

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 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

BRIEF OF APPELLEES
UTAH TRANSIT AUTHORITY AND JOHN INGLISH
(With Attachments in a PDF Document)
(Oral Argument Requested)

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Defendants/Appellees Utah Transit Authority (“UTA”) and John English (together, “UTA”) submit this brief in opposition to the appeal of Plaintiffs/Appellants Lisa Burke (“Burke”) and Michael Carper (“Carper”).

STATEMENT OF JURISDICTION

The district court had jurisdiction over the case by virtue of 28 U.S.C. § 1331, in that Burke and Carper asserted claims against UTA and the U.S. Department of Labor (“DOL”) for alleged violations of 42 U.S.C. § 1983, the Fourteenth Amendment to the U.S. Constitution, and Section 13(c) of the Urban Mass Transportation Act (codified as 49 U.S.C. § 5333(b)). The district court had supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over Burke and Carper’s state law claims against UTA and Local 382 of the Amalgamated Transit Union (“Local 382”) because the state law claims arose out of UTA’s alleged failure to (1) recognize a separate bargaining unit for TRAX employees; and (2) provide Burke and Carper with access to bulletin boards and other avenues of communication that were equal to the incumbent union, Local 382.

The court of appeals has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) because this appeal challenges a district court order denying a motion for reconsideration of the denial of a preliminary injunction. The notice of appeal is timely because it was filed on April 7, 2005, within 30 days of the district court’s March 9, 2005 minute entry denying the motion for reconsideration.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the district court arbitrary, capricious, whimsical, or manifestly unreasonable in deciding, based on bargaining history, common industry practice, and analogous federal law, that the existing UTA bargaining unit was appropriate?

2. Was the district court arbitrary, capricious, whimsical, or manifestly unreasonable in deciding that UTA did not violate Utah law in recognizing and bargaining exclusively with Local 382, the bargaining representative chosen by a majority of employees in an appropriate bargaining unit?

3. Was UTA's agreement with Local 382, the bargaining representative of UTA's employees, that TRAX jobs would be filled by existing bargaining unit employees and included in the existing bargaining unit, inconsistent with federal labor policy?

STATEMENT OF THE CASE

This action was filed on October 22, 2004 in the district court by Lisa Burke and Michael Carper, two UTA employees who work in UTA's TRAX (light rail) business unit. Burke and Carper alleged several claims arising out of UTA's refusal to recognize and bargain with a separate collective bargaining unit for UTA's TRAX employees.

On November 29, 2004, Burke and Carper filed a motion for preliminary injunction in which they sought to bar UTA from (1) transferring bus employees to

the TRAX division; and (2) allowing such transferred employees to have system-wide seniority. Burke and Carper also asked the district court to order UTA to allow them to post information on UTA bulletin boards regarding their efforts to organize a separate bargaining unit. The motion for preliminary injunction was heard on January 24, 2005 and subsequently denied by order dated January 25, 2005. Burke and Carper have not appealed this denial.

On January 31, 2005, less than one week later, Burke and Carper filed another motion styled as a motion for preliminary injunction, this time seeking an order barring UTA from continuing to recognize Local 382 as bargaining representative for TRAX employees. The stated basis for the second motion was that the district court's "previous order was manifest error because it applied the wrong legal standard to the facts." Aplt. App. at 191. This motion, effectively a motion for reconsideration, was heard on April 9, 2005 and denied orally in court. Aplt. App. at 317; Exhibit A hereto (transcript).

STATEMENT OF FACTS

This case is an attempt by Burke and Carper to elevate the status of themselves and other TRAX employees at the expense of UTA's other bargaining unit employees. In 1998, as UTA was preparing to begin TRAX operations, Local 382, the representative of all employees in a system-wide bargaining unit, negotiated an agreement with UTA that gave its constituency, UTA's operations,

maintenance and parts employees, the right to TRAX positions by transferring into the TRAX division. Aplt. App. at 73-74. The agreement also provided for system-wide seniority and maintained Local 382 as representative of a system-wide bargaining unit (which would include TRAX employees). Id. This agreement was incorporated into a collective bargaining agreement that was ratified by vote of all represented employees at UTA. Id. There was no objection to this arrangement, which was plainly of great benefit to UTA's existing employees, including Burke and Carper.

In August 2004, after six years of representation in a system-wide unit, Burke presented a petition to UTA indicating that some TRAX employees were dissatisfied with Local 382's representation on the issue of seniority (they wanted separate TRAX seniority), and that they wanted their own bargaining unit and their own representative. Aplt. App. at 75, 154. Based on the ratified agreement recognizing Local 382 as representative of the system-wide collective bargaining unit, and Utah law that requires UTA to recognize and bargain exclusively with the representative chosen by the majority of employees in an appropriate bargaining unit, UTA properly disregarded the petition. This lawsuit followed.

1. The Parties.

UTA is a political subdivision of the State of Utah. Pursuant to Utah law, it was established in 1969 to purchase the assets of private transit companies

operating in the Salt Lake City metropolitan area and create a public transit service. For many years, UTA provided mass transportation services only through buses. However, in 1999, UTA commenced light rail, or “TRAX,” operations. UTA’s TRAX operations center is headquartered in Salt Lake County, where the TRAX vehicles are housed and maintained, and TRAX services are provided extensively in Salt Lake County. The TRAX system is designed as part of an integrated transit system.

UTA is organized into several business units, including two bus units and the TRAX unit located in Salt Lake County, and bus units in Ogden and Provo, respectively. Employees assigned to the TRAX business unit provide services at the TRAX center and throughout the UTA system wherever TRAX service is provided. Employees assigned to the bus units provide services at the operations centers for those units and in the related service areas for those units. Each business unit is headed by a manager, who in turn reports to UTA’s general manager.

