

No. 05-4222
ORAL ARGUMENT IS NOT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Appellants,

v.

UTAH TRANSIT AUTHORITY, JOHN ENGLISH, individually,
Local 382 of the AMALGAMATED TRANSIT UNION and
THE UNITED STATES DEPARTMENT OF LABOR,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
THE HONORABLE PAUL G. CASSELL,
DISTRICT JUDGE

BRIEF FOR APPELLEE UNITED STATES
DEPARTMENT OF LABOR

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JURISDICTIONAL STATEMENT

- A.** The district court had jurisdiction under 28 U.S.C. 1331, and 28 U.S.C. 1367(a).
- B.** This Court has jurisdiction over this appeal under 28 U.S.C. 1291.
- C.** Appellants filed a timely notice of appeal on August 22, 2005. Fed. R. App. P. 4(a)(1)(B).

D. The appeal is from a final order, entered August 15, 2005, which disposed of all claims except that against the United States Department of Labor (DOL). Previously, on April 7, 2005, the court dismissed the claims against the DOL. We believe that once summary judgment was granted against the other defendants on August 15, 2005, this order became final in that the intent of the district court was "to dispose of plaintiff's entire cause of action." Robert-Gay Enters., Inc. v. State Corp. Comm'n, 753 F.2d 857, 859 n.1 (10th Cir. 1985). Further, the pendency of a motion to file an amended complaint, filed after the order dismissing the claims against the DOL, "ha[s] no effect upon the finality" of that order. Miller v. Shell Oil, 345 F.2d 891, 893 (10th Cir. 1965). Nor, given what we believe was the intent of the district court that its decision be final, does the absence of a separate judgment preclude this Court's review. See Fed. R. App. P. 4(a)(7)(B) ("A failure to set forth a judgment or order on a separate document***does not affect the validity of an appeal from that judgment or order."). See also, Burlington Northern R.R. Co. v. Huddleston, 94 F.3d 1413, 1416 n.3 (10th Cir. 1996).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether based on the DOL's certification, under 49 U.S.C. 5333(b), that the Utah Transit Authority (UTA) had "fair and equitable" "arrangements" to protect "the interests of employees

affected by" the UTA's receipt of federal grants, its employees may obtain judicial relief against the DOL on a claim that they are in an inappropriate bargaining unit.

STATEMENT OF THE CASE

This case involves a lawsuit by state transit employees who assert claims under state and federal labor law as well as the First Amendment, and seek injunctive and monetary relief. Appellants, Lisa Burke and Michael Carper - individually and on behalf of a putative class of light-rail employees of the UTA who are also members of Local 382 of the Amalgamated Transit Union (Local 382) (representing both light-rail and bus employees)¹ - filed suit in federal district court against the UTA, its general manager, Local 382, and the United States Department of Labor. Burke claimed that Local 382 unfairly favored UTA's more numerous bus employees over the agency's light-rail employees, and that the UTA and the DOL had failed to respect the right of the light-rail employees to establish their own separate collective bargaining unit.

With respect to the DOL, Burke's complaint asserted a cause of action under Section 5333(b) of the Federal Transit Law, 49 U.S.C. 5333(b) (formerly § 13(c) of the Urban Mass Transportation Act) (§ 13(c)), preserving the labor rights of transit employees

¹ For convenience, we hereinafter refer to appellants as Burke.

"affected" by federal mass transportation grants, and the Administrative Procedure Act (APA). The district court dismissed that claim for failure to state a claim upon which relief may be granted. Subsequently, the court denied Burke's request for a preliminary injunction on the ground that "plaintiffs ha[d] not established that they [were] substantially likely to prevail on the merits of their claims at trial" (App. A. 99). Burke appealed.

While that appeal was pending, the district court granted summary judgment in favor of the remaining defendants. The previous day, Burke had filed a motion for leave to file an amended complaint. That motion was still pending (responses had yet to be filed) when Burke filed the present appeal. This Court ordered that the appeals be heard together.

STATEMENT OF FACTS

I. Statutory Background

A. Urban Mass Transportation Act, Section 13(c)

Section 13(c) of the Urban Mass Transportation Act of 1964, 78 Stat. 307, as amended, 49 U.S.C. 5333(b), was enacted out of Congressional concern for "the increasingly precarious financial condition" of private transportation companies nationwide.

Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15, 17 (1982). Congress provided financial aid to enable local governments to acquire failing companies and

create public transit authorities. Id. "At the same time, however, Congress was aware that public ownership might threaten existing collective-bargaining rights of unionized transit workers employed by private companies." Id.

Congress addressed that concern through § 13(c), which requires that "a state or local government must make arrangements to preserve transit workers' existing collective-bargaining rights before that government may receive federal financial assistance for the acquisition of a privately owned transit company." Jackson, 457 U.S. at 16. These arrangements, called "employee protective arrangements" or "§ 13(c) agreements" (see No. 05-4079 Supp. App. 248) are negotiated and signed by the employing public transit authority and the labor organization representing employees. See 29 C.F.R. 215.3(a)(1).² The obligation to conclude § 13(c) agreements continues after this initial acquisition as a prerequisite to subsequent grants of federal funds for any continued improvement or operation of the

² In the event, however, that no agreement is reached between the transit authority and the labor organization that meets the requirements of § 13(c), the certification will be based on terms and conditions determined by the Department to meet specified standards. 29 C.F.R. 215.3(d)(7), (e)(3). In addition, "[I]f there is no labor organization representing employees, the [DOL] will set forth the protective terms and conditions in the letter of certification." 29 C.F.R. 215.4(b). "The certification made by the Department of Labor will afford the same level of protection to those employees who are not represented by labor organizations." 29 C.F.R. 215.4(a).

transit system. Jackson, 457 U.S. at 19; see also Amalgamated Transit Union, Int'l v. Donovan, 767 F.2d 939, 940 (D.C. Cir. 1985), cert. denied, 475 U.S. 1046 (1986); 29 C.F.R. 215.3(b) (2), (b) (3). The Secretary of Labor's involvement in this process is limited to the certification of these arrangements. Section 13(c) requires "[a]s a condition of financial assistance," that "the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable." 49 U.S.C. 5333(b) (1). The section further provides:

Arrangements * * * shall include 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

(F) paid training or retraining programs.

49 U.S.C. 5333(b) (2).

In administering the process, "the Department notifies relevant unions, if any, * * * and provides the grant applicant and the affected union(s) an opportunity to develop the terms and conditions of the protections. The Department provides technical and mediation assistance * * * during the negotiations." 60 Fed. Reg. 62,964 (Dec. 7, 1995); see also Guidelines, Section 5333(b), Federal Transit Law, 29 C.F.R. Part 215, particularly Section 215(b), (c). The financial assistance itself is provided through grants made by the Department of Transportation's Federal Transit Administration for the financing of mass transportation systems. See 60 Fed. Reg. 62,964 (Dec. 7, 1995).

B. Utah Code

In response to the enactment of Section 13(c) of the Urban Mass Transportation Act, Utah, as well as other states, enacted legislation according public transit employees the collective bargaining rights they would enjoy as private employees, except for the right to strike. Thus, Utah Code Ann. 17A-2-1031 (2004) provides:

Employees of any public transit 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 * * *. 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.

C. Applicable Protective Arrangements

On October 24, 2001, the DOL issued a certification letter for a grant to UTA. DOL Add. 1a. The certification was conditioned on a number of provisions, which consisted of "protective arrangements" included in prior grants to UTA ("Appendix C," dated September 29, 1993). Add. 2a.

Paragraph 3 of the arrangements, regarding collective bargaining rights, provides:

The collective bargaining rights of employees represented by the Union including the right to arbitrate or otherwise resolve labor disputes and to maintain checkoff arrangements, as provided by applicable laws, policies and/or existing collective bargaining agreements shall be preserved and continued * * *.

No. 05-4079 Supp. App. 249.

The arrangements (paragraph 8(a)) further provide for arbitration of "[a]ny labor dispute or controversy between the Public Body and any employee represented by the Union * * * regarding the application, interpretation, or enforcement of this Arrangement." No. 05-4079 Supp. App. 254.

II. Facts of This Case³

The UTA was created through the acquisition of a series of private transit companies, beginning in 1969. Compl. ¶¶ 9-10, App. A. 13. The UTA acquired these companies using federal funds received under the Urban Mass Transportation Act. Id. at ¶ 9.

