

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

MATTER OF SUBWAY SURFACE
SUPERVISORS ASSN.,

Respondent,

-against-

No. 53

NEW YORK CITY TRANSIT AUTHORITY,

Appellant.

20 Eagle Street
Albany, New York 12207
February 12, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

ROBERT K. DRINAN, ESQ.
OFFICE OF THE GENERAL COUNSEL
NEW YORK CITY TRANSIT AUTHORITY
Attorneys for Appellant
130 Livingston Street, 12th Floor
Brooklyn, NY 11201

GAIL M. BLASIE, ESQ.
LAW OFFICE OF STUART SALLES
Attorneys for Respondent
225 Broadway, Suite 1900
New York, NY 10007

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 53.

2 Counsel, do you want any rebuttal time?

3 MR. DRINAN: Two minutes, please.

4 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
5 ahead.

6 MR. DRINAN: May it please the court, good
7 afternoon, my name is Robert K. Drinan. I'm an
8 attorney in the law department at the Transit
9 Authority, and represent the appellant on this
10 appeal. I didn't write the briefs, so there are
11 certain things that are missing from the briefs that
12 I think are significant - - - at least two.

13 The first is, Judge Meyer's decision in
14 1984 in Collins, is - - - is relevant for context and
15 possibly on the merits for three reasons. Judge
16 Meyer reviewed the fact that there were at that time
17 104 public authorities. Seventy-two of those
18 authorities, by statute, were required to comply with
19 the Civil Service Law.; seven, by statute, expressly
20 not permitted to become civil servants; and twenty-
21 five, there was no expression at all.

22 What Judge Meyer held in that case was two
23 things. One, that the fact that - - - in that case,
24 MaBSTOA, the statutory subsidiary of the Transit
25 Authority, which is not civil service - - - that - -

1 - that although MaBSTOA performed things that the
2 government might, those - - - those functions and - -
3 - and language - - - he didn't say this - - - but
4 language in enabling statutes for public authorities
5 does not transform a public authority into the state.

6 And being the state is different in the
7 state action, of course. Entities that are created
8 by the government, there is state action for
9 constitutional purposes and state constitutional
10 torts as well.

11 Judge Meyer also held that - - -

12 JUDGE GRAFFEO: What - - - what's the basic
13 point you're trying to make? That - - - that the
14 Civil Service Law doesn't apply to these people?

15 MR. DRINAN: The holding - - - the holding
16 was - - - the argument in that case was that - - -

17 JUDGE GRAFFEO: No, I'm asking you about
18 this case. What's your posture in this case?

19 MR. DRINAN: Our posture in this case is
20 that the - - - the Taylor Law is a remedy that's well
21 defined. It defines an employee organization as "The
22 main purpose is to improve the terms and conditions
23 of employment of public employees." The Transit
24 Authority and public benefit corporations are
25 specifically identified in Civil Service Law, Taylor

1 Law, as subject - - - as public employers subject to
2 the Taylor Law. In - - - in Watertown - - -

3 JUDGE SMITH: Yeah, but that doesn't mean
4 they're not subject to the Civil Service Law?

5 MR. DRINAN: No, no, not at all.

6 JUDGE SMITH: Then I guess, I - - - I'm
7 having a little trouble distinguishing - - - I
8 understand you argue that 115 of the Civil Service
9 Law doesn't - - - doesn't give a private right of
10 action. But that's not the point you're making at
11 the moment as I understand it. You're talking about
12 - - -

13 MR. DRINAN: It is not. That's correct.

14 JUDGE SMITH: - - - you're saying that the
15 - - - that these people aren't subject to the Civil
16 Service Law at all. And my question is how can you
17 square that with 1210(2)?

18 MR. DRINAN: Okay, I was coming in the - -
19 - the other way around, Judge, but - - - 1210, if you
20 look at 1210, really, in - - - in '53 when Transit
21 was created, it assumed the employees that had been
22 part of the Board of the Transportation of the city,
23 right? Three subway lines and bus lines. They were
24 civil servants. They were city employees.

25 And when they were transferred to the

1 Authority, they maintained - - - according to the
2 statute, 1210 - - - the same status - - - the same
3 status, and the same status with respect to the
4 retirement fund, which is nice of the city system.
5 They never became state employees. So - - -

6 JUDGE SMITH: I'm just having trouble with
7 the sentence "employees of the Authority shall be
8 subject to the provisions of the Civil Service Law."
9 What - - - what's unclear about that?

