

Fall 11-2-1987

## Second Circuit Summaries (NYLJ)

Alan Kohn

# Second Circuit Summaries

Selected New Decisions by the U.S. Court of Appeals for the Second Circuit    Compiled by Alan Kohn

## **Railroad Police v. Amtrak**

**Civil Rights Law — Police Union's Challenge to Railroad Policy of Evicting Homeless from Pennsylvania Railroad Station**

The dismissal of a suit by a union of police officers challenging AMTRAK's policy of evicting the homeless from Pennsylvania Railroad Station was affirmed Oct. 28.

Judge Kearse, writing in *American Federation of Railroad Police v. National Railroad Passenger Corp.*, 87-7233, found the plaintiff's allegation of injury to police officers failed to state any claim other than one within the exclusive jurisdiction of the National Railroad Adjustment Board, on which relief can be granted by federal courts and as to the claim the policy violates the rights of homeless, the plaintiff lacked standing.

The plaintiff was represented by Erick F. Larsen, of Kranz, Davis & Hersh. The defendants' lawyers were Robert A. McCullough, Joanna L. Moorhead, Mark S. Landman and Amy B. Gallent, of Siff, Newman, Rosen & Parker.

## **U.S. v. Persico**

**Criminal Law — RICO Charges. Participating in Affairs of Colombo Family Racketeering Enterprise**

The convictions of various defendants for violating the federal racketeering law were affirmed Oct. 27 with two exceptions.

Judge Miner, writing in *U.S. v. Persico*, 86-1468, rejected defendants' various contentions with the exception of reversing the substantive RICO convictions of two defendants for failure to prove commission of a predicate act within the five-year statute of limitations. In dissent, Judge Newman stated the two defendants also were entitled to dismissal of the RICO conspiracy charge and to a retrial by jury as to their double jeopardy defense.

The defendants were represented by Stanley M. Meyer, of DePetris & Meyer; Martin G. Weinberg, Boston; Salvatore J. Marinello and Elaine Jackson Stack, of Marinello & Rosenstock, Mineola, L.I.; Susan G. Kellman; Michael Young; David Breitbart; and John L. Pollok, Mark A. Summers and Susan C. Wolfe, of Todtman, Hoffman, Epstein, Young, Goldstein, Tunick & Pollok. The government lawyers were Aaron R. Marcu, Bruce A. Baird, Frank H. Sherman and Stuart E. Abrams, Assistant U.S. Attorneys.

## 2d Circuit Upholds Charges In Crime Family Indictment

The U.S. Court of Appeals for the Second Circuit has upheld most of the convictions in a government indictment under the federal racketeering law (RICO) charging eight men with participating in the affairs of the Colombo Family racketeering enterprise. The Court upheld the convictions law week with the exception of substantive RICO convictions of two men, which were reversed.

Judge Roger J. Miner wrote the Court's thirty-two-page opinion in *U.S. v. Persico*, 86-1468, Oct. 27, with the agreement of Judge Frank X. Altimari. Judge Jon O. Newman handed down an eleven-page opinion, concurring in part and dissenting in part.

The men were convicted last year after an eight-month trial before Judge John F. Keenan, of the U.S. District Court for the Southern District of New York. The Circuit Court rejected contentions dealing with double jeopardy, RICO conspiracy and substantive counts, admissibility of co-conspirator's statements, a witness's compensation arrangement, the anonymous jury and failure to sequester the jury. The convictions of two men on substantive RICO counts were reversed for failure to prove a predicate act within the five-year statute of limitations.

The defendants were represented by Stanley M. Meyer, of DePetris & Meyer; Martin G. Weinberg, Boston; Salvatore J. Marinello and Elaine Jackson Stack, of Marinello & Rosenstock, Mineola, L.L.; Susan G. Kellman, Michael Young, David Breitbart and John L. Pollok, Mark A. Summers and Susan C. Wolfe, of Todtman, Hoffman, Epstein, Young, Goldstein, Tunick & Pollok. The government lawyers were Aaron R. Marcu, Bruce A. Baird, Frank H. Sherman and Stuart E. Abrams, Assistant U.S. Attorneys.