Burke and Carper are currently employed in UTA’s TRAX business unit (where they drive TRAX light rail vehicles), but they were initially hired and worked for many years in UTA’s bus divisions (where they drove buses). Burke was hired as a bus operator at UTA on or about November 13, 1978 and Carper was hired as a bus operator on or about November 29, 1993. *Aplt. App. at 73.*

Local 382 was recognized as the exclusive collective bargaining representative for UTA's operations, maintenance, and parts employees over 100 years ago in 1904 and since then has continuously represented bargaining unit employees at UTA and its predecessors, always in a single, system-wide bargaining unit. In the early years of the twentieth century, Local 382 represented streetcar employees, as gasoline powered buses were not yet in existence. In the 1940s, streetcars were phased out and buses were substituted. During this period, Local 382 represented both bus employees and streetcar employees. After streetcars were phased out, Local 382 represented only bus employees until UTA commenced TRAX operations in 1999. Aplt. App. at 73, 112-14.

2. Agreement To Include TRAX Jobs In Existing Bargaining Unit.

In 1995, as UTA planned to implement TRAX operations, UTA and Local 382 (in its capacity as bargaining representative of UTA's operations, maintenance and parts employees) conducted negotiations over the issue of whether the new TRAX jobs would be considered union or non-union work. At the conclusion of those negotiations, UTA and Local 382 agreed essentially that Local 382 would have the power and authority to bargain for positions performing work in the TRAX unit that was comparable to work performed by bargaining unit employees in bus units, *i.e.*, operations, parts and maintenance. Aplt. App. at 73-74, 113-14.

This initial agreement was followed in July 1998 by a subsequent agreement that, among other things, TRAX employees would be drawn from UTA's existing bus units and that bus employees transferring into the TRAX business unit would retain the same seniority they had accumulated as bus employees. Thus, seniority would be tracked on a system-wide basis (within the categories of operations, parts, and maintenance). Aplt. App. at 73-74, 113-14.

This agreement on transfer and seniority was then included in the "Collective Bargaining Agreement between Utah Transit Authority and Amalgamated Transit Union, Local 382" dated December 11, 1998 ("1998 Contract"). The 1998 Contract was ratified by vote of all employees in the bargaining unit. Aplt. App. at 73-74, 113-14, 125-26.

The effect of these agreements was to set aside the new TRAX jobs for existing UTA employees who were members of the system-wide bargaining unit represented by Local 382. Burke and Carper were members of that system-wide bargaining unit and were beneficiaries of these agreements.

The 1998 Contract also recognized Local 382 as the exclusive bargaining representative of all employees covered by the contract, including TRAX employees. Aplee. Supp. App. at 40. All employees in the bargaining unit at the time of the election in 1998, which includes Burke and Carper, were given the

opportunity to vote on the 1998 Contract. In fact, Burke and Carper have never denied that they themselves voted in favor of the 1998 Contract.

3. Burke And Carper, Along With Others, Transfer To TRAX Jobs.

Pursuant to the transfer and seniority provisions set out in the aforementioned agreements, Burke transferred from UTA's Meadowbrook business unit (one of the Salt Lake County bus units) into the TRAX business unit on or about October 11, 1999 (along with other bus operators). Aplt. App. at 125. Carper transferred into the TRAX unit from Meadowbrook pursuant to the same provisions of the 1998 Contract on or about January 25, 2000 (again, along with other bus operators). Aplt. App. at 125.

During that initial time period, and on regular occasions thereafter, additional bus operators, and parts and maintenance employees transferred from UTA bus units to the TRAX unit. The initial complement of employees was entirely made up of employees from the bus division. There are presently TRAX employees who were hired directly into TRAX, but they were not hired until later. Aplt. App. at 113-14, 126.

Whenever employees transferred to the TRAX division, the transferring employees retained their system-wide seniority based on the 1998 Contract. Although such seniority would not allow a newly-transferred employee to "bump" a TRAX employee with lower seniority back to a bus unit, a newly-transferred

employee could bump such an employee to a less desirable shift. The 1998 Contract also allowed TRAX employees, at their option, to transfer back into a bus unit. Aplt. App. at 126-27.

Burke and Carper, along with all other employees who transferred into the TRAX unit, received extensive training before and after beginning their duties as TRAX employees. Aplt. App. at 127.

4. Negotiation And Ratification Of New Collective Bargaining Agreement.

In August 2003, UTA and Local 382 began negotiating a new collective bargaining agreement. The negotiations resulted in a tentative agreement in May 2004, but it failed to win ratification from employees. Aplt. App. at 127.

On July 27, 2004, after further negotiations, UTA and Local 382 signed a second tentative agreement. Thereafter, it was distributed to members of the bargaining unit in preparation for a vote on ratification. Aplt. App. at 127.

On August 5, 2004, Burke submitted to UTA management a letter containing the following petition:

August 2, 2004

To the Utah Transit Authority:

We, the undersigned members of the TRAX bargaining unit, are notifying the Utah Transit Authority that we do not accept the Amalgamated Transit Union, local 382, as an appropriate bargaining unit to represent us. The ATU has failed to adequately address the seniority issue at TRAX and it appears that there are irreconcilable differences between the goals of bus and rail employees.

Please be on notice that should the contract pass, we will explore all of our options regarding forming or joining a new union. We will also exercise our right to negotiate a separate contract if the Utah Labor Commission agrees with our assessment that the present bargaining unit is an inappropriate bargaining unit for TRAX.

UTA had not previously received any formal objection to the existing bargaining unit. Aplt. App. at 153-54.

On August 10, 2004, the members of the bargaining unit ratified the Collective Bargaining Agreement between Utah Transit Authority and Amalgamated Transit Union, Local 382 effective as of December 11, 2003 (“2003 Contract”). The 2003 Contract was then signed by the Local 382’s leaders and UTA management on August 11, 2004. Aplt. App. at 127. The 2003 Contract states that UTA “recognizes the Union [Local 382] as the sole and exclusive collective bargaining agent for all bus and TRAX operators . . . , parts and maintenance employees” of UTA. Aplee. Supp. App. at 132.

The 2003 Contract maintained the same language regarding transfer of employees into the TRAX unit and seniority. However, it also included a side letter agreement that established a task team to study the seniority issue:

This letter will serve to reflect our agreement that before October 1, 2004, the Authority will establish a task team to study alternatives to the current TRAX seniority system. The task team members or their designees will seek input from TRAX employees and bus employees. On or before October, 2005, the task team will provide, to an Oversight Committee, recommended alternatives to the current TRAX seniority system.

