

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 05-04079

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

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

APPELLANTS' BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Counsel request oral argument. 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.

PRIOR OR RELATED APPEALS

There are no prior or related appeals at this time. However, a decision by the Trial Court is pending on a summary judgment motion by defendant Utah Transit Authority (“UTA”) that will certainly be appealed if it is adverse.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1292 (a)(1). The Trial Court denied by minute entry the motion for reconsideration on March 9, 2005. The plaintiffs filed a timely notice of appeal on April 7, 2005.

STATEMENT OF THE ISSUES

- 1. DID THE TRIAL COURT COMMIT ERROR BY DENYING THE PRELIMINARY INJUNCTION UNDER THE WRONG LEGAL STANDARDS?**
- 2. DID THE TRIAL COURT VIOLATE PLAINTIFFS’ DUE PROCESS RIGHTS BY DENYING THEM BOTH AN EVIDENTIARY AND MOTION HEARING ON THE PRELIMINARY INJUNCTION?**

STATEMENT OF THE CASE

On October 22, 2004, the Plaintiffs, representing the employees of the light rail unit (“TRAX”) of UTA, filed a class action complaint alleging, among other things, that UTA was denying them their right to free speech, free association and was in violation of Utah state law by denying them the right to choose their own bargaining representative and by denying them similar access to a bulletin board afforded Amalgamated Transit Union Local 382 (“Local 382”), a union endorsed by the company but lacking majority support of the TRAX employees. The plaintiffs, after requesting mediation but being rebuffed by UTA, filed for a preliminary injunction requesting immediate access to a bulletin board and other relief. After the injunction was filed, the plaintiffs were given access to a bulletin board by UTA but none of the other relief was granted. Aplt. App. A at 173 ¶ 13. Due to the case involving labor issues, the plaintiffs requested an evidentiary hearing on their injunction to conform with federal law that required such a hearing prior to an injunction being granted. While affidavits were filed with the Trial Court supporting the injunction, plaintiffs also subpoenaed two hostile witnesses. After the filing of the two subpoenas with the Court, counsel was contacted by the Court and informed that an evidentiary hearing would not be held.

Approximately one half hour before the January 24, 2005 hearing, counsel

for the plaintiffs were supplied with a tentative decision denying the injunction on the stated grounds that the plaintiffs were unlikely to prevail on the merits. Counsel noticed that the Trial Court decision had evaluated the merits on the “severance” doctrine and not the “accretion” doctrine. This totally changed the burden of evidence in the case and required that the plaintiffs demonstrate that a combined bus and rail unit was not an appropriate bargaining unit, instead of correctly requiring that UTA demonstrate that the TRAX unit could not be an appropriate bargaining unit. Four days later, the Trial Court issued its final decision that was virtually identical to the tentative decision but with a cursory albeit incorrect analysis of accretion. Plaintiffs, realizing that the Trial Court had committed plain error, asked, in a filing to the Trial Court, for a reconsideration of the severance vs. accretion issue, and provided the Trial Court with new persuasive authority. In light of the fact that an evidentiary hearing would probably be denied, the filing requested a new injunction which asked for new and minimal relief that could be proven without an evidentiary hearing. Thus, the new filing cannot be considered merely a request for reconsideration and should be considered a separate request for an injunction.

The Trial Court, in an unsigned minute entry, denied the request for the new injunction without explanation or a hearing. Plaintiffs requested that a signed order

be issued but were forced to file with the Tenth Circuit Court without the Trial Court ever issuing such an order.

