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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION**

LISA BURKE, et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 UTAH TRANSIT AUTHORITY, et al., )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**Case No. 2:04CV0985PGC**  
**DEFENDANT'S REPLY TO**  
**PLAINTIFFS' OPPOSITION TO**  
**DEFENDANT'S MOTION TO DISMISS**

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## INTRODUCTION

Under Utah state law, as plaintiffs concede, employees of any public transit system have the right to self-organization, to form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing. These statutory rights were in place long before the creation of the TRAX light-rail division and they continue in force through the present day. Because plaintiffs' legal rights have not changed, regardless of plaintiffs' changing preferences regarding the exercise of those rights, plaintiffs can prove no set of facts in support of their claims that would entitle them to relief against the Secretary of Labor's decisions to certify the continuation of plaintiffs' collective bargaining rights.

Plaintiffs' attempt to state a claim for Administrative Procedure Act ("APA") review also fails as a matter of law. Despite plaintiffs' claim to be seeking only APA review of some certification decision unspecified in both their Complaint and opposition brief, plaintiffs actually seek relief far beyond that available under the APA. Plaintiffs insist, wrongly, that the Court should compel the Department of Labor ("DOL") to engage in certain affirmative acts to assist plaintiffs' in their intra-union disagreement. However, the DOL can only be compelled to take action legally required under Section 5333(b) of the Federal Transit Law, 49 U.S.C. § 5333(b) (formerly § 13(c) the Urban Mass Transportation Act) (hereafter "UMTA" or "§ 13(c)"). Contrary to plaintiffs' assertions, because Utah state law has at all relevant times provided for the collective bargaining rights at issue in this case, whether those rights have been continued as required by § 13(c) is determined solely with reference to state law. This Court should dismiss with prejudice plaintiffs' complaint against the DOL.

**I. PLAINTIFFS MISAPPREHEND THE DEPARTMENT OF LABOR'S LIMITED AUTHORITY UNDER § 13(C)**

Plaintiffs allege that "[b]y law, the DOL must ensure that the TRAX employees enjoy similar protections to those which they had under the National Labor Relations Act." See Pl.'s Opp. at 7. Plaintiffs cite § 9 of the National Labor Relations Act, 29 U.S.C. §151, and Amalgamated Transit Union Int'l v. Donovan, 767 F.2d 939 (D.C. Cir. 1985), in support of their assertion that federal labor policy, not Utah state law, determines the scope of "the continuation of collective bargaining rights" for purposes of § 13(c) certification. Id. at 8-9.

Plaintiffs have it precisely backwards.

Utah state law alone determines plaintiffs' collective bargaining rights in this case. First, as the Supreme Court categorically stated in Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, 457 U.S. 15, 27 (1982), "Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers. Section 13(c) would not supersede state law, it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations." Accord Donovan, 767 F.2d at 947 ("Nothing in UMTA pre-empts this authority, nor do section 13(c) or the labor agreements created under it override state law. ... The [Jackson] Court made it abundantly clear that labor protective agreements are to be the product of local laws and local bargaining, but that section 13(c) governs a state's right to federal funding."). Thus, plaintiffs' reliance on the National Labor Relations Act, or any other

reference to "federal labor policy" to discern the scope of the collective bargaining rights that Utah provides to public transit employees – and which the Secretary of Labor must determine to continue in force before certifying a protective agreement – is misplaced. "Congress intended that § 13(c) would be an important tool to protect the collective-bargaining rights of transit workers, by ensuring that state law preserved their rights before federal aid could be used to convert private companies into public entities." Jackson, 457 U.S. at 27-28.

