CHAPTER 13

HOW THE TRILOGY WAS MADE

INTRODUCTION

WILLIAM P. MURPHY*

Welcome to another in the Academy's series of "fireside" chats by honorary life members and senior active Academy members. To refresh your memory, John Dunlop was the first fireside speaker in Washington several years ago; in Atlanta two years ago, we heard Rob Fleming and Bill Wirtz; last year in Denver, Jean McKelvey and Ben Aaron were the speakers. This year our superstar is David Feller.

Dave went to both Harvard University and Harvard Law School, where he was editor of the law review. He then took an advanced degree in economics at the University of Chicago and stayed on to teach. It boggles the mind that Dave might have become a protégé of Milton Friedman, but World War II intervened and Dave served several years in Army military intelligence, surely an exception to an oxymoron. After the war a brief stint with the Justice Department, and then on to become law clerk to the Chief Justice of the United States. Perhaps Dave will tell us what strange chemistry bound him to Fred Vinson.

Then came the law partnership in Washington with Arthur Goldberg and representation of the Steelworkers and, after the merger, of the AFL-CIO Industrial Union Department. This was the period when Dave argued and won the *Trilogy* before the Supreme Court. When Goldberg became Secretary of Labor in 1961, Dave became senior partner. Later in the 1960s when new leadership took over the Steelworkers, Dave gracefully gave up his law firm position and, following Horace Greeley's advice, went

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west to Berkeley, where he taught at the law school for the next 20 years. Dave served as chair of the Berkeley Faculty Association for almost 10 years and, upon his retirement, was honored by the regents for his outstanding service to the University of California.

Dave began arbitrating when he began law teaching, and it is a remarkable tribute to his reputation and integrity that this renowned union advocate was immediately acceptable to management as an arbitrator. In due course Dave became a member of the Academy.

Back in the 1960s, when Dave came as a guest to one of our annual meetings, he told us we should file amicus briefs with the Supreme Court in important arbitration cases. The event had to await the time and the man. In the 1980s the Academy finally did file amicus briefs with the Court in two cases—*AT&T Technologies* and *Misco*. Naturally, the briefs were written by Dave Feller, and the Supreme Court accepted the Academy position in both cases. This may be an example of what Justice Holmes called "the subtle rapture of a postponed power." Or maybe not, but it is such a marvelous phrase I simply had to bring it in.

Dave Feller is a very humbling person. You'll notice I did not say humble—I said humbling. He humbles others. How many times at our meetings has Dave taken the floor mike and impressed us with his breadth of knowledge, depth of analysis, and power of expression so that, as we listened, we had to ask ourselves: Why couldn't I have thought of that? Why couldn't I say it that way?

Since he is a person of superior intellect, it is not easy to impress Dave Feller. But I found out that it can be done. Several years ago Dave was named to a committee created by the club owners and the players' union to study the economics of baseball. Last year at our regional meeting in Atlanta, I was having dinner with Dave and he was talking about all the incidental information about baseball he had picked up. He looked at me in expectant triumph and asked: Do you know what Connie Mack's real name was? Now, I have been a baseball fan since I was six years old, so I was able to reply immediately: Of course, Cornelius McGillicuddy. I followed this up with my own question: Do you know who Howard Ehmke was? And then I saw it, the unmistakable gleam of respect in Dave's eyes. I want you to know that Dave and I have had a whole different relationship since then. So, thank you, Connie Mack and Howard Ehmke! If there are those of you in the audience who don't know who they are, come down later and Dave and I will educate you.

Now, Dave, you're the heavy hitter for this afternoon. So step up to bat and knock out a few home runs.

DAVID E. FELLER*

To be asked to fill the "fireside chat" spot previously occupied by John Dunlop, Bill Wirtz, Robben Fleming, Ben Aaron, and Jean McKelvey is not only an honor. It is also mysterious. Unlike those worthies I am a latecomer to arbitration and spent a good part of my professional life as an advocate. The clue to the mystery is contained in Dennis Nolan's invitation. He said that I had full discretion as to topic but, he added, and here I quote, "There must have been tremendous debate and many deadends before the Steelworkers settled on the litigation strategy leading to *Lincoln Mills* and the *Trilogy*." He suggested that I tell the tale.

Dennis was wrong in one respect. There was no debate, tremendous or otherwise, about strategy. There were, however, deadends. And the story is not really about the Steelworkers, but rather one about Arthur Goldberg and the unique shop he ran, of which I was fortunate enough to be a part. And so, exercising the discretion that Dennis afforded me, I will tell the story of that shop and how, in the end, it produced both *Lincoln Mills*[1] and the *Trilogy*.[2]

The story starts with Philip Murray. Murray was, of course, the president of both the CIO and the Steelworkers. Goldberg was hired by Murray in 1949 to replace Lee Pressman. The ostensible

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After receiving his A.B. and LL.B. degrees from Harvard University, Professor Feller taught law and economics at the University of Chicago. After military service in World War II, he was an attorney at the U.S. Department of Justice and law clerk for Justice Fred Vinson. Thereafter he served as Associate General Counsel both for the CIO and for the United Steelworkers of America, and as General Counsel both for the AFL-CIO Industrial Union Department and later for the United Steelworkers of America. During this time he was, successively, a member of the Washington, D.C., law firms of Goldberg, Feller & Bredhoff; Feller, Bredhoff, & Anker; and Feller & Anker. He began teaching at the University of California-Berkeley in 1967, a second career continuing for two and a half decades, during which time he became a renowned labor arbitrator.

Professor Feller is a board member of the NAACP Legal Defense and Education Fund, a past president of the Council of University of California Faculty Associations, a past member of the University of California Retirement System Board, and past chairman of the Berkeley Faculty Association. In 1987 he received the Berkeley citation for distinguished service to the University of California. Most recently, he participated as an impartial member of the special committee on the economics of baseball. [**Editor's Note:** This material was excerpted from the biographical information in the registration packet.]

