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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

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.

**MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Case Number: 2:04CV00985 PGC

Judge: Paul G. Cassell

Defendants Utah Transit Authority ("UTA") and John English ("English") (together,  
"UTA Defendants") file this Memorandum in Opposition to Plaintiffs' Motion for Partial  
Summary Judgment as to all claims alleged against them in Plaintiffs' Class Action Complaint.

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### **INTRODUCTION**

Plaintiffs' motion for partial summary judgment should be denied for reasons that are by now familiar to the Court. Plaintiffs have not established any violation of Utah Code Ann. § 17A-2-1031 because the existing system-wide bargaining unit is clearly appropriate as a matter of law. In fact, Plaintiffs appear to admit that this unit is appropriate. Plaintiffs argue only that UTA must hold an election for rail service employees because if the National Labor Relations Board had jurisdiction, it would order an election. This argument fails because in the absence of Board jurisdiction, parties typically work out an agreement on the appropriate bargaining unit. Furthermore, even if the Board did have jurisdiction, it would not order an election in this case, but would approve the unit agreed between UTA and Local 382 and endorsed by vote of the members of the bargaining unit. For these reasons and others set forth below, Plaintiffs' motion for partial summary judgment should be denied.

### **RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS**

In responding to Plaintiffs' Statement of Undisputed Facts, UTA will repeat each of Plaintiffs' fact paragraphs (omitting citations) and then state its response.

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.

Response: No dispute.

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

Response: No dispute.

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.

Response: No dispute.

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

Response: UTA does not dispute that there is a facility for rail service maintenance and operations that is separate from the various facilities for bus maintenance and operations. However, this does not show that rail service employees should be separately represented from bus employees. UTA has four operational divisions: Mount Ogden, Salt Lake, Timpanogos, and Rail Service. Each division includes maintenance and operations employees who report up the chain of command within that division. The manager of each division reports to the General Manager of UTA. The divisions are part of a unified whole that provides a seamless transportation service in UTA's service area. Further, all of the bargaining unit employees in each division are included in the existing system-wide bargaining unit. They are governed by a single collective bargaining agreement that sets wages, hours, benefits, and other terms and conditions of employment. In addition, there are regular transfers between bus and rail service divisions, and between different bus divisions, as well as seniority lists that include both rail service and bus employees together (separated between parts, maintenance, and operations). Simpson Decl. at ¶¶ 2-3.

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

Response: Disputed. The rail division management chain is separate from the bus divisions, but no more than the bus divisions are separate from each other. Simpson Decl. at ¶ 4.

6. TRAX employees answer to TRAX supervisors and managers.

Response: No dispute. However, Salt Lake, Mount Ogden, and Timpanogos division bus employees answer to their respective division supervisors and managers as well. 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.

Response: Disputed. Bus supervisors are not trained in light rail operations in the normal course of business. However, rail service employees can transfer to a bus division and bus employees can transfer to the rail service division. An employee who has transferred into rail service and then transferred back to a bus division would have training in light rail operations. Furthermore, rail service supervisors are nearly all former bus division employees who have training in bus operations. Simpson Decl. at ¶ 5.

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

Response: No dispute.

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

Response: No dispute.

10. The first contract vote rejected the proposed contract.

Response: No dispute.

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

Response: No dispute.

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

Response: No dispute.

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

Response: Disputed. The vote was by secret ballot and the Burke Affidavit does not disclose how she has personal knowledge of the detailed results in any UTA division. Simpson Decl. at ¶ 6.

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.

Response: Disputed. UTA management received a petition purportedly signed by rail service employees stating that they did not believe Local 382 was adequately representing their interests regarding "the seniority issue." Simpson Decl. at ¶ 7.

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.

Response: Disputed. The petition was ambiguous on this issue. It stated that they did not "accept" Local 382 as an "appropriate bargaining unit," and that the "present bargaining unit" was "an inappropriate bargaining unit." In short, because the petition referred to Local 382 as a bargaining "unit," it is ambiguous as to the issue of whether the system-wide unit was itself inappropriate. Simpson Decl. at ¶ 8.

