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David E. Feller: The Happy Warrior

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Dave Feller and I first became acquainted when we were both union lawyers in Washington, D.C. Dave was the ultimate happy warrior. He went joyous into combat, and years later he could recount, joyously, objectively, and without rancor toward old foes, the exact details of the many triumphs and the few defeats. A favorite story came from his Supreme Court clerkship. Dave was already seven years out of Harvard Law School, with experience in university teaching, Army intelligence, and the Justice Department, and he didn’t hesitate to tell Chief Justice Vinson he should vote for certiorari in a case close to Dave’s heart. When Vinson remained adamantly opposed, Dave lobbied his fellow clerks to lobby their Justices to counter the Chief. Dave prevailed and Vinson, outraged by this treasonous behavior, fired Dave. But Dave’s was too fine a mind to be lost to the Court, and his clerkship was soon restored.

The peppery, brilliant Felix Frankfurter was a more kindred spirit. Frankfurter took an interest in star clerks, regardless of their home chambers, and he and Dave became friendly during Dave’s clerkship. In subsequent years, when Dave would be awaiting his turn in oral argument before the Court, one could see Frankfurter lean over from the bench and wink broadly at him. Then Dave’s case would be called and the two of them would go at it, hammer and tongs.

After his clerkship Dave became a lawyer for the old CIO and the Steelworkers, later forming a partnership with Arthur Goldberg and Elliot Bredhoff. Dave loved to relate how Goldberg said he wanted “an Irishman who can talk fast in a loud voice about things he knows nothing about.” A mutual friend, Tom Harris, exclaimed, “That’s David Feller!” Dave was hired and the string of Supreme Court victories began.

An early case reflects Dave’s subtlety and foresight. In Guss (1957),\(^1\) after the National Labor Relations Board had declined jurisdiction on the basis of its dollar jurisdictional standards, a Steelworkers local obtained a ruling from Utah’s labor board that an employer had violated the state labor

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But David concluded this would be bad for the labor movement as a whole. He reasoned that it opened the way for increasing state regulation and that instead federal preemption should control, even though the result would be a “no-man’s land” unregulated by either federal or state law. So Dave filed a brief urging reversal and, as he wryly put it, “we succeeded in losing the case.”

Arthur Goldberg argued the landmark *Lincoln Mills* (1957)\(^2\) case, establishing the applicability and constitutionality of Section 301 of the Taft-Hartley Act\(^3\) as the source of federal “common law” for the enforcement of union-employer contracts. Dave was the main author of the brief. Thereafter he became the firm’s principal advocate in oral arguments before the Supreme Court. Dave handled such important cases as *Dowd Box* (1962),\(^4\) holding that state courts have concurrent jurisdiction with federal courts to enforce labor contracts; *Fibreboard* (1964),\(^5\) holding that subcontracting of maintenance work within a plant is a mandatory subject of bargaining; and *Vaca v. Sipes* (1967),\(^6\) holding that a union violates its duty of fair representation only when its action is arbitrary, discriminatory, or in bad faith.

The crowning achievement of Dave’s career as an advocate was the *Steelworkers Trilogy* (1960)\(^7\). Dave argued in all three cases, with Elliot Bredhoff joining him in one. The Trilogy placed the imprimatur of federal law on the labor arbitration process. If an arbitration clause on its face covers a dispute and there is no clear exclusion, a court should order arbitration even if it regards the claim as frivolous. If an award “draws its essence” from the labor contract, and there is no fraud or exceeding of the arbitrator’s authority, a court should enforce the award without reviewing its merits. Dave said that on the day of the decision, he walked out onto the Supreme Court’s steps and thought: “I’ll never top this. It would be only fitting if I were struck dead on the spot!”

When Arthur Goldberg became Secretary of Labor in 1961, Dave became head of the firm of Feller, Bredhoff & Anker as well as General Counsel of the Steelworkers and of the Industrial Union Department of the merged AFL-CIO. But eventually Dave lost the Steelworkers as a client after I.W. Abel ousted Dave McDonald as the Union’s President, and he lost the IUD after a falling out with Walter Reuther over Dave’s insistence

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on expressing his own views. Goldberg's ascent to the Supreme Court was also costly, since Goldberg had to recuse himself in cases that Dave handled. Dave reported that he still had plenty of union business and "made a lot of money but it wasn't as satisfying." In 1967 Dave decided to move to Berkeley and become a law teacher and labor arbitrator. The jaunty warrior proved a master of this new world as well.

