

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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No. 05-4222

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Lisa Burke, Michael Carper, individually, and on behalf  
of all others similarly situated,

Plaintiffs-Appellants,

v.

Utah Transit Authority, John English, individually, Local 382 of the Amalgamated  
Transit Union and the United States Department of Labor,

Defendants-Appellees.

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**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

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**APPELLANTS' OPENING BRIEF**

**ORAL ARGUMENT REQUESTED**

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## **STATEMENT REGARDING ORAL ARGUMENT**

Counsel request oral argument. Plaintiffs request that the oral argument be combined with the oral argument requested for Docket No. 05-4079. Many of the issues in this case are first impression. They implicate First Amendment and labor law policy for transit districts within and outside the Tenth Circuit. The issues are complex and the Court will benefit from oral argument.

## **PRIOR OR RELATED APPEALS**

There is a prior appeal in Docket No. 05-4079 involving the denial of injunctive relief in this case.

## **STATEMENT OF JURISDICTION**

This Court has jurisdiction under 28 U.S.C. § 1291. The Trial Court granted the summary judgment on August 15, 2005. The plaintiffs filed a timely notice of appeal on August 22, 2005. Previously, on April 7, 2005, the Trial Court had dismissed the Department of Labor (“DOL”). That dismissal was not appealable since it did not address all of the parties in the case.

## **STATEMENT OF THE ISSUES**

- I. The Trial Court Committed Error by Granting the Summary Judgment Motion When There Were Disputed Issues of Material Fact.
- II. The Trial Court Committed Error by Granting Summary Judgment When No Discovery Had Occurred and Plaintiffs Had Filed a Rule 56(f) Motion Supported by Affidavits Demonstrating the Need for Discovery.
- III. The Trial Court Committed Error by Ignoring a Properly Filed Motion to

Amend Prior to Granting the Summary Judgment.

- IV. The Trial Court Committed Error in Granting Summary Judgment to Defendants Because It Allowed Local 382 to Waive the TRAX Employees' Right to Choose Their Bargaining Representative.
- V. The Trial Court Committed Error by Weighing the Evidence and Performing the Function of a Jury in the Case Before Granting the Summary Judgment.
- VI. The Trial Court Committed Error by Dismissing the DOL Without Considering the Whole Administrative Record and the Affirmative Statutory Duty of the DOL.
- VII. The Trial Court Committed Error by Dismissing Local 382 of Amalgamated Transit Union, Presumably for a Lack of Subject Matter Jurisdiction, When the Other Parties Should Not Have Been Dismissed.

### **STATEMENT OF THE CASE**

On October 22, 2004, the plaintiffs, representing the employees of the light rail unit ("TRAX") of the Utah Transit Authority ("UTA"), filed a class action complaint alleging, among other things, that UTA was denying them their right to free speech, free association and was in violation of Utah state law by denying them the right to choose their own bargaining representative and by denying them similar access to a bulletin board afforded Amalgamated Transit Union Local 382 ("Local 382"), a union endorsed by the company but lacking majority support of the TRAX employees. The plaintiffs, after requesting mediation but being rebuffed by UTA, filed for a preliminary injunction requesting immediate access to a bulletin board and other relief. After the injunction was filed, plaintiffs were

given access to a bulletin board by UTA but none of the other relief was granted. Aplt. App. A at 77 ¶ 13. Due to the case involving labor issues, plaintiffs requested an evidentiary hearing on their injunction to conform with federal law that required such a hearing prior to an injunction being granted. While affidavits were filed with the Trial Court supporting the injunction, plaintiffs also subpoenaed two hostile witnesses. After the filing of the two subpoenas with the Trial Court, counsel was contacted by the Trial Court and informed that an evidentiary hearing would not be held.

Approximately one half hour before the January 24, 2005 hearing, counsel for the plaintiffs were supplied with a tentative decision denying the injunction on the stated grounds that the plaintiffs were unlikely to prevail on the merits. Counsel noticed that the Trial Court decision had evaluated the merits on the “severance” doctrine and not the “accretion” doctrine. This totally changed the burden of evidence in the case and required that the plaintiffs demonstrate that a combined bus and rail unit was not an appropriate bargaining unit, instead of correctly requiring that UTA demonstrate that the TRAX unit could not be an appropriate bargaining unit. Four days later, the Trial Court issued its final decision that was virtually identical to the tentative decision but with a cursory albeit incorrect analysis of accretion. Plaintiffs, realizing that the Trial Court had committed plain error, asked, in a filing to the Trial Court, for a reconsideration

of the severance vs. accretion issue, and provided the Trial Court with new persuasive authority. In light of the fact that an evidentiary hearing would probably be denied, the filing requested a new injunction which asked for new and minimal relief that could be proven without an evidentiary hearing. Thus, the new filing cannot be considered merely a request for reconsideration and should be considered a separate request for an injunction.

The Trial Court, in an unsigned minute entry, denied the request for the new injunction without explanation or a hearing. Plaintiffs filed a motion requesting that a signed order be issued but were forced to file with the Tenth Circuit Court without the Trial Court ever issuing such an order. Defendants UTA and John English then filed for summary judgment. Plaintiffs opposed the summary judgment on the basis that there was a genuine dispute of material facts, that there had been no discovery and the plaintiffs had timely filed a 56(f) affidavit detailing the need for discovery and finally explaining to the Trial Court that it was applying the wrong legal standard to evaluate the proper community of interest. Before the hearing on the summary judgment motion the Trial Court gave the parties its tentative order granting summary judgment. Plaintiffs noticed that the order did not address the status of defendant Local 382 despite the Trial Court only having ancillary jurisdiction over that defendant. During oral argument, plaintiffs suggested that if the Trial Court was going to dismiss the

other defendants it should dismiss Local 382 for lack of jurisdiction. Besides the grounds identified above for not granting the summary judgment, plaintiffs argued that the Trial Court was ignoring the individual rights of the TRAX employees that the National Labor Relations Act (“NLRA”) protects and that Section 13(c) of the Urban Mass Transportation Act (“UMTA”) similarly protects these rights. The Trial Court accepted the argument made by Local 382 that the NLRA does not protect individual rights but expressed concern after listening to plaintiffs’ oral argument that its decision might not be sustained and asked Local 382 if it could develop a failure to exhaust argument that would give the Trial Court independent grounds to grant summary judgment and gave the parties a briefing schedule.

Plaintiffs timely filed a brief demonstrating that there were no administrative remedies to exhaust and provided the Trial Court with an en banc decision by the District of Columbia Circuit Court of Appeals demonstrating that individual rights are protected by the NLRA and arguing that the Trial Court needed additional oral argument since this legal right went to the heart of plaintiffs’ claims. Approximately three months after the hearing and two months after supplemental briefing was filed, the plaintiffs filed a motion to amend due to changed circumstances since the filing of the original complaint. The Trial Court, after this motion filing, without addressing the motion or amending its tentative

order to address the individual rights issue or the final defendant issue, granted the summary judgment motion and closed the entire case. Thus, once again the plaintiffs are forced to file an appeal with potential loose ends through no fault of their own.

### **STATEMENT OF THE FACTS**

This case involves a group of public employees involved in a light rail operation called TRAX, attempting to protect their free association rights not to have an employer-approved bargaining representative imposed upon them. The TRAX employees, while not covered by the NLRA, have equivalent rights guaranteed by the UMTA and Utah State law; Section 13(c) as codified at 49 U.S.C. §5333(b); Utah Code ANN. §17A-2-1031 (2004). Despite this and approximately 70% of the employees indicating to the state employer, UTA, that they reject the present bargaining representative, UTA is imposing the bargaining representative on the TRAX employees and not allowing them to choose their own bargaining representative. UTA asserts that due to a contract signed between Local 382 and UTA in 1998, that was created prior to the existence of the TRAX unit in 1999, the TRAX employees' bargaining representative is Local 382. Additionally, UTA asserts that if the TRAX employees do not want to be represented by Local 382, they must win a decertification election company-wide and not just within the TRAX unit. The Trial Court, relying on the wrong labor

law doctrine (severance), refused to reconsider its decision when presented with clear case law demonstrating that the case involved the wrongful accretion of employees to an existing bargaining unit and not the severance of employees from that bargaining unit. It granted summary judgment to defendants without allowing any discovery in the case. It did this despite plaintiffs' request for discovery and the filing of an affidavit pursuant to Rule 56(f) of the FEDERAL RULES OF CIVIL PROCEDURE. It also ignored a timely motion to amend the complaint.

Finally, the Trial Court previously had granted a motion to dismiss the DOL without reviewing the administrative record and without considering the statutory duty of the DOL. Moreover, it precluded the plaintiffs from amending their claim by stating that only if the plaintiffs alleged that the DOL knew about a 2004 labor dispute in 2001 when the DOL certified the protective arrangements, would the plaintiffs state a claim against the DOL for the administrative action.<sup>1</sup> This totally eviscerated the plaintiffs' ability to assert a "failure to consider" claim. Also, by ignoring plaintiffs' motion to amend the Complaint, the Trial Court deprived the plaintiffs of a new claim against the DOL. The new complaint addressed issues that arose after the initial complaint was filed.

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<sup>1</sup> Under the UMTA, the DOL has to certify that the bargaining rights of employees have been protected in order for a state agency to be eligible for federal funding.

