

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Case Nos. 05-04079 and 05-4222

LISA BURKE, et al.

Appellants,

vs.

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

Appellees.

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

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

THE HONORABLE PAUL G. CASSELL, DISTRICT COURT JUDGE

**BRIEF OF APPELLEE LOCAL 382 OF THE
AMALGAMATED TRANSIT UNION**

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ORAL ARGUMENT REQUESTED

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PRIOR AND RELATED TENTH CIRCUIT COURT APPEAL

On August 22, 2005, a Notice of Appeal was filed by Plaintiffs from the District Court's final judgment entitled Order Granting Defendants' Motion For Summary Judgment dated August 15, 2005. The Appeal was assigned Tenth Circuit Court of Appeals Docket No. 05-4222. The Appeal was consolidated with this appeal by Order dated September 4, 2005.

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BRIEF OF APPELLEE LOCAL 382

Local 382 of the Amalgamated Transit Union (hereinafter referred to as the “Union” or the “Local”), as one of the above-named Appellees, respectfully submits the following Brief of Appellee Local 382 of the Amalgamated Transit Union supporting the affirmation of the United States District Court’s Order Denying Plaintiffs’ Motion for a Preliminary Injunction dated January 25, 2005

and the decision denying Plaintiffs' motion for reconsideration of the denial of the preliminary injunction dated March 9, 2005.

STATEMENT OF JURISDICTION

The initial complaint filed with the United States District Court raised issues of enforcement of federal statutory and constitutional law and Utah statutory and common law. Therefore, the District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1367. The Plaintiffs/Appellants filed a Motion for Preliminary Injunction, which the District Court denied on January 25, 2005, and a motion for reconsideration which the District Court also denied on March 9, 2005. On April 6, 2005, Appellants filed their Notice to Appeal from those two adverse rulings. Since those two rulings are not final orders, the only basis for this Court's appellate jurisdiction would be 28 U.S.C. §1292 (a)(1).

RESPONSE TO APPELLANTS' STATEMENT OF ISSUES

The Union is satisfied with Appellants' statement of the issues presented for review.

STATEMENT OF CASE

On October 22, 2004, Lisa Burke and Michael Carper, two individual residents of Utah, filed a complaint against the Utah Transit Authority and its general manager, John English, (hereinafter collectively referred to as the "UTA"); the Local; and the United States Department of Labor (hereinafter referred to as the "DOL"). The Complaint alleged five separate causes of action which arose out of a common set of facts involving a labor dispute between the

Plaintiffs, the UTA, and the Local. Count I of the complaint alleges that the UTA was violating the Plaintiffs' First Amendment rights. Count II alleges that the UTA violated Section 13(c) of Urban Mass Transportation Act. Count III alleges that the UTA violated Section 17A-2-1031 of the Utah Annotated Code. Count IV alleges that the Union breached its fiduciary obligations owed to the Plaintiffs under Utah common law. Finally, Count V alleges that the DOL also violated Section 13(c) of the Urban Mass Transportation Act. (Appendix A, pp. 10-30).

Plaintiff Lisa Burke (hereinafter "Burke") has been an employee of the UTA for twenty-six years. Burke is currently employed as a light rail train driver within the UTA TRAX division. Plaintiff Michael Carper (hereinafter "Carper") has been an employee of the UTA for eleven years. Carper is currently employed as a line and signal worker in the maintenance-of-way department of the UTA TRAX division. (Appendix A, p. 12). Although the Complaint is titled a "Class Action Complaint", Burke and Carper have never formally sought, nor has the District Court ever certified this matter as a class action. In fact, the attorney for Burke and Carper stated his clients would wait until after the District Court had ruled on any Motion for Summary Judgment before seeking class certification. (Appendix B, pp. 349-350).

