


MEL S. MARTIN, P.C.
Mel S. Martin (Bar No. 2102)
Edward T. Wells (Bar No. 3422)
5282 South Commerce Drive, #D-292
Murray, Utah 84107
Telephone: (801) 263-1493

Daniel G. Moquin (Bar # 7585)
P.O. Box 725
Tuba City, AZ 86045
Telephone (928) 283-3179
Facsimile (928) 283-3158

Attorneys for Plaintiff

FILED
CLERK, U.S. DISTRICT COURT
2004 NOV 29 P 4: 03
BY  CLERK

UNITED STATES DISTRICT COURT DISTRICT OF UTAH

LISA BURKE and MICHAEL CARPER,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

UTAH TRANSIT AUTHORITY, JOHN
ENGLISH, INDIVIDUALLY, LOCAL 382 OF
THE AMALGAMATED TRANSIT UNION,
AND THE UNITED STATES DEPARTMENT
OF LABOR,

Defendants.

MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION

No. 04-CV- 00985

JUDGE: PAUL CASSELL

Lisa Burke and Michael Carper, through counsel, file this "Memorandum In Support of Motion For Preliminary Injunction." The plaintiffs request that the Utah Transit Authority ("UTA") be enjoined from transferring untrained bus employees to the TRAX division, that the Utah Transit Authority ("UTA") be enjoined from transferring bus employees to the TRAX division with seniority rights superior to existing seniority rights of TRAX division employees,

and that UTA be enjoined from interfering with the First Amendment rights to free speech and association of TRAX division employees. UTA is currently interfering with TRAX employees' speech and association rights by denying them opportunities to post information on company and employee bulletin boards or in a similar area.

ARGUMENT

I. THE EMPLOYEES MEET THE STANDARD FOR INJUNCTIVE RELIEF IN THE TENTH CIRCUIT.

In the Tenth Circuit a party must establish the following for a preliminary injunction. “(1) [a] substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest.” *Kikumura v. Gallegos*, 242 F.3d 950, 955 (10th Cir. 2001).

As explained in detail below, the plaintiffs are able to establish all of these requirements. They are likely to prevail on the merits since the plain language of statutes cited in Plaintiffs' Complaint gives to them the rights that are requested, and which are currently being denied by UTA. The plaintiffs will be irreparably harmed as a matter of law on their First Amendment claims and will suffer a deterioration of their working conditions and be exposed to significant physical risk if the injunction is not granted.

The company will not be damaged by the injunction and will in fact receive collateral benefits since it will operate more safely if the injunction is granted.

Finally, the injunctive relief is in the public interest since UTA is presently engaged in behavior that threatens the safety of the public. The plaintiffs suggest that the Court hold an evidentiary hearing so it can take testimony on the dangerous conditions that exist due to UTA's

existing policy of hiring inexperienced or unqualified employees and supervisors from within the bus system rather than hiring experienced railroad or light rail workers from outside the ranks of UTA employees.

II. THE EMPLOYEES ARE SUBSTANTIALLY LIKELY TO PREVAIL IN THEIR UNDERLYING LAWSUIT.

The employees filed the lawsuit primarily to remedy unacceptable work practices imposed upon them by UTA and to exercise their right to be represented by a representative of their own choosing. The plain language of a state and federal statute recognizes this right to an appropriate bargaining unit.

Utah Code ANN. § 17A-2-1031 (2004) provides that:

Employees of any public transit system established and operated by the district shall have the right to self-organization, to form, join, or assist labor organizations and to bargain collectively through representation of their own choosing provided, however, that such employees and labor organizations shall not have the right to join in any strike against such public transit system. 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.

Additionally, federal law dealing with public transit systems receiving federal funds states that:

Section 13(c) as codified as 49 U.S.C. §5333(b) states that:

(1) As a condition of financial assistance under sections 5307-5312, 5318(d), 5323(a)(1), (b), (d), and (e), 5328, 5337, and 5338(b) of this title **the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. The agreement granting the assistance under sections 5307-5312, 5318(d), 5323(a)(1), (b), (d), and (e), 5328, 5337, and 5338(b) shall specify the arrangements.**

(2) Arrangements under this subsection shall include the provisions that may be necessary for—

(A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;

- (B) the continuation of collective bargaining rights;
- (C) the protection of individual employees against a worsening of their positions related to employment;
- (D) assurances of employment to employees of acquired mass transportation systems;
- (E) assurances of priority of reemployment of employees whose employment is ended or who are laid off; and

(3) Arrangements under this subsection shall provide benefits at least equal to benefits established under section 11326 of this title.

§ 13(c), 49 U.S.C. § 5333(b) (emphasis added).

There can be no more important collective bargaining right than the right of a group to choose a representative. If this Court applies the plain language of the statutes, it will have to find for the plaintiffs. Thus, the plaintiffs are substantially likely to prevail in the underlying suit.

