

ARGUMENT

I. UNDER UTAH STATE LAW, ABSENT A VOTE BY THE TRAX EMPLOYEES COMBINING THE TWO DISTINCT BARGAINING UNITS, THE COMBINED BUS AND RAIL UNIT IS AN INAPPROPRIATE BARGAINING UNIT.

Utah Transit Authority has violated Utah state law by not negotiating with an entity representing a majority of employees in an appropriate bargaining unit as the plain language of a Utah statute mandates. Utah Code ANN. § 17A-2-1031 (2004) provides that:

Employees of any public transit 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.

Thus, UTA has two affirmative duties under the statute; (1) negotiate with a labor organization representing a majority of workers and (2) that majority must exist in an appropriate bargaining unit. UTA is not complying with the law because Local 382 does not represent a majority of workers within the TRAX unit and it cannot rely on a system-wide unit because under clear federal labor law standards, the TRAX employees cannot be accreted into the bus unit without the TRAX employees voting to merge the two separate bargaining units.

The Utah statute does not define "appropriate." However, Utah Code ANN. § 17A-2-1031 should be consistent with federal law since it was created to make Utah law consistent with federal labor law principles. States such as Utah and Colorado changed state law in order to conform to the basic principles of federal labor law in order to comply with the Urban Mass Transportation Act ("UMTA") and thus increase their chance to obtain federal funds. *Regional Transportation Dist. v. Colorado Dept. of Labor*, 830 P.2d 942, 947 (Colo. 1992) (binding

arbitration created to obtain federal funds); Utah Code ANN. § 17A-2-1032 (providing for binding arbitration for transit districts). The Colorado Supreme Court stated: “The arbitration requirement arises out of conditions imposed by the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. § § 1601-1621 (1988 & 1989 Supp.) [Re-codified at 49 U.S.C. §5333(b)] to obtain federal funding. UMTA made federal funds available for the conversion of private mass transit systems to public ownership. As a condition for the assistance, states were required to preserve the collective bargaining rights enjoyed by organized mass transit workers under private ownership.” 830 P.2d at 947.

Moreover, Utah courts have consistently looked to decisions under the National Labor Relations Act (“NLRA”) for guidance in the labor area. *Park City Ed. Assn. v. Bd. Ed. Park City School Dist.*, 879 P.2d 26, 272 (*Utah Ct. App.* 1994). Similarly, federal courts, in determining the requirements of 13(c) under UMTA, have looked to federal law to determine the bargaining rights that must be protected under UMTA. *Amalgamated Transit Union International, AFL-CIO, et al. v. Donovan*, 767 F.2d 939, 948 (D.C. Cir. 1985). Finally, this Court has said that federal labor law cases are persuasive on the issue of an appropriate bargaining unit.

The key to understanding this case is determining whether it concerns the creation of an initial bargaining unit, severance from an existing bargaining unit or an accretion case. All these doctrines have been developed under federal law. UTA has avoided discussing the accretion doctrine because it knows that it is the third-rail to its defense.¹ While Defendants have classified this case as a severance case and then cite to cases that concern the initial creation of a bargaining unit at a company, the case at bar is an accretion case. “An accretion is an attempt to

¹ The third-rail is a high voltage electrified rail used in subways. Contact with this rail can result in instant death. UTA apparently knows that if this Court properly applies the accretion doctrine to this case it will see that UTA has no defense for its actions since under the doctrine the TRAX employees should be free to choose their own bargaining representative.

add new employees or **present employees in new positions** to an existing bargaining unit.”

National Labor Relations Board v. Superior Protection, Inc., 2005 U.S. App. LEXIS 2760; 176

L.R.R.M. 2769 * 11 (Feb. 16, 2005) (Emphasis added). This case clearly meets that standard.

More precisely, it is a case where the workers of a new facility must be considered to be in a

separate bargaining unit from a pre-existing bargaining unit. **“TPC-North was a new facility**

and thus a new bargaining unit.” *Aramark Services, Inc. v. NLRB*, 2002 NLRB Lexis 521 *10-

11 (Oct. 21, 2002) (Emphasis added).

A. Local 382 Does Not Have Majority Support in the Appropriate Bargaining Unit Created When the New TRAX Facility Was Opened. Thus, UTA Is Violating State Law by Negotiating with Local 382 on Labor Issues Concerning TRAX Employees.

