

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

No. 05-4222

Lisa Burke, Michael Carper, individually, and on behalf
of all others similarly situated,

Plaintiffs-Appellants,

v.

Utah Transit Authority, John English, individually, Local 382 of the Amalgamated
Transit Union and the United States Department of Labor,

Defendants-Appellees.

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

The Honorable Paul G. Cassell
District Judge

D.C. No. 2:04-CV-00985

APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This filing is a Reply to the filing of the United States Department of Labor (“DOL”). The filing by the DOL makes the conclusory statement that Utah law protects the bargaining rights of the TRAX employees but does not explain how present Utah law protects the right of the TRAX employees to choose their own bargaining representative and not be accreted into a bargaining unit in which they do not share a community of interest. Nor does the filing explain how the DOL can claim that the TRAX employees merely needed to file suit in state court to protect their rights when a federal judge has already ruled, interpreting Utah law, that the TRAX employees have no protection from accretion. The DOL was aware of this and still re-certified the protective arrangements, despite it being clear that Utah law does not protect essential parts of bargaining rights. The right to choose a bargaining representative and to be in a bargaining unit in which they share a community of interest is an essential right.

ARGUMENT

I. UTAH LAW, AS INTERPRETED BY THE TRIAL COURT, CLEARLY DOES NOT PROTECT THE ESSENCE OF BARGAINING RIGHTS SINCE THERE CAN BE NO MORE ESSENTIAL RIGHT THAN THE RIGHT TO CHOOSE A BARGAINING REPRESENTATIVE IN THE CORRECT BARGAINING UNIT.

Defendant DOL claims that the plaintiffs could have filed a lawsuit in state court to protect their rights. Aplee. DOL Brief at 15-16. The DOL does not even attempt to cite to any language in state law that provides for unit clarification. The DOL just claims that there is some “longstanding” general law applicable to Transit workers. Aplee. DOL Brief at 22. The DOL also ignores that the Trial Court’s interpretation of Utah law gives the TRAX employees no recourse to what, under federal law, was clearly an illegal accretion. The DOL essentially asserts that the TRAX employees, blue collar workers, must continue to finance a lawsuit and spend years in court proving that Utah law is inadequate prior to being able to challenge the DOL’s decision to certify the protective arrangements. Meanwhile, this allows the DOL to escape its duty to provide a record to demonstrate the rationality of its decision that Utah law protects essential federal rights. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). It is: “The agency [that] must make plain its course of inquiry and its reasoning.” *Id.*(citation omitted). Merely asserting in a letter or a court filing that Utah law

does protect TRAX employee rights is not adequate under Tenth Circuit precedent.

Of course, this Court also needs to examine the Trial Court's failure to review the latest challenged certification decision by the DOL. In light of the Trial Court's earlier decision, it clearly was inappropriate to re-certify protective arrangements without considering the plaintiffs' complaints about the inadequacy of the protective arrangements. Thus, the Amended Complaint certainly was not futile and this Court should, now, remand for a decision on the Amended Complaint.¹ Additionally, the plaintiffs should be provided with both the 2001 and 2005 administrative records so they can examine whether the DOL had a basis for finding that Utah law protects the essence of federal labor law.

However, even without the record, it is clear that if the Trial Court's

¹ The DOL argues that since the Trial Court dismissed the cause of action the plaintiffs had to ask for leave to amend. First, the DOL ignores the reality that plaintiffs had asked for leave to amend and since the DOL's action to re-certify occurred after the dismissal, that certainly provided grounds for the amendment. Certainly, leave to amend should be freely granted. *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed 2d 222, 83 S. Ct. 227 (1962). Moreover, it is not clear that plaintiffs need permission to amend. The case DOL cites to assert this requirement is easily distinguishable. In *Glenn v. First National Bank In Grand Junction*, the granting of the motion to dismiss closed the case. 868 F.2d 368, 371 (10th Cir. 1989). Thus, some type of post judgment motion was needed to re-open the case. *Id.* In the case at bar, the motion to amend was filed prior to the closing of the case and thus the case cited by DOL is not controlling. Judicial economy is not served by requiring amendment prior to the identification of needed amendments in other causes of action. The plaintiffs correctly moved to amend all the causes of action together to avoid duplicate hearings.

interpretation of Utah law is correct, Utah law does not satisfy the requirements under the Urban Mass Transportation Act (“UMTA”) that the essence of federal labor rights be protected by state law to be eligible for federal funds. The DOL wants to straddle the issue and claim that Utah law protects the essence without clearly stating that the Trial Court’s interpretation of Utah law is incorrect.

