

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

Case Nos. 05-4079 and 05-4222

LISA BURKE, et al.

Plaintiffs-Appellants,

v.

UTAH TRANSIT AUTHORITY, LOCAL 382 OF THE
AMALGAMATED TRANSIT UNION, et. al.,

Defendants-Appellees

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

The Honorable Paul G. Cassell, District Court Judge

United States District Court
Case No. 2:04-CV-00985

**OPPOSITION OF APPELLEE LOCAL 382 OF THE AMALGAMATED
TRANSIT UNION TO APPELLANTS' PETITION FOR EN BANC REVIEW**

The Honorable Timothy M. Tymkovich, Circuit Judge
The Honorable Robert H. McWilliams, Senior Circuit Judge
The Honorable Claire V. Eagan, Chief District Judge, District of No. Okla.

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INTRODUCTION

Pursuant to Order of the Court dated September 20, 2006, and Rule 35(e), Federal Rules of Appellate Procedures, Appellee Local 382 of the Amalgamated Transit Union (hereinafter “Local 382”), by and through its attorney of record, Joseph E. Hatch, herewith files the following brief in opposition to Appellants’ Petition for En Banc Hearing. This brief will be divided into three sections. First, Local 382 will describe its understanding of the legal criteria for the granting an en banc hearing. Second, Local 382 will argue that the Appellants’ petition failed to satisfy the legal minimum requirement for granting an en banc hearing. Third, Local 382 will briefly address several other matters raised by Appellants in their petition.

POINT I: EN BANC HEARINGS ARE DISFAVORED.

The legal criteria for the granting of an en banc hearing are outlined in Rule 35(a), Federal Rules of Appellate Procedure, which reads, in pertinent part, as follows:

...An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

- (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or
- (2) the proceeding involves a question of exceptional importance.
[Emphasis added]

I have highlighted Rule 35(a)(2) because it appears to be the requirement for the granting of an en banc review upon which the Appellants rely with their petition.

This Court, in its Tenth Circuit Rules, further comments upon Rule 35(a) in Cir. R. 35.1(A), which reads as follows:

Extraordinary procedure. A request for en banc consideration is disfavored. En banc review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court. [Emphasis added]

The phrases “a question of exceptional importance” or “an issue of exceptional public importance” are further refined in Rule 35(b)(1)(B),

Federal Rules of Appellate Procedure, which reads as follows:

The petition must begin with a statement that.....

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

There is only modest judicial interpretation as to what is meant by “extraordinary importance”. One of the best analyses can be found in a dissenting opinion by Circuit Judge Lay in the case of Olander v. State Farm Mutual, et. al., 317 F. 3d 807 (8th Cir. 2003).

The Olander case involved a diversity jurisdiction action which required the federal courts to interpret an agency agreement pursuant to North Dakota law. The federal district court ruled in favor of State Farm, and Olander appealed. The Eight Circuit Court panel reversed, and State Farm petitioned for a re-hearing en banc. In granting the en banc review, the majority wrote:

Because this decision may affect countless State Farm agency relationships in the Eighth Circuit and nationwide and conflicts with a number of decisions by other courts construing the standard form State Farm agency contract, we granted State Farm's petition for rehearing en banc...

317 F. 3d at 809.

In a strong dissent, Judge Lay reviews Rule 35, Federal Rules of Appellate Procedures, and writes, in part, as follows:

When scheduling a case to be heard en banc in any federal court of appeals, one must consider the limited resources of that court in terms of whether the issues itself it so significant that it should require the time of all of the active and participating senior judges involved. Allowing this case to proceed en banc invites every lawyer in every routine appellate case in this circuit to petition for rehearing en banc without a thought as to the significance of the issue involved or the limited resources of the court. Albeit, the court does not have to grant any petition, but the court must read every petition filed.

317 F. 3d at 813.

However broadly or narrowly this Court chooses to define the phrases “a question of exceptional importance” and “an issue of exceptional public importance”, one aspect of Rule 35 is absolutely clear, the rule can not be utilized by a losing litigant to reargue alleged errors in a panel’s decision.

U.S. v. Roscigno, 499 F. 2d 173 (7th Cir. 1974).

