

**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

D.C. No. 2:04-CV-00985

APPELLANTS' REPLY BRIEF

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INTRODUCTION

This filing is a Reply to the filings of the Utah Transit Authority and John English (“UTA”) and Local 382 of the Amalgamated Transit Union (“Local 382”). This filing presumes that the Court will accept the filing by Local 382 despite it being filed a day late and by its own admission in twelve point type. Plaintiffs do not waive any objections to the filing but do not wish to burden the Court with any unnecessary procedural challenges. Both responses of the defendants seem to ignore the arguments by the plaintiffs and make arguments which were anticipated and addressed in the initial filing by the plaintiffs. Consequently, plaintiffs will file a reply that only concentrates on the global issues of this case in the minimum amount of pages needed.

ARGUMENT

I. The Case Under Appeal Requires the Application of the Accretion Policy of the National Labor Relations Board (“NLRB”). The Defendants’ Defense is Illegal Under NLRB Precedent.

Both UTA and Local 382 try to distinguish the plaintiffs’ cited accretion cases by claiming that there was no agreement to accrete the workers in plaintiffs’ cases. They ignore that after *Sheraton* and *Boire* the ability to accrete, by contractual agreement, a group of employees that could be a separate bargaining unit is prohibited. *Sheraton –Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1356 (9th Cir

1970); *Boire v. Intern. Brotherhood of Teamsters* 479 F.2d 778, 789 (5th Cir. 1973). Ironically, Local 382, in two pages of its filing, discusses how rare it is for the NLRB to find an accretion and then argues implicitly that an accretion has occurred. In order for this case to be a severance case, as claimed by the defendants, the TRAX employees would have had to be accreted into the larger bargaining unit. Since this never occurred, this case cannot be considered a severance case. “An accretion is an attempt to add new employees or **present employees in new positions** to an existing bargaining unit.” *NLRB v. Superior Protection, Inc.*, 2005 U.S. App. LEXIS 2760; 176 L.R.R.M. 2769 * 11 (Feb. 16. 2005) (emphasis added). In the case at bar, in 1998, prior to the new TRAX facility being created, UTA entered into a contract with Local 382 that mandated Local 382 as the representative for the TRAX employees. The TRAX operation did not commence operations until December of 1999. UTA staffed the new TRAX facility with a combination of some new employees and transferred employees. Such an accretion would deny the TRAX employees their individual rights under the NLRA and would be considered an unfair labor practice under the NLRA. As stated in *Aramark*, “it is well established that an employer’s grant of recognition to a union is inappropriate and **unlawful** if granted before a representative complement of employees is present.” *Aramark Services, Inc. v. NLRB*, 2002 NLRB Lexis 521 * 12 (Oct. 21, 2002) (emphasis added) (citing *Kroger Co.*, 275 NLRB 1478 (1985) *Lianco*

Container Corp., 173 NLRB 1444, (1969)). The fact that UTA's defense is illegal was discussed in detail in plaintiffs' opening brief but the cases supporting this contention as well as the contention itself was completely ignored by the defendants. Cf. Appellants' brief pp. 14-16; Appellees' brief. Apparently, defendants hope that the reviewing Court will not catch this omission. Since the January 24, 2005, injunctive hearing before the Trial Court, and the initial briefing on this case, the NLRB decided a case that clearly demonstrates that the plaintiffs' view of the law is correct and an agreement to accrete is not valid. *Frontier Telephone of Rochester Telephone, Inc.*, 344 N.L.R.B. No. 153 *1 (2005) (Attachment B). In that case the NLRB found that no accretion had occurred. In making that determination two factors were most important: (1) separate supervision (2) little exchange between workers. In fact the NLRB stated that "the absence of these factors will ordinarily defeat a claim of lawful accretion." *Id* at n.7. In that case like this case, the workers in the new facility had different day to day supervision and the company and the union had agreed to accrete the workers. Moreover, in that case as in this case, there are virtually no temporary transfers between the two groups.¹ In an initial bargaining