10 MR. DRINAN: There's nothing unclear about
11 it. The - - - the - - -

12 JUDGE SMITH: So how can you say that Civil
13 Service Law 115 does not apply to them? I can
14 understand you're saying that they don't have a
15 lawsuit under it, but how does it not apply to them?

16 MR. DRINAN: All right, well, there are two
17 reasons. The first is, if you look at the structure
18 of Article VIII where 115 is - - - Articles I through
19 VII deal with classification of - - - of employees'
20 appointment and the testing process, and that all
21 applies to the municipal civil service commission of
22 the city, right, and - - - and around the state.

23 When you get to Article VIII, it - - - it
24 designates that it applies to the state. If you look
25 at the sections, each section deals with the state.

1 Section 130 has detailed grades. Section 118
2 described 115 as a principle. And - - - and 118
3 suggests that that principle is implemented by
4 Article VIII, which establishes grades for state
5 employees and regular rates of pay as well.

6 JUDGE SMITH: Unless I'm missing something,
7 you're now on - - - you're on the second - - - you're
8 on the private right of action argument.

9 MR. DRINAN: Yeah, I think they get muddled
10 for me a little bit, Judge, but 115 would not apply
11 for two reasons. First, the Transit Authority is not
12 the state, has never been the state, and 115 only
13 applies to the state. Okay.

14 JUDGE SMITH: And - - - and the next
15 reason?

16 MR. DRINAN: And the next reason is that if
17 you look at the - - - there's no cause of action. So
18 there wouldn't be a cause of action against the
19 Transit Authority. And the - - - the remainder of
20 that argument is that you don't need a cause of
21 action under 115 for two reasons.

22 One is, this court from Abrams and - - -
23 and many cases since then has recognized the cause of
24 action based on the equal protection clause for
25 disparate wages, right. But it's got to be the

1 imposition. It's got to be the unilateral imposition
2 by the state.

3 So individuals not in a union can - - - can
4 assert a cognizable claim under the equal protection
5 clause. Unionized employees have a - - - have a
6 detailed procedure in the Taylor Law that includes
7 improper practices, and I wanted to comment on this -
8 - -

9 JUDGE GRAFFEO: So are - - - are you
10 arguing that this was the subject of collective
11 bargaining?

12 MR. DRINAN: Yes.

13 JUDGE GRAFFEO: But that there's not a
14 private action to enforce it?

15 MR. DRINAN: Yes. I'm saying that this - -
16 -

17 JUDGE GRAFFEO: Is that - - - is - - - I'm
18 - - - we're - - - I guess we're trying to simplify
19 your argument here.

20 MR. DRINAN: Okay. 115 - - - 115 and the
21 Taylor Law aren't competing policies. They're - - -
22 they're policies that go to the same goal. And what
23 - - - what the Taylor Law does is it protects union
24 activities. It protects unit - - - unit work so that
25 - - -

1 JUDGE SMITH: You're saying the Taylor law
2 serves that function, and therefore no private right
3 of action is necessary under 115.

4 MR. DRINAN: Yeah, and I'm saying, Judge,
5 that the Taylor Law is the exclusive remedy, because
6 if a union decides that a - - - that a rate of pay is
7 unfair, they can go to impasse arbitration. That's
8 the remedy of the legislature that's chosen so that
9 it's not before the court to impose a rate of pay.

10 JUDGE GRAFFEO: And what did PERB decide
11 here? There was an improper practice charge, wasn't
12 there - - -

13 MR. DRINAN: There was - - - there was some
14 - - -

15 JUDGE GRAFFEO: - - - in front of PERB?

16 MR. DRINAN: Not directly on this case.
17 There was some other cases where, you know, over the
18 course of time, when they closed the token booths and
19 the state's agents came out and there was some
20 transfer of work, which is, by the way, an improper
21 practice. You can't transfer unit work. And the
22 First Department was troubled by the union being
23 powerless. They're not. Almost everything is - - -

24 CHIEF JUDGE LIPPMAN: So the overriding
25 argument is don't interfere here. This is really

1 subject to a negotiation and the labor process and
2 PERB, and that assuming that it applies to you, it's
3 kind of a general policy prescriptive, that we
4 shouldn't go - - - we shouldn't go there. Is that -
5 - -

6 MR. DRINAN: That - - - that - - -

7 CHIEF JUDGE LIPPMAN: - - - you're
8 argument?

9 MR. DRINAN: That is the argument. And the
10 only other thing I would add is that under - - - for
11 interest, arbitration under - - - for PERB - - -

12 CHIEF JUDGE LIPPMAN: Right.

13 MR. DRINAN: - - - one of the factors
14 they'd look at is that they compare the
15 characteristics and conditions of employment along
16 with the wages and benefits to other unions that
17 perform similar functions.