POINT II: THE APPELLANTS HAVE FAILED TO MAKE THE CASE FOR AN EN BANC REVIEW

Although it is not clear from Appellants’ Petition for an En Banc Hearing, it appears that the Appellants advance two main reasons why an en banc hearing should be granted. First, the Appellants argue that the decision of the panel conflicts with the opinion of a Circuit Court of Appeals in Amalgamated Transit Union v. Donovan, 767 F. 2d 939(D.C. Cir. 1986). Second, the Appellants argue that the panel wrongly interpreted Utah law. I will discuss both these arguments separately.

A. The Panel’s decision is consistent with Donovan.

The Donovan decision is a seminal case involving the interpretation of Section 13(c) of the Urban Mass Transportation Act of 1964. 49 U.S.C. § 5333(b). The impact of Section 13(c) upon Utah labor law for its public transit employees has been the central focus of all the legal arguments between the Appellants and all

the Appellees. The most critical language from Donovan significant to the case at hand is as follows:

Thus, Congress neither imposed upon the states the precise definition of “collective bargaining” established by the NLRA and the case law that has developed under that Act, nor did it employ a term of art devoid of all meaning, leaving the states free to interpret and define it as they saw fit. Instead, Congress used the phrase generically, incorporating within the statute the commonly understood meaning of “collective bargaining.” The 1964 Congress was not writing on a clean slate. Then as now, collective bargaining was universally understood to require, at a minimum, *good faith* negotiations, to a point of impasse, if necessary, over wages, hours and other terms and conditions of employment.

767 F.2d at 949.

Nothing in the panel’s decision conflicts with the Donovan interpretation of Section 13(c). In fact, the panel’s decision quotes much of the above statement favorable.

B. The Panel’s interpretation of Utah law does not merit en banc review.

The gravamen of Appellants’ case has always involved the legal meaning of the phrase “an appropriate bargaining unit” as found in Utah Code Annotated §17A-2-1031. The Appellants argue that interpretation of this Utah statute is of such extraordinary importance, to justify an en banc review, because

the decision affects the employment rights of several thousand employees of Appellee Utah Transit Authority. While Local 382 certainly concurs that the panel's decision is very important to the employees of the Utah Transit Authority, the Local, for two reasons, strongly believes that the panel's decision does not merit en banc review.

First, Local 382 agrees with Circuit Judge Lay, in his decision in Olander v. State Farm Mutual, et al, ibid., which argues that, except in the most unusual of circumstances, a panel decision interpreting state law should not be reviewed by a Circuit Court en banc. The Appellants have articulated no such unusual circumstances.

Second, the panel decision correctly interpreted Utah law. Appellants spend much of their petition arguing that the panel interpreted Utah law incorrectly. It is a general misinterpretation of Rule 35, Federal Rules of Appellate Procedure, to use a petition for an en banc rehearing to reargue the merits of one's case under the color of panel "error". A reading of both the District Court's opinion and the panel's decision demonstrate that they are well written, well reasoned, and mainstream legal analysis. The only "error" is that these four jurists disagree with Appellants.

POINT III: OTHER MATTERS RAISED IN PETITION ARE
IRRELEVANT

The Appellants raise two “errors by the panel” which are completely inappropriate for an en banc hearing. First is the panel’s affirmation of the District Court’s denial of Appellants’ Rule 56(f) Motion. Second is the panel’s affirmation of the District Court’s failure to grant Appellants’ Motion for Leave to File an Amended Complaint. Any review of these two points clearly demonstrate that both panel “errors” were in fact correctly decided and are the type of routine procedural matters which are completely inappropriate for en banc consideration.

CONCLUSION

Appellants’ petition for an en banc hearing should be denied. The panel’s decision should stand.

DATED this _____ day of October 2006.

Joseph E. Hatch
Attorney for Appellee Local 382 of the
Amalgamated Transit Union

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPPOSITION OF APPELLEE LOCAL 382 OF THE AMALGAMATED TRANSIT UNION TO APPELLANTS' PETITION FOR EN BANC REVIEW** was mailed, postage prepaid, on this _____ day of October, 2006 to the following:

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Joseph E. Hatch