SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : TRIAL TERM PART 26

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CARUSO, et al.,

INDEX

Petitioner, 114514/94

-against-

MACDONALD, et al.,

Defendants. MOTION

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60 Centre Street
New York, New York
May 26,1994

Before:

HONORABLE KARLA MOSKOWITZ,

Justice

Appearances:

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Official Court Reporter

MR. LYSAGHT: James Lysaght.

Your Honor, this is a proceeding wherein the New York City Patrolmen's Association seeks a preliminary injunction at the intercession of the Court to declare the actions of the City of New York and the Board of Collective Bargaining of the City of New York illegal, and that the action in declaring an impasse in mandating or putting into motion the procedures within the law in the declaration of an impasse, including the selection of arbitrators, was a decision that was arbitrary, capricious, and which puts the City of New York in the position of the police department P.B.A. of the City of New York in a position where they sustained a massive detriment in going forward in a hearing where factually we can demonstrate we have not in fact done a violation of any single demand which is a mandatory subject of negotiation. That in fact, the actions of the B.C.B. at the behest of the City were

actions that give indication of an indication of bias on the part of the B.C.B., a bias that is exactly opposite that which is commanded legally to be an objective arbiter of decisions between labor unions of the City and the City of New York.

What occurred, your Honor, in sum and substance, and we had some discussion last week, as negotiations first commenced with this administration between the P.B.A. and this administration on March 1st--

THE COURT: Did you have negotiations before that?

MR. LYSAGHT: Not to speak of. Let me just tell you what we had.

In February, 1993 I sent off a letter with a great set of demands to the City in hopes of stimulating an interest with the Dinkins administration into negotiation of a contract with the P.B.A. Your Honor may or may not be aware--

THE COURT: Why don't we take the first issue here. The first issue is

whether or not I will grant the cross motion to dismiss.

MR. LYSAGHT: With regard to the cross motion to dismiss, your Honor, the issue is one of jurisdiction, as I pointed out to your Honor in the memorandum of law in the case of Mount Saint Mary's Hospital.

THE COURT: I don't see where that says this Court has jurisdiction in this case.

MR. LYSAGHT: It says in fact, your Honor, as does the case afterward, Rabinowitz and the City of Albany case, that the court has inherent jurisdiction to enjoin a proceeding when it finds that proceeding is acting extra-legally or illegally.

THE COURT: It is not a dispute within the public sector.

MR. LYSAGHT: In that case, your honor, the arbitrator third party, the body supposed to be acting as independent in the City of Albany, it was a public sector, it was P.E.R.B., P-E-R-B. In the

private sector, the State was enjoined from going forward and forcing an arbitration of issues.

THE COURT: Which case is that? That was not the kind of case we have here, just purely public sector case.

MR. LYSAGHT: The City of Albany is a case involving the Public Employees Relations Board.

THE COURT: Would you give me a copy of that?

MR. LYSAGHT: the brief.

THE COURT: Would you give me a copy of that decision?

MR. LYSAGHT: Page 28, your Honor, City of Albany.

THE COURT: I don't think that stands for what you say it stands for. I made copies of some of the cases but not that one.

MR. LYSAGHT; Your Honor, the thing we had some discussion about last week was whether or not the U.F.A. case and the

Beecher case prohibited us from seeking the injunctive relief of this court. Your Honor, they are both radically distinguishable on the fact what those cases sought to do is freeze the status quo. The Court of Appeals said there is no power inherent in the court to freeze the status quo of the labor dispute or through B.C.B. to freeze the status quo of the parties. That is absolutely opposite what is going on here.

THE COURT: Isn't the last decision by the Court of Appeals the one I should follow?

MR. LYSAGHT: The Beecher case?

THE COURT: 19-92 decision of the Court of Appeals, isn't it?

MR. LYSAGHT: The Beecher case?

THE COURT: I am not talking about Beecher, I am talking about the U.F.A. case.

MR. LYSAGHT; Again, I believe your Honor can in fact enjoin the actions of the B.C.B. in this case while following

that case. I don't think it is opposite this quest at all. I think you have independent authority to stop what is obviously an illegal act. In other words, what the courts decided in the U.F.A. case is that you may not stop a department from functioning, from making decisions administratively and otherwise without statutory legislative grant.