The UTA presently provides both bus and light-rail transportation services. Compl. ¶¶ 23-24, App. A. 14. The UTA's light-rail division, known as TRAX, was established sometime after 1998. Id. at ¶ 21. Nearly all of TRAX's light-rail division employees came from the ranks of UTA's bus personnel (id. at ¶ 23), and retained their bus division seniority rights. App. B. 202, Aplnts. Attch. C 3. Light-rail division employees number approximately 150, while bus division employees number approximately 1000. Compl. ¶ 60, App. A. 18.

The private companies that were acquired to create the UTA all employed transit workers who enjoyed rights to self-organization, to form, join or assist labor organizations, and to bargain collectively through their chosen representatives. Compl. ¶ 12, App. A. 13. Local 382 is the incumbent union responsible for the representation of UTA employees. Id. at ¶ 16. The union has been in existence, representing employees of the UTA, since before the creation of the TRAX light-rail

³ This statement is based on the facts alleged in Burke's complaint, and those set forth in the opinion of the district court.

division. Compl. ¶ 21, App. A. 14. The local "represented Salt Lake's streetcar operators from 1904 up until the 1940s" (App. B. 207), then represented bus and streetcar drivers until the streetcars were eliminated. And the local continues to be the collective bargaining unit for both bus and light-rail employees of the UTA. Compl. ¶¶ 23-28, App. A. 14-14a.

The present lawsuit "arose in 2003 when negotiations between the union and UTA began on a new collective bargaining agreement." App. B. 202, Aplnts. Attch. C. 3. During the negotiations, "several TRAX employees [unsuccessfully] petitioned management seeking separate union representation." Id. On August 10, 2004, the union's membership ratified a new collective bargaining agreement, which retained the prior provisions as to transfer of bus employees into TRAX without loss of seniority. App. B. 202-203, Aplnts. Attch. C 3-4.

On September 7, 2004, Lisa Burke, a TRAX employee, requested that the DOL "investigate * * * and take the appropriate action" in regard to the dispute between light-rail employees, Local 382 and the UTA. September 7, 2004 Letter and attached Complaint by Lisa Burke, DOL Add. 5a; see also Compl. ¶ 121, App. A. 29. Burke stated that "[t]he essence of my claim is that UTA is negotiating with an inappropriate bargaining unit." September 7, 2004 Letter and Complaint, DOL Add. 6a. In the complaint accompanying her letter, Burke claimed that the "UTA denies these

rail workers the right to pick their own bargaining representative in an appropriate bargaining unit." Id. Burke further claimed that Local 382 was an improper bargaining representative, imposed by her employer, and that this rendered UTA's "existing 'protective arrangements' inadequate." Id.

More specifically, Burke alleged that the protective arrangement was "inadequate" (September 7, 2004 Letter and Complaint, DOL Add. 8a) for two reasons. First, Burke asserted that Local 382, which had negotiated the arrangement with the UTA, was not the appropriate bargaining unit because TRAX light-rail division employees, although members of Local 382, were not fairly represented by the union. Id. Second, Burke alleged that the arrangement was inadequate because it did not include a procedure "to assure that such agreements are being negotiated with a representative which is supported by the majority of the employees in an appropriate bargaining unit." Id. The Secretary of Labor, Burke asserted, had "an obligation" to ensure that such a procedure was included in § 13(c) agreements and adequately enforced, and to "suspend federal funds until UTA allows the rail workers to choose their own representatives." Id.

On September 28, 2004, the DOL informed Burke that the existing protective arrangement fully satisfied the requirements of § 13(c). September 28, 2004 response by DOL, DOL Add. 11a; see also Compl. ¶ 122, App. A. 29-30. The DOL also informed

Burke that her allegations concerning the appropriateness of a collective bargaining unit were covered by state law, not § 13(c), and therefore should be raised "according to the established processes under state law." DOL Add. 12a.

Instead, Burke filed the present lawsuit. She sought injunctive relief barring the DOL from disbursing federal funds to the UTA as a result of the Department's alleged failure "to preserve the right to choose a representative for collective bargaining." Compl. ¶ 123 & Prayer for Relief ¶ 2, App. A. 30. Burke also sought unspecified monetary damages.⁴ Compl. ¶ 127 & Prayer for Relief ¶ 7, App. A. 30.

