presented.

Principle three: An agreement to arbitrate grievances under a collective-

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employer's and the union's part to bargain in good faith with a view toward reaching an agreement. *See* 29 U.S.C. § 158(a)(5), (b)(3), (d); *see also* Anne Marie Lofaso, *Talking Is Worthwhile: The Role of Employee Voice in Protecting, Enhancing, and Encouraging Individual Rights to Job Security in a Collective System*, 14 EMP. RTS. & EMPLOYER POL'Y J. 101, 116 (2010).

140. Shulman, *supra* note 135, at 1003.

141. *Id.* at 1002.

142. *See generally* Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1 (2007).

143. *See Lincoln Mills*, 353 U.S. at 457; *see also* Cox, *supra* note 71, at 1484.

bargaining agreement is binding and enforceable through specific performance.[144]

Principle four: Courts are limited to determining whether a labor dispute is substantively arbitrable. In making that determination, courts may not weigh the merits of the grievance or they risk depriving the parties of what they bargained for – the arbitrator's judgment.[145]

Principle five: Labor arbitration is an extension of the collective-bargaining process, which serves to avoid industrial strife, encourage industrial peace, and strengthen the parties' relationship.[146]

Principle six: The collective-bargaining agreement is itself "a system of industrial self-government"[147] between parties that have a pre-existing relationship. That agreement "covers the whole employment relationship."[148]

Principle seven: When an arbitrator interprets or applies a collective-bargaining agreement, he or she thereby creates a new common law – the law of the shop – that serves as the shop's rule of law.[149]

Principle eight: No contract can cover all eventualities. The grievance-arbitration machinery serves the purpose of having a process for fair resolution over disputes created, at least in part, by gaps in the agreement and unforeseeable problems.[150]

Principle nine: The arbitrator is the person for whom the parties have bargained to interpret those gaps and ambiguities in a fair manner, thereby giving meaning to the collective agreement. He or she is an agent in the collective-bargaining process. In rendering a fair decision, the arbitrator must be neutral, and draw upon his or her experience and expertise in labor relations, the particular industry, and even the particular shop.[151]

Principle ten: The court's review of the arbitrator's neutral, experienced, and expert opinion is, therefore, limited to determining whether the arbitral award "draws its essence from the collective bargaining agreement" or whether the arbitrator exceeded his or her authority by "dispens[ing] his own brand of industrial justice."[152]

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144. *See* Lincoln Mills, 353 U.S. at 454; Enter. Wheel & Car Corp., 363 U.S. at 599 (upholding district court order to enforce arbitration award by specific performance); *see also* Cox, *supra* note 71, at 1484.

145. Am. Mfg. Co., 363 U.S. at 568.

146. *Warrior & Gulf.*, 363 U.S. at 581.

147. *Id*. at 580.

148. *Id.* at 579 (citing Shulman, *supra* note 135, at 1004–05).

149. *Warrior & Gulf*, 363 U.S. at 578–79.

150. *Id.* at 580–81 (citing Shulman, *supra* note 135, at 1005).

151. Enter. Wheel & Car Corp., 363 U.S. at 597.

152. *Id.*

C. En Banc Arguments Showing that the Panel Decision Conflicts with Supreme Court Precedent and Involves a Question of Exceptional Importance

As discussed above, Deflategate is a grievance-arbitration case in which the NFL requested the district court to enforce its Article 46 arbitral decision under Section 301. At first blush, this seems like an easy case. After all, the Commissioner took action against Tom Brady under Article 46, Section 1(a) of the NFL-NFLPA collective-bargaining agreement, which provides, in relevant part, as follows:

> All disputes . . . involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows . . .[153]

Moreover, the parties expressly agreed that the Commissioner may "serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion."[154] Here, once Tom Brady appealed his case, Commissioner Goodell exercised his discretion in serving as the appellate hearing officer, that is, the arbitrator.

The problem here is two-fold. First, the Commissioner lacked several important characteristics of an arbitrator. In particular, the Commissioner was not neutral. Second, the Commissioner failed to explain his decision in terms of generally accepted principles of industrial due process and failed to address arguments grounded in the collective-bargaining agreement. As discussed in the amicus brief, the Commissioner's actions created a significant question of national labor law. In particular, the amici argued that an agreement to arbitrate labor disputes can never amount to an agreement "to an arbitrary process where that arbitrator may transform an appellate proceeding into a trial de novo, ignore generally accepted principles of industrial due process, and ignore arguments grounded in the collective bargaining agreement ('CBA')."[155] In the amici's view, if courts were to "allow arbitrators to ignore [a] CBA's 'appellate' limitations or the parties' arguments (and the probative CBA language cited in support of those arguments), parties will no longer be able to trust arbitration as a fundamentally fair process, thereby discouraging its use as a dispute-resolution method that protects industrial peace."[156] According to the amici, this "may

153. There is some dispute as to whether Goodell followed these "exclusive" procedures insofar as he delegated his Article 46, Section 1(a) authority to discipline a player for conduct detrimental to the integrity of the game of professional football to NFL Executive Vice President of Football Operations, Troy Vincent. That question, which is essentially a question of contract interpretation, while an appropriate issue for appellate review, does not meet the high standards for en banc review – namely a question of national significance or a conflict with mandatory authority. Accordingly, that question is beyond the scope of this article.