On November 29, 2004, Burke and Carper filed a Motion for Preliminary Injunction against the UTA seeking to enjoin the UTA from transferring UTA bus division employees to the UTA TRAX division, transferring bus division employees to the TRAX division with superior seniority rights, and interfering

with the First Amendment rights of free speech and association of the TRAX division employees. (Appendix A, pp. 36-37). The allegations of Counts I, II, and III of the Complaint formed the basis of the Motion. The Motion was fully briefed by the parties. The Union joined the UTA in opposing the Motion. Oral argument was held before the District Court on January 24, 2005. No evidentiary hearing was held. The District Court, after taking the matter under advisement, rendered its decision, denying the Motion for Preliminary Injunction, on January 25, 2005. (Appendix B, pp 181-190).

Six days after the District Court had rendered its decision, Burke and Carper filed a second “Motion for Preliminary Injunction” seeking to enjoin the UTA from recognizing the Local as the bargaining representative for the TRAX division employees. (Appendix B, pp 191-192). Although the Motion was titled a “Motion for Preliminary Injunction”, it appeared to the Union to be really a Motion for Reconsideration. This is because the Motion rehashes the same legal arguments and facts as the previously denied Motion. (Appendix B, pp. 256-257). This second Motion was fully briefed by all parties. On March 9, 2005, without a hearing, the District Court denied the second Motion. (Appendix B, p. 278). This appeal followed on April 6, 2005.

The DOL filed a Motion to Dismiss which was also fully briefed and argued on March 9, 2005. (Appendix B, pp. 314-356). On April 6, 2005, the District Court granted the DOL’s Motion to Dismiss. (Appendix B, pp 282-283). Burke and Carper filed a Motion for Summary Judgment and the UTA filed a cross-motion for Summary Judgment which were fully briefed and argued on

May 20, 2005. Recently, the District Court granted the UTA's Motion for Summary Judgment on August 15, 2005. (See Addendum to this Brief). Burke and Carper filed a second Notice of Appeal.

On September 14, 2005, this Court ordered the two appeals be consolidated.

STATEMENT OF FACTS

The Local has represented transportation workers employed by the UTA, or its predecessors, since 1904. First, the Union represented street car employees. As street cars were phased out of existence, the Union began to represent more bus drivers. By the 1940s, the UTA's predecessors only operated buses. (Appendix A, pp 112-114).

By the 1990s, it had become certain that the UTA would introduce light rail trains, known as TRAX, into the Salt Lake Valley. In anticipation of the introduction of TRAX, the UTA and the Union conducted negotiations over whether the work at the TRAX division would be performed by employees represented by the Union. On June 14, 1995, the Union and the UTA entered into a letter agreement which provided that the Union would represent the employees of the TRAX division "to the extent such jobs were comparable to jobs performed by bargaining unit employees in the bus division". (Appellee's Supp. Appendix, p. 31) In July, 1998, the Union and the UTA entered into a second letter agreement which provided that UTA bus division employees could begin to transfer to the TRAX division and retain their UTA system-wide seniority. Pursuant to this letter agreement, bus division employees began

transferring to the TRAX division in August of 1998. (Appellee's Supp. Appendix, p. 245).

In September of 1998, the Union and the UTA started negotiations for a new Collective Bargaining Agreement. This negotiation successfully resulted in a new comprehensive Collective Bargaining Agreement which was ratified by the Union membership and executed effectively on December 11, 1998. This 1998 Collective Bargaining Agreement incorporated the precepts contained in the July, 1998 letter agreement. (Appellee's Supp. Appendix, pp. 40-130 and Appendix A, pp. 125-126).

Pursuant to the terms of the 1998 Collective Bargaining Agreement, Plaintiff Carper transferred from the bus division to the TRAX division on January 25, 1999. Also pursuant to the Collective Bargaining Agreement, Plaintiff Burke transferred from the bus division to the TRAX division on October 11, 1999. (Appendix A, p. 125). Burke and Carper have worked in the UTA TRAX division under the Collective Bargaining Agreement since their transfer. (Appendix A, pp. 48 and 166).

