MondayMonday

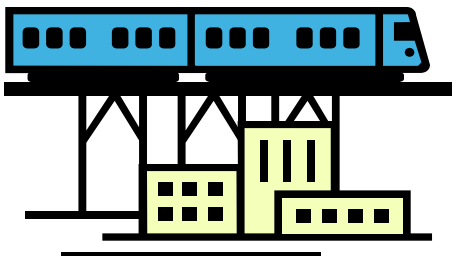
1/2-Million Dollar Trip Over the PJI

January 20, 2014

There are people who understand that the real glory of diversity is that people are different. It is that difference which makes a city great and keeps it always new. Then, of course, there is the adage which never fails and always delights: We can't hate anyone whose food we eat. Eating is understanding, the enemy of hate.

Judy Protas understood that principle in the way that only a real live Mad Man of the 60's could. In an era which relegated women to roles which, too often, underutilized their skills, Protas, born in Brooklyn and educated at Barnard, with a Master's in English Lit from Yale, was an advertising legend. In 1961, Protas realized that Doyle Dane Berbach's client had a product that, though ethnic in origin, had crossed over into becoming a product that transcended the boundaries of one culture to become the darling of all.

In promoting Levy's Real Jewish Rye bread, Protas told it like it was and still is: "You Don't Have to Be Jewish to Love Levy's Real Jewish Rye." She used what most would identify as distinctly non-Jewish faces to bring that point home, a young black boy, the Irish cop, even a Native American, all



eating Levy's rye. The point was that the joy of eating is our most common denominator.

Judy Protas passed away last week at 91. Along with Levy's Rye, she gave us the simplest of all jingles as well, "Candy-coated popcorn, peanuts and a prize" for Cracker Jack. In the jargon of the era, that's telling it like it was and still is. Food is truth.

A $500K verdict on pain and suffering goes temporarily south this past week when the trial court blows a jury charge on, of all things, constructive notice. In *Harrison v. NYCTA*, 2014 NY Slip Op 00277 (1st Dep't, 1/16/14), over objection and contrary to defendant's request to charge, the trial court's instruction was that the jury had to find that the TA "either knew about the dangerous conditions or circumstances and that would be actual notice or a reasonable person would conclude that such a condition existed, and that would be called constructive notice." But that instruction, the majority held, "does not make it clear that in order to find constructive notice, the jury must conclude that the condition was visible and apparent, and that it existed for a sufficient length of time for defendant to have discovered it and taken curative action." If that language sounds familiar to you, then you've read PJI 2:90 and 2:11A, which perhaps the court read after the charge, as it attempted to later instruct the jury about reasonable time to remove the snow or ice from the rail platform on which plaintiff had slipped. But alas, that curative instruction was not coupled to the court's earlier instructions on notice.

As plaintiff did present evidence on constructive notice, which the defendant countered, the case is remanded for a new trial on liability, as the jury questions prevail.

The excellent discussion on the vagaries of constructive notice notwithstanding, the two dissenting justices would toss the case entirely, finding that there was no evidence of actual notice and the evidence of constructive notice was insufficient. The ice here had formed between the yellow dots on the strip on the train platform where one enters the trains doors. The TA can't be charged with notice of a small patch of ice on a relatively clean outdoor platform upon a showing of no more than general awareness of freezing temperatures and the possibility of ice forming. With two dissents is this case Eagle St. bound? Who knows? Stay tuned.