Aplt. App. at 75, Aplee. Supp. at 245.

5. Bargaining Units In Other Transit Districts.

The vast majority of transit authorities across the United States that provide both bus and light rail operations have both bus employees and rail employees in the same collective bargaining unit and represented by the same union. Aplt. App. at 13, 100-11, 116-23, 127-28.

6. Section 13(c) Labor Protective Conditions.

As a condition to UTA's receipt of funding from the Federal Transit Administration, UTA is required to enter into an agreement pursuant to Section 13(c) that contains labor protective conditions. These protective conditions have been applied to all federal capital funding received by UTA pursuant to the Federal Transit Act since 1993. Aplt. App. at 128; Aplee. Supp. App. at 261-66.

Plaintiffs' ultimate goals, as stated in their complaint, are to secure a change in the existing seniority rules so that bus operators cannot "'bump' into the TRAX seniority roster," Aplt. App. at 13, and to get higher pay. *Id.* at 14. The petition submitted to UTA in August 2004 also specifically identified the seniority issue as the reason they sought separate representation. Aplt. App. at 153-54.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying Burke and Carper's motion for reconsideration on grounds that they could not establish the probability of success on the merits.

Utah Code Ann. § 17A-2-1031 requires that UTA recognize and bargain exclusively with the majority representative of its employees in an appropriate bargaining unit. UTA has met this duty.

First, there is no dispute that the existing unit is appropriate and that Local 382 is the chosen representative of a majority of employees in that unit. Thus, the literal language of the statute has been complied with.

Second, to the extent Section 1031 incorporates the substance of federal labor policy, there has also been no violation. The method of determining an appropriate unit is procedural, not substantive. Federal labor policy is met if the end result is an appropriate unit. In any event, federal labor policy is not opposed to the determination of bargaining units by agreement, as in this case.

Even if the National Labor Relations Board had jurisdiction, the result would have been no different. The existing unit has been in place for six years. The Board will not go back in time to assess the appropriateness of a bargaining unit. And even if it had, Board precedent supports a determination by agreement

when the affected employees are transferred pursuant to that agreement and the union retains a majority, as in this case.

ARGUMENT

Burke and Carper’s renewed motion for preliminary injunction (motion for reconsideration) sought to enjoin UTA “from recognizing Local 382 of the Amalgamated Transit Union (“Local 382”) as the exclusive bargaining representative for the TRAX facility.” The district court did not abuse its discretion in denying this motion.

I. THE DISTRICT COURT DECISION SHOULD BE DISTURBED ONLY IF IT WAS AN “ARBITRARY, CAPRICIOUS, WHIMSICAL, OR MANIFESTLY UNREASONABLE JUDGMENT.”

Burke and Carper erroneously characterize their motion to the district court as merely a second motion for preliminary injunction. In reality, it was a motion for reconsideration of the previous motion. The motion itself stated it was filed because the district court’s “previous order was manifest error.” Aplt. App. at 191. The district court also understood it as a motion for reconsideration. Aplt. App. at 317. It was filed less than one week after the denial of Burke and Carper’s initial motion for preliminary injunction. Even in their appellate brief, Burke and Carper essentially admit that the motion was in substance a motion for reconsideration. See Aplt. Brief at 3 (“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 persuasive new authority.”).

The standard of review for denial of a motion for reconsideration is abuse of discretion. Wright v. Abbott Laboratories, Inc., 259 F.3d 1226, 1235-36 (10th Cir. 2001). The lower court decision will not be disturbed “unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of a permissible choice in the circumstances.” Id. (quoting Phelps v. Hamilton, 122 F.3d 1309, 1324 (10th Cir. 1997)). The appellant must show that the lower court decision was “an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.” Id. (quoting Brown v. Presbyterian Healthcare Serv., 101 F.3d 1324, 1331 (10th Cir. 1996)). Burke and Carper have failed to meet this standard. Accordingly, the district court decision should be affirmed.

Burke and Carper sought reconsideration of a motion for preliminary injunction. A motion for preliminary injunction should be granted only upon a showing that the moving party has satisfied four elements: “(1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest.” Salt Lake Tribune Publishing Co.,

LLC v. AT&T Corp., et al., 320 F.3d 1081, 1099 (10th Cir. 2003). Furthermore, the right to relief must be “clear and unequivocal” because “a preliminary injunction is an extraordinary remedy.” Id. (citing Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001) (internal quotes omitted).

Additionally, in cases where the moving party seeks to change the status quo, a preliminary injunction can be granted only if each of the four elements cited above weighs “heavily and compellingly” in favor of granting the injunction. Id. (citing Kikumura and SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098-99) (internal quotes omitted). In this case, the status quo for the last 100 years has been that all bargaining unit employees at UTA are included in a single system-wide bargaining unit, and Local 382 was recognized as their exclusive representative. TRAX employees have been included in this system-wide bargaining unit since 1998. Burke and Carper’s renewed motion for preliminary injunction, which sought to separate the TRAX employees from this bargaining unit, would have changed this status quo. Accordingly, Burke and Carper were required to meet the heightened burden of persuasion.

II. BURKE AND CARPER FAILED TO ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS THAT WEIGHED “HEAVILY AND COMPELLINGLY” IN FAVOR OF GRANTING THE INJUNCTION.

The district court did not abuse its discretion in determining that Burke and Carper failed to establish a substantial likelihood of success on the merits. The

complaint alleged three claims against UTA: (1) denial of free speech and association rights under 42 U.S.C. § 1983; (2) violation of Section 13(c) of the Urban Mass Transportation Act (codified at 49 U.S.C. §5333(b)); and (3) violation of Utah Code Ann. § 17A-2-1031. Aplt. App. at 20-25.

The Section 1983 claim was not raised in the motion for reconsideration or in Burke and Carper’s brief to this Court. Additionally, there can be no direct claim against UTA for violation of Section 13(c). Section 13(c)’s requirements, as applied to a specific employer, are stated in the employer’s Section 13(c) agreement. The only claim an employee may bring against the employer is breach of contract under state law. Jackson Transit Auth. v. Local Division 1285, 457 U.S. 15 (1982). Burke and Carper have not argued on appeal that UTA breached its 13(c) *agreement*. Accordingly, the only claim against UTA at issue in this appeal is the claim that UTA violated Utah Code Ann. § 17A-2-1031. As shown below, the district court did not abuse its discretion in determining that Burke and Carper could not prove that UTA violated Section 1031.

