

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

PRESENT: HON. ROBERT D. LIPPMANN
Justice

PART 21

Automobile club of
New York, Inc.

INDEX NO.

109034/03

MOTION DATE

- v -

Metropolitan Transportation
Authority et al.

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*Proceeding pursuant to article 78
decided in accordance with the
accompanying memorandum decision,
order and judgment.*

Dated: June 4, 2003

Robert D. Lippmann
HON. ROBERT D. LIPPMANN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

JUN 04 2003

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS Part 21

-----X

Application of
THE AUTOMOBILE CLUB OF NEW YORK, INC.,

Petitioner,

and

VITO FOSSELLA, ANDREW LANZER, JOHN MARCHI,
MATTHEW MIRONES and JAMES ODDO,

Petitioners-Intervenors,

For a Judgment under CPLR Article 78

- against -

METROPOLITAN TRANSPORTATION AUTHORITY
a.k.a. MTA, Peter S. Kalikow, Chair/Commissioner of the
Metropolitan Transportation Authority, MTA BRIDGES
& TUNNELS, TRIBOROUGH BRIDGE AND TUNNEL
AUTHORITY a.k.a. **TBTA**, MICHAEL ASCHER, President,
and XYZ Corp.'s 1-20, which are related entities which
service and operate various TBTA Bridges and Tunnels,

Respondents.

-----X

ROBERT D. LIPPMANN, J.:

Petitioner moves for a judgment, pursuant to Article 78 of the CPLR, vacating the
March 6, 2003 determination (the "Determination") of the MTA's board of directors (the
"Board") to, *inter alia*, raise tolls on various bridges and tunnels, effective May 18, 2003.

PARTIES

Petitioner is a New York not-for-profit corporation which claims to represent the interests of over 1.3 million members who operate motor vehicles in New York City and surrounding counties.

Messrs. Fossella, Lanzer, Marchi, Mirones and Oddo (collectively, “the intervenors”), as alleged in their verified (by counsel) intervenor petition, are public officials who reside in Staten Island and use the City’s bridges and tunnels.

The Metropolitan Transit Authority (“MTA”) is a public benefit corporation responsible for developing and implementing a unified mass transportation policy and providing transportation services for the City of New York and seven counties in the metropolitan area. It is specifically mandated by the Legislature to act “in all respects for the benefit of the people of the state of New York” (Public Authorities Law [“PAL”] § 1264[2]).

The Triborough Bridge and Tunnel Authority (“TBTA”), also a public benefit corporation, and frequently referred to as “MTA’s Bridges and Tunnels,” was made an affiliate of the MTA in 1968 by the State Legislature with the express purpose of having the TBTA partially subsidize the operations of the MTA and the New York City Transit Authority (the “TA”). Pursuant to the legislative scheme, the TBTA’s annual operating surplus and surplus investment income are used to fund the operating expenses of the transit system and commuter railroads and/or to finance the cost of certain capital costs and projects of the transit system and the commuter system, including payment of debt service on obligations of the MTA issued to finance costs and projects.

The (MTA) Board consists of a chairman and **16** other voting members, all of whom are appointed by the Governor with the advice and consent of the Senate (see PAL § 1263).

Respondent Peter **S.** Kalikow is MTA’s Chairman and its chief executive officer; he is also

responsible for the discharge of the executive and administrative functions and powers of MTA's subsidiaries and affiliates, including TBTA. The Board also serves as the Board for the TBTA and the Executive Director of MTA is, *ex officio*, Executive Director of TBTA, although the TBTA has its own management structure which is responsible for its day-to-day operations (see PAL § 552). Respondent Michael C. Ascher is TBTA's President and functions as its chief operating officer.

The related entities which service and operate various TBTA Bridges and Tunnels, sued herein as XYZ Corp.'s 1-20, have not been served or identified by petitioner.

