

ARGUMENT

I. THE PUBLIC UTILITY DOCTRINE IS NOT APPLICABLE TO THE CASE AT BAR. CONSEQUENTLY, THE PLAINTIFFS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT.

Defendant Local 382 attempts to defeat Plaintiffs' request for partial summary judgment by invoking the public utility doctrine. However, the public utility doctrine does not apply in the case for the following reasons: (A) Because there is no danger of a strike, the TRAX employees' Section 7 rights should not be impeded, (B) A transit company does not meet the modern definition of a public utility and the earlier bus company cases are ignored by the NLRB, (C) The Accretion Doctrine would trump the public utility doctrine.

A. THERE IS NO DANGER OF DISRUPTION OF SERVICE.

Cellco Partnership, 2004 NLRB Lexis 138 * 9 ((2004) explains the reasons behind the public utility doctrine and implicitly why it is not applicable to this case. The reason for the doctrine is that labor disruptions or stoppages at one facility could halt "the provision of essential services to the public in places likely far removed from the situs of the dispute." 2004 NLRB Lexis 138 at *8. That cannot occur in the case at bar since Utah transit workers do not have the right to strike and instead have the right to binding arbitration which could never disrupt service "far removed from the situs of the dispute." Utah Code Ann. § 17 A-2-1031; Utah Code Ann. § 17 A-2-1032 (2004). Since there is no chance of a disruption of service there is no need for a systemwide presumption.

As stated in *Cellco*:

In creating the systemwide presumption, the Board essentially balanced the employees'

Section 7 right to bargain collectively through representatives of their own choosing against the public's interest in the unbroken provision of necessary services. This balance makes the most sense when the petitioned-for employees are an integral part of the utility service such that a labor stoppage or dispute at one part threatens the ability of the whole to serve the public good. **However, where there is no such danger, we find no basis for limiting the organizational rights of employees by requiring them to organize only in comprehensive units.**

2004 NLRB Lexis 138 at 9-10 (Emphasis added).

In a decision decided on February 9, 2005 before the NLRB, the fact finder stated:

The Board's rationale for a system-wide presumption for public utilities is largely a matter of public policy; namely that the public has an "immediate and direct interest in the uninterrupted maintenance of the essential services that the public utility industry alone can adequately provide." *Baltimore Gas & Elec.*, 206 NLRB 199, 201 (1973). This is ultimately a balancing test between employees' Section 7 rights and the public's interest in uninterrupted utility service that only a single entity provides. Generally, the Board is reluctant to limit employee's Section 7 rights unless the countervailing public interest is substantial. The Board's public utility presumption is not absolute; rather the Board has found less than system-wide units appropriate in certain circumstances.

Alyeska Pipeline Service Co., NLRB Region 19. Case 19-RC-14600 (2005) (citation omitted)

(Exhibit A).

In the case at bar, the public utility presumption does not apply. There is no reason to impede the TRAX workers' Section 7 rights. Since they cannot strike they cannot disrupt services. Thus, there is no need to apply the presumption. This is consistent with Tenth Circuit case law. *Mountain States Telephone and Telegraph*, 310 F.2d 478 (10th Cir. 1960). In that case the fact that the bargaining unit had little chance to disrupt service justified a separate unit. Consequently, the court departed from the public utility presumption of a system-wide unit and allowed a separate unit. In this case, there is no substantial or even minimal countervailing public interest that would justify impeding the Section 7 rights protected by the NLRB's presumption of a single facility being the appropriate bargaining unit. *Id.* at 9-10.

B. PUBLIC TRANSIT COMPANIES PROBABLY WOULD NOT QUALIFY AS PUBLIC UTILITIES UNDER MODERN LAW.

In *Alyeska Pipeline Service Co.*, the fact finder stated that; “While the Board has applied the public utility presumption to a handful of industries such as electrical, water and the natural gas industry, it has never clearly defined ‘public utility’. *Id.* at 8. The fact finder then examined both Black’s Law Dictionary and the Internal Revenue Code for definitions of a ‘public utility.’ In neither definition was a transit company a public utility. In an era where bus companies compete with various shuttles, taxis, limos, and most importantly the private automobile, can it really be said that a transit company deserves the status of a ‘public utility’? Interestingly, if one Shepardizes the old cases, one finds that application of these cases soon reaches a legal evolutionary dead end. The cases are no longer even cited. Meanwhile, cases are being handed down by the NLRB (administrative law judges) that have organized bus units into single-facility bargaining units and even applied the single-facility presumption in those cases. E.g. *First Transit, Inc. NLRB, Region 5*, Case 15797 (April 7, 2005); *Academy Express, LLC Region 22*, Case 22-RC-12287 (December 18, 2002) (Exhibits B & C).

