

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, ET AL.,

Plaintiffs-Appellants,

v.

UTAH TRANSIT AUTHORITY, ET AL.,

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

District Court No. 2:04-CV-00985

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**BRIEF OF APPELLEES**  
**UTAH TRANSIT AUTHORITY AND JOHN INGLISH**  
(With Attachments in a PDF Document)  
**(Oral Argument Requested)**

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Defendants/Appellees Utah Transit Authority (“UTA”) and John English (together, “UTA”) submit this brief in opposition to the appeal of Plaintiffs/Appellants Lisa Burke (“Burke”) and Michael Carper (“Carper”).

### **STATEMENT OF JURISDICTION**

The district court had jurisdiction over the case by virtue of 28 U.S.C. § 1331, in that Burke and Carper asserted claims against UTA and the U.S. Department of Labor (“DOL”) for alleged violations of 42 U.S.C. § 1983, the Fourteenth Amendment to the U.S. Constitution, and Section 13(c) of the Urban Mass Transportation Act (codified as 49 U.S.C. § 5333(b)). The district court had supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over Burke and Carper’s state law claims against UTA and Local 382 of the Amalgamated Transit Union (“Local 382”) because the state law claims arose out of UTA’s alleged failure to (1) recognize a separate bargaining unit for TRAX employees; and (2) provide Burke and Carper with access to bulletin boards and other avenues of communication that were equal to the incumbent union, Local 382.

The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291 because this appeal challenges a final district court order. The notice of appeal is timely

because it was filed on August 22, 2005, within 30 days of the district court's August 15, 2005 order granting UTA's motion for summary judgment.<sup>1</sup>

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Did Burke and Carper present evidence that, if true, would establish all of the elements of their causes of action?

2. Did Burke and Carper's Rule 56(f) motion identify specific facts they hoped to uncover in discovery that, if true, would enable them to establish all of the elements of their causes of action?

3. Did the filing of the notice of appeal deprive the district court of jurisdiction to allow Burke and Carper's proposed amendments?

4. Assuming the district court had jurisdiction to allow an amendment, would the proposed amendment have prevented summary judgment on the causes of action against UTA?

5. Did the district court correctly determine as a matter of law based on undisputed facts that the existing bargaining unit was appropriate?

6. In light of the lack of any objection to the existing bargaining unit in 2001, when, prior to the filing of the complaint, the DOL most recently certified

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<sup>1</sup> It appears that no separate judgment was issued pursuant to Rule 58(a) of the Federal Rules of Civil Procedure. However, the district court's decision was intended as a final judgment. Under these circumstances, appellate review is appropriate. See Burlington Northern R.R. Co. v. Huddleston, 94 F.3d 1413, 1416 n.3 (10<sup>th</sup> Cir. 1996).

UTA's protective arrangements as adequate under Section 13(c) of the Urban Mass Transportation Act, and in light of the district court's determination that the existing unit is appropriate, did the district court err in dismissing the cause of action against the DOL?

7. Assuming that the claims against other parties were correctly dismissed, did the district court abuse its discretion in dismissing the state law claim against Local 382?

### **STATEMENT OF THE CASE**

This Statement of the Case is identical to that included in the Brief of Appellees Utah Transit Authority and John English filed in Appeal No. 05-4079, except that it includes the case history subsequent to the denial of Burke and Carper's second motion for preliminary injunction.

This action was filed on October 22, 2004 in the district court by Lisa Burke and Michael Carper, two UTA employees who work in UTA's TRAX (light rail) business unit. Burke and Carper alleged several claims arising out of UTA's refusal to recognize and bargain with a separate collective bargaining unit for UTA's TRAX employees.

On November 29, 2004, Burke and Carper filed a motion for preliminary injunction in which they sought to bar UTA from (1) transferring bus employees to the TRAX division; and (2) allowing such transferred employees to have system-

wide seniority. Burke and Carper also asked the district court to order UTA to allow them to post information on UTA bulletin boards regarding their efforts to organize a separate bargaining unit. The motion for preliminary injunction was heard on January 24, 2005 and subsequently denied by order dated January 25, 2005. Burke and Carper have not appealed this denial.

