

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT  
Case No. 05-4222

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LISA BURKE, et al.

Appellants,

vs.

UTAH TRANSIT AUTHORITY, LOCAL  
382 OF THE AMALGAMATED  
TRANSIT  
UNION, et. al.,

Appellees.

United States District Court  
Case No. 2:04-CV-00985

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

THE HONORABLE PAUL G. CASSELL, DISTRICT COURT JUDGE

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BRIEF OF APPELLEE LOCAL 382 OF THE  
AMALGAMATED TRANSIT UNION

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ORAL ARGUMENT REQUESTED

## TABLE OF CONTENTS

	<b>PAGE</b>
<b>TABLE OF AUTHORITIES</b>	<b>iii</b>
<b>BRIEF OF APPELLEE LOCAL 382</b>	<b>1</b>
<b>STATEMENT OF JURISDICTION</b>	<b>2</b>
<b>STATEMENT OF ISSUES</b>	<b>2</b>
<b>STATEMENT OF CASE</b>	<b>3</b>
<b>STATEMENT OF FACTS</b>	<b>7</b>
<b>SUMMARY OF ARGUMENT</b>	<b>10</b>
<b>ARGUMENT</b>	<b>11</b>
<b>I.    THERE WERE NO FACTUAL DISPUTES           WHICH WOULD BARR THE GRANTING           OF SUMMARY JUDGMENT</b>	<b>11</b>
<b>II.   THE DISTRICT COURT APPROPRIATELY           DENIED BURKE AND CARPER’S RULE 56(F)           MOTION</b>	<b>13</b>
<b>III.  THE DISTRICT COURT COULD NOT GRANT           A MOTION FOR LEAVE TO FILE AMENDED           COMPLAINT</b>	<b>14</b>
<b>IV.  THE EXISTING BARGAINING UNIT IS           APPROPRIATE</b>	<b>15</b>

<b>V. THE COMPLAINT AGAINST THE DOL WAS CORRECTLY DISMISSED</b>	<b>17</b>
<b>VI. THE DISMISSAL OF THE STATE BASED CLAIM AGAINST LOCAL 382 WAS APPROPRIATE</b>	<b>18</b>
<b>CONCLUSION</b>	<b>19</b>
<b>REQUEST FOR ORAL ARGUMENT</b>	<b>20</b>
<b>CERTIFICATE OF COMPLIANCE WITH RULE 31.3</b>	<b>21</b>
<b>CERTIFICATE OF COMPLIANCE WITH RULE 32(a)</b>	<b>22</b>
<b>CERTIFICATE OF DIGITAL SUBMISSION</b>	<b>23</b>
<b>CERTIFICATE OF SERVICE</b>	<b>24</b>

## TABLE OF AUTHORITIES

### CASES

	<b>PAGE</b>
Amalgamated Transit Union International v. Donovan 767 2d 939 (D.C. Cir. 1985)	17
Burlington North R.R. v. Huddleston, 94 F. 3d 1413 (10 <sup>th</sup> Cir. 1996)	19
Garcia v. Burlington North Railroad Company, 818 F. 2d 713 (10 <sup>th</sup> Cir. 1987)	15
Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 103 S. Ct. 400 (1982)	15
Patty Precision v. Brown & Sharpe Mfg. Co., 742 F. 2d 1260 (10 <sup>th</sup> Cir 1984)	13
Taylor v. Pepsi-Cola Co., 196 F. 3d 1106 (10 <sup>th</sup> Cir. 1999)	12
United States v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357 (1950)	17-18

### STATUTES

28 U.S.C. §1291	2
28 U.S.C. §§1331 and 1367	2
49 U.S.C. §5333 (b), (Section 13(c) of the Urban Mass Transportation Act)	4, 9-10, 17

Utah Code Annotated §17A-2-1031	4, 15-16
---------------------------------	----------