STATEMENT OF THE FACTS

This case involves a group of public employees involved in a light rail operation called TRAX, attempting to protect their free association rights not to have an employer-approved bargaining representative imposed upon them. The TRAX employees, while not covered by the National Labor Relations Act (“NLRA”), have equivalent rights guaranteed by the Urban Mass Transportation Act (“UMTA”) and Utah State law; Section 13(c) as codified at 49 U.S.C. §5333(b); Utah Code ANN. §17A-2-1031 (2004) (attachment A). Despite this and approximately 70% of the employees indicating to the state employer, UTA, that they reject the present bargaining representative, UTA is imposing the bargaining representative on the TRAX employees and not allowing them to choose their own bargaining representative. UTA asserts that due to a contract signed between Local 382 and UTA in 1998, that was created prior to the existence of the TRAX unit in 2001, the TRAX employees’ bargaining representative is Local 382. Additionally, UTA asserts that if the TRAX employees do not want to be represented by Local 382, they must win a decertification election company-wide and not just within the TRAX unit. The Trial Court, relying on the wrong labor law doctrine (severance),

refused to reconsider its decision when presented with clear case law demonstrating that the case involved the wrongful accretion of employees to an existing bargaining unit and not the severance of employees from that bargaining unit. Because of this action the employees are being irreparably harmed due to the loss of their statutory and constitutional rights to choose their own bargaining representative for their bargaining unit.

SUMMARY OF THE CASE

The Trial Court denied a request for injunction by choosing the improper labor law doctrine. The Trial Court improperly imposed upon the plaintiffs the requirement that they demonstrate that a bargaining unit that would include both bus employees and TRAX employees is not an appropriate unit. The correct legal standard would have required that UTA demonstrate that the TRAX employees could not be an appropriate bargaining unit before UTA could accrete them into the existing bargaining unit. Thus, the Trial Court incorrectly evaluated the TRAX employees' case under a severance and not an accretion standard. Consequently, the Trial Court abused its discretion in denying the second injunction.

UMTA, as a condition of federal funds, requires states to protect the bargaining rights of employees. 49 U.S.C. §5333(b). In 1969, Utah law was changed in an attempt to comply with that act. Utah Code ANN. §17A-2-1031

(2004). Federal labor law principles, albeit not the NLRA, define the rights that state law must protect. *Amalgamated Transit Union Intl' v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985). Section 7 of the NLRA, 29 U.S.C. § 157 guarantees workers the right to choose their own bargaining representative or to choose not to be represented by a union. UTA, by imposing a pliable union on the workers, has violated both of these rights. UTA has also violated related First Amendment rights. The Trial Court has refused to grant a revised injunction protecting the employees' First Amendment rights.

ARGUMENT

I. THE TRIAL COURT COMMITTED ERROR BY NOT GRANTING THE INJUNCTION SINCE THE PLAINTIFFS HAD SATISFIED THE REQUIREMENTS FOR ISSUING AN INJUNCTION.

A. Standard of Review

The standard of review for the denial of an injunction is abuse of discretion.

Utah Licensed Beverage Association v. Leavitt, 256 F.3d 1061 (10th Cir. 2001)

(citing *See A.C.L.U. v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999)).

An abuse of discretion occurs ‘only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling.’

Id. (Citation omitted.)

The Trial Court violated this standard by applying the wrong legal standard to

determine the appropriateness of the challenged bargaining unit. Contrary to the law, the Trial Court accepted defendants' (UTA and Local 382) argument that they could create an agreement between them that mandated that the TRAX employees be represented by Local 382.

B. Discussion

The Trial Court denied the initial injunction on the basis that the plaintiffs were unlikely to prevail in their underlying lawsuit. Aplt. App. B at 184-187. The gravamen of the plaintiffs' complaint is that UTA, acting in collusion with Local 382, has denied the plaintiffs their right to choose their own bargaining representative. While the plaintiffs realize that the NLRA does not apply, the workers are entitled to similar protections.

1. The Urban Mass Transportation Act Requires UTA to Afford Protections Similar to the National Labor Relations Act to the Plaintiffs.

UMTA requires, as a condition of federal funds, that similar rights be applicable to employees impacted by the granting of federal funds. It is Section 13(c) of UMTA that requires these protections. Section 13(c) as codified at 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).

