

U.S. v. International Brotherhood of Teamsters and SEC v. Drexel Burnham Lambert, Inc.

WHEN THE GOVERNMENT GOES JUDGE SHOPPING

BY
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How government lawyers manipulated the system to steer suits against the Teamsters and Drexel to sympathetic judges—and why that should worry everyone.

The two most important civil suits pending in the United States are the Securities and Exchange Commission case against Drexel Burnham Lambert, Inc., Michael Milken, and related defendants, and the Justice Department's case against the International Brotherhood of Teamsters. In one, the government is suing the nation's most aggressive investment bank and its leader for basic, sweeping violations of the securities laws. In the other, the government is trying to get the largest union in the free world declared a racketeering organization so that the court will appoint an honest trustee to take it over.

If ever there were two cases where we should want the system to shine—to be a model of justice dispensed fairly, credibly, effectively—these are the cases. If ever there were two cases where we want the government to behave as if it isn't just another litigant but is the one litigant that is supposed to care more about a fair trial and about justice than it does about winning, these are the cases.

Which is why it is so embarrassing, so destructive that these cases have started out in kangaroo court, each overseen by a judge who is anything but evenhanded, and each steered to that judge by cynical government lawyers who have forgotten the higher values they're sworn to uphold.

STEERING THE TEAMSTERS TO EDELSTEIN

On the merits, you can't get me to say a word in favor of the Teamster defendants; I wrote a book about the union ten years ago detailing not just its involvement in organized crime but that it is organized crime incarnate.

In 1982 the Justice Department had brought this type of civil RICO suit in New Jersey to remove the Teamsters' corrupt local leadership and replace it with a court-appointed trustee until honest, democratically elected leadership could be assured. That kind of suit is what RICO was meant for: federal assaults on racketeering organizations that attack the organization itself. Now, in the winter and spring of 1988, the Justice Department was preparing a monster version of this local suit: a RICO fight to take over the union's Washington, D.C.-based national leadership. On June 28, the long-awaited national suit, which could have been filed anywhere in the country, was filed in the Southern District of New York by U.S. Attorney Rudolph Giuliani.

In the Southern District, as in all federal court districts with more than one or two judges, cases are assigned randomly. When a case is filed at the courthouse in Manhattan's Foley Square, a judge's name is picked, bingo-style, out of a bowl that spins on a wheel. But there's one exception to the wheel: If a case is related to another case, the plaintiff's lawyer can fill in a box on the complaint form citing the related case. If he does, his case is automatically routed to the judge handling the supposedly related case. The judge can then accept it, or he can reject it if he deems it unrelated.

When Assistant U.S. Attorney Randy Mastro, the 32-year-old former Cravath, Swaine & Moore associate and superstar in Giuliani's office who is running the Teamsters case, filled out the complaint form, he filled

in the related case box, citing a RICO suit brought earlier in the year against two small local units of the Teamsters operating in Queens.

The local union case is being handled by Judge David Edelstein.

A 37-YEAR EMBARRASSMENT TO THE BENCH

I'll give a free subscription to anyone who's ever litigated a case with Edelstein who on a one-to-ten scale rates him anything higher than a .5 (and who's willing to be hooked up to a lie detector as he renders his rating). Edelstein, who at 78 is a senior judge, was appointed in 1951 by President Truman. For 37 years he has been an embarrassment to the federal bench.

I interviewed 30 lawyers of all different stripes who have practiced before Edelstein. None had a good word to say about him. The words "stupid" or "dumb" were used 27 times, "bully" or "arrogant" 24 times, "incompetent" 27 times, "lazy" 20 times. And 26 of the 30 lawyers offered "pro-government" to describe Edelstein, including 6 such assessments from the 7 present or former federal prosecutors interviewed.

Edelstein is widely remembered as the judge who turned the government's antitrust case against IBM into our civil law version of Vietnam, allowing it to run 13 years, including two years in which depositions were read out loud into the trial record by lawyers playacting in Edelstein's courtroom.

Edelstein did everything short of bring in a hanging rope to help the government win its unwinnable case. He harassed IBM's lawyers from Cravath, Swaine & Moore with name-calling and knee-jerk denials of objections and motions, ruling for the government in 74 of 79 contested motions while upholding 60 percent of the government's objections versus 3 percent of Cravath's. He allowed the government to amend its complaint whenever the mood struck and to take discovery and question witnesses endlessly.

But Edelstein's damage spreads far beyond the IBM case, which ended when the government—over Edelstein's objection!—dismissed it in 1982. Print out a WESTLAW search of run-of-the-mill cases he's handled and you get a roll call of lawyers who say it was the worst experience they've ever had in front of a judge. Except that lawyers for the government (five chosen at random) who had cases before Edelstein after the mid-seventies (a period when he seems to have gone from being

simply incompetent, slow, and bullying to being incompetent, slow, bullying, and pro-government) admit that they had an easy, if humiliating, time with him.