Under the terms of the 1998 Collective Bargaining Agreement, the Union and the UTA enter into negotiations for a new Collective Bargaining Agreement in August of 2003. It was not until May of 2004 that the Union submitted a new tentative Collective Bargaining Agreement to the Union membership for ratification. The membership refused to ratify the agreement; thus, the UTA and Union continued to negotiate. In July, 2004, a revised, tentative Collective Bargaining Agreement was reached between the Union and UTA and submitted

to the membership for ratification. The contract was ratified on August 10, 2004, and was made retroactive to the end of the 1998 Collective Bargaining Agreement, December 11, 2003. (Appellee’s Supp. Appendix, pp. 132-246 and Appendix A, pp. 126-127).

Prior to the end of the 1998 Collective Bargaining Agreement and while the UTA and Union were negotiating the terms of a new agreement, the UTA requested and received certification of its labor arrangements as required by Section 13(c) of the Urban Mass Transportation Act (UMTA) in order for the UTA to continue to receive federal funding. This certification occurred on September 29, 2003. (Appendix A, p. 128).

In August of 2004, Burke and Carper began to circulate a “petition” among TRAX division employees seeking to notify the UTA that the Union no longer represented the TRAX division employees because of the Union’s failure “to adequately address the seniority issues at TRAX...”. (Appendix A, pp. 170-176).

When the UTA rejected the petition, this litigation followed.

SUMMARY OF ARGUMENT

The District Court appropriately denied the Motion for Preliminary Injunction requested by Burke and Carper because the court correctly held that Section 13(c) of the UMTA requires the application of Utah law as to what is an appropriate bargaining unit at the UTA. The court further correctly held that a system-wide bargaining unit is appropriate and that there had not been

an illegal accretion of TRAX division employees to a system-wide bargaining unit.

The District Court also utilized the appropriate procedures when it denied the Motion for Preliminary Injunction because there is no requirement for a trial court to hold an evidentiary hearing and the court's Order complied with the requirements of Rule 52(a)

ARGUMENT

POINT I: THE DISTRICT COURT APPROPRIATELY DENIED THE MOTION FOR A PRELIMINARY INJUNCTION.

A. Standard of Review.

The standard of review for a denial of a preliminary injunction is abuse of the discretion of the District Court. Utah Licensed Beverage v. Leavitt, 256 F. 3rd 1061 (10th Cir. 2001). In order to prevail in their motion at the District Court, Burke and Carper had to satisfy four specific 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 Publication Co. v. AT&T, et. al., 320 F. 3d 1081 (10th Cir. 2003).

Although the Union and the UTA argue that the granting of the preliminary injunction would be inappropriate on any of the above stated four grounds, most of the debate and the District Court's Order centered on

whether or not Plaintiffs have a substantial likelihood of succeeding on the merits. This appeal also centers on whether or not Plaintiffs' case has the likelihood of success.

In review for an abuse of discretion, this Court must "examine the District Court's underlying factual findings for clear error, and its legal determination de novo". Davis v. Minetu, 302 F. 3d 1104, 1110 (10th Cir. 2002).

B. Section 13(c)

Central to all the arguments in this case is the interplay between Section 13 (c) of the Urban Mass Transportation Act (UMTA), state labor law for public transit employees, and federal labor law as developed under the National Labor Relations Act (NLRA). An understanding of the interplay between these three areas of law is critical to an understanding of the issues raised by this appeal. Section 13(c) of the UMTA is codified in 49 U.S.C. § 5333 (b) and reads as follows:

- (1) As a condition of financial assistance under sections 5307-5312, 5318(d), 5323(a)(1), (b), (d), and (e), 5328, 5337, and 5338(b) of this title the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. The agreement granting the assistance under sections 5307-5312, 5318(d), 5323(a) (1), (b), (d), and (e), 5328, 5337, and 5338(b) shall specify the arrangements.
- (2) Arrangements under this subsection shall include the provisions that may be necessary for-
 - (A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
 - (B) the continuation of collective bargaining rights;
 - (C) the protection of individual employees against a worsening of their positions related to employment;

- (D) assurances of employment to employees of acquired mass transportation systems;
- (E) assurances of priority of reemployment of employees whose employment is ended or who are laid off; and
- (3) Arrangements under this subsection shall provide benefits at least equal to benefits established under section 11326 of this title.