The seminal case on § 13(c) protections and the interplay of federal labor law is *Amalgamated Transit Union Intl' v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985). The key is that:

Section 13(c) does not prescribe mandatory labor standards for the states, but rather dictates the terms of federal mass transit assistance. States are free to forego such assistance and thus to adopt any collective bargaining scheme they desire. The mandatory language of Section 13(c) in no way alters this prerogative. But Section 13(c) does not allow states to eliminate bargaining rights and still enjoy federal aid. Section 13(c) prevents such a result by prohibiting the Secretary from certifying labor agreements that do not provide for the continuation of collective bargaining rights.
767 F.2d at 947.

Of course, the most basic bargaining right that the individual employees have is the right to pick their own bargaining representative. The employees had

this right when UTA first used federal funds to buy out a private company in 1969. Only if Utah law protects the right to choose a bargaining representative should UTA be eligible for federal funds. The Trial Court has dismissed the Department of Labor (“DOL”) from the lawsuit after they claimed that Utah law does protect the bargaining rights of the employees. However, UTA refuses to allow the TRAX employees to choose their own representative. Thus, the injunction should be granted under Utah state law as explained below since the Trial Court cannot claim that the labor agreements or “protective arrangements” protect basic federal bargaining rights and then not find a violation of those rights by UTA.

As the court in *Donovan* stated:

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.

767 F.2d at 948.

The applicable Utah law, 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-organize, to form, join, or assist labor organizations and to bargain collectively through representatives 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 organizations, to enter into and execute a written contract incorporating therein the agreements so reached. (Emphasis added.)

Thus, UTA is in violation of state law if it is not negotiating with an entity representing a majority of workers in an appropriate bargaining unit. Under NLRA case law, when a company is faced with a dispute over who represents workers and enters into a contract with a union that is not proven to represent the majority of the appropriate unit, the contract is not binding. *NLRB v. RCA Del Caribe, Inc.*, 262 N.L.R.B. 963 (1982). UTA was notified prior to ratifying the present contract that there were serious issues about whether Local 382 represented the TRAX employees. Plaintiff Lisa Burke presented to UTA a petition signed by about half the TRAX employees as well as a cover letter, demonstrating that the company should examine whether Local 382 continued to represent a majority of the workers. The best estimate is that more than 70% of TRAX employees want alternative representation. Aplt. App. A at 153-164. If UTA had acted upon the petition and polled its employees at TRAX, as was its responsibility, it would have known that it could not enter into a contract with Local 382. Despite this, UTA and Local 382, acting in collusion, have denied them their right to choose a bargaining

representative. This action denies the TRAX employees their individual rights under the NLRA and for reasons explained above is either contrary to Utah law or means that the DOL has created inadequate protective arrangements.

2. Federal Labor Law Protects Both Individual and Collective Rights and the Trial Court Improperly Allowed the Defendants to Violate the Individual Rights of the Plaintiffs.

The defendants argued, and the Trial Court accepted the argument, that Local 382 and UTA could create an agreement between them that forced a bargaining representative on the TRAX employees. This is contrary to United States Supreme Court precedent. The United States Supreme Court allows a union to waive economic rights but not bargaining rights. The United States Supreme Court stated that:

[A] different rule should obtain where the rights of the employees to exercise their choice of a bargaining representative is involved-whether to have no bargaining representative, or to retain the present one, or to obtain a new one. When the right to such a choice is at issue, it is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining unit.

NLRB v. Magnavox Co., 415 U.S. 322, 326 (1974) (Citation omitted.)