Because the Teamsters case involves requests for equitable relief, including the appointment of a special trustee, it will all be decided by Edelstein, not a jury.

THE "RELATED CASE" MANEUVER

The local court rule about related cases under which Assistant U.S. Attorney Mastro got this landmark suit in front of Edelstein seems clear. "Cases are related," the rule states, "if they present common questions of law and fact, or arise from the same source or substantially similar transactions, happenings, events, or relationships, or if for any other reason they would entail substantial duplication of labor if assigned to different judges."

The small civil case Edelstein already had, upon which Mastro now piggybacked the civil case against the national union, had been brought against John Long and John Mahoney, Jr., who are officers of two local units of the Teamsters union in Queens. Long and Mahoney had allegedly misappropriated local pension-fund investments.

The national union consists of 742 locals, hundreds of which are far more corrupt—and far more the real grist of the national suit—than the two Queens locals. The two locals aren't charged in the small suit with overall, systemic corruption, only with pension-fund corruption. Nor is the government seeking a trustee to take over the locals.

Indeed, the complaint in the national suit is 113 pages long and contains all of two sentences referring to the local Queens suit. It is impossible, therefore, to imagine any of the overlap in witnesses, fact issues, legal issues, or anything else that the rule was designed to accommodate.

When a lawyer moves on the complaint form to have his case deemed related to another one so that it goes to the same judge, he is required to attach a brief statement explaining its relatedness. Thus, Mastro wrote: "In both this case and in *U.S. v. Long* [the local case] . . . the United States has brought suit under the civil remedies provisions of RICO . . . to remedy corruption within the International Brotherhood of Teamsters. This case deals with alleged corruption at the international level [the Teamsters call the national union an "international" one because it has units in Canada], while *U.S. v. Long* deals with corruption at the local

level which the International Union leadership has failed to address."

True, the allegations against Long and Mahoney are among the dozens of examples of corruption alleged in the national case that the national leaders have allegedly tolerated, but that hardly makes the cases related in the way the rule requires. (And, as we'll see below, there's evidence that the Long and Mahoney allegations were added to the national complaint only to get the national case related to the Long and Mahoney case once Edelstein got the Long and Mahoney case.)

More important, Long and Mahoney are also under criminal indictment, and Mastro and his office have agreed to stay the civil case against them—and all discovery related to it—pending the outcome of that criminal case. In fact, the government has now taken the inconsistent position that because of the Long and Mahoney criminal case, the national union's lawyers cannot now take discovery of witnesses related to the minuscule Long and Mahoney portions (two sentences of a 113-page complaint) of the national civil case. Thus, the very reason for the related-cases rule, to speed the process and to avoid duplication, has been negated by the government.

The complaint form also states that the plaintiff can fill in the box designating a related case "ONLY if you intend to move for consolidation." (The capital letters are the form's, not mine.) Consolidation means that the cases would be tried together.

According to chief Southern District judge Charles Brizant, Jr., that admonition about consolidation was added in 1981 because "we began to think too many people were being a bit loose about what a related case was."

Asked if he intends to move to consolidate the cases, Mastro declines comment. But he hasn't moved to do so, and it's clear that he won't and shouldn't, for several reasons. First, the two cases have so little to do with each other that consolidation would be a farce (as would consolidation of discovery, which Brizant asserts is another option under the admonition). Second, at least one of the two Queens locals is generally viewed by law enforcement officials as not endemically corrupt in the way the national suit seeks to portray the national union, so having that local be part of the national case would undercut the national case. Third, neither of these two locals is under the rigid control of the national union leadership the way so many larger, more corrupt locals are; so including those two locals, and those two alone, as part of the national case would similarly undercut the national case.

Asked how a litigant could fill in the box and then not move to con-

solidate, Brizant explains that the internal rules of the court on the assignment of judges are "for the benefit of the judges only. We can do it any way we want to." He adds, "If I want to give one of my cases to another judge because I want to go to the beach, that's fine. . . . No one has the right to any judge or to any system of choosing judges . . . and these rules don't give anyone any rights."

As for how a judge should deal with a litigant who ignores the admonition about moving to consolidate, Brizant says that the instruction is "only a guideline, because it's entirely for Judge Edelstein to decide whether he should take that case."

"When the controversy dies down that has arisen lately [because of the Teamsters and Drexel cases] about this rule," adds Brizant, "we'll probably look at changing the form. It's really not meant to be as rigid as it seems. The part about consolidation was put there just to slow down this trend to consolidate. . . . The important thing is that it's the judges' decision to make about who handles what cases."