¹ The NLRB also grants companies and unions great deference in creating initial bargaining units. That is because no matter what is decided the workers will be given an opportunity to vote on the bargaining representative. Also, it does not upset an existing bargaining unit because the unit is just being created. In the accretion context, an attempt to impose a bargaining unit or force an accretion of employees into an existing bargaining unit is prohibited. *NLRB v. Paper Manufacturers*, 786 F.2d 1163 (3rd Cir. 1986) (Citing *Chas S. Winner, Inc. v.*

unit test the NLRB must only choose an appropriate bargaining unit and not the most appropriate bargaining unit, but: “In the accretion context, however, ‘[a] group of employees is properly accreted to an existing bargaining unit when they have such a close community of interests with the existing unit that they have no true identity distinct from it.’” *Id.* at * 15. Simply stated, if a group of employees could be an appropriate bargaining unit alone, they cannot be accreted into an existing bargaining unit. *Baltimore Sun v. National Labor Relations Board*, 257 F.3d 419, 427 (4th Cir. 2001).

Under accretion standards, “when an employer transfers a portion of its employees at one location to a new location, the new facility is presumptively a

Teamsters Local Union No. 115, 777 F.2d 861 (3rd Cir. 1985). As stated by the NLRB in *Frontier Telephone of Rochester, Inc.*, 344 NLRB No. 153 *11 n.6: “The test is different than the traditional community of interest test that the Board applies in deciding appropriate units in initial representation cases. In that context, the Board will certify any unit that is *an* appropriate unit, even if it is not the most appropriate unit. *Bartlett Collins*, 334 NLRB 484 (2001). In the accretion context, however, ‘[a] group of employees is properly accreted to an existing bargaining unit when they have no true identity distinct from it. *NLRB v. St Regis Paper*, 674 F.2d 104, 107-108 (1st Cir. 1982)”. UTA, in its filing, asserts that under state law the test in this case is the same as in an initial representation case. Unfortunately, the Trial Court agreed with this view. However, this violates the basic principles of federal labor law. While not all the provisions of the NLRA are applicable to UTA, both state law and federal case law on Section 13(c) require that the basic rights enshrined in the principles of federal law be protected. See *Park City Ed. Assn. v. Bd. Ed. Park City School Dist.*, 879 P.2d 267, 272 (Utah Ct. App. 1994); *Amalgamated Transit Union International, AFL-CIO, et al. v. Donovan*, 767 F.2d 939, 948 (D.C. Cir. 1985). To deny application of the limitations on accretion would deny the TRAX employees basic Section 7 rights. Such a finding also would make Utah ineligible for federal funding under *Donovan*. 767 at 947.

separate unit.” *U.S. Tsubaki, Inc.*, 331 N.L.R.B. 327 (2000). UTA has not even attempted to rebut this presumption. Instead, it has attempted to argue that the combined unit could be an appropriate bargaining unit. This would be a valid defense if this case were a severance case or a determination of the initial bargaining unit. However, it is legally irrelevant in an accretion case. In this case, if the TRAX employees can show that they were an appropriate bargaining unit at the time TRAX was created, then as a matter of law UTA must recognize them as a separate bargaining unit. The declarations filed by UTA do nothing to bolster their claim that the TRAX unit is not an appropriate bargaining unit. In fact, a declaration by Jerry Benson admits that at several other transit districts the light-rail and bus divisions are separate units which supports a finding that the TRAX employees can constitute a separate bargaining unit. *Aplt. App. A* at 127 ¶13.

Thus, as a matter of law the TRAX employees are in a separate bargaining unit. This Court should find that the Trial Court erred in finding that the plaintiffs had to prove the right to a severance to prevail.²

The TRAX unit clearly has separate supervision and no daily interchange of employees between the bus and TRAX units. These facts preclude any possibility of rebutting the presumption of TRAX being a separate bargaining unit and clearly

² While plaintiffs do not believe as a matter of law that they need to meet the burden of demonstrating entitlement to a severance, they believe that they could demonstrate this right after discovery.

distinguish this case from *International Brotherhood of Electrical Workers v. Aubry, Jr.*, 42 Ca. App. 4th 861 (Ct. App. 2nd Appellate Dist., Div. 4 1996).³