## **RULES**

Rule 56, Federal Rules of Civil Procedure	12
Rule 56(f), Federal Rules of Civil Procedure	3, 13-14
Rule 7-1 (b)(3), U.S. District Court for Utah Civil Rules	14
Rule 56-1(c), U.S. District Court for Utah Civil Rules	11-12

## **PRIOR AND RELATED TENTH CIRCUIT COURT APPEAL**

On April 6, 2005, a Notice of Appeal was filed by Plaintiffs from the District Court's interlocutory Order Denying Plaintiffs' Motion for a Preliminary Injunction dated January 25, 2005. The Appeal was assigned Tenth Circuit Court of Appeals Docket No. 05-4079. The Appeal was consolidated with this appeal by Order dated September 4, 2005.



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UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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LISA BURKE, et al.,

Appellants,

vs.

UTAH TRANSIT AUTHORITY,  
LOCAL 382 OF THE  
AMALGAMATED TRANSIT  
UNION, et. al.,

Appellees.

Tenth Circuit Court of Appeals  
Case Nos. 05-4079 and 05-4222

United States District Court  
Case No. 2:04-CV-00985

ORAL ARGUMENT REQUESTED

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**BRIEF OF APPELLEE LOCAL 382**

Local 382 of the Amalgamated Transit Union (hereinafter referred to as the “Union” or the “Local”), as one of the above-named Appellees, respectfully submits the

following Brief of Appellee Local 382 of the Amalgamated Transit Union supporting the affirmation of the United States District Court's Order Granting Defendants' Motion for Summary Judgment dated August 15, 2005. This Brief is filed in the United States Court of Appeals for the Tenth Circuit, Case No. 05-4222.

### **STATEMENT OF JURISDICTION**

The initial complaint filed with the United States District Court raised issues of enforcement of federal statutory and constitutional law and Utah statutory and common law. Therefore, the District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1367. Defendant/Appellee United States Department of Labor filed a Motion To Dismiss, which was granted by Order dated April 7, 2005. The Defendants/Appellees Utah Transit Authority and John English (hereinafter collectively referred to as "UTA") filed a Motion for Summary Judgment, which the District Court granted on August 15, 2005. On August 22, 2005, Appellants filed their Notice to Appeal from these two adverse rulings. Since the August 15<sup>th</sup> Order was decreed as a final order, the basis for this Court's appellate jurisdiction would be 28 U.S.C. §1291.

### **STATEMENT OF ISSUES**

1. Were there disputed issues of material fact which require the reversal of District Court's Summary Judgment?

2. Was Burke and Casper's Rule 56(f) motion properly presented before the District Court?
3. Did the District Court err by not ruling upon Burke and Casper's motion for leave to file an amended complaint?
4. Based upon the undisputed facts, did the District Court correctly determine that the existing bargaining unit was appropriate?
5. Based upon the administrative record before the court, did the District Court commit error in dismissing the claim against the United States Department of Labor?
6. If the District Court's dismissal of the other claims was appropriate, did the District Court err in dismissing the state claim against the Local?

### **STATEMENT OF CASE**

Much of this Statement of Case is similar to Statement of Case contained in the Brief of Appellee Local 382 filed in Appeal No. 05-4079.

On October 22, 2004, Lisa Burke and Michael Carper, two individual residents of Utah, filed a complaint against the UTA, the Local, and the United States Department of Labor (hereinafter referred to as the "DOL"). The Complaint alleged five separate causes of action which arose out of a common set of facts involving a labor dispute between the Plaintiffs, the UTA, and the Local. Count I of the Complaint alleges that the UTA was

violating the Plaintiff's First Amendment rights. Count II alleges that the UTA violated Section 13(c) of Urban Mass Transportation Act. Count III alleges that the UTA violated Section 17A-2-1031 of the Utah Annotated Code. Court IV alleges that the Union breached its fiduciary obligations owed to the Plaintiffs under Utah common law. Finally, Count V alleges that the DOL also violated Section 13(c) of the Urban Mass Transportation Act. (Aplt. App., pp. 11-31).

