



## ARGUMENT

### **I. THE TRAX EMPLOYEES HAVE NO CONTRACT REMEDIES TO EXHAUST SINCE THE CONTRACT DOES NOT APPLY TO THEM.**

Defendant Local 382 wants the TRAX employees to grieve under the contract. That contract is not binding on the TRAX employees because it was negotiated with an inappropriate bargaining unit. Moreover, since the incumbent union, Amalgamated Transit Union, Local 382, failed to even attempt to represent the interests of TRAX employees, the contract does not address the issues important to them. No TRAX employee was permanently assigned to represent TRAX employees during the contract negotiations. Instead, a bus employee hostile to the TRAX employees' interests was assigned to represent them. Even if the TRAX employees desired to proceed under the contract, it would offer no relief since it did not address the right of the TRAX employees to have their own separate bargaining unit based on federal labor law which prohibits accreting employees in new positions into an existing bargaining unit if they could stand alone as a bargaining unit. Under NLRA case law, when a company is faced with a dispute over who represents workers and enters into a contract with a union that is not proven to represent the majority of the appropriate unit, the contract is not binding. *National Labor Relations Board v. RCA Del Caribe, Inc.*, 262 N.L.R.B. 963 (1982). UTA was notified prior to ratifying the contract that there were serious issues about whether Local 382 represented the TRAX employees. Lisa Burke presented to UTA a petition signed by about half the employees as well as a cover letter, demonstrating that the company should examine whether Local 382 continued to represent a majority of the workers. The best estimate is that more than 80% of TRAX employees want alternative representation. If UTA had acted upon the petition and polled its employees at TRAX, as was its responsibility, it would have known that it could not enter

into a contract with Local 382.

Moreover, the NLRB has created a test to determine when an employee must proceed under a contract remedy instead of bringing a complaint to the Board. *Hammtree v. NLRB*, 925 F.2d 1486, 1490 (D.C. Cir. 1991) (en banc). At least two of the mandatory prongs are missing in this case, (1) the contract does not cover “the dispute at issue” (whether the TRAX employees have the right to change their bargaining representative) and (2) “the contract and its meaning lie at the center of the dispute.” The TRAX employees’ interpretation of the contract is not the center of the dispute. The TRAX employees dispute that the contract even applies to them.

Thus, the very remedy at issue is whether the TRAX employees can pursue their complaint against UTA for imposing a union upon them contrary to Utah state law. “The Courts have never insisted upon exhaustion of remedies when the legal challenge implicates the very remedy itself.” 925 F.2d at 1517 (Mikva dissent) (Citing *See Association of National Advertisements v. FTC*, 201 U.S. App. D.C. 165, 627 F.2d 1151, 1156-57 (D.C. Cir. 1979), cert. denied, 447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1113 (1980)). “In other contexts, we have made it clear that exhaustion is a prudential doctrine that should be applied flexibly and not when further pursuit of remedies is futile.” 925 F.2d at 1517. Any resort to alleged contractual remedies is futile and counsel for UTA acknowledged as much in oral argument on the summary judgment motion.

Moreover, this case, which involves Section 13(c) protections, the accretion doctrine, TRAX employees, Local 382 and the UTA, is far too complex and would not be amenable to contractual remedies even if they applied. As stated by the United States Supreme Court, “[t]here cannot be any justification to make the processes wait until the union member exhausts

internal procedures plainly inadequate to deal with all phases of the complex problem concerning employer, union, and employee member.” *NLRB v. Marine Workers Local 22*, 391 U.S. 418, 425, 88 S. Ct. 1717, 20 L. Ed. 2d 706 (1968).

To understand why the contract does not apply to the TRAX employees, this Court needs to understand that the NLRA protects both individual and collective rights and that the accretion doctrine was developed in a manner not to impede workers’ individual rights under the NLRA. While the plaintiffs have discussed these issues numerous times, the Court’s colloquy with the attorney for Local 382 at the summary judgment hearing suggests that neither the Court nor the union understands that the NLRA protects both individual and collective rights.

