

L&M Bus Corp. v New York City Dept. of Educ.

2008 NY Slip Op 31246(U)

April 9, 2008

Supreme Court, New York County

Docket Number: 0104001/2008

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **CAROL EDMEAD**
J.S.C. Justice

PART 35

INTERIM ORDER

L & M Bus

INDEX NO. 104001/08

MOTION DATE 4/9/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

NVCDOE, BOE

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
APR 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the application by petitioners for an order compelling DOE to comply with petitioners' letter demand for discovery is denied as premature. And it is further

ORDERED that respondents shall serve and file its Answer by May 9, 2008; and it is further

ORDERED that petitioners shall serve and file a Reply by May 23, 2008; and it is further

ORDERED that oral argument on the Article 78 petition shall be held on June 2, 2008, 10:00 a.m.

This constitutes the INTERIM decision and order of the Court.

Dated: 4/19/08

[Signature]
CAROL EDMEAD
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
L&M BUS CORP., B&F SKILLED, INC., BOBMAR
TRANSPORTATION INC., CAROL BUS
TRANSPORTATION CORP., DON THOMAS BUSES
INC., FORTUNA BUS COMPANY, INC., HAPPY
CHILD TRANSPORTATION LLC, HAPPY DAY
TRANSIT, IRIDIUM SERVICES CORP., USA BUS
CORP., MARCH TRANSPORTATION INC., MISSY
TRANSPORTATION, INC., NANNY'S BUSES NC.,
P&O TRANSPORTATION, PENNY
TRANSPORTATION, INC., PINNACLE BUS SERVICE,
INC., PRIDE TRANSPORTATION SERVICES INC.,
RIMAR TRANSPORTATION, ROBIN
TRANSPORTATION LTD., ROUND TRANSPORTATION,
SMART PICK THOMAS BUSES, INC.,

Petitioners,

-against-

THE NEW YORK CITY DEPARTMENT OF
EDUCATION, THE BOARD OF EDUCATION OF THE
CITY OF NEW YORK, and DAVID N. ROSS, in his
official capacity as Executive Director of the Division of
Contracts and Purchasing,

Respondents.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 104001-2008

DECISION/ORDER

FILED
APR 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this Article 78 proceeding, petitioners, comprising various pupil bus transportation companies located in New York City, seek (1) to enjoin the New York City Department of Education ("DOE"), the Board of Education of the City of New York,¹ and its Executive Director for Contracts and Purchasing (collectively "respondents") from accepting or opening bids based

¹ The panel of the Board of Education of the City of New York was abolished in 1992 under Mayor Bloomberg, and became the Department of Education.

on a solicitation for pupil transportation services until certain specifications are removed or revised; (2) to enjoin the respondents from awarding any contracts on such bids; and (3) a declaration that such specifications are unlawful, and that no bids may be accepted or opened and no contracts awarded based on them.

Background

The DOE administers transportation contracts for its students: Special Education contracts for disabled school-age children, and General Education contracts for the general population of school-age children.

As a result of a strike in 1979 by bus driver, mechanic and matron employees from Local 1181 of the Amalgamated Transit Union ("Local 1181"), the DOE, and major bus companies entered into an agreement, dated May 16, 1979 (the "Mollen Agreement"). Pursuant to the Mollen Agreement, "employee protection provisions" were required to be included in the specifications for the 1979 Special Education and General Education contracts. The employee protection provisions establish a Master Seniority List requiring contractors with the DOE to give priority in hiring to employees on the Master Seniority List, in seniority order, until the list is exhausted. Since 1979, and except for a few small contracts, the DOE never bid out these contracts again, but merely negotiated extensions of the original contracts.

According to petitioners, by 1990, Local 1181 had gained control over the costs of bus operators, leading to corruption in the student transportation system and DOE was spending far more per student.

In the meantime, the New York City Department of Transportation ("DOT") was responsible for transporting Pre-Kindergarten ("Pre-K") and Early Intervention Program ("EI")

children to and from school. In an effort to standardize transportation among school children, in 2006, DOT transferred its contracts to DOE, which was already providing transportation to the a much larger student population. It is noted that for the previous 15-year period beginning in the late 1980's, DOT had been administering these transportation contracts by competitive sealed bidding, without employee protection provisions, as required by law.

When DOT transferred its Pre-K and EI contracts to DOE, DOE did not bid them out, but rather, exercised extension clauses that permitted limited extensions at the DOE's option. Since extensions would no longer remain after June 30, 2008 for many of these contracts, such contracts now have to be solicited.

