



## FACTS

The following facts are undisputed in the record.

1. At the time the 1998 contract between Utah Transit Authority and Amalgamated Transit Union Local 382 was ratified, the new TRAX division had not yet opened and a representative complement of workers was not yet in place. *See* Affidavit of Lisa Burke dated March 29, 2005 at ¶ 4. (Hereafter “Burke ¶ \_\_\_\_.”).

2. TRAX was opened as a separate facility from the UTA Bus operations on December 4, 1999. Burke ¶ 5.

3. At the time of the opening of the TRAX facility in December of 1999, UTA transferred over to the TRAX operation a full complement of workers. *Id.*

4. The TRAX division of UTA is operated as a separate facility both geographically and by supervision. Burke ¶ 6.

5. TRAX has a management and supervision chain distinct and separate from the bus side of UTA. *Id.*

6. TRAX employees answer to TRAX supervisors and managers. *Id.*

7. The bus supervisors have no technical training in the area of light rail operations or management and are not directly involved in TRAX operations or management. *Id.*

8. The 2003 contract between UTA and Local 382 was not ratified until August 2004. Burke ¶ 7.

9. Two contract votes on the 2003 contract took place by Local 382 union members. *Id.*

10. The first contract vote rejected the proposed contract. *Id.*

11. The second contract vote was held in August 2004. *Id.*

12. A majority of the union employees company wide accepted the second proposed contract. *Id.*

13. A majority of the TRAX employees rejected the second contract in August of 2004. *Id.*

14. Prior to the second vote on the 2003 contract in August of 2004, approximately 48% of the TRAX employees notified UTA's management by signed petition that they did not believe Local 382 was adequately representing their interests as employees of the TRAX division of UTA. Burke ¶ 8.

15. The petition presented to UTA by the TRAX employees claimed that a systemwide bargaining unit was not an appropriate bargaining unit for TRAX employees. *Id.*

16. The petition also claimed that Local 382 did not represent the interests of the TRAX employees. *Id.*

17. Seventy-three TRAX employees signed the petition. *Id.*

18. At the time the petition was presented to UTA management, there were approximately 150 bargaining unit employees working at the TRAX facility. *Id.*

19. The original petition was present to John English, the general manager of UTA. Burke ¶ 9.

20. On August 5, 2004, a copy of the petition was delivered to Kathryn Pett, UTA general counsel. *Id.*

21. UTA management failed to address or discuss the petition with TRAX employees. *Id.*

22. The attempts by TRAX employees to raise the issue of the appropriateness of the existing bargaining unit, and to require a bargaining unit election for TRAX employees with

respect to their bargaining representative were ignored by the Union and UTA. Burke ¶ 11.

23. The UTA board of directors ratified the new contract between Local 382 and UTA on August 11, 2004. Burke ¶ 12.

24. No discussion between UTA and the TRAX employees regarding an appropriate bargaining unit for TRAX employees this matter has ever taken place. Burke ¶ 13.

25. No vote on the issue of an appropriate TRAX employees bargaining unit or appropriate representation for TRAX employees has ever taken place. Burke ¶ 14.

### ARGUMENT

#### **I. PLAINTIFFS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF WHETHER THE TRAX DIVISION IS AN APPROPRIATE BARGAINING UNIT.**

Plaintiffs are entitled to partial summary judgment on the issue of whether the TRAX division should be considered a separate bargaining unit. As a matter of law, under the standard set by federal labor law dealing with accretion cases, when the new TRAX facility was opened in December 1999, a presumption occurred that a new bargaining unit was created and admissions by the Defendants make that presumption non-rebuttable. Under the standard adopted by the Tenth Circuit, Plaintiffs are entitled to summary judgment.

Summary judgment is appropriate if ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’ *Fed. R. Civ. P. 56(c)*. When applying this standard we view the evidence and draw reasonable inferences to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). To avoid summary judgment, the party opposing the motion must establish, at a minimum, an inference of the existence of each essential element to the case. *Hulsey v. Kmart, Inc.*, 43 F.3d 555, 557 (10<sup>th</sup> Cir. 1994). *Foster v. Allied Signal Inc.*, 293 F.3d 1187, 1192 (10<sup>th</sup> Cir. 2002).

