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David Feller

Richard McCracken†

Feller briefed and argued many cases to the Supreme Court, but what is more important than the sheer number is the thematic integrity of this work. Almost all the cases were on the same subject: the establishment of a regime of industrial democracy with arbitration at its core. There was no happenstance here. He and his colleagues had a design for how this system should work, and they picked the cases that provided the pieces to fit to the frame. Because he had the design clearly before him, he could not only see but explain to the Court how the pieces were related.

It was an elegant design that was based on sociological and management studies mostly from the first half of the 20th Century. As Feller saw it, the modern industrial workplace is bureaucratically organized because of its size and complexity. It must have detailed rules for its operation. These rules are designed not just to control the behavior of the productive workers but their managers as well. Indeed, one of the functions of the rules is to give the workers some ability to help upper-management find out what lower-level managers are doing and to correct them. Collective bargaining agreements are frequently decried for being laden with rules that restrict management flexibility too much. In Feller’s view, there would be detailed rules no matter whether there was collective bargaining. The truth of this is amply demonstrated today. Every nonunion company of any size has an employee handbook. These have grown into formidable documents, usually twenty or more pages long, covering everything from the company’s statement of its mission to the proper length of fingernails. What Feller said thirty years ago—that a nonunion company’s own rules cover virtually every subject covered in a collective bargaining agreement—is even more true today, in the sense that all these things have been compiled into a written form that looks very much like a collective bargaining agreement.

The only difference, he said, lies in whether the workers themselves have any say in developing the rules. Naturally, he thought that they should

† Partner, Davis, Cowell & Bowe, and General Counsel, Hotel Employees and Restaurant Employees International Union, AFL-CIO. The author was Professor Feller’s Research Assistant in 1973-1974 and assisted in editing Feller’s A General Theory Of The Collective Bargaining Agreement, 61 CAL. L. REV. 663 (1973).
have such a role, through the collective bargaining process. But because these were rules that grew out of the need to organize production, rules that would inevitably be adopted unilaterally by the enterprise if not agreed to through collective bargaining, Feller saw very little place for the courts or the National Labor Relations Board in the administration of this system. He refused to use the term "union contract" and hastened to correct anyone who said it in his presence. There was only a "collective bargaining agreement," which was very different from any contract. Because the collective bargaining agreement contained the "rules of the shop" and could only be understood in the context of the operation—viewed from the inside—of the business out of which it grew, courts accustomed to contract interpretation could not be expected to understand it and enforce it with the necessary level of sophistication. For workers to really have a say, however, their voices needed to be heard not only in the negotiation of the terms of the agreement but in enforcement as well. Arbitration was of course the way to give workers the ability to enforce the agreement without bringing the courts into the picture.

With this view of arbitration in mind, Feller and his co-workers proceeded to put the legal framework together in a remarkably short period of time. It began in 1957 with *Lincoln Mills* and ended with *Vaca v. Sipes* in 1967. During that decade, Feller persuaded the Court to adopt all of the central principles of labor arbitration which are familiar today. The agreement to arbitrate is specifically enforceable under Section 301 despite the prohibition in the Norris-LaGuardia Act against injunctive relief in labor disputes. The courts must grant request to compel arbitration of grievances without making even a preliminary inquiry into their merits; all grievances are arbitrable unless it can be said "with positive assurance" that the terms of the collective bargaining agreement cannot possibly support the grievance; and arbitration awards must be enforced summarily unless it was apparent that the arbitrator based the decision on something else besides the agreement. Even disputes about basic entrepreneurial decisions like subcontracting are mandatory subjects of bargaining, which of course results in rules about subcontracting being bargained and any disputes about compliance with the rules being arbitrable. Procedural questions like the timeliness of grievances must also be entrusted to the arbitrator as well as

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the merits, and provide no grounds to avoid arbitration. Breach of a non-strike clause does not vitiate an employer’s obligation to arbitrate. A worker cannot sue for breach of a collective bargaining agreement without first exhausting the grievance and arbitration machinery. Even after exhausting these remedies, no suit by an individual worker is allowed unless it can be shown that the industrial dispute-resolution machinery did not work because the union breached its duty of fair representation. Successful individual suits would be rare, because the duty imposed upon the union is only to act in a manner that is not arbitrary, discriminatory or in bad faith.