[1] *Textile Workers v. Lincoln Mills*, 335 U.S. 448, 40 LRRM 2113 (1957).

[2] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

reason for Pressman's discharge was that he was a communist. That he was. But the real reason, I believe, was that, in accordance with the then-communist line he had supported Henry Wallace's bid for the presidency of the United States in 1948, while the CIO and the Steelworkers had supported Harry Truman. In any event, Goldberg was hired in 1949 and proceeded to get rid of all those who had served under Pressman in the office of the general counsel of both the Steelworkers and the CIO in Washington.

This was not as large an operation as that statement would seem to indicate. The Steelworkers had house counsel in Pittsburgh and most litigation at the trial level was handled by local counsel. The office in Washington was on Jackson Place, next to Blair House, and consisted of three lawyers: Goldberg, who was ostensibly only working part-time and remained a partner in a Chicago law firm, and two other lawyers who were hired on salary to work under his supervision. The first one hired was Tom Harris. Harris was a remarkable lawyer who had previously served as chief of litigation in the Office of the Alien Property Custodian in the Department of Justice when I worked there. After hiring Harris, Goldberg gave Harris the job of finding the second lawyer. Harris later said that Goldberg told him that he wanted an Irishman who can talk fast in a loud voce about things he knows nothing about. Harris says he replied, "You have just described Dave Feller."

Whether that is true or not, Harris did appear at my office in the Supreme Court, where I was serving as chief law clerk to Chief Justice Vinson, and suggested that I apply for the job. I accepted but said that I could not come to work until September. One of my fellow clerks, Ike Groner, brought around a classmate of his who was looking for a job, and I suggested that the classmate go to Goldberg's office and offer to fill the number three position on an interim basis. His name was Elliot Bredhoff. He got the job for the summer and proved so good that he was retained permanently, thus enlarging the office by 33 percent, and incidentally arguably making him senior to me.

When I was interviewed by Goldberg he described my duties. For the Steelworkers I was to assist in negotiations and appellate litigation when asked. For the CIO, he gave me a copy of its Constitution. Its preamble spoke in gradiloquent terms, not only about the rights of labor, but also about guarantees of full employment, Social Security, and the protection of the family. Racial persecution, intolerance, selfishness, and greed, it said, have no place in the human family. It was to those ends, the preamble said, that the Constitution of the CIO was dedicated. My assignment for

the CIO, Arthur said, was to review the docket of the Supreme Court and to suggest and draft briefs for the CIO in any cases that involved the values set forth in the preamble. We were to, and did, function as a "public interest" law office, although that term was not then in use, and, as well, as a "labor interest" law firm. We were also to make ourselves available to affiliated unions where their cases appeared to have the potential for development of the law.

I never knew whether this broad charter was one that Murray had given Arthur or one that Arthur had assumed. I am inclined to believe that it was more of the latter than the former. Arthur was just the man to exercise the maximum degree of decision-making authority permitted him. In any event amicus briefs were filed for the CIO in a substantial number of cases. Some involved strictly labor issues. Others were concerned with civil rights and civil liberties. Most important, amicus briefs were filed in all the significant segregation cases beginning with *Henderson v. United States*[3] in 1949 and ending with the final decision in *Brown v. Board of Education*[4] in 1955.

Arthur had a very free hand. The relationship between Murray and his counsel was, as far as I know, unique in the labor movement. And similarly, Arthur gave those who worked for him enormous leeway in determining what actions to take and briefs to file to advance what Arthur regarded as his mission.

The *Henderson* case provides a marvelous example of this relationship. At issue in the case was the permissibility of segregated seating in the dining cars of southern railroads. I drafted and filed a brief amicus in the Supreme Court, arguing that the reason governmental approval of the practice violated not only the Interstate Commerce Act but also the Constitution was not the lack of equal facilities but enforced segregation compelling diners of different races to eat at separate tables. *Plessy v. Ferguson*,[5] we argued, should be overruled. We said "separate but equal" was bad doctrine and should be overruled. But we were premature and did not prevail. In the end the Court adopted a narrower ground, and *Plessy* would have to wait five years to be overturned.

When the *Henderson* decision came down, Arthur was in New York engaged in negotiations. He called me and instructed me to issue a statement from Philip Murray applauding the decision as

[3]339 U.S. 816 (1950).
[4]349 U.S. 294 (1955).
[5]163 U.S. 537 (1896).

in accordance with CIO and Steelworker policy. I did. But in a burst of enthusiasm (and ignorance), I added the statement that the Steelworkers would not countenance segregation in any of its meetings or activities. Unbeknownst to me, Murray was scheduled to address a Steelworkers rally in the baseball stadium in Birmingham, Alabama. Birmingham required segregation, and there never had been an unsegregated rally in the stadium. Murray was therefore a little disturbed when he read in the newspaper what he had said about Steelworkers meetings. He complained to Arthur. Arthur checked with me, and I confirmed that I had indeed put those words in Murray's mouth. I went home and told my wife, Gilda, that I was going to be fired. But Arthur didn't fire me. Instead he told Murray that he took responsibility for the statement and insisted that Murray should do what he was quoted as saying he would do and demand that there be no segregation at the rally. The result, in the end, was that the Steelworkers held the first nonsegregated meeting that had ever been held in Birmingham's stadium, and without incident. That's why we felt that the Court made a mistake talking about "all deliberate speed." They should just do it!

Murray died in 1952. Our relationship with Walter Reuther, his successor as CIO president, was not quite the same. I don't think I have to tell you that Walter wrote his own press releases! Tom Harris remained in the CIO building. Goldberg, Bredhoff, and I formed a law firm with outside offices.

