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UNITED STATES DISTRICT COURT DISTRICT OF UTAH

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

Plaintiffs,

v.

UTAH TRANSIT AUTHORITY, JOHN
ENGLISH, INDIVIDUALLY, LOCAL 382 OF
THE AMALGAMATED TRANSIT UNION,
AND THE UNITED STATES DEPARTMENT
OF LABOR,

Defendants.

No. 04- CV- 00985

PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS' MOTION TO
DISMISS

JUDGE: PAUL CASSELL

Pursuant to the provisions of Rule 7-1 of the Court's Local Rules of Practice, Plaintiffs, through counsel, file this Memorandum In Opposition To Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss filed by the United States Department of Labor.

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ARGUMENT

I. THIS COURT CLEARLY HAS SUBJECT MATTER JURISDICTION OVER THE CLAIM AGAINST THE DEPARTMENT OF LABOR.

Plaintiffs' claim against the United States Department of Labor ("DOL") is that the DOL has failed to create adequate protective arrangements under the requirements of the Urban Mass Transportation Act of 1964 ("UMTA") to protect the existing bargaining rights of the TRAX Division Employees of the Utah Transit Authority ("UTA"). The DOL, throughout its oversized memorandum, has asserted that Plaintiffs' are requesting relief based on a theory other than the statutory requirement that the DOL create protective arrangements that protect the TRAX Employees' bargaining rights. The existing "protective arrangements" deny to TRAX Employees rights guaranteed by the UMTA by imposing a bargaining representative on the TRAX Employees that under federal labor law has no right to represent the TRAX Employees. The complaint clearly states a claim for relief based upon the inadequacy of the existing protective arrangements and the failure of DOL to carry out its statutory duty to protect the bargaining rights of TRAX Employees.

At page 23 of their Memorandum, the DOL concedes that a claim regarding the inadequacy of the protective arrangements may be reviewed by a court. The DOL states: "As noted above, the DOL does not contend that a certification decision under § 13(c) is not subject to judicial review under § 706." Since this is the exact relief sought by plaintiffs, by making this concession, DOL concedes that plaintiffs' complaint states a cause of action.

The seminal case on the responsibilities of the DOL under § 13(c) is *Amalgamated Transit Union Int'l v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985). Therein the court clearly found § 13(c) certification to be subject to judicial review. The Court stated:

A certification decision under section 13(c) of the UMTA clearly falls within the large category of agency decisions that, under *Chaney* are subject to judicial review. Certification constitutes an affirmative act of approval—unless and until the Secretary determines that a given § 13(c) agreement is fair and equitable within the meaning of the statute, no UMTA funds may be disbursed. Moreover, certification decisions are made under a statute that sets out clear guidelines for determining when such approval is to be given. Indeed, section 13(c), with its five express requirements, sets out far more precise standards than the statute at issue in *Overton Park*, which simply prohibited the Secretary of Transportation from approving any project using parkland unless he determined that no ‘feasible’ alternatives existed. In short, the plain language of the statute, as well as the Supreme Court’s decision in *Chaney*, demonstrate the Secretary’s claim of unreviewability is simply untenable. The District Court correctly ruled that certification decisions are subject to review. *Id.* at 945-46 (citation omitted).

While the Tenth Circuit has never ruled on the reviewability of section 13(c), it has clearly found similar statutes reviewable. In *Sierra Club v. Hodel*, 848 F.2d 1068, 1075 (10th Cir. 1988), the Court said: “In general, in the absence of an express statutory prohibition of judicial review (which would invoke APA § 701(a)(1), an agency bears ‘the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [the agency’s] decision.’”

Since the action by the DOL of certifying the “protective arrangements” is what is being challenged, the DOL has failed to meet its heavy burden of showing that the matter is not reviewable. In fact, what the Plaintiffs are truly seeking is a prohibition of certification of protective arrangements that do not protect their rights. At the time UMTA funds were first obtained by UTA, employees had the right to choose their bargaining representative. Without this most basic and fundamental of bargaining rights, none of the other bargaining rights can be protected. However, when TRAX was created, TRAX employees were not given the same right.