There are two significant cases which interpret the above quoted statute.

The first case is the United States Supreme Court decision of Jackson Transit Authority v. Local 1285, Amalgamated Transit Union, 457 US 15, 120 S. Ct 2202 (1982). In Jackson, a sister local of the Union filed a complaint in federal court against a state transit authority for breach of the parties' collective bargaining agreement. The legal issue before the Supreme Court was whether there is a federal cause of action for breach of a collective bargaining agreement which had been certified under Section 13(c) of the UMTA. The Supreme Court held that there was no federal cause of action and that the appropriate judicial remedies had to be found in state court.

The Supreme Court came to this conclusion after reviewing the extensive legislative history of the UMTA. The Court concluded that by enacting Section 13(c) of the UMTA, Congress did not want to federalize labor/management relations between public transit employees and their state agency employer.

The Jackson case is applicable, to the case at hand, in that the legal relationship between the UTA, its employees, and the Union is governed by the laws of the State of Utah, not federal law.

The second significant case interpreting Section 13(c) is Amalgamated Transit Union International v. Donovan, 767 2d 939 (D.C. Cir, 1985). In

Donovan, the Secretary of Labor certified as Section 13(c) compliant the labor arrangements between the Metropolitan Atlanta Rapid Transit Authority and its employees. This certification was despite the fact that controlling Georgia law prevented certain terms and conditions of employment being subject to collective bargaining. The D.C. Circuit Court of Appeals ruled that that certification was wrong by holding:

As the Supreme Court recognized in *Jackson Transit Authority*, states have no automatic entitlement to federal funding for their transit systems, and must satisfy section 13(c) if they desire such assistance. The 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.....

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 the statute 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.

Although Section 13(c) does not federalize the labor relations between public transit workers and their state agency employer, the Section does mandate minimal standards, should the state desire federal financial assistance. The State of Utah has complied with Section 13(c) by adopting Utah Code Annotated § 17A-2-1031, which reads 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 provided, however, that such employees and labor organizations shall not have the right to join in any strike against such public transit system. The district shall recognize and bargain exclusively with any labor organization representing a majority of its employees in an appropriate unit with respect to wages, salaries, hours, working conditions, and welfare and pension and retirement provisions, and, upon reaching agreement with such labor organization, to enter into and execute a written contract incorporating therein the agreements so reached. [Emphasis added]

In September of 2003, in part because of the above quoted state statute, the DOL certified, as Section 13(c) compliant, the protected employment agreement between the Union and the UTA.

The dispute between the Plaintiffs and the Local boils down to whether a system-wide bargain unit is appropriate, as advocated by both the Union and the UTA, or whether two division bargaining units are appropriate, as argued by the Plaintiffs. Because of the interplay between Section 13(c) of UMTA and state labor law, the appropriateness of the UTA's bargaining unit must turn on of the above quoted Utah statute.

There is virtually no law interpreting Utah's statute. The State of Utah does not have a sophisticated system of governance of public employee labor relations. Utah has no "little labor relations board" as exist in some states such as California and New York. Therefore, all parties to this action have looked to the NLRA and the decisions rendered pursuant to it for guidelines as to what is meant by "an appropriate bargaining unit".

There is a difficulty in looking to cases promulgated under the NLRA and applying them to the two sentence Utah statute. NLRA cases are very detailed

in their analysis of process. For strong public policy reasons, federal labor law is very driven by procedure. Clearly, Utah labor law has no spelled out process. The statute is result oriented. This difference may be the product of the fact that federal labor law deals with private employee/employer relationships for the entire nation while the Utah law deals just with its relationship with its public transit employees. Therefore, when looking to NLRA cases for guidance, it is important to examine substantive analysis of what is “an appropriate bargaining unit”, rather than get lost in the detailed analysis of the NLRA process.