18 JUDGE SMITH: You also - - - you mentioned
19 the equal protection clause a minute ago. Could you
20 just take a minute or two - - - you're not saying - -
21 - you're not saying there's - - - that workers - - -
22 that union - - - you're not saying that work - - -
23 unionized workers can't sue under the equal
24 protection clause, or are you?

25 MR. DRINAN: What I'm saying - - - what I

1 was saying was that there are remedies for these
2 kinds of claims, for individuals, and these - - -

3 JUDGE SMITH: Well, I understand that. I -
4 - - tell me what - - - tell me just briefly why
5 there's no - - - why these plaintiffs don't have - -
6 - have at least stated, an equal protection claim - -
7 -

8 MR. DRINAN: The union - - -

9 JUDGE SMITH: - - - apart from the fact
10 that they don't mention the equal protection clause,
11 but the facts in their - - - in their - - -

12 MR. DRINAN: Right.

13 JUDGE SMITH: - - - petition, why don't
14 those facts add up to an equal protection violation?

15 MR. DRINAN: Because the union here agreed
16 to a contract, and - - - and equal protection of
17 violation - - - a violation of equal protection
18 requires a unilateral imposition that creates two
19 classes.

20 JUDGE SMITH: You mean if my union agrees
21 to have me - - - to invidious discrimination, I can't
22 sue under the equal protection clause?

23 MR. DRINAN: Well, you know, that's the
24 question, right? But the answer is that all those
25 claims, equal protection claims and discrimination,

1 they have private right of action. And then - - -
2 and you can sue the union if the union has engaged in
3 that. But in this case, which just relates to wages,
4 which is one of the fundamental terms and conditions
5 of employment - - -

6 JUDGE SMITH: Yeah, but we've held that you
7 can sue for - - - that if - - - that if you're paid
8 less than the guy next to you, sometimes that's an
9 equal protection violation.

10 MR. DRINAN: Sometimes it is for
11 individuals, but - - -

12 JUDGE SMITH: You're saying that that - - -
13 you're saying that the carve - - - the collective
14 bargaining is a carve-out from that doctrine,
15 essentially?

16 MR. DRINAN: Well, I - - - as I understand
17 equal protection, Judge, it's got to be a unilateral
18 imposition, a classification imposed by the state,
19 not consensual. Here, the union said, okay, we'll
20 accept this, this rate of pay.

21 JUDGE SMITH: No, take - - - take a more
22 outrageous case. I know it's not going to happen.
23 The union and the - - - and the employer agree - - -
24 you know, we're only going to - - - I'm sick of all
25 these minority workers; let's hire only white

1 workers. You're saying the - - - the workers - - -
2 the only remedy of the black worker is against the
3 union?

4 MR. DRINAN: Well, that would be a
5 troublesome situation.

6 JUDGE SMITH: It sounds like an equal
7 protection violation to me, offhand.

8 MR. DRINAN: But against whom?

9 JUDGE SMITH: You're saying the state - - -
10 you're saying that in that case, better, in that
11 contract, the state has not violated the equal
12 protection clause?

13 MR. DRINAN: I think the protect - - - the
14 constitutional - - - fundamental constitutional
15 rights an individual could - - - could mount a claim.
16 And the state constitution describes persons; and a
17 person can mount a claim. But I don't think the
18 union can mount a claim here, based on the agreement
19 that - - -

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 JUDGE SMITH: I'm sorry, just one follow-
22 up.

23 CHIEF JUDGE LIPPMAN: Sure, Judge Smith.

24 JUDGE SMITH: Basically, you're - - -
25 you're drawing a distinction between an action by the

1 individ - - - by the individual union members and by
2 union itself. You would - - - you would agree that
3 the un - - - an individual union member, on the facts
4 alleged here, could state an equal protection claim?