FACTS

The underlying facts are by now well known. In November 2002, at a public Board meeting, the MTA announced it would have a \$24.6 million surplus at the end of fiscal year 2002 and a deficit of \$2.8 billion for fiscal years 2003-2004. A month later, in December 2002, the MTA issued an interim financial plan for 2003-2004 (the "December Plan") which echoed its November announcement, asserted that the \$2.8 billion deficit would be reduced to \$951 million through various internal cost-saving measures, and called for an increase, beginning in 2003, of bridge and tunnel tolls as well as a subway, bus and commuter railroad fare increase of up to 33%.

In January 2003 the MTA issued notices of public hearings (the "Notice"), which stated in the "Introduction/Overview":

In November 2002, the MTA published its two-year Financial Plan for 2003 and 2004 in which it projected a combined gross deficit of \$2.8 billion. Numerous internal actions have been identified, including administrative reductions and cost-saving measures such as the closing of some token booths and the elimination of

the token, as a means to reduce this deficit to an estimated \$1 billion. This remaining deficit is proposed to be addressed by one of the three options described below, which include combinations of fare and toll increases, service reductions, and/or increased governmental assistance. Public comments are being solicited on these proposals through a series of hearings throughout the region as noted below. Comments can also be submitted via e-mail through our website.

At a public hearing held at Hofstra University on February 10, 2003 pursuant to the Notice, the Auto Club's representative, Antoanela Vaccaro, testified that the current tolls were already too high. In her supporting affidavit she states that she was the only member of the public that appeared to oppose a toll increase and that if petitioner and similar organizations had known that the MTA was seeking a toll increase in a year when it had a surplus, petitioner would have publicized the lack of necessity for the increase. On March 6, 2003, after the public hearings concluded, the Board voted to approve *inter alia* a \$50 increase in bridge and tunnel tolls for major facilities (the toll increases range from \$.25 to \$1.00, depending on location of the facility and size of the vehicle).

In early January 2003, the State Comptroller, Alan G. Hevesi, commenced an audit of the MTA's finances, focusing on the December Plan. According to the Comptroller, the MTA was so recalcitrant that in order to complete his audit he was forced to issue subpoenas in February 2003 to obtain records and testimony from MTA officials concerning specific elements of the December Plan. On April 23, 2003, the Comptroller released a report of his audit (the "Hevesi Report" – see exhibit K). The Hevesi Report contained the following findings: "the MTA had two versions of the December Plan: the one it showed to the public and the one it kept to itself" which revealed previously undisclosed material transactions, moved resources off budget from 2002 to subsequent years, shifted \$512.5 million from 2002 to 2003 and 2004, and disclosed

“hidden reserves” in 2004 (see exhibit K, p 1). The Hevesi Report also noted that “the bridges and tunnels already generate far more revenue than is needed to cover their expenses [and that] the surplus revenues are used to subsidize the operating and capital budgets of New York City Transit and the commuter railroads” (see exhibit K, pp 22, 40).

While the State Comptroller was auditing the MTA, the City Comptroller, William C. Thompson, Jr., conducted an audit of the TA. Simultaneously with the issuance of Hevesi’s Report, Comptroller Thompson issued a report stating that the TA “did not provide the public with complete, clear, and accurate information about its current and future financial position.” It is undisputed that at all pertinent times the TBTA (unlike the MTA and TA) was operating well within its means and had no deficit.

On April 30,2003, several days after the Hevesi and Thompson Reports were released, the New York Public Interest Research Group Straphangers Campaign, Inc. (“Straphangers”) commenced a proceeding seeking to vacate the Determination on the ground that the public hearings were a “sham” because the Notice misrepresented the MTA’s financial condition. By “decision/order” dated May 14,2003 the court (York, J.) directed the MTA to roll back the fare increases for subways, buses and railroads to their prior levels, finding that the misleading Notica resulted in flawed public hearings. The court did not address tolls because TBTA was not a party to the Straphangers’ proceeding. Petitioner chose not to intervene in that proceeding and join the TBTA therein.