Plaintiff Lisa Burke (hereinafter "Burke") has been an employee of the UTA for twenty-six years. Burke is currently employed as a light rail train driver within the UTA TRAX division. Plaintiff Michael Carper (hereinafter "Carper") has been an employee of the UTA for eleven years. Carper is currently employed as a line and signal worker in the maintenance-of-way department of the UTA TRAX division. (Aplt. App., p. 12). Although the Complaint is titled a "Class Action Complaint", Burke and Carper have never formally sought, nor has the District Court ever certified this matter as a class action. In fact, the attorney for Burke and Carper stated his clients would wait until after the District Court had ruled on any motion for summary judgment before seeking class certification. (Aplt. App., pp. 297-298).

On November 29, 2004, Burke and Carper filed a motion for preliminary injunction against the UTA seeking to enjoin the UTA from transferring UTA bus

division employees to the UTA TRAX division, transferring bus division employees to the TRAX division with superior seniority rights, and interfering with the First Amendment rights of free speech and association of the TRAX division employees. The allegations of Counts I, II, and III of the Complaint formed the basis of the motion. The motion was fully briefed by the parties. The Union joined the UTA in opposing the motion. Oral argument was held before the District Court on January 24, 2005. No evidentiary hearing was held. The District Court, after taking the matter under advisement, rendered its decision, denying the motion for preliminary injunction, on January 25, 2005. (See, Brief of Appellee, Local 382, pp. 3-4 in Appeal No. 05-04079 for references.)

Six days after the District Court had rendered its decision, Burke and Carper filed a second “Motion for Preliminary Injunction” seeking to enjoin the UTA from recognizing the Local as the bargaining representative for the TRAX division employees. Although the motion was titled a “Motion for Preliminary Injunction”, it appeared to the Union to be really a motion for reconsideration. This is because the motion rehashes the same legal arguments and facts as the previously denied motion. This second motion was fully briefed by all parties. On March 9, 2005, without a hearing, the District Court denied the

second motion. Appeal No. 05-04079 followed on April 6, 2005. (See, Brief of Appellee Local 382, p. 4 in Appeal No. 05-4079 for references).

The DOL filed a motion to dismiss which was also fully briefed and argued on March 9, 2005. On April 6, 2005, the District Court granted the DOL's motion to dismiss. (Aplt. App., pp 119-120).

The UTA filed a motion for summary judgment and Burke and Casper filed a cross-motion for partial summary judgment which were both fully briefed and argued on May 20, 2005. The Union supported the UTA in its motion for summary judgment and opposed Burke and Carper on their motion for partial summary judgment. The District Court granted the UTA's motion for summary judgment on August 15, 2005. Burke and Carper filed a second notice of appeal. (Aplt. App., pp 7-9).

Simultaneously with the filing of their memorandum in opposition to the UTA's motion for summary judgment, the attorney for Burke and Carper filed a "Rule 56(f) Affidavit of Daniel Moquin". (Aplt. App., pp 146-150). The purpose of the affidavit was to support the argument of Burke and Carper that they did not have sufficient opportunity to conduct discovery.

At 11:48 p.m. Sunday evening, on August 14, 2005, Burke and Carper filed a motion for leave to amend their complaint with the District Court. (Aplt. App.,

pp 169-170). The next day, presumably without knowledge of the midnight filing of the motion for leave to amend, the District Court filed its Order Granting Defendants' Motion for Summary Judgment and closing the case. (Aplt. App., pp 200-212).

Instead of waiting for the Local and the UTA to file their responses to the motion to amend and instead of requesting relief of the District Court, Burke and Carper filed this appeal on August 22, 2005. (Aplt. App., pp 213-214).

On September 14, 2005, this Court ordered the two appeals be consolidated.