What was quested there was that the U.F.A. alter its administrative policies during the pendency of the B.C.B. hearing, they not have access to the free range of authority they otherwise would have to. The Court said they invited, and in fact last year because the injunctive relief bill vetoed by the governor, it is now being reamended. I did the lobbying in Albany, also in the legislature to set standards whereby the court may intervene, and the legislature, nobody ever knows what it is going to do, but that intervention is an intervention intended only for the purpose of stopping a

municipal governing entity, in this case a public safety entity, police and fire department in Beecher one, and fire the other, in going forward with an action that it otherwise might be able to take, then the challenge happens later, and whether that action was wrong, arbitrary, capricious, et cetera.

That is not the case here. What we are asking that we stop continue the collective bargaining process, what the B.C.B. did, to announce its decision, to announce that-- going forward in. We are saying your Honor has the absolute right, witness the cases we have cited, to look at whether or not they have done so within their legal authority.

THE COURT: I don't read those cases like that. I think firefighters is dispositive, and the Court of Appeals in its alternate grounds says, second and even more importantly-- labor disputes before the Board or P.E.R.B. would have the undesirable effect of employing the

court in the merits of such disputes. A matter best left to the impartial body with expertise in that area.

MR. LYSAGHT: The facts upon which that is based are not based upon the facts here. The facts upon which that is based are facts that would retrain, in other words, either the fire department--

THE COURT: In order to issue a preliminary injunction, one of the criteria is whether or not, that is you have to look into whether or not there is a likelihood of the applicant's ultimate success on the merits, correct? How do I look into that without disturbing the process?

MR. LYSAGHT: One of the things in that case, what they meant by ultimate success is, whether or not enjoining the fire department from even as it is in this action, which they allege was an action necessary to proper function of the fire department, whether or not U.F.A.

would be eventually successful in arguing that should be--

THE COURT: If I issued a preliminary injunction, I am making a decision as to whether or not the Board, right, is it the Board of Collective Bargaining, made a correct decision in deciding it was an impasse..

MR. LYSAGHT: No. What you are doing is--

THE COURT: Aren't I?

MR. LYSAGHT: No, your Honor. I believe you can have a hearing to find out whether or not they met the statutory mandate. In other words, the declaration of impasse starts a new proceeding. That new proceeding we started has detriment to both parties.

THE COURT: You are asking me to make a judgment whether or not that Board acted properly in issuing, saying that it is making a decision there is an impasse and the other procedure should take effect?

MR. LYSAGHT: I am asking the final decision of the Board with respect to the declaration of impasse is sufficient as a matter of law--

THE COURT: That is not a final decision.

MR.. LYSAGHT: It is a final decision with respect to the impasse procedure.

THE COURT: I don't read it as a final decision.

MR. LYSAGHT: It is a final decision, your Honor, because what it does is it caused the intervention of the third party. The parties--

THE COURT: It starts a new process. It is not a final decision within the Article 78. That is not a final decision. I don't know how you can say that with a straight face to me that it is a final decision.

MR. LYSAGHT: If I can, I can tell you. Very simply, not only with a straight face, there is no doubt it is a final decision. What it does is causes the

intervention of third parties. Not under the control, direction or capable, or even forgetting--

THE COURT: But it is not a final decision.

MR. LY8AGHT: It is. The beginning decision as we pointed out is exactly on point with the Albany case, exactly on point.

THE COURT: But the Albany case is a 1976 case. And I have to look at what the Court of Appeals has told me to look at in 1992, not 1976.

MR. LYSAGHT: You are mistaken, in all due respect, you are making a mistake in terms of blending together a request of the fire department or the union on the other side stopped some activity that they are doing which the other side alleges a breach of contract. I am not doing that.

What we are alleging here is that a third party foreclosed our information process in order to go forward on

collective process rights that were--

THE COURT: I don't--

MR. LYSAGHT: --seven people now being selected, or three people as a result of--

THE COURT: I also have an affidavit from somebody, I think from the City, saying that even while this process goes on, that oftentimes there are still negotiations that go on between you, and there is no reason you cannot continue to negotiate.

MR. LYSAGHT: It is absolutely not true. It is a self-serving statement. The requirement of that statute is why I am saying it is a final decision. If you look at the requirement of the statutes, the test is arbitrary and capricious. The requirement says you have to find an exhaustion of collective bargaining before you declare an impasse.

THE COURT: I don't see this as a final decision, just don't read it that way at all. It is the beginning of a

process.