THIS PROCEEDING

Having foregone the opportunity of joining the Straphangers’ proceeding, petitioner commenced this “me too” proceeding by order to show cause dated May 16,2003 naming the

MTA and TBTA as respondents. At a hearing held that same day, this court denied petitioner's request for a temporary restraining order. At a second hearing held on May 20, 2003 the court granted the intervenors' application to intervene in this proceeding. The intervenors, who are represented by counsel, have not submitted any affidavits.

Petitioner, relying heavily on the Straphangers' petition, the Hevesi Report and Justice York's May 14, 2003 order, makes the following arguments: the MTA, which was a party to the Straphangers' proceeding, is barred by the doctrine of collateral estoppel from relitigating the issues of justiciability, the sufficiency of the Notice, the adequacy of the public hearings and the validity of the Determination; petitioner has standing to bring this Article 78 proceeding and the issues raised in this proceeding are justiciable; the Notice was defective, the public hearings were fundamentally flawed by the misleading Notice and the Determination to raise bridge and tunnel tolls was unlawful; PAL § 2804 required the TBTA to disclose financial information and conduct public hearings prior to the toll increase; and, the TBTA failed to file notice of the proposed changes in the toll rates with the Secretary of State for publication in the state register 45 days prior to the effective date of the proposed toll increase (May 18, 2003) as required by section 202 of the State Administrative Procedure Act ("SAPA").

The intervenors echo petitioner's arguments while placing primary reliance on the TBTA's failure to comply with PAL § 2804(1).

In opposition, respondents argue that: respondents' determination to raise tolls is not justiciable because the TBTA has unfettered discretion to raise tolls; the TBTA is not required to conduct public hearings before tolls can be raised; the notice requirements of PAL §§ 1266(3) and 1263(9) do not apply to toll increases by the TBTA, which is not an MTA subsidiary; when

the Board raised tolls on bridges and tunnels, it did so in its capacity as the TBTA board; the Notice complied with all statutory requirements; the Hevesi Report provides no support for petitioner's claims because it states that it would have been "imprudent" to use all of the surplus revenues in 2003; it is undisputed that a budget deficit did exist for 2003-2004; any claim under PAL § 2804(1) is barred by laches; and, the toll increase was adopted in compliance with SAPA § 202.

DISCUSSION

The parties have raised the threshold issues of collateral estoppel, standing and justiciability.

The doctrine of collateral estoppel precludes a party from relitigating "an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point". . . . It is a doctrine intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it. There are now but two requirements which must be satisfied before the doctrine is invoked. First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination. . . . The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action.

(Kaufman v. Eli Lilly and Company, 65 NY2d 449,455-456 [1985]).

This court has read Justice York's May 14, 2003 decision in the Straphangers' proceeding. The central issue in that proceeding was the validity of the Notice and the public hearings based on the Notice. The court found that the Notice and public hearings were invalid because "the hearings were based on the false and misleading premise that the MTA was in

worse financial condition than it knew itself to be, and . . . the Notice wrongfully relegated the public to the role of assisting the MTA in closing a ‘budget gap of \$2.8 billion’ which did not exist” (NYPIRG Straphangers Campaign, Inc. v. Metropolitan Transportation Authority, ___ Misc 2d ___, NYLJ May 20, 2003, p 18, col 1). That finding, with which this court agrees, is binding on the MTA under the doctrine of collateral estoppel enunciated above (Kaufman v. Eli Lilly, supra, 65 NY2d at 455-456). However, the court’s finding in the Straphangers’ proceeding, is not binding on the TBTA under the doctrine of collateral estoppel because the TBTA was not a party to that proceeding.

Petitioner has standing to challenge the toll increase on behalf of its membership (see Automobile Club of New York, Inc. v. Port Authority of New York and New Jersey, 706 F Supp 264,271, affd 887 F2d 417 [1989]; New York State Club Association, Inc. v. City of New York, 487 US 1, 8-9 [1988]).