The dissent in *Magnovox*, including now Chief Justice Rehnquist, explained that a union's ability to waive Section 7 rights does not include the right to waive rights where the union and employees have conflicting interests. 415 U.S. at 327. Counsel for the TRAX employees thought that this case clearly established that the

TRAX employees have individual rights concerning choosing a bargaining representative that could not be waived by any contract between UTA and Local 382. Similarly, an en banc decision from the D.C. Circuit recognizes that a union cannot waive individual rights and that *Magnavox* and its progeny clearly stand for the proposition that the NLRA protects individual rights. *Hammontree v. NLRB*, 925 F.2d 1486, 1490 (D.C. Cir. 1991) (en banc). The clearest statement in the case is from a concurrence which states, “the NLRA and the LMRA [Labor Management Relations Act] are designed to protect both **individual** and collective rights” *Id.* at 1502 (emphasis added). However, the majority decision similarly recognizes the distinction. “[T]he NLRA established waivable group and **individual rights**, redressable in a complex administrative scheme.” *Id.* at 1497 (emphasis added). As the concurrence noted in that case, the NLRA and the LMRA are designed to protect both **individual** and collective rights. The concurrence, citing United States Supreme Court case law, stated that: “The waiver of the individual rights can only occur when the union does not “breach its duty of good-faith representation.” *Id.* at 1502 (citing *Metropolitan Edison Co. v. NLRB* 460 U.S. 693, 706-07 n.11 (1983)). This is precisely what has occurred in this case in which a backroom deal between UTA and Local 382 resulted in TRAX employees being denied the right to choose their own representative. Thus, this case is similar

to *Lee v. NLRB*, 393 F.3d 491 (4th Cir. 2005) in which the court, citing to cases such as *Magnavox*, stated that: “Section 7 rights are integral to employees’ rights to choose their bargaining representative and thus cannot be bargained away by either the union or the company.” 393 F.3d 491 *14-15.

The TRAX employees have never waived their right to pick their own representative and cannot have a representative that is the result of a backroom deal imposed upon them. As stated by the United States Supreme Court:

The House Report recognized that ‘no one, whether employer or employee need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust.
Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705, 75 L. Ed. 2d 387, 103 S. Ct. 1467 (1983.) (Quoting H.R. Rep. No. 245, 80th Cong., 1st. Sess., 17 (1947)

(emphasis in original). The TRAX employees, in affidavits provided to the Trial Court, demonstrated that Local 382 was not even addressing their safety issues.

The Plaintiffs asked for an evidentiary hearing to show the complicity between UTA and Local 382 but were denied that hearing. Most of plaintiffs’ witnesses are UTA employees who are unwilling to voluntarily give testimony due to fear of losing their employment.

3. The Accretion Doctrine Was Created to Be Consistent with the Protection of Individual Rights under the NLRA. UTA Has Violated Utah Code Ann. § 17 A-2-1031 (2004) and NLRB Policy by Accreting Employees into an Existing Bargaining Unit.

The first error of law committed by the Trial Court was to evaluate the merits of the case under a severance standard and not an accretion standard. “An accretion is an attempt to add new employees or **present employees in new positions** to an existing bargaining unit.” *NLRB v. Superior Protection, Inc.*, 2005 U.S. App. LEXIS 2760; 176 L.R.R.M. 2769 * 11 (Feb. 16. 2005) (emphasis added). In the case at bar, UTA entered into a contract with Local 382 prior to the TRAX facility being created that mandated Local 382 as the representative for the TRAX employees. Then it staffed the new TRAX facility with a combination of some new employees and transferred employees. Such an accretion would deny the TRAX employees their individual rights under the NLRA and would be considered an unfair labor practice under the NLRA. As stated in *Aramark*, “it is well established that an employer’s grant of recognition to a union is inappropriate and **unlawful** if granted before a representative complement of employees is present.” *Aramak Services, Inc. v. NLRB*, 2002 NLRB Lexis 521 * 12 (Oct. 21, 2002) (emphasis added) (Citing *Kroger Co.*, 275 NLRB 1478 (1985) *Lianco Container Corp.*, 173 NLRB 1444, (1969)). Despite this case law the Trial Court

