

Remembering *Local 1330*^α

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There's a well nigh irrepressible desire to fill my portion of the hour with war stories. But I'm going to limit myself to two.

In January 1980, we filed our lawsuit and Judge Lambros set a mid-March trial date. US Steel in its infinite arrogance announced that it was going to close its Youngstown facilities about a week before the case was to go to trial. And so the forces of good delegated former Attorney General Ramsey Clark and me to go to Cleveland and get an injunction. Ramsey, as you know, is a very tall man. Judge Lambros is a short man. And I learned that morning how you address former attorney generals, because when Ramsey and I walked into the courthouse, we met the Judge. The Judge looked up at Ramsey and said, "Good morning, General." Seemed like a good beginning, somehow.

Our advocacy strategy was that Ramsey would provide a kind of equitable framework and I would talk about what was happening in Youngstown. I will never forget Ramsey's first words, which were, more or less, "Judge, we have to start with the railroad strike of 1877."

But we got the injunction. Not only did we get the injunction, but Judge Lambros also decided to try the case in Youngstown. That meant that the trial would be a kind of morality play for the community. And there was also a civil procedure issue. Cleveland would have been too far from Pittsburgh to subpoena the chairman of the board and the chief executive officer of U.S. Steel, but Youngstown was close enough. And that's why we got them all down to our town, flying in separate helicopters like the president and vice president of the United States, in case one went down.

My second anecdote has to do with what happened after Judge Lambros had ruled against us and we went down to Cincinnati to argue before the Sixth Circuit Court of Appeals.

Arthur Kinoy of the Center for Constitutional Rights had filed an amicus brief based on the research of a young colleague named Michael Ratner. Arthur had in addition sought permission from the court to argue as amicus. This isn't often done, but it just so happened that Judge Edwards, the head of the three-judge panel, knew Arthur. They were friends. I believe that Arthur had won a case called *U.S. v. U.S. District Court* in front of Judge Edwards.¹

And so after I gave my spiel about the nuts and bolts, Arthur got up as amicus. He tried to maintain Joe Singer's thesis that somehow this property was imbedded in the community, and there were ties between the management of the property and the

^α Remarks at Symposium, *Local 1330 v. U.S. Steel: 30 Years Later* (Feb. 25, 2011), www.legaleft.org/conference/local1330.

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¹ 444 F.2d 651 (6th Cir. 1971).

community, and it wasn't quite right for the company to be able to throw all of this away like an orange peel.

Arthur was rather short and besides, we were looking up at the folks in black robes. So Arthur is looking up and George Edwards is looking down and the Judge says, "Professor Kinoy, can you give me one case, one law review article, one legal authority of any kind to support your position?" This is an inside joke for law students. Arthur replied, "Marbury v. Madison."

There's a tendency to look back on events like the Local 1330 lawsuit as beads on a long string of labor struggles, some of them won, most of them lost, all of them inspiring. Let me suggest a different conceptual framework.

I believe that the shutdown of steelmaking in Youngstown and then in Pittsburgh illustrates the catastrophic failure of the Congress of Industrial Organizations ("CIO") model of trade unionism. It is a failure comparable to the collapse of European social democracy in August 1914 when labor parties in nation after nation voted to support taxes for the war efforts of their various governments.

From the 1970s onward, industrial trade unions in the United States, with hundreds of thousands of members, have stood by helplessly as corporations shut down manufacturing and moved their operations to other countries.

This is not the typical recession followed by the return of manufacturing to previous levels. Corporations are hiring again, but overseas. Thus more than half of the 15,000 workers that Caterpillar Inc. hired in 2010 were hired outside of the United States. Corporations are expanding markets, but in other countries. Thus General Motors sold 2.2 million vehicles in the United States last year, but 2.4 million vehicles in China. And the percentage of American workers in trade unions declined to 11.9% in 2010, the lowest rate in more than seventy years.