III. Order of the District Court Dismissing Claims Against DOL

The court "agree[d] * * * that [DOL's] certification decisions under 49 U.S.C. § 5333(b) are amenable to judicial review," but reasoned that "any such review would be limited to the record before the agency at the time of the certification decision at issue." App. A. 119, Aplnts. Attch. B.). The court then noted that "plaintiffs have failed to plead or otherwise allege that the agency had any knowledge or information regarding the current labor dispute when it made the challenged certification decision * * *." App. A. 119-20 (Aplnts. Attch.

⁴ Burke later clarified that no monetary relief was being sought from DOL. App. B 272.

B.). The court then held that "[a]bsent any such allegations, plaintiffs have failed to state a claim upon which relief may be granted and their claims against the U.S. Department of Labor should be dismissed * * *." Id. at 120 ((Aplnts. Attch. B.)).

IV. Motion To File Amended Complaint

Subsequent to the issuance of the dismissal order, on June 13, 2005, the DOL again certified UTA's employee protective arrangements in connection with four new grant applications. The DOL, pursuant to its regulations, had notified Local 382, but had not notified Burke. Subsequently, Burke moved to file an amended complaint to reflect these developments (as well as make other additions regarding the claims against UTA and Local 382). App. B. 169, 195-96. The district court did not rule on that motion, which was filed on Sunday, August 14, 2005 (at 11:48 p.m. and served by mail). The next day, the court issued its order granting summary judgment. Id. at 200. On August 22, 2005, before the time to respond to the motion had expired (see DUCivR 7-1(b)(3) (opposition due 15 days after service); Fed. R. Civ. P. 6(e) (three days added for service by mail)), Burke filed a notice of appeal. Id. at 213.

SUMMARY OF ARGUMENT

Burke never discusses the only statutory provision pertinent to the DOL - § 13(c). Under that provision, the district court

properly dismissed Burke's claim against the Department as having failed to state a claim upon which relief may be granted.

1. Section 13(c) neither creates federal causes of action for breaches of § 13(c) agreements and collective bargaining arrangements, nor disturbs the exclusion of local government employers from coverage by the National Labor Relations Act (NLRA). Grant recipients must commit only to preserving "the essence of federally-defined collective bargaining rights" (emphasis added) - "'[g]ood faith' bargaining, to a point of impasse if necessary, over wages, hours and other terms and conditions of employment." Amalgamated Transit Union, 767 F.2d at 950-51. The role of the DOL is to certify that the proposed "protective arrangements" are "fair and equitable" under the statutory standards, and, if there were to be a fundamental change in state law contrary to the policy of 13(c), to cut off grants or take other appropriate measures. Thus, Burke's invocation of Section 9(b) of the NLRA (National Labor Relations Board (NLRB) to determine appropriate bargaining unit, 29 U.S.C. 159(b)) as the "statutory requirement that the DOL has not satisfied" (Aplnts. Br. 27) is baseless.

2. Burke's complaint sets forth no deficiency in the arrangements that the DOL has approved, nor any serious departure from such arrangements. Rather, it alleges only that current circumstances require a new and separate bargaining unit for TRAX

employees. That matter has no relation to the DOL's responsibility for applying the broad standards of § 13(c). It is nothing more than a discrete labor law dispute as to "the existence of an appropriate bargaining unit." Aplnts. Br. 9. The circumstances of that dispute in 2004 were not even before the Department in 2001, the time of the challenged certification. Consequently, the district court properly dismissed Burke's claim against the DOL on that ground. Moreover, even if the Department had known in 2001 of such a dispute or Burke had been permitted to file the proposed amended complaint challenging the 2005 certification, her claim would have been unavailing since the DOL has no statutory role in such disputes.

3. Burke claims, however, that, notwithstanding the absence of such allegations in her complaint, the "lawsuit was based on the fact that DOL failed to satisfy its affirmative duty to study Utah law and ascertain that no mechanism existed to protect the workers' right to unit clarification * * *" (emphasis supplied). Aplnts. Br. 26. Yet such a claim (whether challenging the 2001 or 2005 certifications) would also lack merit. There is no mandate under § 13(c) that the state provide an independent board comparable to the NLRB to make the determination that employees are in the "appropriate" bargaining unit explicitly required by Utah law (Utah Code Ann. 17A-2-1031 (2004)). Here, there was an effective dispute resolution mechanism in that, as the UTA