A LONG WAY AROUND THE "WHEEL."

The government's maneuvering to get the case to Edelstein seems to have started well before Mastro filled out the form claiming the cases were related. Originally, Edelstein didn't have the Long and Mahoney civil case. When that case was filed on May 11, 1988, it was assigned, via the wheel, to Judge Richard D'Amico. What's interesting about that is that two other civil cases brought by the government were already pending against one of the two Queens locals and two of its officers, including one of the defendants in this May 11 case (Mahoney). The other two cases had to do with the same pension-fund corruption allegations made in the Long and Mahoney case that went to D'Amico via the wheel.

Those two earlier cases were in Judge Louis Stanton's court. Giuliani's office apparently doesn't fancy Stanton, because no move was made to have this new Long and Mahoney case sent to his court as a "related" case, which it clearly was.

On May 21 Judge D'Amico was murdered at his home by the father of a disappointed litigant in an unrelated case. The Long and Mahoney case was then transferred to Judge Vincent Broderick.

Meantime, a criminal RICO indictment against Long had been filed on December 14, 1987. Edelstein had drawn this case off the wheel. On April 27, 1988, a new indictment was brought in the Long criminal case.

superseding the first one and adding Mahoney as a defendant. Because it was an addendum to the first indictment, the new indictment stayed with Edelstein.

But in May of 1988, Mastro—who was not the lawyer in Giuliani's office handling the Long and Mahoney civil or criminal cases but was handling the national Teamsters case—called Long and Mahoney's lawyers and asked if they would agree to have their civil case transferred to Edelstein, who had the Long and Mahoney criminal case. There is no provision in the rules for civil cases to be transferred to "related" criminal cases, because a criminal case, obviously, is supposed to be tried independently of all other cases and kept untainted by any extraneous evidence. But according to an affidavit subsequently filed by Mahoney's lawyer, Jo Ann Harris, Mastro made a good practical argument for moving that civil case to Edelstein; he promised that the civil case would remain dormant while the criminal case went forward and that, according to Harris's affidavit, "if Mahoney [was] acquitted in the criminal action the Government would . . . drop the civil action. . . ."

Faced with nothing to lose—she already had the bad luck of having Edelstein in the criminal case, and if she won that she'd be rid of the civil case—Harris and her co-counsel agreed.

Now Edelstein had the Long and Mahoney civil case.

A month later, Mastro filed the national Teamsters case, called it related to the Long and Mahoney case, and got it into Edelstein's court.

In August the Teamsters' newly retained lawyer, Jed Rakoff of Wall Street's Mudge Rose Guthrie Alexander & Ferdon, figured out what had happened. In an angry motion—which he had to make before Edelstein—he demanded that the government be enjoined from prosecuting the case before Edelstein and that the case be sent back to the wheel for reassignment. Rakoff accused the U.S. attorney's office (where he was once chief of the frauds unit) of "sharp practices and constitutional infringements" in its "attempt to steer the . . . case to this Court by a manipulation of the local Rules. . . ."

"[A]ny overlap between this case and the Long case," Rakoff contended, "is so demonstrably *de minimis* as to render incredible any claim that the Government sought to promote any meaningful or substantial savings of time by the Court, as contemplated by Rule 15. Rather, the logical and compelling inference which arises from these facts is that the Government's acts, at least beginning with its successful effort to transfer *U.S. v. Long* to this Court, were undertaken not to aid the Court in the proper application of its Rules, but instead to give the Government the

improper and unconstitutional advantage of affecting the selection of the tribunal for this case."

Rakoff also asserted that "any doubt as to the almost total lack of relationship of Long to this action has now been resolved by the fact" that the government had now opposed any discovery of Long or Mahoney in the national case, despite "the expedited discovery schedule" in the national case. The government "could only defend such a position," he charged, "on the basis of an admission that allegations relating to Long and Mahoney are insubstantial in the context of" the national case.

Mastro replied that he'd only been following the rules, as he was obligated to. He argued that the cases were, indeed, related and contended that he'd promised Harris, Mahoney's lawyer, only that the civil case would stay dormant pending the criminal case and that if she won the criminal case he would "discuss" what should happen to the civil case. Most important, he declared in an indignant reply brief that it is the judge, not the litigants, who decides if the cases are related. That is true, but it skirts the reality that a senior judge like Edelstein looking for a high-profile, important case will grab it if offered, and that, according to his own chief judge, he can grab it once offered no matter how minimally related it is.

Teamsters counsel Rakoff had cited the fact that Mastro personally had called Harris to get the Long and Mahoney case moved to Edelstein, even though he wasn't working on that case, as evidence of Mastro's carefully planned effort to "steer" the case. Mastro replied that as deputy chief of the Southern District's civil division he had supervisory responsibility over the Long and Mahoney case, too, even if he wasn't working on it. Asked in an interview how many times he had ever made similar calls—related to a case he wasn't working on himself rather than have the assistant running the case do it—he declined comment.