This may be because the old presumption appears to be quite weak. Ironically, *In the Matter of Los Angeles Metropolitan Transit Authority*, California State Conciliation Service, Feb. 23, 1959, (the case submitted by Local 382) the order had five different groups vote with the possibility that five different bargaining units could be created. Ironically, one of those groups had its right to strike upheld in *Los Angeles Metro Transit Authority v. Brotherhood of Railroad Trainmen*, 54 Cal. 2d 684; 355 P.2d 905 (Cal. 1960) just one year after the determination and it was clear that more than one bargaining representative existed at the “public utility.”

Thus, applying a more modern interpretation of “public utility” is justified and would preclude the application of the public utility doctrine in this case.

C. THE ACCRETION DOCTRINE, WHICH CONCERNS THE PROTECTION OF SECTION 7 RIGHTS, IS MORE IMPORTANT THAN THE APPLICATION OF THE PUBLIC UTILITY DOCTRINE WHICH IS BASED ON PUBLIC POLICY AND IS NOT A STATUTORY MANDATE.

As explained above, the public utility doctrine was created as a matter of public policy. In contrast, the accretion doctrine was created and is limited by the Section 7 rights of the employees. 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)). In a case that directly addressed the interplay between accretion and the public utility doctrine, *NLRB v. Security-Columbia Banknote*, the Third Circuit Court stated that “an accretion and a unit determination are similar concepts, but the Board has restrictively applied the accretion principle since it operates to deny the accreted employees a vote on their choice of bargaining representative.” 541 F.2d 135, 140 (3rd Cir. 1976) *Id.* (Citations omitted).¹ The court went on to apply the accretion restrictions and stated that a case which might be read to favor the public utility doctrine over the accretion doctrine was overruled, if it did indeed conflict with the court’s decision to prevent accretion. *Id.* at 141n.1. In a more recent unpublished case, the court examined the interplay between the doctrines. *Innovative Communications Corp. v. NLRB*, 39 Fed Appx. 715,

¹ Contrary to assertions by Local 382, *International Brotherhood of Electrical Workers v. Aubry, Jr.*, 42 Cal. App. 4th 861 (1996) supports Plaintiffs’ position. The court clearly applied an accretion analysis in the case and only found an accretion because the employees were not in a separate facility. The “public utility” doctrine was only mentioned as an afterthought to support the decision already made based upon the accretion analysis.

718n.5 (3rd Cir. 2002) (Exhibit D). The court noted that the Petitioner's attempt to support a contention that the public utility doctrine created an exception to the accretion doctrine was not supported since the courts in those public utility cases still examined whether the factors allowing accretion were present. *Id.* Moreover, the court in *Innovative* did not find an accretion despite the argument that the public utility doctrine supported a finding that a system-wide unit was appropriate. 39 Fed Appx. 715, 718n.5 (3rd Cir. 2002) (Exhibit D). The bottom line is that modern decisions do not allow accretion if the new unit could be an appropriate bargaining unit.² In fact, in *Intern. Ass'n of Machinists v. NLRB*, 759 F.2d 1477, 1479 (9th Cir. 1985), the Ninth Circuit went even further. Despite two thirds of the employees initially being transfers at the time the union challenged the company, the NLRB and the Ninth Circuit refused to find an accretion because it might deny the new employees a vote on their bargaining representative. *Id. at 1480*. They made this ruling despite the fact that there was real doubt about whether the new facility could be an appropriate bargaining unit.

The fact that UTA and Local 382 purportedly agreed to impose a bargaining representative, Local 382, is of no legal significance. In *Sheraton-Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1356 (9th Cir. 1970), the collective bargaining agreement of a company with five hotels attempted to force an accretion on its employees when the company opened a sixth hotel. The Court held that such an accretion violated the workers rights. *Id.* A similar result was reached in *Boire v. Intern.*

²Numerous other cases support the view that if a new facility could be a separate bargaining unit no finding of accretion can be made. E.g. *Baltimore Sun Company v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001); *Westvaco, Va. Folding Box Div. v. NLRB*, 795 F.2d 1171, 1173 (4th Cir. 1986); *Westinghouse Elec. Corp. v. NLRB*, 506 FR.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).