## SUMMARY OF THE CASE

The Trial Court improperly granted summary judgment when there were disputed facts and there was a legitimate request for discovery under Rule 56(f) which would have resulted in a stronger basis to resist the summary judgment motion. The Trial Court also improperly weighed the evidence against defendant John English. Moreover, the Trial Court granted a dismissal to the DOL when the plaintiffs had clearly stated a claim. Additionally, the Trial Court improperly imposed upon the plaintiffs the requirement that they demonstrate that a bargaining unit that includes both bus and TRAX employees is not an appropriate unit. The correct legal standard would have required that UTA demonstrate that the TRAX employees could not be an appropriate bargaining unit before UTA could accrete them into the existing bargaining unit. Thus, the Trial Court incorrectly evaluated the TRAX employees' case under a "severance" and not an "accretion" standard. Consequently, the Trial Court improperly granted summary judgment and a motion to dismiss.

### **I. The Trial Court Committed Error by Granting the Summary Judgment Motion When There Were Disputed Issues of Material Fact.**

#### **A. The Standard of Review**

The standard of review for the granting of summary judgment is to "review the granting of a motion for summary judgment de novo, and apply the same standard as the district court." *Schalk v. Gallemore*, 906 F.2d 491, 494 (10<sup>th</sup> Cir.

1990) (citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). “Summary Judgment is appropriate only when there are no genuine issues of fact, and one party is entitled to judgment as a matter of law.” *Schalk v. Gallemore*, 906 F.2d 491, 494 (10<sup>th</sup> Cir. 1990) (citations omitted). Moreover, “In First Amendment cases in particular, ‘an appellate court has an obligation to “‘make an independent examination of the whole record’” in order to make sure that “the judgment does not constitute a forbidden intrusion on the field of free expression”’.” *Id.* (Citations omitted).

## **B. Discussion**

The first and foremost of the disputes is the existence of an appropriate bargaining unit. This is Count III of the Complaint. The Trial Court has improperly characterized the case as a severance case. However, because it concerns employees in new positions it is an accretion case. *National Labor Relations Board v. Superior Protection, Inc.* 401 F.3d 282, 287 (5<sup>TH</sup> Cir. 2005). However, even if it were a severance case, a jury (since a jury was requested) would have to use a twelve factor community of interest test to determine the appropriate bargaining unit.<sup>2</sup> The difference is that in an accretion case UTA

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<sup>2</sup> The NLRB has a test for determining appropriate bargaining units. *Baltimore Sun Company v. National Relations Board*, 257 F.3d 419, 429 (4<sup>th</sup> Cir. 2001). The test consists of twelve parts: “(1) similarity in the scale and manner of determining earning; (2) similarity in employment benefits, hours of work, and other terms and conditions of employment; (3) similarity in the kind of work performed (4) similarity in the qualifications, skills, and training of the employees; (5) frequency

would have to show that the TRAX unit alone could not be an appropriate bargaining unit.<sup>3</sup> In a severance case, the TRAX employees would have to demonstrate that a combined bus/rail unit would not be an appropriate bargaining unit due to lack of community of interest. Neither of these factually intensive questions is amenable to summary judgment. Questions of fact should generally “not be decided at the summary judgment stage.” *Sally Beauty Company, Inc. v. Beauty Co. Inc.*, 304 F.3d 964, 978 (10<sup>th</sup> Cir. 2002) (citing *Marker Int’l v. DeBruler*, 844 F.2d 763, 764 (10<sup>th</sup> Cir. 1988)). The plaintiffs have alleged that they do not share a community of interest with the bus employees and that factual dispute cannot be resolved through summary judgment. Aplt. App. A at 77 ¶ 15.

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of contact or interchange among the employees; (6) geographic proximity (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected workers; (12) extent of union organization.” *These factually intensive questions should not have been determined by summary judgment.*

<sup>3</sup> 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.*, 401 F.3d 282, 287 (Feb. 16, 2005). In *Borden v. NLRB*, 19 F.3d 502 (10<sup>th</sup> Cir. 1994), even though employees were represented by the same bargaining representative it still did not result in an automatic finding of accretion. “Thus, the Board enters an accretion order only when the accreted employees have an insufficient group identity to function as a separate unit and their interests are so closely aligned with those of the preexisting bargaining unit that the Board can safely assume that the accreted employees would opt into that unit if given the opportunity.” *Baltimore Sun Co. v. National Labor Relations Board*, 257 F.3d 419, 427 (5<sup>th</sup> 2001) (citations omitted). Similarly, the Tenth Circuit Court still looked to see if employees had a separate identity in which case they would not be accreted. 19 F.3d 502, 508 (10<sup>th</sup> Cir. 1994).

That alone is sufficient to preclude summary judgment in this case but plaintiffs have identified numerous other material factual disputes. Aplt. App. A at 123 and 124. Plaintiffs identified these explicit points of dispute in their response to the motion for summary judgment. The appropriate bargaining unit allegations in dispute include paragraph 27 of the complaint in which the plaintiffs allege that their preferences are being canceled out by the much larger bus unit which, incredibly, defendants deny. Cf. Aplt. App. A at 14(a); Aplt. App. A at 44. Defendants also denied paragraph 28, a claim that there is general hostility of bus employees for TRAX employees. Cf. Aplt. App. A at 14(a); Aplt. App. A at 44. Defendants also deny paragraphs 29 and 30 in which plaintiffs allege different and higher skills than the bus employees. Cf. Aplt. App. A at 14(a); Aplt. App. A at 44. However, it is the denial by defendants in paragraph 31, that the TRAX employees want additional pay, that demonstrates the frivolous and deceptive answers by defendants. Cf. Aplt. App. A at 14(a); Aplt. App. A at 45. Also key paragraphs of the complaint that established a community of interest within the TRAX division and denied in part or in whole by defendants include Aplt. App. A at 18-19 ¶¶ 56,57,60,65 and 66. (Appellants' Complaint) and Aplt. App. A at 47-48 (Appellees' Answer). In an accretion case such as the case at bar, a group having a separate identity cannot be accreted into an existing bargaining unit. *Frontier Telephone of Rochester Telephone, Inc.*, 344 NLRB No. 153 at \*5-6

(2005).

In total, all these paragraphs demonstrate that a genuine material dispute existed that should have precluded summary judgment on the cause of action. In oral arguments, plaintiffs discussed the fact that there was a dispute about whether votes in a contract election were counted separately at TRAX, creating an inference of a separate bargaining unit. Aplt. App. B at 326-27 (ln. 24-25; ln.1-5). Plaintiffs also identified a dispute over whether the company was involved in or covered up intimidation by Local 382. Aplt. App. B at 329. Also, plaintiffs argued that the bargaining unit determination was not amenable to summary judgment. Aplt. App. B at p. 330 lines 6-25.

**II. The Trial Court Committed Error by Granting Summary Judgment When No Discovery Had Occurred and Plaintiffs Had Filed a Rule 56(f) Motion Supported by Affidavits Demonstrating the Need for Discovery.**

**A. Standard of Review**

The standard of review for the denial of Rule 56(f) motion is abuse of discretion. *Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260, 1264 (10<sup>th</sup> Cir. 1984). “Unless dilatory or lacking in merit, the motion should be liberally treated.” *Committee For the First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992) (internal citations omitted). *Id.*

**B. Discussion**

Both the Trial Court and defendants relied on an assertion that Local 382

enjoyed majority support in a system-wide entity as a defense to the plaintiffs' Complaint. Aplt. App. B at 221, 223.<sup>4</sup> However, the plaintiffs, in their 56(f) affidavit and motion, requested discovery on this very issue, due to the dubious nature of this claim. Aplt. App. A at 147 ¶ 6.<sup>5</sup> Of course, the crucial information is in possession of defendants. "The importance of permitting discovery when crucial information is in the exclusive control of the defendant was discussed in *Palmer v. Chicago*, 755 F.2d 560, 573 (7<sup>th</sup> Cir. 1985)." *Riggs, III. v. City of Albuquerque*, 916 F.2d 582, 586 (10<sup>th</sup> Cir. 1990). The Trial Court has allowed a railroading of the plaintiffs by denying the requested discovery in clear defiance of the spirit of Rule 56 and United States Supreme Court precedent. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326; 106 S. Ct. 2548, 2554 (1986). Since the plaintiffs believe that the proper inquiry under the accretion doctrine is the "community of interest" of the TRAX unit, the need to examine employee preference is critical. Aplt. App. A at 147 ¶ 7.<sup>6</sup> Discovery on the various job

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<sup>4</sup> Utah law requires that UTA negotiate with a bargaining representative with majority support. UTAH CODE ANN. § 17a-2-1031. (Attachment A).

<sup>5</sup> This goes to Count III of the complaint. UTA would clearly be violating this provision if it has negotiated with a union that does not have majority support. This information is in the hands of Local 382 and UTA, thus discovery is necessary.

<sup>6</sup> For an in-depth analysis of the "accretion doctrine" and community of interest, see Appellants' brief for injunctive relief. Tenth Cir. Case No. 05-4079. An accretion is an attempt to add new employees or **present employees in new jobs** to an existing bargaining unit. *National Labor Relations Board v. Superior Protection, Inc.*, 401 F.3d 282, 287 (Feb. 16, 2005) (emphasis added). Simply

positions also goes to the community of interest issue. Aplt. App. A at 147 ¶ 12.

