IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 05-4222 and 05-4079

LISA BURKE, MICHAEL CARPER, ET AL.,

Plaintiffs-Appellants,

v.

UTAH TRANSIT AUTHORITY, ET AL.,

Defendants-Appellees.

On Appeal From the United States District Court for the District of Utah

The Honorable Paul G. Cassell
District Judge

District Court No. 2:04-CV-00985

**OPPOSITION OF APPELLEES
UTAH TRANSIT AUTHORITY AND JOHN INGLISH
TO APPELLANTS' PETITION FOR REHEARING EN BANC**
(With Attachments in a Scanned PDF Document)

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Appellees Utah Transit Authority ("UTA") and John Inglish ("Inglish") file this Opposition to Appellants Lisa Burke and Michael Carper's (together "Burke") Petition for Rehearing En Banc.

INTRODUCTION

Burke's Petition for Rehearing En Banc ("Pet.") should be denied because it does not meet either of the criteria specified in Rule 35(b) of the Federal Rules of Appellate Procedure. Burke fails to identify any conflict between the panel decision and a decision of the Supreme Court or of this Court. Moreover, there is no question of exceptional importance because the panel decision addressed a matter of Utah law and does not conflict with any decision of another circuit. Finally, Burke fails to demonstrate that the panel decision is erroneous in any respect.

STATEMENT OF THE CASE

The Utah Transit Authority ("UTA"), a special service district and political subdivision of the State of Utah, provides public transportation by bus and light rail in the Salt Lake metropolitan area. UTA was created in 1969 and received federal funds pursuant to the Urban Mass Transportation Act to purchase the assets of private companies then providing public transportation service by bus in Salt Lake City.

Since 1904, UTA's[1] operations, maintenance, and parts employees have been continuously represented in a single, system-wide collective bargaining unit by Defendant-Appellee Local No. 382 of the Amalgamated Transit Union ("Local 382"). UTA originally provided transportation by streetcars that ran on tracks. In the 1940's, UTA gradually moved from a streetcar system to a system with gasoline-powered buses and streetcars, and then to a bus-only system. From that time until 1999, UTA operated only buses. In 1999, UTA began light rail, or "TRAX," operations, and now provides public transportation in a unified system of buses and light rail vehicles.

As a result of discussions that began in 1996, UTA and Local 382 agreed that TRAX vehicle operators, maintenance employees, and parts employees would be considered "bargaining unit" positions and would be included for bargaining purposes in the existing, system-wide bargaining unit. UTA also agreed that existing employees in UTA's bus divisions would have preferential rights to bid for TRAX jobs. In addition, employees who transferred into TRAX positions would retain the seniority they earned as bus division employees. This agreement was formalized in a collective bargaining agreement that was duly ratified by Local 382's membership in 1998.

[1] For the sake of simplicity in this brief, the term "UTA" includes UTA's predecessors.

Pursuant to this agreement, employees were transferred into the TRAX division and TRAX began operations in 1999. In August 2004, after several years of bargaining history with TRAX employees included in the existing system-wide bargaining unit, Plaintiff Lisa Burke, a TRAX vehicle operator, circulated a petition calling for separate union representation for TRAX employees. She garnered a number of signatures on this petition and submitted it to UTA management. UTA, because it had already recognized Local 382 as the representative of the system-wide bargaining unit, and because of its statutory duty to bargain "exclusively" with that representative, declined to respond to Burke's petition. Burke thereupon filed this action.

Burke's lawsuit alleged two claims[2] against UTA: (1) violation of Utah Code Ann. § 17A-2-1031 ("Section 1031"), which provides for collective bargaining by public transit systems in Utah; and (2) violation of section 13(c) of the Urban Mass Transportation Act ("Section 13(c)"), which requires, as a condition of certain federal funding, that the interests of transit employees affected by the funding "be protected under arrangements the Secretary of Labor concludes are fair and equitable," including the "continuation of collective bargaining rights." 49 U.S.C. § 5333(b). In essence, Burke argued that UTA's refusal to recognize a

[2] Burke also alleged claims that UTA abridged TRAX employees' First Amendment rights, but she did not argue those claims on appeal and does not raise them in her Petition for Rehearing En Banc.

separate bargaining unit for TRAX employees violated these two sections because, under cases decided by the National Labor Relations Board, the inclusion of TRAX employees in the system-wide bargaining unit was an illegal "accretion," and that the TRAX employees were free to select a new bargaining representative to represent them in a separate bargaining unit composed of TRAX division employees.