Similarly, the defendants have denied the plaintiffs the right to post information on bulletin boards. UTA has granted that right to the incumbent union and allows individual employees to post information. However, it has interfered with the putative class' right to free speech and association. UTA, as a state entity, cannot choose which speech it will allow without a showing of a compelling interest. UTA cannot make such a showing under the facts of this case; therefore, the plaintiffs will likely prevail on this issue.

III. THE PLAINTIFFS WILL SUFFER IRREPARABLE INJURY IF INJUNCTIVE RELIEF IS NOT GRANTED.

In cases of an interference with constitutional rights such as protected speech, any interference is considered irreparable harm as a matter of law. *American Civil Liberties Union et al v. Johnson et al*, 194 F.3d 1149, 1163 (10th Cir. 1999). The acts of UTA, as alleged in the Complaint, show a *prima facie* case of denial of the right to free speech.

The prohibition on the transfer of untrained and unqualified bus drivers to the TRAX division as operators with seniority rights superior to those of existing TRAX employees will

also prevent irreparable harm in two ways. The least important, albeit still significant is the impact on the personal lives of the TRAX employees. For example, one TRAX maintenance employee is a recent mother. She has a day shift, which allows her to be with her child at night, and presently has access to acceptable day care. If UTA is allowed to transfer a higher seniority bus employee to her department as planned, her loss of seniority would cause her to lose the right to her daytime shift and force her to work nights. This would cause a problem in providing for the care of her child while at work. There is no way to fully compensate a mother for the disruption of her family life and thus she will be irreparably harmed. Many other seniority problems will occur if UTA is allowed to transfer bus division employees to the TRAX division with existing seniority rights.

The second irreparable harm is more complex and goes to the very heart of this case. The National Labor Relations Act and Utah Code ANN. § 17A-2-1031 (2004) protect the rights of employees to engage in “concerted activity.” Concerted activity clearly includes actions taken to protect the safety of employees by bargaining for safe working conditions and to engage in other conduct to protect safety when a union fails to protect safety. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). Concerted activity has made the coal mines in United States some of the safest in the world. Ironically, because countries like the “People’s Republic of China” do not respect the right of the “People” to engage in concerted action over safety issues, the coal mines in China are some of the most dangerous in the world.

Equally ironic in the case at bar, the incumbent union and UTA have conspired to deny the employees of TRAX the right to engage in concerted activities to address glaring safety deficiencies that have arisen in the TRAX division. The incumbent union and UTA appear to be more concerned with continuing the ability of bus employees to transfer to TRAX with their

existing seniority intact then with safety issues. Supervisors are supervising TRAX rail employees despite having little or no experience with light-rail trains. This is contrary to the safer practice of cities such as San Diego. For example, a light-rail supervisor in San Diego is required to have many years of experience with light-rail trains before assuming a supervisory position. As explained in section five of this memorandum, alert TRAX employees have prevented the occurrence of at least one catastrophic accident precipitated by the incompetence of a supervisor who was transferred from the bus system without experience or an aptitude for the TRAX supervisory position. Despite numerous incidents involving this TRAX supervisor, she has not been sent back to the bus system.

This Court should grant this injunction to prevent the continued transfer of unqualified bus system employees to the TRAX division. Granting the requested injunction could possibly prevent a future catastrophic accident. The occurrence of such an accident should certainly be considered irreparable harm. The employees, once granted their appropriate bargaining union, will then be in a position to bargain for a change in these conditions. UTA is planning to upset the status quo again by an imminent transfer of a number of bus system employees to the TRAX division, with their bus system seniority transferring over. If this is allowed to happen, it will seriously impair the seniority rights of the class plaintiffs and will serve to worsen labor conditions in the TRAX division. UTA has been unwilling to address these serious seniority and safety issues.

Thus, this Court should use its equitable powers to protect the TRAX employees and the public from a potentially catastrophic accident with a potential of causing serious injury or death to both the public and members of the putative class, and also to protect TRAX employees from

having their seniority and other employee rights diminished by the transfer of bus employees to the TRAX division with intact seniority rights.

IV. THE POTENTIAL HARDSHIP TO THE EMPLOYEES FAR EXCEEDS THE HARDSHIP TO THE EMPLOYERS.

Employees being denied the ability to post information seriously interferes with their constitutional rights to free speech and association as well as their ability to undertake concerted action on safety issues. UTA will suffer no injury by allowing the employees to post information.

In regards to the injunction against the transfer of employees, the hardship that may be suffered by the plaintiffs is loss of seniority rights, and possible injury or death from an accident caused or contributed to by inexperienced personnel transferred to TRAX with superior employee rights. The transferred, inexperienced employees can be a safety hazard as detailed in section five of this memorandum. UTA would benefit from a system that hired experienced railroad or light rail employees or at least engaged in a training period in which it realized that bus experience does not train an individual for rail operations and thus no seniority should be afforded the transferred employees.