Feller worked on many other cases, to be sure, but these were the ones that were most important to him. He explained how they all worked together to create a special system for industrial justice in *A General Theory of the Collective Bargaining Agreement*, which is still the summation of his thought about this system. It was not a review and reconstruction, an attempt to make sense out of what the courts had done in this area. Without saying it in so many words, it was a description of how he had gone about making theory into reality. How many approach their work with an ever-present awareness of a unifying, intellectual conception? How many succeed?

He was quite disappointed in how it all turned out. Those who have read and listened to his many analyses of the system of labor arbitration, persistently lamenting the passage of a golden age, are familiar with this disappointment. I believe he underestimated the enduring nature of the system and how much his work contributed to nurturing and protecting it.

Feller wanted the interpretation of collective bargaining agreements to be the province of expert labor arbitrators, not courts. That is still the rule. Even decisions that may be regarded as inroads on this principle, like *Boys Markets*, do not really give up much ground. Yes, the federal courts will enjoin breaches of no-strike promises, but only on condition that the employer arbitrate the underlying dispute. If there is no underlying dispute because the breach is itself the dispute, then there is no injunction. It would have been better for the integrity of labor arbitration as a purely

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10. *Id.*, 386 U.S. at 190.
11. *Id.*, 386 U.S. at 190.
12. *Id.*, 398 U.S. at 254.
private and fully-malleable process for each business if the Court had not allowed arbitration awards to be overturned on the basis of "public policy." Although for a while, lawyers with only a narrow interest in winning and without any feel (or perhaps even any real appreciation) for the special nature of this institution tried to exploit this opening to make awards less final and binding, the Court has firmly held this door open at only a crack. An award is defective only when compliance with it would be a violation of the law.

In practice, at least in my experience, it is rarely necessary to sue to compel arbitration and the suits are almost invariably successful when brought. None of the awards in the many arbitration cases I have handled, or the thousands my firm has done, has ever been overturned, including the one, ill-advised attempt we made to do so. Duty of fair representation suits are another rarity and it is an uncommon plaintiff who can establish both that the employer violated the collective bargaining agreement and the union breached the duty of fair representation. Most duty of fair representation suits are brought by new lawyers who have not yet figured out that this is a poor way to make any money.

Both in legal theory and in practice, there has been no real erosion of the structure Feller put in place. Instead, an opposite phenomenon has occurred. The Court has exported this structure to commercial arbitration.

What was achieved in the Steelworkers Trilogy was extraordinary. It went strongly against the grain of the judicial attitudes of the time, which were unsympathetic to arbitration. Since then, that attitude has changed almost completely. Arbitration is now favored as heavily in commercial arbitration as it is in labor. The Supreme Court has come to cite and apply the Trilogy as its basic policy under the Federal Arbitration Act.

Maybe this change has come about because the courts labor under such enormous workloads that deferring routinely to arbitrations—and even ordering it when the parties have not agreed to it contractually—is just another way to cope with this burden. Or perhaps it is because the system of labor arbitration was seen to work so well that the Court concluded that it should be extended much more widely and that for it to have the same success in other areas of the law, it needed the same high walls of protection that had been put up around labor arbitration. A case can be made that David Feller was the author of the most fundamental change in

17. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (thorough intermingling of the Steelworkers Trilogy with FAA precedents in a case where a local automobile dealer asserted claims, including antitrust claims, against a manufacturer; the Court decided that although statutory claims were involved, the case nevertheless must be deferred to arbitration under the broad arbitration clause in the dealership's contract with the manufacturer).
judicial philosophy that has occurred in this country.

I believe he recognized this and although he must have been gratified that his ideas for how to establish the proper relationship between the judiciary and arbitration had such profound influence, he was not altogether happy about how the law developed. After all, he viewed the collective bargaining agreement as a very special type of code, not a contract. Commercial arbitration is mostly about contracts. Commercial arbitrators inevitably bring to bear the elaborate and precedent-based principles of contract construction. What they are doing is very different from how Feller conceived the role of the labor arbitrator, who ideally is not a strict contract constructionist who lets the “chips fall where they may” but instead someone who helps the parties in a permanent relationship within an enterprise to keep that relationship healthy and productive. If the laws governing commercial arbitration and labor arbitration merge, Feller saw a danger that labor arbitrators will be seen as just another variety of contract interpreters and subjected to the same kind of judicial review. Because judges are by and large unfamiliar with collective bargaining agreements but very comfortable with the principles of contract interpretation, this could lead over time to a greater willingness to substitute judicial judgment for that of the arbitrators. He also worried about an increasing willingness of arbitrators to include analysis of public law in their decisions, and even to start arbitrating claims founded on statutory protections. He thought that this would subject their decisions to greater judicial review because the courts are, of course, unlikely to give as much deference to decisions interpreting statutes as to those confined to explaining the meaning of collective bargaining agreements. As far as I can see, however, this has not happened, probably because arbitration has become so widely used and valuable that the courts have many incentives not to impair its independence and finality. Moreover, labor arbitration is no longer unique as an institution for helping to administer a code instead of interpreting contracts. The World Intellectual Property Organization (WIPO) performs an analogous function for the users of the Internet.

