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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

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LISA BURKE and MICHAEL CARPER, )  
individually and on behalf of all others )  
similarly situated, )  
Plaintiffs, )  
v. )  
UTAH TRANSIT AUTHORITY, JOHN )  
INGLISH, INDIVIDUALLY, LOCAL 382 )  
OF THE AMALGAMATED TRANSIT )  
UNION AND THE UNITED STATES )  
DEPARTMENT OF LABOR, )  
Defendants. )

**REPLY TO MEMORANDUM OF  
LOCAL 382 IN OPPOSITION TO  
MOTION FOR PRELIMINARY  
INJUNCTION**

Civil No. 2:04-CV-00985  
Judge PAUL CASSELL

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Plaintiffs, Lisa Burke and Michael Carper, through Counsel, file this "Reply to the Memorandum in Opposition to Motion for Preliminary Injunction filed by Defendant, Local 382 of the Amalgamated Transit Union.

**INTRODUCTION**

Defendant Local 382 of the Amalgamated Transit Union(the "Union") argues the Plaintiffs have failed to establish that this Court erred in its prior ruling. It claims the existing

system-wide bargaining unit is an appropriate bargaining unit. The Union argues that there is a presumption in favor of system-wide units that applies to public entities and public utilities.

*The Union also argues, without explanation, that granting the injunction would affect the rights and benefits of Utah Transit Authority (“UTA”) workers.*

These arguments are without merit and seek to divert the Court from the real issue that the status quo is a violation of State and Federal Law; that this is a case where the TRAX employees have been wrongfully accreted into the Union; and that denial of the requested relief puts Plaintiffs in the position of having been wronged and left without a remedy.

### ARGUMENT

The gravamen of the Union’s argument is that the system-wide collective bargaining unit, which was in place at the time TRAX was established in 1999, is appropriate due to the *presumption that such a unit reflects a public interest in system-wide units in public utilities and that there is a trend toward larger units in public entities.* These arguments are similar to the arguments made by UTA in its Memorandum. To the extent the arguments apply, Plaintiffs adopt their Reply Memorandum previously filed in response to the Opposition of UTA to Plaintiff’s Motion for Injunction.

*The real issue before this Court is an accretion issue, to-wit, when TRAX was created in 1999, and UTA employees were transferred to the new facility with new management, new jobs, and new duties, was the TRAX unit, consisting of only employees of the TRAX division of UTA, an “appropriate unit” for collective bargaining purposes as that term is used under State and Federal law.*

If the answer to this question is “yes,” then Plaintiffs are entitled to the relief requested.

## THE TRAX UNIT IS AN APPROPRIATE BARGAINING UNIT

In the present case, UTA and the Union have both admitted that they jointly determined that the appropriate bargaining unit for all UTA employees is a system-wide unit consisting of all union employees of UTA. This decision, which UTA claims was made when the 1998 labor contract was ratified, has never been reviewed by the NLRB or any agency of the State of Utah. This contract between UTA and the Union accreted the TRAX employees into the Union upon the creation of the separate TRAX facility. An agreement between the Union and UTA, made prior to the creation of TRAX, to accrete the employees of the TRAX unit into the union upon its creation is an unfair labor practice. *Sheraton –Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1356 (9<sup>th</sup> Cir 1970).

This lawsuit was brought to enforce the right to choose their own bargaining unit, a right which is granted to Plaintiffs by the Urban Mass Transit Act (“UMTA”). UMTA requires States which receive federal mass transit funds to provide employees of the mass transit entities the same rights that existed under federal labor law at the time the mass transit district was created.

Thus, UTA’s employees have all of the rights granted by federal labor law. UMTA requires a State to enact laws which grant to mass transit employees all of the rights which would be available under federal labor law if the mass transit district was a private entity. Unless state law so protects workers, a state cannot receive federal funds under the UMTA. *Amalgamated Transit Union Int’l v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985). The State of Utah originally adopted Utah Code ANN. §17A-2-1031 (2004) in order to allow UTA to receive federal funds.