V. IT IS IN THE PUBLIC INTEREST TO GRANT THE PRELIMINARY INJUNCTION.

The public will enjoy increased safety due to the granting of the injunction. While the plaintiffs suggest that the Court hold an evidentiary hearing to understand the safety concerns the following may prove illuminating.

UTA has a policy, dictated at the highest level of administration, of hiring only bus drivers to operate TRAX trains. Despite having an FRA (Federal Railroad Administration) licensed engineer employed in the TRAX maintenance department, UTA will not let him transfer to TRAX operations in deference to bus drivers who have virtually no knowledge of railroads. Neither is he allowed to go into supervision or teach classes. UTA's top administrators, those

above the TRAX manager and directors, have had this agreement with Amalgamated Transit Union; local 382, since TRAX was first built.

Bus drivers transferring to rail operations, or bus mechanics transferring to TRAX maintenance get to keep their company-wide seniority, which means the newest rail employees often have better shifts and working conditions than longer term TRAX employees. This is referred to as "bumping." In an ironic twist, UTA expects TRAX employees who will be bumped to train the new transfers.

Bus drivers transferring to TRAX must complete numerous tests to become operators. These include signal and switch classes. Understanding signals and switches is so critically important it cannot be over emphasized. Yet many new TRAX trainees have gone back to the bus division because of an inability to grasp these fundamentals of railroad work, having failed the TRAX classes or operating trains incompetently after passing their classes. However, UTA continues to treat bus and rail workers as interchangeable. UTA, through its human resources office, routinely promotes bus personnel to TRAX rail supervisors. One such promotion has resulted in numerous near accidents, averted only by luck and the scrutiny of experienced TRAX personnel. This bus driver came over to TRAX about two years ago to take the operators' class. She failed the signals test and the operating test multiple times due to an inability to understand rail work. Shortly after, it was announced she had been selected as a TRAX supervisor. She failed the supervisors' test, was re-instructed for four months and was then certified as a supervisor. It is unclear if she ever was able to pass the test.

Each TRAX supervisor must at times act as a "controller." The controller stays in the radio room and has oversight of all TRAX trains in the system. A thorough understanding of signals, switches, railroad regulations and the TRAX system is essential. This supervisor routinely gives train operators authorization to bypass red signals without trying to determine the cause. She gave a train operator authorization to bypass a red signal, oblivious to the fact that a disabled train was on the same track a short distance ahead of the signal. The train operator,

understanding the significance of the red signal and moving at a reduced speed, rounded a curve to find a stopped train on his track in front of him.

This same supervisor authorized a train to bypass a red when another train was using a crossover track ahead of it. The TRAX operators are justifiably concerned about safety when this supervisor is in control.

About two months ago a new train operator returned to bus after having "trailed" a switch at an interlocking. This is when a train crosses a switch that is not set for that direction of train travel. Trailing causes damage and these electronically controlled switches can cost as much as \$30,000 to replace. The train operator stated later that the switch did not appear to be set correctly. The supervisor referred to above was at the scene and did nothing to stop the operator from trailing through the switch. She showed no indication that she understands switches.

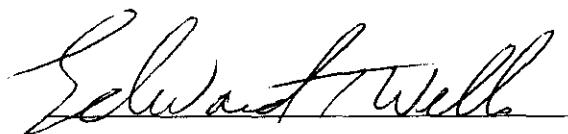
TRAX operators have complained about this situation but no apparent action has been taken against this supervisor. At least one operator filed a signed complaint. This supervisor was promoted over several well-qualified and experienced train operators.

Adopting a policy allowing expanded hiring of TRAX personnel is in the best interest of the public.

CONCLUSION

The Court should grant the preliminary injunction requested by the plaintiffs. The plaintiffs clearly meet the requirements for injunctive relief in the Tenth Circuit. A failure to grant the relief will lead to irreparable harm to the plaintiffs and may result in severe injury to the public.

Dated this 29th day of November, 2004

A handwritten signature in cursive script, reading "Edward T. Wells", written in black ink on a white background.

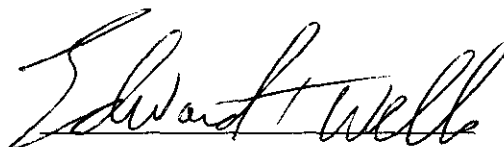
Edward T. Wells, Attorney for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of November, 2004, I caused to be mailed, postage prepaid, the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION to the following:

James S. Jardine
Scott A. Hagen
Ray Quinney & Nebeker
36 South State Street #1400
Salt Lake City, Utah 84111

Joseph E. Hatch
5295 South Commerce Drive
Suite 200
Murray, Utah 84107

A handwritten signature in black ink, appearing to read "Edward T. Wells". The signature is written in a cursive style with a horizontal line underneath the name.