The matter before the court presents a justiciable controversy. Clearly, respondents have the right to manage their business affairs and to raise tolls without court intervention. However, that right does not empower them to deliberately mislead the public whose interests they were created to advance. The court has the right to review challenges that respondents ignored procedural and statutory safeguards which have been developed to protect the public (see Stein v. Metropolitan Transportation Authority, 110 Misc 2d 1027, 1029 [Sup Ct, Nassau Co, 1981]; Sheldon v. New York City Transit Authority, 39 AD2d 950 [2^d Dept 1972]; County of Nassau v. Metropolitan Transportation Authority, 57 Misc 2d 1025, 1028-1029 [Sup Ct, Nassau Co, 1968]). “[W]here a quasi-legislative act by an administrative agency such as a rate determination is challenged on the ground that it ‘was made in violation of lawful procedure, was affected by an

error of law or was arbitrary and capricious or an abuse of discretion' (CPLR 7803[3]), a proceeding in the form prescribed by article 78 can be maintained" (New York City Health and Hospitals Corporation v. McBarnette, 84 NY2d 194,204[1994], rearg den 84 NY2d 865 [1994]).

A. The Notice and Public Hearings

There is nothing in PAL Article 3 ("Triboroughbridge and tunnel authority act") which requires the TBTA to hold public hearings before raising tolls (see PAL § 550, et seq.). However, the Board, which is the *ex officio* board of the TBTA (see PAL § 552[1]), chose to include toll increases in the Notice and the resulting public hearings. This choice was binding on the TBTA because the Board ultimately controls both the MTA and the TBTA (see PAL § 1264[1]).

The Notice must comply with strict statutory requirements even when it is voluntary (see PAL § 1263[9]). The MTA was not required to disclose information about its financial condition (see Id.). Nonetheless, the Notice heralded an alleged \$2.8 billion deficit for 2003-2004 based on the superseded December Plan, thereby setting a false underpinning to the public debate which would follow.

"[T]he right to a public hearing and to public scrutiny. . . goes to the heart of the fundamental fairness which is required of all governmental agencies, officers and employees when dealing with the citizens of the State or their affairs" (Glen v. Rockefeller, 61 Misc 2d 942, 949 [Sup Ct, NY Co, 1970], affd 34 AD2d 930 [1st Dept 1970]). The language of a notice cannot be deceptive or misleading or framed to give a false concept because that would discourage

interested parties from attending the hearing and thwart the underlying purpose of the notice requirement (Reizel v. Exxon Corporation, 42 AD2d 500, 506 [2d Dept 19731; see also Gematt v. Town of Sardinia, 87 NY2d 668, 678 [1996]; Garlen v. City of Glens Falls, 17 AD2d 277, 278 [3^d Dept 19621, affd 12 NY2d 1025 [1963]; 41 Kew Gardens Road Associates v. Tvburski, 124 AD2d 553, 554 [2^d Dept 19861).

The court finds that the public hearings, which included proposed toll increases, were fundamentally flawed because the MTA led the public to believe that the MTA was facing a budget gap of \$2.8 billion which did not exist, and that TBTA toll hikes were **part** of the solution to bridging the purported budget gap. Had the true financial facts been known, the public testimony in opposition to fare and toll hikes would undoubtedly have been far more vigorous, spirited and persuasive.

B. Financial Disclosure Requirements

Both the MTA and the TBTA are subject to specific disclosure requirements under the Public Authorities Law.

The MTA is required to submit a detailed five-year plan to the Governor every year (PAL § 1269-d). Nonetheless, it has brazenly ignored this statutory requirement for several years. The last five-year plan was submitted in 1999. The current five-year plan was submitted in March 2003, and only after the State Comptroller issued his subpoenas and the public hearings had been concluded. The MTA's failure to comply with PAL § 1269-d is fully alleged in the petition (see ¶¶ 16, 45-48, 77[b]). MTA offers no explanation for its failure to file annual five-year plans with

the Governor since 1999; instead, it hides behind its standing challenge, apparently secure that the one person with an incontrovertible right to object – the Governor – has not and will not.