found that a contract between UTA and Local 382 prohibited the TRAX employees from voting out Local 382 as their bargaining representative. The Trial Court presumed that the TRAX employees had to follow the procedure for severance from a bargaining unit. In fact, due to the accretion doctrine the TRAX employees were never properly part of the bargaining unit. The Trial Court was provided with a case on all fours with the case at bar, which found that the creation of a light rail unit creates an accretion issue. The case concerned maintenance workers for a light rail unit in California who demanded a vote on whether they were entitled to separate representation from the bus employees. *International Brotherhood of Electric Workers v. Aubrey, Jr.*, 42 Ca. App. 4th 861 (Ct. App. 2nd Appellate Dist., Div. 4 1996). The case reviewed a decision by the California Director of the Department of Industrial Relations. “[I]n making his determination, the director must apply federal labor law and federal administrative practice.” *Id.* at 866 (citation omitted). The California agency, with decades of labor law experience in the most populous state in the nation, clearly evaluated the case as an accretion case. *Id.* However, unlike the case at bar, those employees did not have separate mid-level management nor, most importantly, a separate facility. *Id.* at 871. Consequently, those light rail workers could not demonstrate that their proposed unit could be an appropriate bargaining unit. Thus, accretion did occur in that

matter but under the facts of this case accretion would clearly be inappropriate here.

The second and related error of law by the Trial Court was accepting the argument that a company and a union could agree on a bargaining representative for a group of employees that could constitute an appropriate bargaining unit. As stated by the Third Circuit Court of Appeals; “Representation issues may not be decided by contract, and thus may not be decided by an arbitrator.” *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)). That court went on to state:

Like successorship, **accretion** is a representative issue. **It cannot be resolved by a contract** between Local 169 and the employer and thus cannot be resolved by the contractual remedy of arbitration.
Id. (emphasis added).

This is entirely consistent with *Magnavox*, which requires that the choosing of a bargaining representative remain free and precludes a union from conspiring with a company to choose the bargaining representative. 415 U.S. at 324.

In protecting the right of employees to choose their own bargaining representative and unit, the NLRB has created a different test for appropriateness than is used to determine an initial bargaining unit. In an initial bargaining unit test the NLRB must only choose an appropriate bargaining unit and not the most

appropriate bargaining unit, but:

In the accretion context, however, ‘[a] group of employees is properly accreted to an existing bargaining unit when they have such a close community of interests with the existing unit that they have no true identity distinct from it.’

Aramak Services, Inc. v. NLRB, 2002 NLRB Lexis 521 * 15 (Oct. 21, 2002).

Simply stated, if a group of employees could be an appropriate bargaining unit alone, they cannot be accreted into an existing bargaining unit. *Baltimore Sun v. National Labor Relations Board*, 257 F.3d 419, 427 (4th Cir. 2001). Numerous other cases support the view that if a new facility could be a separate bargaining unit no finding of accretion can be made. E.g. *Westvaco, Va. Folding Box Div. v. NLRB*, 795 F.2d 1171,1173 (4th Cir. 1986); *Westinghouse Elec. Corp. v. NLRB*, 506 FR.2d 668, 672-73 (4th Cir. 1974); *NLRB v. Stephens Ford Inc*, 773 F.2d 468, 472-76 (2d Cir. 1985); *Intern. Ass’n of Machinists v. NLRB*, 759 F.2d 1477, 1479 (9th Cir. 1985); *Retail Clerks Local 588, etc. v. NLRB*, 565 F.2d 769, 772 (D.C. Cir. 1977).