**A. The National Labor Relations Act Protects Both Individual and Collective Rights.**

The plaintiffs have cited a United States Supreme Court case that has addressed the issue of which **individual rights** a union may waive and which **individual rights** a union may not waive. The United States Supreme Court allows a union to waive economic rights but not bargaining rights. In a quote repeatedly cited to this Court, sometimes twice in the same document, 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 unit.

*National Labor Relations Board v. Magnavox Co.*, 415 U.S. 322, 326 (1974) (Citation omitted).

The dissent in *Magnovox*, including now Chief Justice Rehnquist, explained that a union’s ability to waive Section 7 rights does not include the right to waive rights where the union and employees have conflicting interests. 415 U.S. at 327. Counsel for the TRAX

employees thought that the case clearly established that the TRAX employees have individual rights concerning choosing a bargaining representative that could not be waived by any contract between Local 382 and UTA. Thus, counsel was incredulous when both the Court and the union claimed that there are no individual rights under the NLRA. As *Hammontree*, the case from the D.C. Circuit, which has great expertise with the NLRA, clearly demonstrates, counsel for the TRAX employees is correct and both this Court and union counsel do not understand that *Magnavox* and its progeny clearly stand for the proposition that the NLRA protects individual rights. 925 F.2d 1486. 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.) However, 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.

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.’” 460 U.S. 693, 705 (1983) (Quoting H.R. Rep. No. 245, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess., 17 (1947) (emphasis in original).

**B. The Accretion Doctrine Was Created to Be Consistent with the Protection of Individual Rights under the NLRA. UTA Has Violated Utah Code Ann. § 17 A-2-1031 (2004) and NLRB Policy by Accreting Employees into an Existing Bargaining Unit.**

“An accretion is an attempt to 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). In the case at bar, UTA staffed the new TRAX facility with a combination of some new employees and transferred employees. UTA and Local 382 then attempted to accrete the new employees into the existing bargaining unit which cannot be done as a matter of law. Such an accretion would deny the TRAX employees their individual rights under the NLRA.

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). This is entirely consistent with *Magnavox*, which requires that the choosing of a bargaining representative remain free and precludes a union from conspiring with a company to choose the bargaining representative. 415 U.S. at 324.

In protecting the right of employees to choose their own bargaining representative and unit, the NLRB has created a different test for appropriateness than used to determine an initial bargaining unit. 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 interests with the existing unit that they have no true identity distinct from it.'" *Id.* at \*15. Simply stated, if a group of employees could be an appropriate bargaining unit alone, they cannot be accreted into an existing bargaining unit. *Baltimore Sun v. National Labor Relations Board*, 257 F.3d 419, 427 (4<sup>th</sup> Cir. 2001).

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 (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.

In the present case, some of the TRAX employees joined the company without working for the bus unit. They 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 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).

As was stated in a recent NLRB case: “It is well settled that an accretion is the addition of new employees to an already existing group. The NLRB has limited this principle and construed it narrowly so as not to stifle the desires of employees regarding membership.” See *Auto Processing Co.*, 258 NLRB 854 (1981), and cases cited therein. In other words, the accretion principle cannot subvert the rights of employees to freely choose who, if anyone, will represent them. *Safeway Stores*, 256 NLRB 918 (1981). The facts of this case do not make any case for accretion. “**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).

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.

*Id.* (Citing *Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1961)).

The Tenth Circuit has also been protective of employees’ individual rights under the NLRA. 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. 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).

In sum, the NLRA does protect individual rights. The modern cases in particular recognize these rights. The accretion doctrine has evolved to better protect these rights. UTA, Local 382 and now unfortunately, this Court, have denied that these rights exist. This Court

should realize that the 50-year-old cases cited by the defendants are no longer controlling, and instead, should at least use cases that have occurred since *Magnavox* to make its decision. The trend of the law is to protect the individual rights whereas the 50-year-old cases that are largely relied on by this Court do not. This case is liable to be subjected to a great deal of academic scrutiny since it raises cutting edge issues of the protection of individual rights under the NLRA. Moreover, this case has gained notoriety nationally among transit companies and unions. Lisa Burke, Michael Carper and the supporters of this suit have been labeled “rogues” by other entrenched bureaucratic unions.