When contemplating a toll increase, the TBTA is required to submit a detailed financial report to the governor, comptroller, chairman of the senate finance committee, chairman of the assembly ways and means committee and ranking minority member of each of such committees, not less than 120 days prior to the proposed date of date of the increase. The report must set forth:

(a) the need for such increase or imposition; (b) its receipts and disbursements, or revenues and expenses, during the prior three fiscal years, or so much thereof as it may have been in existence, in accordance with the categories or classifications established by such authority or commission for its own operating and capital outlay purposes; (c) its assets and liabilities at the end of its last fiscal year including the status of reserve, depreciation, special or other funds and including the receipts and payments of these funds; (d) a schedule of bonds and notes outstanding at the end of its fiscal year and their redemption dates, together with a statement of the amounts redeemed and incurred during such fiscal year; (e) information on future authority or commission operations, debt service and capital construction, together with estimated receipts and expenditures for the next five fiscal years without reference to such proposed increase or imposition; (f) projections and estimates as to the effect which the proposed increase or imposition will have on the future use of the facilities, and an estimate of the revenues which will accrue to the authority or commission as the result of the proposed increase or imposition.

(PAL § 2804 [1]). The TBTA did not file a detailed financial report with the governor, comptroller and specific elected officials 120 days prior to the effective date of the toll increase (May 18,2003).

Matter of New York Public Interest Research Group, Inc. [New York State Thruway Authority] (77 NY2d 86 [1990]) and Patterson v. Carey (41 NY2d 714 [1977]) do not invalidate PAL § 2804(1), as argued by respondents. NYPIRG, citing Patterson, affirmed the Third

Department (155 AD2d 861) and struck PAL §§ 2804(2) and (3) because those subsections (like PAL § 153-c, the court's focus in Patterson, which was superseded by PAL § 2804), impermissibly infringed upon the State Comptroller's discretionary powers. The Court of Appeals did not invalidate PAL § 2804(1) in NYPIRG. The Court's finding is consistent with a very simple principle: a discretionary act (in this case the Comptroller's) by definition cannot be compelled. Hence, the Court's leaving § 2804(1) intact while striking §§ 2804(2) and (3) is totally consistent with the corollary principle: just as a discretionary act cannot be compelled, it cannot be foreclosed. The Comptroller cannot do his job in a vacuum. PAL § 2804(1) is designed to provide him with the information he needs to decide whether or not to exercise his discretion to review respondents' activities. Respondents state on page five of their supplemental memorandum of law that they chose to interpret Patterson and NYPIRG as having rendered § 2804(1) (and its predecessor) a nullity for over two decades. Respondents' self-serving interpretation is not binding on this court. Furthermore, the court does not agree with respondents that any claim under PAL § 2804(1) is barred by laches. Laches is an equitable doctrine which bars a claim asserted by the plaintiff if the plaintiffs inordinate delay in asserting the claim caused prejudice to the defendant (see Matter of Estate of Barabash, 31 NY2d 76, 81 [1972]). Respondents cannot in good conscience invoke principles of equity to blame petitioner for the respondents' interpretation of Patterson and NYPIRG.

According to **SAPA** § 202(1)[a], the TBTA is required to submit notice of a proposed toll hike ("rule") to the Secretary of State for publication in the state register and to afford the public an opportunity to submit comments at least **45** days prior to either (i) a change in the rule for which statute does not require a public hearing to be held prior to adoption or (ii) the first

public hearing on a proposed rule for which such a hearing is so required. The proposed toll increase did not require a public hearing pursuant to statute. The TBTA did file an “emergency rule” change (no public hearings required) with the Secretary of State on March 10, 2003. However, the TBTA failed to give a detailed description of the nature, cause, consequences and expected duration of the emergency, as well as an explanation of why compliance with SAPA § 202(1) would be contrary to the public interest as required by SAPA § 202(6)[d](iv) (see petitioner’s memorandum of law, exhibit B).

