

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Appellants,

v.

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

Appellees.

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

RESPONSE OF APPELLEE UNITED STATES
DEPARTMENT OF LABOR TO PETITION FOR REHEARING EN BANC

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STATEMENT OF THE ISSUE

Whether the panel's decision - holding that light rail (TRAX) employees of the Utah Transit Authority (UTA) were in "an appropriate unit" (Utah Code 17A-2-1031 (2004)), so that the Department of Labor correctly certified that UTA ensured basic collective bargaining rights (Section 13(c) of Urban Mass Transit Act of 1964 (UMTA), 49 U.S.C. 5333(b)) - raises an "issue of exceptional public importance" or conflicts "with a decision of the United States Supreme Court or of this court" (Tenth Cir. R. 35.1(A)).

STATEMENT OF THE CASE

A. Statutory Background

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

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

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

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

Jackson, 457 U.S. at 17. Congress addressed that concern by

requiring that "a state or local government must make arrangements to preserve transit workers' existing collective-bargaining rights before that government may receive federal financial assistance for the acquisition of a privately owned transit company." Id. at 16. These arrangements, called "employee protective arrangements" or "§ 13(c) agreements" (see No. 05-4079 Supp. App. 248) are negotiated and signed by the employing public transit authority and the labor organization representing employees. See 29 C.F.R. 215.3(a)(1). The obligation to conclude § 13(c) agreements continues after this initial acquisition as a prerequisite to subsequent grants of federal funds for any continued improvement or operation of the transit system. Jackson, 457 U.S. at 19; see also Amalgamated Transit Union Int'l v. Donovan, 767 F.2d 939, 940 (D.C. Cir. 1985), cert. denied, 475 U.S. 1046 (1986); 29 C.F.R. 215.3(b)(2), (b)(3).

The financial assistance itself is provided through grants made by the Department of Transportation's Federal Transit Administration for the financing of mass transportation systems. See 60 Fed. Reg. 62,964 (Dec. 7, 1995). The Secretary of Labor's involvement is limited to the certification of the protective arrangements. Thus, Section 13(c) requires "[a]s a condition of financial assistance," that "the interests of employees affected by the assistance shall be protected under arrangements the

Secretary of Labor concludes are fair and equitable." 49 U.S.C.

5333(b)(1). As pertinent here, the section further provides:

Arrangements * * * shall include provisions
that may be necessary for -

* * * * *

(B) the continuation of collective bargaining
rights

2. Utah Code

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

Employees of any public transit 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 * * *. 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.

B. Factual Background

The UTA, a political subdivision of the state of Utah, primarily operates a bus system throughout the state. In 1995, UTA decided to also provide a light rail service (TRAX) in Salt Lake City. UTA employees were then covered by a collective bargaining agreement with Local 382, "the bargaining representative for [employees of] UTA and its predecessors since 1904." Slip. Op. 4. UTA negotiated with Local 382 to modify the collective bargaining agreement and a new agreement was concluded that "a majority of UTA employees ratified in 1999." Id. Under that agreement, Local 382 was designated as the bargaining representative for both bus and TRAX employees, and a seniority system was initiated for UTA employees who transferred to TRAX positions. Burke¹ (like "the vast majority of TRAX's 150 employees" (slip op. 4)) transferred to TRAX from the 1000-member bus division.

In 2003, negotiations began for a new agreement, and Burke objected that the proposed new agreement "maintained Local 382 as its exclusive bargaining agent and continued the seniority program." Slip. Op. 5. "UTA denied [Burke's] petition and a majority of UTA employees ratified the new agreement, which

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

included a provision establishing a task force to study the seniority issue.” Slip. Op. 5. The task force recommended no changes.

Burke then complained to DOL (invoking Section 13(c) of Urban Mass Transit Act of 1964 (UMTA), 49 U.S.C. 5333(b)) “that Local 382 could not adequately represent the interests of TRAX employees and, therefore, UTA was violating their collective bargaining rights” (*id.*) by not placing them in a separate bargaining unit. DOL responded that the existing protective arrangements fully satisfied the requirements of 13(c) and rejected the complaint. *Id.* Br. for Appellee Dep’t of Labor, Add. 12a.

Burke then filed a lawsuit in federal district court alleging that first, UTA had violated the UMTA, Utah Code 17A-2-1031, and the First Amendment, second that Local 382 had breached its fiduciary duty to TRAX employees, and third, DOL had violated the UMTA. The district court denied requests for a preliminary injunction, granted summary judgment for UTA, and dismissed the suit against DOL. Burke then filed the present appeal.

C. Opinion Of The Panel

The panel first addressed Burke’s “primary argument,” that “the district court erred in concluding that TRAX employees were not entitled to a separate bargaining representative under UMTA and Utah Code § 17A-2-1301.” Slip Op. 7. Relying on Jackson

Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15 (1982), the panel held that Section 13(c) of UMTA, establishing "minimal standards that a state transit authority must satisfy before it may receive federal funding" (Slip Op. 8), "does not create a federal cause of action against state transit recipients" (id. at 9), so that Burke's "claim must arise, if at all, under state law." Id.