**II. UNDER THE PROPER LEGAL ANALYSIS, PLAINTIFFS ARE ENTITLED TO A PARTIAL SUMMARY JUDGEMENT ON THE ISSUE OF THE APPROPRIATE BARGAINING UNIT.**

While Defendants have classified this case as a severance case and then cite to cases that concern an initial creation of a bargaining unit at a company, the case at bar is in fact an accretion case. More precisely, it is a case where, as a matter of law, the workers at a new facility must be considered to be in a bargaining unit separate from a pre-existing bargaining unit because they cannot be accreted.

“An accretion is an attempt to add either new employees, or **present employees in new positions** to an existing bargaining unit.” *National Labor Relations Board v. Superior Protection, Inc.*, 2005 U.S. App. LEXIS 2760; 176 L.R.R.M. 2769 \* 11 (Feb. 16. 2005) (Emphasis added) This is exactly what UTA did in this case. UTA created a new division, operating at a new and separate facility, when TRAX went into operation in December 1999. UTA does not deny this. UTA staffed the new TRAX facility with a combination of new and transferred employees. UTA and Local 382 then attempted to accrete the new employees into the existing bargaining unit under the terms of a previously ratified labor agreement.

UTA and Local 382 have attempted to justify their actions by citing to a variety of cases which are not accretion cases. Borrowing principles from one area of labor law and then attempting to apply them in a different area of labor law is improper. It is akin to trying to apply civil discovery rules in a criminal case. The accretion test is very different from the test applied to initially certifying a bargaining unit. In a case that is the mirror image of the case at bar, the

Fourth Circuit overturned a decision by the NLRB which attempted to apply accretion principles to an initial bargaining unit determination stating that the NLRB was not free to borrow from one area of labor law and apply it in another area of labor law. *NLRB v. United Food & Comm. Workers*, 68 F.3d 1577, 1581 (4<sup>th</sup> Cir. 1995).<sup>1</sup> In an initial bargaining unit case the NLRB need only choose an appropriate bargaining unit, not the most appropriate bargaining unit. However, in an accretion context

[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 (4<sup>th</sup> Cir. 2001). Therefore, as a matter of law, if the TRAX employees could be an appropriate bargaining unit, they cannot be accreted to and made a part of the existing unit which is represented by Local 382. Whether the TRAX employees were legally forced to remain a part of a system-wide bargaining unit, represented by Local 382, is the focal issue in this litigation. It is also an issue which can be answered in the negative on a Motion for Summary Judgment because the issue is controlled by the *Baltimore Sun* case, *Id.*

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 separate unit.” *U.S. Tsubaki*,

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<sup>1</sup> 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. However, 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 (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).

*Inc.*, 331 N.L.R.B. 327 (2000).<sup>2</sup> UTA ignores this claim and has made no attempt at rebuttal of this claim. Instead, UTA attempts to argue that the combined unit could be an appropriate bargaining unit. This might be a valid defense if this case were a severance case or a case involving determination of the initial bargaining unit.

However, whether a combined system wide unit is an appropriate unit irrelevant in an accretion case. In this case, all that the TRAX employees must show to prevail on the merits is that they were an appropriate bargaining unit at the time TRAX was created. If the TRAX employees could, in fact, constitute an appropriate bargaining unit at the time TRAX was opened, then as a matter of law UTA must recognize them as a separate bargaining unit.

*Baltimore Sun v. National Labor Relations Board, supra.* The declarations filed by UTA do nothing to bolster their claim that the TRAX unit is not an appropriate bargaining unit. The declarations do not create a genuine factual dispute about a material matter. In fact, a declaration by Jerry Benson admits that at several other transit districts the light-rail and bus divisions are separate units. This statement in fact bolsters plaintiffs' claims and supports a finding that the TRAX employees can in fact constitute a separate bargaining unit. Benson Affidavit at paragraph 13.