NYLS 4/2

3 November 1957

MICHELE MARIESCHI (1710-1744)

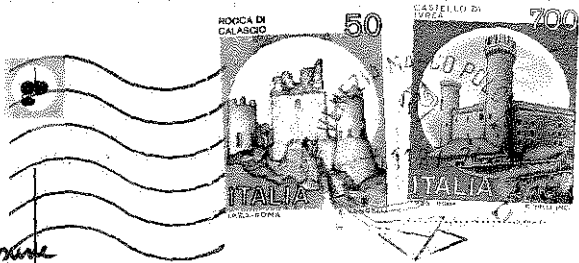
Il ponté sul Rio di Cannaregio  
Le pont sur le Rio de Cannaregio  
The bridge on Rio Cannaregio  
Bruecke am Rio Cannaregio

Collezione Duca di Buccleuch e Quensbery  
Bowhill, Selkirk

Dear Judge & Jackie: Ginsburg!  
Who is Ginsburg? The Herald Tribune  
reports that Meier was pushing him  
& thought Meier was pulling for us  
& can't tell you how disappointed and  
helpless I felt from here. Meier  
probably not much I could have done  
from the States, but I feel so guilty  
being here in Italy when all of that  
was going on back home. Please know  
how frequently you both have been  
in my mind and that I realize how  
difficult this has been for you.  
I'll call as soon as I return.

Edizione Angelo GARIBOLDI  
Venezia - Castello 5314 - Tel. 24745

Edwards  
A 20



JUDGE & MRS. ROGER MINER

RD # 2, Box # 110-E

HUDSON, NEW YORK 12534

PER VIA AEREA  
PAR AVION

U.S.A.

Imprints on Italy

## Miner to speak in Albany Nov. 12

ALBANY — U.S. Appeals Court Judge Roger J. Miner of Hudson will be the featured guest speaker at the 11th annual Lewis H. Case Memorial Lecture Nov. 12 at 4 p.m. in the gymnasium at Albany Law School, 80 New Scotland Ave., here.

His topic will be "The Tensions of a Dual Court System and Some Prescriptions for Relief."

<sup>11-5-87 RS</sup>  
The lecture, to be followed by a question-and-answer period, is open to the public free of charge.

Before his appointment to the U.S. Court of Appeals, Miner served on the Federal District Court and before that on the New York State Supreme Court. He also is an adjunct professor of law at New York Law School.

From 1968-1975, he was Columbia County district attorney

and from 1959-1975 he was a partner in the Hudson law firm of Miner and Miner.

The Case Memorial Lecture Series is conducted in honor of the late Lewis H. Case, who received his law degree from Albany Law School in 1950. Case was a trustee of both Albany Law School and the Monroe County Bar Association.

For information, call 445-2309.



STATE OF NEW YORK  
SUPREME COURT APPELLATE DIVISION  
THIRD DEPARTMENT

LEONARD A. WEISS  
ASSOCIATE JUSTICE

CHAMBERS  
ALBANY COUNTY COURT HOUSE  
EAGLE STREET  
ALBANY, NEW YORK 12207

November 5th, 1987

PERSONAL AND UNOFFICIAL

RECEIVED

William J. Hoblock, Esq.  
39 North Pearl Street  
Albany, New York 12207

NOV 10 1987

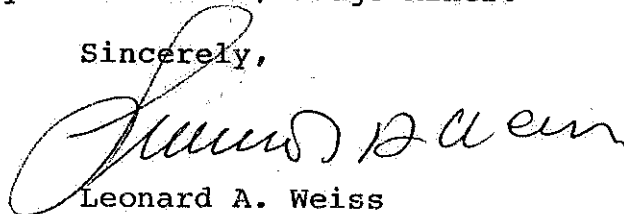
ROGER J. MINER  
U.S. CIRCUIT JUDGE  
ALBANY NEW YORK

Dear Bill:

I have received your letter of October 29 advising me of the Capital District Law School Alumni Association meeting on November 12, 1987 at 4:00 p.m., at which Judge Roger Miner will be the featured speaker.