The panel next addressed the application of Utah Code § 17A-2-1031. Slip Op. 9. It found that "[Burke's] claim * * * is legally insupportable * * *." Id. at 19. The panel first explained that under that provision, requiring collective bargaining with "*any labor organization representing a majority of its employees in an appropriate unit,*" "UTA need only bargain with an appropriate unit, not the most appropriate unit." Slip Op. 11. And "[b]ecause this provision was enacted to ensure federal funding under UMTA," the panel "read appropriate to mean any unit sufficient to comply with UMTA." Id.

The panel then held that "[t]he bargaining unit here - composed of both TRAX and bus employees - is appropriate." Slip Op. 11. The panel discussed "a number of reasons" (id.) - that "[f]irst, the collective bargaining history of UTA evidences the appropriateness of the consolidated unit" (id.), "[s]econd, the current standard practice throughout the nation demonstrates that consolidations of bus and light rail employees is typically

appropriate" (id.), third and "more importantly, nothing in the formation of UTA's current bargaining unit demonstrates an impairment to collective bargaining rights" (noting that "[t]he parties engaged in good faith negotiations on multiple occasions," and "both the original and subsequent bargaining agreements were ratified by a majority of UTA employees"). Id. at 12.

Although expressing "doubt" as to whether "federal labor doctrine even applies here" (Slip. Op. 13 n.2), the panel then addressed the district court's reliance on "federal labor law principles" regarding "accretion" and severance" to "reach[] the same conclusion." Id. at 13. The panel "agree[d] with the district court" (id.) that this was a severance case and therefore "[t]he burden rests on the party requesting severance to 'show sufficient dissimilarity' to warrant the change to the bargaining unit." Id. at 15.

The panel discussed three facets of the record that "compelled" (id. at 16) this conclusion; "[f]irst [Burke's] objection to * * * inclusion in the bargaining unit arose nearly six years after the alleged accretion occurred" (id.), "[s]econd, this case involves employees previously represented by the same bargaining unit" (id.), "[t]hird, the circumstances here do not resemble a typical accretion claim" that "involves a group being cast against its will into another group" (id.). The panel

further noted that even if the case were to be treated as involving an "accretion" - as a staffing of a new facility by transferring employees from an existing facility - Burke had failed to overcome the applicable "presumption of continued support of the union." Id. at 17.

The panel explained that "[t]he district court's conclusion is consistent with case law interpreting [accretion and severance]" (id.), and noted that "at all times the key consideration is the history of collective bargaining within the unit." Id. at 18. Summary judgment, the panel stated, was warranted in that "the undisputed facts" were "more than ample to find the bargaining unit appropriate for purposes of Utah Code § 17A-2-1031 under any standard we apply." Id.

Turning to the district court's dismissal, under Fed. R. Civ. P. 12(b)(6), of Burke's certification claim against DOL, the panel found "no violation." The panel explained, quoting Donovan, 767 F.2d at 950-51, that "[s]tates must only preserve 'the essence of federally-defined collective bargaining rights,' by ensuring both that the state's protective arrangements are 'fair and equitable' and that they provide for the 'continuation of collective bargaining rights.'" Slip. Op. 19-20 (citation omitted). Since the panel already had determined that "UTA has

met this standard," it found "no error in DOL's certification of UTA's protective arrangements in 2001 and 2006."² Slip Op. 20.

ARGUMENT

THE UNANIMOUS DECISION OF THE PANEL NEITHER DECIDES A QUESTION OF "EXCEPTIONAL PUBLIC IMPORTANCE," NOR "CONFLICTS WITH A DECISION OF THE UNITED STATES SUPREME COURT OR OF THIS COURT," AND THUS PRESENTS NO ISSUE WARRANTING REHEARING EN BANC

This Court's rules state that "[a] request for en banc consideration is disfavored," and explain that such review "is an extraordinary procedure" intended to address "an issue of exceptional public importance or * * * a panel decision that conflicts with a decision of the United States Supreme Court or of this court." Tenth Cir. R. 35.1(A). Burke has failed to show that the "primary" (Slip. Op. 7) question decided by the panel - whether, under the factual circumstances of this case, Burke and her fellow TRAX employees are in an "appropriate [bargaining] unit" - was incorrectly decided, and, in any event, this ruling hardly amounts to an "issue of exceptional public importance" (emphasis supplied).

Moreover, Burke claims no conflict "with a decision of the United States Supreme Court or of this court" (emphasis supplied)

² The panel also rejected Burke's claim that the district court should have granted her request for discovery (Slip Op. 20) and held that the district court properly did not address Burke's motion to amend, filed after the filing of her notice of appeal. Id. at 22.

as specified by this Court's rules. Rather, she claims only an "implicit conflict with a District of Columbia Circuit's decision" (Aplnts. Pet. 1) - Donovan. And as we will also show, even that asserted "implicit conflict" is nonexistent.