Our relationship with the Steelworkers also changed when Murray died. David McDonald was the new president, and Goldberg became even more important in steel negotiations. Although it has nothing whatsoever to do with the background of the *Trilogy*, I can illustrate the role Goldberg played by describing the events leading to the 1955 steel strike. Under Murray the ultimate decision as to the essential economic terms was Murray's, subject of course to the approval of the union's designated bodies. He would meet privately with John Stephens, the steel industry's chief negotiator, in a hotel room. The ground rules were that nothing they said to each other would ever be disclosed unless there was an agreement. That gave them freedom to talk about bottom lines and whatnot. If they did reach agreement, our office would then work to incorporate those terms into the contracts with the basic steel companies within the framework of Murray's decisions.

Under McDonald it was different. He wasn't up to doing what Phil did, and as a result Arthur became a co-negotiator of the

economic terms. That explains what happened later. In 1955 there was a wage reopener. The companies initially offered a 10 cent per hour increase. In private talks this was increased to 12½ cents. McDonald, after visiting privately with many of the chief executives of the major producers, was satisfied that that was all there was to be had. The strike deadline was midnight, June 30. As that time approached, Dave McDonald was prepared to agree on a 12½ cent settlement. Goldberg somehow sensed (how, I don't know) that this was not in fact the companies' bottom line—there was more to be had. As midnight approached he engaged in the only significant case of a solitary "sick-in" that I know of. He said, "Dave, I'm feeling sick. I have to leave," and he left the small room in which the meetings between McDonald and the industry's chief negotiator were taking place.

After leaving the room, he summoned me and Elliot Bredhoff and we spent the next several hours strolling through the deserted streets of Pittsburgh. McDonald was afraid to make a settlement in Arthur's absence. When midnight came, the union, following the no-contract, no-work principle, went on strike. Then, when Arthur "recovered" and rejoined the meeting, 15 cents per hour was on the bargaining table! Agreement was reached in the early hours of July 1, after the shortest nationwide steel strike in the industry's history. That was our relationship with the Steelworkers in 1955, quite different from what it had been with Phil Murray.

Our CIO practice after 1952 remained largely the same, but we began to take on other union clients and concentrated on litigation involving trade union issues. I not only reviewed the cases pending in the Supreme Court but also read the advance sheets containing the decisions of the lower federal courts to see whether there were issues that could be profitably pursued to develop the law in a way favorable to the labor movement. It was in pursuit of that activity that I came across the decision of the Third Circuit in *Westinghouse Salaried Employees v. Westinghouse Electric Co.*[6]

What happened there was that on one day 4,000 salaried employees represented by an independent union did not come to work. The record is unclear as to the reason, but my understanding is that they were supporting a grievance strike by the production and maintenance employees that occurred on that same day. In any event, Westinghouse docked the salaried workers for the day

[6]210 F.2d 263, 33 LRRM 2462 (1954).

of absence. The union filed a grievance and the company denied it. Arbitration was not required by the contract, and the union brought suit under section 301 of the Labor Management Relations Act, claiming that the deduction was contrary to the collective bargaining agreement, which listed items for which the employees could be docked and this absence was not one of them.

The district court found that it had jurisdiction under section 301, but that the union was wrong on the merits and the employees were not entitled to be paid for that day. On appeal, the Third Circuit did not reach the substantive question. It held that there was no jurisdiction under section 301.

The opinion was a fascinating one. The court said that section 301 gave it jurisdiction over suits by a union for breach of the employer's contract with it. But, after examining the various theories as to the nature of a collective bargaining agreement, it concluded that the employer's promise to the union under such an agreement was simply to incorporate into each employee's individual contract of hire the terms and conditions set forth in the union agreement. The right to actually receive pay was a right of individual employees under their contracts of employment, and the union could not therefore sue for failure to pay them. Section 301, it said, permitted suits only for violation of contracts between unions and employers whereas this claim was for a violation of individual contracts of hire incorporating the terms of the union contract. That meant that section 301 was essentially useless for unions.

When I read the decision, I realized that it was an ideal vehicle to turn section 301, which had been enacted as part of the Taft-Hartley Act to permit suits against unions, into a weapon to enforce collective agreements against employers. I called up counsel for the salaried employees union and asked whether he planned to petition for certiorari. When he said no, I offered the services of the CIO legal department for free and he accepted.

We got certiorari and I decided that what was needed was a Brandeis brief. I felt that the words of a mere lawyer would not persuade the Court as to the true nature of a collective bargaining agreement and the union's interest in asserting the rights of individuals under such an agreement. I therefore engaged Jack Barbash, the renowned labor economist and historian, to write an extended appendix to the brief analyzing the function of a collective bargaining agreement. I figured that the Justices wouldn't

listen to a dumb lawyer, so I got Barbash. He did a magnificent job, but it was too much for the Justices to swallow.

We lost. But the Justices could not agree among themselves as to why. Three, in an opinion by Justice Frankfurter, disagreed that section 301 created any substantive federal law. State law governed the collective agreement. In view of the constitutional doubts as to whether Congress could grant jurisdiction over suits not arising under federal law (and not involving diversity of citizenship), he concluded that the suits were simply not within section 301. Warren and Clark concurred that there was no jurisdiction but dissociated themselves from the constitutional question raised by Frankfurter. Reed concurred separately, basically on the ground asserted by the court of appeals. Douglas and Black dissented. So the effort to develop the law under section 301 ended up in a disaster, and we had mud on our faces.

The question, after *Westinghouse*, was how to dig ourselves out of the hole we had dug. The first opportunity came along in *Lincoln Mills*. By this time the CIO no longer existed. The merger that created the AFL-CIO took place in 1955. But our office remained the general counsel's office for the Industrial Union Department of the AFL-CIO. Our mission, as Goldberg saw it, remained the same.