Case law has clearly protected “employee self-determination” under Section 7 of 29 U.S.C. § 157 and that is perhaps the “fundamental promise of the National Labor Relations Act.” *Baltimore Sun Company v. National Labor Relations Board*, 257 F.3d 419, 426 (4th Cir. 2001). As stated by the court in *Baltimore Sun*:

Because the Board’s discretion in selecting an appropriate bargaining unit for an election is broad, that same breadth correspondingly narrows its

discretion in accreting employees because, under the Board's accretion rule, any employees that could **appropriately be a separate unit cannot be accreted to another unit.**

257 F.3d at 430 (emphasis added). This is only fair.

In the present case, some of the TRAX employees joined the company without working for the bus unit. They have been forced into being represented by a union that they never voted to support. This violates the basic principles of federal labor law. While not all the provisions of the NLRA are applicable to UTA, both state law and federal case law on Section 13(c) require that the basic rights enshrined in the principles of federal law be protected. *Park City Ed. Assn. v. Bd. Ed. Park City School Dist.*, 879 P.2d 267, 272 (Utah Ct. App. 1994); *Amalgamated Transit Union International, AFL-CIO, et al. v. Donovan*, 767 F.2d 939, 948 (D.C. Cir. 1985).

As was stated in a recent NLRB case:

It is well settled that an accretion is the addition of new employees to an already existing group. The NLRB has limited this principle and construed it narrowly so as not to stifle the desires of employees regarding membership. See *Auto Processing Co.*, 258 NLRB 854 (1981), and cases cited therein.

In other words, the accretion principle cannot subvert the rights of employees to freely choose who, if anyone, will represent them. *Safeway Stores*, 256 NLRB 918 (1981). The facts of this case do not make any case for accretion. "**TPC-North was a new facility and thus a new bargaining unit.**" *Aramark Services, Inc. v.*

NLRB, 2002 NLRB Lexis 521 *10-11 (Oct. 21, 2002) (emphasis added).

In a footnote in *Aramark* the administrative law judge admonished the parties. This quote from *Aramark* could appropriately be directed at UTA and Local 382 in this case:

The arguments offered by the parties in this case often missed the gravamen of the alleged violations here. The right of employees to freely choose who, if anyone, will represent them for the purposes of collective bargaining is an untrammelled right. It may not be defeated by parties' willingness to engage in backdoor deals, however well intentioned.

Id. (Citing *Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1961)).

The Tenth Circuit Court has also been protective of employees' individual rights under the NLRA. In *Borden v. NLRB*, 19 F.3d 502 (10th Cir. 1994), even though employees were represented by the same bargaining representative it still did not result in an automatic finding of accretion. The Tenth Circuit Court still looked to see if employees had a separate identity in which case they would not be accreted. 19 F.3d 502, 508 (10th Cir. 1994).

In sum, the NLRA does protect individual rights. The modern cases in particular recognize these rights. The accretion doctrine has evolved to better protect these rights. UTA, Local 382 and now unfortunately, the Trial Court, have denied that these rights exist. The Trial Court erred by relying on 50-year-old cases cited by the defendants that are no longer controlling, and instead, should have at least used cases that have occurred since *Magnavox* to make its decision. The trend

of the law is to protect the individual rights whereas the 50-year-old cases that are largely relied on by the Trial Court do not.

The plaintiffs have asserted that either the protective arrangements are deficient or the Trial Court should have found that UTA had violated state law. The plaintiffs have made essentially a failure to consider claim against the DOL. However, the Trial Court has dismissed that cause of action for a failure to state a claim. Yet, it refuses to issue an injunction for a violation of state law. Logically, either the TRAX employees are being denied their Section 7 rights due to deficient protective arrangements or a violation of state law by UTA is occurring. The Trial Court's decision has denied the TRAX employees their individual rights. The Trial Court erred in not following federal case law. Section 7 of the NLRA, 29 U.S.C. § 157 does protect individual rights of employees and Section 9(b) requires that:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining[.]

The Trial Court should have similarly attempted to maximize the TRAX employees' rights since under the statutory scheme it was functioning similar to the NLRB and not as an appellate court reviewing an agency action. The TRAX employees do not have a state administrative body to address their issues since the Utah Labor Commission only hears employment law type cases and does not hear

collective bargaining type cases.