On January 31, 2005, less than one week later, Burke and Carper filed another motion styled as a motion for preliminary injunction, this time seeking an order barring UTA from continuing to recognize Local 382 as bargaining representative for TRAX employees. The stated basis for the second motion was that the district court's "previous order was manifest error because it applied the wrong legal standard to the facts." Aplt. App. (Case 05-4079) at 191. This motion, effectively a motion for reconsideration, was heard on April 9, 2005 and denied orally in court. Aplt. App. (Case 05-4079) at 317; Exhibit A hereto (transcript).

On December 22, 2004, Defendant United States Department of Labor moved to dismiss the case as against it on grounds that the cause of action failed to state a claim. This motion was granted by order dated April 6, 2005.

On March 25, 2005, UTA filed a motion for summary judgment as to all causes of action in the complaint directed against it. In addition, Burke and Carper filed a motion for partial summary judgment and for a court-ordered election to

designate a different bargaining representative for TRAX employees. These motions were fully briefed and oral argument was held on May 20, 2005. On August 15, 2005, the district court issued an order granting UTA's motion for summary judgment and denying Burke and Carper's motion for partial summary judgment. Burke and Carper have appealed from the grant of summary judgment to UTA but have not appealed from the denial of their motion for partial summary judgment.

At 11:48 p.m. on Sunday evening, August 14, 2005, Burke and Carper filed a motion for leave to amend their complaint in the district court's outside drop box. Aplt. App. at 169 (clerk's stamp). Due to the typical delay in transferring a motion from the office of the clerk of the court to the district judge assigned to a case, it is likely that the district court had already issued its order closing the case before it received any notice that a new motion for leave to amend the complaint had been filed. Burke and Carper never filed a motion to reopen the case for the purpose of deciding their motion for leave to amend. Rather than do so, Burke and Carper filed their notice of appeal on August 22, 2005, Aplt. App. at 9, which was one week after entry of the district court order granting summary judgment and two weeks before the due date for UTA's memorandum in opposition to the motion for leave to amend complaint.

## STATEMENT OF FACTS

This Statement of Facts is identical to that included in Appeal No. 05-4079, except that the citations are to the separate appendix filed by Burke and Carper in connection with this appeal.

This case is an attempt by Burke and Carper to elevate the status of themselves and other TRAX employees at the expense of UTA's other bargaining unit employees. In 1998, as UTA was preparing to begin TRAX operations, Local 382, the representative of all employees in a system-wide bargaining unit, negotiated an agreement with UTA that gave its constituency, UTA's operations, maintenance and parts employees, the right to TRAX positions by transferring into the TRAX division. *Aplee. Supp. App. at 4-5.* The agreement also provided for system-wide seniority and maintained Local 382 as representative of a system-wide bargaining unit (which would include TRAX employees). *Id.* This agreement was incorporated into a collective bargaining agreement that was ratified by vote of all represented employees at UTA. *Id.* There was no objection to this arrangement, which was plainly of great benefit to UTA's existing employees, including Burke and Carper.

In August 2004, after six years of representation in a system-wide unit, Burke presented a petition to UTA indicating that some TRAX employees were dissatisfied with Local 382's representation on the issue of seniority (they wanted

separate TRAX seniority), and that they wanted their own bargaining unit and their own representative. Aplee. Supp. App. at 6; Aplt. App. at 85. Based on the ratified agreement recognizing Local 382 as representative of the system-wide collective bargaining unit, and Utah law that requires UTA to recognize and bargain exclusively with the representative chosen by the majority of employees in an appropriate bargaining unit, UTA properly disregarded the petition. This lawsuit followed.