acknowledged to the district court, Burke's claim "is cognizable in state court." Aplnts. App. B. 294.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review applied to the dismissal of a challenge to administrative action for failure to state a claim upon which relief may be granted (Fed. R. Civ. P. 12(b)(6)) is de novo. Colorado Env'tl. Coalition v. Wenker, 353 F.3d 1221, 1226 (10th Cir. 2004). The determination of the Secretary of Labor that arrangements under § 13(c) are "fair and equitable" under the provision's requirements is subject to judicial review, but is entitled to deference. Kendler v. Wirtz, 388 F.2d 381, 384 (3d Cir. 1968) ("It is for the reasonable accommodation of unavoidably conflicting interests in such a situation as this that the Congress has seen fit to make the judgment of the Secretary of Labor as to what is fair and equitable controlling."); Amalgamated Transit Union, Int'l v. Donovan, 767 F.2d 939, 945 n.7 (D.C. Cir. 1985) (Kendler "adopted a limited scope of review for situations where the Secretary decides whether or not a specific provision within a labor agreement satisfies one of section 13(c)'s express objectives"), cert. denied, 475 U.S. 1046 (1986).

II. UTA'S EMPLOYEES MAY NOT OBTAIN JUDICIAL RELIEF ON A CLAIM OF AN "INAPPROPRIATE" BARGAINING UNIT BASED ON DOL'S CERTIFICATION OF "FAIR AND EQUITABLE" "ARRANGEMENTS" TO PROTECT "THE INTERESTS OF EMPLOYEES AFFECTED BY" UTA'S RECEIPT OF FEDERAL GRANTS

The portion of Burke's brief addressing her claim against the DOL (Aplnts. Br. 26-29) does not even cite much less discuss § 13(c), which prescribes the only statutory duties pertinent to the Department. Under that provision, the district court correctly held that Burke has failed to state a claim upon which relief may be granted.

A. Section 13(c) Conditions Receipt Of Grants On Maintaining The "Essence Of Federally-Defined Collective Bargaining Rights," Not On Following The Procedures Of The NLRA

The Supreme Court made clear in Jackson that § 13(c) "c[ould] not [be] read * * * to create federal causes of action for breaches of § 13(c) agreements and collective bargaining agreements," (457 U.S. at 29), and thus "le[ft] intact the exclusion of local government employers from the National Labor Relations Act * * *" (emphasis added). Id. at 26. See Amalgamated Transit Union, 767 F.2d at 950 ("Congress chose not to incorporate the entire structure and requirements of the NLRA into section 13(c)."). Rather, the section conditioned the receipt of federal grants on the preservation of "the essence of

federally-defined collective bargaining rights" (emphasis added) - "'[g]ood faith' bargaining, to a point of impasse if necessary, over wages, hours and other terms and conditions of employment." Id. at 950-51.

Thus, Burke's quotation of Section 9(b) of the NLRA (NLRB to determine appropriate bargaining unit, 29 U.S.C. 159(b)) and her assertion that "[i]t is this statutory requirement that the DOL has not satisfied" (emphasis added) (Aplnts. Br. 27) are inexplicable. There is no such requirement. As Jackson concluded, "Congress designed § 13(c) * * * to accommodate state law to collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law." 457 U.S. at 28. The role of DOL under § 13(c) is to first, certify as of the time of a pending grant application that the "protective arrangements" are "fair and equitable" under the five standards, and second, if the state were to change its law "'contrary to the policy of 13(c)'" and thus disregard the threat of "'receiving no further UMTA funds,'" "'halt the flow of funds or take other appropriate action.'" Amalgamated Transit Union, 767 F.2d at 948 n.9; Local Div. 589, Amalgated Transit Union v. Massachusetts, 666 F.2d 618, 634 (1st Cir. 1981), cert. denied, 457 U.S. 1117 (1982).⁵

⁵ Only a change that is "basically unfair or inequitable" would be problematic since "Congress's general intent to secure fair arrangements does not require the implementation of any

B. Burke's Complaint Alleged Only A Discrete Dispute Over The Appropriate Bargaining Unit For TRAX Employees, Not Systemic Failure To Guarantee Fundamental Rights

The allegations in Burke's complaint have nothing to do with the broad guarantees that are the province of DOL under § 13(c). Burke has not alleged that there was any change, whether or not objectionable, in the arrangements that the Secretary had repeatedly certified to be "fair and equitable" implementations of the five standards of § 13(c). Nor did the complaint question the overall structure of guaranteed rights. Rather, its allegations set forth nothing more than a classic and discrete labor law dispute within the framework of the existing arrangements - a dispute over the adequacy of union representation and the appropriateness of a bargaining unit.⁶ See e.g., St. Anthony Hosp. Sys., Inc. v. NLRB, 884 F.2d 518

particular set of detailed provisions." Local Division 589, 666 F.2d at 634.