Even if the failure to create adequate protective arrangements could be construed as an enforcement action, a construction that Plaintiffs reject, the action would still be reviewable

under *Sierra Club v. Hodel* because there is law to apply under the statute and general federal labor law that is clearly applicable. See *Sierra Club v. Hodel*, 848 F.2d at 1075. As stated by the court in *Hodel*: “Thus, even though BLM’s position in this case perhaps could be characterized as a decision not to take enforcement action, that decision is nonetheless reviewable. Like the statute in *Dunlop*, and unlike the statute in *Chaney*, *FLPMA* provides ‘law to apply.’” *Id.*

Even if *Chaney* did apply to the facts of this case, the United States Supreme Court suggested in *Chaney* that there might be two exceptions that both would apply in the case at bar. The two exceptions are when an agency believes it does not have jurisdiction when in fact it has jurisdiction, and when there has been a total abdication by an agency of its duty to carry out duties mandated by statute. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). In paragraph 122 of their complaint, Plaintiffs allege that the DOL has asserted it has no jurisdiction to deal with the plaintiffs complaints, and in paragraph 126, plaintiffs allege that the DOL has totally abdicated its statutorily mandated responsibility. Both these paragraphs are supported by factual allegations in other paragraphs. *Heckler v. Chaney* mandates that plaintiffs be given an opportunity to present evidence on these points.

Moreover, in determining whether Federal Question Jurisdiction exists, a party has only to make a colorable federal claim. The Tenth Circuit Court addressing this standard stated:

In *Harline v. DEA*, 148 F.3d 1199 (10th Cir. 1998), for example, we held that: To determine whether a claim is colorable, it is necessary to examine its merits. A determination that a claim lacks merit, however, does not necessarily mean it is so lacking as to fail the colorable test. A ...claim...is not colorable if it is immaterial and made solely for the purpose of obtaining jurisdiction or ... is wholly insubstantial or frivolous. *Id.* at 1203 (internal quotation marks omitted); see also *United States v. McAleer*, 138 F.3d 852, 857 (10th Cir. 1998) (defining ‘colorable’ as having ‘some possible validity’). *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1240 (10th Cir. 2001).

Thus, this Court clearly has jurisdiction to grant the type of injunctive relief sought by the Plaintiffs. The Plaintiffs are not seeking monetary relief from the DOL. They have pled that they have suffered monetary damages due to the actions of the DOL as part of their pleading a concrete injury. However, they do not seek money damages from DOL. Thus the cases cited by DOL, such as *Lock v. U.S., No 2:01-CV-898PGC, 2003 WL 211152879* (Utah Mar. 27, 2003) (Cassell, J.) while well reasoned, have no applicability to the issues in this case because the Plaintiffs are not seeking monetary damages from the DOL.

II. THE PLAINTIFFS HAVE CLEARLY PLEADED A CLAIM.

A court may not dismiss a cause of action for a failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts supporting a claim for relief. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989). “Granting a motion to dismiss is ‘a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice.’” *Cayman Exploration Corp. v. United Gas Pipeline Co.*, 873 F.2d 1357, 1359 (10th Cir. 1989) (quoting *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986)). Additionally, “[t]he issue in reviewing the sufficiency of a complaint is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support his or her claim.” *Scheur v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974).