1. The issue of whether one group of public transit authority employees is in "an appropriate [bargaining] unit" for purposes of implementing their collective bargaining rights is certainly important to those employees involved, but is not "of exceptional public importance" (emphasis supplied). The panel's decision is only one of many that address the appropriateness of bargaining units in a variety of distinct factual settings. See e.g., St. Anthony Hosp. Sys., Inc. v. NLRB, 884 F.2d 518 (10th Cir. 1989); NLRB v. Foodland, Inc., 744 F.2d 735 (10th Cir. 1984).

As the panel emphasized, the Utah law, "enacted in 1969 to comply with the requirements of federal law contained in UMTA and thereby ensure federal funding" (Slip Op. 9) guarantees UTA's employees the right to collective bargaining in "an appropriate [bargaining] unit." The panel's thorough opinion makes evident that Burke's case involves nothing more than the application of that right to a particular set of facts, not some sweeping issue of more general significance. The panel carefully analyzed Burke's claim both under the panel's "primary analysis" and "the district court's alternative analysis" (slip op. 19) applying

federal law, and concluded that Burke was indeed in an "appropriate [bargaining] unit."

Given the panel's consideration and disposition of Burke's claim regarding the appropriateness of her bargaining unit, Burke's raises no serious issue as to the propriety of DOL's certifications that UTA had appropriate protective arrangements to preserve "the essence of federally-defined collective bargaining rights.'" Slip. Op. 20. The role of the DOL is to certify that proposed "protective arrangements" are "fair and equitable" under the statutory standards, and, if there were to be a fundamental change in state law contrary to the policy of 13(c), to "halt the flow of funds or take other appropriate action." Donovan, 767 F.2d at 947 n.9. Burke's complaint sets forth no deficiency in the arrangements that the DOL has approved, nor any serious departure from such arrangements. Rather, it alleges only that current circumstances require a new and separate bargaining unit for TRAX employees. That matter has no relation to the DOL's responsibility for applying the broad standards of Section 13(c).

Burke's petition claims, however, that "[a]rguably, Utah state law which has no provisions for unit clarification or decertification does not protect bargaining rights" and that "workers should simply not have to engage in expensive litigation to get the most basic bargaining rights; the right to an agent of

his or her own choosing." Pet. 13. Yet Burke's complaint makes no such allegation.³ In any event, through the present lawsuit, Burke has already obtained precisely such "clarification," albeit one with which she continues to disagree.

2. There is no conflict, explicit or "implicit" (Pet. 1), between the decision of the panel and that of the D.C. Circuit in Donovan. There, the court held that by foreclosing from mandatory collective bargaining several otherwise "mandatory subjects of collective bargaining" - wages (fringe benefits), regular hours of work and maximum overtime, subcontracting (767 F.2d at 952) - a Georgia law had deprived public transit employees of rights that were of "the essence of federally-defined collective bargaining rights" (id. at 950-51). Accordingly, the court found the Georgia law to be contrary to Section 13(c) of UMTA.

Here, by contrast and contrary to Burke's assertion (Pet. 2), Utah law expressly preserves those essential rights, in particular the right to union representation within an "appropriate [bargaining] unit." Again, unlike the employees in

³ Whatever the merits of a state's providing an NLRB-type board for such matters as a matter of policy, 13(c) embodies no such mandate. See Donovan, 767 F.2d at 950 ("Congress chose not to incorporate the entire structure and requirements of the NLRA into section 13(c)."). Local Div. 589, Amalgamated Transit Union v. Massachusetts, 666 F.2d 618, 634 (1st Cir. 1981) ("Congress's general intent to secure fair arrangements does not require the implementation of any particular set of detailed provisions."), cert. denied, 457 U.S. 1117 (1982).

Donovan, Burke's quarrel is simply one as to the application of a statutorily established right in a particular instance. Therefore, rehearing en banc is unwarranted.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for rehearing en banc.

Respectfully submitted,

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OCTOBER 2006

CERTIFICATION OF DIGITAL SUBMISSIONS

I certify (1) that there were no privacy redactions that needed to be made in this document and (2) that the document submitted in Digital Form is an exact copy of the written document filed with the Clerk, and (3) that the digital submission has been scanned for viruses using Trend Micro Office Scan, version 6.5, last updated Oct. 16, 2006, and according to that program is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October 2006, filed the foregoing response for appellee United States Department of Labor with this Court by causing copies to be mailed, postage prepaid, via Federal Express, and served the foregoing response for appellee United States Department of Labor upon counsel by causing copies to be mailed, postage prepaid, via USPS Express Mail or Federal Express, to:

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