A. UTA Complied With Section 1031’s Mandate To Recognize And Bargain Exclusively With A Union Representing A Majority Of Employees In An Appropriate Unit.

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.

Utah Code Ann. § 17A-2-1031 (2004) (emphasis added).

UTA's duty, as expressly set out in section 1031, is to "recognize and bargain exclusively with any labor organization representing a majority of its employees in an appropriate unit." Utah Code Ann. § 17A-2-1031. As shown below, UTA has complied with this duty.¹

1. The system-wide unit is appropriate.

The majority of public transit authorities with both light rail and bus operations have recognized bargaining units that include both rail and bus employees together. UTA and its predecessors have consistently bargained over the years with a company-wide bargaining unit from the early years of the last century to the present, including the time period around the 1940s, when public transit in Salt Lake City included buses and streetcars. Aplt. App. at 113-14.

¹ There is no procedure applicable to UTA under Utah or federal law for determining whether a particular unit is appropriate for purposes of collective bargaining. Neither the Utah Labor Relations Board nor the National Labor Relations Board ("Board") has jurisdiction over political subdivisions of a state, Utah Code Ann. § 34-20-2(5), 29 U.S.C. § 152(2), and UTA is a political subdivision of the State of Utah.

Furthermore, although the Board does not have jurisdiction in this case, its decisions are persuasive, and the Board has regularly determined that company-wide bargaining units are appropriate in public transportation systems. St. Louis Public Service Company, 77 N.L.R.B. 749, 752, 754-55 (1948) (“The Board has frequently held that a unit of all operators and maintenance employees in a public transportation system is an appropriate one” and “We have frequently found that in a public transportation system such as this, . . . a system-wide unit, including both operating and maintenance employees, is the most appropriate unit.”). The Board’s decision in St. Louis involved both bus employees and streetcar employees.

Notably, Section 1031 does not require that UTA bargain with the “most appropriate unit,” or “the appropriate unit,” but only “an appropriate unit.” Thus, it is very persuasive that the Board declared in St. Louis that in public transit systems a system-wide unit is the “most appropriate.” The Board has also ruled that in cases involving public utilities, which are analogous to transit authorities, the company-wide unit is presumptively appropriate. Pacific Gas and Elec. Co., 87 N.L.R.B. 257 (1949) (“It is clear, therefore, that a system-wide unit is, as we have on numerous occasions stated, the optimum unit for representation of the employees of this Employer.”); accord Cellco Partnership, 2004 NLRB LEXIS 138, *9 (2004)² (“In creating the system-wide presumption, the Board essentially

² Copy attached as Exhibit B.

balanced employees' Section 7 right to bargain collectively through representatives of their own choosing against the public's interest in the unbroken provision of necessary services.”). This rule was also applied by a California Court of Appeal in holding that a system-wide unit was appropriate for rail and bus maintenance employees of the Los Angeles Metropolitan Transportation Authority. Int'l Brotherhood of Elec. Workers v. Aubrey, 42 Cal. App. 4th 861, 871 (1996) (“System-wide units are favored in public utilities.”).

The Board has also determined that a company-wide unit is presumptively appropriate when a union petitions for it. Western Electric Co., Inc., 98 N.L.R.B. 1018, 1032 (1952):

On its face, the unit requested is appropriate because it is coextensive with the entire Company. A unit of such scope is the first one called appropriate in Section 9 (b) of the Act, upon which the Board's authority to establish collective bargaining units rests. Apart from situations controlled or affected by special statutory requirements, it is also the basic unit recognized by the Board since its earliest days. *Indeed, it may be stated as a general rule that, absent any statutory considerations, the Board does not refuse to grant a company-wide unit to a labor organization unless it is affirmatively shown that a smaller one is more appropriate.*

Id. (emphasis added) (citations omitted). The Board continues to view petitioned-for company-wide units as presumptively appropriate. See, e.g., Huckleberry Youth Programs, 326 N.L.R.B. 1272 (1998) (describing company-wide unit as “presumptively appropriate”). In this case, Local 382 has consistently sought a system-wide unit.

Finally, broad unit determinations are generally favored in the public sector. See Lee C. Shaw & R. Theodore Clark, Jr., Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems, 51 Or. L. Rev. 151, 176 (1971-72) (Authors state in conclusion: “We have tried to indicate what we believe are the critical factors in unit determination in the public sector. If any one point is paramount, it is that bargaining units should be as broad as is consistent with viable negotiations. We strongly recommend that this principle be legislatively prescribed as the overriding standard for establishing bargaining units in the public sector.”).

For these reasons, the weight of the evidence and legal authority demonstrates that the existing collective bargaining unit is “appropriate” for purposes of Section 1031.

2. Because the system-wide unit is appropriate, UTA was obligated to recognize and bargain exclusively with it.

Given that Local 382 is the chosen bargaining representative of the majority of employees in an appropriate unit, UTA had a duty under Section 1031 to recognize Local 382 and bargain exclusively with it. UTA satisfied that duty. Burke and Carper apparently desire a different unit and a different representative, so that they can seek different collective bargaining goals, but in *collective* bargaining, the wishes of the few are subordinated to the goals of the many. Among other things, Burke and Carper appear to want to shut out current bus

employees from the advantages they enjoyed when they transferred to the TRAX division using the same transfer and seniority rules that are currently in effect. The fact that Burke and Carper have not been able to reach these goals does not mean that they are being denied the right to act in concert. They are merely unhappy with the results, which have resulted from bargaining on behalf of employees as a whole, not for Burke and Carper, or TRAX employees, alone.