⁶ Burke describes the case as "an accretion case" (Aplnts. Br. 9) - one alleging that "plaintiffs have been improperly 'accreted' to an already existing unit" (App. B. 206-07) - versus "a severance case" - "one in which plaintiffs seek 'severance' from an existing bargaining unit." Id. at 206. The complaint concludes that "TRAX employees have effectively been denied representation by local 382" (Complnt. ¶ 65, App. A. 19) and that "[t]he failure of Local 382 to represent the interests of TRAX operators has denied to TRAX operators the right to bargain for seniority rights, higher wages and other benefits which would have come to them had they been able to bargain separately as TRAX employees." Complnt. ¶ 66, App. A. 19.

(10th Cir. 1989); NLRB v. Foodland, Inc., 744 F.2d 735 (10th Cir. 1984). Indeed, Burke emphasizes that "[t]he first and foremost of the disputes is the existence of an appropriate bargaining unit."⁷ Aplnts. Br. 9. The district court correctly held (without reference to whether the DOL could properly have addressed such a dispute) that since the circumstances of that dispute, arising years later, were not before the Department at the time of the challenged certification, Burke's claim against the DOL had to be dismissed on that ground.⁸

And to the extent that Burke's proposed amended complaint challenged the certification made in 2005 on the ground of an inappropriate bargaining unit, that would have made no difference since, as just established, the DOL has no statutory role in such

⁷ Ultimately, the district court, in denying plaintiffs' motion for partial summary judgment against the remaining defendants, held that "the system-wide unit recognized in the most recent contract negotiations was not 'inappropriate.'" App. B. 210.

⁸ Burke offhandedly asserts that "[o]f course, since DOL did not even notify TRAX employees that protective arrangements concerning them were being created, the Trial Court's finding is also flawed from a due process perspective." Aplnts. Br. 28. Burke omits stating that, as required by DOL's regulations, the employees' union, Local 382, was notified. 29 C.F.R. 215.3(b). Moreover, Burke acknowledges that Local 382 is the "incumbent" (Compl. ¶ 16, App. A. 13) bargaining representative for TRAX employees, and in the absence of a determination by a Utah authority that such representation is improper (see discussion infra 22-24), there is no basis for Burke's contention that providing notice to the Local, as her bargaining representative, was in any way defective.

disputes.⁹ It is therefore inconsequential that the district court did not have the opportunity to address Burke's motion to file the amended complaint.¹⁰ Thus, a remand to permit a ruling on that motion would be unwarranted. See Mountain View Pharmacy v. Abbott Labs., 630 F.2d 1383, 1389 (10th Cir. 1980) ("While Rule 15(a) [(Fed. R. Civ. P. 15(a))] requires that leave to amend be freely given, the Supreme Court has declared that this requirement is not applicable when the 'futility of amendment' is 'apparent.'") (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)); Gohier v. Enright, 186 F.3d 1216, 1218 (10th Cir. 1999).

**C. Consistent With § 13(c), Utah's
Courts Provide A Forum For
Adjudicating An Alleged Deprivation**

⁹ For this reason, Burke's discussion as to the duty of an administrative agency to "consider all relevant factors" (Aplnts. Br. 28) is irrelevant.

¹⁰ There is no basis for Burke's claim that the district court "ignor[ed]" (Aplnts. Br. 15) her motion. The filing of a notice of appeal deprived the court of jurisdiction before the time to respond to the motion had expired. See Garcia v. Burlington N. R.R. Co., 818 F.2d 713, 721 (10th Cir. 1987). Similarly, Burke errs in claiming that "since no responsive pleading had been filed by the DOL, the plaintiffs did not need to seek permission to amend their claims." Aplnts. Br. 17. See Glenn v. First Nat'l Bank In Grand Junction, 868 F. 2d 368, 370 (10th Cir. 1989) ("After the court granted the motion to dismiss, Appellants could have amended their complaint only by leave of court or by written consent of the adverse party."); Calderon v. Kansas Dep't of Soc. & Rehabilitation Servs., 181 F.3d 1180, 1185 (10th Cir. 1999).