1. The Parties.

UTA is a political subdivision of the State of Utah. Pursuant to Utah law, it was established in 1969 to purchase the assets of private transit companies operating in the Salt Lake City metropolitan area and create a public transit service. For many years, UTA provided mass transportation services only through buses. However, in 1999, UTA commenced light rail, or “TRAX,” operations. UTA’s TRAX operations center is headquartered in Salt Lake County, where the TRAX vehicles are housed and maintained, and TRAX services are provided extensively in Salt Lake County. The TRAX system is designed as part of an integrated transit system.

UTA is organized into several business units, including two bus units and the TRAX unit located in Salt Lake County, and bus units in Ogden and Provo, respectively. Employees assigned to the TRAX business unit provide services at

the TRAX center and throughout the UTA system wherever TRAX service is provided. Employees assigned to the bus units provide services at the operations centers for those units and in the related service areas for those units. Each business unit is headed by a manager, who in turn reports to UTA's general manager.

Burke and Carper are currently employed in UTA's TRAX business unit (where they drive TRAX light rail vehicles), but they were initially hired and worked for many years in UTA's bus divisions (where they drove buses). Burke was hired as a bus operator at UTA on or about November 13, 1978 and Carper was hired as a bus operator on or about November 29, 1993. Aplee. Supp. App. at 4.

Local 382 was recognized as the exclusive collective bargaining representative for UTA's operations, maintenance, and parts employees over 100 years ago in 1904 and since then has continuously represented bargaining unit employees at UTA and its predecessors, always in a single, system-wide bargaining unit. In the early years of the twentieth century, Local 382 represented streetcar employees, as gasoline powered buses were not yet in existence. In the 1940s, streetcars were phased out and buses were substituted. During this period, Local 382 represented both bus employees and streetcar employees. After

streetcars were phased out, Local 382 represented only bus employees until UTA commenced TRAX operations in 1999. Aplee. Supp. App. at 4.

2. Agreement To Include TRAX Jobs In Existing Bargaining Unit.

In 1995, as UTA planned to implement TRAX operations, UTA and Local 382 (in its capacity as bargaining representative of UTA's operations, maintenance and parts employees) conducted negotiations over the issue of whether the new TRAX jobs would be considered union or non-union work. At the conclusion of those negotiations, UTA and Local 382 agreed essentially that Local 382 would have the power and authority to bargain for positions performing work in the TRAX unit that was comparable to work performed by bargaining unit employees in bus units, *i.e.*, operations, parts and maintenance. Aplee. Supp. App. at 4.

This initial agreement was followed in July 1998 by a subsequent agreement that, among other things, TRAX employees would be drawn from UTA's existing bus units and that bus employees transferring into the TRAX business unit would retain the same seniority they had accumulated as bus employees. Thus, seniority would be tracked on a system-wide basis (within the categories of operations, parts, and maintenance). Aplee. Supp. App. at 5.

This agreement on transfer and seniority was then included in the "Collective Bargaining Agreement between Utah Transit Authority and Amalgamated Transit Union, Local 382" dated December 11, 1998 ("1998

Contract”). The 1998 Contract was ratified by vote of all employees in the bargaining unit. Aplee. Supp. App. at 5.

The effect of these agreements was to set aside the new TRAX jobs for existing UTA employees who were members of the system-wide bargaining unit represented by Local 382. Burke and Carper were members of that system-wide bargaining unit and were beneficiaries of these agreements.

The 1998 Contract also recognized Local 382 as the exclusive bargaining representative of all employees covered by the contract, including TRAX employees. Aplee. Supp. App. at 165. All employees in the bargaining unit at the time of the election in 1998, which includes Burke and Carper, were given the opportunity to vote on the 1998 Contract. In fact, Burke and Carper have never denied that they themselves voted in favor of the 1998 Contract.

3. Burke And Carper, Along With Others, Transfer To TRAX Jobs.

Pursuant to the transfer and seniority provisions set out in the aforementioned agreements, Burke transferred from UTA’s Meadowbrook business unit (one of the Salt Lake County bus units) into the TRAX business unit on or about October 11, 1999 (along with other bus operators). Aplee. Supp. App. at 5. Carper transferred into the TRAX unit from Meadowbrook pursuant to the same provisions of the 1998 Contract on or about January 25, 2000 (again, along with other bus operators). Aplee. Supp. App. at 5.