Local 1181 asked DOE to include the employee protection provisions in the Pre-K and EI transportation contracts to be solicited. However, Family Court Act §236 (3)(b)² requires that these contracts be procured by competitive sealed bidding and awarded to the lowest responsible bidder. Thus, due to the apparent friction created by the employee protection provisions and the Family Court Act's mandate that requires that contracts be awarded to the lowest bidder, DOE sought legislation to amend the Family Court Act to permit solicitation through an "Request for Proposals" ("RFP") process. DOE would be permitted to award contracts under the RFP

² Family Court Act §236, entitled "Powers of the family court with regard to certain handicapped children" provides in section (3)(a) and (b), in pertinent part:

. . . services to be provided after September first, nineteen hundred eighty-six which provides for the transportation of a child shall further require that such transportation shall be provided by the county or the city of New York, as the case may be, and, that the city of New York may delegate the authority to provide such transportation to the board of education of such city.

. . . such transportation . . . shall be provided as part of a municipal cooperation agreement or as part of a contract awarded to the lowest responsible bidder in accordance with the provisions of section one hundred three of the general municipal law and that buses and vehicles utilized in the performance of such contract shall meet the minimum requirements for school age children as established by the commissioner of transportation.

process, "through which contracts could be required to include protection of bus company employees" (Petition, Exhibit E). The RFP process would also "insure that . . . drivers are not penalized by new contracts that do not honor past commitments including wages and benefits." This proposed legislation was rejected.

Yet, DOE included employee protection provisions in its solicitation, under the title "solicitation for bids" ("SFB"), *i.e.*, Section 4.24.1.2:

"Any new contractors, *i.e.*, those who did not provide service pursuant to contract expiring June, 2008 . . . shall give priority in employment in July, 2008 or thereafter on the basis of seniority to every operator (driver), mechanic, dispatcher and attendant (escort-matron) performing such service pursuant to such contract starting from the first employee from the MSLs until such MSLs are exhausted."

The solicitations were made available on January 30, 2008, and due by March 6, 2008. The due date was later extended to March 24, 2008, after DOE made various amendments to the solicitation in response to issues raised by potential bidders. DOE also cancelled its contracts with two of the petitioners herein.

This Article 78 proceeding ensued.

Request for Discovery

By letter dated March 24, 2008, petitioners sought leave pursuant to CPLR §408 for disclosure to refute the position taken by DOE that (1) DOE did not insert the employment protection provisions at the behest of Local 1181; (2) the purpose for seeking to amend the Family Court Act was to permit the use of an RFP and not for requiring the insertion of employment protection provisions; and (3) the February 11, 2008 pre-bid meeting was not recorded or transcribed, and therefore, the DOE could not provide records of such meeting as requested in petitioners' FOIL request.

Thus, petitioners sought documents evidencing communications between the DOE and Local 1181 relating to the insertion of the employee protection provisions into the specifications, communications among DOE and New York City employees evidencing the reasons for seeking to amend the Family Court Act, and records of the questions and answers given at the pre-bid meeting on February 11, 2008.

In opposition, respondents argue that petitioners failed to show why the discovery they seek is relevant or necessary pursuant to CPLR 408, which is applicable to special proceedings. Petitioners' request concerning the employee protection provisions does not have any bearing on the legal issue raised by petitioners that such provisions are illegal. Discovery is only warranted in a special proceeding to sharpen the issues of fact, and not where there are no material issues of fact. There is no showing that the discovery sought is material or necessary to enable them to prepare for trial.

Petitioners' request concerning the amendment is improper to the extent it seeks correspondence to and from the Corporation Counsel, which is absolutely immune under the attorney-client privilege. Further, to the extent this request seeks documents that are protected by the deliberative process privilege, such request is improper as well. Agency staff's analysis and opinions are protected to ensure full and frank exchanges regarding governmental decision making.

Further, petitioners were advised that a transcript of the pre-bid meeting does not exist, and petitioners failed to establish that their request for any additional records regarding the pre-bidding meeting is necessary. Additionally, since petitioners' claim that certain bid specifications were unlawful or made in excess of respondents' authority, is a matter of law,

discovery is unwarranted.