5 MR. DRINAN: I - - - you know, I've often
6 found this issue troublesome. But if I were a union
7 member, and - - - and the employer and the union
8 agreed to something that was going to
9 disproportionately harm women or people of color, I
10 would want standing to be able to challenge that
11 provision, yes.

12 CHIEF JUDGE LIPPMAN: Okay, thanks,
13 counsel.

14 MR. DRINAN: Thank you very much.

15 MS. BLASIE: Good afternoon, Your Honors.
16 I'm Gail Blasie. I'm of counsel to Stuart Sales, the
17 attorney for the union, Subway Surface Supervisors -
18 - -

19 CHIEF JUDGE LIPPMAN: Counsel, why should
20 we get involved in this thing? Why isn't it a
21 collective bargaining thing, and, you know, PERB is
22 there for just this very kind of purpose? Why should
23 the court impose a solution here to this? Why aren't
24 you more than capable, you know, in dealing with
25 this?

1 MS. BLASIE: This - - - the issue here is
2 not whether the union bargained for an unfavorable
3 pay scale. The issue here is that the Transit
4 Authority has been arbitrarily imposing the Level II
5 work on the Level Is without - - -

6 CHIEF JUDGE LIPPMAN: But isn't this a
7 situation where it's odd - - - the titles change, and
8 now you have two unions representing them?

9 MS. BLASIE: The title - - - yes, there
10 were two - - - there are two - - -

11 CHIEF JUDGE LIPPMAN: Yeah.

12 MS. BLASIE: - - - and through the years,
13 the Transit Authorities have shift - - - the Transit
14 Authority has shifted the work of the Level IIs onto
15 the Level Is. PERB - - -

16 JUDGE GRAFFEO: Boy, that sounds like
17 classic PERB complaint to me, right?

18 MS. BLASIE: Yes, and PERB complaints were
19 brought.

20 JUDGE GRAFFEO: Work out - - - work-out-of-
21 title.

22 MS. BLASIE: And tho - - - they were not
23 sustained. The - - - the PERB said that they can do
24 this. So what we are left now coming to the court,
25 because PERB said they can do this. So what we have

1 now, in other - - - in Trerotola, which is another
2 case where it was one union; here we have two unions
3 - - - but in Trerotola, that one union negotiated for
4 the consolidation of titles and the kind of mish-mash
5 of the work.

6 We don't have that here. The SSSA has
7 never agreed to have the Level II work - - -

8 CHIEF JUDGE LIPPMAN: So what would you
9 have us do?

10 MS. BLASIE: I think that we have - - -

11 CHIEF JUDGE LIPPMAN: What relief do you
12 want now?

13 MS. BLASIE: We want equal pay for equal
14 work pursuant to Civil Service Law 115 and under the
15 constitution.

16 CHIEF JUDGE LIPPMAN: You don't - - - you
17 don't want the promotion issue? It's not here
18 anymore or - - -

19 MS. BLASIE: The promotion issue?

20 CHIEF JUDGE LIPPMAN: Yeah. You don't want
21 it - - - you don't want to change titles or whatever?
22 You just want equal pay.

23 MS. BLASIE: We want equal pay, yes.

24 JUDGE PIGOTT: Well, the original - - - the
25 original petition was for a violation of Civil

1 Service Law 61 - - -

2 MS. BLASIE: Out-of-title work.

3 JUDGE PIGOTT: Right.

4 MS. BLASIE: That's correct.

5 JUDGE PIGOTT: And that's all it still
6 says, I think. I - - - was it amended, or was there
7 something that happened here that it turned into
8 something else?

9 MS. BLASIE: What happened is the pl - - -
10 the facts as pled were sufficient for a Civil Service
11 Law 115 violation and a constitutional violation.
12 And after we responded to the motion to dismiss, we
13 brought up Civil Service Law 115 and the
14 constitution, and there were replies, and surreplies,
15 and everybody had full opportunity - - -

16 JUDGE SMITH: Both Judge Goodman and the
17 Appellate Division essentially treated your petition
18 as having been amended.

19 MS. BLASIE: That's correct.

20 JUDGE SMITH: Even - - - yeah, okay.

21 MS. BLASIE: Because everybody had - - -

22 JUDGE GRAFFEO: This - - - this isn't the
23 appeal from the PERB decision, right?

24 MS. BLASIE: No, no. But the PERB decision
25 is our - - -

1 JUDGE GRAFFEO: So this is - - - this
2 you're trying to use a private right of action under
3 the Civil Service Law, as opposed to an appeal from a
4 PERB?