We in the law tend to think of any defeat as a failure to pursue the appropriate legal theory. However, we had good legal theories in Youngstown and Pittsburgh. In Youngstown there were several claims but centrally we pursued a contract theory, promissory estoppel, articulated in *Restatement of Contracts* § 90.² In Pittsburgh, close to a dozen municipalities in the Monongahela Valley, including the City of Pittsburgh, created a new regional entity similar to the Tennessee Valley Authority, and sought to acquire, reopen and operate shutdown steel mills by using the power of eminent domain.³

We failed not because our legal theories or our lawyering were inadequate but for several more fundamental reasons.

First, the United Steelworkers of America ("USWA") sabotaged our efforts. The USWA was suspicious of any initiative that it did not control. In Youngstown the so-called international union left the battle to its local unions, disavowed the idea of worker-community ownership, and declined my request to file an amicus brief when we appealed to the Sixth Circuit. In Pittsburgh, as you'll hear, the international relied on feasibility assessments by the Wall Street firm Lazard Frères and failed to inform

² RESTATEMENT (SECOND) OF CONTRACTS § 90.

³ See generally Mike Stout, Remembering Pittsburgh, Remarks at *Local 1330 v. U.S. Steel: 30 Years Later* (Feb. 25, 2011), in 7 UNBOUND: HARV. J. LEGAL LEFT 50 (2011).

embattled rank and filers until long after it had ceased to believe in and support their cause.

Second, without the support of the USWA, we failed to obtain from the federal government an indispensable component for any legal strategy for reopening facilities as capital-intensive as steel mills, namely money. A Democratic administration abandoned Youngstown.

At the time it would have cost perhaps \$20 million to acquire any of the closed facilities in the Mahoning Valley, but every ton of steel in Youngstown was made in antiquated open-hearth furnaces. It would have made no sense to reopen any of the area steel mills without the capacity to rebuild the hot end, that is, without installing basic oxygen or electric furnaces in place of open hearths and substitute continuous casters for blooming mills to semi-finish the steel.

In any of the three mills that shut down in Youngstown between 1977 and 1980, necessary new investment would have cost at least \$200 million. But the Carter Administration had set aside loan guarantees to assist steel makers amounting to only \$100 million for the entire country. As John Barbero observes in the documentary movie *Shout Youngstown*, decision makers in government and private industry were not interested in worker-community operations in what they considered their private preserve.⁴

In Pittsburgh, the struggle unfolded during the early years of the Reagan administration. The exercise of eminent domain has two prerequisites. The first is a public purpose. The second is cash in the amount of fair market value. Where were the Tri-State Conference on Steel or the newly-minted Steel Valley Authority to find that kind of money in the early 1980s?

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Finally, the union reform movement, even had it been more successful, would not have prevented this rust belt catastrophe. That movement has focused on the internal government of unions. Hence, between 1970 and 2000, you had the campaign of Arnold Miller and Miners for Democracy, of Ed Sadlowski in the United Steel Workers, and Ron Carey and Teamsters for a Democratic Union. None of these reformers said anything about two features of the standard CIO collective bargaining agreement that made our task in Youngstown and Pittsburgh almost impossible.

The first such feature is the management prerogative clause. One day during the summer of 1980, I stopped by the Local 1330 union hall. This was the meeting place from which Ed Mann had led a mass meeting of steelworkers down the hill to occupy the US Steel administration building. Six months later, defeat was visibly evident. The now empty building with its big glass windows had become a natural target for neighborhood kids, and several windows and the glass front door had been smashed.

Bob Vasquez, president of Local 1330, was alone in the building, sorting papers. He looked up as I came in and said, "I understand that you're a historian." Then he gave me several typewritten drafts of the first collective bargaining agreement between

⁴ SHOUT YOUNGSTOWN (Cinema Guild 1984).

the Steelworkers Organizing Committee and US Steel in March 1937. One clause was the same in all these drafts and remains virtually unchanged today. It reads: “The management of the works and the direction of the working forces including the right to hire, suspend, discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work or other legitimate reasons is vested exclusively in the corporation.”