In reply, petitioners' argue that the Court has broad discretion to permit disclosure in this special proceeding. It is undisputed that petitioners have asserted facts to establish a cause of action. Additionally, the three categories of disclosure are related to the issues of whether the disputed employee protection provisions are unlawful because not expressly authorized by law, whether the disputed employment protection terms were included at Local 1181's behest, and whether DOE considers the proposed "termination for convenience clause" as one to be used pretextually to prematurely end contracts for other, unstated reasons.

Further, the request for disclosure is tailored to disputed facts, and there is no privilege violation that would arise from disclosure. In any event, a valid interest could be protected by an *in camera* inspection by the Court.

Petitioners point out that the DOE argued that petitioners failed to overcome the presumption of regularity and honest motivation which attaches to official acts. The discovery petitioners now seek addresses this presumption, and are related to petitioners' allegations that the employment protection provisions result from backroom bargaining. Further, the DOE already terminated two bus companies to stifle dissent and intimidate bus companies that criticized the DOE. The record of the February 11, 2008 pre-bid meeting may have recorded a candid statement by DOE that it was prepared to exercise its termination-for-convenience" power to avoid having to hold a "termination-for-default" due process hearing and might bear on the issue of whether such a termination provision could be included lawfully in this solicitation.

DOE's claim that the documents are protected under the attorney-client and deliberative process privileges is premature, in that there is no indication that counsel for DOE reviewed such

records before asserting these privileges. Moreover, the public interest privilege is not absolute, and requires a balancing of the parties' interests. The DOE fails to state who would be harmed and how, by disclosure of the requested discovery. Further, the request for communications with Local 1181, a third party, would not invoke any public interest privilege, and if so, was waived. Additionally, the request for documents concerning the amendment to the Family Court Act is proper, where the City stated its support for the amendment. Such documents are not subject to any public interest privilege.

Finally, no delays will occur as a result of discovery, due to the limited scope of the discovery requested and given that the Court must still determine the issue of intervention.

*Leave to Intervene*³

By order to show cause, Local 1181 seeks leave pursuant to CPLR 7802(d) to intervene in this proceeding, arguing that it represents 325 employees of petitioners, in addition to some 9,000 members employed by other bus companies which have contracts with DOE containing the employee protection provisions, who are directly affected by this challenge to such provisions.

Local 1181 contends that the employee protection provisions in the Mollen Agreement have been included in contracts between employers in the school bus industry and the DOE, amending and updating the original Mollen Agreement. The current contract including the employee protection provisions is still known as the Mollen Agreement. Such provisions have provided labor peace, created a stable workforce in the industry, provided standard wages, benefits, and job security to employees, and experienced workers, benefitting workers, their

³ In the interim, the Court granted the Union's oral application to seek leave to intervene, with the condition that Local 1181 address only the merits of whether leave should be granted. In the event leave was granted, the Union would be permitted to address the merits of the petition.

unions, and the employers.

Local 1181's interest as a labor organization in the working conditions of its members would be severely affected and undermined by the absence of basic employment standards provided by the employee protection provisions. This would lead to instability in the industry, decline in wages and working conditions, and erode the quality of the work force, undermine labor peace, and erode the public's confidence in DOE's ability to provide safe and reliable transportation to its children. A determination that such provisions be removed from the bidding requirements for the Pre-K and EI contracts would put into question the continuing vitality of such provisions in the entire New York City school bus industry. Additionally, in requesting communications between DOE and Local 1181, petitioners acknowledge that Local 1181 has an interest in these proceedings, and the disclosure of such communications could raise issues that Local 1181 has an interest in protecting. Inasmuch as the inclusion or exclusion of such provisions directly affects the rights, benefits, and privileges of its members, Local 1181 is an interested party to these proceedings.

By letter dated April 2, 2008, petitioners objected to the various portions of Local 1181's papers, claiming that they went beyond discussing the legal entitlement to intervene and addressed the merits of the employment protection provisions.

Petitioners subsequently argued that Local 1181's application, which has already delayed the resolution of this matter, should be denied for failure to submit a proposed pleading. Petitioners maintain that Local 1181 should have submitted a proposed pleading setting forth its position on the various claims in the Verified Petition, an affidavit from someone with knowledge presenting Local 1181's factual basis for intervention, and a legal memorandum

setting forth grounds to intervene. The affidavit of Local 1181's lawyer, who lacks knowledge of the facts, merely presents legal arguments superficially and the uncontested employee protection provisions.