With all due respect to the Court, the colloquy between this Court and counsel for the union was alarming in that both participants seem to assume that individual rights were not protected by the NLRA. Certainly, in a case of national prominence and importance, this Court would want to reach a well-reasoned decision.

This lawsuit is based on these individual rights and counsel for plaintiffs requests that a hearing be held in which the plaintiffs can explain the rights that they seek to have vindicated and have an opportunity to correct misconceptions that the Court appears to have that no individual rights exist under the NLRA. This will allow the Court to address this cutting edge legal issue appropriately.

**II. THE TRAX EMPLOYEES HAVE NO ABILITY TO GRIEVE RIGHTS UNDER THE SECTION 13(C) PROTECTIONS BECAUSE THE DEPARTMENT OF LABOR FAILED TO CONSIDER AN IMPORTANT ASPECT OF THE PROBLEM WHEN IT HELPED CREATE THE PROTECTIONS. THAT WAS THE ESSENCE OF THE LAWSUIT BY THE TRAX EMPLOYEES AGAINST THE DOL.**

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.<sup>1</sup> See *Thompson v. HUD*, 348 F. Supp. 2d 398, 457-59 (D. Md. 2005). "Thus a courts' 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.*

The plaintiffs have asserted that the protective arrangements are deficient. They have made essentially a failure to consider claim. Section 7 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 the 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 this Court has held that the plaintiffs failed to assert in their complaint that the Department of Labor knew about the 2004 dispute in 2001 when they approved the protective

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<sup>1</sup> 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 this 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 this Court to take any action but dismissal when it lacks subject matter jurisdiction.

arrangements, the law does not require such an impossible conclusion. 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 Court's finding is also flawed from a due process perspective. The 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) (Quoting *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, the reviewing court must determine whether the agency **considered all relevant factors** and whether there had been a clear error of judgment. *Id.* (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 so implausible that it could not be ascribed to a difference in view of 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 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 an 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).

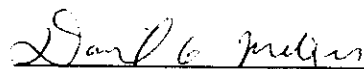
The Court, prior to making such a finding, should have reviewed the entire record as it existed in 2001. The district court must have before it the ‘whole record’ on which the agency acted. *Bar MK Ranches v. Yeutter*, 994 F.2d 735, 739 (10<sup>th</sup> Cir. 1993) (Citations omitted). Only after examining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

### CONCLUSION

This Court should hold oral arguments on the issue of individual rights under the NLRA. The Court demonstrated in summary judgment oral arguments that it does not understand the basis of the TRAX employees’ case. Since this case is of national importance and is on the cutting edge of the individual rights vs. collective rights under the NLRA, the Court should make a well-reasoned decision.

Once the Court understands that individual rights are protected under the NLRA, it will see that the contract does not apply to the TRAX employees and thus there cannot be any requirement to exhaust administrative remedies.

SUBMITTED THIS 12<sup>th</sup> day of June, 2005.



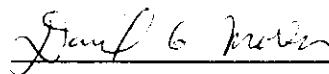
Attorney for Plaintiffs

**CERTIFICATE OF MAILING**

I hereby certify that on this 12<sup>th</sup> day of June, 2005, I caused to be mailed, postage prepaid, the foregoing **SUPPLEMENTAL SUMMARY JUDGMENT BRIEFING** to the following:

James S. Jardine  
Scott A. Hagen  
Ray Quinney & Nebeker  
P.O. Box 45385  
Salt Lake City, Utah 84145-0385

Joseph E. Hatch  
5295 South Commerce Drive  
Suite 200  
Murray, Utah 84107

  
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