This Section provides:

Employees of any public transit system established and operated by the district shall have

the right to self-organize, 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 organizations, to enter into and execute a written contract incorporating therein the agreements so reached. (Emphasis added.)

The Utah Statute guarantees employees the right to bargain in an appropriate unit. However, the State of Utah has not provided a labor commission, or other administrative body, which enforces the rights guaranteed Utah State Statutes, and which are guaranteed by the UMTA as a condition for receipt of federal funds by UTA. For this reason, Plaintiffs in this case must ask this Court to perform such a function.

The question of what constitutes an appropriate unit is a federal law question because Section 13(c) of the UMTA requires the States to grant the same rights to unionized employees that exist under federal law. This is clearly reflected in *Amalgamated Transit Union Int'l v.*

*Donovon, supra*, where the court stated:

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 13(c)(2) operation in such a fashion. 767 F. 2d at 948.

Thus, both State and Federal law are intended to protect the bargaining rights of workers and maximize their right to choose an appropriate bargaining unit.

As set forth in Plaintiffs' opening memorandum, when employees are transferred from an existing location to a new location, there is a rebuttable presumption that the employees in the

new location constitute a new appropriate bargaining unit. *Gitana Group, Inc.*, 308 NLRB 1172 (1992). Thus, when TRAX was created in 1999, the issue was whether, notwithstanding any provision contained in the 1998 contract, the new TRAX facility employees could lawfully be accreted into the existing unit which was represented by Local 382. The answer to this question, under current federal law, is “No.”

Incredibly, the Union continues to claim that this is not an accretion case. The NLRB recently held that it is well settled that an accretion is the addition of new employees to an already existing group. The Board stated that the NLRB has limited this principle and construed it narrowly so as not to stifle the desires of employees regarding membership. *See Auto Processing Co.*, 258 NLRB 854 (1981), and cases cited therein. In other words, the accretion principle cannot subvert the Section 7 rights of employees to freely choose who, if anyone, will represent them. *Safeway Stores*, 256 NLRB 918 (1981). Recent decisions clearly contradict the claims of the Union. The facts of this case do not entitle UTA and the Union to accrete the new TRAX facility’s employees into the existing unit. *See, Aramak Services, Inc. v. NLRB*, 2002 NLRB Lexis 521 \*10-11 (Oct. 21, 2002) (a new facility represents a new bargaining unit); *Gitano Group, Inc.*, 308 N.L.R.B. 1172 (1992)(a new facility presumptively creates a new bargaining unit). At the creation of the TRAX facility in 1999, the employees who transferred over to the TRAX facility presumptively became an appropriate bargaining unit. *Id.* The question then becomes whether the TRAX unit was legally subsumed into the existing unit.

In a footnote in *Aramark* the administrative law judge made a comment which could appropriately be directed at UTA and Local 382 in this case:

The arguments offered by the parties in this case often missed the gravamen of the alleged

violations here. The right of employees to freely choose who, if anyone, will represent them for the purposes of collective bargaining is an untrammelled right. It may not be defeated by parties' willingness to engage in backdoor deals, however well intentioned. *Id.* [Citing *Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1961)].

Moreover, as stated by the Third Circuit Court of Appeals;

Representation issues may not be decided by contract. . . *NLRB v. Paper Manufacturers*, 786 F.2d 1163 (3<sup>rd</sup> Cir. 1986) (Citing *Chas S. Winner, Inc. v. Teamsters Local Union No. 115*, 777 F.2d 861 (3<sup>rd</sup> Cir. 1985).

That court then went on to state:

Like successorship, **accretion** is a representative issue. **It cannot be resolved by a contract between Local 169 and the employer.** . . *Id.* (Emphasis added).