C. Appropriate Bargaining Unit

The gravaman of Plaintiffs’ Motion for Preliminary Injunction is that a system-wide bargaining unit at the UTA is not appropriate. The only argument advance by Burke and Carper, that the system-wide unit is inappropriate, is that the current bargaining unit was the product of an illegal “accretion” as defined under federal labor law. However, this argument is a misreading of federal law.

1. Accretion.

The doctrine of “accretion” is a concept created by the National Labor Relations Board (hereinafter “Board”) and the courts to deal with certain narrow bargaining unit issues. Essentially an accretion is “simply the addition of a relatively small group of employees to an existing unit where these additional employees share a sufficient commitment of interest with the unit employees and have no separate identity”. American Med. Response, Inc. 335

N.L.R.B. No. 90 (2001). Normally, accretion cases involve multi-plant employers who open or acquire a new plant which is not a part of an existing bargaining unit. The employer, a union, or both want the new plant “accreted” to the existing bargaining unit. The Board allows such an accretion under limited circumstances unless the employees of the new plant hold a representation election. Gitano Group, Inc., 308 NLRB 1172 (1992).

Therefore, if the case at hand is an accretion case, it is not the type case we normally associate with the doctrine.

The relevant facts before the District Court on the issue of “accretion” were undisputed: 1) Before any “new” jobs were created or any employees hired at the TRAX division of the UTA, the UTA and Union negotiated a side agreement to the then existing collective bargaining agreement stating that the Union would be the bargaining agent for the TRAX jobs “to the extent such jobs were comparable to jobs performed by bargaining unit employees in the bus division”. 2) The UTA and Union negotiate a second side letter to the then existing Collective Bargaining Agreement stating that bus division employees would be given first opportunity to transfer to the TRAX division and maintain their system-wide seniority. 3) Both side letters were incorporated into a new collective bargaining agreement which was ratified by an affirmative vote of the members of the Union. 4) After the Collective Bargaining Agreement was ratified, Burke and Carper took advantage of the provisions of the new Collective Bargaining Agreement and transferred from the bus division to the TRAX division with their system-wide seniority intact. 5) Most employees of

the TRAX division have transferred from the bus division; and 6) it was not until six (6) years after creation of the TRAX division by the UTA that Burke and Carper alleged that the division was inappropriately accreted to the already existing bargaining unit at the UTA.

In light of the above, undisputed facts, the District Court had no option but to rule that including the TRAX division within the system-wide UTA bargaining unit was not an inappropriate accretion. Burke and Carper have not pointed to a single case, despite the larger number of cases, which involve individual employees objecting to an “accretion” when the alleged accretion occurred more than six years earlier. The major cases referred to by Appellants are distinguishable. Baltimore Sun Co. v. N.L.R.B., 257 F. 3d 419 (4th Cir. 2001) centered on an employer challenging an accretion. In Gitano Group, Inc., 308 N.L.R.B. 1172, the Union objected to the adding of the accreted employees.

The most recent case with the most similarity to the case at hand is I.B.E.W., Local 889 v. Aubry, 42 Cal. App. 4th 861 (1996). In Aubry, subway and light rail maintenance workers for the Los Angeles Metropolitan Transportation Authority were include in a system-wide bargaining unit for the transportation authority under which a sister local of the Union was the exclusive bargaining agent. A different union, the I.B.E.W., obtained signatures from many rail maintenance workers who desire the I.B.E.W. represent their interests instead of the Amalgamated Transit Union. The I.B.E.W. filed a petition for recognition with the California agency responsible

for making bargaining unit determinations, the Department of Industrial Relations. After an extensive hearing, which applied federal substantive and procedural labor law, the Department found the system-wide bargaining unit to be appropriate and the small I.B.E.W. unit to be inappropriate.

The I.B.E.W. appealed the Aubry decision to the California Superior Court and then to the California Court of Appeals. Although the appellant decision deals mainly with standards of review issues, the court does address the doctrine of accretion. The court stated:

We do not read the case [Sheraton-Kauai Corporation v. N.L.R.B. 429 F. 2d 1352 (9th Cir. 1970)] as standing for a broad principle that whenever jobs are added due to expanded operations, the added positions must be deemed the appropriate unit if the employees therein so elect, regardless of other pertinent factors.