The undisputed facts of this case did not entitle UTA and Local 382 to accrete the new TRAX facility's employees into the existing bargaining unit. See *Aramark Services, Inc. v.*

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<sup>2</sup> 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 F.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).

*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.* 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.” Thus, as a matter of law the TRAX employees are in a separate bargaining unit and the Court should grant summary judgment on the issue of whether the TRAX employees are in a separate bargaining unit, and require that a representation election be held for the employees of the TRAX facility..

This conclusion is buttressed by admissions made by the Defendants. In paragraph 56 of their complaint, Plaintiffs alleged that the TRAX facilities are geographically separate from the bus facilities. In their answer, Defendants admitted that separate facilities exist. Thus, the presumption of a separate bargaining unit exists in this case.

Other admissions in the answer of UTA preclude any rebuttal of this presumption. In paragraph 57, Plaintiffs alleged that they have separate supervisors. While Defendants try in the answer to muddle the issue by stating that under certain (unspecified) circumstances bus supervisors might have authority over TRAX employees, it is clear that a separate supervisory system exists. The Affidavit of Lisa Burke clearly sets forth that there is separate supervision of TRAX employees. In paragraph 59, Plaintiffs alleged a separate chain of command for TRAX employees up to John English, the General Manager of UTA. Again, except for unspecified

circumstances, UTA admits this allegation. UTA's answers preclude any possibility of rebutting the presumption of TRAX being an appropriate separate bargaining unit. The facts in this case clearly distinguish it from the case of *Brotherhood of Electrical Workers v. Aubry, Jr.*, 42 Cal App 4th 861 (1996), which is cited by UTA.

The union and UTA have continuously tried to distinguish the clear law on accretion by asserting that employees of TRAX were included in the existing bargaining unit by contract. However, as a matter of law that is incorrect and cannot be legally accomplished.

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)). The *NLRB v. Paper Manufacturers* Court stated:

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

In fact, such a claimed defense itself is not only ineffective, it is illegal. An agreement between Local 382 and UTA, made prior to the creation of TRAX, to accrete the employees of the TRAX division into Local 382 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); see *NLRB v. Paper Manufacturers, supra*.

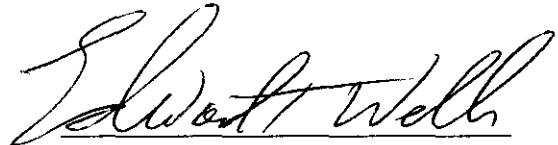
Finally, the affidavits previously filed in this case by the Plaintiffs demonstrate that there is no genuine issue of material fact which would preclud the granting of summary judgment on this issue. The Court has on file an affidavit from Plaintiff Michael Lee Carper. In paragraphs 9 & 10 he states that a separate community of interest exists and that at no time did the TRAX employees agree to merge the two bargaining units. A similar statement was made by Plaintiff Lisa Burke in paragraph 15 of her November, 2004 affidavit . UTA has presented no affidavits

contesting these facts and cannot genuinely claim that the TRAX employees have ever had an election to choose their bargaining representative or have agreed to a merger of the bargaining units.

### CONCLUSION

The case law cited herein and in previous filings with the Court clearly shows that this is an accretion case. This case involves 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 more recent cases cited by Plaintiffs herein and in their previous filings, it is clear this is in fact an accretion case. As a matter of law, under the accretion analysis and the admitted facts in this case, a separate bargaining unit was created when the new facility was built. The Court should grant summary judgment to the TRAX employees on the issue of *whether they constitute an appropriate bargaining unit, and then upon entering such ruling, order a representative election for TRAX employees.*

Dated this 29th day of March, 2005



Edward T. Wells,  
Attorney for Plaintiffs

**CERTIFICATE OF MAILING**

I hereby certify that on this 29th day of March, 2005, I caused to be mailed, postage prepaid, the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** to the following:

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