The Tenth Circuit has made it clear that it is essential that workers’ preferences be considered in deciding a bargaining unit. *NLRB v. Ideal Laundry & Dry Cleaning*, 330 F.2d 712, 717 (10th Cir. 1964). Another case that determined that workers cannot be accreted into an existing bargaining unit without a vote if they can constitute their own bargaining unit is *Borden v. National Labor Relations Board*, 19 F.3d 502, 508 (10th Cir. 1994). As stated by the Tenth Circuit panel, “[W]here employees have a separate identity, or lack of community of interest [with the unit into which they would be accreted], accretion is inappropriate.” *Id.* These rights are essential to allowing workers to exercise their section 7 rights under the NLRA. UMTA legislative history and case law are clear that workers must enjoy the same rights that they had when federal money was used to purchase private operations and these rights never sunset.² *ATU v. Donovan*, 247 U.S. App. D.C. 149, 767 F.2d 939, 947-49 (D.C. Cir. 1985). As

² With the exception of strikes. Recently, in a transportation bill, Congress considered sunsetting the other UMTA rights but did not do so.

stated by the court in *Donovan*:

There can be little doubt as to the effect of the Morse amendment: by adopting it, Congress meant to *require* the continuation of collective bargaining rights, not merely to recommend such a continuation. Whatever discretion the Secretary may have under section 13(c), it does not include the discretion to ignore the statute's requirements and certify a labor agreement that does not provide for the continuation of collective bargaining rights.

Id. at 947. As stated in a concurrence,

Congress did not provide for sunseting section 13(c) and said nothing in the text of the provision to suggest that the essential process entailed in 'the continuation of collective bargaining rights' should come to mean less as time goes by.

Id. (Ginsburg concurrence). UTA history shows that at the time of purchase in 1969, the private companies ran buses exclusively. Thus, with the creation of TRAX, the workers in the new rail positions certainly would have been protected against accretion. *See NLRB v. Superior Protection, Inc.*, 401 F.3d 282, 287 (5th Cir. 2005) (Stating that accretion analysis applies to existing workers in new positions).

The Trial Court's decision does not protect the essence of federal rights since it allows UTA and Local 382 to not only negotiate economic issues but representative issues, contrary to controlling United States Supreme Court precedent. This is contrary to United States Supreme Court case law which is clear that unions may not decide representation issues by contract since they have a self-interest which may be contrary to the section 7 rights of the workers. *NLRB v.*

Magnavox Co., 415 U.S. 322, 325-326, 94 S. Ct. 1099, 1102 (1974);

Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 103 S. Ct. 1467, 1476 (1983).

Persuasive authority from other Circuits makes it clear that deciding accretion in a contract is illegal. *NLRB v. Paper Manufacturers*, 786 F.2d 1163 (3rd Cir. 1986)

(Citing *Chas. S. Winner, Inc. v. Teamsters Local Union No. 115*, 777 F.2d 861 (3rd Cir. 1985)). Thus, UTA's reliance on the 1998 contract is misplaced and violates

the essence of federal protections. In the same light, so is deciding the bargaining unit representative prior to the hiring of a representative complement of workers.

Aramark Services, Inc. v. NLRB, 2002 NLRB Lexis 521 * 12 (Oct. 21, 2002).

The NLRB has created a test for determining bargaining units that is the "community of interest" test. *Baltimore Sun v. National Labor Relations Board*, 257 F.3d 419, 429 (4th Cir. 2001). If a group of employees could be an appropriate bargaining unit alone, they cannot be accreted into an existing bargaining unit.

Baltimore Sun, 257 F.3d at 427.