On October 13, Edelstein, to no one's surprise, denied Rakoff's motion, ruling that the judge alone has the right to accept or reject related cases.

According to two government lawyers who say they saw an earlier draft of the national case complaint that was written several weeks prior to Mastro's move to get the Long and Mahoney case moved to Edelstein, the earlier draft had nothing about Long or Mahoney. Those two sentences about Long and Mahoney, which Rakoff had argued appeared in the complaint "as a grain of sand appears on a beach," and had "all the earmarks of being added simply for the purposes of manipulating the local rules," didn't appear in that earlier draft at all, according to those

sources, but were, indeed, added to a draft that was written after Mastro got the Long case moved to Edelstein.

Mastro declined comment when asked about the contents of earlier drafts of the complaint.

Mastro, Giuliani, and others in Giuliani's office take the position, as one puts it, that "it was our duty to call the relatedness to the attention of the court." They even say it with a straight face, although they didn't see that duty when it came to relating the Long and Mahoney case to the clearly related cases being handled by Judge Stanton, and although around the office, steering the case to Edelstein was seen, according to two sources in the office, as a coup nearly worthy of celebration.

The Teamsters' lawyers aren't free of hypocrisy either. Rakoff's papers take pains to point out that he's not suggesting that the union wouldn't get a fair trial from Edelstein, perish the thought. Indeed, because such motions to get a judge off a case have to be made to the judge himself, reality always has to be avoided. Which, of course, allowed Edelstein, in his ruling denying Rakoff's motion to take the case away from him, to note that the Teamsters' due process rights weren't violated because "the Union has not pointed to any prejudice as a result of the case being heard by this court. In fact, the Union has stated in open court and in its moving papers that it has no question of the court's impartiality."

So all three players are engaged in an elaborate charade, one that anyone who cares about our system should be embarrassed about, and one that will produce anything but evenhanded, credible justice in this landmark case. Indeed, the Teamsters' only hope now is that Edelstein will be more incompetent than biased—it's always a close contest with him—and that the case will get mired in years of discovery and pending motions.

DREXEL GOES TO KANGAROO COURT

As almost every newspaper-reading American knows (courtesy of a two-year cascade of leaks), Drexel Burnham Lambert, Inc., and its junk-bond king, Michael Milken, have been under investigation by the SEC and by Giuliani's office from the moment pseudo-arbitrageur Ivan Boesky got caught in the Dennis Levine insider trading scandal and turned informant.

During the first week in September, members of the multimillion-dollar legal team representing Drexel and Milken were told, they say, by the SEC that formal charges were finally coming. According to two

lawyers on the Drexel side, because they were mindful of what the government had just done in the Teamsters case they feared that when the SEC did file its case, the commission would claim that it was related to cases being handled by Judge Milton Pollack, and that, therefore, Pollack would get the case.

The cases Pollack was already handling (via the wheel and then the federal courts' multidistrict consolidation procedure) were those that had been filed against Ivan Boesky and other defendants by assorted plaintiffs claiming to have been injured by Boesky's insider trading. The two main categories of plaintiffs were class action plaintiffs who had bought or sold stock in the companies Boesky had traded on, and investors in an arbitrage fund Boesky had organized that had lost millions when Boesky had been forced to liquidate after he was caught.

Drexel was a tangential co-defendant in these class action cases against Boesky, because Levine and another confessed insider trader, Martin Siegel, had been employed at Drexel during part of the time they and Boesky had done their dirty work. Drexel is a co-defendant in the suits by Boesky's investors because it was the underwriter in the Boesky fund offering. Thus, the allegations the SEC was preparing against Drexel, though broad and damning, had nothing to do with Drexel's status as a defendant in the shareholder suits and were only tangentially related to the arbitrage fund suits. Nonetheless the Drexel lawyers feared that the SEC would call its case a related case in order to get it in front of Pollack.

THE PROSECUTORS' FAVORITE JUDGE

Milton Pollack, 82, a former plaintiffs securities lawyer appointed to the bench by President Johnson in 1967, is smart, indeed brilliant. He is anything but lazy. Although tough on lawyers in court, he is usually respectful. Off the bench he's a candid, direct, witty man. His clerks and former clerks revere him.

And when it comes to running a courtroom, he is everything that Edelstein isn't and everything a judge should be. Under Milton Pollack lawyers attempting discovery abuses or anything else that avoids the merits are stripped bare; Pollack is the model of how the system can work when a judge wants it to work.

But around the Southern District it is an open secret that Pollack has two bedrock problems. First, he's so sure of how smart and how "right"