B. UTA Did Not Violate Section 1031 By Including The TRAX Jobs In The Existing Unit By Agreement.

Burke and Carper appear to concede that the system-wide unit is appropriate. However, they argue that UTA nonetheless violated Section 1031 because TRAX employees were improperly “accreted” into the existing bargaining unit under federal law. Burke and Carper argue that federal labor laws apply because Section 13(c)’s requirement of the “continuation of collective bargaining rights” refers to collective bargaining rights provided by federal law. According to Burke and Carper, since Utah’s Section 1031 was enacted to comply with Section 13(c)’s requirement that collective bargaining rights be continued, Section 1031 must be interpreted to require determination of the appropriate bargaining unit using applicable federal rules. This analysis should be rejected for reasons set out below.

1. UTA’s Agreement To Include TRAX Jobs In The Existing Bargaining Unit Is Consistent With Federal Labor Policy.

Although Section 1031 provides collective bargaining rights that are consistent with federal labor policy, it does not, via Section 13(c), incorporate all of federal labor law and make it applicable to UTA. Thus, even if the existing bargaining unit hypothetically violated federal labor law, which UTA denies, that federal labor law does not apply to UTA through Section 1031.

Section 13(c) provides that as a condition of financial assistance from the federal government, the interests of transit employees affected by the financial assistance “shall be protected under arrangements the Secretary of Labor concludes are fair and equitable.” 49 U.S.C. § 5333(b). Such arrangements are to include the “continuation of collective bargaining rights.” *Id.* The Department of Labor certified that the arrangements provided by UTA for the protection of its employees, including the protection of its employees’ collective bargaining rights pursuant to § 13(c), are fair and equitable. Aplee. Supp. App. at 267-70.

Applicable case law makes clear that the term “collective bargaining rights,” as used in Section 13(c), incorporates the general substance of federal labor *policy*, but not federal labor law itself. This point was explained in Amalgamated Transit Union International v. Donovan, 767 F.2d 939 (D.C. Cir. 1985), the leading case on Section 13(c) labor standards and the case on which Burke and Carper rely:

[Section 13(c)] provides that state law should govern the labor relations of public transit authorities and their employees, but it conditions federal transit aid, in part, on the continuation of collective bargaining rights. In setting out those rights, Congress chose not to incorporate the entire structure and requirements of the NLRA into section 13(c), for to do so would force states to choose between federal transit aid and their exclusion from the coverage of the NLRA. On the other hand, Congress made it clear that federal labor policy would dictate the substantive meaning of collective bargaining for purposes of section 13(c). “Good faith” bargaining, to a point of impasse if necessary, over wages, hours and other terms and conditions of employment has always been the essence of federally-defined collective bargaining rights; indeed, excluding the federal sector, it is the almost universally recognized definition of collective bargaining in the United States.

Section 13(c)’s requirement, therefore, that labor protective agreements provide for “the continuation of collective bargaining rights” means, at a minimum, that where employees enjoyed collective bargaining rights prior to public acquisition of the transit system, they are entitled 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 950-51.

Donovan’s description of the *substantive* content of federal labor policy makes clear that federal labor *policy* does not include all of federal labor *law*. Section 13(c) does not “incorporate the entire structure and requirements of the NLRA.” Id. States can provide for the “continuation of collective bargaining rights,” and thus comply with Section 13(c), without copying all of the Board’s rules and procedures. This principle plainly extends to the determination of an appropriate bargaining unit. Although it is fair to assume that the Donovan

reference to the right to be “represented” in “meaningful negotiations” encompasses within it a right to be in an *appropriate bargaining unit*, the particular method of determining an appropriate bargaining unit cannot fairly be described as “substantive.” Federal labor policy dictates that the bargaining unit be “appropriate,” but not that it be determined in any particular way.

Furthermore, although the Board provides a procedural mechanism for determination of collective bargaining units, the Board’s determinations can be modified by agreement of the parties, so long as the ultimate result is an appropriate unit. White-Westinghouse Corp., 229 N.L.R.B. 667 (1977) (parties may agree to combine two bargaining units into one); Albertson’s, Inc., 307 N.L.R.B. 338 (1992) (inclusion by agreement of customer service employees in larger unit of store employees barred decertification petition of customer service employees only). As stated in a respected labor law treatise, the scope of the bargaining unit is a permissive subject of bargaining:

Whenever bargaining takes place without a prior Board definition of the unit, the parties must agree upon the unit to be covered by the contract they negotiate. “The parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining.” Even when the Board has defined a unit, the parties are free to agree on a negotiated unit different from the certified or recognized unit. ... The Board accepts as lawful the bargaining units that the parties establish by consensual agreement.

1 Patrick Hardin & John E. Higgins, Jr., *The Developing Labor Law*, 1257-58 (4th ed. 2001) (citations omitted).

In this case, as demonstrated above, the system-wide unit is appropriate. It is essentially undisputed that this bargaining unit would be considered “appropriate” under federal law, and that TRAX employees have had the same rights as every other employee in the bargaining unit to nominate union officers, vote for whom they choose, and even to vote out Local 382 as the recognized collective bargaining representative. There is also no dispute that TRAX employees have been represented, along with all other employees in the bargaining unit, in good faith negotiations over wages, hours and other terms and conditions of employment at UTA.

For these reasons, UTA did not violate federal labor policy in agreeing with Local 382 on the scope of the bargaining unit.³ Because there has been no violation of federal labor policy, there cannot have been a violation of Section 1031, even accepting Burke and Carper’s argument, based on Donovan, that Utah law must be interpreted to incorporate the substance of federal labor policy.

2. The National Labor Relations Board, Even If It Had Jurisdiction, Would Not Have Upset This Existing Bargaining Unit.

In any event, even if the Board had jurisdiction over UTA, the result in this case would be no different. In fact, a review of federal labor law suggests that

³ The usual practice when, as in this case, there is no agency assigned the task of determining an appropriate bargaining unit, is to establish it by agreement. Shaw & Clark, 51 Or. L. Rev. 151, supra, at 152.