Further, Local 1181's interest does not fall within the zone of interest sought to be promoted by the statutory provision under which DOE acted, i.e., public bidding laws. Petitioners note that they challenge the DOE's solicitation on the grounds that certain employment protection provisions are inconsistent with two interests of the public, namely the protection of the public fisc by obtaining the best work at the lowest possible price, and the prevention of favoritism, improvidence, fraud and corruption. Although Local 1181 has an interest in the wages, benefits, and job availability of the employees it represents, the DOE did not solicit bids based on any statute whose interest it was to provide higher wages, better benefits, or job security. Additionally, caselaw does not support intervention by organizations whose members claim to suffer a financial or economic losses, as such injuries do not fall within the zone of interests sought to be promoted by the public bidding law.

Even if employee job benefits and security were an appropriate interest to confer standing, Local 1181 failed to show any injury in fact to the interests it asserts or that it is a proper representative of those interests. The threat of continuing vitality of the employment protection provisions of the Mollen Agreement is not an "injury in fact." Nor is Local 1181 an appropriate representative of such injuries. In the event the employment protection provisions are removed from the Pre-K and EI contracts, no member will be prohibited from seeking available jobs, or deprived of wages to which he or she may be entitled, and senior members will merely not be given preference over other members of the Local 1181. Further, as Local 1181

does not allege that it represents only senior transportation employees, Local 1181 should not be deemed to have standing to support provisions which enhance job opportunities to some of its members over other members.

In further opposition to intervention, the owner of Pride Transportation Services, Inc. attests that his employees are, and have been represented by Local 917 since 2003. Employees of Bobmar Transportation Corp., Penny Transportation, Inc. and Smart Pick are also represented by Local 917. Employees of L&M Bus Corp. and Thomas Buses, Inc. are represented by Local 355, and employees of Selby Transportation Corp. are represented by Local 426, while employees of Robin Transportation Ltd. and Happy Child Transportation LLC are represented by Local 713. None of these unions, which represent transportation employees engaged in the transportation of Pre-K or EI children, are seeking intervention, yet Local 1181, which represents employees engaged in the transportation of older, school-age children is seeking to intervene.

Except for Carol Bus Transportation Corp., Local 1181 has not alleged that it represents employees of any of petitioners. And, since the DOE terminated all of Carol's contracts, Local 1181 will not be representing a single employee of Carol engaged in Pre-K or EI transportation.

Indeed, Local 1181 represents predominantly the employees of large bus companies who carry school-age children under contracts with DOE, which are non-bid contracts and forever renewed. Such contracts are not the subject of the petition, as petitioners are not seeking to remove employment protection provisions from renewal contracts, but from Pre-K and EI contracts.

Furthermore, 1181's "interests" are adequately represented by existing parties. The well being of Pre-K transportation companies, the DOE's wishes, the safety of children, and the

public's confidence are not interests of Local 1181. And, even if the legality of the employee protection provisions in the Pre-K transportation specification were deemed a cognizable interest of Local 1181, there would still be no reason to permit Local 1181 to intervene, since that very interest is already represented by defendants.⁴

In reply, Local 1181 argues that its papers properly set forth the legal standard applicable to intervention in Article 78 proceedings, and that its arguments are directed entirely to Local 1181's request to intervene. Local 1181 sets out the basis of the nature and importance of its interest in this proceeding and the crucial role of employee protection provisions in the New York City school bus industry. In order to assess the nature of Local 1181's interest, it must describe the facts and circumstances that create that interest. Further, 1181 has set forth no legal arguments regarding the merits of the arguments raised by petitioner.⁵

ANALYSIS

Discovery

Except as to a notice to admit, discovery in Article 78 proceedings is available only by leave of the court (*see* CPLR 408; CPLR 7804[a]; *Stapleton Studios, LLC v City of New York*, 7 AD3d 273, 776 NYS2d 46 [1st Dept 2004]). The party seeking disclosure must establish that the requested information is "material and necessary" to the prosecution or defense of the proceeding (*Matter of Allocca v Kelly*, 2007 NY Slip Op 7319 [1st Dept 2007]; *Stapleton Studios, LLC v City of New York*, 7 AD3d 273, *supra*; *Town of Wallkill v New York State Bd. of Real Property*

⁴ The DOE has no objection to Local 1181's application to intervene.

⁵ In a telephonic conference with counsel for all parties and counsel for Local 1181, it was agreed that Local 1181's assertion that DOE was acting as a market participant be stricken from Local 1181's papers.