**Of The Right To An "Appropriate"
Bargaining Unit**

Burke argues here, however, that the protective arrangements applicable to the UTA are insufficient. More specifically, Burke states, without referencing any of the allegations in her complaint, that her "lawsuit was based on the fact that DOL failed to satisfy its affirmative duty to study Utah law and ascertain that no mechanism existed to protect the workers' right to unit clarification * * *" (emphasis supplied). Aplnts. Br. 26. Yet even assuming that the complaint's allegations sufficed to make that claim,¹¹ it would have been unavailing. There is no basis here for such a "defective mechanism" claim.¹² The long standing Utah law applicable to public transit employees (Utah Code Ann. 17A-2-1031 (2004)) does mandate that "[t]he district shall recognize and bargain exclusively with any labor organization representing a majority of its employees in an appropriate unit * * *" (emphasis added). And, as previously discussed, § 13(c) imposes no requirement

¹¹ By comparison, the amended complaint that Burke sought to file explicitly made this claim by adding the statement that "[t]he protective arrangements certified by the DOL, did not even address the glaring deficiency that has been identified by the existing suit that there are no procedures in Utah law for unit clarification and/or unit decertification." Amended Complnt. ¶ 135, App. B. 196.

¹² Thus, as with Burke's claim of an inappropriate bargaining unit, it is inconsequential that the district court did not have the opportunity to rule on her motion to file the amended complaint.

that the mechanism for enforcing a preserved right resemble that provided by the NLRA. See Amalgamated Transit Union Int'l, 767 F.2d at 955-56 (§ 13(c) does not mandate a particular "mechanism[] for dispute resolution").

Here, there was a mechanism - the state courts - just not an administrative agency comparable to the National Labor Relations Board. Thus, the UTA acknowledged before the district court that "[i]f we have violated Section 1031 * * *, if there is an allegation that we have violated that statute, it is cognizable in state court." Aplnts. App. B. 294. This was precisely the route that the DOL suggested to Burke when the Department informed her that "[p]erceived violations of state law provisions, such as unit determination and/or recognition of a new union, may be pursued according to the established processes under state law."¹³ See September 28, 2004 letter from DOL to Burke. DOL Add. 12a. Instead, Burke chose to pursue her state law claim in federal district court under that court's supplemental jurisdiction and then before this Court. But whether the claim of an inappropriate bargaining unit is to be addressed in state or federal court, there is an effective mechanism by which it will be authoritatively resolved. Thus,

¹³ The DOL also advised Burke that any claim as to a violation by UTA of the "protective arrangements" had to be pursued through the procedures for arbitration that were specified by such arrangements. September 28, 2004 response by DOL, DOL Add. 12a.

Burke's claim that there is "no mechanism * * * to protect the workers' right to unit clarification" (Aplnts. Br. 26) is groundless.¹⁴

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the district court dismissing Burke's claims against the DOL.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

¹⁴ This Court may affirm on an alternative ground supported by the record below, i.e., that Utah law provides a mechanism for determining an appropriate bargaining unit and that the DOL has no statutory role in making such determination. Blum v. Bacon, 457 U.S. 132, 137 n.5 (1982); Mactec, Inc. v. Gorelick, Nos. 03-1290, 03-1378, 2005 WL 2767135 *8 (10th Cir.).

Insofar as this case concerns the dismissal of claims against the DOL, we do not believe that oral argument is necessary in light of Burke's failure to present any argument as to the application of the relevant statute. If, however, the Court determines that oral argument of that aspect of the case would be helpful, we would be pleased to participate.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the attached answering brief is Monospaced, has 10.5 or fewer characters per inch and contains 5,560 words.

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CERTIFICATION OF DIGITAL SUBMISSIONS

I certify that there were no privacy redactions that needed to be made in this document and that the document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk. I also certify that the digital submission has been scanned for viruses using the InoculateIT - Shell Scanner Version 6.0.85, last update 12/14/04, and that, according to the program, the submission is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2005, filed the foregoing brief for appellee United States Department of Labor with this Court by causing copies to be mailed, postage prepaid, via Federal Express, and served the foregoing brief for respondents upon counsel by causing copies to be mailed, postage prepaid, via USPS Express Mail or Federal Express, to:

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