MR. LYSAGHT: That's exactly the point. It is final as to the beginning of the process, which means now I am going forward in-impasse proceedings without adequate information. It is a grotesque club the City is allowed to use.

THE COURT: I am not, the courts are not, do not just don't intervene in a decision by the Board that the decision says there is an impasse. I am not going to look at that decision. I don't think you have shown enough. I don't even get to that issue. It is not a final decision.

When everything is done, you come back. You have rights to bring an Article 78 if you disagree with the decision.

MR. LYSAGHT: Two thousand police officers will go forward in a proceeding that will decide for the five years, perhaps 39 months of their lives that they have contractual rights which--

THE COURT: Excuse me, counsel.

MR. LYSAGHT: --though they--

THE COURT: Excuse me.

MR. LYSAGHT: Legal right to decide--

THE COURT: Counsel, stop grandstanding. They have been working without a contract since when? Since when? .

MR. LYSAGHT: 1991, October.

THE COURT: You mean to tell me with a straight face no negotiation has been going on for that contract?

MR. LYSAGHT: Absolutely. Because of the Dinkins administration and the B.C.B.

THE COURT: Does anybody else want to be heard?

MR. DECOSTA: Steven Decosta, representing the Board of Collective Bargaining and MacDonald. I just want to touch on a couple of points your Honor raised.

First of all, the City of Albany case which the P.B.A. does rely on, that is a

public sector case, but it really doesn't involve the issue raised here. That was a case where there was a dispute that the parties were at impasse. The issue there was whether an arbitrator who was selected should be disqualified because of prior actions. And it really has nothing to do with the context of this case, doesn't deal with the question of the declaration of an impasse. It also is a lower court decision which precedes the firefighters, case.

Our position is that because this particular case involves--

THE COURT: You are right, City of Albany is a trial court.

MR. DECOSTA: It is a Supreme Court Albany case, which dealt with the question whether or not an arbitrator designated after an impasse was declared should have been disqualified.

The other cases, Mount Saint Mary's Hospital, Long Island Hospital, doesn't involve the question of impasse. One

involved the constitutionality of the section of the Labor Law which also provides arbitration, and the other had to do with the scope of matters that can come before that court, but none of that relates to the issue raised here.

Our position is that the Board's determination was not a final determination, that it merely initiated a new stage of the bargaining process. It does not preclude further bargaining. In fact, to the contrary, the statute expressly authorizes the impasse panel to attempt to mediate between the parties. There is the possibility of further bargaining and a settlement, and even if that is unsuccessful, even if it goes forward, at that point the impasse panel makes a report and recommendation that is subject to appeal to the Board of Collective Bargaining, and its determination would be subject to review in the court.

So there are many further steps to be

taken in the process before there is a final determination. However, our position is that this is not a final determination, it is not subject to review at this point.

I would also like to add that on the question of preliminary injunction, there is really no showing of any kind of irreparable harm to the petitioners.

THE COURT: I don't have to reach that if I grant the motion to dismiss, correct?

MR. DECOSTA: That is correct.

THE COURT: Do you want to be heard?

MR. SCHLESINGER: Alan M. Schlesinger, Assistant Corporation Counsel, Office of the Honorable Paul A. Crotty, Corporation Counsel, City of New York, representing the Honorable Mr. Levine, Commissioner of the Office of Labor Relations, the Office of Labor Relations, of course, of the City of New York.

Your Honor, we have submitted fairly detailed brief in this case. We would

like to rely on this brief, unless your Honor, of course, has any questions.

THE COURT: No, I read the brief. I also read the case law I have discussed here. I really don't see any reason why I should not grant the motion to dismiss, and I don't see any reason to grant a preliminary injunction.

It seems to me that the process should go forward, it is not a final determination and everything else I stated before. I just think you should not be arguing to me, you should go back and take your demands, the demands of the matters, and go forward to the impasse panel, go and follow the procedures that are set forth for resolving these disputes.

MR. LYSAGHT: May I be heard, your Honor?

Your Honor, everything you just said is exactly what we would stand ready to do and be willing to do. The problem that I am trying to focus your Honor on is that

they have not even in their own decision set forth the factual basis for their acts. Their act starts a process where there are no rights other than for the rights of---

THE COURT: Counsel, please. I read the papers. I disagree with you. I am the Judge. You can go to the Appellate Division, but this is it.

Thank you.

Certified to be a true and accurate transcript.

DORN M. ALEXANDER
Official Court Reporter