Lincoln Mills was a suit to compel arbitration. It's clear that was a promise to the union, not to individual employees. The question was whether a district court could, under section 301, order performance of the duty to arbitrate contained in the collective bargaining agreement with the old CIO Textile Workers Union. The union in *Lincoln Mills* had filed a grievance about workloads, which the company denied, and the union sued for arbitration under section 301. The Fifth Circuit, following Frankfurter's opinion in *Westinghouse*, said that state law controlled and that under Alabama law an executory agreement to arbitrate could not be enforced by injunction. The First Circuit, in a case involving the old AFL United Textile Workers Union, had come to the opposite result in a case involving *Goodall-Sanford*.[7] Goldberg believed passionately in arbitration, and so we undertook the representation of both textile unions in the Supreme Court. And we were successful.

The Steelworkers had a case in the Supreme Court the same year that *Lincoln Mills* was decided. It had nothing to do with section 301 or arbitration, but it serves to illustrate the unique role that our

[7] *Goodall-Sanford, Inc. v. Textile Workers Local 1802*, 353 U.S. 550, 40 LRRM 2118 (1957).

office played in labor litigation in the Supreme Court. The case was *Guss v. Utah Labor Relations Board*,[8] which involved a Steelworkers local union in Utah.

Our office usually did not participate in Steelworkers litigation in the state courts or in trial courts. That was normally handled by local counsel. So we had no knowledge of what had happened in *Guss* before it got to the Supreme Court of the United States. The Steelworkers had been certified by the NLRB as the bargaining agent at the Guss plant. Shortly thereafter, however, the Board, at that time consisting of a majority of Eisenhower appointees, raised its dollar jurisdictional standards, thereby effectively removing NLRA jurisdiction over smaller companies. As a result, the Board would not entertain unfair labor practice charges when Guss refused to bargain and discharged certain employees for union activities. Local counsel for the Steelworkers then filed charges with the Utah Labor Relations Board, which found violations of the state's labor relations act. Guss argued that the state had no jurisdiction because of preemption by the NLRA, even if the Board refused to exercise jurisdiction. The Steelworkers attorney, however, successfully defended the Utah Board in the Supreme Court of Utah. Guss then petitioned for certiorari, and Utah counsel sent the case to us to defend.

Guss presented a real conflict. If the position taken by the Steelworkers below was sustained, the way would be open for the Labor Board to continue to raise its jurisdictional standards in an effort to transfer jurisdiction to the states, most of which had no comparable labor relations statutes. Preemption of state law would no longer apply in such cases. The Steelworkers would win the case but the effect on the labor movement as a whole would be disastrous. When Arthur handed the case to me I decided to poll the Industrial Union Department unions and ask their views. Almost unanimously they believed that any decision that would turn over to the states all cases in which the Labor Board declined jurisdiction would be disastrous, particularly in the southeast, since we had come to use preemption to protect picketing and other union activities. Accordingly, we filed a brief for the Steelworkers urging the Court to hold that Utah had no jurisdiction and to reverse the decision that the Steelworkers had obtained in the Utah Supreme Court. I remember discussing the case with Archie Cox, who said that we would never be able to persuade the

[8]353 U.S. 1, 39 LRRM 2567 (1957).

Court that there was a "no-man's land" in which the states could not act even though the National Board would not. But we succeeded in losing the case and the Court so held.

The result in *Guss* was, however, only the first step in Arthur's long-range plan. The second step was administrative. Responding to the decision that it could not turn jurisdiction over to the states, the Board in 1958 reversed course and lowered its dollar standards. The third step was legislative. Arthur was then deeply involved in helping then-Senator John Kennedy draft a labor reform measure. The bill, after passing the Senate, was transformed in the House, eventually becoming the Landrum-Griffin Act of 1959. It was strongly opposed by the labor movement. But tucked away in it was a new section of the National Labor Relations Act that expressly authorized the Board to decline jurisdiction over small business but forbade it to decline jurisdiction over any dispute that met its then existing standards. The end result was to freeze those standards, and given inflation, to greatly enlarge the Labor Board's jurisdiction because the dollar amount could not be changed.

The *Guss* case, I think, illustrates the role that our office played. We didn't consult with the Steelworkers local involved, or indeed with local Steelworkers counsel. The union was a magnificent source of litigation material, but we were not so much interested in winning for the union as we were in developing the law in a way that was favorable to the labor movement and, because we believed in it, arbitration.

Lincoln Mills and *Goodall-Sanford*, unlike *Guss*, were cases we really wanted the unions to win. When the time came to brief the cases, I had learned from the *Westinghouse* experience not to spread out too large a panorama. The brief was simple and straightforward. We didn't ask the Court to overrule *Westinghouse*. We relied mainly on section 301, not on the Federal Arbitration Act, because the courts were still hostile to arbitration. We thought it best to distinguish labor arbitration from commercial arbitration because the former was a substitute for a strike rather than a substitute for litigation. By grounding the authority of the Court to enforce an agreement to arbitrate on section 301, we wanted to lay the basis for a much broader acceptance of arbitration than would be the case if jurisdiction were based upon the Federal Arbitration Act. In labor arbitration, if the Court said something couldn't be arbitrated, it was essentially dead, whereas in commercial arbitration, if the Court said no to arbitration, you could still go back and sue.

We won *Lincoln Mills* in June 1957 on the ground we had urged. The National Academy of Arbitrators was not pleased. Discussion of *Lincoln Mills* was the centerpiece of the January 1959 Annual Meeting in Detroit. Its impact was discussed by Ben Aaron, Archie Cox, Nate Feinsinger, and Russ Smith. Some speakers believed that *Lincoln Mills* was a disaster for the labor arbitration process. Others, more charitably, said that it provided an opportunity to educate the courts about the nature of the arbitration process. No one was enthusiastic. What they didn't know was that *Lincoln Mills*, like *Guss*, was only a first step in a well-planned litigation strategy. By January 1959, all three cases that ultimately became the *Trilogy* had already been filed.