Similarly, plaintiffs identified the need for more discovery on the issue of whether John English, UTA General Manager, had given special benefits to Steve Booth, the union president, presumably for favorable treatment in contract negotiations. Such an action clearly interferes with free association rights and John English should have known that he was interfering with such rights. Aplt. App. A at 147 ¶ 8. The plaintiffs would have been supported in their opposition to summary judgment on Count I, had they been granted discovery on this count. Additional discovery is also needed on safety issues. Aplt. App. A at 147 ¶ 9 goes to discovery on safety issues which demonstrates the ineffectiveness of the present representation. This is a factor in community of interest. The community of interest test supports the plaintiffs' claims in Count II and III since their bargaining rights are not being protected unless they are in the correct bargaining unit community of interest.

Case law clearly protects “employee self-determination” under Section 7 of

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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). 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. *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.*, 773 F.2d 468, 472-76 (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).

29 U.S.C. § 157 and that is perhaps the “fundamental promise of the National Labor Relations Act.” *Baltimore Sun Company v. National Labor Relations Board*, 257 F.3d 419, 426 (4<sup>th</sup> Cir. 2001). As stated by the court in *Baltimore Sun*:

Because the Board’s discretion in selecting an appropriate bargaining unit for an election is broad, that same breadth correspondingly narrows its discretion in accreting employees because, under the Board’s accretion rule, any employees that could **appropriately be a separate unit cannot be accreted to another unit.**

257 F.3d at 430 (emphasis added). This is only fair.

Plaintiffs also outlined the need to find out what John English’s purpose was in riding the TRAX trains as well as the purpose of the letter to employees. Aplt. App. A at 148 ¶ 14. These are questions of intent that should rarely be decided by summary judgment. *Buell Cabinet Co. v. Sudduth*, 608 F.2d 431, 433 (10<sup>th</sup> Cir. 1979) (stating that: “Questions of intent involve many intangible factors, such as witness credibility, that are best left to the consideration of a factfinder after a full trial.”); *See White v. Conoco, Inc.* 710 F.2d. 1442, 1447 (10<sup>th</sup> Cir. 1983.) Moreover, the Trial Court, in weighing the evidence, has ignored the requirement to resolve reasonable doubt in favor of the nonmovant. *Hom v. Squire*, 81 F.3d 969, 973 (10<sup>th</sup> Cir. 1996).

### **III. The Trial Court Committed Error by Ignoring a Properly Filed Motion to Amend Prior to Granting the Summary Judgment.**

#### **A. Standard of Review**

The standard of review for the denial of a motion to amend is abuse of

discretion. *Grossman v. Novell*, 120 F.3d 1112 (10<sup>th</sup> Cir. 1997) (citing *T.V. Communications Network v. Turner Network*, 964 F.2d 1022, 1028 (10<sup>th</sup> Cir. 1992)). It is an abuse of discretion to deny a request to amend without expressing a justification. *Id.*

## **B. Discussion**

The plaintiffs sought permission from the Trial Court to amend their Complaint against defendants UTA and Local 382 to address changes in fact as well as information obtained since the original Complaint was filed. Aplt. App. B at 169-70 (Motion) & 171-199 (Memorandum and Amended Complaint). Simultaneously, the Complaint was being amended against the DOL as a matter of right to address a changed factual situation. Judicial economy would have been served by addressing all changes in one filing. Permission to amend plaintiffs' Complaint against defendants was requested pursuant to Rule 15 (a) of FEDERAL RULES OF CIVIL PROCEDURE which specifically provides:

(a) *Amendments.* **A party may amend his pleading once as a matter of course at any time before a responsive pleading is served**, or if the pleading is one to which no pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. **Otherwise a party may amend his pleading only by leave of court** or by written consent of the adverse party; **and leave shall be freely given when justice so requires.** A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(Emphasis added.)

As stated in the above rule, since no responsive pleading had been filed by the DOL, the plaintiffs did not need to seek permission to amend their claim against the DOL. *See Id.* A motion to dismiss is not a responsive pleading according to the limited authority on this issue. *Duba v. Board of Educ. of Franklin Park Pub. Sch. Dist. No. 84*, 133 F.3d 1054, 1056-57 & n.2 (7<sup>th</sup> Cir. 1998).

Permission should have been granted for amendment against the other defendants due to the following reasons: (1) This case was in its infancy: no Rule 26(f) attorneys' scheduling conference had occurred, no discovery had been undertaken, and no effort had been made to place this case on the Court's trial calendar. Defendants could have plead no legitimate prejudice by this filing. *See LeaseAmerica Corp. v. Eckel*, 710 F.2d 1470, 1474 (10<sup>th</sup> Cir. 1983). Unlike defendants, plaintiffs have never requested any extensions of time for filings and were not the party that requested a delay in discovery. Where the case is in its infancy, there is a strong preference for allowing a plaintiff to amend to clarify his claims. *See Grossman v. Novell et al.*, 120 F.3d 1112 (10<sup>th</sup> Cir. 1997) (stating that pursuant to Rule 15 "leave to amend should be freely given"). As explained below, except for clarifications of position, the changes were due to changing facts or newly discovered evidence that was not available to the plaintiffs when they filed the original Complaint.

The need to amend the Complaint was primarily driven by the decision of the DOL to certify new protective arrangements during the pendency of this action. This action has totally eviscerated the rationale behind the Trial Court's earlier decision to dismiss the DOL. While the plaintiffs had always disagreed with the Trial Courts' earlier decision as was explained in plaintiffs' "Supplemental Summary Judgment Briefing," the Trial Court's rationale certainly should not apply to a decision made after the DOL, with full knowledge of the dispute over a bargaining representative and indeed the appropriate bargaining unit, decided to re-certify new protective arrangements. Aplt. App. A at 156.

The changes in the Complaint against UTA were minor and resulted primarily from their decision to reduce the meager training given to bus operators to become rail operators. While not explicitly addressed in the original Complaint, the plaintiffs expressed in numerous filings to the Trial Court their concern over safety issues and the connection of this concern to their desire to change their bargaining representative. These filings included affidavits on safety issues and UTA should not have been surprised that their decision to reduce training resulted in an amendment of the Complaint to explicitly address safety issues.

While the changes against Local 382 were more extensive, they resulted either from new violations of their fiduciary duty or newly discovered evidence.

Local 382 had not taken any action to address the reduced safety standards. Additionally, while being denied formal discovery, Plaintiffs learned that Local 382 had declined an offer of a wage premium for TRAX employees. A more obvious breach of fiduciary duty could not have been found.

The plaintiffs timely filed an amended complaint. Thus, on any remand the previous decisions by the Trial Court on the motion to dismiss and summary judgment are moot. The defendants need to address the new complaint.

#### **IV. The Trial Court Committed Error in Granting Summary Judgment to Defendants Because it Allowed Local 382 to Waive the TRAX Employees Right to Choose Their Bargaining Representative.**

##### **A. Standard of Review**

The standard of review for the granting of summary judgment is to “review the granting of a motion for summary judgment de novo, and apply the same standard as the district court.” *Schalk v. Gallemore*, 906 F.2d 491, 494 (10<sup>th</sup> Cir. 1990) (citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). “Summary Judgment is appropriate only when there are no genuine issues of fact, and one party is entitled to judgment as a matter of law.” *Schalk v. Gallemore*, 906 F.2d at 494 (citations omitted).

##### **B. Discussion**

The defendants argued, and the Trial Court accepted the argument, that Local 382 and UTA could create an agreement between them that forced a bargaining

representative on the TRAX employees. Allowing a union and company to waive employees' right to choose a bargaining representative is contrary to United States Supreme Court precedent. The United States Supreme Court allows a union to waive economic rights but not bargaining rights. The United States Supreme Court stated that:

[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.

*NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974) (Citation omitted.)

The dissent in *Magnovox*, including former Chief Justice Rehnquist, explained that a union's ability to waive Section 7 rights does not include the ability to waive rights where the union and employees have conflicting interests. 415 U.S. at 327. As stated by the Third Circuit Court of Appeals; "Representation issues may not be decided by contract, and thus may not be decided by an arbitrator."

*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 went on to state: "Like successorship, **accretion** is a representative issue. **It cannot be resolved by a contract** between Local 169 and the employer and thus cannot be resolved by the contractual remedy of arbitration." *Id.*

(emphasis added).

Counsel for the TRAX employees thought that this case clearly established that the TRAX employees have individual rights concerning choosing a bargaining representative that could not be waived by any contract between UTA and Local 382. Similarly, an en banc decision from the D.C. Circuit recognizes that a union cannot waive individual rights and that *Magnavox* and its progeny clearly stand for the proposition that the NLRA protects individual rights. *Hammontree v. NLRB*, 925 F.2d 1486, 1490 (D.C. Cir. 1991) (en banc). The clearest statement in the case is from a concurrence which states, “the NLRA and the LMRA [Labor Management Relations Act] are designed to protect both **individual** and collective rights” *Id.* at 1502 (emphasis added). However, the majority decision similarly recognizes the distinction. “[T]he NLRA established waivable group and **individual rights**, redressable in a complex administrative scheme.” *Id.* at 1497 (emphasis added). As the concurrence noted in that case, the NLRA and the LMRA are designed to protect both **individual** and collective rights. The concurrence, citing United States Supreme Court case law, stated that: “The waiver of the individual rights can only occur when the union does not “breach its duty of good-faith representation.” *Id.* at 1502 (citing *Metropolitan Edison Co. v. NLRB* 460 U.S. 693, 706-07 n.11 (1983)). This is precisely what has occurred in this case in which a backroom deal between UTA and Local 382 resulted in TRAX employees being denied the right to choose their own

representative. Despite this, the Trial Court thought that the NLRA does not protect individual rights. Aplt. App. B at 358. Thus, this case is similar to *Lee v. NLRB*, 393 F.3d 491 (4<sup>th</sup> Cir. 2005) in which the court, citing to cases such as *Magnavox*, stated that: “Section 7 rights are integral to employees’ rights to choose their bargaining representative and thus cannot be bargained away by either the union or the company.” 393 F.3d 491 \*14-15.