Since Utah state law embodies the rights plaintiffs seek to vindicate in this mis-directed lawsuit against the DOL, it is to state law that plaintiffs must turn for relief. Since 1969, Utah has provided public transit system employees the statutory right "to self-organization, to form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing..." U.C.A. 1953 § 17A-2-1031. Plaintiffs concede that Utah "actually changed [its] state law[] ... in order to comply with the requirements of UMTA and thereby increase their chance to obtain federal funds." See Pl.'s Opp. at 7 (citing U.C.A. § 17A-2-1032); see also Pl.'s Compl. at ¶ 95 (claiming "property and/or liberty interests" under U.C.A. § 17A-2-1031) and ¶¶ 102-07 (claiming violation of U.C.A. § 17A-2-1031 for, inter alia, UTA's refusal to allow TRAX employees to choose their own representatives and for negotiating with an inappropriate bargaining unit).<sup>1</sup>

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<sup>1</sup>Plaintiffs' assertion that the DOL "has an obligation" either to determine appropriate bargaining units in Utah or to direct Utah to create a Labor Commission to do so, see Pl.'s Opp. at 9, finds absolutely no support either in § 13(c) or the case law interpreting it. This contention is further evidence that, contrary to their claims to seek only APA review of a certification decision, plaintiffs actually want this Court to compel the DOL to conduct investigations and make determinations neither authorized under § 13(c) nor part of any certification process.

Second, plaintiffs selectively quote from the Donovan case to imply that the D.C. Circuit Court of Appeals held that the National Labor Relations Act, not state law, "provides critical guidance on the basic rights of the TRAX employees under federal policy." See Pl.'s Opp. at 8. Because that case stands for precisely the opposite principle of law, it is worth discussing that case in detail.

The Donovan case concerned public transit employees of the Metropolitan Atlanta Rapid Transit Authority ("MARTA"). Although Georgia state law "at the time did not permit public employers to bargain collectively," the Georgia legislature carved out a statutory exception for MARTA employees, creating for them essentially the same right to bargain collectively that they had enjoyed as employees of privately owned transit systems. See Donovan, 767 F.2d at 941. For over twenty years, Georgia accorded MARTA employees a statutory right to collective bargaining. During this time, the Secretary of Labor certified numerous § 13(c) agreements between the MARTA employees' labor union and the transit authority as "fair and equitable." Id. at 942. That is, the Secretary certified, inter alia, to the continuation of the collective bargaining rights of MARTA employees under Georgia state law. However, in 1982, the Georgia legislature severely curtailed the collective bargaining rights it had previously granted to MARTA employees. Id. at 943. Despite this change in state labor law, the Secretary of Labor certified a pending § 13(c) agreement as fair and equitable, based in part on certain understandings he concluded with both the transit authority and the labor union. Id. When the Supreme Court's opinion in Jackson Transit Authority (handed down the day the Secretary certified the § 13(c) agreement) altered the union's legal remedies, the union asked the Secretary to withdraw his

certification, "arguing that MARTA's transit workers no longer enjoyed the continuation of collective bargaining rights as required by section 13(c)." Id. The Secretary refused, and the union brought suit. Id. The District Court upheld the Secretary's certification under APA review as neither arbitrary nor capricious, and rejected the union's argument that the six criteria set forth in § 13(c) were mandatory, rather than general objectives to be considered under the Secretary's broad discretion. Id. at 944.

The Court of Appeals reversed, holding that the § 13(c) criteria were mandatory, not advisory, criteria for the Secretary to use in making his certification decision. Donovan, 767 F.2d at 944. Because Georgia state law had changed during the relevant time period to deny public transit employees their previously enjoyed right to collective bargaining, the Court held that the Secretary could not certify the "continuation of collective bargaining rights."

That is not the case here. Whereas the Georgia legislature in Donovan changed for the worse the collective bargaining rights that public transit employees had enjoyed previously (and based on which the Secretary of Labor certified the continuation of their collective bargaining rights in the previous decade of § 13(c) agreements), the Utah legislature has done nothing to change controlling state law that provides for the collective bargaining rights of public transit employees. The state law granting public transit employees the right to collective bargaining and to determine the appropriateness of their employment unit, U.C.A. 1953 § 17A-2-1031, existed long before the TRAX light-rail unit was created and continues in force to this day. Thus, the Secretary of Labor correctly certified that the relevant § 13(c) agreements provided for the

continuation of collective bargaining rights, which, under state law, remained unchanged from before.