The first case actually filed was the third case of the *Trilogy*, *Enterprise Wheel & Car. Lincoln Mills* had held that an agreement to arbitrate could be specifically enforced, but it did not overrule *Westinghouse*. There remained the question as to whether a suit to enforce an arbitration award providing benefits to individual employees could be maintained under section 301. A sensible argument could be made that in suing to compel arbitration the union was suing to compel the enforcement of a promise to it but, when an award was issued in favor of individuals, enforcement involved the same kind of a claim that the Court had said in *Westinghouse* could not be maintained under section 301.

That was the principal issue initially involved in *Enterprise*.[9] It was a companion case to *Cone Mills v. Textile Workers*.[10] In both cases suits had been filed to enforce arbitration awards providing benefits to individuals. In both the question was whether *Westinghouse* prevented the exercise of section 301 jurisdiction. I argued both in the Court of Appeals for the Fourth Circuit. It held that although there was a contradiction between *Lincoln Mills* and *Westinghouse*, the correct result was that there was jurisdiction to enforce the arbitrators' awards when the union sued.

Enterprise, however, had another issue in it, not present in *Cone Mills*. That issue was whether after a contract had expired an arbitrator could award reinstatement as well as back pay for a period when there was no agreement in existence.

The facts in *Enterprise* were interesting. The company, which was a small firm, had fired one employee. An 11-man committee of the union met with the company president to protest the discharge.

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[9] *Steelworkers v. Enterprise Wheel & Car Corp.*, 269 F.2d 327, 44 LRRM 2349 (4th Cir. 1959).
[10] 268 F.2d 920, 44 LRRM 2345 (4th Cir.), *cert. denied*, 361 U.S. 886, 45 LRRM 2085 (1959).

He said they should file a grievance. They responded by walking out. One of them then called the union staff representative. He told them to go back to work. Within a half hour of their leaving the plant, they called the company president and said they were coming back to work. They'd been out only about an hour. He said they should come back next morning. Then he called his lawyer. The lawyer told the president there was no obligation to take the employees back because they had quit. When they reported for work next day, they were told they could not do so. The union then filed a grievance for the 11 employees. The case of the first discharged employee was abandoned. The issue was whether the discharge of those who had walked out was for just cause. The employer refused to arbitrate.

In the middle of all this, the contract expired. The parties met and reached an informal agreement as to the terms of a new contract, but the employer said he would not sign an agreement unless the union dropped its claim to arbitrate the discharge grievances of the strikers. The union said no and went to court to obtain an order directing arbitration, which the court granted. In due course the matter came before Arbitrator Milton Schmidt, who later became a judge of the Sixth Circuit. He decided that, under all the facts and circumstances, discharge was too severe a punishment, reduced the discipline to a 10-day suspension, and ordered reinstatement with back pay. The company refused to comply, and a motion to order compliance was sought and obtained in the district court.

The principal issue on appeal, as well as in *Cone Mills*, was whether the court had jurisdiction under section 301 to enforce an award in favor of individual employees. It was the only issue I had time to argue orally. We won on that issue. But in *Enterprise* the court of appeals held that the arbitrator had exceeded his jurisdiction in awarding reinstatement after the contract had expired and back pay for a period when there was no contract in existence. The decision in both cases came down on June 16, 1959.

Meanwhile, over in the Sixth Circuit *American Manufacturing*[11] had been decided in March. It involved the simple question of whether the court could say that a grievance was so frivolous that it would not order arbitration—the old *Cutler-Hammer*[12] argument. We weren't involved in the litigation in the trial court or the court

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[11] *Steelworkers v. American Mfg. Co.*, 264 F.2d 624, 43 LRRM 2757 (6th Cir. 1959).

[12] *In re Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S.2d 317, 19 LRRM 2232, *aff'd*, 297 N.Y.S.2d 519, 74 N.E.2d 464, 20 LRRM 2445 (1947).

of appeals. It was handled by Buddy Cooper of Birmingham, Alabama, who represented the Steelworkers throughout most of the South because we were occupied with basic steel negotiations in Pittsburgh. But we knew about the litigation and Arthur's name was on the brief. *American Manufacturing* became the first case decided in the *Trilogy*.

Warrior & Gulf, which became the second case in the *Trilogy*, was not argued in the Fifth Circuit until June and was not to be decided until July, after *Enterprise Wheel*. We not only knew about it. We were involved from the beginning. Warrior & Gulf was a common carrier operating barges on the Mississippi River. It was also, however, a subsidiary of U.S. Steel. The Interstate Commerce Commission permitted it to operate as a common carrier, despite U.S. Steel's ownership and use of Warrior & Gulf, under the limitation that U.S. Steel would have no part in the direction or management of Warrior & Gulf. The case arose when Warrior & Gulf contracted out the maintenance and repair of its barges. The Steelworkers filed a grievance. Warrior & Gulf refused to arbitrate. Buddy Cooper called me up and asked me whether I could get U.S. Steel management to overrule the management of Warrior & Gulf so that the case could go to arbitration. I called Warren Shaver, the man in charge of labor relations for U.S. Steel, and asked him to do so. He responded that under the terms of Warrior & Gulf's license he was forbidden to interfere with the management of the company. I asked him whether he could, nevertheless, give a little friendly advice to the company that they should agree to arbitrate the grievance. After all, I said, we arbitrate those grievances all the time in the steel industry and, although we lose most of them, we have never had any objection to arbitration. He said he would do what he could. A few days later he called me back and said that Warrior & Gulf was adamant on the arbitrability question. He said, "Those dummies—sue 'em!" So we did!

Buddy Cooper filed suit in the district court and lost.[13] I argued the appeal in the Fifth Circuit and lost.[14] If one must lose a case, it is at least comforting to know that your oral argument persuaded someone. Judge Rives, who dissented, opened his dissent with the following words: "Originally of like view with my brothers and the

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[13] *Steelworkers v. Warrior & Gulf Navigation Co.*, 168 F. Supp. 702, 43 LRRM 2328 (S.D. Ala. 1958).