During that initial time period, and on regular occasions thereafter, additional bus operators, and parts and maintenance employees transferred from UTA bus units to the TRAX unit. The initial complement of employees was entirely made up of employees from the bus division. There are presently TRAX employees who were hired directly into TRAX, but they were not hired until later. Aplee. Supp. App. at 5-6.

Whenever employees transferred to the TRAX division, the transferring employees retained their system-wide seniority based on the 1998 Contract. Although such seniority would not allow a newly-transferred employee to “bump” a TRAX employee with lower seniority back to a bus unit, a newly-transferred employee could bump such an employee to a less desirable shift. The 1998 Contract also allowed TRAX employees, at their option, to transfer back into a bus unit. Aplee. Supp. App. at 5.

Burke and Carper, along with all other employees who transferred into the TRAX unit, received extensive training before and after beginning their duties as TRAX employees. Aplee. Supp. App. at 6.

4. Negotiation And Ratification Of New Collective Bargaining Agreement.

In August 2003, UTA and Local 382 began negotiating a new collective bargaining agreement. The negotiations resulted in a tentative agreement in

May 2004, but it failed to win ratification from employees. Aplee. Supp. App. at 6.

On July 27, 2004, after further negotiations, UTA and Local 382 signed a second tentative agreement. Thereafter, it was distributed to members of the bargaining unit in preparation for a vote on ratification. Aplee. Supp. App. at 6.

On August 5, 2004, Burke submitted to UTA management a letter containing the following petition:

August 2, 2004

To the Utah Transit Authority:

We, the undersigned members of the TRAX bargaining unit, are notifying the Utah Transit Authority that we do not accept the Amalgamated Transit Union, local 382, as an appropriate bargaining unit to represent us. The ATU has failed to adequately address the seniority issue at TRAX and it appears that there are irreconcilable differences between the goals of bus and rail employees.

Please be on notice that should the contract pass, we will explore all of our options regarding forming or joining a new union. We will also exercise our right to negotiate a separate contract if the Utah Labor Commission agrees with our assessment that the present bargaining unit is an inappropriate bargaining unit for TRAX.

UTA had not previously received any formal objection to the existing bargaining unit. Aplee. Supp. App. at 6, Aplt. App. at 84-85.

On August 10, 2004, the members of the bargaining unit ratified the Collective Bargaining Agreement between Utah Transit Authority and Amalgamated Transit Union, Local 382 effective as of December 11, 2003 (“2003

Contract”). The 2003 Contract was then signed by the Local 382’s leaders and UTA management on August 11, 2004. Aplee. Supp. App. at 6. The 2003 Contract states that UTA “recognizes the Union [Local 382] as the sole and exclusive collective bargaining agent for all bus and TRAX operators . . . , parts and maintenance employees” of UTA. Aplee. Supp. App. at 166.

The 2003 Contract maintained the same language regarding transfer of employees into the TRAX unit and seniority. However, it also included a side letter agreement that established a task team to study the seniority issue:

This letter will serve to reflect our agreement that before October 1, 2004, the Authority will establish a task team to study alternatives to the current TRAX seniority system. The task team members or their designees will seek input from TRAX employees and bus employees. On or before October, 2005, the task team will provide, to an Oversight Committee, recommended alternatives to the current TRAX seniority system.

Aplee. Supp. App. at 6-7.

5. Bargaining Units In Other Transit Districts.

The vast majority of transit authorities across the United States that provide both bus and light rail operations have both bus employees and rail employees in the same collective bargaining unit and represented by the same union. Aplee. Supp. App. at 7.