While defendants' failure to find *Frontier Telephone* discussed above may be forgiven, their argument about the public utility doctrine allowing accretion was foreclosed even before they made the argument to the Trial Court. *Cellco Partnership*, 2004 NLRB Lexis 138 * 9 (2004) explains the reasons behind the public utility doctrine and implicitly why it is not applicable to this case. The reason for the doctrine is that labor disruptions or stoppages at one facility could halt "the provision of essential services to the public in places likely far removed from the situs of the dispute." 2004 NLRB Lexis 138 at *8. That cannot occur in the case at bar since Utah transit workers do not have the right to strike and instead have the right to binding arbitration which could never disrupt service "far removed from the situs of the dispute." Utah Code Ann. § 17 A-2-1031; Utah Code Ann. § 17 A-2-1032 (2004). Since there is no chance of a disruption of service there is no need for a systemwide presumption.

As stated in *Cellco*:

In creating the systemwide presumption, the Board essentially balanced the employees' Section 7 right to bargain collectively through representatives of

³ UTA and Local 382 attempt to argue that the decision in *Aubry* was reached due to the public utility doctrine, however a review of the case clearly demonstrates that case was not decided on that basis but under the standard accretion analysis. Their view is a distortion of the true rationale.

their own choosing against the public's interest in the unbroken provision of necessary services. This balance makes the most sense when the petitioned-for employees are an integral part of the utility service such that a labor stoppage or dispute at one part threatens the ability of the whole to serve the public good. **However, where there is no such danger, we find no basis for limiting the organizational rights of employees by requiring them to organize only in comprehensive units.**

2004 NLRB Lexis 138 at 9-10 (Emphasis added).

In a decision decided on February 9, 2005 before the NLRB, the fact finder stated:

The Board's rationale for a system-wide presumption for public utilities is largely a matter of public policy; namely that the public has an "immediate and direct interest in the uninterrupted maintenance of the essential services that the public utility industry alone can adequately provide." *Baltimore Gas & Elec.*, 206 NLRB 199, 201 (1973). This is ultimately a balancing test between employees' Section 7 rights and the public's interest in uninterrupted utility service that only a single entity provides. Generally, the Board is reluctant to limit employee's Section 7 rights unless the countervailing public interest is substantial. The Board's public utility presumption is not absolute; rather the Board has found less than system-wide units appropriate in certain circumstances.

Alyeska Pipeline Service Co., NLRB Region 19. Case 19-RC-14600 (2005) (citation omitted).

In the case at bar, the public utility presumption does not apply. There is no reason to impede the TRAX workers' Section 7 rights. Since they cannot strike they cannot disrupt services. Thus, there is no need to apply the presumption. This is consistent with Tenth Circuit case law. *Mountain States Telephone and Telegraph*, 310 F.2d 478 (10th Cir. 1960). In that case the fact that the bargaining unit had little chance to disrupt service justified a separate unit. Consequently, the court departed

from the public utility presumption of a system-wide unit and allowed a separate unit. In this case, there is no substantial or even minimal countervailing public interest that would justify impeding the Section 7 rights protected by the NLRB's presumption of a single facility being the appropriate bargaining unit. *Id. at 9-10.*

While it is clear that an accretion is not possible, UTA has raised the possibility that a merger of the two distinct bargaining units has occurred. Neither is this possible. Both multi-employer or multi-location bargaining units require an unequivocal intent to merge. *West Lawrence Care Center, Inc.*, 305 N.L.R.B. 212 **26, 26n.5. (1991). The fact that Local 382 counted TRAX votes separately and claimed in their answer to the complaint to have provided separate representation means that high standard for merger has not been met in their summary judgment motion. Moreover, since under *U.S. Tsubaki*, 170 L.R.R.M. 443 (2003), the bargaining representative came over as a matter of law and the existing contract could be honored by an agreement between the company and Local 382, the employees toleration of the status quo did not demonstrate a consent to a merger. The employees, acting through their union representative, do have the right to agree to destroy the separate identity. However, Section 7 considerations need to be balanced with the merger doctrine. Both *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974) and *Chemical Workers Local 1 v. Pittsburg Glass Co.*, 404 U.S. 157, 172 (1971) limit Local 382's ability to merge the units contrary to wishes of the TRAX