I had preceded Dave into teaching law by two years, and by 1967 was working on the revision of one of the standard labor law casebooks. Dave reported he had looked over the crop of existing casebooks and was dissatisfied with all of them. "I told the kids I was waiting for your revision to be published, Ted," said Dave. "You too came out of active practice and you'll know what these students should be taught." I gulped. My revision consisted mostly of updating and a little rearranging of material in what I considered a basically sound work. I was sure Dave would be no more satisfied with my version than with its predecessors. Indeed, when the new edition came out, I heard—quite uncharacteristically—not a word from Dave. In due course the publisher noted that Berkeley had not adopted our fine new product. Dave had his own way of doing things and no other would suffice. The results speak for themselves. The men and women who went into labor law as a career because of Dave's teaching are legion.

Despite his background as a vigorous union advocate, Dave was quickly accepted as an arbitrator by both management and labor. It was typical of his finely calibrated mind that he took particular pride in one case where his award was subsequently vacated by a court. "We both got it right!" Dave declared gleefully. "The collective bargaining agreement called for conduct that violated public law. My job was to interpret and apply that contract," he explained. "I ruled the action did not breach the contract. The court's job was to interpret and apply the law. The court held the contract was unenforceable. Each of our positions was perfectly sensible and consistent with the other."

Dave's success as an arbitrator soon led to his membership in the National Academy of Arbitrators, an organization of over 600 of the country's leading labor arbitrators. In 1992 Dave became President of the Academy. His term was scheduled to be capped by the 1993 annual meeting in Denver. Then came a brouhaha. The State of Colorado had recently adopted a constitutional amendment that purported to annul any municipal ordinances prohibiting discrimination against gays and lesbians. Some vocal Academy members urged a relocation of the meeting as a rebuke to Colorado. Ironically, however, Denver was one of the very cities whose antidiscrimination ordinances had prompted the State's effort at

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preemption. Dave, clear-headed as usual amidst the clamor, saw a boycott of Denver as punishing the victim instead of the culprit. He insisted that the meeting stay put and it did.

In his Presidential Address that year, Dave focused on the Steelworkers Trilogy. Instead of reveling in his great triumph, however, he all but delivered a funeral oration. Recent rulings had held that the Federal Arbitration Act (FAA) created a body of federal substantive law, binding on the states, for the enforcement of arbitration agreements. That rendered Lincoln Mills and its progeny largely unnecessary, except insofar as Section 301 was still needed for an action in federal court. Moreover, and much worse in Dave’s eyes, language in Enterprise Wheel, the third of the Steelworkers Trilogy, would enable a court that disagreed with an arbitral award to set it aside on the grounds it did not draw its “essence” from the collective bargaining agreement. For Dave, the anomalous result was that labor arbitration awards now appeared more vulnerable under Enterprise and Section 301 than commercial awards under the FAA.

One of Dave Feller’s major contributions to the National Academy of Arbitrators was his authorship of a series of amicus briefs in several leading Supreme Court cases. Nearly all his briefs were winners. In Misco (1987) the Court went most of the way with Dave in sharply limiting the basis for setting aside an arbitration award on the grounds of public policy. The policy would have to be “explicit,” “well defined and dominant,” and ascertainable “by reference to the laws and legal precedents and not from general considerations of supposed public interests.”

In Wright (1998) Dave supplied the key by which the Court was able to avoid the difficult question of whether a union could waive employees’ rights to sue on a statutory discrimination claim and instead require them to