The Trial Court's refusal to use this test under state law demonstrates that Utah law does not protect the "broad guarantees" [of rights] that even the DOL concedes "are the province of DOL under § 13(c)." Aplee. DOL Brief at 19. As stated by the United States Supreme Court; "For Congress declared in § 1 of the Act [NLRA] that it was the policy of the United States to protect 'the exercise by workers of full freedom of association, self-organization, and designation of

representatives of their own choosing’.” *NLRB v. Magnavox Co.*, 415 U.S. 322, 325-26 (quoting 29 U.S.C. § 151). Despite this, the DOL has the hubris to suggest that protecting the TRAX employees’ right to choose their own representative is not essential in a protective arrangement.

Moreover, in a California court that applied federal labor law and federal administrative practice as a matter of state law found it necessary to apply the “community of interest” test. *International Brotherhood of Electric Workers v. Aubrey, Jr.*, 42 Ca. App. 4th 861, 871 (Ct. App. 2nd Appellate Dist., Div. 4 1996). The California court determined that the “community of interest” test was different in an accretion context than in an initial unit determination. *Id.* at 872-73.³ Additionally, while in that case the court allowed accretion due to the employees not having separate supervisors and separate facilities, it clearly understood that the accretion doctrine was essential to prevent workers from being denied their right to choose a bargaining representative. *Id.* Moreover, the court found that a

³ This distinction is consistent with NLRB decisions. As stated by the NLRB in *Frontier Telephone of Rochester, Inc.*, 344 NLRB No. 153 *11 n.6 (July 29, 2005): “The test is different than the traditional community of interest test that the Board applies in deciding appropriate units in initial representation cases. In that context, the Board will certify any unit that is an appropriate unit, even if it is not the most appropriate unit. *Bartlett Collins*, 334 NLRB 484 (2001). In the accretion context, however, ‘[a] group of employees is properly accreted to an existing bargaining unit when they have no true identity distinct from it.’ *NLRB v. St Regis Paper*, 674 F.2d 104, 107-108 (1st Cir. 1982).”

union and company could not forestall consideration of other factors of the “community of interest” test by an accretion clause which is exactly what is occurring in the case at bar.⁴

Utah state law, as interpreted by the Trial Court, also ignores a simple and bright-line test of the NLRB for deciding cases such as this. Under *Gitano Group, Inc.*, 308 NLRB 1172 (1992), when a new facility opened (such as the TRAX facility), a new bargaining unit was created. *Id.* at * 13-14. *Gitano* creates a clear test for deciding the second issue of representation: Since the majority of the workers had been represented by Local 382 when they were transferred to the new bargaining unit, Local 382 initially had a right to represent the new bargaining unit (TRAX), as well as the initial bargaining unit (bus). *See Id.* at * 14.

However, it is clear under federal law, since the TRAX employees were in a separate bargaining unit, they were and remain entitled to a decertification election with just the members within the TRAX unit voting on the decertification. Thus,

⁴ Actually, whether the defendants even created an accretion clause is subject to doubt since the term “accretion” is not even used in the contracts. Interestingly, defendants also attempt to misuse *Aubrey* by stating that it stands for the proposition that a system-wide unit is mandated for a bus-rail operation. A fair reading of the case demonstrates that an accretion analysis must be employed when bus employees are moved to rail positions. *Id.* The case clearly did not hold what the defendants contend. Moreover, the recent NLRB case, *Frontier Telephone of Rochester, Inc.*, 344 NLRB No. 153 *20-21 (July 29, 2005) makes it clear that accretion clauses are invalid if they do not satisfy the “community of interest” test used in accretion cases.

Utah law, as interpreted by the Trial Court, does not protect the essence of these federal rights since it does not protect the TRAX employees' right to choose their own representative. The DOL cannot evade its duty by claiming it did not know of the Utah deficiencies since it clearly knew of them when it chose to re-certify the protective arrangements. Additionally, the DOL ignores that it had an affirmative duty to assure that Utah law protected the bargaining rights of the employees. This burden is statutory and the DOL must address deficiencies in protective arrangements. The DOL has this statutory duty to affirmatively protect bargaining rights even if the parties do not raise the issue. *See Thompson v. HUD*, 348 F. Supp. 2d 398, 457-59 (D. Md. 2005).