employees. In fact, the TRAX employees had no notice that UTA and Local 382 were even attempting a merger prior to UTA making that eleventh-hour argument in this case. Even the dissent in *West Lawrence* (the case that declined to find merger) agreed that Section 7 rights required informing the employees of a merger plan. 305 N.L.R.B. 212, 218. This is necessary to allow the employees to move to decertify the union in a timely manner to avoid the dilution of Section 7 rights. In a doubtful case such as this, the proper procedure is to order an election on the merger with the TRAX employees deciding whether to merge. See e.g. *Libbey-Owens Ford Glass Co.*, 173 N.L.R.B. 1231 (1968). Of course, this Court could follow the persuasive authority of *South Jersey Catholic Teachers Organization v. Diocese of Camden*, 347 N.J. Super 301; 789 A.2d 682, 691 (2000) and just refuse to follow the cases cited by UTA because they do not take into account the factors necessary to create a community of interest under other NLRB cases. The NLRB itself seems to have distinguished and question many of its earlier cases in *West Lawrence Care Center, Inc.*, 305 N.L.R.B. 212 ** 26, 26n.5. (1991).

The decision by the Trial Court to deny the injunction substantially based on the incorrect assumption that the case required a severance and not an accretion analysis was based on an incorrect interpretation of law and thus is clearly arbitrary. At a minimum, this Court should remand this case with instructions that the Trial Court should apply the correct legal standard. However, given the severity of the First

Amendment deprivation this Court should immediately grant the injunction.

II. The TRAX Employees Have Demonstrated That They Meet the Requirements For Injunctive Relief and the Plaintiffs' Filing Should Be Considered a Motion For a Different Injunction and Not Just a Reconsideration Since It Asked For Distinct Relief.

A. NEW RELIEF WAS SOUGHT

The second attempt by the plaintiffs to obtain an injunction asked for substantially different relief than the first attempt. The second attempt should have been treated as a request for a new injunction. Thus, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Trial Court had a duty to issue findings of fact and conclusions of law. *See Wolf v. New Mexico Dept. Of Human Resources*, 69 F.3d 1081, 1087 (10th Cir. 1995). The first attempt to receive injunctive relief attempted to preserve the status quo by not allowing UTA to transfer employees from the bus system to TRAX system. The second attempt to obtain relief only attempted to prevent UTA from continuing to recognize Local 382 as the bargaining representative. The only reconsideration requested was to fix the clear error by the Trial Court, discussed above, that this case is a severance and not an accretion case which led to the denial of the injunction.

B. THE STATUS QUO IS ILLEGAL

Defendants argue that plaintiffs, since their injunction seeks a change in the status quo, must meet a more demanding standard according to *L.L.C. v. AT&T*,

Corp., et. al., 320 F.3d 1081, 1099 (10th Cir. 2003). However, defendants ignore that the status quo is illegal and thus should not be sustained. *See Boire v. Intern. Brotherhood of Teamsters*, 479 F.2d 778, 789 (5th Cir. 1973). Moreover, UTA incorrectly asserts that the TRAX employees have been part of a system-wide bargaining unit since 1998, but in fact the TRAX operation did not even open until December 4, 1999. The light-rail operators began training for new positions in mid-1999 but those new positions alone meant that the accretion doctrine had to be applied to this case. “An accretion is an attempt to add new employees or **present employees in new positions** to an existing bargaining unit.” *NLRB v. Superior Protection, Inc.*, 2005 U.S. App. LEXIS 2760; 176 L.R.R.M. 2769 * 11 (Feb. 16, 2005) (emphasis added). The TRAX jobs were clearly new positions since no similar positions had existed at UTA or its predecessors for about 60 years and the technology has changed so dramatically in those decades that in no way can the old positions be considered the same as the new modern positions. Additionally, the closing of the old trolley system abolished those positions in the bargaining unit and the defendants cannot point to any contract that had trolley positions included in the definition of the bargaining unit. If the positions had been retained in the bargaining unit and were sufficiently similar to the new positions, then there would have been no need to create a new agreement between UTA and Local 382 to include the positions. While UTA and Local 382 may have attempted to create one system-wide unit, they