[14] *Steelworkers v. Warrior & Gulf Navigation Co.*, 269 F.2d 633, 44 LRRM 2567 (5th Cir. 1959).

learned district judge, further study and reflection have brought me to the certain conclusion that this judgment should be reversed."[15] I would like at least to think that that further study and judgment involved principally listening to my argument in New Orleans in the case. The decision came down on July 30, 1959, a little over a month after the decision of the Fourth Circuit in *Enterprise Wheel.*

We now had three cases involving arbitration. All three involved the Steelworkers Union and we had lost all three. The question was how to maneuver the cases so that we would have what eventually came out to be the *Steelworkers Trilogy.* The principal problem, of course, was to get certiorari. *American Manufacturing* seemed the most likely candidate. It involved a simple and general question of principle. The arbitration provision was a standard one. The Sixth Circuit had concluded that, under the seniority provision of the agreement, the grievants' claim was simply preposterous and arbitration would therefore not be ordered. *Warrior & Gulf* was more doubtful: the arbitration clause was unique, providing that matters that were strictly a function of management were not arbitrable. It was, as the lawyers say, "fact bound," and the Court regularly refuses to take such a case because it doesn't have any general significance. But if we first got certiorari in *American Manufacturing,* it was possible that we could then hitch *Warrior & Gulf* onto it. To do that we would have to slow down *American Manufacturing.* We did. We filed a petition for rehearing in the court of appeals. It was denied on April 10, 1959, while *Warrior & Gulf* and *Enterprise Wheel* were still pending undecided in the Fifth and Fourth Circuits.

We also needed time in *American Manufacturing* for a quite different reason. 1959 was the year of the great steel strike. The contract was due to expire on June 30 and all of us were deeply involved in the negotiations that were taking place in Pittsburgh and in New York. So, to get more time after the petition for rehearing was denied, we filed an application for an extension of time in which to file a petition for certiorari in *American.* The court gave us until August 28, 1959, to file our petition. By that time *Warrior & Gulf* and *Enterprise Wheel* had been decided. In our petition for certiorari in *American Manufacturing,* however, we

[15] *Id.*, 44 LRRM at 2570.

made no reference to those cases. What we wanted was a nice simple issue as to the scope of the Court's inquiry when asked to order arbitration under a standard arbitration clause. We believed that if we first got certiorari in *American Manufacturing* on that basis, we could probably get certiorari in *Warrior & Gulf* as presenting a similar although more difficult issue.

And that's the way it turned out. Certiorari was applied for on August 28 in *American Manufacturing* and granted on November 9, 1959. On the same day, the company's petition for certiorari in *Cone Mills*, the companion case to *Enterprise Wheel*, was denied. Then we hurried along *Warrior & Gulf*. We had until October 28 to file a petition for certiorari but we accelerated and filed our petition on September 30. It was granted on December 7, 1959, and the Court set the case for argument following *American Manufacturing*.

Enterprise Wheel was a much more difficult proposition. There was a certain attraction in the holding of the court of appeals that an arbitrator could not order reinstatement at a date when there was no collective bargaining agreement in effect and order back pay at the same time for that period. So we slowed up *Enterprise Wheel*. It had been decided on June 16, 1959, along with *Cone Mills*, but we filed a petition for rehearing which was not denied until August 24, 1959, and we filed our petition on the last day in which it was due, November 23. It was granted on January 11, 1960, and sent down for argument following *American Manufacturing* and *Warrior & Gulf*. So we now had all three cases to be argued consecutively and in precisely the order in which we wanted.

I have omitted one thing in this recital of how that litigation developed and how I got to argue the *Trilogy*. It was really a matter of luck involving the steel strike of 1959. The strike began on July 15, 1959, and President Eisenhower invoked the Taft-Hartley emergency provisions leading to an 80-day injunction against the strike. The action seeking that injunction was filed on October 20, 1959. Arthur decided that we would try to litigate the validity of this procedure all the way to the Supreme Court. This was very difficult, considering that the injunction expires in 80 days and the case becomes moot. And it doesn't do much good to litigate it when the strike is being enjoined. So, when we argued the case in the District Court of the Western District of Pennsylvania, we got all the appeal papers ready. When the district judge decided to issue a temporary injunction, we said we would stipulate it to be final and asked for a stay pending appeal. We had three documents prepared: one

asked for a stay pending appeal; the second, for a 30-day stay; and the third, for a stay for an unspecified period. The judge denied the first two and said, "I understand that Judge Staley of the Ninth Circuit is in town, so I'll give you a one-hour stay."

So we went upstairs in the courthouse and made application to Judge Staley for an extension of the stay. He asked, "Have you filed an appeal in the court of appeals?" We had. We had stationed a man in Philadelphia to file an appeal the moment the district court acted, so he could get a docket number. So we said yes. Judge Staley said, "Okay, I'll give you a stay until tomorrow, provided you file any request for further stay in the Third Circuit tomorrow." And we did! We chartered a plane and flew to Philadelphia at midnight to argue for an extension of the stay. The judges there asked whether we were prepared to argue the merits. Arthur said yes, so he argued the merits. We lost on the merits, but we got a further stay from the court of appeals for another week, provided we filed a petition for certiorari within that week.

In the end we managed to take the case to final injunction, argument, and decision in the district court, argument and decision in the court of appeals, and decision by the Supreme Court of the United States in the period between October 20 and November 7, 1959, when the court affirmed and the stays that we had succeeded in obtaining expired. As you can imagine, the feat of taking a case from a petition for a preliminary injunction to argument and final decision in the Supreme Court in 19 days, all the while obtaining stays of the injunction against a strike that the President had found constituted a threat to the national health and safety, was prodigious. I remember the Chief Justice saying that this was a model for all litigants. Hardly!