Having established the correct characterization of the case as an accretion case, this Court

has clear guidance under the facts of this case. Under the standards set by federal labor law case

Gitano Group, Inc, 308 NLRB 1172 (1992) dealing with accretion cases, when the new UTA

facility housing TRAX was opened, a presumption occurred that a new bargaining unit was

created.² Under accretion standards, “when an employer transfers a portion of its employees at

one location to a new location, the new facility is presumptively a separate unit.” *U.S. Tsubaki*,

² UTA, in its filing, deleted critical language from a *Gitano* quote. The quote with *all* the pertinent language states: As an initial matter, we announce today that when an employer transfers a portion of its employees at one location to a new location, we will no longer define the nature of the transfer in terms of the relationship between the “new” unit and the “old” unit (i.e., whether one is a “spinoff” or “partial relocation” from the other). Rather, we will begin with the Board’s long-held rebuttable presumption that the unit at the new facility is a separate appropriate unit. Assuming that that presumption is not rebutted, we will then apply a simple fact-based majority test to determine whether the respondent is obligated to recognize and bargain with the union as the representative of the unit at the new facility. If a majority of the employees in the unit at the new facility are transferees from the original bargaining unit, we will presume that those employees continue to support the union and find that the employer is obligated to recognize and bargain with the union as the exclusive collective-bargaining representative of the employees **in the new unit. Absent this majority showing, no such presumption arises and no bargaining obligation exists.** (Emphasis added. The last sentence was deleted from UTA’s Memorandum in Opposition to Plaintiff’s Motion for Partial Summary Judgment (page 12).

Inc. 331 N.L.R.B. 327 (2000).³ Because the majority of TRAX employees were transferred from the existing UTA operation, there was a presumption that the existing bargaining representative transferred to the new bargaining unit (see footnote 2). However, the fact that both bargaining units have been represented by the same bargaining representative does not alter the fact that the bargaining units are separate. Thus, between 1999 and 2004, UTA employees were in two separate bargaining units represented by a single bargaining representative, Local 382. However, when the employees of TRAX realized that Local 382 had totally abdicated its responsibility to represent their interests, they passed a petition requesting that the company not ratify the contract and examine the issue of an appropriate bargaining unit. At that time the TRAX employees and their counsel did not fully understand the distinction between bargaining representative and bargaining unit, which is understandable since neither had had a chance to study the law in depth concerning accretion. However, what is not understandable is how UTA, in its declaration by Lorin Simpson and response filing, still confuses the two. UTA asserts that because a majority of the employees came over to TRAX from the bus divisions, that somehow merges the two bargaining units. The National Labor Relations Board (“NLRB”) rejects such a claim. In *U.S. Tsubaki* 331 N.L.R.B. 327, 329 neither the fact that 100% of the employees had transferred from an existing unit nor the fact they had bargained together for eight years merged the bargaining units.

In the case at bar, the TRAX employees rejected the bargaining representative, Local 382, prior to ever ratifying a contract and voted down the contract both times it was sent to them. (Exhibit). Moreover, about 10% of the employees were not transfers but were new hires. UTA is

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

trying to confuse this Court by mixing up two separate concepts; bargaining representative and bargaining unit. Despite the sophistry by UTA, they clearly were on notice that there was serious doubt whether Local 382 had majority support in the TRAX bargaining unit and Utah law clearly places the burden of ascertaining this fact on UTA. Under federal labor law standards, when 30% of employees show that they oppose a bargaining representative that is sufficient to trigger an election. 29 U.S.C. § 159(e). In this case, almost 50% of the TRAX bargaining unit members signed the original petition and to date nearly 70% have signed but UTA still refuses to allow a vote on whether Local 382 should represent the workers. The TRAX employees have a right to pick their own representative for their own bargaining unit. UTA does not have the right to impose a bargaining representative on the TRAX employees.

Thus, if the proper standard is applied it is clear that the opening of TRAX created a separate bargaining unit. UTA has failed to negotiate with a labor organization representing a majority in the appropriate bargaining unit. This Court should grant the partial summary judgment motion and declare that the TRAX employees are in a separate bargaining unit and are entitled to vote on their own representative.

II. THE SYSTEM-WIDE BARGAINING UNIT IS AN INAPPROPRIATE UNIT BECAUSE IT WOULD CONTAIN EMPLOYEES INAPPROPRIATELY ACCRETED INTO THE BARGAINING UNIT.

UTA and Local 382 have attempted to justify their actions by saying that a system-wide bargaining unit is appropriate, citing to a variety of cases which are not accretion cases. However, accreting the TRAX employees into the existing bus employee bargaining unit is clearly inappropriate.⁴ In cases such as *Baltimore Sun Company v. National Labor Relations*

⁴ UTA has asserted that the TRAX employees have conceded that a system-wide unit is appropriate. This has no basis in fact. Plaintiffs have consistently challenged the appropriateness of such a unit without a vote by TRAX employees merging the bargaining units, which has not occurred. Moreover, the complaint clearly challenges the

Board, courts have held that the NLRB did not have the authority to find that a bargaining unit that attempted to improperly accrete workers was an appropriate bargaining unit. 257 F.3d 419, 430 (4th Cir. 2001). Clearly, if an agency with labor expertise cannot find such a unit appropriate as a matter of law, UTA cannot make such a determination, particularly with its obvious conflict of interest.