### **STATEMENT OF FACTS**

Most of this Statement of Facts is a repeat of the Statement of Facts contained in Brief of Appellee Local 382 filed in Appeal No. 05-4079.

The Local has represented transportation workers employed by the UTA, or its predecessors, since 1904. First, the Union represented street car employees. As street cars were phased out of existence, the Union began to represent more bus drivers. By the 1940s, the UTA's predecessors only operated buses.

By the 1990s, it had become certain that the UTA would introduce light rail trains, known as TRAX, into the Salt Lake Valley. In anticipation of the introduction of TRAX, the UTA and the Union conducted negotiations over whether the work at the TRAX division would be performed by employees represented by the Union. On June 24, 1995,

the Union and the UTA entered into a letter agreement which provided that the Union would represent the employees of the TRAX division “to the extent such jobs were comparable to jobs performed by bargaining unit employees in the bus division”. In July, 1998, the Union and the UTA entered into a second letter agreement which provided that UTA bus division employees could begin to transfer to the TRAX division and retain their UTA system-wide seniority. Pursuant to this letter agreement, bus division employees began transferring to the TRAX division in August of 1998.

In September of 1998, the Union and the UTA started negotiations for a new Collective Bargaining Agreement. This negotiation successfully resulted in a new comprehensive Collective Bargaining Agreement which was ratified by the Union membership and executed effectively on December 11, 1998. This 1998 Collective Bargaining Agreement incorporated the precepts contained in the July 1998 letter agreement. Pursuant to the terms of the 1998 Collective Bargaining Agreement, Carper transferred from the bus division to the TRAX division on January 25, 1999. Also pursuant to the Collective Bargaining Agreement, Burke transferred from the bus division to the TRAX division on October 11, 1999. Burke and Carper have worked in the UTA TRAX division under the Collective Bargaining Agreement since their transfer.

Under the terms of the 1998 Collective Bargaining Agreement, the Union and the UTA enter into negotiations for a new Collective Bargaining Agreement in August of 2003. It was not until May of 2004 that the Union submitted a new tentative Collective Bargaining Agreement to the Union membership for ratification. The membership refused to ratify the agreement; thus, the UTA and Union continued to negotiate. In July, 2004, a revised, tentative Collective Bargaining Agreement was reached between the Union and UTA and submitted to the membership for ratification. The contract was ratified on August 10, 2004, and was made retroactive to the end of the 1998 Collective Bargaining Agreement, December 11, 2003.

Prior to the end of the 1998 Collective Bargaining Agreement and while the UTA and Union were negotiating the terms of a new agreement, the UTA requested and received certification of its labor arrangements as required by Section 13(c) of the Urban Mass Transportation Act (UMTA) in order for the UTA to continue to receive federal funding. This certification occurred on September 29, 2003.

In August of 2004, Burke and Carper began to circulate a “petition” among TRAX division employees seeking to notify the UTA that the Union no longer represented the TRAX division employees because of the Union’s failure “to adequately address the

seniority issues at TRAX...”. (See Brief of Appellee Local 382 filed in Appeal No. 05-4079 for references).

When the UTA rejected the petition, this litigation followed.

### **SUMMARY OF ARGUMENT**

Burke and Carper failed to present any disputes of material fact which would have precluded the granting the UTA’s motion for summary judgment. Additionally, Burke and Carper failed to demonstrate a sufficient nexus between any information they desired to develop through additional discovery and their opposition to the UTA’s motion for summary judgment. Finally, Burke and Carper could not prove, as a matter of law, that the UTA’s existing bargaining unit was inappropriate under Utah law. Therefore, the District Court correctly granted UTA’s motion for summary judgment.

The District Court appropriately did not consider Burke and Carper’s motion for leave to amend complaint because the District Court had been denied jurisdiction to rule on said motion by this appeal.

The District Court appropriately dismissed the complaint against the DOL because the DOL is not required to consider matters not raised with it when the DOL certified the UTA’s labor protection agreements as contemplated under 13(c) of UMTA.