never created such a unit because they never allowed the TRAX employees to vote on their preference to merge their separate bargaining unit, which was created as a matter of law, into the bus unit. Despite *NLRB v. Magnavox*, 415 U.S. 322, 325 (1974) and its progeny, UTA and Local 382 incorrectly believe that they can bargain away workers' rights to choose their bargaining representative. Only by relying on decades old case law and ignoring recent decisions affirming workers' rights to avoid accretion can UTA and Local 382 even argue to this Court that the Trial Court's decision was correct. This Court should not turn labor law back fifty-plus years to uphold the Trial Court's decision.

C. IRREPARABLE HARM IS OCCURRING

Defendant UTA argues that plaintiffs have not shown irreparable harm. Besides ignoring the arguments raised in the plaintiffs opening brief, UTA ignores that since this case involves First Amendment rights, irreparable harm is presumed.⁴ *Pacific Frontier et al. v. Pleasant Grove City*, 414 F.3d 1221,1235-36 (10th Cir. 2005); *A.C.L.U. v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999).

UTA also misstates the relative hardships imposed by granting or denying the injunction. The bus employees presently are represented by a bargaining

⁴In Defendant UTA Appellees' brief on page sixteen, defendant mentions that plaintiffs did not ask for reconsideration of the Trial Court's decision on 42 U.S.C. § 1983. That action by the plaintiffs was unnecessary to receive relief on the new request for an injunction.

representative of their own choosing. If this Court allows the TRAX employees to be represented by a bargaining unit of their own choosing the bus employees will not be denied that right. The First Amendment and Section 7 type rights of the bus employees will not be impacted. The bus employees are not impacted by the safety deficiencies that the present bargaining representative fails to address at TRAX. However, by denying the injunction the TRAX employees are being denied their Section 7 type rights as well as their First Amendment free association rights. Moreover, the plaintiffs and public will continue to be endangered by unaddressed safety issues. See *Aplt. App. A* at 48-51 & 166-69.

CONCLUSION

Stripped to its essence, this case involves a state entity, UTA, conspiring with a self-serving union, Local 382 to deny employees their right to choose their own bargaining representative in violation of both state and federal law. UTA, by denying the TRAX employees the right to choose their representative, avoids addressing safety issues, inadequate pay for the positions performed and other legitimate grievances. Local 382 has essentially agreed not to address these grievances and has received in return protection from the threat of being replaced as the bargaining representative for TRAX employees. It also can obtain more benefits for the more numerous bus employees by short-changing the TRAX employees. This, in turn increases its ability to win elections. This backroom type deal is

precisely why the United States Supreme Court does not allow unions to negotiate away Section 7 rights.

The Trial Court acted arbitrarily by evaluating the injunction under a “severance” and not an “accretion” standard. It also did not support its incorrect decision with findings of fact and conclusions of law pursuant to the Federal Rules of Civil Procedure. It denied the request for different relief in a cursory one line decision. This was done despite the plaintiffs supplying the Trial Court with a case that clearly demonstrated that employees working in different positions could not be accreted into an existing bargaining unit if they have their own identity.

At a minimum, this Court should remand with instructions to the Trial Court to apply the correct legal standard. However, to prevent further deprivations of TRAX employees rights’ it should enjoin the illegal actions by UTA.

Dated this 12th day of October, 2005.

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CERTIFICATE OF DIGITAL SUBMISSION

This document complies with Tenth Circuit rules for electronic filing and violates no privacy rules. It has been scanned with a current Norton Antivirus program.

Daniel G. Moquin

CERTIFICATE OF MAILING

I hereby certify that on this ____ day of October, 2005, I caused to be mailed, postage prepaid, the foregoing **APPELLANTS' REPLY BRIEF** to the following:

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