The TRAX employees have never waived their right to pick their own representative and cannot have a representative that is the result of a backroom deal imposed upon them. As stated by the United States Supreme Court:

The House Report recognized that ‘no one, whether employer or employee need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705; 75 L. Ed. 2d 387, 103 S. Ct. 1467 (1983.) (Quoting H.R. Rep. No. 245, 80<sup>th</sup> Cong., 1<sup>st</sup>. Sess., 17 (1947)) (emphasis in original). In a footnote in *Aramark*, the administrative law judge admonished the parties in the case. This quote from *Aramark* 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. *Aramark Services, Inc. v. NLRB*, 2002 NLRB Lexis 521 \*12 (Oct. 21, 2002) (Citing *Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1961)). Interestingly, in

*Aramark*, the company tried to assert that they had an agreement with the union to accrete the new facility into the existing bargaining unit but the NLRB ALJ did not find such an agreement consistent with the NLRA. *Id.* at \*11.

The TRAX employees have been forced into being represented by a union that they never voted to support. This violates the basic principles of federal labor law. While not all the provisions of the NLRA are applicable to UTA, both Utah state law and federal case law on Section 13(c) require that the basic rights enshrined in the principles of federal law be protected. *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).<sup>7</sup>

**V. The Trial Court Committed Error by Weighing the Evidence and Performing the Function of a Jury in the Case Before Granting the Summary Judgment.**

**A. Standard of Review**

The Tenth Circuit reviews “the district court’s grant of summary judgment

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<sup>7</sup> While the plaintiffs’ 42 U.S.C. § 1983 claim is primarily supported by the First Amendment violations, the statutory violations of the requirements of the UMTA also support the Section 1983 claim. Federal Constitutional and statutory violations certainly support a Section 1983 claim. *Lagoy v. Correction Medical Services*, 358 F. Supp. 2d 58 (N.D. N.Y. 2005) (Attachment D). Plaintiffs’ claim, in the case at bar, is stronger than the plaintiff’s claim in that case because the UMTA does apply federal statutory standards to UTA but the NLRB does not have jurisdiction in the case, thus no “comprehensive enforcement mechanism exists” to vindicate the plaintiffs’ rights in this case. *See Id.* at \*\* 11; 49 U.S.C. § 5333(b); *Amalgamated Transit Union Intl’ v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985).

de novo, applying the same legal standard used by the district court.” *Foster v. Alliedsignal Inc.*, 293 F.3d 1189, 1192 (10<sup>th</sup> Cir. 2002) (citing *Cooperman v. David*, 214 F.3d 1162, 1164 (10th Cir. 2000)).

## **B. Discussion**

United States Supreme Court law is clear that: “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The Trial Court, by deciding which evidence was important, affording no inferences to plaintiffs and implicitly giving more credibility to assertions by defendants, has violated all of these prohibitions. Plaintiffs have provided sufficient evidence for a factfinder to find for them and thus, the Trial Court committed error by granting summary judgment. *See* 293 F.3d at 195-96. The Trial Court held that a combined TRAX and bus unit was appropriate largely based on historical evidence. However, the Trial Court ignored affidavits that the unit was not appropriate. Aplt. App. A at 72 ¶ 9 and at 77 ¶ 15. The affidavits outline many of the factors of a community of interest, including one of the most important in the Tenth Circuit, the will of the TRAX employees, and would support a finding by a jury that an appropriate bargaining unit does not exist. *NLRB v. Ideal Laundry & Dry Cleaning*, 330 F.2d 712, 717

(10<sup>th</sup> Cir. 1964). As stated by the Tenth Circuit: “While the desires of employees with respect to their inclusion in a bargaining unit is not controlling, it is a factor which the Board should take into consideration in reaching its ultimate decision.” *Id.* This factor alone is enough to preclude summary judgment on this count since, if believed, the affidavits demonstrate the inappropriateness of the combined unit. Similarly, the Trial Court seemed to weigh the evidence against John English. The Complaint against John English supports an inference that he attempted to intimidate the TRAX employees against exercising their free association rights. Aplt. App. A at 23 ¶ 92. The Trial Court also ignored other evidence that John English had intimidated the TRAX employees to cease their efforts to assert their free association rights. This evidence supported an inference of an *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970) type conspiracy between Local 382 and UTA to interfere with free association rights. Aplt. App. A at 23 ¶ 92, Aplt. App. A at 147, 148 ¶¶ 8, 13, 14 and Aplt. App. B at 321, 322, 324-325. Of course, the Trial Court also denied the plaintiffs discovery on these various issues. Additionally, the affidavits against Katherine Pett, UTA general counsel, supported a free speech claim against UTA. Aplt. App. A at 38, 39 and Aplt. App. A at 75-77. These actions also support Plaintiffs’ 1983 claims, since it is the Constitutional violations that primarily support the 1983 cause of action. The plaintiffs clearly distinguished precedent cited by the Trial Court used to ignore

the evidence. Aplt. App. B at 208-209. Simply stated, this case is not about two unions vying for representation but a respect for the rights of employees opposed to a company supported union. The Trial Court has deprived the plaintiffs of their Seventh Amendment rights by performing jury functions.

**VI. The Trial Court Committed Error by Dismissing the DOL Without Considering the Whole Administrative Record and the Affirmative Statutory Duty of the DOL.**

**A. Standard of Review**

“On appeal from a district court's review of an agency action, the appellate court ‘must render an independent decision on the basis of the same administrative record as that before the district court; the identical standard of review is employed at both levels; and once appealed, the decision of the district court is afforded no particular deference.’ *Webb v. Hodel*, 878 F.2d 1252, 1254 (10th Cir. 1989) (quoting *Brown v. United States Dept. of Interior*, 679 F.2d 747, 748-49 (8th Cir. 1982) [\*\*35] (citations omitted)).” *Franklin Savings Corp. v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1142 (10<sup>th</sup> Cir. 1991).

**B. Discussion**

The plaintiffs’ lawsuit was based on the fact that the DOL failed to satisfy its affirmative duty to study Utah law and ascertain that no mechanism existed to protect the workers’ right to unit clarification, an important protector of the individual right of choosing a representative guaranteed by the NLRA and found

unwaivable by United States Supreme Court decisions as explained above. An agency's failure to satisfy its statutory duty certainly states a claim. See *Thompson v. HUD*, 348 F. Supp. 2d 398, 457-59 (D. Md. 2005). "Thus a court's deference to the agency's decision making process 'does not require it to countenance the agency's failure to consider an important aspect of the problem [ . . . ]'" *Id.* at 457.

The plaintiffs have asserted that the protective arrangements are deficient. They have made essentially a failure to consider claim. Section 7 of the NLRA does protect individual rights of employees and Section 9(b) requires that: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining[.]" It is this statutory requirement that the DOL has not satisfied by ensuring that Utah law protects workers' rights to choose their own bargaining representative. Thus, this case is similar to *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971) in which the failure of the agency to consider whether a statutory requirement was satisfied demonstrated an arbitrary and capricious act by the agency.

While the Trial Court held that the plaintiffs failed to assert in their Complaint that the DOL knew about the 2004 dispute in 2001 when they approved

the protective arrangements, case law does not require such an impossible burden. The people challenging the action do not have to raise the issue nor does the fact that it wasn't even considered preclude a finding that the agency did not satisfy its statutory requirements. Of course, since the DOL did not even notify the TRAX employees that protective arrangements concerning them were being created, the Trial Court's finding is also flawed from a due process perspective. The Trial Court seems to have confused these grounds with the grounds that the agency ignored evidence, in which a party's providing that evidence is certainly important. It is the burden of the agency to demonstrate that it considered all relevant factors.

The duty of a court reviewing agency action under the 'arbitrary or capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10<sup>th</sup> 1994) (Citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 US. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)). In reviewing the agency's explanation, the reviewing court must determine whether the agency **considered all relevant factors** and whether there had been a clear error of judgment.

*Id.* (emphasis added) (citations omitted).

Agency action will be set aside:

If the agency relied on factors which Congress had not intended for it to consider, entirely **failed to consider an important aspect of the problem**, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

42 F.3d at 1574 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*,

463 U.S. at 43. (emphasis added.)

Moreover, the Trial Court was incorrect in assuming that the law would preclude it from considering evidence outside the record. A reviewing court may go outside the administrative record to determine “whether an agency **considered all relevant factors** including evidence contrary to the agency’s position.”

*Franklin Savings Corp. v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1137 (10<sup>th</sup> Cir. 1991) (emphasis added).

The Trial Court, prior to making such a finding, should have reviewed the entire record as it existed in 2001. The district court must have before it the ‘whole record’ on which the agency acted. *Bar MK Ranches v. Yeutter*, 994 F.2d 735, 739 (10<sup>th</sup> Cir. 1993) (Citations omitted). Only after examining the whole record can a court legally determine whether the record needs to be supplemented.