Finally, the District Court correctly dismissed the state based claim against the Union for lack of subject matter jurisdiction when the District Court dismissed all the federally based causes of action.

### **ARGUMENT**

With each issue presented for review, the Local agrees with Burke and Carper's articulation of the standard of review as advanced in their opening Brief.

#### **I. THERE WERE NO FACTUAL DISPUTES WHICH WOULD BARR THE GRANTING OF SUMMARY JUDGMENT.**

Burke and Carper argue that whether or not a bargaining unit is appropriate under Utah law is a fact sensitive issue. The Union and the UTA have argued that, in this case, the existing bargaining unit is appropriate as a matter of law. This issue was briefed extensively by the parties in Appeal No. 05-4079. Therefore, the Union will not reargue this point.

Additionally, Burke and Carper in their Memorandum in Opposition to Defendants' Motion For Summary Judgment fail to appropriately challenge any factual representation of the UTA advanced in the UTA's initial memorandum. (Aplt. App., pp 123-124). The local rules for the U.S. District Court of Utah, as stated in DUCivR 56-1(c), read as follows:

*Contested Facts Declared in Summary Judgment Motion.* A memorandum in opposition to a motion for summary judgment must begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute must be numbered, must refer with particularity to those portions of the record on which the opposing party relies and, if applicable, must state the number of the movant's fact that is disputed. All material facts of record meeting the requirements of Fed. R. Civ. P. 56 that are set forth with particularity in the statement of the movant will be deemed admitted for the purpose of summary judgment, unless specifically controverted by the statement of the opposing party identifying material facts of record meeting the requirements of Fed. R. Civ. P. 56.

The District Court referenced the failure of Burke and Carper to comply with the local rule when it held:

The Court also notes that it was hindered in its evaluation by plaintiffs' failure to comply with Local Rule 56(c), which requires that in memoranda opposing summary judgment, "[e]ach fact in dispute must be numbered, must refer with particularity to those portions of the record on which the opposing party relies, and, if applicable, must state the number of the movant's fact that is disputed." Failure to do this results in the admission of all of movant's facts not specifically controverted as outlined in the rule. Although not necessary for the court's grant of summary judgment, the court nonetheless deems as admitted all of defendants' facts not specifically controverted by plaintiffs in their memorandum in opposition to summary judgment in accordance with Local Rule 56(c).

(Aplt. App. p 227). The above quoted ruling is supported by the Court's decision in Taylor v. Pepsi-Cola Co., 196 F. 3d 1106, 1108 n.1 (10<sup>th</sup> Cir. 1999).

The District Court correctly found that there were no material issues of disputed fact which would justify the denial of the UTA's Motion for Summary Judgment.

II. THE DISTRICT COURT APPROPRIATELY DENIED BURKE AND CARPER'S RULE 56(F) MOTION.

Burke and Carper have argued that the District Court abused its discretion by denying their Rule 56(f) motion. Rule 56(f), Federal Rules of Civil Procedure, reads as follows:

**When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavits facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The District Court specifically addressed the Rule 56(f) Motion in its Order by noting that Burke and Carper failed to demonstrate a "sufficient nexus" between the information they hope to develop through future discovery and their opposition to the UTA's Motion for Summary Judgment, by saying "Absent a demonstration of their nexus, the court does not see how the analysis would be altered by further discovery." (Aplt. App., p. 211). See Patty Precision v. Brown & Sharpe Mfg. Co. 742 F. 2d 1260 (10<sup>th</sup> Cir 1984).

Finally, when the District Court was scheduling matters in this case, Burke and Carper did not raise any objections that they did not have sufficient time to conduct discovery. (Aplt. App., pp 297-300). It was not until after they had filed a motion for preliminary injunction, filed a second motion for preliminary injunction, responded to a motion to dismiss, and filed a motion for partial summary judgment, that Burke and Carper alleged they needed more time to conduct discovery.