5 MS. BLASIE: No, because - - -

6 JUDGE GRAFFEO: I guess I'm trying to
7 understand why - - - why haven't the - - - why hasn't
8 your union filed an improper practice complaint with
9 PERB over this situation?

10 MS. BLASIE: Because it's not an improper
11 practice. The - - - PERB has already found it's not
12 an improper practice, that the job, I guess,
13 descriptions and the duties between the two weren't
14 that diverse that they could not be kind of swapped.

15 JUDGE SMITH: So you're saying - - -

16 MS. BLASIE: So we're in this position - -
17 -

18 JUDGE SMITH: As I - - - if I understand
19 your argument, it is that everybody - - - every
20 government employee, at least everyone subject to the
21 Civil Service Law, who says that he or she is not
22 getting equal pay for equal work can sue under
23 Section 115?

24 MS. BLASIE: If they are working. Whether
25 or not it would be sustained, we don't know - - -

1 JUDGE SMITH: Yeah, I understand.

2 MS. BLASIE: - - - because it doesn't have
3 to be enforced in every situation - - -

4 JUDGE SMITH: And not just - - - not just
5 equal pay for equal work, because there's other stuff
6 in 115, too. Where is it? They - - - they can sue
7 if they're not getting regular increases in pay and
8 proper proportioned increase of ability.

9 MS. BLASIE: That's correct. And it's not
10 any civil - - -

11 JUDGE SMITH: But aren't you - - - aren't
12 you - - - why is - - - why is Mayor DeBlasio
13 bothering to ask for a minimum wage law? I mean, the
14 courts can fix fair wages on this - - - on this
15 statute any time they want, right?

16 MS. BLASIE: We're not saying any civil
17 service worker. What we're saying is that because
18 Transit Authority workers are by - - - by the
19 legislature are - - - serve the benefit of the people
20 of the State of New York. They're not city workers.
21 They - - - they're civil - - -

22 JUDGE SMITH: Okay, but - - -

23 MS. BLASIE: And civil servants - - -

24 JUDGE SMITH: But there are a lot of
25 workers subject to Section 1 - - - to the Civil

1 Service Law who are out there.

2 MS. BLASIE: Yes, but not everybody - - -

3 JUDGE SMITH: And every - - - and every one
4 of them who says I didn't - - - I'm not getting
5 increases in pay in proper proportion to my increase
6 of ability, has a lawsuit?

7 MS. BLASIE: 115 only applies - - - it does
8 not apply to city workers.

9 JUDGE SMITH: Okay.

10 MS. BLASIE: 115 applies to state workers
11 and those who serve the State of New York.

12 JUDGE GRAFFEO: Right. So I don't - - -

13 MS. BLASIE: Not the city.

14 JUDGE GRAFFEO: I don't - - - I don't
15 understand why on behalf of your union members, you
16 don't bring your own PERB proceeding and then take an
17 appeal and challenge it?

18 MS. BLASIE: Because not - - -

19 JUDGE GRAFFEO: Isn't that the process, as
20 opposed to taking a generalized public policy statute
21 and claiming that every state worker can come in and
22 claim I'm doing as much work as the person sitting
23 next to me, so I deserve a 15,000-dollar raise?

24 MS. BLASIE: When two people are working
25 side-by-side, doing the same exact thing, and one

1 person gets 15,000 dollars more just because they
2 have a different title, that is a violation. Not a
3 PERB violation. That is a statutory and
4 constitutional violation, and PERB doesn't have the
5 authority, as you stated in Zuckerman, to tell the
6 government what to do in that - - - in that
7 situation.

8 The collective bargaining is about
9 bargaining, whether you're - - - you know, whether
10 you're bargaining, you're preventing people from
11 being in a union - - - I'm sorry; I said PERB. I
12 meant the Taylor Law.

13 JUDGE GRAFFEO: But I thought we're talking
14 about out-of-title work.

15 MS. BLASIE: No, we're not talking about
16 out-of-title work. What we are talking about is
17 statutory and constitutional violations of not paying
18 equal pay for people who are doing the same exact
19 work. It started out - - - yes, and it - - - and I
20 apologize for any confusion. It started out as a
21 petition for out-of-title. But it - - - it did not -
22 - - that is not ultimately what we are asking for.