Brotherhood of Teamsters and the violation of these precious Section 7 rights justified an injunction as was requested in this case. 479 F.2d 778, 789 (5th Cir. 1973).

The cases cited by Local 382 continue the pattern by Defendants of citing old cases and ignoring new cases. Since the NLRB has not been very diligent about explicitly overturning cases, that does lead to confusion. However, present law and the trend of labor law to consider the protection of Section 7 rights as the paramount responsibility of the NLRB supports the TRAX employees' right to have a separate bargaining unit. This Court should issue an order in the mainstream of legal opinion and grant partial summary judgment to the TRAX employees.

II. IF THIS COURT IS PRESENTLY UNWILLING TO DECLARE THE TRAX UNIT AS THE APPROPRIATE BARGAINING UNIT IT SHOULD ADOPT THE METHODOLOGY OF ARCHIBALD COX.

While the case cited by Local 382, *In the Matter of Los Angeles Metropolitan Transit Authority*, California State Conciliation Service, Feb. 23, 1959, is not helpful in the "public utility" context it may provide the blueprint for a successful conclusion of this case. In that case Mr. Cox stated; "The critical question therefore is whether State Officials should impose their opinion that an industrial unit is best upon the Authority's employees without regard to wishes which the employees may have formed after a long period of observation and experience." He answered that question in the negative and allowed the employees to essentially choose their bargaining units by vote. *Id.* at 27.

This Court faces a similar decision. While the TRAX employees have not observed the situation for a long period, the short period of joint representation, although not joint bargaining unit status, has demonstrated that a single bargaining unit will not protect their rights. This is made abundantly clear in the factual allegations of the complaint. UTA should not impose its will on the

TRAX employees. As Mr. Cox stated: "For State Officials to override strong employee sentiment upon the ground that government knows best would be inconsistent with the basic ideals of self-organization. I am therefore satisfied that a final decision as to the appropriate unit or units should be postponed until an election has been held in which the desires of the employees can be reflected according to the fourth method outlined above (see pp. 20-21 above)." *Id.* at 27.

Around seventy percent of the TRAX workers have expressed their preference for a separate unit. This is despite UTA's strong opposition which has been expressed to TRAX employees. However, a secret ballot election should be held at both the TRAX and bus units to ascertain the real support for the present compliant bargaining representative that UTA is desperately trying to force on the TRAX employees. The ballot should have the option of no union, Local 382, or a new union. Only if both the bus and TRAX employees vote for Local 382 should a single bargaining unit be created.

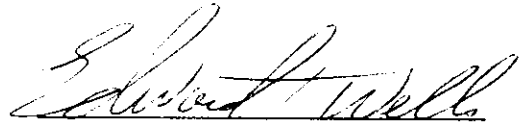
A decision to conduct such an election would be consistent with Tenth Circuit precedent. In *NLRB v. Ideal Laundry and Dry Cleaning*, the Court stated that: "[W]e think the relevancy of the wishes of employees concerning their inclusion or exclusion from a proposed bargaining unit is inherent in the basic right to self organization under § 7 of the Act." 372 F.2d 307 (10th Cir. 1967). While UTA seems to consider it irrelevant that the TRAX employees do not want to be in a bargaining unit with the much more numerous bus employees, the Tenth Circuit considers such desires important. The undisputed facts in this case demonstrate that the much more numerous bus employees have frustrated the Section 7 rights of the TRAX employees to negotiate for improved safety, seniority, and a wage system that is consistent with the national norm of paying light-rail employees at a higher wage scale than bus employees.

CONCLUSION

Partial summary judgment should be granted to the Plaintiffs. Under the accretion doctrine the opening of the new facility presumptively created a new bargaining unit. Since the Defendants have not presented any evidence that the TRAX unit is not an appropriate bargaining unit, the Plaintiffs are entitled to partial summary judgment.

Alternatively, this Court should solve the problem similarly to the manner Archibald Cox used to solve his bargaining unit dilemma; order an election and essentially allow the affected employees to choose their bargaining unit or units.

Dated this 16 day of May, 2005



Edward T. Wells,
Attorney for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on this 16th 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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