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

Response: See response to no. 14.

17. Seventy-three TRAX employees signed the petition.

Response: UTA objects on grounds that this assertion is irrelevant. UTA had no duty to count the signatures, attempt to verify them, or respond in any way.

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

Response: See objection in response to ¶ 17.

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

Response: No dispute.

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

Response: No dispute.

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

Response: No dispute that UTA management did not formally discuss the petition with rail service employees. Simpson Decl. at ¶ 9.

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.

Response: UTA admits that it did not respond to attempts to contest the appropriateness of the bargaining unit because the existing bargaining unit is appropriate as a

matter of law and separate communications with rail service employees on this issue would possibly violate Utah Code Ann. § 17A-2-1031, which requires that UTA recognize and bargain exclusively with the majority representative of employees in an appropriate bargaining unit. UTA disputes that it “ignored” the petition. Simpson Decl. at ¶ 9.

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

Response: No dispute.

24. No discussion between UTA and the TRAX employees regarding an appropriate bargaining unit for TRAX employees this matter [sic] has ever taken place.

Response: No dispute that no formal discussion between UTA and rail service employees regarding this issue has taken place. Simpson Decl. at ¶ 9.

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

Response: No dispute that a vote limited only to rail service employees has never taken place. Furthermore, no petition or other written complaint was ever presented to UTA management on this issue until August 2004, long after the ratification of the 1998 Contract and the December 1999 opening of rail operations. Between December 1999 and August 2004, UTA and Local 382 negotiated agreements, adjusted grievances, and otherwise consistently dealt with issues affecting all employees, including employees assigned to the rail service division. Simpson Decl. at ¶ 10.

**ARGUMENT**

Plaintiffs' motion for partial summary judgment seeks a ruling "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." Mem. Supp. Mot. Partial Sum. Judg. ("Plaintiffs' Mem. Supp.") at 10. This relief cannot be granted because as a matter of law UTA has not violated Utah Code Ann. § 17-2A-1031, the statute which provides for UTA's collective bargaining responsibilities. Accordingly, Plaintiffs' motion should be denied.

**I. UTA HAS NOT VIOLATED § 1031 BECAUSE THE EXISTING BARGAINING UNIT IS APPROPRIATE AND LOCAL 382 IS THE MAJORITY REPRESENTATIVE OF EMPLOYEES IN THAT BARGAINING UNIT.**

The parties appear to agree that Utah has no labor relations board with authority to address the types of labor issues typically handled by the National Labor Relations Board. Furthermore, § 1031 states a substantive rule without specifying any procedural mechanism for achieving compliance. Specifically, § 1031 requires that "[t]he district shall recognize and bargain exclusively with any labor organization representing a majority of its employees in an appropriate unit." There is no reference to elections, counting cards, surveys, or any other method of determining "an appropriate unit" or ascertaining employees' preferences as to representation.

Additionally, there is no authority for the proposition that the appropriateness of a unit for collective bargaining purposes, where neither the NLRB nor any other comparable agency has jurisdiction, cannot be determined in the first instance by agreement, so long as the unit is, in fact, "appropriate." Indeed, it appears that the general practice is to determine the appropriate unit by agreement. Lee C. Shaw & R. Theodore Clark, Jr., Determination of Appropriate

Bargaining Units in the Public Sector: Legal and Practical Problems, 51 Or. L. Rev. 151, 152-53 (1971-72) (“In states which do not have applicable legislation, the determination of the appropriate bargaining unit is made by the parties. With increasing frequency, however, the determination of whether a unit is appropriate, in the absence of voluntary agreement by the parties, is made by a public employee labor relations board.”).