The District Court did not abuse its discretion by denying Burke and Carper's Rule 56(f) motion.

### III. THE DISTRICT COURT COULD NOT GRANT A MOTION FOR LEAVE TO FILE AMENDED COMPLAINT.

Just before midnight on a Sunday, Burke and Carper filed their motion for leave to amend complaint. The next day, presumably without knowledge of the motion for leave to amend complaint, the District Court's issued its Order Granting Defendants' Motion for Summary Judgment and closing the case. Responses to this motion from the UTA, the Union, and the DOL were not due until September 1, 2005. DUCivR 7-1(b)(3). However, without first requesting relief to its closing order from the District Court, Burke and Carper filed their notice of appeal on August 22, 2005, ten (10) days before any party was required to file a response to the motion for leave to amend.

The filing of the notice of appeal from a final order ends any jurisdiction the District Court may have had to hear the motion for leave to amend complaint. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 103 S. Ct. 400 (1982).

This Court described this lack of jurisdiction in Garcia v. Burlington North Railroad Company, 818 F.2d 713 (10<sup>th</sup> Cir. 1987) when it said:

Filing a timely notice of appeal pursuant to Fed.R.App.P.3 transfers the matter from the district court to the court of appeals. The district court is thus divested of jurisdiction. Any subsequent action by it is null and void. In collateral matters not involved in the appeal, however, the district court retains jurisdiction. Thus, when an interlocutory appeal is taken, the district court retains jurisdiction to proceed with matters not involved in that appeal. More important to plaintiff, courts have found certain matters to be collateral to a final judgment. For example, even after a timely notice of appeal is filed, a district court may retain jurisdiction to determine the propriety and amount of attorney's fees. [Citations omitted]

818 F. 2d at 721. It is difficult to imagine any scenario in which a motion for leave to amend complaint would be collateral to a final judgment.

The District Court correctly did not, and could not, rule upon Burke and Carper's motion for leave to amend complaint.

#### IV. THE EXISTING BARGAINING UNIT IS APPROPRIATE.

Utah statutory law is very clear. Utah Code Annotated § 17A-2-1031 reads, in

pertinent part, as follows:

The district shall recognize and bargain exclusively with any labor organization representing a majority of its employees in an appropriate unit with respect to wages, salaries, hours, working conditions, and welfare and pension and retirement provisions, and, upon reaching agreement with such labor organization, to enter into and execute a written contract incorporating therein the agreements so reached. [Emphasis added]

The law does not require the UTA to bargain with the most appropriate unit or the most appropriate units; it requires that the UTA bargain with an appropriate unit. This subject was briefed extensively by the parties in Appeal No. 05-4079; therefore, the Union will not reargue this matter herein, except to state that Burke and Carper did not present any relevant new facts or law during the briefing and the hearing on the cross-motions for summary judgment to demonstrate that the existing bargaining unit at the UTA was inappropriate. A system wide bargaining unit in public transportation companies is the overwhelming norm in this country. Burke and Carper have been unable to point to anything as to why Utah, in light of the language of its statute, should be any different than the rest of our nation.

The District Court appropriately held that, as a matter of law, the UTA's existing bargaining unit is appropriate.

V. THE COMPLAINT AGAINST THE DOL WAS CORRECTLY DISMISSED.

Burke and Carper have argued that the DOL inappropriately certified, under Section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 5333(b), the labor protective agreements between the UTA and its employees. Under the federal law, had the DOL not certified those protective agreements, the UTA would have been denied the \$100s million it has received to construct the TRAX light rail system.