The district court rejected this argument when it denied Burke's motion for preliminary injunction and later granted UTA's motion for summary judgment. The district court determined that UTA did not violate either Section 1031 or Section 13(c) because the existing system-wide bargaining unit was "appropriate." Section 1031 states as follows:

> 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 representatives of their own choosing . . . *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, enter into and execute a written contract incorporating therein the agreements so reached.

(Emphasis added.)

Section 1031 was enacted to comply with Section 13(c), which requires the following as a condition to receipt of federal funding:

> (1) As a condition of financial assistance under [certain federal statutes providing financial assistance to transit authorities], 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 [the federal statutes providing financial assistance] shall specify the arrangements.
>
> (2) Arrangements under this subsection shall include provisions that may be necessary for—
>
> (A) the preservation of rights, privileges, 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;
>
> * * *

49 U.S.C. § 5333(b). The district court held that Section 13(c) "requires only that the collective bargaining rights of public transit employees be preserved," and that Section 1031 "requires only that UTA bargain with '*an* appropriate unit,' not the most appropriate unit." Order Granting Defendants' Motion for Summary Judgment ("District Court Order"), Exh. A hereto, at 8.

Relying on decisions of the National Labor Relations Board, the district court then determined that the existing system-wide bargaining unit was "appropriate" as a matter of law, and therefore that there was no violation of Utah law or Section 13(c). The district court rejected Burke's "accretion" argument because, after several years of inclusion in a system-wide unit, Burke's request to

carve out the TRAX employees was more akin to a "severance" than an "accretion." District Court Order, Exh. A, at 7-8.

Burke made essentially the same arguments on appeal. The panel affirmed the district court's grant of summary judgment and dismissed as moot Burke's appeal of the denial of her motion for preliminary injunction. Burke, et al. v. Utah Transit Authority, et al., Case Nos. 05-4079 and 05-4222 (Sep. 1, 2006) ("Panel Op."), Exh. B, at 22-23. The panel affirmed summary judgment on the Section 13(c) claim because Section 13(c) creates no federal claim against federal transit funding recipients. Panel Op., Exh. B, at 9 (citing Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15, 27-28 (1982)). The panel affirmed summary judgment on the state law Section 1031 violation because it agreed with the district court conclusion that the existing system-wide bargaining unit, which includes the TRAX employees, is appropriate as a matter of law. Panel Opinion, Exh. B, p. 18.

ARGUMENT

I. THE PETITION FOR REHEARING EN BANC SHOULD BE DENIED BECAUSE IT DOES NOT MEET THE REQUIREMENTS STATED IN RULE 35(b).

Burke's petition for rehearing en banc fails to comply with the express requirements of Rule 35(b)(1), which provides that such a petition must begin with a statement that either the panel decision conflicts with a decision of the Supreme

Court or of this Court, or the case involves a question of exceptional importance, which may apply where the panel decision conflicts with decisions of other federal courts of appeals. Fed. R. App. 35(b)(1). See 10th Cir. R. 35.1(A) ("request for en banc consideration is disfavored"). Burke's petition identifies no conflict with the Supreme Court or this Court, and fails to identify any issue of exceptional importance.

A. The Panel Decision Does Not Conflict With Any Decision Of The Supreme Court Or Of This Court.

First, the panel decision does not conflict with any decision of the Supreme Court or of this Court. Although Burke claims the panel decision refused to properly analyze the doctrine of accretion, and cites the case of Borden v. N.L.R.B., 19 F.3d 502 (10th Cir. 1994), where this Court applied accretion analysis in affirming a decision of the National Labor Relations Board, Burke does not claim any conflict between the panel decision and Borden.