It cannot avoid this statutory duty by taking an overly parsimonious view of its duty under UMTA. To claim that the DOL does not have to ensure that Utah law protects the TRAX employees ability to choose their bargaining representative and be in a "community of interest" totally negates the intent of UMTA. Clearly, Congress did not intend to create a right to the standards of federal labor law without a remedy.

II. UNDER UMTA, THE DOL WAS PROHIBITED FROM RE-CERTIFYING THE PROTECTIVE ARRANGEMENTS SINCE THEY DID NOT PROTECT THE BARGAINING RIGHTS OF THE TRAX EMPLOYEES.

The DOL has cited to *Jackson Transit Authority v. Local Division 1285*,

Amalgamated Transit Union, 457 U.S. 15, 72 L. Ed. 2d 639, 102 S. Ct. 2202

(1982) to claim that it had no duty to protect the right of the TRAX employees not to be accreted into another bargaining unit against their will. Aplee. DOL Brief at 18. The DOL has used *Jackson* in a deceptive manner. While *Jackson* does state that UMTA does not substitute federal law for state law, that does not mean that the DOL can ignore the reality that Utah state law does not protect the essence of federal bargaining rights. 457 U.S. at 27. *Donovan* makes it clear that:

[A]s the Supreme Court recognized in *Jackson Transit Authority*, states have no automatic entitlement to federal funding for their transit systems, and must satisfy section 13(c) if they desire such assistance. The Court made it abundantly clear that labor protective agreements are to be the product of local laws and local bargaining, but that section 13(c) governs a state's right to federal funding.

Donovan at 947. The *Donovan* Court went on to state that;

The legislative history, therefore, reveals Congress' clear intent to measure state labor laws against the standards of collective bargaining established by federal labor policy. The Secretary's contrary construction of section 13(c) would produce a meaningless tautology: if state law defines the "collective bargaining rights" that must be continued under the federal statute, then a public transit authority's labor relations always will be in compliance with section 13(c), because by definition a state transit authority will be in conformity with state law. Congress clearly did not envision section 13(c)(2) operating in such a fashion.

Id. at 949.

Sadly, the DOL has learned nothing from its rebuke in *Donovan* since it has ignored the Trial Court's decision which interpreted state law in a manner that

does **not** protect the federal standards of bargaining rights and has re-certified the protective arrangements. The Trial Court's decision did not use federal standards to interpret the requirements that Utah law placed upon UTA. The Trial Court engaged in a simplistic analysis to arrive at its conclusion that a combined bus-light rail unit could be an appropriate bargaining unit. In doing so, the Trial Court implicitly interpreted Utah law as allowing workers to be accreted into an existing unit when they had their own identity and their own community of interest which is contrary to federal law. That action by the Trial Court, alone, should have led to a refusal to re-certify the protective arrangements. However, UTA, a state agency, is also interpreting state law in a manner clearly inconsistent with providing the essence of federal labor protections. As explained above, the accretion doctrine is an essential part of federal labor law. Thus, the DOL has clear evidence of the deficiency of Utah state law. The DOL must respond under UMTA to this evidence. The proper response is made clear in *Donovan*: "[T]he statute does not allow states to eliminate collective bargaining rights and still enjoy federal aid." *Id.* at 947. In order for the DOL to certify the protective arrangements, the DOL must be certain that Utah law protects the TRAX employees bargaining rights. *See Amalgamated Transit Union, International, AFL-CIO v. Reich*, 1993 U.S. Dist. LEXIS 15395. * 7. After the Trial Court's interpretation of Utah law, the issue of whether the TRAX employees had state protection against illegal accretion

became uncertain at least. Thus, the DOL cannot rely on its assertion that the plaintiffs could go to state court to vindicate their rights to support its decision to re-certify the protective arrangements. Even if the mechanism of suing in state court to prevent an illegal accretion could be considered equivalent to the inexpensive and relatively simple process of filing for a unit clarification (which is designed for blue collar workers) under federal law, a contention that plaintiffs emphatically dispute, after the Trial Court's summary judgment decision the DOL should not have found that to be an appropriate remedy. The fact that Utah may have been inadequate for decades does not allow the DOL to continue to authorize federal funds by re-certifying the protective arrangements. Of course, the plaintiffs, without access to the entire record, do not know if there were assurances by the State of Utah, in 1969, to interpret their state law consistent with federal standards and it is only the present management that has deprived the TRAX employees of their federally protected rights.