Plaintiffs may seek to exercise their rights under Utah state law, but they have no cause of action against the DOL.

## **II. PLAINTIFFS' APA CLAIM FAILS AS A MATTER OF LAW BECAUSE PLAINTIFFS' STATE LAW RIGHTS CONTINUE UNCHANGED**

Plaintiffs misleadingly state that the "DOL concedes that a claim regarding the inadequacy of the protective arrangements may be reviewed by a court." See Pl.'s Opp. at 2. Defendant's position is neither so simplistic nor so broad. As a threshold matter, as stated in defendant's memorandum of law and unanswered by plaintiffs, the United States has not waived its sovereign immunity to plaintiffs' claims. Neither § 13(c) itself nor any of the other jurisdictional statutes asserted in plaintiffs' complaint provide the explicit waiver of immunity that plaintiffs' require in order to proceed with their lawsuit against the DOL in federal court.

Although § 13(c) does not provide a federal cause of action, the Secretary of Labor's decision to certify a particular employee protective arrangement is subject to judicial review under the APA. However, such review is limited to the narrow question whether, on the record before the Secretary at the time she made her decision, certification of a particular protective arrangement was either arbitrary, capricious, or not in accordance with law. See Donovan, 767 F.2d at 945. The Court "must determine whether the Secretary followed the plain language of the applicable statute" and, only if the language of the statute is ambiguous, "determine whether the Secretary's interpretation is permissible, meaning rational and consistent with the statute."

Amalgamated Transit Union Int'l v. Reich, Civ. A. No. 82-2922, 1993 WL 460797, at \*1 (D.D.C. April 13, 1993) (applying APA review to a § 13(c) certification decision).

As a matter of law, this Court should uphold the Secretary's certifications because, as noted above, an unchanged Utah state law has guaranteed the continuation of plaintiffs' collective bargaining rights since its adoption in 1969, the year of UTA's creation. See U.C.A. 1953 § 17A-2-1031; see also Pl.'s Compl. at ¶¶ 9-10. As stated above and in defendant's memorandum of law, it is the continuation of plaintiffs' rights under that state law that the Secretary must determine before certifying an employee protective agreement to be fair and equitable. Although plaintiffs apparently grew dissatisfied with their union representation at some unspecified time after the creation of TRAX, their rights under the law did not change. Plaintiffs are free to exercise their right in the proper state court forum. However, plaintiffs do not and cannot point to any material fact that demonstrates a change in their statutory rights that would render the Secretary's decision to certify the continuation of their collective bargaining rights arbitrary, capricious, or not in accordance with law.

Plaintiffs actually seek more from this Court than APA review. See Pl.'s Opp. at 8-9 ("The DOL has 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."); see also id. at 9 (asserting that DOL has the statutory duty to "tailor[] its protective arrangements to correct deficiencies in state labor law" and to "aggressively seek[] changes in state law to conform to the requirements of federal labor law policy..."). Plaintiffs cite to no statute or case law for such a "duty." And plaintiffs have no claim under the APA to require such specific

performance because "the only agency action that can be compelled under the APA is action legally required." Norton v. Southern Utah Wilderness Alliance, 542 U.S. \_\_\_, 124 S.Ct. 2373, 2380 (2004) (emphasis in original).

**CONCLUSION**

For the reasons stated above, this Court should dismiss plaintiffs' suit against the Department of Labor for want of a waiver of sovereign immunity and for failure to state a claim upon which relief can be granted.

Dated: January 21, 2004

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on January 21, 2004, I caused a copy of the foregoing Defendant's Memorandum of Supporting Authorities in Support of Defendant's Motion to Dismiss to be served by First Class U.S. Mail, postage prepaid, upon counsel at the following addresses:

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