II. THE TRIAL COURT IMPROPERLY DENIED THE PLAINTIFFS AN EVIDENTIARY HEARING NECESSARY TO DEMONSTRATE THE NEED FOR THE INJUNCTION AND FAILED TO ISSUE REQUIRED CONCLUSIONS OF LAW AND FACTS .

A. The Standard of Review

The standard of review for a denial of a preliminary injunction is abuse of discretion. *Utah Licensed Beverage v. Leavitt*, 256 F.3d 1061, 1065 (10th Cir. 2001)(citing *A.C.L.U. v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999)).

B. Discussion

Plaintiffs made it clear in their filings that under the Norris-LaGuardia Act an evidentiary hearing is required before a court can issue an injunction. *International Union v. LaSalle Machine Tool, Inc.*, 696 F.2d 452, 455 (6th Cir. 1982). The need of the plaintiffs to examine hostile witnesses that had unique information on the contract negotiations, as well as witnesses too concerned about their own continued employment to voluntarily give testimony by affidavits also supported the request for an evidentiary hearing. The Trial Court denied all requests for an evidentiary hearing and denied the reconsideration without even a motion hearing. Granting an injunction to prevent workers from being unfairly accreted is not without precedent. An injunction was issued in *Boire v. Intern. Brotherhood of Teamsters*, 479 F.2d 778, 789 (5th Cir. 1973) because the Court

found a similar arrangement to be a violation of Section 7 rights and held that an injunction, as has been requested in this case, was appropriate.

Thus, under the unique facts of this case the plaintiffs believe that the denial of the evidentiary hearing on the injunction violates due process. Despite the reasons identified above supporting an evidentiary hearing, Plaintiffs concede that no published decisions from the Tenth Circuit Court require a trial court to hold an evidentiary hearing on a request for an injunction. However, the Trial Court's refusal to issue findings of fact and conclusions of law clearly is contrary to Tenth Circuit Court case law. E.g. *Wolf v. New Mexico Dept. Of Human Resources*, 69 F.3d 1081, 1087 (10th Cir. 1995). The plaintiffs had filed a request for an injunction that requested different and substantially more limited relief than contained in the first injunction. The plaintiffs requested the alternative relief when it became apparent that they would not be granted an evidentiary hearing. The Plaintiffs additionally provided the Trial Court with authority demonstrating that the Trial Court had used the incorrect legal standard in evaluating the merits of their underlying case. Properly understood, the second request for an injunction cannot be considered a simple request for reconsideration.

Consequently, the plaintiffs were entitled under Rule 52(a) of the Federal Rules of Civil Procedure to findings of and a clear statement of whether the Trial

Court evaluated the injunction under the accretion standard or the severance standard. Fed. R. Civ. P. 52(a). Instead, the plaintiffs only received an unsigned minute entry that gave no rationale for the denial of the injunction. Aplt. App. B at 278. Moreover, even the first order did not examine the other factors necessary for an injunction and thus makes appellate review difficult. *See* Aplt. App. B at 181-189. Thus, if this Court believes that an immediate granting of the injunction is not required, it should order a remand to allow the Trial Court to satisfy Rule 52(a).

III. PLAINTIFFS HAVE SATISFIED THE OTHER REQUIREMENTS FOR INJUNCTIVE RELIEF.

A. The Plaintiffs Will Suffer Irreparable Injury If Injunctive Relief Is Not Granted.

Interference with the basic Section 7 rights of an employee clearly states an irreparable injury. The TRAX employees are being denied the right to be represented by an agent of their own choosing. Every day that they cannot address safety issues documented in affidavits submitted to the Trial Court certainly endangers them. Aplt. App. A at 48-51 & 166-169. The magnitude of this danger would have been demonstrated at an evidentiary hearing, a process that was denied the TRAX employees for the previous injunction. The NLRA and Utah Code ANN. § 17A-2-1031 (2004) protects 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 the “People’s Republic of China” does 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, UTA and Local 382 have conspired to deny the employees of TRAX the right to engage in concerted activities to address glaring safety deficiencies that have arisen. UTA and Local 382 are more concerned with continuing the ability of bus employees to transfer to TRAX with their seniority intact than with safety issues. Supervisors are supervising TRAX rail employees despite having little or no experience with light-rail trains. This is contrary to the practice of cities such as San Diego. A light-rail supervisor in San Diego has years of experience with light-rail trains before assuming that position.

