



No. 104, Original

IN THE
**SUPREME COURT OF
THE UNITED STATES**

OCTOBER TERM, 1985

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF NEVADA
THE NEVADA PUBLIC SERVICE COMMISSION
AND THE CITY OF LAS VEGAS, NEVADA,
Defendants.

**MOTION TO DISMISS BY DEFENDANT,
CITY OF LAS VEGAS, NEVADA**

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Defendant, City of Las Vegas, hereby moves this Court to dismiss Plaintiff's Complaint pursuant to FRCP 12b(1) and (6) on the ground that Plaintiff lacks standing to sue Defendant, City of Las Vegas, to contest the validity of Las Vegas City Ordinance No. 3190.

Plaintiff alleges in its Complaint that the Defendant,

City of Las Vegas, "adopted an ordinance [Ordinance No. 3190] which now requires New Jersey to obtain yet another permit before shipment because of the nature of the cargo." Plaintiff's Complaint, paragraph XII. Notwithstanding this allegation by Plaintiff, Ordinance No. 3190 does not require the State of Nevada to obtain such a permit.

Attached to Plaintiff's Complaint as Exhibit 22 is a copy of Las Vegas Ordinance No. 3190. The regulatory provision of this ordinance is contained in Section 9.36.060(A):

Except as [is] otherwise provided in subsection (B) of this section, a non-transferable permit for hazardous transport shall be required annually for each person who transports hazardous materials in the quantities listed in subsections (A) to (C), inclusive, of Section 9.36.040.

(emphasis added.) Thus, the permit requirement of Ordinance No. 3190 applies clearly only to transporters of hazardous materials.

Plaintiff's Complaint, paragraph II, states that "New Jersey as the shipper of the contaminated soil has also contracted with the Union Pacific Railroad as a common carrier to transport the soil in interstate commerce to Beatty, Nevada." Even assuming Plaintiff is the "shipper" of the hazardous materials, Plaintiff specifically alleges in its Complaint that the Union Pacific Railroad is the "transporter."

Also, as Plaintiff acknowledges in its Complaint, paragraph XL, Defendant, City of Las Vegas, has

instituted legal action only against the Union Pacific Railroad. Defendant, City of Las Vegas, did not attempt to take legal action against the Plaintiff, State of New Jersey. Defendant, City of Las Vegas, has consistently treated the Union Pacific Railroad, not the State of New Jersey, as the "transporter" of the hazardous material.

Based on the facts of this litigation as it appears from the face of Plaintiff's Complaint, it is clear that the Plaintiff, State of New Jersey, has no standing to challenge Las Vegas City Ordinance No. 3190 which clearly applies only to "transporters" of hazardous material. Since the State of New Jersey is not "transporting" hazardous material through the corporate limits of the City of Las Vegas, the State of New Jersey is not subject to Ordinance No. 3190. As an entity not subject to Ordinance No. 3190, the State of New Jersey has no interest that it can call upon this Court to protect.

This standing analysis is supported by case decisions by the United States Supreme Court. In Warth v. Seldin, 422 U.S. 490 (1975), the Supreme Court noted that the question of standing is in essence:

whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise In both dimensions it is founded in concern about the proper — and properly limited — role of the courts in a democratic society.

In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf. The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'

Id. at 498-499 (citations omitted, emphasis in original).

In the instant case, the adoption of Ordinance No. 3190 by the Defendant, City of Las Vegas, is not seen to cause any "injury in fact" to the Plaintiff, State of New Jersey. The Ordinance is only applicable against "transporters" of hazardous materials. On the facts of Plaintiff's Complaint, the Union Pacific Railroad is the transporter of the allegedly radioactive soil; the State of New Jersey has merely contracted with the Union Pacific Railroad for the railroad to provide a service to the State of New Jersey. If the railroad is aggrieved by the action of the Defendant, City of Las Vegas, in adopting Ordinance No. 3190, then the Union Pacific

Railroad is the proper party to bring suit against the City of Las Vegas. "[Even] when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth, supra at 499.

In fact, since the filing of this original jurisdiction action, the Union Pacific Railroad has filed suit in the United States District Court for the District of Nevada against the City of Las Vegas contesting the validity of Ordinance No. 3190 (Union Pacific Railroad v. City of Las Vegas, Case No. CV-LV-85-932, HDM, filed October 29, 1985).

The standing requirements enunciated in Warth, supra, have been reemphasized in later decisions by this Court. As the Court stated in Duke Power Co. v. Carolina Env. Study Gp., 438 U.S. 59 (1978):

As refined by subsequent reformulation, this requirement of a 'personal stake' has come to be understood to require not only a 'distinct and palpable injury,' to the plaintiff, but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct.

Id. at 72 (citations omitted).

Likewise, in Blum v. Yaretsky, 457 U.S. 991 (1982), the Court further enunciated:

It is axiomatic that the judicial power conferred by Art. III may not be exercised unless the plaintiff shows 'that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.' It is not enough that the conduct of which the plaintiff complains will injure someone. The complaining party must also show that he is within the class of persons who will be concretely affected.

Id. at 99 (citation omitted, emphasis in original).

As each of these cases makes clear, the State of New Jersey cannot rely on any alleged injury that the Union Pacific Railroad has allegedly suffered because of the adoption of Ordinance No. 3190 by the City of Las Vegas. Because the State of New Jersey is not a "transporter" of hazardous materials, it is not seen to have the requisite "personal stake" necessary to contest the validity of Ordinance No. 3190.

For the reasons set out above, Defendant, City of Las Vegas, urges this Court to grant this Motion to Dismiss pursuant to FRCP 12b(1) and (6).

DATED this _____ day of December, 1985.

Respectfully submitted,

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