The fact that the Union and UTA purportedly agreed in 1998 to impose Local 382 upon employees of the new TRAX facility upon its creation in 1999 not only has no legal significance and constitutes an unfair labor practice, it is unenforceable against a claim of the TRAX employees that they constitute an appropriate separate bargaining unit. In *Sheraton-Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1356 (9<sup>th</sup> Cir. 1970), a company owning five hotels and the Union representing the employees at those hotels attempted to force the existing union on employees of the company when it opened a sixth hotel. The Court held that such an accretion violated the workers' rights. A similar result was reached in *Boire v. Intern. Brotherhood of Teamsters*, 479 F.2d 778, 789 (5<sup>th</sup> Cir. 1973) where the Court found a similar arrangement to be a violation of Section 7 rights and held that an injunction, as has been requested in this case, was appropriate. *See, Melbet Jewelry Co.*, 180 NLRB 107 (1969). Any attempt to distinguish these cases fails.

Attempts to limit the scope of such holdings has been rejected. The NLRB has stated that:

We find no merit to the Union's contention that *Gitano* is limited to situations involving a merger of represented with unrepresented employees. In *Armco Steel Co.*, 312 NLRB 257, 259-260 (1993), the Board rejected the contention that *Gitano* limited unit clarification proceedings to a determination of the inclusion or exclusion of relocated employees vis-a-

vis the unit from which they came and applied the *Gitano* analysis to determine the appropriateness of a separate unit of the relocated employees.  
*U.S. Tsubaki*, 331 N.L.R.B.327 (2000).

Numerous other cases support the view that if a new facility could be a separate bargaining unit no finding of accretion can be made. E.g. *Baltimore Sun Company v. NLRB*, 257 F.3d 419, 426 (4<sup>th</sup> Cir. 2001); *Westvaco, Va. Folding Box Div. v. NLRB*, 795 F.2d 1171,1173 (4<sup>th</sup> Cir. 1986); *Westinghouse Elec. Corp. v. NLRB*, 506 FR.2d 668, 672-73 (4<sup>th</sup> Cir. 1974); *NLRB v. Stephens Ford, Inc.* (2d Cir. 1985); *Intern. Ass'n of Machinists v. NLRB*, 759 F.2d 1477, 1479 (9<sup>th</sup> Cir. 1985); *Retail Clerks Local 588, etc. v. NLRB*, 565 F.2d 769, 772 (D.C. Cir. 1977).

The fact that a union and a company cannot bargain away the Section 7 rights of a group of employees who could appropriately be considered a separate unit is not a new concept in labor law. In *NLRB v. Magnovox*, the United States Supreme Court held that a union contract which violates the Section 7 rights of employees is not enforceable. 415 U.S. 322, 362 (1974). The *Maganvox* Court differentiated between evaluating the economic agreements of a contract and the contract's attempts to regulate the Section 7 rights of employees. The Court held:

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 representative. *Id.*

In the present case, UTA and the Union, in 1998, attempted to bargain away the basic Section 7 right of employees to choose their own union representation upon the creation of the TRAX division in 1999. This is a clear violation of existing labor law principles. Thus, the TRAX employees are substantially likely to prevail in this action against UTA and the Union.

At the time of the December 11, 1998 contract, the TRAX facility, the creation of which

created a new bargaining unit, had not yet been completed and no representative complement of employees existed. Thus, the recognition of Local 382 as the representative of employees of the not yet created division was a clear violation of law. UTA fails to admit to this Court that the TRAX employees, as opposed to Local 382 members as a whole, twice turned down attempts to pass the 2003 contract and have never separately ratified the same.

The TRAX employees have never voted on or authorized the merging of the two separate bargaining units into a single unit for bargaining purposes. There has been no history of bargaining together since the TRAX facility did not exist at the time of the 1998 contract, and the TRAX employees objected to inclusion in the unit prior to ratification of the 2003 contract. Had Trax Employees' votes been counted as a separate unit, the 2003 contract would have been rejected by them.

TRAX opened in December 1999. TRAX employees have explicitly rejected the bargaining representative, Local 382. In *U.S. Tsubaki*, 331 N.L.R.B.327 (2000), the NLRB found that a unit retained its separate identity despite a history of bargaining of more than eight years and what appears to have been a unit which was entirely, at least initially, staffed with transferred employees. Thus, the Court could make no other factual finding other than that the TRAX employees maintain a separate identity to this date and represent an appropriate bargaining unit.