42 Cal. App. 4th at 872.

The Court, in rejecting the I.B.E.W.'s claim of an illegal accretion, also held that the mail maintenance works would be an inappropriate bargaining unit.

There are, of course, differences between Auby and the case at hand. However, many of those differences reinforce the correctness of the District Court's decision. First, Auby involved a rival union's petition, not the claim of two employees. Second, the I.B.E.W. filed their petition shortly after the alleged inappropriate accretion, not more than six years later. Third, California by express statute must utilize both federal substantive and procedural labor law; Utah has no such requirement.

The District Court properly rejected the Plaintiffs' claim that under Utah law the TRAX division employees were inappropriately accreted into the system-wide bargaining unit at the UTA.

2. System-wide Bargaining Unit.

One extremely significant aspect of this case which Burke and Carper can not dispute is that the system-wide bargaining unit at the UTA is an appropriate unit. The undisputed facts in this matter demonstrated that in virtually every transit district in this country, which have both buses and light rail, the bus division employees and the rail division employees are within one system-wide bargaining unit. There are strong legal reasons for such system-wide units.

In analyzing the appropriateness of such system-wide units, the Board applies a different standard to public utilities (including public transit systems) than to a manufacturing industry. In manufacturing, a single plant unit is presumptively appropriate. However, in public utilities, the presumptively appropriate unit is system wide. In Safeway Trails, Inc. 120 NLRB 79 (1958), the Board rejected a unit request from a sister local of the Union which sought a separate unit consisting of the bus lines formerly operated by one company prior to a merger of two companies. In rejecting that argument, the Board approved a system wide unit. 120 NLRB at 82-83.

The Board has continued to apply the system-wide presumption in public utilities. In New England Telephone, 280 NLRB 162, 164 (1986), the Board states "in public utility industries a system wide unit is optimal." It then

quotes from Baltimore Gas & Electric, 206 NLRB 199, 201 (1973) where the Board stated:

That judgment [for system wide units] has plainly been impelled by the economic reality that the public utility industry is characterized by a high degree of interdependence of its various segments and that the public has an immediate and direct interest in the maintenance of the essential services that this industry alone can adequately provide. The Board has therefore been reluctant to fragmentize a utility's operations. It has done so only when there was compelling evidence that collective bargaining in a unit less than system wide in scope was a "feasible undertaking" and there was no opposing bargaining history.

In New England Telephone, the Board denies a non-system wide unit noting the system wide labor relations (also present at UTA) and the limited autonomy of the managers in the divisions that were sought to be division units. The Board then concluded:

While each of the petitioned-for units does constitute an administrative subdivision of the Employer's operations, in neither case have the Unions shown that the employees in the respective subdivisions share a sufficiently distinct community of interest to warrant bargaining on a less than system wide basis. Indeed, the record shows that virtually all of the terms and conditions of employment, including hours, wage rates, wage progressions, fringe benefits, grievance procedures, work rules, job classifications and duties with those classifications, are uniform system wide. Accordingly, we conclude that the smallest appropriate unit is a system wide unit for each department and thus that the petitioned-for units are inappropriate.

New England Telephone Co., *supra*, 280 NLRB at 162.

The Baltimore Gas & Electric case is also instructive. There,

the International Brotherhood of Electrical Workers sought a unit of employees at the employer's nuclear power plant. The Board rejected that unit. The Board noted the differing technology and skills between nuclear and fossil-fuel electricity generation but rejects the argument that the nuclear employees have a separate community of interest.

[N]uclear generating plants and their fossil fuel counterparts differ only in the means by which they provide the heat utilized in the first step of the generation process. This distinction, while admittedly requiring a different technology in nuclear plants, does not require a finding that the employees at [the nuclear plant] have a separate community of interest.