## **VII. The Trial Court Committed Error by Dismissing Local 382 of ATU, Presumably for a Lack of Subject Matter Jurisdiction, When the Other Parties Should Not Have Been Dismissed.**

### **A. Standard of Review**

The Court reviews a dismissal for a lack of subject matter jurisdiction de novo. *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1544 (10<sup>th</sup> Cir. 1996).

### **B. Discussion**

The plaintiffs first notified the Trial Court in oral argument that its tentative order was defective since it did not address defendant Local 382. Aplt. App. B at

323. Plaintiffs notified the Trial Court in a supplemental pleading as follows:

The plaintiffs have not appealed the decision to dismiss the DOL since it is not a final order. Until all the issues of all the parties are addressed an order is not final for appeals purposes. If the Trial Court does not change its tentative decision to grant summary judgment to the UTA defendants, it should sua sponte dismiss Local 382 since it would no longer have subject matter jurisdiction over the supplemental claim against Local 382. *Williams v. Life Savings and Loan*, 802 F.2d 1200, 1202 (10<sup>th</sup> Cir. 1986) (stating: “It is well settled that a federal court must dismiss a case for lack of subject matter jurisdiction, even should the parties fail to raise the issue.”) This would facilitate the appeal to the Tenth Circuit by the plaintiffs and is mandated since it would be an abuse of discretion for the Court to take any action but dismissal when it lacks subject matter jurisdiction.

Aplt. App. A at 165 n.1.

### CONCLUSION

The Court should reverse the decision to grant summary judgment to defendant UTA and the decision to grant a dismissal to defendant DOL. The decision to grant the dismissal was contrary to the law in a “failure to consider” case. The grant of summary judgment is clear error for multiple reasons. (1) There were disputed material facts; (2) plaintiffs had properly requested discovery under 56(f); and (3) plaintiffs had filed, timely, an Amended Complaint that was not addressed by the Trial Court.

**STATEMENT REGARDING ORAL ARGUMENTS**

Counsel request oral argument. Many of the issues in this case are first impression. They implicate First Amendment and labor law policy for transit districts within and outside the Tenth Circuit. The issues are complex and the Court will benefit from oral argument.

Respectfully submitted,

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*Attorneys for Plaintiffs*

## CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing **APPELLANTS' OPENING BRIEF** was furnished by U.S. Mail to the following on this \_\_\_\_ day of \_\_\_\_\_, 2005.

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# **ATTACHMENT A**

9 of 100 DOCUMENTS

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\*\*\* STATUTES CURRENT THROUGH THE 2004 THIRD SPECIAL SESSION \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH 2004 UT 27, 2004 UT APP 102 \*\*\*  
\*\*\* AND APRIL 1, 2004 (FEDERAL CASES) \*\*\*

TITLE 17A. SPECIAL DISTRICTS  
CHAPTER 2. INDEPENDENT SPECIAL DISTRICTS  
PART 10. PUBLIC TRANSIT DISTRICTS

**GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

*Utah Code Ann. § 17A-2-1031 (2004)*

§ 17A-2-1031. Employees may organize and bargain collectively -- Strikes prohibited -- District to enter into bargaining agreements

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.

**HISTORY:** L. 1969 (1st S.S.), ch. 12, § 31; C. 1953, 11-20-31; renumbered by L. 1990, ch. 186, § 397.

USER NOTE: For more generally applicable notes, see notes under the first section of this article, part, chapter, subtitle, or title.

# **ATTACHMENT B**

FILED  
CLERK'S OFFICE  
7:55 APR -7 P 12:40

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

LISA BURKE, et al.,

Plaintiffs,

vs.

UTAH TRANSIT AUTHORITY, et al.,

Defendants.

ORDER GRANTING U.S.  
DEPARTMENT OF LABOR'S  
MOTION TO DISMISS

Case No. 2:04-CV-985 PGC

Defendant, the United States Department of Labor, has moved to dismiss plaintiffs' claims against it pursuant to Fed.R.Civ.P. 12(b)(1) and (6) in the above-referenced matter. Plaintiffs oppose dismissal, arguing that the agency's certification decisions under 49 U.S.C. § 5333(b) (formerly § 13(c) of the Urban Mass Transportation Act) are properly subject to judicial review.

As an initial matter, the court agrees with plaintiffs that agency certification decisions under 49 U.S.C. § 5333(b) are amenable to judicial review. It is evident, however, that any such review would be limited to the record before the agency at the time of the certification decision at issue. But plaintiffs have failed to plead or otherwise allege that the agency had any knowledge or information regarding the current labor dispute when it made the challenged certification

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decision in October of 2001. Absent any such allegations, plaintiffs have failed to state a claim upon which relief may be granted and their claims against the U.S. Department of Labor should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

Accordingly, the U.S. Department of Labor's motion to dismiss (29-1) is GRANTED.

DATED this 6th day of April, 2005.

BY THE COURT:



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Paul G. Cassell  
United States District Judge

United States District Court  
for the  
District of Utah  
April 8, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cv-00985

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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# **ATTACHMENT C**

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IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

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LISA BURKE and MICHAEL CARPER,  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

vs.

UTAH TRANSIT AUTHORITY, JOHN  
ENGLISH, individually, and LOCAL 382 OF  
THE AMALGAMATED TRASIT UNION,

Defendants.

ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT

Case No. 2:04-CV-00985 PGC

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In this labor dispute, plaintiffs (several light-rail or "TRAX" operators) and defendants, Utah Transit Authority ("UTA"), John English, and Local 382 of the Amalgamated Transit Union ("Local 382") have filed cross-motions for summary judgment on plaintiff's collective bargaining and First Amendment claims. Specifically, plaintiffs seek partial summary judgment that the TRAX division of UTA should be considered as a separate bargaining unit from the rail division. Defendants, for their part, seek summary judgment on plaintiffs' § 1983 claims alleging that UTA and John English violated their First Amendment rights to free speech and free

association, on plaintiffs' claims under § 13(c) of the Federal Transit Act alleging a breach of the agreement between the Department of Labor and UTA under the Act, and on plaintiffs' claims under Utah Code Ann. § 17A-2-1031, alleging failure to protect the employees' rights to choose their own labor representatives.

Plaintiffs argue that they are entitled to a summary ruling that the TRAX division be considered a separate bargaining unit because precedent suggests that the division was improperly "accreted" into the larger unit at the time of TRAX's creation. As a result of this improper accretion, plaintiffs believe that UTA has denied them their right under state and federal law to be represented, for collective bargaining purposes, by separate representatives of their own choosing. Defendants maintain that there has been no breach of the § 13(c) agreement, and thus no violation of collective bargaining rights under the law. Further, defendants argue that no violation of Utah law has occurred because this court has already held that UTA bargained with "an appropriate unit" at the time of the most recent collective bargaining negotiations. Finally, defendants cite clear precedent to the effect that TRAX employees' First Amendment rights were not violated when they were forbidden from posting certain union information on UTA company and employee bulletin boards.

The court concludes that plaintiffs have not established that the TRAX division should be considered a separate bargaining unit and thus DENIES plaintiffs' motion for partial summary judgment on this issue. The court further finds that the undisputed facts demonstrate that UTA, John English, and Local 382 did not violate plaintiffs' collective bargaining rights either under federal or state law. UTA and John English also did not violate plaintiffs' First Amendment

rights to free speech and free association. Nor would further discovery, as plaintiffs have urged, be likely to lead to any evidence supporting plaintiffs' claims. Accordingly, the court GRANTS defendants' motion for summary judgment on all of plaintiffs' claims.

### **I. BACKGROUND**

Local 382 has represented UTA transit employees continuously since 1904. Initially, the Local represented only streetcar employees. During the 1940s, the Local came to represent both bus and streetcar employees when buses were being phased into Salt Lake's transit system. Later, streetcars disappeared into the dustbin of history, but the Local continued to represent UTA's bus employees.

In 1995, UTA determined to (re)introduce light rail transport and entered into an agreement with Local 382 providing essentially that it would represent the new light rail division employees whose work was comparable to that of bus division employees. In December of 1998, UTA and Local 382 reached a collective bargaining agreement providing that light-rail or "TRAX" employees would come from UTA's existing bus divisions and that bus drivers transferring to the light rail division would retain their bus division seniority rights. Most, if not all, of the plaintiffs in this case transferred into their light rail jobs from UTA bus divisions under the terms of this agreement.

The issues presented in this lawsuit arose in 2003 when negotiations between the union and UTA began on a new collective bargaining agreement. In the course of these negotiations, several TRAX employees petitioned management demanding separate union representation. Recognition of this right was not forthcoming and, on August 10, 2004, the new collective

bargaining agreement was ratified by the union membership. This new agreement contained the same provisions regarding transfer of bus employees into the TRAX division with existing bus division seniority rights.

Plaintiffs, several TRAX operators, then filed suit against the defendants. In their complaint, plaintiffs alleged collective bargaining and First Amendment violations. As to collective bargaining, plaintiffs allege that UTA violated both federal and state labor laws in failing to recognize their right to representation by a union separate and apart from that for the bus division. These claims were the subject of plaintiffs' earlier motion for preliminary injunction, in which they sought an order enjoining UTA (1) from transferring any bus employees to the TRAX division, (2) from transferring bus employees to the TRAX division with seniority rights that would trump the seniority rights of existing TRAX employees, and (3) from interfering with plaintiffs' First Amendment rights to free speech and free association by denying plaintiffs' access to post union information on company and employee bulletin boards.