UTA has tried to justify a combined bargaining unit by citing to initial bargaining unit determinations. Borrowing from one area of labor law and applying it in a different area of labor law is akin to applying civil discovery standards in a criminal case. The accretion test is very different from the test applied to initially certifying a bargaining unit. In a case that is the mirror image of the case at bar, the Fourth Circuit overturned a decision by the NLRB which attempted to apply accretion principles to an initial bargaining unit determination stating that the NLRB was not free to borrow from one area of labor law and apply it in another area of labor law. *NLRB v. United Food & Comm. Workers*, 68 F.3d 1577, 1581 (4th Cir. 1995).⁵ In an initial bargaining unit test the NLRB must only choose an appropriate bargaining unit and not the most appropriate bargaining unit, but: “In the accretion context, however, “[a] group of employees is properly accreted to an existing bargaining unit when they have such a close community of

appropriateness of the system-wide unit. For example paragraph 103 of the complaint states: “Defendants violated section 17A-2-1031 in that they:

- a) Refused to allow the TRAX employees to choose own their representatives;
- b) Negotiated with an inappropriate bargaining unit;
- c) Negotiated a contract with an inappropriate bargaining unit purporting to bind the TRAX employees;
- d) Ratified the contract after being notified by TRAX employees that local 382 was not an appropriate bargaining unit for them;
- e) Refused to discuss the rights of the employees with their counsel both before and after the contract was ratified;
- f) Engaged in acts, practices, and a course of business that operated to deprive employees of their state statutory rights without any due process.

⁵ The NLRB also grants companies and unions great deference in creating initial bargaining units. That is because no matter what is decided the workers will be given an opportunity to vote on the bargaining representative. Also, it does not upset an existing bargaining unit because the unit is just being created. In the accretion context, an attempt to impose a bargaining unit or force an accretion of employees into an existing bargaining unit is prohibited. *NLRB v. Paper Manufacturers*, 786 F.2d 1163 (3rd Cir. 1986) (Citing *Chas S. Winner, Inc. v. Teamsters Local Union No. 115*, 777 F.2d 861 (3rd Cir. 1985).

interests with the existing unit that they have no true identity distinct from it.” *Aramark Services, Inc. v. NLRB*, 2002 NLRB Lexis 521 *10-15 (Oct. 21, 2002). Simply stated, if a group of employees could be an appropriate bargaining unit alone, they cannot be accreted into an existing bargaining unit. *Baltimore Sun v. National Labor Relations Board*, 257 F.3d 419, 427 (4th Cir. 2001).

The undisputed facts of this case do not entitle UTA and Local 382 to accrete the new TRAX facility’s employees into the existing bargaining unit. See *Aramark Services, Inc. v. NLRB*, 2002 NLRB Lexis 521 *10-11 (Oct. 21, 2002) (a new facility represents a new bargaining unit); *Gitano Group, Inc.*, 308 N.L.R.B. 1172 (1992) (a new facility presumptively creates a new bargaining unit). At the creation of the TRAX facility in 1999, the employees who transferred over to the TRAX facility presumptively became an appropriate bargaining unit. Thus, the separate facility distinguishes this case from *Brotherhood of Electrical Workers v. Aubry, Jr.*, 42 Cal App 4th 861 (1996). However, that case clearly demonstrates that when a bargaining unit exists prior to the opening of a new facility, it is the accretion doctrine that must be examined and a court cannot just rely on the fact that other systems may have combined rail and bus operations.

UTA and Local 382 have tried to distinguish the clear law on accretion by asserting that employees of TRAX were included in the existing bargaining unit by contract. However, that is incorrect as a matter of law. Representation issues may not be decided by contract . . . *NLRB v. Paper Manufacturers*, 786 F.2d 1163 (3rd Cir. 1986) (Citing *Chas S. Winner, Inc. v. Teamsters Local Union No. 115*, 777 F.2d 861 (3rd Cir. 1985). That court then went on to state:

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

In fact, the defense itself is not only ineffective, it is illegal. An agreement between Local 382 and UTA, made prior to the creation of TRAX, to accrete the employees of the TRAX division into Local 382 upon its creation is an unfair labor practice. *Sheraton –Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1356 (9th Cir 1970). In contrast, the bargaining representative can come over to the new bargaining unit not as a matter of contract but because federal labor law allows such a presumption. However, the employees in that new bargaining unit are free to decertify the bargaining representative and choose a new one. In a footnote in *Aramark* the administrative law judge admonished the parties. 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 *10-11 (Oct. 21, 2002) (Citing *Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1961)).