Burke and Carper’s request that TRAX employees be separated into their own bargaining unit presents a question of severance, not accretion, as the district court determined in denying the first motion for preliminary injunction. *Aplt. App.* at 186 (“Given these facts, the court views the present case as one in which plaintiffs seek ‘severance’ from an existing bargaining unit instead of one in which plaintiffs have been improperly ‘accreted’ to an already existing unit.”).⁴

First, if the issue of the appropriate unit were to come before the Board, it would assess the unit as it now is, not as it existed in 1998, as Burke and Carper seem to suggest. *Gibbs & Cox, Inc.*, 280 N.L.R.B. 953 (1986). In *Gibbs & Cox*, the Board noted that “in the face of a timely challenge,” it would not “accrete employees in a newly created presumptively appropriate unit into a larger unit if those employees have not had an opportunity to express their sentiments as to representation.” *Id.* at 954. However, the Board continued, this preference is “of lesser cogency where a history of meaningful bargaining has developed.” The Board concluded: “Thus, to characterize the unit from the vantage of any period of time but the one presently under consideration is to disturb the reasonable balance the Board seeks to achieve between the aims of assuring freedom of employees’

⁴ Burke and Carper would have had no remedy before the Board. Given that their argument is based on alleged wrongdoing by UTA in 1998 (in supposedly forcing a union on the TRAX employees), any unfair labor practice charge filed in 2004 (the time of the petition) would have been rejected by the Board as time-barred. See 29 U.S.C. § 160(b).

choice and fostering established bargaining relationships.” Id. at 955. The Board then determined that the larger, existing unit was the proper unit for evaluating the employer’s claim of a good faith doubt as to the union’s continuing majority status. Id. Accord Green-Wood Cemetery, 280 N.L.R.B. 1359 (1986) (Board refused to evaluate petition for decertification in relation to original unit in the face of six years of bargaining history with merged unit); Albertson’s, Inc., 307 N.L.R.B. 338 (1992) (“the appropriate unit in a decertification election must be coextensive with the currently *recognized and established* bargaining unit”) (emphasis added).

In Albertson’s, the merged unit had been in place for only 10 months and the Board refused to consider a petition to decertify the originally certified unit. In this case, the currently recognized and established bargaining unit had been in place for *six years* when the petition was presented in August 2004. Accordingly, Burke and Carper’s request to separate the TRAX employees from the existing unit would be viewed by the Board as a request for a severance, not as some kind of a request to undo an accretion.

Second, even if TRAX employees had been classified in a separate bargaining unit in 1998, Local 382 would have continued to represent all employees and could have agreed to a combined unit. In Gitano Group, Inc., 308 N.L.R.B. 1172 (1992), the Board announced the following rule for determining the

collective bargaining unit in cases where an employer transfers employees to a new location:

[W]e announce today that when an employer transfers a portion of its employees at one location to a new location, we will no longer define the nature of the transfer in terms of the relationship between the “new” unit and the “old” unit (i.e., whether one is a “spinoff” or “partial relocation” from the other). Rather, we will begin with the Board’s long-held rebuttable presumption that the unit at the new facility is a separate appropriate unit. Assuming that that presumption is not rebutted, we will then apply a simple fact-based majority test to determine whether the respondent is obligated to recognize and bargain with the union as the representative of the unit at the new facility. *If a majority of the employees in the unit at the new facility are transferees from the original bargaining unit, we will presume that those employees continue to support the union and find that the employer is obligated to recognize and bargain with the union as the exclusive collective-bargaining representative of the employees in the new unit.*

Gitano Group, 308 N.L.R.B. at 1175 (emphasis added). In short, under Gitano Group, even if the TRAX employees had been regarded as a separate bargaining unit, their bargaining representative would have been Local 382.

Furthermore, Local 382, as bargaining representative of both of these hypothetical bargaining units, could have agreed with UTA to combine the two units into one, system-wide unit. White-Westinghouse Corp., 229 N.L.R.B. 667 (1977); Albertson’s, Inc., 307 N.L.R.B. 338 (1992) (inclusion by agreement of customer service employees in larger unit of store employees barred decertification petition of customer service employees only). Thus, the end result, a properly-recognized system-wide bargaining unit, would have been the same.

Finally, the Board would have upheld the recognition clause found in the 1998 Contract, even if it had been challenged at the time. In Kroger Co., 219 N.L.R.B. 388, 389 (1975), the employer and the union agreed that all locations of the employer within a certain geographic area, even those not yet established, would fall within the existing collective bargaining unit. The Board declared that such recognition clauses are enforceable because they are interpreted as depriving the employer of the right to require an election when the union demands recognition based on a showing of majority support (by card count). The clauses are only improper when the union does not actually have majority support. The Board later clarified that majority support can be shown by “a card check or some other method.” Safeway Stores, Inc., 276 N.L.R.B. 944, 951 (1985). Majority support can also be shown by the fact that a majority of employees transferred to the new location are already members of the existing bargaining unit. Gitano Group. Given that under Gitano Group, Local 382 had majority support among TRAX employees when they were transferred into the TRAX division from UTA bus divisions, the Board would have upheld the 1998 Contract’s recognition clause under Kroger.

In short, where the collective bargaining agreement provides that employees in a new location will be drawn from the existing bargaining unit, and that they will continue to be in the same bargaining unit, which will include the new

location, and the majority of employees in the new location are in fact drawn from the existing bargaining unit, there is no violation. That is what happened in this case.

3. Burke And Carper's Accretion Cases Do Not Apply Because They Involve New Employees, A Rival Union, And The Lack Of A Prior Agreement.

For these reasons, Burke and Carper's cases are inapplicable. Their accretion cases do not involve system-wide bargaining units and ratified agreements providing that existing employees, members of the bargaining unit, will be transferred to new jobs that will be included in the existing system-wide bargaining unit. Instead, Burke and Carper's cases involve new employees (or existing employees who had not been represented by the union), no previous collective bargaining agreements regarding inclusion in the unit, and a battle between rival unions. See N.L.R.B. v. Superior Protection Inc., 401 F.3d 282 (5th Cir. 2005) (new employees); Aramark Services, Inc. v. N.L.R.B., 2002 NLRB Lexis 521 (Oct. 21, 2002) (no previous agreement; two rival unions)⁵; Int'l B'hood of Elec. Workers v. Aubrey, 42 Cal. App. 4th 861 (Cal. Ct. App. 1996) (no previous agreement, two rival unions); N.L.R.B. v. Paper Mfrs. Co., 786 F.2d 163 (3d Cir. 1986) (no previous agreement, two rival unions); Baltimore Sun v. N.L.R.B., 257 F.3d 419 (4th Cir. 2001) (new employees; no previous agreement); Westvaco Va.,

⁵ Copy attached as Exhibit C.