The timing was, however, fortuitous. The 80-day period of the injunction beginning on November 7 gave us a little breathing time to brief the *Trilogy*. We filed one brief in all three cases on the date the first brief, *American Manufacturing*, was due. In that brief we tried to develop an entire theory about the nature of the arbitration process and its place in the scheme of industrial relations. Argument was set for April 1960. The steel dispute was settled in January by McDonald and Goldberg, just as the 80-day injunction was about to expire. But, as it turned out, that gave me my claim to fame.

Normally, the practice in our office was for me to draft the briefs, subject to review by Goldberg. When it came to the oral argument, Goldberg, as the senior partner, was entitled to assert his right to

present it. That was the way it was in *Lincoln Mills.* Fortunately in *Lincoln Mills* I did get a chance to get my oar in because we had a companion case for the AFL Textile Workers that was argued at the same time, and I was given the opportunity to argue that case. But Goldberg was so exhausted from the steel negotiations that he ended up in the hospital, and the *Trilogy* became my baby, with help from Elliot Bredhoff.

The cases were argued on April 27 and 28, 1960. Unlike the present practice, we had one hour on each side in each case, for a total of six hours of oral argument. We started on a Wednesday and used all of that day for oral argument and finished up on Thursday. The way the cases had been set up, it was possible to use each case to support the next. With three hours, interrupted only by argument on the other side, I had the opportunity, probably never to be repeated, given the Court's current manner of scheduling arguments, to really attempt to educate the Court on the nature of the arbitration process. Bredhoff gave the opening argument in *Enterprise Wheel,* and I stitched together the arguments in the three cases in the rebuttal. And so we won the *Trilogy.* That's the story I was asked to talk about.

The cases were decided together in June. The first call I got congratulating me on the result was from Warren Shaver of U.S. Steel. He said that *Warrior & Gulf* had got what they deserved!

At the time the *Steelworkers Trilogy* constituted, I believe, a significant contribution to collective bargaining and the profession of labor arbitration. It was not, however, principally a Steelworker achievement. Rather it was the end product of a long and carefully planned litigation strategy engineered in Arthur Goldberg's office and involving four union clients.

Sometimes the real clients didn't benefit. I don't know whether the *Lincoln Mills* grievances were ever arbitrated. They involved workloads and the plant at which they arose had been closed at the time the case was decided in the Supreme Court. The union did win both *American Manufacturing* and *Warrior & Gulf* in arbitration. The end result in *Enterprise Wheel* was ironic. The contract had expired and there was no new contract when the discharge grievances were decided because the employer refused to sign an agreement if the union persisted in pressing them. The union went on strike. The strike was lost. Replacements were hired and the union was ousted as collective bargaining representative. Most of the employees lost their jobs. The only ones who didn't were the 11 that Arbitrator Schmidt had ordered reinstated. And surely the

employees in *Guss*, who had been ordered reinstated by the Utah Labor Relations Board, got no benefit from the Supreme Court's decision that the Utah Board had no jurisdiction.

In one way I guess I was the primary beneficiary of all this litigation. I had lucked into the job with Goldberg by working at the Office of Alien Property when Tom Harris was chief of litigation there. And I had the good fortune to work for a man who not only had a vision that went beyond the immediate interests of his clients but also allowed those who worked under his supervision an enormous amount of discretion in pushing for his vision.

Arthur left the labor movement and went on to be Secretary of Labor and then a Justice of the Supreme Court. After he left we tried to continue in his tradition. We had some successes—*Fibreboard*[16] for the Steelworkers, *Wiley v. Livingston*[17] for the AFL-CIO. In time, however, the opportunities diminished. I had a falling out with Walter Reuther because I insisted on expressing views in the same way we had with Murray, and it didn't work with him. He said, "Who paid your dues?" When I didn't have a good answer to that, we finally decided to cease the relationship. And when McDonald was defeated as president of the Steelworkers, his successor, I.W. Abel, exercised the right that was his to name Bernie Kleiman, the lawyer who had represented him in the campaign, as general counsel of the Steelworkers. We divided the firm. My half (two lawyers) no longer represented the Steelworkers. The other half, headed by Bredhoff, continued to do so.

Some opportunities remained. I undertook to petition for certiorari, brief and argue in the Supreme Court for the independent United Brotherhood of Packing House Workers (familiarly known as "Swift's Union") in *Vaca v. Sipes*[18] because I thought it provided a vehicle for favorable development of the law. (It didn't quite. We won the case but the opinion was less than satisfactory.) Jerry Anker went with me. We had plenty of union business for other clients, but the grand scope that Goldberg and the Steelworkers had offered was gone. I made a lot of money but it wasn't as satisfying. Defending Tony Boyle's administration of the Mine Workers against the government's effort to force elections of its district officers was certainly remunerative but was, equally, depressing. And it didn't help when Arthur went on the Court. An

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[16] *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 57 LRRM 2609 (1964).
[17] *John Wiley & Sons v. Livingston*, 376 U.S. 543, 55 LRRM 2769 (1964).
[18] 386 U.S. 171, 64 LRRM 2369 (1967).

Indiana union lawyer (who is now a member of the Academy) retained me to try to get a court of appeals decision refusing to order arbitration reversed. I did get certiorari but the decision was affirmed summarily by an equally divided court, with Goldberg out because of our relationship. When I called the lawyer who retained me, he said he had made only one mistake: hiring the wrong lawyer!