With this appeal, Burke and Carper are advocating the unique argument that the DOL should retroactively reconsider its past certification of UTA's labor protective agreements in light of Burke and Carper's recently articulated views on the supposed deficiencies in Utah public employment labor law. Under Amalgamated Transit Union International v. Donovan, 767 2d 939 (D.C. Cir. 1985), the only remedy available to the Burke and Carper should they be successful in their claim against the DOL is the denial of federal funds to the UTA. Therefore, the logical result of Burke and Carper's argument, if successful, is that the UTA would have to repay the \$100s million it has received from the federal government. It is in part because of such possibly extreme results that courts will normally limit their judicial review of an agency action to the record created during the administrative processes. United States v. Morton Salt Co.,

338 U.S. 632, 70 S. Ct. 357 (1950).

Burke and Carper argue in their Brief that it would be impossible for them to go back to 2001 and present their current complaints about the UTA's labor protective agreements to the DOL. However, the real problem is that Burke and Carper failed to raise any complaints about the UTA's bargaining unit, in any form, until six (6) years after the bargaining unit included the Utah TRAX business division employees.

The District Court properly dismissed the cause of action against the DOL when it held that the DOL could not be charged with knowing, during the 2001 certification of the UTA's labor protective agreements, with complaints first articulated in 2004.

#### VI. THE DISMISSAL OF THE STATE BASED CLAIM AGAINST LOCAL 382 WAS APPROPRIATE.

Interestingly, the Local does not greatly disagree with the argument advanced by Burke and Carper in Point VII of their Brief. (Appellants' Opening Brief, pp. 29-30). Although the District Court does not state any reasons for dismissing the state based cause of action against the Local, it should be presumed that the dismissal was for lack of subject matter jurisdiction. This presumption is consistent with the request made before the District Court by Burke and Carper. It is also consistent with treating the District Court's Order Granting Defendants' Motion for Summary Judgment as a final judgment

pursuant to Burlington Northern R.R. v. Huddleston, 94 F. 3d, 1413, 1416 n. 3 (10<sup>th</sup> Cir. 1996).

Since, as argued elsewhere, the dismissal of all the federal based causes of action raised by Burke and Carper were appropriate, the dismissal for lack of subject matter jurisdiction of the state based claim against the Union was equally appropriate.

#### CONCLUSION

Local 382 respectfully requests that this Court affirm the District Court's Order Granting U.S. Department of Labor's Motion To Dismiss and Order Granting Defendants' Motion For Summary Judgment.

DATED this \_\_\_\_\_ day of November, 2005.

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Joseph E. Hatch  
Attorney for Appellee Local 382

## **REQUEST FOR ORAL ARGUMENT**

The Union respectfully requests that this case be set for oral argument. This case involves important legal issues of Utah labor law within public transit districts and Union believes oral argument would further illuminate the specific legal principles at issue.

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Joseph E. Hatch  
Attorney for Appellee Local 382

### **CERTIFICATE OF COMPLIANCE WITH RULE 31.3**

In accordance with Tenth Circuit Rule 31.3(B), counsel for Union certifies that it is necessary to submit a separate brief because it is not practical to file a joint brief with the UTA. The UTA and the Union have similar but not identical interests in this case and have differing positions on some of the issues at stake.

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Joseph E. Hatch  
Attorney for Appellee Local 382

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,789 words.

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Joseph E. Hatch  
Attorney for Appellee Local 382

## **CERTIFICATE OF DIGITAL SUBMISSION**

Pursuant to the Emergency General Order filed October 20, 2004, as Amended (the “Order”), on November 29, 2005, the undersigned certifies: (1) all privacy redactions required by the Order have been made and that this electronically submitted document is otherwise an exact copy of the written document filed with the Clerk; and (2) that this electronic document has been scanned with the most recent version of McAfee VirusScan 7.0 last updated November 29, 2005, and according to that program is free of viruses.

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Joseph E. Hatch  
Attorney for Appellee Local 382

## **CERTIFICATE OF SERVICE**

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLEE LOCAL 382 OF THE AMAGAMATED TRANSIT UNION was mailed, postage prepaid, on this \_\_\_\_\_ day of November, 2005 to the following:

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