After full briefing and oral argument, the court denied plaintiffs' motion for preliminary injunction, finding plaintiffs' unlikely to prevail on the merits of their claims. Subsequently, defendant United States Department of Labor moved for dismissal of all claims against it. This motion was granted as there was no evidence nor had plaintiffs' ever alleged that the Department had before it any information about the relevant labor dispute at the time the agency made the 13(c) certification decision plaintiffs' were challenging. The remaining parties' cross-motions for summary judgment followed and are now pending decision.

## **II. STANDARD OF REVIEW**

Summary judgment should be granted “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.”<sup>1</sup> Further, in determining the appropriateness of summary judgment, the court must “view the evidence, and draw reasonable inferences therefrom, in the light most favorable to the non-moving party.”<sup>2</sup>

### **III. DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

Defendants seek summary judgment on plaintiffs’ collective bargaining claims and § 1983 claims. Plaintiffs base their collective bargaining claims on UTA’s alleged violations of § 13(c) of the Federal Transit Act and § 17A-2-1031 of the Utah Code. Plaintiffs § 1983 claims allege that UTA has violated their First Amendment rights to free speech and association by not allowing them to post competing organizing information on company and employee bulletin boards. The court will examine each of these claims in turn.

#### **A. Section 13(c) of the Federal Transit Act and Utah Code Ann. § 17A-2-1031**

Among other things, the Federal Transit Act governs the obligations of public transit systems which receive federal funding. Section 13(c) of the Act provides that

(1) As a condition of financial assistance under [the Act], the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable.

And this section also conditions federal funding on

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<sup>1</sup>Fed.R.Civ.P. 56(c).

<sup>2</sup>*Combs v. Pricewaterhousecoopers, LLP*, 382 F.3d 1196, 1199 (10th Cir.2004).

- (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.

Additionally, under Utah state law,

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 representation 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.<sup>3</sup>

By refusing to recognize the right of TRAX employees to be represented separately from bus division employees, plaintiffs have claimed that UTA violated their collective bargaining rights under federal and state labor laws – specifically, § 13(c) of the Federal Transit Act and Utah Code § 17A-2-1031.

To defeat summary judgment on these claims, plaintiffs must establish a factual or legal basis for determining that this case should be treated as an “accretion” case under existing labor law precedents. An accretion case is one in which the propriety of a new group being added to an existing bargaining unit without a representation election is challenged. Plaintiffs argue that *Baltimore Sun Company v. National Labor Relations Board*,<sup>4</sup> *Boire v. International Brotherhood*

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<sup>3</sup>UTAH CODE ANN. § 17a-2-1031 (2004) (emphasis added).

<sup>4</sup>257 F.3d 419 (4<sup>th</sup> Cir. 2001).

of *Teamsters*,<sup>5</sup> and *Gitano Group*<sup>6</sup> – all accretion cases – govern the outcome of this case and support a finding of unfair labor practices on the part of UTA. Yet these cases are factually distinguishable from the present action. *Baltimore Sun* involved a group of employees who the company would not agree to let the union represent. *Boire* involved a group of entirely new, non-union, independent contractors added when the company opened a new facility in another state. *Gitano Group* is distinguishable because the union in that case objected to the representation, whereas here no party objected to Local 382's representation of the TRAX division employees during the relevant time-frame. Further, *Gitano* would seem to suggest that even if a presumptive separate bargaining unit had been created by the transfer of employees to the new TRAX location, the presumption would be that those employees continue to support the old union.

In this case, the union forged an agreement with UTA before the creation of the light rail division to represent UTA's future light rail employees. As part of this agreement, the union was able to secure transfer and seniority rights for bus division employees wishing to join TRAX. In turn, the majority of TRAX's initial work force was comprised of employees who had transferred to the new light rail division from the bus division under the terms of this agreement. Indeed, that very agreement was ratified by the full bus division membership before these transfers.

Given these undisputed facts, this case is one in which plaintiffs seek "severance" from an existing bargaining unit instead of one in which plaintiffs have been improperly "accreted" to

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<sup>5</sup>479 F.2d 778 (5<sup>th</sup> Cir. 1973).

<sup>6</sup>308 N.L.R.B. 1172.

an already existing unit. Plaintiffs' ability to prevail on summary judgment regarding its collective bargaining claims, then, hinges on raising any factual or legal basis for determining that a bargaining unit made up of *both* bus and TRAX employees is not an appropriate bargaining unit for purposes of § 13(c) of the Federal Transit Act or Utah Code Ann. § 17A-2-1031.

Plaintiffs have failed to do so.

For starters, the National Labor Relations Board has previously ruled in an analogous case involving both bus and streetcar operators of a public transportation system that a "system-wide unit, including both operating and maintenance employees, is the most appropriate unit."<sup>7</sup> Even though the National Labor Relations Board lacks jurisdiction over public entities, the NLRB's pronouncements are persuasive on the issue of the appropriateness of a given bargaining unit here.

Moreover, history and current national standard practice also fail to support plaintiffs' claims. As noted earlier, Local 382 represented Salt Lake's streetcar operators from 1904 up until the 1940s – at which point it represented *both* bus and streetcar drivers until streetcars were permanently phased out of service. Also, across the country, many public transit systems with light rail operations bargain with units routinely made up of both bus and light rail employees.

Federal law requires only that the collective bargaining rights of public transit employees be preserved. Utah law requires only that UTA bargain with "*an* appropriate unit," not *the most* appropriate unit. Given NLRB precedent, Local 382's history in representing Salt Lake public

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<sup>7</sup>*National Labor Relations Board v. St. Louis Public Service Co.*, 77 N.L.R.B. 749, 755 (1948).

transit employees, and common practices around the nation, the court would be hard pressed to conclude that a collective bargaining unit made up of both bus and light rail employees is somehow “inappropriate.” Plaintiffs have raised no factual issue, nor could they if further discovery were allowed, to demonstrate that a bargaining unit made up of both bus and light rail employees is “inappropriate.” Therefore, defendants are entitled to summary judgment on plaintiffs’ § 13(c) and Utah state law claims.

#### **B. Plaintiffs’ First Amendment Claims**

Defendants also seek summary judgment on plaintiffs’ claims under § 1983 alleging violation of the First Amendment. Plaintiffs have alleged that UTA and John English violated their rights to free speech and free association under the First Amendment by prohibiting employees from posting union information on UTA bulletin boards and by refusing to bargain separately with a representative of rail division employees alone.

To defeat summary judgment, plaintiffs must demonstrate some factual or legal basis that would support the conclusion that either UTA or John English violated their First Amendment rights to free speech or free association. Plaintiffs maintain that UTA has violated their First Amendment right to free speech by not allowing them to post competing organizing information on company and employee bulletin boards. However, plaintiff’s position is contrary to the Supreme Court’s decision in *Perry Education Association v. Perry Local Educators’ Association*,<sup>8</sup> which held that a collective bargaining agreement denying a rival union access to teacher mailboxes and the interschool mail system did not violate the First Amendment. *Perry*

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<sup>8</sup>460 U.S. 37 (1983).

*Education Association* explains that the “exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools.”<sup>9</sup> “The policy,” the decision continues, “serves to prevent the District’s schools from becoming a battlefield for inter-union squabbles.”<sup>10</sup> Plaintiffs have not distinguished their First Amendment claim from the one at issue in *Perry*. To the contrary, *Perry Education Association* appears to govern and preclude plaintiffs’ free speech claim.

Similarly, to avoid summary judgment on their free association claim, plaintiffs must demonstrate facts or law establishing that UTA or John English has violated plaintiffs’ right to free association by continuing to bargain with Local 382 and refusing to bargain separately with a representative of the TRAX employees only. As a matter of law, however, government employers have no obligation to recognize or bargain with any employee association.<sup>11</sup> Although the First Amendment imposes no affirmative obligation on UTA to recognize or bargain with a separate TRAX-employee union, it does grant TRAX employees the right to associate and speak freely without threat of retaliation.<sup>12</sup> Yet the only evidence presented by plaintiffs suggestive at all of some form of “retaliation” by UTA are the allegations about John English riding buses in an attempt to “intimidate” TRAX employees from joining in the fight for separate union representation. This is, however, very thin evidence that Mr. English did anything truly

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<sup>9</sup>*Id.* at 52.

<sup>10</sup>*Id.* (quoting *Haukvedahl v. School District No. 108*, No. 75C-3641 (N.D.Ill.1976)).

<sup>11</sup>*Smith v. Arkansas Highway Employees Local 1315*, 441 U.S. 463, 465 (1979).

<sup>12</sup>*Id.*

“retaliatory” for purposes of the First Amendment as his actions were not, strictly speaking, job-related. Because plaintiffs have not alleged that UTA took any adverse employment actions against them by virtue of their attempts to obtain separate union representation, plaintiffs’ right to free association has not been violated. Moreover, even if plaintiffs could show that UTA interfered with employees’ free association rights, it is not at all clear that Ms. Burke or Mr. Carper would have adequate standing to raise these claims, as they would essentially be attempting to assert the rights not of themselves, but of third parties. Neither Ms. Burke nor Mr. Carper, for example, appears to have been on any of the buses allegedly ridden by Mr. English, and although the court need not decide the issue as it has not been raised by any of the parties, it is clearly debatable whether under these factual circumstances plaintiffs could demonstrate adequate standing to even bring their free association claims in the first instance.

As *Perry* and *Smith* are legally dispositive of plaintiffs’ § 1983 First Amendment claims, defendants’ motion for summary judgment on these claims is granted.