Furthermore, there is no indication of such a conflict. Although in this case the panel expressed its "doubt" that federal labor doctrine applied to this case because collective bargaining for UTA employees is governed by state law, the panel went ahead and analyzed federal labor doctrines, including the doctrine of accretion, in deciding the case. Panel Op., Exh. B, at 9-19. It simply decided that the undisputed facts of this case did not suggest that any improper accretion took

place, whereas in Borden, under a different set of facts, this Court affirmed a National Labor Relations Board decision that found an improper accretion.

In particular, in Borden, a rival union objected at the time the employer declared that certain employees had been accreted into a different collective bargaining unit. By contrast, in this case, Burke did not circulate her petition until 2004, six years after the 1998 collective bargaining unit that classified TRAX employees in the existing system-wide bargaining unit. Thus, Burke sought to carve employees out of the bargaining unit after the fact, instead of trying to prevent UTA from classifying employees in the bargaining unit in 1998. As the district court and the panel determined, this situation is more akin to a severance than an accretion. Accordingly, Burke has not identified any conflict between the panel decision and another decision of this Court.

B. This Case Involves No Question Of Exceptional Importance.

Second, this case does not involve any question of "exceptional importance." Burke argues that the key issue is the "protection afforded to transit workers to choose their bargaining unit and representative under the Urban Mass Transportation Act," and that this issue is of exceptional importance because it can "impact the rights of thousands of transit workers within the Tenth Circuit and will be cited as precedent in the rest of the United States." Pet. at 1. Burke also argues that the panel decision conflicts with Amalgamated Transit Union Int'l v.

Donovan, 767 F.2d 939, 948 (D.C. Cir. 1985), which held that Congress, in enacting Section 13(c), intended to "measure state labor laws against the standards of collective bargaining established by federal labor policy." Pet. at 2. Neither of these assertions raises a question of exceptional importance.

First, the decision interprets a specific provision of Utah law regarding collective bargaining by public transit districts, and does so only in the context of a specific factual situation. At the very most, the panel decision held that UTA and Local 382 did not violate Utah law when they voluntarily agreed on the scope of the bargaining unit for UTA employees, because Utah law requires only that the unit be "appropriate" without stating precisely how it should be determined. The only principle of wider significance in this decision is the statement, in a footnote, that the specific doctrines of accretion and severance are procedural tools used by the National Labor Relations Board to assess the appropriateness of a bargaining unit, and thus are not specifically encompassed within the collective bargaining rights that must be "continued" for a transit authority to be eligible for federal funds pursuant to Section 13(c). Panel Op., Exh. B, at 13 n.2. This is unlikely to affect any transit workers other than those who work for UTA because each state has its own labor laws. See Olander v. State Farm Mut. Auto. Ins. Co., 317 F.3d 807, 813-14 (8th Cir. 2003) (Judge Lay, dissenting) (state law issues ordinarily are not appropriate for en banc review).

Second, the panel decision does not conflict in any way with Donovan. In Donovan, the District of Columbia Circuit held that Section 13(c)'s requirement of the continuation of collective bargaining rights means that the state in question must have state laws that accord to transit authority employees "at a minimum" the right "to be represented in meaningful, 'good faith' negotiations with their employer over wages, hours and other terms and conditions of employment." 767 F.2d at 951, quoted by, Panel Op., Exh. B, at 12. The panel decision explained that "nothing in the formation of UTA's current bargaining unit demonstrates an impairment to collective bargaining rights." Panel Op., Exh. B, at 12. In so holding, the panel relied on the parties' history of multiple good faith bargaining sessions, the ratification of labor contracts by a majority of employees, and the fact that Burke's specific concern over seniority was taken into account in bargaining "and a task force to study the issue was created." Id.