In the case at bar, the Plaintiffs are entitled to present evidence of their claim that the DOL has created inadequate protective arrangements. The filings by the two other Defendants in response to the motion for injunctive relief filed herein support the contention that the protective arrangements are inadequate. The Utah Transit Authority (“UTA”) and the Amalgamated Transit Union, Local 382 (“the union”) both claim that state law allows them to choose the

appropriate bargaining unit. Such a claim is contrary to the express holdings of numerous federal courts in labor law cases over the past seventy years. That a company should not choose the appropriate bargaining unit with which it bargains is blatantly obvious. Under such circumstances, the company would have a motive to always pick the weakest available union. Equally obvious is that a union will always find that a new unit created by an employer should be placed under its jurisdiction. The United States Supreme Court has stated that a union cannot be trusted to act fairly when the issue is the scope of its representation. *The United States Supreme Court distinguished the importance of contracts on economic issues in which the contract should be honored and other separate issues when it stated: "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."* *National Labor Relations Bd. v. Magnavox Co.*, 415 U.S. 322, 326 (1974) (Citation omitted).

All parties appear to agree that the key to this case is the determination of an appropriate bargaining unit for the TRAX employees. The union and UTA believe that the employees in the TRAX division should be included in the bargaining unit with bus drivers and that they have no right to break away from the existing bargaining unit and form a unit consisting only of employees of TRAX. This belief is contrary to the holdings of courts over a seventy year period, which holdings require that employees be given an opportunity to choose a representative of their own preference in a bargaining unit that constitutes a community of interests.

Neither UTA nor the existing union can be trusted to make a correct determination about the appropriate bargaining unit for TRAX employees, and the fact that they may have negotiated

such an arrangement does not correct the situation. The contention of UTA and the union, that under Utah law they have the right to choose the appropriate bargaining unit, and that they have exercised that right, is clear evidence that the laws of Utah are inadequate to protect the TRAX employees. The DOL has the statutory obligation to step into the void created by Utah's failure to protect TRAX workers by either creating adequate protective arrangements for the TRAX employees, or denying certification and thus federal funding to UTA. By law, the DOL must ensure that the TRAX employees enjoy similar protections to those which they had under the National Labor Relations Act.

Federal courts examining the requirements of 13(c) of UMTA have looked to federal law to determine the bargaining rights that must be protected. *E.g. Amalgamated Transit Union International, AFL-CIO, et al. v. Donovan*, 767 F.2d 939, 948 (D.C. Cir. 1985). States such as Utah and Colorado actually changed their state laws in order to conform to the basic principles of federal labor law. This was done in order to comply with the requirements of UMTA and thereby increase their chance to obtain federal funds. *Regional Transportation Dist. v. Colorado Dept. of Labor*, 830 P.2d 942, 947 (Colo. 1992) (binding arbitration created to obtain federal funds); Utah Code Ann. § 17A-2-1032 (providing for binding arbitration for transit districts). The Colorado Supreme Court stated: "The arbitration requirement arises out of conditions imposed by the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. § § 1601-1621 (1988 & 1989 Supp.) [Re-codified at 49 U.S.C. §5333(b)] to obtain federal funding. UMTA made federal finds available for the conversion of private mass transit systems to public ownership. As a condition for the assistance, states were required to preserve the collective bargaining rights enjoyed by organized mass transit workers under private ownership." 830 P.2d at 947.

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 collective 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.

Section 9 of 29 U.S.C. § 151 et. Seq. provides critical guidance on the basic rights of the TRAX employees under federal policy. Section 9(b) states in pertinent part that:

The Board shall decided 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 shall be the employer unit, **craft unit**, plant unit or subdivision thereof: Provided: That the Board shall not ... (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or[.] (Emphasis added)

It is this basic right that must be protected. The Court in *Donovan* stated that:

The legislative history, therefore reveals Congress’ clear intent to measure state labor laws against the standards of collective bargaining established policy. The Secretary’s contrary construction of section 13(c) would produce a meaningless tautology; if state law defined the ‘collective bargaining rights’ that must be continued under the federal statute, then a public transit authority’s labor relationship 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) operation in such a fashion. 767 F.2d at 948.