#### **IV. PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs have also sought partial summary judgment seeking an order declaring the TRAX division to be a separate bargaining unit for purposes of collective bargaining with UTA. Given the court’s ruling that defendants are entitled to summary judgment on all claims – and particularly because the court found that the system-wide unit recognized in the most recent contract negotiations was not “inappropriate” – plaintiffs’ motion for partial summary judgment is DENIED.

### **V. PLAINTIFF'S 56(f) ARGUMENT**

Plaintiffs oppose summary judgment on their claims by raising an argument under Fed.R.Civ.P. 56(f) that further discovery is needed before they can respond adequately to the arguments raised in favor of summary judgment. However, plaintiffs give scant detail as to what information they hope to develop through further discovery, and, more important, fail to establish a sufficient nexus between this information and the claims at issue. Absent a demonstration of this nexus, the court does not see how the analysis would be altered by further discovery. Accordingly, plaintiffs' request for a Rule 56(f) continuance is denied.

The court also notes that it was hindered in its evaluation by plaintiffs' failure to comply with Local Rule 56(c), which requires that in memoranda opposing summary judgment,

[e]ach fact in dispute must be numbered, must refer with particularity to those portions of the record on which the opposing party relies and, if applicable, must state the number of the movant's fact that is disputed.

Failure to do this results in the admission of all of movant's facts not specifically controverted as outlined in the rule. Although not necessary for the court's grant of summary judgment, the court nonetheless deems as admitted all of defendants' facts not specifically controverted by plaintiffs in their memorandum in opposition to summary judgment in accordance with Local Rule 56(c).

### **VI. CONCLUSION**

Because plaintiffs have not shown any triable issues of fact or legal basis for their claims, defendants' motion for summary judgment is GRANTED. Plaintiffs' motion for partial summary judgment is, accordingly, DENIED. The Clerk of Court is directed to close this case.

DATED this 15th day of August, 2005.



# **ATTACHMENT D**

**DARCY LAGOY, Plaintiff, v. CORRECTIONAL MEDICAL SERVICES;  
RICHARD H. MILES; STERLING PRICE; GLORIA COOPER; JOHN DOE; and  
JANE DOE, Defendants.**

**1:02-CV-1439 (GLS/DRH)**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
NEW YORK**

*358 F. Supp. 2d 58; 2005 U.S. Dist. LEXIS 1792; 177 L.R.R.M. 2180; 150 Lab.  
Cas. (CCH) P59,961*

**February 8, 2005, Decided**

**DISPOSITION:** [\*\*1] Defendants' motion to dismiss denied.

relief, n3 compensatory and [\*60] punitive damages, and attorney's fees and costs.

**LexisNexis(R) Headnotes**

**COUNSEL:** FOR THE PLAINTIFF: ELMER R. KEACH, III, ESQ., Office of Elmer R. Keach, III, Albany, NY.

n1 LaGoy's jurisdictional statement also refers to 28 U.S.C. § 1341, which is inapplicable to her claims.

[\*\*2]

FOR THE DEFENDANTS: GLEN P. DOHERTY, ESQ., McNamee, Lochner Law Firm, Albany, NY; MICHAEL S. BURNS, ESQ., ROBERT D. MORELAND, ESQ., Baker, Daniels Law Firm, Fort Wayne, IN.

n2 Without determining the adequacy of her recitation, the court notes that *section 1981* prohibits intentional racial discrimination, and LaGoy has asserted no facts in support of her claim. *See Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 391, 73 L. Ed. 2d 835, 102 S. Ct. 3141 (1982).*

**JUDGES:** Gary L. Sharpe, U.S. District Judge.

n3 LaGoy's requests for declaratory and injunctive relief are asserted as separate causes of action.

**OPINIONBY:** Gary L. Sharpe

**OPINION:**

[\*59] **DECISION AND ORDER**

**I. Introduction**

Plaintiff Darcy LaGoy brings this suit under 28 U.S.C. § § 1331 and 1343. n1 She asserts claims under 42 U.S.C. § § 1983 and 1981, n2 alleging that Correctional Medical Services (CMS) and the individual defendants (collectively the "CMS defendants") acted under color of state law to violate her constitutional rights under the *First* and *Fourteenth Amendments*. Invoking the court's supplemental jurisdiction under 28 U.S.C. § 1367, LaGoy also asserts state law claims for defamation and intentional and/or negligent infliction of emotional distress. She seeks declaratory and injunctive

The CMS defendants have moved to dismiss under *Rule 12(b)(1) of the Federal Rules of Civil Procedure*, contending that LaGoy's claims are preempted by sections 7 and 8 of the National Labor Relations Act (NLRA), 29 U.S.C. § § 157, 158, and are subject to the National Labor Relations Board's (NLRB) primary jurisdiction. For the following reasons, the CMS defendants' motion to dismiss is denied.

**II. Procedural Background**

LaGoy commenced this action on November 14, 2002. *Dkt. No. 1*. The present motion was filed on February 24, 2003. *Dkt. No. 11-16*. The case was reassigned to this court on February 17, 2004, *Dkt. No.*

18, and the motion was taken on submit on February 3, 2005. [\*\*3]

### III. Facts n4

n4 The factual background is taken from LaGoy's complaint. Under the standard of review applicable to *Rule 12(b)(1)* motions (*infra* part IV-A), limited reference is made to the exhibits in the moving affidavit of Michael Burns (Burns Aff.), counsel for the CMS defendants. *Dkt. No. 12*.

LaGoy was employed as a nurse for CMS, a Missouri corporation that provides medical services at the Albany County Correctional Facility (ACCF). These services are rendered pursuant to a contract with the City of Albany. *Complaint PP5, 12, n5 16, Dkt. No. 1*. CMS has allowed only two union organizations in its nearly three hundred facilities nationwide. *Id. P14*. Moreover, CMS's written policies provide that all CMS facilities should be "union free," and require employees to attend "union free workplace" seminars where the company actively discourages association with labor unions. *Id. P13*.

n5 Paragraph 12 refers to a contract for the Rensselaer County Jail, which appears to be a typographical error.

[\*\*4]

Dissatisfied with poor working conditions at CMS, LaGoy and several other employees began to organize a local chapter of the Civil Service Employees Association (CSEA). *Id. P15*. On September 12, 2002, CSEA held a rally at ACCF seeking union membership for CMS employees. *Id. P16*. LaGoy participated in this rally along with other CMS employees and CSEA members. *Id. P17*. The following day, LaGoy and her coworkers received a letter from CMS and Cooper maintaining that the rally violated the notice provisions of the NLRA by failing to provide the requisite tendays' notice before picketing a "health care site." *Id. P18*. CMS then filed a charge of unfair labor practices with the NLRB, claiming that CSEA had violated *section 8(g) of the NLRA*, and requested injunctive relief. *Id.; Burns Aff., Ex. A, Dkt. No. 12*. The NLRB issued a complaint n6 against CSEA. *Compl. P19; Burns Aff., Ex. B*.

n6 The NLRB complaint asserts that CMS is an employer engaged in interstate commerce and

a health care institution for purposes of the NLRA. *See Burns Aff., Ex. B, pp. 1,2*.

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According to LaGoy, CMS claimed it would "take no actions [relative to your employment] other than as authorized by the NLRB." *Compl. P18*. She also asserts that the NLRB complaint "did not imply, much less require, the termination of any CMS employee for participating in the supposedly illegal rally." *Id. P20*. She contends that the NLRA, even if it applied to her case, only allows employers to terminate employees for participation in unauthorized strikes or work stoppages, and not illegal pickets. *Id.*

Based on the NLRB's preliminary findings, CMS claimed it was authorized to terminate LaGoy. *Id. P21*. In a letter from Price, CMS claimed that its investigation [\*61] had confirmed that LaGoy n7 had "participated in picket activity ... by carrying [signs] and/or walking the picket line showing support for the illegal picket." *Id.* On September 30, 2002, CMS terminated LaGoy without a hearing, based on her "participation in an illegal picket." *Id. PP5, 21-22*. LaGoy also claims that the decision to terminate her was made collectively by the individual defendants, including Miles. *Id. P23*.

n7 Throughout her complaint, LaGoy makes references to the involvement of her co-workers. She also makes allegations suggesting violations of those individuals' rights. At one point, she even refers to them as "Plaintiffs." However, LaGoy may not buttress her own claims with alleged violations of the rights of third parties. She has no standing to do so, because she "must assert her own legal rights and interests, and cannot rest her claim to relief on the legal rights or interests of third parties." *Warth v. Seldin, 422 U.S. 490, 499, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975)* (citations omitted).

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Following her termination, CMS allegedly made public defamatory statements to media outlets, claiming LaGoy was terminated for participating in "illegal activity." *Id. P22*. LaGoy alleges that the media focus on her, combined with the loss of her job and employee benefits, has caused her severe emotional distress and humiliation. *Id. P24*. She further alleges that her job opportunities have diminished. *Id. P25. n8*

n8 She was, however, re-hired by CMS, albeit without back pay. *See Compl. P68*.

LaGoy's first three counts assert violations of her civil rights under 42 U.S.C. § 1983. The first count alleges that the CMS defendants, while acting under color of state law, violated a number of her *First Amendment* rights as a government employee. *Id.* PP28-35. In her second count, LaGoy alleges that the CMS defendants (again acting under color of state law) violated her *Fourteenth Amendment* due process rights by depriving her of property and liberty interests [\*\*7] as a government employee. *Id.* PP37-44. The third count alleges that CMS, Miles, and unknown defendants violated LaGoy's First and *Fourteenth Amendment* rights based on unconstitutional policies and on their failure to properly train/supervise. *Id.* PP46-51. LaGoy's fourth and fifth counts assert individual and vicarious claims for infliction of emotional distress and defamation. *Id.* PP53-62.