6. Section 13(c) Labor Protective Conditions.

As a condition to UTA's receipt of funding from the Federal Transit Administration, UTA is required to enter into an agreement pursuant to Section 13(c) that contains labor protective conditions. These protective conditions have been applied to all federal capital funding received by UTA pursuant to the Federal Transit Act since 1993. Aplee. Supp. App. at 7-8.

Burke and Carper's ultimate goals, as stated in their complaint, are to secure a change in the existing seniority rules so that bus operators cannot "'bump' into the TRAX seniority roster," Aplt. App. at 14, and to get higher pay. Id. at 15. The petition submitted to UTA in August 2004 also specifically identified the seniority issue as the reason the signers of the petition sought separate representation. Aplt. App. at 84-85.

**SUMMARY OF ARGUMENT**

The district court did not err in granting UTA's motion for summary judgment because there was no genuine dispute as to the material facts and UTA was entitled to a judgment as a matter of law. Burke and Carper failed to identify any genuine disputes because they did not present evidence in support of their allegations. Instead, they simply identified several allegations from the complaint that were denied in UTA's answer. Burke and Carper also argued that the determination of the appropriate bargaining unit is inherently fact-based.

However, they failed to present evidence of any facts that show the existing unit is not appropriate.

Burke and Carper's accretion argument must be rejected for several reasons. First, too much time has passed. There is now an existing unit with a bargaining history of several years. Second, under cases decided by the National Labor Relations Board, Local 382 would have continued as the bargaining representative of any separate TRAX unit and could have agreed to a combined unit. Third, based on additional Board precedents, UTA was free to agree with Local 382 to include the TRAX jobs in the existing unit and recognize Local 382 as the representative, so long as Local 382 had majority support among TRAX employees at the time of the initial complement of TRAX employees. Because the initial complement all transferred over from bus jobs, Local 382 is deemed to have had that majority support.

The district court properly denied Burke and Carper's Rule 56(f) motion because it did not properly comply with the rule. Their affidavit in support identified some proposed discovery in general terms, but there was no explanation at the district court level or on appeal of how the expected answers would help prevent summary judgment.

The district court did not abuse its discretion in failing to allow Burke and Carper's proposed amendment because their notice of appeal deprived the district

court of jurisdiction to act on the motion for leave to file an amended complaint. Moreover, the proposed amendment would not have prevented summary judgment in favor of UTA.

The 1998 collective bargaining agreement, which recognized Local 382 as the bargaining representative of the system-wide bargaining unit, including TRAX positions, and provided for preferential transfer rights from bus positions to TRAX positions, did not waive any right of TRAX employees to choose their bargaining representative. TRAX employees have always had the right, along with other employees in the bargaining unit, to choose a different representative. They still have that right. However, although each employee has an individual right to vote, the ability to choose a bargaining representative is by definition a collective right. The TRAX employees voted on the 1998 CBA as bus employees and then transferred, pursuant to its provisions, into the TRAX division. They never objected at that time or thereafter until August 2004, six years after the 1998 CBA was ratified.

The district court did not weigh the evidence in granting the motion for summary judgment. Burke and Carper submitted conclusory and irrelevant evidence that the district court properly disregarded. They did not address the facts they claim are inherent in the analysis of the appropriate bargaining unit, instead

focusing on the single argument of accretion. Furthermore, the First Amendment claim was decided as a matter of law based on Burke and Carper's alleged facts.

The district court properly dismissed the claim against the DOL because the scope of the bargaining unit was not raised as an issue when UTA's protective arrangements were last certified by the DOL in 2001.

Finally, the claim against Local 382 was properly dismissed because the other claims had been dismissed and it was based on state law.

## **ARGUMENT**

### **I. THERE WERE NO FACTUAL DISPUTES THAT BARRED SUMMARY JUDGMENT.**

#### **A. Burke and Carper's Purported Disputes Were Neither Genuine Nor Material.**

Burke and Carper first argue that the district court erred in granting UTA's motion for summary judgment because there were allegedly disputed issues of fact that precluded the district court from ruling as a matter of law. This argument fails because the disputes were neither genuine nor material, as Burke and Carper failed to present evidence in support of their asserted facts, and failed to indicate how their facts contradicted the district court's legal rulings.