Folding Box Div. v. N.L.R.B., 795 F.2d 1171 (4th Cir. 1986) (new employees; no previous agreement); Westinghouse Elec. Corp. v. N.L.R.B., 506 F.2d 668 (4th Cir. 1974) (no previous agreement); N.L.R.B. v. Stevens Ford, Inc., 773 F.2d 468 (2d Cir. 1985) (new employees; no previous agreement); Int’l Ass’n of Machinists, Local 1414 v. N.L.R.B., 759 F.2d 1477 (9th Cir. 1985) (new employees; no previous agreement); Retail Clerks Local 588 v. N.L.R.B., 565 F.2d 769 (D.C. Cir. 1977) (two rival unions; no previous agreement). In addition, these cases are fundamentally different because in each case the challenge was brought at the time of the alleged accretion, not six years later.

TRAX employees are properly part of the existing bargaining unit, which is “appropriate” as a matter of law, and cannot simply demand an election in a narrower unit of their choosing. There is no violation of Utah law and there would be no violation of federal law, if it applied. Even if federal law were applied by analogy, Burke and Carper’s only options for breaking away from the existing bargaining unit would be (1) to meet the exacting standards for a severance, see generally Mallinckrodt Chemical Works, 162 N.L.R.B. 387 (1967); or (2) to decertify the entire system-wide unit. Campbell Soup Co., 111 N.L.R.B. 234, 235 (1955) (“Congress has made no provision for the decertification of part of a certified *or recognized* bargaining unit”) (emphasis added).

III. THE DISTRICT COURT WAS NOT OBLIGATED TO HOLD AN EVIDENTIARY HEARING BEFORE DENYING BURKE AND CARPER’S MOTION FOR PRELIMINARY INJUNCTION.

As Burke and Carper concede, there is no Tenth Circuit decision requiring a district court to hold an evidentiary hearing before denying a motion for preliminary injunction, and they cite no cases from any other jurisdiction establishing any such requirement.⁶

In fact, this Court has held in an unpublished decision that the district court is not required to hold an evidentiary hearing prior to disposing of a motion for preliminary injunction:

[Plaintiff] also claims the district court abused its discretion by failing to hold an evidentiary hearing prior to resolving the motion [for preliminary injunction]. We reject this argument. [Plaintiff] has failed to cite any Tenth Circuit authority that requires a district court to hold an evidentiary hearing prior to granting or denying a preliminary injunction motion . . . Accordingly, we do not instruct the district court to hold an evidentiary hearing prior to disposition of [plaintiff’s] motion, although the district court is free to do so within its own discretion.

Reynolds and Reynolds Co. v. Eaves, 1998 WL 339465 (10th Cir. June 10, 1998)

(copy attached hereto as Exhibit D). See also, McDonald’s Corp. v. Robertson,

147 F.3d 1301, 1311 (11th Cir. 1998) (so long as the party opposing a preliminary

⁶ Burke and Carper’s assertion that “under the Norris LaGuardia Act an evidentiary hearing is required before a court can issue an injunction” is irrelevant, because (1) they have not established that their request for an injunction is governed by the Norris-LaGuardia act, and (2) even if they had, the district court did not issue an injunction.

injunction has a fair opportunity to oppose the application and to prepare for such opposition, Rule 65 does not require an evidentiary hearing).

Burke and Carper's unsupported assertion that the district court was required to hold an evidentiary hearing before denying their preliminary injunction is incorrect. Their request for a remand on this basis should therefore be denied.

IV. THE DISTRICT COURT WAS NOT REQUIRED TO ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN DENYING BURKE AND CARPER'S MOTION FOR RECONSIDERATION.

The district court issued a comprehensive nine-page Order Denying Plaintiffs' Motion for Preliminary Injunction on Jan. 25, 2005 ("Order"). See Aplt. Brief at Attachment B. This Order complies with the requirements of Rule 52(a), of the Federal Rules of Civil Procedure. Furthermore, Rule 52(a) does not require findings of fact and conclusions of law to be issued by the district court when denying a motion for reconsideration.

Rule 52(a) provides that a district court "shall find the facts specially and state separately its conclusion of law thereon." This Court has explained that Rule 52(a) "serves to (1) engender care on the part of trial judges in ascertaining the facts; and (2) make possible meaningful appellate review." Wolfe v. New Mexico Department of Human Services, 69 F.3d 1081, 1087 (10th Cir. 1995):

Thus, the touchstone for whether findings of fact satisfy Rule 52(a) is whether they are sufficient to indicate the factual basis for the court's general conclusion as to ultimate facts so as to facilitate a meaningful review of the issues presented.

Id.

As this Court can determine, the Order satisfies this standard. The Order stated the facts the district court found to be relevant to its legal analysis, then explained its application of the law to those facts. Further, the district court stated each of the elements that Burke and Carper must establish in order for a preliminary injunction to issue, and denied the injunction on the grounds that they failed to establish a substantial likelihood of success on the merits. See Order, Aplt. Brief at Attachment B, at 7, 9.

Burke and Carper also assert that the district court was required to issue Rule 52(a) findings of fact and conclusions of law in denying their subsequent attempt to persuade the district court to change its mind. As discussed above, this attempt was properly classified by the district court as a motion for reconsideration, the denial of which does not require findings of fact and conclusions of law.

Because the January 25, 2005 Order allows this Court to conduct a meaningful appellate review of the issues in this appeal, and because Rule 52(a) findings of fact and conclusions of law are not required in denying a motion for reconsideration, this matter should not be remanded on this basis.

V. BURKE AND CARPER HAVE NOT SATISFIED THE OTHER REQUIREMENTS FOR INJUNCTIVE RELIEF.

As shown, the district court properly denied Burke and Carper’s motion for preliminary injunction because they failed to show a substantial likelihood of success on the merits. Accordingly, neither this Court nor the district court is required to address the other factors which are necessary to establish an entitlement to a preliminary injunction. In any event, contrary to their assertion, Burke and Carper have not satisfied the other requirements for issuance of a preliminary injunction.