Having thus given management a free hand to make unilateral investment decisions including the right to close the facility, the new CIO unions also took away from their members the ability to do anything about it by direct action. A second feature of the standard CIO collective bargaining agreement, beginning with the contracts with General Motors and US Steel in early 1937, was the clause prohibiting strikes and slowdowns for the duration of the contract.

The no-strike clause violated the explicit legislative intent of the Wagner Act expressed in Section 13 of the statute.⁵ The principle draftsman of the National Labor Relations Act, Leon Keyserling, was asked by an interviewer years later whether there was some specific reason for putting that residual guarantee of the right to strike in the Act. Keyserling responded there was a definite reason. Wagner was always a strong supporter of the right to strike, which he regarded as workers’ ultimate weapon, without which labor was powerless.

That guarantee was a part of his thinking. It was particularly necessary because a lot of people made the argument that because the government was giving labor the right to bargain collectively, it was a substitute for the right to strike.

Keyserling’s apprehension proved altogether correct. Proceeding on the fiction that rank-and-file union members had somehow voluntarily surrendered or waived their statutory right to strike during the duration of a collective bargaining agreement, unions, the National Labor Relations Board (“NLRB”), the courts, and some professors of labor law have acquiesced in this dramatic departure from legislative intent.

So what is to be done? Let me very quickly suggest a radical tactic.

This suggestion is an extension of management’s duty to bargain, embodied in Section 8(a)(5) of the Act, to encompass what have been called members-only or minority unions, that is, any group of workers numerically fewer than half the potential voters in an appropriate bargaining unit.⁶ Professor Charles Morris in his book *The Blue Eagle at Work* demonstrates that this was the original conception of union recognition in the 1930s and recommends a duty to bargain with members-only unions as a way to reclaim meaningful democratic rights in the American workplace.⁷

An important ambiguity remains, however. Existing unions have at all times, in Professor Morris’ words, looked upon these membership-based agreements as merely a temporary means to the end of exclusive representation: useful stepping stones on the path to majority membership and mature collective bargaining.

⁵ National Labor Relations Act § 13, 29 U.S.C. § 163.

⁶ 29 U.S.C. § 158(a)(5).

⁷ CHARLES J. MORRIS & THEODORE J. ST. ANTOINE, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (2004).

In contrast, I've had some personal experiences with local union officials at the giant Inland Steel local union in East Chicago, Indiana that these very inspirational workers remembered in this way: from after the Little Steel Strike of 1937 until that time in World War II when the Steelworkers union won the right to be the exclusive bargaining representative, we did better for our members than at any later time because we retained the right to strike. If it was difficult to work something out with local plant officials, somehow the open hearth would roll only half as many coils that night and the next morning you better believe that grievance got settled.

I don't have time to say more about that. This issue of so called minority or members-only bargaining is before the NLRB at the moment. Professor Sachs told me last night that an advice memo rejects Professor Morris' argument and historical evidence.

We'll have to see. In any case this is just a tactic. Like other radical tactics such as working to rule (the AE Staley experience), or occupation of the plant (Pittston and Republic Doors and Windows in Chicago), except in an unusually favorable context, and after life-and-death struggle, none of these tactics would have prevented US Steel from shutting down its Youngstown facilities at will.

We need a strategy. This is where Pittsburgh, not Youngstown, and Local 1397, not Local 1330, came forward as pioneers and showed the way. The Pittsburgh movement in the first half of the 1980s fought tooth and nail for worker-community ownership just as Youngstown had, but Pittsburgh pursued a strategy based on eminent domain. I well remember that just as the Youngstown effort was coming to a close, a city planner named Arthur Bray blew into town and said, "You know, Staughton, if you have a run-down neighborhood, abandoned homes, you can use eminent domain; why not use it for abandoned industrial facilities?" And it sounded like a good idea, but our moment to try to use it had passed. Fortunately, the brothers and sisters in Pittsburgh, although ultimately defeated, gave it a much better shot.