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11. Feller, supra note 9, at 4. The FAA does not constitute an independent basis for federal jurisdiction.
12. 363 U.S. at 597.
13. Feller, supra note 9, at 7. Section 10(a) of the FAA, 9 U.S.C. § 10(a) (2000), provides for four limited grounds for the vacatur of arbitration awards. In essence they are (1) fraud; (2) arbitrator partiality; (3) arbitrator misconduct; and (4) arbitrators’ exceeding of their powers. The lower courts, however, have added several nonstatutory grounds. See generally Stephen L. Hayford, The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration, 21 BERKELEY J. EMP. & LAB. L. 521, 549-53 (2000).
14. Feller, supra note 9, at 9-10.
16. Misco, 484 U.S. at 43.
submit the grievance to arbitration. In keeping with Dave’s argument, the Court concluded that at least such a waiver would have to be “clear and unmistakable.” Dave produced a genuine tour-de-force in a case involving baseball player Steve Garvey. The Ninth Circuit had vacated an award denying Garvey collusion damages because it found the arbitrator’s findings so implausible that he must have “dispensed his own brand of industrial justice,” contrary to the mandate of Enterprise. Dave contended, alone of all the participants, that the court of appeals had so clearly erred in substituting its judgment for the arbitrator’s that no oral argument was necessary but that a per curiam opinion by the Supreme Court was needed to reaffirm the Misco standards. The Court followed this script to the letter, reversing the Ninth Circuit’s decision and declaring it “nothing short of baffling.”

Dave was a formidable figure at Academy meetings when he strode to the microphone to analyze a problem, trenchantly and brusquely, often with an arcane bit of history or some biting humor thrown in. Yet this fearsome debater could not have been more solicitous toward younger arbitrators anguishing over a decision. His most powerful advice was invariably to the effect: “Decide it! Decide it! Have the courage of your convictions!” Dave was also unlike some respected senior members of the Academy who have been criticized for being too cliquish. He regularly went out of his way to welcome newcomers and spend time with them at the social events of the Academy.

Even Dave Feller had to meet the academic world’s publication requirements for tenure. He did it with a flourish, in a highly original, provocative article of almost two hundred pages on the nature of collective bargaining agreements. Dave’s thesis was that the usual labor agreement is only a contract between the employer and the union, not the employer and the employees. For employees with a claim against their employer, the sole resort is ordinarily the enforcement of the arbitration clause—a matter within the union’s discretion, subject only to its duty of fair representation. Agree with him or not, one cannot help but marvel at the skill and ingenuity with which Dave marshals his arguments. Beginning law students and veteran scholars alike could profit from one lesson in particular. While Dave takes a back seat to nobody in his mastery of theory, he always starts with the facts of individual cases—frequently cases whose full significance

18. Id. at 80.
only Dave had recognized.

Was Dave ever wrong about a legal issue? Over the years there were several matters on which he and I disagreed, and naturally I like to think he was wrong about all of those. But there is only one on which I am confident history will come down against him. In 1981, I presented a paper at the annual meeting of the National Academy of Arbitrators, urging that the United States should adopt the recommendations of the International Labor Organization and join all the other major industrial democracies of the world in eliminating the pernicious doctrine of employment at-will.23 Under that rule, in the absence of a specific statutory prohibition or contractual limitation, employers may, as once famously stated, “dismiss their employees at will, . . . for good cause, for no cause or even for cause morally wrong.”24 In the discussion following my presentation, Dave opposed my position. I have always thought he was influenced by a notion common among an older generation of union lawyers. This was that employees are best protected against unjust discipline by collectively bargained arbitration procedures and that statutory safeguards undercut a major argument for unionization. For somewhat similar reasons organized labor initially opposed the Fair Labor Standards Act.25 Yet experience has shown that unions can almost always build on the minimum protections or floor erected by legislation. On the assumption that Dave was mistaken on at-will employment, however, it is actually refreshing to realize that his judgment was not infallible.

How does one sum up a person of such stature? Dave Feller was a consummate craftsman, a dauntless advocate, an inspiring teacher, and a born leader. He had a mind as quick and sharp as a rapier, and a wit equally nimble and piercing. He was totally lacking in pretension himself, and he would brook no overweening poses in others. Although legendary as an imaginative, even wily, legal thinker, he was the soul of integrity when it came to informing a court about what it was entitled to know. And beyond his public persona, Dave was a warm, lively, multifaceted human being, who treated his wife Gilda26 as the full intellectual partner she was, and all the rest of us, without regard to title or status, according to our own individual merits.

26. At a social gathering someone kept referring to Gilda as “Carmen.” Finally, Dave could stand it no longer and quipped tersely, “You have the wrong opera!”