III. THE TRIAL COURT MADE FUNDAMENTAL PROCEDURAL ERRORS THAT REQUIRE A REMAND IN THE CASE.

Defendant DOL also claims that the decision is correct under the record the Trial Court had to review. The Trial Court did not even possess, let alone examine, the administrative record in the case. Thus, to say, as the DOL does, that the Trial Court was correct because the existing administrative record would not have

considered the present circumstances is disingenuous. Aplee. DOL Brief at 20.⁵

The Trial Court violated clear Tenth Circuit law that it should have had the entire administrative record before it to decide the appropriateness of an administrative decision. The Trial Court had the responsibility to process the challenge to the administrative action like an appeal. *Olenhouse v. Commodity Credit Corp.* 42 F.3d 1560, 1580 (10th Cir. 1994). As stated in that case:

A district court is not exclusively a trial court. In addition to its *nisi prius* functions, it must sometimes act as an appellate court. Reviews of agency action in the district courts must be processed as appeals. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure....When a district court fails to conduct the requisite plenary review and make necessary factual findings to support the affirmance of agency action, we may either vacate its order and remand for further proceedings or we may conduct the necessary review ourselves based on the same administrative record considered by the district court.

Id. (Citation omitted).

Unfortunately, since the Trial Court failed to conduct the requisite plenary review there is no administrative record for this Court to review. Since the plaintiffs have been denied all discovery in this case, they are unable to provide the administrative record to this Court to alleviate this deficiency. Thus, this Court should remand to conduct the proper review.

⁵ It is entirely conceivable that at the prior certification the DOL, UTA and Local 382 had considered the issue of representation for the new light-rail operation. The question is whether the DOL made sure that Utah law would protect federal rights.

CONCLUSION

The Court should reverse the granting of the Motion to Dismiss. The Trial Court erred in dismissing the case without reviewing the record when the plaintiffs had clearly stated a claim and the DOL had a statutory duty to ensure that the plaintiffs' bargaining rights were protected. Additionally, the Trial Court erred by not addressing and then allowing the amendments to the complaint based on changed circumstances after the complaint was filed. The changed circumstances included the DOL re-certifying the protective arrangements. This occurred after the Trial Court had interpreted Utah State law in a manner that did not provide the TRAX employees with the protections that are the essence of federal labor law. This is prohibited under UMTA. Thus, the re-certification was clearly improper.

Finally, the entire review process by the Trial Court was flawed. The Trial Court did not engage in a plenary review of DOL's record as mandated by the Administrative Procedures Act. There was no examination of the administrative record since the Trial Court did not even possess the record. The Trial Court just accepted the parsimonious reading of the DOL's duty under UMTA.

Dated this ___ day of December, 2005.

Daniel G. Moquin

STATEMENT REGARDING ORAL ARGUMENT

Counsel request oral argument. Plaintiffs request that the oral argument be combined with the oral argument requested for Docket No. 05-4079. Many of the issues in this case are first impression. They implicate First Amendment and labor law policy for transit districts within and outside the Tenth Circuit. The issues are complex and the Court will benefit from oral argument.

Daniel G. Moquin

CERTIFICATE OF DIGITAL SUBMISSION

This document complies with Tenth Circuit rules for electronic filing and violates no privacy rules. It has been scanned with a current Norton Antivirus program.

Daniel G. Moquin

CERTIFICATE OF MAILING

I hereby certify that on this _____ day of December, 2005, I caused to be mailed, postage prepaid, the foregoing **APPELLANTS' REPLY BRIEF** to the following:

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