REMEDIES

The court has discussed the MTA’s failure to comply with PAL § 1269-d, as well as the TBTA’s failure to comply with PAL § 2804(1) and SAPA § 202 because the failings did, in fact, occur. Had the MTA and the TBTA complied with the statutory requirements, the MTA may very well have not been in the position to foist misleading financial information (*e.g.*, the alleged \$2.8 billion budget deficit) upon the public. However, petitioner and the intervenors lack standing to seek any remedy for the MTA’s and TBTA’s statutory transgressions. PAL § 1269-d concerns the Governor, not the public. PAL § 2804(1) concerns the Governor and other elected officials, none of whom are a petitioner in this proceeding. SAPA § 202 primarily concerns the New York Secretary of State, who is not a petitioner in this proceeding. Although SAPA § 202 provides for a public hearing, the hearing requirement is in conflict with the PAL, which grants to the TBTA the “unlimited” right to raise tolls and transfer any surplus funds to the MTA and TA without holding public hearings (see PAL § 552,553; Carey Transportation, Inc. v. Triborough Bridge and Tunnel Authority, 38 NY2d 545,553-554 [1976], remittitur amended 39

NY2d 833 [1976], cert den 429 US 830 [1976]; see also D'Angelo. v. Triborough Bridge and Tunnel Authority, 106 AD2d 128[1st Dept 1985, affd 65 NY2d 714 [1985]]. The public hearing requirement of SAPA § 202 is inconsistent with Title 3 of the PAL, which contains no provision for public hearings when the TBTA decides to raise tolls, and is therefore of no effect (see PAL § 571: “Insofar as the provisions of this title are inconsistent with the provisions of any other act, the provisions of this title shall be controlling”).

The “bottom line” is this: the TBTA is the MTA’s “cash cow” and the MTA can milk it whenever it wants. The court can roll back the toll increases as requested by the petitioner and the intervenors. However, the TBTA, acting alone, could reinstate the toll increases shortly after the court’s order, and the increase could be used to fund the MTA’s actual deficit (possibly within the range of \$1 billion). The facts adduced in this proceeding evidence that during the past few months, and probably years, the MTA has been operating in a manner inconsistent with the legislative intent. Permanent remedies for the MTA’s misconduct lie with the Governor, the Legislature and the Comptroller, not the courts.

CONCLUSION

The MTA involved the TBTA in the deceptive Notice and the flawed public hearings. The MTA failed to file annual five-year plans with the Governor as required by PAL § 1269-d and the court is constrained to note that the Governor did not insist on compliance. The TBTA has not honored PAL § 2804(1) for years because it chose to interpret two Court of Appeals cases in the light most favorable to it notwithstanding the fact that the court in NYPRIG did not strike PAL § 2804(1) when it struck §§ 2804(2) and (3).

Respondents were created for the express purpose of serving the public. Instead of following their statutory mandate, they have displayed a pattern of untrammelled arrogance and deception and a disdain for the public they were obligated to serve, which is epitomized by the MTA's voluntarily and intentionally deceiving the public with the Notice. Respondents' misconduct has been documented herein. The court finds that the Board's March 6, 2003 Determination was made in violation of lawful procedure (see CPLR 7803[3]). Furthermore, the Determination to raise tolls was not rationally based, as it must be (see Colton v. Berman, 21 NY2d 322, 329 [1967]), because it was based on a deceptive Notice, flawed public hearings and inaccurate financial information,

Accordingly, the petition (and the intervenors' petition) is granted to the extent that it is hereby ORDERED, ADJUDGED and DECLARED that:

The March 6, 2003 Determination of the MTA Board of Directors, to the extent that it increased bridge and tunnel tolls, is vacated on the ground that the Determination was reached in violation of lawful procedure and was arbitrary and capricious because it was based on misleading financial information, the deceptive Notice and flawed public hearings.

This matter is hereby remanded to respondents for further proceedings consistent with this decision.

Respondents are directed to devise and implement a plan (which shall eschew any *nunc pro tunc* toll increases) within 10 days from the date of this decision and order for the purpose of reimbursing the driving public for the toll increases improperly collected since May 18, 2003.

In all other respects the petition (and the intervenors' petition) is denied.

This constitutes the decision, order and judgment of the court.

Dated: June 4, 2003

JUN 04 2003

Robert D. Lippmann

J.S.C.

HON. ROBERT D. LIPPMANN

J.S.C.