154. CBA art. 46, § 2(a).

155. Brief for U.S. Labor Law et al. as Amici Curiae Supporting Petitioners, NFL Mgmt. Council v. NFL Players Ass'n, 820 F.3d 527 (2d Cir. 2016) (Nos. 15-2801, 15-2805).

156. *Id*.

destroy the very process that the Court wishes to protect – the peaceful resolution of labor disputes through a non-arbitrary and fair proceeding."[157]

The compound question that the amicus brief presents may be broken down into the following two questions:

1. Are the parties to a labor arbitration entitled to an arbitrator who exhibits certain characteristics, namely, neutrality, expertise, and experience?

2. Are fundamental principles of industrial due process automatically embedded in a collective-bargaining agreement such that where an arbitrator ignores such principles he or she has essentially dispensed his or her "own brand of industrial justice"?

These arguments are reviewed in turn.

1. Commissioner Goodell Lacked Essential Characteristics of an Arbitrator – at least with Respect to Deflategate

As discussed above, labor arbitration is an extension of the collective-bargaining process, which serves to avoid industrial strife, encourage industrial peace, and strengthen the parties' relationship. To fulfill these policies and values underlying labor arbitration, the arbitrator must be neutral, experienced, and expert. These traits arise directly from the principles emanating from the Steelworkers Trilogy. Insofar as the collective-bargaining agreement erects a system of industrial self-government to cover an entire employment relationship, the grievance-arbitration machinery is built to strengthen that relationship by forcing the parties to resolve their disputes in a peaceful manner.

Here, the NFL-NFLPA collective-bargaining agreement permits the Commissioner to "serve as hearing officer in any [Article 46] appeal . . . at his discretion."[158] Contrary to the NFL's contention, which ultimately won the day, that is not the same as the parties choosing Commissioner Goodell by agreement to serve as the arbitrator in these types of cases. Rather they expressly bargained for "his discretion" as to when to serve as the hearing officer. This agreement is against a backdrop of discretion to which all grievance procedures are subject based on the labor grievance-arbitration principles developed in the Section 301 context, chief among them, the Steelworkers Trilogy.

Simply put, the parties did not bargain for Commissioner Goodell. They bargained for discretion in cases that question the integrity of the game of football. Management often likes to bargain for "discretion" in making decisions, thinking that discretion means unfettered or unreviewable decision-making. However, discretion is always constricted by the rule of law and reasonableness standards. The NFL's interpretation of Article 46 as bargaining for Goodell makes these important labor arbitration principles a lost triviality. Article 46 requires Commissioner Goodell to use his discretion in deciding who

157. *Id*.
158. CBA art. 46, § 2(a).

should hear Tom Brady's case. He needed to find a neutral arbitrator who would draw upon his or her experience with the NFL and expertise in labor relations in professional football to render a fair decision that would tend to create industrial peace. Goodell could never be that person in this case because he had already prejudged Brady as guilty. The conditions for deference to the arbitrator – neutrality, expertise, trust – simply do not hold here.

2. Fundamental Principles of Industrial Due Process Are Part and Parcel of all Labor Agreements such that Arbitrators Who Ignore Such Principles Have Essentially Dispensed Their Own Brand of Industrial Justice

As discussed above, the Steelworkers Trilogy placed a significant limitation on the arbitrator's decisional authority. Namely, the arbitral award "is legitimate only so long as it draws its essence from the collective bargaining agreement."[159] Reviewing courts should not vacate an arbitral award, where an arbitrator shows how his or her decision fits within well-established standards for justice.