Moreover, the cases cited by Plaintiffs to the effect that unit determination and representation issues must be decided by the Board, and cannot be decided by contract, are based on statutory interpretations of the Board’s *jurisdiction*. For example, in N.L.R.B. v. Paper Manufacturers Company, 786 F.2d 163 (3d Cir. 1986) (cited in Plaintiffs’ Mem. Supp. at 9), the court stated that “under section 9 of the National Labor Relations Act, representation issues are matters relegated to the Board. Representation issues may not be decided by contract, and thus may not be decided by an arbitrator.” 786 F.2d at 166-67 (citations omitted). Obviously, the Board has no jurisdiction over UTA, and § 1031 does not relegate representation or any other issues to any agency. Therefore, Paper Manufacturers does not apply.

Because there is no such public employee labor relations board in Utah, it is proper to determine the unit by agreement between the parties. Furthermore, because Plaintiffs apparently do not dispute that the system-wide unit is “appropriate,” the Court should rule as a matter of law that UTA has not violated § 1031. For these reasons, Plaintiffs’ motion for partial summary judgment should be denied.

**II. EVEN IF THE NATIONAL LABOR RELATIONS BOARD HAD JURISDICTION, IT WOULD NOT FIND ANY VIOLATION IN UTA'S ACTIONS AND WOULD APPROVE THE EXISTING BARGAINING UNIT.**

Even if the Board did have jurisdiction, it would undoubtedly approve the existing, system-wide unit. Plaintiffs have not cited any case that is on point with the facts before the Court. In this case, UTA and Local 382 (on behalf of the employees in the bargaining unit) negotiated an agreement that rail employees would be drawn from the existing bargaining unit and that Local 382 would be bargaining representative of all bargaining unit employees in a single, system-wide unit. This agreement was then ratified by a vote of all employees in the bargaining unit. Because the agreement was so obviously favorable to the existing employees, there is reason to believe that it was ratified by a very substantial majority. Neither of the named plaintiffs in this case claims to have voted against this agreement. Subsequently, the rail division was filled with a complement of employees drawn from the existing bargaining unit, pursuant to the agreement.

None of Plaintiffs' cases matches these facts. In every case, one of the parties objected, whether it be the employer, e.g., Baltimore Sun Co., 257 F.3d 419 (4<sup>th</sup> Cir. 2001), the union, e.g., Gitano Group, 308 N.L.R.B. 1172, or a rival union, e.g., International Brotherhood of Electrical Workers v. Aubry, 42 Cal. App. 4<sup>th</sup> 861 (1996). There is no case directly on point because parties do not institute cases unless there is a dispute, and a dispute that arises long after the fact—as in this case—is barred by the applicable statute of limitations<sup>1</sup> and the Board's strong policy in support of bargaining history. See Children's Hospital, 312 N.L.R.B. 920, 929 (1993) (“‘compelling circumstances’ are required to overcome the significance of bargaining history.”).

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<sup>1</sup> For example, Plaintiffs' claims that UTA and Local 382 committed unfair labor practices would have been barred by the six-month limitations period applicable to unfair labor practice charges. 29 U.S.C. § 160(b).

Nevertheless, several well-established precedents demonstrate that UTA's actions in this matter would not have violated the National Labor Relations Act. First, even if the Board's decision in Gitano Group applied, it would arguably provide for a separate bargaining unit, but one that is represented by Local 382. As the Board made clear, there would be no election:

[W]e announce today that when an employer transfers a portion of its employees at one location to a new location, we will no longer define the nature of the transfer in terms of the relationship between the "new" unit and the "old" unit (i.e., whether one is a "spinoff" or "partial relocation" from the other). Rather, we will begin with the Board's long-held rebuttable presumption that the unit at the new facility is a separate appropriate unit. Assuming that that presumption is not rebutted, we will then apply a simple fact-based majority test to determine whether the respondent is obligated to recognize and bargain with the union as the representative of the unit at the new facility. *If a majority of the employees in the unit at the new facility are transferees from the original bargaining unit, we will presume that those employees continue to support the union and find that the employer is obligated to recognize and bargain with the union as the exclusive collective-bargaining representative of the employees in the new unit.*

Gitano Group, 308 N.L.R.B. at 1175 (emphasis added). In short, under Gitano Group, even if the rail division were separated into its own bargaining unit, the bargaining representative would be Local 382.