23 JUDGE PIGOTT: How can you do that? I - -
24 - I appreciate what Judge Smith said, where everybody
25 seems to be treating this like it's a different case.

1 But don't you - - -

2 MS. BLASIE: Because it is.

3 JUDGE PIGOTT: But don't you have to amend
4 your pleadings - - -

5 MS. BLASIE: No.

6 JUDGE PIGOTT: - - - and then get an
7 answer, and then, you know, maybe have some
8 discovery, and then move on from there?

9 MS. BLASIE: Not if - - - not if the facts
10 are sufficient in the pleading to - - -

11 JUDGE PIGOTT: If I say - - - if I - - - if
12 I'm suing you for negligence, and then I say, well,
13 really she did it intentionally, so let's go from
14 there, I think you would be upset, say wait a minute,
15 wait a minute; that's a whole different ballgame
16 here.

17 And what - - - and what you were saying was
18 that - - - it's out-of-title work, because all of the
19 sudden we're doing what the SS-IIs are doing, and
20 we're SS-Is, and that made a lot of sense. And then
21 it was gone, and now there's this public policy thing
22 that says everybody ought to get paid the same, and
23 it morphed into that somehow. I'm - - - I'm
24 mystified.

25 MS. BLASIE: The facts - - - the facts as

1 stated in the pleading were sufficient for out-of-
2 title and sufficient for CSL 115 and constitutional
3 violations. So, up - - - and everybody was - - - we
4 briefed everything. There's no surprise here.
5 There's no prejudice whatsoever, because as - - -
6 because all of these issues were addressed.

7 JUDGE SMITH: Are we still - - - I mean,
8 suppose we think it really would have been a more
9 orderly procedure for the courts below to insist on a
10 real amended petition before they decided whether it
11 was legally sufficient or not. Are we basically
12 stuck with the fact that they exercised their
13 discretion to do it in this rather informal way?

14 MS. BLASIE: Yes. And that - - -

15 JUDGE PIGOTT: When you argue five years
16 from now - - - when - - - I apologize. When, you
17 know, you're coming and we say, well, there's that
18 case on 61(2) which says that out-of-title work, you
19 know - - - that this doesn't apply.

20 And you're going to say, well, wait a
21 minute. It may say that it's was a 61(2), but it
22 really wasn't, because later on, one of the judges
23 decided that it was a 115 because we properly stated
24 it, so don't look at that case as a 61(2), even
25 though that's what the petition says.

1 MS. BLASIE: 61(2) isn't argued at all - -
2 -

3 JUDGE PIGOTT: I understand, but what - - -

4 MS. BLASIE: - - - in any of the motions,
5 so it can never be - - - I'm sorry for interrupting.

6 JUDGE PIGOTT: It's okay.

7 MS. BLASIE: So - - - so it would never - -
8 - it - - - that - - - this case could never stand for
9 the proposition that on this set of facts it was not
10 out-of-title, because that was never addressed.
11 There was never any holding on that issue.

12 JUDGE RIVERA: Counsel, you said there was
13 a challenge brought to PERB?

14 MS. BLASIE: A few years - - - yes, years
15 ago.

16 JUDGE RIVERA: Yes, and what - - - and that
17 was not appealed?

18 MS. BLASIE: I don't know. I don't think
19 so.

20 CHIEF JUDGE LIPPMAN: So you have no other
21 vehicle than this, is your argument?

22 MS. BLASIE: No other vehicle whatsoever.
23 And, you know, it is interesting to look at the other
24 cases where there have been things bargained for,
25 such as a pregnancy policy that was found to be in

1 violation of the Human - - - I think it's the Human
2 Rights Law or something, and that was bargained for.
3 And the court said - - - this court said, no, even
4 though it was bargained for, we cannot sustain that
5 policy.

6 Same thing with - - - there was a - - - the
7 Cohoes City School District, where they bargained
8 that probationary employees could not be let go,
9 unless for good cause. And what this court found
10 was, no, that violates a statute that says that the
11 school board has the ultimate say. We cannot uphold
12 that provision even though it was bargained for.