Thus, the DOL’s response herein to the Plaintiffs, that they must exercise any rights they might have under state law, is inadequate and contrary to the intent of Congress in enacting Section 13(c) and in effect abdicates the responsibilities delegated to the DOL under Section 13(c). *The DOL had an affirmative duty to require a procedure in the protective arrangements*

that allows the TRAX employees the right to choose their own bargaining unit and representative. The fact that Utah, unlike most states, does not have a Labor Commission that determines appropriate bargaining units means that the DOL has an obligation to step into the void and either create them as part of the protective arrangements or tell Utah officials that until they make changes in state law, they are not eligible for certification for federal assistance under the UMTA.

As was stated in the concurring opinion in *Donovan*, “Congress did not provide for sunseting section 13(c) and said nothing in the text of the provision to suggest the essential process entailed in ‘the continuation of collective bargaining rights’ should mean less as time goes by.” 767 F2d at 956 (Ginsburg, J. Concurrence).

However, the DOL seems to have adopted a contrary approach whereby it no longer aggressively seeks changes in state law to conform to the requirements of federal labor law policy and is no longer tailoring its protective arrangements to correct deficiencies in state labor law. Whatever its justification, the DOL cannot ignore its statutory duties without being arbitrary and capricious. Plaintiffs should be given an opportunity to present evidence on the DOL’s abdication of its statutory duties.

Under the proper standard of review: “All well-pleaded factual allegations in the complaint are accepted as true and viewed in the light most favorable to the non-moving party. All reasonable inferences raised in the pleadings are resolved in favor of the plaintiffs.” *Lock v. United States*, No:2:01-CV-898PGC, 2003 U.S. Dist. Lexis 9928 , at * 12 (D. Utah Mar. 27, 2003)(Cassell, J.). If the Court examines paragraphs 11-20 along with 116-127 and grants all inferences to the Plaintiffs, it will clearly see that Plaintiffs are making a claim that the DOL did not create adequate protective arrangements. The paragraphs discuss the DOL’s failure to

protect the bargaining rights of the TRAX employees. Additionally, paragraph 118 clearly identifies the duty to create the protective arrangements.

If the Court does not find that these paragraphs, with all reasonable inferences, support a claim, then the Plaintiffs should be given leave to amend. Plaintiffs can clearly support and prove a claim that the DOL has not created adequate protective arrangements. Alternatively, the Court also may consider the "mere argument" in this response to the motion to dismiss.

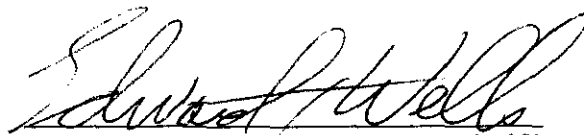
Plaintiffs in this memorandum have explicitly alleged what even the DOL concedes is a claim. *MaCarthur v. San Juan County*, 309 F.3d 1216, 1221 (10th Cir. 2002) (citing *Ohio v. Peterson, Lowry, Rall, Barber, & Ross*, 585 F.2d 454, 457 (10th Cir. 1978)).

Thus, the motion to dismiss should be denied. Plaintiffs clearly state a claim upon which relief can be granted.

CONCLUSION

Defendant DOL's motion to dismiss should be denied. The Court clearly has subject matter jurisdiction to review whether the DOL has complied with the requirements of Section 13(c) of the UMTA. Moreover, Plaintiffs' allege that the protective arrangements certified by the DOL are deficient under the UMTA. This clearly states a claim which is subject to review by this court. Finally, if the motion to dismiss is granted, then the Plaintiffs should be given leave to amend since they can clearly make and support such claims, if allowed to do so by the court.

RESPECTFULLY SUBMITTED THIS 10th DAY OF JANUARY, 2005


Edward T. Wells, Attorney for Plaintiff

CERTIFICATE OF MAILING

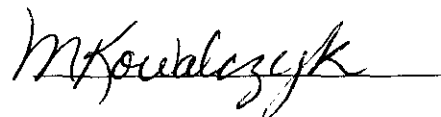
I hereby certify that on this 10th day of January, 2005, I caused to be mailed, postage prepaid, the foregoing PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS to the following:

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A handwritten signature in black ink, appearing to read "M. Kowalczyk", written over a horizontal line.