Furthermore, the panel directly addressed Burke's argument that the district court should have applied the doctrine of "accretion" and should have held that the TRAX employees were improperly "accreted" into the system-wide bargaining unit. Although the panel determined—correctly—that federal labor law probably did not apply as this was a matter governed by state law, it nevertheless carefully reviewed federal labor law before concluding that no improper accretion occurred

and that the existing unit was appropriate as a matter of law. Panel Op., Exh. B, at 13-19.

II. BURKE FAILS TO IDENTIFY ANY ERROR IN THE PANEL DECISION.

The bulk of Burke's petition for en banc rehearing is an unconvincing attempt to point out errors in the panel decision. In fact, Burke merely rehashes the same arguments that she made before the district court and before the panel. UTA will briefly address each of these claimed errors.

First, Burke argues that the panel erred by failing to analyze federal labor doctrines of accretion and severance. Pet. at 3-8. As stated above, however, the panel decision carefully reviewed both of these doctrines and concluded that Burke's attempt to carve TRAX employees out of the existing bargaining unit presented a question of severance, not accretion, and that Burke failed to establish the demanding requirements for a severance. Panel Op., Exh. B, at 17-18 (citing Maillinckrodt Chem. Works, 162 N.L.R.B. 387 (1966). Among other things, the panel pointed out the lengthy bargaining history between Local 382 and UTA, and the fact that TRAX employees did not object between 1998, when they were first included in Local 382 by agreement between UTA and Local 382, and 2004, when Burke finally presented UTA management with a petition requesting a separate bargaining unit. Panel Op., Exh. B, at 16.

Burke's only response to this failure to object is to assert that TRAX employees had no need to object because "they were as a matter of law in a separate bargaining unit." Pet. at 6. That statement is flatly wrong because the collective bargaining agreement ratified in 1998 expressly included TRAX employees in the existing bargaining unit. There is no such thing as a hypothetical bargaining unit that conflicts with a bargaining unit specified in the parties' collective bargaining agreement. Moreover, the National Labor Relations Board has held that the appropriateness of a bargaining unit is addressed as of the time of the challenge (in this case, 2004), not as of the date when an allegedly improper accretion occurred (in this case, 1998 or 1999). Gibbs & Cox, Inc., 280 N.L.R.B. 953, 954 (1986), cited in, Panel Op., Exh. B, at 16.

Second, Burke argues that the panel improperly affirmed summary judgment despite numerous factual disputes. Pet. at 8-10. As the panel pointed out, however, the *undisputed* facts were "more than ample to find the bargaining unit appropriate." Panel Op., Exh. B, at 18. Indeed, although Burke claimed that determining the appropriateness of a bargaining unit required consideration of "twelve criteria," she never presented any *evidence* to the district court in support of an argument that under those criteria the existing unit was not appropriate. Instead, she argued without evidence that a TRAX-only unit was *also* appropriate. Pet. at 9. As the panel correctly noted, under Utah law, UTA need only recognize

the representative of a majority of employees in an appropriate unit. Panel Op., Exh. B, at 11. As long as the existing unit is "appropriate," the possibility of other appropriate units is irrelevant.

Third, Burke argued that the panel decision incorrectly affirmed the district court's denial of her Rule 56(f) motion. However, Burke failed to support her motion with an affidavit that identified the information likely to be discovered and how that information would help prevent summary judgment. Panel Op., Exh. B, at 21.

Finally, Burke objected to the panel decision regarding her eleventh-hour motion to amend. This argument fails becuase Burke filed her notice of appeal before the district court ruled on her motion to amend, divesting the district court of jurisdiction. The panel decision was therefore correct in finding that the district court did not abuse its discretion in failing to rule on that motion.

CONCLUSION

Based on the foregoing reasons, Burke's petition for rehearing en banc should be denied. She has not established any conflict between the panel decision and any decision of the Supreme Court or of this Court, nor has she identified any issue of exceptional importance. Finally, her assertions of error are without merit.

Dated on this 4th day of October, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPPOSITION OF APPELLEES UTAH TRANSIT AUTHORITY AND JOHN INGLISH TO APPELLANTS' PETITION FOR REHEARING EN BANC** was mailed, postage prepaid, on this 4th day of October, 2006 to the following:

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