I am scheduled to be on the bench that afternoon. However, in the event we complete our calendar before the usual 5:00 p.m. time, I will certainly hurry over to the Law School to attend the lecture by my dear friend, Judge Miner.

Sincerely,



Leonard A. Weiss

LAW/er

cc: Hon. Roger Miner  
Dean Martin Belsky

# Court Restores Claim Against TWA Prospectus

*N.Y. Journal 11/5/89*

The U.S. Court of Appeals for the Second Circuit has reinstated a stockholder's suit that claimed a 1983 prospectus contained material omissions. The prospectus was used to sell 4 million shares of preferred stock of Trans World Airlines at \$25 per share.

The majority, in *Kronfeld v. Trans World Airlines*, 86-7330, Nov. 2, found there were material issues of fact precluding summary judgment, which was granted last year by Judge Edward Weinfeld, of the U.S. District Court for the Southern District of New York.

## 1983 Suit

Judge J. Daniel Mahoney wrote the Court's thirty-two-page opinion, in which Judge James L. Oakes concurred. Judge Roger J. Miner handed down a four-page dissent.

The plaintiff, Joel Kronfeld, sued under §11 of the Securities Act of 1933 claiming that the prospectus failed to disclose that Transworld Corporation (TWC), the holding company for TWA, was considering a plan to completely spin off TWA to the public.

He also claimed the offering documents failed to mention an ongoing study by TWC's investment banker, Goldman, Sachs & Co., even though at the time of the July 29, 1983, offering, Goldman, Sachs was "preparing to recommend the spinoff of TWA."

In September, 1983, Goldman Sachs presented to TWC seven alternative financial steps it could take to improve the company's performance, which was being held down by TWA's losses. Although one of the alternatives offered was the complete spinoff of TWA, Goldman, Sachs made no recommendations as to which alternative should be adopted.

## Proposal Adopted

The TWC board adopted the spinoff alternative the same month. Following public announcement that a spinoff of TWA was being considered, the price of Mr. Kronfeld's shares dropped markedly: a 23.8 percent decline in price between Sept. 20 and Oct. 3, 1983, according to court papers.

Judge Weinfeld granted summary judgment, holding that when the prospectus was issued, there had been no final action to spin off TWA and that the views of the individual directors

*Continued on page 3, column 3*

# TWA Prospectus

*Continued from page 1, column 2*

on the board did not have to be disclosed prior to formal board action.

On appeal, Judge Mahoney found the court was not bound by a line of cases that has rejected arguments that preliminary merger negotiations should be disclosed. Section 11, he noted, was designed to assure compliance with the disclosure provisions by "imposing a stringent standard of liability on the parties who play a direct role in a registered offering."

## Question of Fact

What the Court had to decide, Judge Mahoney explained, was not whether the plaintiff was correct in his claims but whether he had raised a genuine issue of material fact based on a balancing of the likelihood of an occurrence with its "anticipated magnitude if it occurs in light of the totality of company activity."

There was "certainly, at a minimum," the judge continued, "more than a wholly remote possibility" in July, 1983, when the prospectus was issued, that TWC might withdraw its financial support of TWA. Given the fact the TWC-TWA relationship received considerable attention in the TWA prospectus, the majority could not conclude that the evidence was "so one-sided that one party must prevail as a matter of law and does not present a sufficient disagreement to require submission to a jury."

The judge also noted there were "serious limitations" on a company's ability to charge its shareholders with knowledge of information omitted from a prospectus on the basis that the information was public knowledge and otherwise available.

There was an issue, Judge Mahoney found, as to whether the buyers of the preferred stock could be charged with knowledge on July 29, 1983, and thereafter that Goldman, Sachs was then engaged in a study, of which one of the "live" options was to spin off TWA. That it was "live," the judge observed, was evident from notes taken by a Goldman, Sachs employee at a meeting with TWC officials July 7.