The bottom line is that the building of the new TRAX facility created a new bargaining unit. Unless and until the employees of the new unit vote, in a separate election limited to TRAX employees, to merge into the existing union local, they retain the right to pick their own bargaining representative. More than 60% of the employees have now informed UTA by petition that they do not want to be represented by Local 382. It is past time to have an election which

gives the employees their three options: (1) No union (2) retain the present union (3) choose another bargaining representative. Both Utah and federal law require such an election to satisfy the requirement that the bargaining representative be supported by a majority of the employees in an appropriate bargaining unit.

**A SYSTEM-WIDE UNIT IS NOT MANDATED BY STATE OR FEDERAL LAW**

The Union claims that system-wide bargaining units are favored for public employees and that public policy mandates a system-wide unit of UTA employees. Nothing in the law suggests that there may be only one bargaining unit or bargaining representative for the transit district. The Union claims the case of *Brotherhood of Electrical Workers v. Aubry, Jr.*, 42 Cal App 4th 861 (1996) shows that this Court previously ruled correctly. However, such is not the case. The *Aubry* Court clearly held that accretion should be applied very restrictively because it denies employees their section 7 right to vote on who is to represent them. *Id.* At 872. The *Aubry* Court went on to hold that while case law supported the proposition that if the newly created positions could properly constitute an appropriate bargaining unit, the inquiry is ended and an election is required, this principle did not control because, for the reasons set forth in the case, the new employees did not constitute an appropriate bargaining unit. *Id.* at 873.

In the present case, the TRAX employees in fact constitute an appropriate bargaining unit. Therefore, the presumption set out in *Aubry, supra*, and the other cases cited herein, require a representative election by the TRAX employees, an election which has been unlawfully refused by UTA and the Union.

For the above reasons, an injunction is mandated in order to allow the TRAX employees, who as a matter of law constitute an appropriate bargaining unit, to bargain separately with UTA

in their own bargaining unit. Federal labor law mandates a representative election before the TRAX employees can be accreted into the existing Local 382.

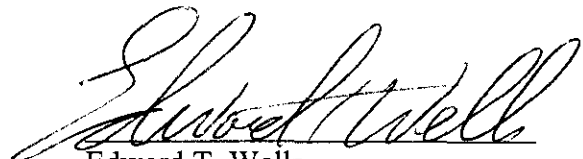
Utah Code ANN. §17A-2-1031 (2004) was enacted to allow the UTA to be eligible for federal funds under the UMTA. Utah law also requires such an election because under Utah law, employees are granted the right to choose their own bargaining representative as allowed under federal law.

### **CONCLUSION**

The case law cited herein and in previous filings with the Court clearly show that this is an accretion case. This case is a textbook example of an improper and illegal attempt to accrete a group of workers into an existing bargaining unit. If evaluated under the proper standard, as set forth in the recent cases cited by Plaintiffs herein and in previous filings, it becomes clear this is in fact an accretion case and the court has a duty to protect and preserve the Section 7 rights of the TRAX employees by granting the Injunction and allowing TRAX employees to choose their own bargaining representative by election. This Court must stop the illegal attempts of UTA and the Union to force the TRAX employees into a bargaining unit which does not represent their interests.

By granting the injunction, the Court does not affect the contract between UTA and its bus drivers who are represented by the Union. All that is accomplished by the injunction is to allow the TRAX employees to exercise their rights, guaranteed to them by State and Federal law, to choose their own bargaining representative.

Dated this 8th day of March, 2005



Edward T. Wells,  
Attorney for Plaintiffs

**CERTIFICATE OF MAILING**

I hereby certify that on this 8th day of March, 2005, I caused to be mailed, postage prepaid,  
the foregoing **REPLY TO MEMORANDUM OF LOCAL 382 IN OPPOSITION TO  
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