Second, Local 382, as bargaining representative of both bargaining units at issue, could have agreed with UTA to combine the two units into one, system-wide unit. White-Westinghouse Corp., 229 N.L.R.B. 667 (1977); see Albertson's, Inc., 307 N.L.R.B. 338 (1992) (inclusion by agreement of customer service employees in larger unit of store employees barred decertification petition of customer service employees only).

Third, the Board has also held that geographic recognition clauses such as the one found in Sheraton-Kauai Corp. v. N.L.R.B., 429 F.2d 1352 (9<sup>th</sup> Cir. 1970), are enforceable so long as the union in question actually has majority support in the new location that will be added to a

larger overall unit. Kroger Co., 219 N.L.R.B. 388, 389 (1975). In Kroger, the employer and the union agreed that all locations of the employer within a certain geographic area, even those not yet established, would fall within the existing collective bargaining unit. The Board declared that such recognition clauses are enforceable because they are interpreted as depriving the employer of the right to demand an election when the union demands recognition based on a showing of majority support (by card count). The clauses are only improper when the union does not actually have majority support, as in Sheraton-Kauai. Subsequent cases clarified that majority support can be shown by “a card check or some other method.” Safeway Stores, Inc., 276 N.L.R.B. 944, 951 (1985). Plainly, majority support can also be shown by the fact that a majority of employees transferred to the new location are already members of the existing bargaining unit. Gitano Group.

In short, where the collective bargaining agreement provides that employees in a new location will be drawn from the existing bargaining unit, and that they will continue to be in the same bargaining unit, which will include the new location, and the majority of employees in the new location are in fact drawn from the existing bargaining unit, there is no violation. That is what happened in this case.

Based on these principles, UTA’s recognition of Local 382 as the bargaining representative of rail division employees would not have violated the National Labor Relations Act, even if that Act applied. Thus, even if Plaintiffs had raised their concerns in a timely manner, they would still be properly included in the existing system-wide unit. Plaintiffs’ present position, several years after the fact, is even more attenuated. There is no question that rail division employees are properly considered members of the existing bargaining unit.

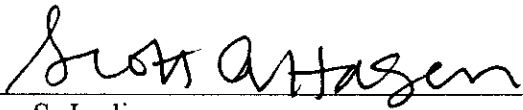
For these reasons, Plaintiffs' cases are simply inapplicable. Plaintiffs are properly part of the existing bargaining unit, which is "appropriate" as a matter of law, and cannot simply demand an election in a narrower unit of their choosing. There is no violation of Utah law and there would be no violation of federal law, if it applied. Even if federal law were applied by analogy, Plaintiffs' options for breaking away from the existing bargaining unit are (1) to meet the exacting standards for a severance, see generally Mallinckrodt Chemical Works, 162 N.L.R.B. 387 (1967); or (2) to decertify the entire unit. Campbell Soup Co., 111 N.L.R.B. 234, 235 (1955) ("Congress has made no provision for the decertification of part of a certified *or recognized* bargaining unit") (emphasis added); Albertson's, Inc., 307 N.L.R.B. at 338 (approving dismissal of petition for decertification because it was found that there had been a "merger of units and, accordingly, the petition for an election in the smaller, recently certified unit of customer service employees was inconsistent with the Board's longstanding policy as to the appropriate unit in a decertification election must be coextensive with the currently *recognized and established* bargaining unit.") (emphasis added).

### CONCLUSION

Based on the foregoing, UTA requests that Plaintiffs' Motion for Partial Summary Judgment be denied.

Dated this 2nd day of May, 2005.

RAY QUINNEY & NEBEKER



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** was mailed, postage prepaid, on this 2<sup>nd</sup> day of May, 2005 to the following:

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