For discipline to be just, there must be a good reason for the discipline; a legitimate managerial interest that is furthered; and procedural fairness.[160] The time-tested just-cause standard has developed meaning over the years through its application in thousands of specific cases. Arbitrators faced with applying a just-cause standard "have access to a rich body of decisional law supported by arbitral opinions."[161] Much of this jurisprudence pertains to the procedures that management, seeking to discipline workers, must apply. Indeed, "the practical significance of the essence standard in discipline cases has been to require arbitrators to determine the meaning of contractual language by reference to the established jurisprudence of penalties and infractions as applied in previous cases."[162] Accordingly, as the amicus brief further noted: An arbitral decision that follows the established arbitration precedence, "draws its essence from the agreement. This standard is consistent with the basic policy behind the essence standard. So long as the arbitrator is seeking to be consistent with the decisions of other arbitrators or judges, he or she is not attempting to "'dispense his own brand of industrial justice.'"[163]

All collective-bargaining agreements must be read with the background that workers are entitled to industrial due process. At the very least, this means the following: "actual or constructive notice of expected standards of conduct and penalties for wrongful conduct"; a "decision based on facts, determined after an

159. *Enter. Wheel & Car Corp.*, 363 U.S. at 597.

160. *See* Roger Abrams & Dennis Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L. J. 594, 594 (1985) ("[f]ew things are more significant to employees than limitations on their employer's power to discipline or discharge them").

161. Brief of U.S. Labor Law et al. as Amici Curiae Supporting Petitioners, NFL Mgmt. Council v. NFLPA, 820 F.3d 527 (2d Cir. 2016) (Nos. 15-2801, 15-2805), at 3.

162. *Id.* at 4.

163. *Id.*

investigation that provides the employee an opportunity to state his case, with union assistance if he desires it"; "the imposition of discipline in gradually increasing degrees"; and "proof by management that just cause exists."[164] The employee is also entitled to industrial equal protection, which means that the arbitrator must treat like cases alike.[165]

Commissioner Goodell, a non-neutral arbitrator, failed to apply these well-established rules of fair process and equal protection. With respect to industrial due process, although Goodell based his determination on an investigation, the imposition of the specific penalty was unprecedented and non-gradual. Moreover, Goodell failed to provide proof of cause for this penalty. In particular, by upholding the suspension without good reasoning, Goodell analogized Brady's conduct to taking performance-enhancing drugs. This permitted Goodell to jump over contractually agreed-to lesser penalties in favor of suspension, thereby violating the principle of gradual discipline.

Goodell also failed to provide Brady with industrial equal protection when he equated ball deflation with drug use but never explained how drug use and equipment violations constituted like cases. This analogy is unfair for at least two reasons. First, although the NFLPA agreed to specific penalties for steroid use as part of the collective-bargaining process, it had no voice in establishing any such penalty for football deflation. By contrast, the NFLPA did have a voice in establishing the penalty schedule, which Commissioner Goodell ignored. Second, whereas performance-enhancing drug use often involves criminal law violations, deflating football is not against the law, but a mere violation of game rules. To meet equal protection standards, Goodell should have explained how performance-enhancing drug use and this type of equipment violation both constitute" conduct detrimental to the integrity of, or public confidence in, the game of professional football."[166] He did not; as the amicus brief concluded, "[i]t is difficult to avoid the conclusion that his failure to do so comprises the fatal arbitration error of seeking to impose his own brand of industrial justice."[167]

CONCLUSION

As this article shows, the merits of Deflategate were not at issue at the en banc stage of these proceedings. Rather, this case was about whether Tom Brady received a fair process.

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164. *See* Abrams, *supra* note 160, at 612.

165. *Id.*

166. There is some dispute as to whether Goodell followed these "exclusive" procedures insofar as he delegated his Article 46, Section 1(a) authority to discipline a player for conduct detrimental to the integrity of the game of professional football to NFL Executive Vice President of Football Operations, Troy Vincent. That question, which is essentially a question of contract interpretation, while an appropriate issue for appellate review, does not meet the high standards for en banc review – namely a question of national significance or a conflict with mandatory authority. Accordingly, that question is beyond the scope of this article.

167. Amici Brief of U.S. Labor Law, *supra* note 161, at 5.

Part III explains why Tom Brady did not receive a fair process. Simply put, Commissioner Goodell should not have appointed himself to hear Brady's case because of his previous involvement in the case. Goodell failed as a non-neutral arbitrator as revealed by the language in his arbitration decision. There is, however, a larger point here. The NFL-NFLPA has a major structural obstacle to fair process, which is found in Article 46 itself. That Article allows the immediate escalation of certain types of grievances to the highest level of authority. While the parties are at liberty to make such an agreement, it seems that such an agreement is unwise. There are historically grounded reasons why most grievance-arbitration clauses require layered review designed to encourage open communication and settlement at the lowest level of authority. Now that the Commissioner, as arbitrator and with court approval, has interpreted this clause as an agreement that the Commissioner has nearly unfettered discretion to hear these cases, the parties should consider changing that language in their next round of negotiations.