Thus, the law is clear that a combined rail and bus bargaining unit is not an appropriate bargaining unit because the system-wide unit would illegally accrete employees into an existing unit. This accretion would deny the workers the fundamental right of employee self determination. Case law has clearly protected "employee self-determination" under Section 7 of 29 U.S.C. § 151 et. Seq. 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 (4th Cir. 2001).⁶

⁶ While it is clear that an accretion is not possible, in recent filings UTA has raided the possibility that a merger of the two distinct bargaining units has occurred. This is not possible. Both multiemployer or multi-location bargaining units require an unequivocal intent to merge. *West Lawrence Care Center, Inc.*, 305 N.L.R.B 212 ** 26, 26n.5. (1991). The fact that Local 382 counted votes separately at TRAX and claimed in their answer to the complaint to have provided separate representation means that the high standard for merger has not been met. Moreover, since

Thus, by negotiating with Local 382, representing an inappropriate bargaining unit, UTA has violated state law. This Court should grant the partial summary judgment motion and declare that the TRAX employees are in a separate bargaining unit and are entitled to vote on their own representative.⁷

III. GRANTING THE PARTIAL SUMMARY JUDGMENT WOULD PROTECT UTA FROM A LAWSUIT BY LOCAL 382. UTA WOULD BE ABLE TO NEGOTIATE AN END TO THIS LAWSUIT WITH THE TRAX EMPLOYEES.

A decision by this Court granting the partial summary judgment would protect UTA from a lawsuit by Local 382 for negotiating with a new bargaining representative for the TRAX employees. This would be consistent with federal law which states that a contract negotiated with an inappropriate bargaining representative is not a valid binding contract. *National Labor Relations Board v. RCA Del Caribe, Inc.*, 262 N.L.R.B. 963 (1982).

This is also consistent with agency law in that an agency has to have authority to bind a principal to a contract. Local 382 had no such authority after the petition was presented to UTA.

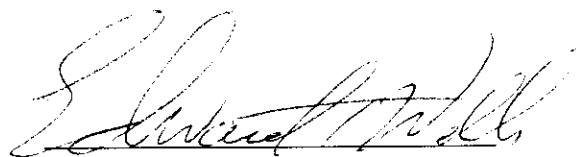
CONCLUSION

under U.S. Tsubakai, 170 L.R.R.M. 443 (2003) the bargaining representative came over as a matter of law and the existing contract was honored by an agreement between the company and Local 382, the employees' toleration of the status quo did not demonstrate a consent to a merger. The TRAX employees, acting through their union representative, do have the right to agree to destroy the separate identity. However, Section 7 considerations need to be balanced with the merger doctrine. Both *NLRB v. Magnovox Co. Of Tenn.*, 415 U.S. 322, 325 (1974) and *Chemical Workers Local 1 v. Pittsburg Glass Co.*, 404 U.S. 157, 172 (1971) limit Local 382's ability to merge the units contrary to wishes of the TRAX employees. In fact, the TRAX employees had no notice that UTA and Local 382 were even attempting a merger of the bargaining units until the UTA filing of its "Reply Memorandum In Support of UTA Defendants' Motion For Summary Judgment." Even the dissent in *West Lawrence* (the case that declined to find merger) agreed that Section 7 rights required informing the employees of a merger plan. 305 N.L.R.B. 212, 218. This is necessary to allow the employees to move to decertify the union in a timely manner to avoid the dilution of Section 7 rights. Of course, this Court could follow the persuasive authority of *South Jersey Catholic Teachers Organization v. Diocese of Camden*, 347 N.J. Super 301; 789 A.2d 682, 691 and just refuse to follow the cases cited by UTA because they do not take into account the factors necessary to create a community of interest under other NLRB cases. The NLRB itself seems to have distinguished and question many of its earlier cases in *West Lawrence Care Center, Inc.*, 305 N.L.R.B 212 ** 26, 26n.5. (1991).

⁷ Another possible proper procedure is to order an election on the merger and allow TRAX employees to decide whether to merge. See e.g. *Libbey-Owens Ford Glass Co.*, 173 N.L.R.B. 1231 (1968).

This Court should grant partial summary judgment for the Plaintiffs. Absent a vote by the TRAX employees that they wish to merge their bargaining unit with the bus employees' bargaining unit, the only appropriate bargaining unit for the TRAX employees is one that includes just the TRAX facility. The acceptance by the TRAX employees of the same bargaining representative until August 2, 2004 does not preclude the TRAX employees from decertifying Local 382 as their bargaining representative. A decision granting the partial summary judgment motion will facilitate a settlement of this case because it will allow UTA to negotiate an end to the dispute without fearing a lawsuit by Local 382.

Dated this 12th day of May, 2005

A handwritten signature in cursive script, appearing to read "Edward T. Wells".

Edward T. Wells,
Attorney for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on this 12 day of May, 2005, I caused to be mailed, postage prepaid, the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** to the following:

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