#### IV. Discussion

##### A. Rule 12(b)(1) Motion to Dismiss

Dismissal under *Rule 12(b)(1)* is proper where the court is without statutory or constitutional authority to decide a case. *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). The court must accept as true the material factual allegations in the complaint, *see Atl. Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992), and may consider evidence outside the pleadings for the limited purpose of addressing the *Rule 12(b)(1)* motion to dismiss. *Makarova*, 201 F.3d at 113 (citation omitted). The plaintiff has the burden of proving the court's jurisdiction by a preponderance of the evidence. *See id.* (citation omitted).

##### [\*\*8] B. Analysis

Here, the issue is whether the NLRA preempts the court's jurisdiction over LaGoy's *section 1983* and state law claims. The parties' positions are irreconcilable. The CMS defendants argue that LaGoy's claims are preempted because they are based on conduct governed by the NLRA, and therefore within the primary jurisdiction of the NLRB. LaGoy contends that her claims have nothing to do with the NLRA, and should instead be analyzed as state action infringing on her constitutional [\*\*62] rights as a public employee. At this stage of the case, the court must agree with LaGoy.

##### 1. Preliminary Concerns

The CMS defendants have failed to address a crucial element of LaGoy's complaint: the allegation that they violated her rights as a *government employee*. n9 It is well established that neither public employers, nor public employees, are covered by the NLRA. 29 U.S.C. §

152(2); *see, e.g., Lyes v. City of Riviera Beach, Fla.*, 166 F.3d 1332, 1342 (11th Cir. 1999); *Jackson v. Temple Univ. of Commonwealth Sys. of Higher Educ.*, 721 F.2d 931, 933 (3d Cir. 1983). Thus, whether the NLRA is even applicable to this case is a [\*\*9] question that must be resolved before the court can turn to the merits of the defendants' arguments. As this issue has not been addressed by the CMS defendants, their motion to dismiss must be denied at this stage.

n9 LaGoy's potential status as a public employee leads to a reasonable inference that CMS was a government or public employer. The court notes that while LaGoy has alleged CMS to be a Missouri corporation, she nonetheless contends that it acted under color of state law by "exercising powers which are traditionally exclusively reserved to the state." *LaGoy's Brief in Opposition*, p. 2, Dkt. No. 15 (quoting *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996) (citations omitted)). The court is also aware that the NLRB has asserted jurisdiction over CMS's and the CSEA's cross-charges. However, the CMS defendants have neither offered any argument contesting LaGoy's rationale, nor have they raised this issue for the court's consideration. While the court may have some doubts about the factual accuracy of LaGoy's allegations in light of the exercise of jurisdiction by the NLRB, it cannot at this stage give dispositive effect to the latter.

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##### 2. NLRA Preemption

The above concerns notwithstanding, the court must reject the CMS defendants' preemption arguments. As already noted, CMS's chief contention is that the NLRB has primary jurisdiction over LaGoy's claims, as they are based on conduct controlled by the NLRA. While the court may be inclined to agree in part with this argument, the defendants have failed to address LaGoy's fundamental allegation: that they acted under color of state law in violating her constitutional rights.

##### (a) Section 1983 Claims

To the extent LaGoy asserts violations of her constitutional rights under *section 1983*, the question whether such claims are preempted by the NLRA is governed by the standard n10 enunciated by the Supreme Court in *Golden State Transit Corporation v. City of Los Angeles*, 493 U.S. 103, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989) ("*Golden State II*"). *See Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 780 n.6 (9th Cir.), cert.

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177 L.R.R.M. 2180; 150 Lab. Cas. (CCH) P59,961

denied, 534 U.S. 1020, 151 L. Ed. 2d 423, 122 S. Ct. 545 (2001).

n10 The CMS defendants submit that the standard applicable here is the one enunciated in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959). Under *Garmon*, when conduct is arguably subject to *section 7* or *section 8 of the NLRA*, "the States as well as the federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245. The *Garmon* doctrine, however, only applies to NLRA preemption of state, not federal, law. See, e.g., *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 948 F.2d 98, 105 (2d Cir.), vacated on other grounds sub nom. *Yellow Freight Sys., Inc. v. United States*, 506 U.S. 802, 121 L. Ed. 2d 4, 113 S. Ct. 31 (1992) (citing Supreme Court and Second Circuit cases).

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*Section 1983* provides remedies for violations of federal statutory and constitutional [\*63] rights by persons acting under color of state law. 42 U.S.C. § 1983. Therefore, "the [remedial] coverage of this statute must be broadly construed." *Golden State II*, 493 U.S. at 105 (citations omitted). Additionally, *section 1983* "provides a remedy 'against all forms of official violation of federally protected rights.'" *Id.* at 106 (quoting *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 700-701, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)). Under *Golden State II*, the court must apply a two-part test to determine the validity of a *section 1983* claim: (1) if a plaintiff asserts the deprivation of a federal constitutional or statutory right, a 1983 claim is presumed to exist unless (2) the defendant satisfies its burden of showing that "Congress specifically foreclosed a remedy under § 1983 ... by providing a comprehensive enforcement mechanism for protection of a federal right." *Id.* (internal citations, quotation marks and alteration omitted).

In this case, LaGoy alleges that the CMS defendants acted under color of state law and violated her [\*12] *First* and *Fourteenth Amendment* rights. This contention is unchallenged by the defendants. Therefore, the only open question is whether the defendants can show that the NLRA provides a comprehensive enforcement mechanism for these rights.

In *Hobbs v. Hawkins*, 968 F.2d 471 (5th Cir. 1992), employees and their union brought suit under *section 1983* for violations of their rights under the NLRA and

the *First Amendment*. *Id.* at 473. Applying the *Golden State II* test, the Fifth Circuit held that the plaintiffs could not sustain a *section 1983* action based on violations of their rights under the NLRA because Congress had provided a comprehensive enforcement mechanism for these rights in the statute. *Id.* at 475-79. However, with respect to the plaintiffs' *First Amendment* claims, the Circuit stated: "The district court concluded that the constitutional injuries ... were not 'separate and distinct from the type of injury protected by the NLRA' and thus were within the [NLRB]'s exclusive jurisdiction ... Whether or not the NLRB entertains constitutional claims, such claims would not fall within [its] primary jurisdiction. Thus, the district [\*13] court had jurisdiction to consider plaintiffs' constitutional claims." *Hobbs*, 968 F.2d at 479-80 (internal quotation marks, citation omitted). The *Hobbs* holding was based on *Communications Workers of America v. Beck*, 487 U.S. 735, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988), where the Supreme Court noted that constitutional claims were not within the NLRB's primary jurisdiction, and therefore subject to district court jurisdiction. *Beck*, 487 U.S. at 744 n.1 (collecting cases). n11 Adopting the same rationale, the Ninth Circuit stated that "the NLRA does not provide, of course, a comprehensive scheme for the vindication of constitutional rights. There is accordingly no preemption of the plaintiff[s] § 1983 constitutional claims..." *Radcliffe*, 254 F.3d at 781 (citations omitted). n12

n11 This court may have reached a different result in interpreting the implications of the *Beck* footnote, in light of the specific grounds for the Supreme Court's observation and the history of that case. However, it defers to the interpretation and meaning assigned to it by the Fifth and Ninth Circuits.

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n12 *Radcliffe* involved *Fourth Amendment* claims based on false arrest and malicious prosecution. See 254 F.3d at 781.

Based on the above, and in light of the CMS defendants' uncontested status as state actors, LaGoy's *section 1983* constitutional claims are not preempted by the [\*64] NLRA and the court has jurisdiction over them. Therefore, the motion to dismiss must be denied.

#### (b) State Law Claims

The CMS defendants' argument that LaGoy's emotional distress and defamation claims are preempted

358 F. Supp. 2d 58, \*; 2005 U.S. Dist. LEXIS 1792, \*\*;  
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by the NLRA is without merit. The Supreme Court has held that these claims, even where they involve conduct arguably protected or prohibited under the NLRA, may be excepted from *Garmon* preemption under certain circumstances. *Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290, 51 L. Ed. 2d 338, 97 S. Ct. 1056 (1977) (intentional infliction of emotional distress); *Linn v. United Plant Guard Workers*, 383 U.S. 53, 15 L. Ed. 2d 582, 86 S. Ct. 657 (1966) (defamation). n13 Accordingly, the motion to dismiss LaGoy's state law claims must also be denied.

n13 Although the CMS defendants concede that *Linn* precludes their position, they attempt to attack, in footnote form, the pleading insufficiency of LaGoy's defamation claim. They are not moving, however, for dismissal for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*, and the court declines to consider their argument as unsupported. Similarly, the court rejects their

argument, again made in a footnote to their reply brief, that LaGoy has conceded preclusion of her state law claims by failing to address the issue in her opposition.

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**WHEREFORE**, it is hereby

**ORDERED** that defendants' motion to dismiss is **DENIED**; and it is further

**ORDERED** that the Clerk serve a copy of this Decision and Order on all parties.

**IT IS SO ORDERED.**

Dated: February 8, 2005

Albany, New York

Gary L. Sharpe

U.S. District Judge