206 NLRB at 201.

The case at hand also involves a separate technology but the basic business, the movements of passengers, remains the same. Light rail cars are powered by electric motors. Buses have (generally) natural gas motors using fossil fuel. The technology is different but the job is the same. Each operate a transit vehicle used to carry passengers in the territory of the UTA. In Key System Transit Lines, 105 NLRB 526 (1953), the Machinists union sought a unit of bus mechanics and related employees. At that time, Key System (the private predecessor to AC Transit in Alameda and Contra Costa Counties of California) operated both bus and rail public transit. A sister local of the Union represented bus and rail mechanics and opposed the severance of the bus mechanics unit. (See 105 NLRB at 527, n.4). The Board rejected the requested

unit for a separate bus maintenance unit and dismissed the petition of the Mechinists despite finding “separate lines of supervision for rail and automotive work.” 105 NLRB at 528.

In this case, the Plaintiffs have no bargaining history to support their case. The bargaining history favors the system-wide unit, including bus and rail. As the Plaintiffs have no bargaining history to contradict the general rule, the Court must apply the general rule precluding occupational units in public utilities and public transit.

The only appropriate unit is the system-wide unit.

**POINT II: THE DISTRICT COURT UTILIZED THE APPROPRIATE
PROCEDURE WHEN DENYING THE MOTION FOR
PRELIMINARY INJUNCTION.**

Burke and Carper raise two potential procedural defects to the District Court’s denial of the Motion for Preliminary Injunction. First, they argue that the District Court inappropriately denied them an evidentiary hearing. Second, they argue, in the alternative, that the District Court shall be required to issue “Finding of Fact and Conclusions of Law” pursuant to Federal Rules of Civil Procedure, Rule 52. The Union agrees with the Appellants’ description of the appropriate standard of review for this issue; however, the Union strongly disagrees with the conclusion of Burke and Carper that the District Court abused its discretion.

Burke and Carper admit in their Brief that there are no published decisions from this Court requiring “a trial court to hold an evidentiary hearing on a request for an injunction” (Appellants’ Brief, p. 22). The only legal reason argued by Burke and Carper for an evidentiary hearing was to satisfy the requirements of the Norris-LaGuardia Act, 29 U.S.C. § 101. However, the District Court specifically found that it did not need to apply that statute to the case at hand. (Appendix B, p. 189). Burke and Carper have not appealed this aspect of the District Court’s Order.

Burke and Carper seem to concede this point when they argue, alternatively, that the District Court should have entered findings of fact and conclusions of law under Rule 52(a), Federal Rules of Civil Procedure.

However, that rule says, in pertinent part, as follows:

It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in an opinion or memorandum of decision filed by the Court.

Clearly, the Order Denying Plaintiffs’ Motion for a Preliminary Injunction dated January 25, 2005, satisfies the above quoted rule. This Court held in Wolfe v. New Mexico Department of Human Services, 69 F. 3d 1081 (10th Cir. 1995) as follows:

This 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. Ramey Constr. Co., Inc. v. Apache Tribe, 616 F. 2d 464, 466-67 (10th Cir. 1980). 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. Otero v. Mesa County Valley Sch. Dist.
568 F. 2d 1312, 1316 (10th Cir. 1977)

Whether or not one disagrees with the District Court's findings and conclusions as stated in its well written Order, it would be impossible to argue that the Order does not provide a basis for this Court to engage in a "meaningful review".

The District Court did not abuse its discretion when it did not conduct an evidentiary hearing and its Order fully complied with the requirement of Rule 52(a).

CONCLUSION

For the reason stated above, this Court should affirm the District Court's denial of the Motion for Preliminary Injunction.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument on this consolidated appeal is appropriate because it involves complex labor law issues for transit districts in the state of Utah.

Respectfully submitted this _____ day of _____, 2005.

JOSEPH E. HATCH
Attorney for Appellee Local 382

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) because it contains 5655 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii). This brief uses a monospaced typeface and contains 668 lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 12 point Bookman Old Style font.

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Dated this _____ day of September 2005.

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of September, 2005, I served two copies of the Brief of Appellee Local 382 upon the following, by depositing two copies thereof in the United States mail, postage prepaid, addressed as follows:

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ADDENDUM