A. Burke And Carper Have Not Established That They Will Suffer Irreparable Injury If The Injunction Is Not Issued.

The only injunctive relief requested by Burke and Carper in their motion for reconsideration was for the district court to prohibit UTA from recognizing Local 382 as their exclusive bargaining representative. However, Burke and Carper have failed to demonstrate they are irreparably harmed by UTA’s continued recognition of Local 382 as the exclusive system-wide bargaining representative.

“To constitute irreparable harm, an injury must be certain, great, actual and not theoretical.” Heideman v. South Salt Lake City, 348 F.3d 1182, 1189 (10th Cir. 2003). “Simple economic loss usually does not, in and of itself, constitute irreparable harm, such losses are compensable by monetary damages.” Id.

Burke and Carper have presented no evidence that the continued recognition by UTA of Local 382 as the exclusive bargaining agent for all of its operators, including those in the TRAX Division, has caused or will cause them irreparable harm. Burke and Carper claim that any interference with the right to engage in “concerted activity” is irreparable harm, but they fail to cite any cases or provide any explanation of why that should be so. Based on their first motion for preliminary injunction, Burke and Carper clearly want to end the preferential transfer and system-wide seniority rules currently in place in the existing collective bargaining agreement. However, they have never explained how transfers and seniority could not be reversed if the ultimate judgment provided for it.

Burke and Carper also claim, as they did in the district court, that the current system-wide bargaining unit somehow decreases safety in TRAX operations. Burke and Carper state that bus operators “must complete numerous tests” to qualify as TRAX vehicle operators, and that many bus operators are returned to the bus side “because of an inability to understand” light rail “signals and switches.”

None of this proves that UTA ignores safety in transferring bus operators to the rail division. In fact, it proves the opposite. UTA does not allow bus operators to become TRAX operators unless they pass the required tests and operate competently, and if they cannot learn to operate the vehicles safely, they must return to a bus unit. Moreover, although Burke and Carper allege Local 382 and

UTA are more concerned with system-wide seniority than with safety, they fail to support this allegation with any explanation or reasoning, or with statistics showing, for example, that transit properties with separately-represented rail employees are safer than transit properties with system-wide seniority. Nor do they explain how a separate bargaining unit will lead to separate seniority; such a change would have to be negotiated. Accordingly, there is no basis for Burke and Carper's allegation of irreparable harm.

B. The Balance Of Hardships Weighs Against The Injunction.

Burke and Carper's assertion that the balance of hardships weighs in favor of granting their requested injunction is without merit. Burke and Carper claim that the current system-wide unit "prevents them from addressing safety issues in a meaningful way," but again do not explain how. This purported harm is simply illusory.

In terms of the harm to UTA if this injunction were granted, Burke and Carper fail to take into account the harm to UTA, Local 382, and other bargaining unit employees from undoing the existing collective bargaining agreement, which was signed and ratified in August 2004 after months of negotiations. If that agreement were declared void, all parties would presumably be back at the negotiating table. Furthermore, Burke and Carper seek changes in current transfer and seniority rules that would come at the expense of bus division employees, their

fellow workers. Finally, changing the existing collective bargaining agreement would violate UTA's Section 13(c) obligations. Plainly, the balance of hardships weighs against granting the injunction.

C. The Injunction Is Adverse To The Public Interest.

Burke and Carper claim that this injunction is not against the public interest because the public "will enjoy increased safety." Burke and Carper support this contention by pointing out the contractual provisions allowing bus operators to transfer to the TRAX division and to do so with system-wide seniority. However, Burke and Carper do not explain how these practices hurt safety. In fact, they concede that bus operators who transfer to TRAX positions are trained and required to pass tests before actually operating any TRAX vehicles, and that those who do not understand and perform well are sent back to the bus divisions. In short, Burke and Carper have failed to identify the contractually-required practice that supposedly causes safety problems. Furthermore, Burke and Carper do not explain how they could ensure any improvement in safety simply by barring UTA from recognizing Local 382 as representative of the TRAX employees.

In addition, Burke and Carper have not even addressed the harm to the public interest in upsetting an existing collective bargaining agreement. Indeed, the Board's presumption in favor of system-wide units in public utility and public transportation cases is based on the Board's position that smaller units are contrary

to the public interest. See Cellco Partnership, 2004 NLRB LEXIS 138, *9 (2004) (“In creating the system-wide presumption, the Board essentially balanced employees’ Section 7 right to bargain collectively through representatives of their own choosing against the public’s interest in the unbroken provision of necessary services.”). If units smaller than system-wide are contrary to the public interest, then Burke and Carper’s requested injunction, which seeks to bar UTA from recognizing the system-wide unit, is adverse to the public interest.

CONCLUSION

Based on the foregoing, UTA requests that the Court affirm the district court’s denial of Burke and Carper’s motion for reconsideration.

DATED this ____ day of September, 2005.

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ORAL ARGUMENT REQUEST

UTA respectfully requests that this case be set for oral argument. This case involves important legal issues of Utah labor law and federal labor policy, and UTA believes oral argument would further illuminate the specific legal principles at stake.

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CERTIFICATE OF COMPLIANCE WITH RULE 31.3

In accordance with Tenth Circuit Rule 31.3(B), counsel for UTA certifies that it is necessary to submit a separate brief because it is not practical to file a joint brief with Local 382. UTA and Local 382 have similar but not identical interests in this case and have differing positions on some of the issues at stake.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,578 words.

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CERTIFICATE OF DIGITAL SUBMISSIONS

Pursuant to the Emergency General Order filed October 20, 2004, as amended (the "Order"), the undersigned certifies: (1) all privacy redactions required by the Order have been made and that this electronically submitted document is otherwise an exact copy of the written document filed with the Clerk; and (2) that this electronic document has been scanned with the most recent version of Norton Antivirus 2004 (Virus Definition dated 9/21/2005) and according to that program is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEES UTAH TRANSIT AUTHORITY AND JOHN INGLISH** was mailed, postage prepaid, on this _____ day of September, 2005 to the following:

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