Services, 274 AD2d 856 [3d Dept 2000], citing *Matter of Town of Mamakating v New York State Bd. of Real Prop. Servs.*, 246 AD2d 844, 845, 668 NYS2d 261 [3d Dept 1998]).

The Court granted an interim stay, and the DOE does not oppose a continued stay pending further determination of the Article 78. At this juncture, the petitioners cannot establish a basis for a need of discovery. The need for discovery at a later point in this proceeding may be appropriate, but is premature at this juncture.

Intervention

CPLR Article 7802(d) permits the Court to “allow other interested persons to intervene.” Thus, in a Article 78 proceeding, CPLR 7802(d) confers upon the courts broader authority to allow intervention than is permitted under the general intervention provisions of CPLR 1012 (intervention by right) and 1013 (intervention by permission) (*Roosevelt Islanders for Responsible Southtown Dev. v Roosevelt Island Operating Corp.*, 291 AD2d 40, 47 [1st Dept 2001]; *Kruger v Bloomberg*, 1 Misc 3d 192, 768 NYS2d 76 [Supreme Court, New York County 2003]). New York courts have “liberalized and expanded the rights of persons with interest in the outcome of the litigation to take part in the proceedings (*New York City Health and Hosp. Corp. v City of New York*, 85 Misc 2d 501 [Supreme Court, New York County 1976]). However, to be an “interested party” for purposes of Article 78 intervention status, one must have a legally cognizable claim to intervene, rather than just a general interest in the result of the proceeding (*Kruger v Bloomberg*, 1 Misc 3d 192, *supra*).

The Union’s “interest” in the proceeding (CPLR 7802) must be found in the proposed intervenors’ entitlement to the protection afforded by the employee protection provisions. It bears noting that the employment protection provisions contained in the Mollen Agreement, and

subsequent contracts, which DOE now seeks to insert into bid specifications for Pre-K and EI bus contracts, were the direct result of an agreement between Local 1181 and DOE and other bus companies. Any determination by the Court that the employment protection provisions in the Pre-K and EI bid specifications are unlawful, has a direct effect on the existing contracts under which Local 1181 members are currently employed. Local 1181's interest as a labor organization in protecting the working conditions of its members would be affected by the elimination of the employment protection provisions in the Pre-K and E-1 contracts, previously inserted when DOT administered such contracts. Notwithstanding the fact that petitioner Carol's contract, which involves Pre-K and/or EI school age children, has been terminated by the DOE, Carol's contract remains in effect until June 8, 2008. Thus, Local 1181 has a direct interest in the outcome of this proceeding. This is not an instance where the asserted injury "amounts to only 'tenuous' and 'ephemeral' harm" (see *Matter of New York State Psychiatric Assn., Inc. v Mills*, 29 AD3d 1058 [3d Dept 2006]).

Nor can it be said that Local 1181's interest in protecting the vitality of the employment protection provisions is adequately protected by DOE. In fact, none of existing parties to this proceeding represent the interests of the employees who would be affected by the elimination of the employee protection provisions from Pre-K and EI contracts.

Contrary to petitioners' contention, *Kingsport Press, Inc. v Board of Education of the City of New York* (50 Misc 2d 428 [Supreme Court, New York County 1966]) is factually distinguishable. Any determination that the Board of Education lacked the ability to issue a resolution opposing the purchase of any books from the union members' employer, had no bearing on the right of a union to urge prospective purchasers from refraining from doing

business with their employer. Here however, a determination that the employment protection provisions in the Pre-K and EI contracts are unlawful have the effect of eliminating the existing, contractual protection afforded to Carol's employees by such provisions.

Therefore, the order to show cause by Local 1181 for leave to intervene in this proceeding is warranted.

Conclusion

Based on the foregoing, it is hereby

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the application by petitioners for an order compelling DOE to comply with petitioners' letter demand for discovery is denied as premature. And it is further

ORDERED that respondents shall serve and file its Answer by May 9, 2008; and it is further


ORDERED that petitioners shall serve and file a Reply by May 23, 2008; and it is further

ORDERED that oral argument on the Article 78 petition shall be held on June 2, 2008, 10:00 a.m. And it is further

ORDERED that the order to show cause by Local 1181 for leave to intervene in this proceeding is granted, and Local 1181 shall serve and file an Answer by May 9, 2008.

This constitutes the decision and order of the Court.

Dated: April 9, 2008


Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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