B. The Potential Hardship to the TRAX Employees Far Exceeds the Hardship to the Employer.

The TRAX employees are being denied their Section 7 rights. UTA will suffer no legally cognizable injury by allowing the employees to exercise these rights. As stated in *Boire*, a court should not preserve the status quo of an illegal

contract. 479 F.2d at 788. The TRAX employees are losing the rights conferred to them by Section 7 and this prevents them from addressing safety issues in a meaningful way. State law is inadequate to protect them because it is a state agency that is presently violating their rights.

C. 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 Trial 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 transferring 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 policy agreement with Local 382 since before TRAX opened.

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 by new bus transfers to train them.

Bus drivers transferring to TRAX operations 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 understand these aspects of railroad work. Some of the former bus drivers have gone back to bus after having failed the TRAX classes. More alarmingly, some have been sent back after operating incompetently after passing. Thus, the present system endangers the public. However, UTA continues to treat bus and rail workers as interchangeable.

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 injury to the public. Alternatively, if the Court believes that the Trial Court’s failure to make requisite findings of fact and conclusions of law makes appellate review problematic, it should remand the case for compliance with Rule 52(a) of the Federal Rules of Civil Procedure.

STATEMENT REGARDING ORAL ARGUMENTS

Counsel request oral argument. 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing **APPELLANTS' OPENING BRIEF AND APPENDIX** was furnished by U.S. Mail to the following on this _____ day of _____, 2005.

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ATTACHMENTS

ATTACHMENT A

9 of 100 DOCUMENTS

UTAH CODE ANNOTATED
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*** STATUTES CURRENT THROUGH THE 2004 THIRD SPECIAL SESSION ***
*** ANNOTATIONS CURRENT THROUGH 2004 UT 27, 2004 UT APP 102 ***
*** AND APRIL 1, 2004 (FEDERAL CASES) ***

TITLE 17A. SPECIAL DISTRICTS
CHAPTER 2. INDEPENDENT SPECIAL DISTRICTS
PART 10. PUBLIC TRANSIT DISTRICTS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Utah Code Ann. § 17A-2-1031 (2004)

§ 17A-2-1031. Employees may organize and bargain collectively -- Strikes prohibited -- District to enter into bargaining agreements

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 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.

HISTORY: L. 1969 (1st S.S.), ch. 12, § 31; C. 1953, 11-20-31; renumbered by L. 1990, ch. 186, § 397.

USER NOTE: For more generally applicable notes, see notes under the first section of this article, part, chapter, subtitle, or title.

ATTACHMENT B

FILED
CLERK, U.S. DISTRICT COURT

2005 JAN 25 P 3:38

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

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

Plaintiffs,

vs.

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

Defendants.

ORDER DENYING PLAINTIFFS'
MOTION FOR A PRELIMINARY
INJUNCTION

Case No. 2:04-CV-00985 PGC

In this labor dispute, plaintiffs (several light-rail or "TRAX" operators) have moved for a preliminary injunction enjoining defendant, Utah Transit Authority (UTA), (1) from transferring any bus employees to the TRAX division, (2) from transferring bus employees to the TRAX division with seniority rights that would trump the seniority rights of existing TRAX employees, and (3) from interfering with plaintiffs' First Amendment rights to free speech and association by denying them access to post union information on company and employee bulletin boards

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ATTACHMENT C

ATTACHMENT D

ATTACHMENT E

