

# ASK BARTLEBY

Dear Bartleby,

What was Wheeling's legal history with "yellow dog contracts?"

-Kevin Flanagan

Dear Kevin,

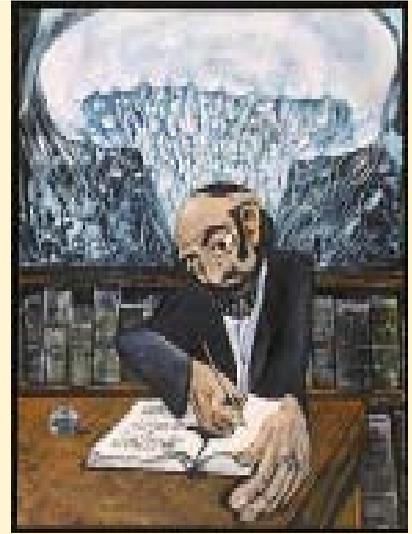
When The Pittsburgh Bessemer Steel Company began operations in nearby Homestead in 1881, it required its employees to sign agreements that they would not join any labor organization during their employment. These "yellow dog contracts" were an early thorn in the side of labor organizations, and led to bitter strikes in Allegheny County, culminating in the famous Homestead Strike with the Carnegie Steel Company on July 6, 1892.

While the "yellow dog" contract was notorious in the early steel industry in Pennsylvania, it was used extensively in West Virginia to keep the United Mine Workers of America from unionizing West Virginia coal operations.

In 1907, the legality of "yellow dog contracts" had still not been conclusively settled when the Judge of the U.S. District (then Circuit) Court for the Northern District of West Virginia, Alston Gordon Dayton, awarded an injunction to the Hitchman Coal & Coke Company banning the United Mine Workers of America (and others, including union official John Mitchell) from peacefully organizing or soliciting Hitchman's employees for membership in the union, or conducting a strike over Hitchman's refusal to recognize the union, because Hitchman had secured "yellow dog contracts" from its employees in advance of offering them a position to the effect that they would not join a union, and withdraw from employment if they did so.

The *Hitchman* case went all the way to the

Supreme Court, but was not decided until 1917, as *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229. By that time, the Supreme Court had already decided that employers had the right to make non-membership in a union a condition of employment. *Adair v. United States*, 208 U.S. 161 (1908). The case nonetheless achieved some notoriety, with the Supreme Court reversing the appellate court's overturning of Judge Dayton's injunction, and holding that even peaceful solicitation of the union in the face of Hitchman's pre-employment contracts amounted to "malicious interference" with Hitchman's property.



Imprimis: I am a man who, from his youth upwards, has been filled with a profound conviction that the easiest way of life is the best. — *Bartleby, the Scrivener* Herman Melville

One organizer from the Ladies Garment Workers Union, Fannie Sellens, achieved celebrity status among labor activists at the time, (and a stint in a Fairmont jail) for defying one of Judge Dayton's injunction orders.

In a thoughtful dissent in the *Hitchman* case, Justice Brandeis questioned how the Supreme court, which did not dispute that the union was a lawful organization engaged in

peaceful conduct, could find its solicitation of employees to join the union and support a strike any more coercive than the employer's obtaining of the agreements not to join a union as a condition of employment. Accordingly, he would not have granted the injunction in the first place. In this, he was a then lone voice in the great tradition of Judge Oliver Wendell Holmes, who had argued as early as 1896 that economic self-interest was justification enough for peaceful union coercion. *Vegeahn v. Guntner*, 167 Mass.92 (1896), dissenting opinion. With the advent of the National Labor Relations Act, "yellow dog contracts" were made illegal. But the NLRB has lately allowed large employers to accomplish the same result by simply designating employees "supervisors," and adding, if necessary, minor supervisory duties to their jobs, to keep them from being eligible to join or support a union.

Judge Dayton, born

in Phillippi in 1857, was a former Member of Congress from the Second Congressional District of west Virginia, and practiced previously in Barbour County with the firm of Dayton & Dayton. While in Congress, Judge Dayton distinguished himself in naval affairs, promoted rights for veterans of the civil war, and urged armed conflict "if necessary" with Spain, concluding with the prescient words, "Cuba will be free!"

Hitchman was represented in the Supreme Court of United States by Wheeling attorney Charles R.E. Gilchrist. Also born in 1857, he was admitted to practice in West Virginia, at Wheeling, in 1881, and specialized in corporation, estate and labor union litigation in state and federal courts. At the time, he was noted to have one of the most extensive individual law libraries in the country.

The union and individual defendants were represented in the Supreme Court of the

United States by West Virginia lawyers Charles Edgar Hogg, (1852-1935) from Point Pleasant, WV, a former dean of the College of Law of West Virginia University, and author of a number of works on legal procedure, and Charles J. Hogg, of Charleston, WV.

Yours Truly,

Bartleby, the Scrivener



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