And so I opted for leaving the practice in favor of teaching and arbitrating. In that I was, again, extraordinarily lucky. I accepted an untenured position at Berkeley. When it came to producing the scholarly work required for tenure I decided to write a piece summarizing the cases involving the duty of fair representation. I drafted a detailed but pedestrian piece and was about to send it off for publication when disaster struck. Someone stole from my office the attaché case containing the only copy of the manuscript. On the assumption that the thief was interested only in the case and would promptly dispose of the contents, Gilda and I spent hours going through all the trash cans in the law school and the surrounding ones in the street trying to retrieve the opus. We couldn't find it and I couldn't face the prospect of redoing all that dull research. So I spent several years researching and writing a quite different piece that I somewhat grandiosely entitled "A General Theory of the Collective Bargaining Agreement," which turned out to be quite good. That not only got me tenure but also some measure of acclaim, and I owe that thief a measure of gratitude for forcing the work on me. I also did some arbitrating, helped enormously by recommendations to employers from Bob Graney of Inland Steel, whom I had had the good luck to work with in getting SUB legislation passed in Indiana.

It all got me here. I can think of no better cap to a career than serving as President of this Academy. And who could ask for anything more! For that I thank all of you.

[**Editor's Note:** Mr. Feller agreed to answer some questions after his presentation.]

Q. Dave, you spoke a few words about Walter Reuther, but you didn't mention George Meany. If you remember in Atlanta, I said to you, "I've always wondered if the labor movement in the United States would have turned out differently if Walter Reuther had been elected president of the AFL-CIO after the merger, instead of George Meany." I was so interested in your answer, that's why I'm asking the question now, because I think the Academy members are interested too, if you can remember what you said.

A. I haven't the slightest recollection of what I said, but I came to have a very high regard for George Meany. Walter Reuther gave a great first impression; he was a great speechmaker, great salesman, except if you heard the speech three or four times, then it got a little tiresome. But George Meany was a much greater student than Walter Reuther, a much wiser man in many ways. The merger of the AFL-CIO took place because George Meany wanted the merger. He forced Walter into it. Indeed, my big falling out with Walter came a couple of years later when, contrary to what I think was Walter's expectation, George didn't die or resign, and Walter didn't become the president of the AFL-CIO. He called a caucus of the former CIO unions in Miami over the issue of AFL unions moving into the jurisdiction of the CIO unions. He was trying to agitate a withdrawal of the old CIO unions from the AFL-CIO, and I fought with him like mad about it. That's when he said, "Who paid your dues?" for which I didn't really have an answer. We really were not very friendly.

George Meany was a very able man and was responsible for the AFL-CIO merger. Before Bill Green and Phil Murray died, there had been ongoing committee meetings for years between the AFL and the CIO about raiding that never went anywhere. Right after their death and we were installed in our offices, Arthur said to me, "We're having another committee meeting. Draft up a proposal for the CIO." So I did. Knowing what I did about the AFL, I drafted one that I thought they might possibly accept. I gave it to Arthur and he said, "Dave, you don't understand. These meetings are just a show. The idea is to have a proposal that looks good but they won't ever accept." So I said, "Oh, I can do that too." So I drafted a proposal for an enforceable no-raiding agreement without regard for jurisdiction, which I knew would be anathema to the oldtime AFL guys. Arthur came back from the meeting and said, "There's eventually going to be a merger. They agreed to it." George had decided there would be a merger and there was a merger. And then the Packinghouse Workers started to leave the CIO, and the CIO was falling apart, and Walter was forced into it. In all the fights they had on the AFL-CIO Executive Council, George beat the hell out of Walter.

Q. What was the big controversy between Abel and McDonald?

A. You mean, other than personal ambition? The issue was that the technicians were running the union. By the technicians they meant Dave Feller, Ben Fischer, Marvin Miller, Johnny Tomayko, and one other, who were really the advisory people who worked

with Dave McDonald and helped him. Dave McDonald was not a very aggressive kind of guy, and we were doing our best to help him run the union. Abel said he wanted to get rid of the technicians and give the rank and file the right to run the union. That was the issue in public.

Q. What else did you want from the Court in *Vaca v. Sipes*?

A. It really was a suit against the union, but I argued the question of the employer's liability. What I wanted was an order from the Court to arbitrate. I said that the Court should use the standard which they adopted as to the duty of fair representation but, if they found breach of such a duty, the only appropriate order was an order to arbitrate the grievance because the parties had written the collective bargaining agreement with the assumption that its meaning and interpretation would be decided by an arbitrator. And I lost on that issue. I perhaps shouldn't have raised it because I didn't have time enough to brief it fully, but I lost on it. I was sitting in the courtroom when Mr. Justice White said, "I have the opinion and judgment of the Court in *Vaca v. Sipes*," and I said to whoever was sitting next to me, "Oh, I won the case but lost the opinion." And that was exactly right!

Q. Do you have an opinion on this latest Labor Board decision about the nurses in Ohio being supervisors?

A. I haven't read it, but if the newspaper story about it is right, it seems we have to ask, "What happens to leadmen now?" The only good thing I can say about it is that all the good people were in dissent. Maybe with the new judge it will eventually come out differently.

Q. What would have happened if you had lost the *Trilogy*?

A. I never tried to think about what would have happened if we had lost. I don't think it was possible to lose *American Manufacturing*. We might have lost *Warrior & Gulf*, based on the peculiar language in the arbitration clause. And we might have lost *Enterprise Wheel*. What would have happened if we had lost them all? Given what's happened, we would probably end up where we are today, because the Court would later change its mind about arbitration and decide to apply the Federal Arbitration Act in ways that nobody ever contemplated back in those days. We would get all the deference that commercial arbitrators are entitled to, and all doubts would be resolved in favor of arbitration when the question was arbitrability, as they now say in the commercial cases.

The essential premise of our argument in the *Trilogy* was that the courts' disfavor for other arbitration should not apply to labor arbitration. But that disfavor has now turned 180 degrees around. I went to great lengths to distinguish *Wilko v. Swan*,[19] and the Court said this case is not like *Wilko v. Swan*. Today it should be the same because *Wilko v. Swan* was overruled. So the answer to your question is: today we probably would end up where we are now. Maybe even better. We wouldn't have that stupid "essence" language to contend with.

[19]346 U.S. 427 (1957).