13 In this case, it's not even that - - - it's
14 not even that situation, because we never even
15 bargained for this situation that we're in, where
16 we're doing the same work as somebody else and
17 getting paid less. So we have a right - - - you are
18 the - - -

19 JUDGE RIVERA: Why isn't 115 just a
20 statement of policy? Why isn't the dissent correct?

21 MS. BLASIE: Well, first of all, the court
22 has to enforce a policy that is stated by the
23 legislature. You must give effect to it. If it's
24 just a policy, then it's empty; it's hollow; it has
25 no meaning.

1 JUDGE PIGOTT: You know, you're opponent
2 argues that there's sub - - - you know, the statutes
3 that follow fill out the policy within the Civil
4 Service Law with grades and positions and things like
5 that. And all this does is say, this is the way we
6 run our state, and this is how we run our state in
7 the subsequent sections.

8 MS. BLASIE: Oh, but, it's not - - - it
9 says equal pay for equal work. Gradation,
10 classification, that has nothing to do with equal pay
11 for equal work.

12 JUDGE SMITH: Well, maybe - - - look, the
13 Constitution starts out by saying we're doing this to
14 form a more perfect union. But you can't bring a
15 more perfect union lawsuit. I mean, the courts don't
16 go around saying, I got a good idea for a more
17 perfect union. I'm ordering it. I mean, why isn't
18 this just essentially a preamble that puts everything
19 in context, not a - - - not a substantive piece of
20 legislation?

21 MS. BLASIE: It's not a preamble, because
22 it specifically says that it is the policy of this
23 state that we - - - that in order to attract merit
24 and ability, equal pay for equal work, and so that
25 the people of the state and the taxpayers are ensured

1 that they will get the proper benefit for their - - -
2 for these services. I mean, it's - - - I don't - - -
3 it's not just something that's in a preamble of
4 legislation. This was put in the body of the law.

5 CHIEF JUDGE LIPPMAN: Okay, counsel.

6 MS. BLASIE: Thank you.

7 CHIEF JUDGE LIPPMAN: Thank you.

8 Counsel, rebuttal?

9 MR. DRINAN: Very brief. I don't think
10 this was ever an out-of-title-work case. I think
11 this was a - - - what's called a unit work case for
12 PERB to resolve. They have primary jurisdiction over
13 these issues. They use notions like discernible
14 boundaries and exclusivity - - -

15 JUDGE PIGOTT: They use notions like what?

16 MR. DRINAN: Discernible boundaries - - -

17 JUDGE PIGOTT: What - - - what kind of
18 boundaries?

19 MR. DRINAN: Discernible.

20 JUDGE PIGOTT: Discernible, okay.

21 MR. DRINAN: And exclusivity. So in some
22 of the PERB - - -

23 JUDGE GRAFFEO: Can they determine
24 salaries, though? Can - - -

25 MR. DRINAN: If - - -

1 JUDGE GRAFFEO: I mean, your adversary is
2 saying PERB can't change the salary base for these
3 employees. At least, I think that's what she said.

4 MR. DRINAN: Well, that's the whole purpose
5 of impasse arbitration and - - - and the requirement
6 that all of the characteristics be evaluated between
7 this union and that union, the - - - the salary, the
8 benefits. That's what the interest panels do. And
9 primarily when you go to interest arbitration, one
10 union will say, well, look, this other union is
11 making this much. We think we deserve that much.
12 That's the argument that they make, because it's
13 valid. It gives them some objective criteria.

14 But unit work is the - - - is the issue
15 here. And what PERB said was that neither of these
16 unions could prove that it was exclusively their work
17 or the other work. So in - - - in PERB law, if - - -
18 if you - - - if you transfer away unit work or you
19 give somebody new work that's not in their job
20 assignment, that's a mandatory subject.

21 If you give them more work that's within
22 their job assignment or job description, that - - -
23 that requires impact bargaining. But there's always
24 bargaining. All these things that affect the terms
25 and conditions, that all requires bargaining. This

1 is all resolvable at PERB.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 MR. DRINAN: Thank you.

4 CHIEF JUDGE LIPPMAN: Thank you both.

5 MS. BLASIE: Thank you, Your Honor.

6 MR. DRINAN: Thank you for your time. It's

7 really an honor to be here.

8 MS. BLASIE: Yes, it is.

9 CHIEF JUDGE LIPPMAN: Thank you. We
10 appreciate it. Thank you both for being here.

11 (Court is adjourned)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Subway Surface Supervisors Assn. v. New York City Transit Authority, No. 53 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: February 20, 2014