There is another area where Feller’s feeling that there has been a fall from grace is unfortunately all too real. Feller was a vigorous advocate but a very civil man. He saw arbitration as not only an efficient way to adjust workplace disagreements but also to diffuse the anger, often bitter, that occurs in labor disputes. His ideal for labor relations included as a bedrock principle that the parties would not savage each other. They would not try to destroy each other. There might be strikes or lockouts as a test of will and economic strength, but steel workers would properly shut down the plant before striking in order to avoid damage. Through their union, workers would show an employer how much their labor was needed, but they would not try to undermine the employer’s reputation in the market.
Feller was very disheartened to see the steady degradation in this ideal over the last thirty years. It was a cause for unhappy discussion between us, because I have been at times a participant in the increasingly confrontational nature of industrial relations. I tried to explain that management had started it with the big growth of the union buster business starting in the 1970s, leaving unions no option but to fight back in any way they could. He was not convinced, or even impressed, by these arguments.

This was his gravest disappointment. The institution he saw as an engine for achieving a more rational, mutually-respectful and ultimately more productive regime of industrial democracy has indeed survived and prospered. But while the means are still in pretty good shape, the ends have receded in many places. I wish we could have seen a turn back towards his goals, but this has not been very much in evidence. Things are unlikely to improve as long as substantial parts of the business sector reject the whole notion of labor unions and voluntary collective bargaining.¹⁸

One reason why many in the managerial class may believe they can eliminate unions as a force in American society can be explained by another important belief Feller expressed. For him, collective bargaining worked best when it was between employers and unions of relatively equal size and strength. The past forty years has seen a growing imbalance in this equation. Corporate structures have become much larger and have globalized at a terrific rate. The labor movement, on the other hand, has shrunk by about two-thirds in relative size. Even worse, it has preserved essentially the same forms of organization that it has had since the 1880s. These often have the virtue of making direct democratic participation by individual members possible, but because of the atomization and redundancy of these forms, unions usually find themselves up against corporate power vastly bigger and more flexible than they. Since unions' existence is frequently threatened, it is small wonder that many of them have turned to more confrontational tactics that sometimes attack the very legitimacy of a business.

Part of the remedy for this destructive syndrome may lie within the labor movement itself, recalling Feller's axiom about the balance of powers necessary for successful collective bargaining. Part of it also lies with management, which must turn from the current, widespread rejection of collective bargaining and study once again another of Feller's axioms: that there will be rules of the shop, union or no union, that the only question is whether workers have a genuine voice in formulating them, and that when

¹⁸. For instance, on March 27, 2003, recent NLRB member Robert Brame said at a Federalist Society conference that collective bargaining has been a disaster for individual employees. In a published decision, recent Board member William B. Cowen, suggested that there might be merit in the argument that an employer's agreement not to oppose unionization of its employees is a crime under Section 302. Brylane, L.P., 338 NLRB No. 65 (2002) (dissenting opinion).
workers have a union to help and protect them in enforcing the rules, management is given a means of correcting waywardness in its own ranks and of diffusing anger and frustration that may otherwise find more destructive outlets.

This reminiscence has focused on Feller's ideas because that is what was most important in my relationship with him as my teacher, mentor, and eventually, client. We had little else in common. When he learned that I had only once been to a professional baseball game, he gave me his famous look of skeptical surprise (I got more than one of these). His usual look, though, was one of great enjoyment. He almost always had a grin of infinite amusement. The grin was its broadest when he was revealing something about the law that he regarded as particularly elegant. He loved to think about labor law and labor relations. Even more, he loved to teach people about them—not just in the formal, classroom way, but in casual conversation and in his work as the leader of the Council of Faculty Associations of the University of California and on the board of the University's retirement system. He had ideas about everything and every time was an opportunity to teach. That is why he was such a great advocate: He came not to harangue, but to teach, not to parade himself but share his pleasure and fascination with ideas that could make a real difference. Everyone who had the privilege to know him came away with more knowledge and more respect for knowledge.