Burke and Carper's purported factual disputes are not genuinely disputed because their disputes are based only on the pleadings, and lack evidentiary support. It is well-settled that merely identifying allegations from the complaint

and corresponding denials from the answer does not constitute identifying genuine issues of disputed fact because there is no evidence. Lujan v. National Wildlife Federation, 497 U.S. 871, 888, 110 S. Ct. 3177, 3188 (1990) (“Rule 56(e) provides that judgment ‘shall be entered’ against the nonmoving party unless affidavits or other *evidence* ‘set forth specific facts showing that there is a genuine issue for trial.’”) (emphasis added). Lowell Staats Mining Co. v. Philadelphia Electric Co., 878 F.2d 1271, 1275 (10<sup>th</sup> Cir. 1989) (same). Accordingly, the mere fact that paragraphs 27-31, 56-57, 60, and 65-66 of the complaint were denied in UTA’s answer does not mean that the allegations in those paragraphs are genuinely disputed for purposes of summary judgment. The district court did not err in granting summary judgment despite the presence of these purported disputes.

**B. The District Court Properly Determined As A Matter Of Law That The Existing Unit Was Appropriate.**

Burke and Carper also argue that the issue of the “existence of an appropriate bargaining unit” is inherently fact-based, and therefore may not be decided in a summary judgment. Aplt. Brief at 9. On the contrary, the district court properly determined as a matter of law that the existing bargaining unit was appropriate.

1. UTA’s Facts Were Undisputed.

First, the undisputed facts asserted by UTA in support of its motion for summary judgment were never disputed by Burke and Carper. Accordingly, the

district court properly considered them to be undisputed for purposes of deciding the legal issue of whether the existing system-wide bargaining unit was “an appropriate unit” under Utah law.

UTA set forth 17 statements of undisputed fact in its initial memorandum in support of motion for summary judgment. In their response, Burke and Carper failed to dispute any of them. Although they listed their own 17 statements of “material disputed facts,” Aplt. App. at 123-24, none of those statements purported to dispute UTA’s asserted undisputed facts. Rule 56-1(c) of the district court’s local rules requires that the nonmoving party list all material disputed facts, and that those facts must identify the “number of the movant’s fact that is disputed.” DUCivR 56-1(c), Exh. A hereto. If the moving party’s undisputed facts are not specifically controverted in this way, they will be “deemed admitted.” *Id.* Burke and Carper’s facts did not specifically or even generally address UTA’s facts. Thus, UTA’s facts were not controverted in any way. Pursuant to federal law and the district court’s local rules, UTA’s facts were undisputed. See Taylor v. Pepsi-Cola Co., 196 F.3d 1106, 1108 n.1 (10<sup>th</sup> Cir. 1999) (affirming grant of summary judgment based in part on the district of Colorado’s local rules and nonmoving party’s failure to controvert statement of undisputed facts).

2. Burke and Carper's Facts Were Not Supported by Admissible Evidence.

Second, Burke and Carper's list of 17 "material disputed facts" was largely unsupported by admissible evidence, as required at the summary judgment stage. Lowell Staats, 878 F.2d at 1275 (the nonmovant "cannot rest on the allegations of the complaint; rather it must produce some evidence showing a genuine issue for trial"). Their facts 1 and 2 were supported by reference to affidavits, but the remaining 15 facts merely referenced the pleadings, Aplt. App. at 123-24, which is insufficient. Moreover, the first two facts merely stated that the TRAX employees have not had an election that was not part of a larger election held in the entire bargaining unit, and that the TRAX employees' ultimate goal is to have their own bargaining representative to negotiate issues of pay, seniority, and safety. Aplt. App. at 123.

3. Burke and Carper Do Not Explain How The Existing Unit Is Not Appropriate.

Third, Burke and Carper do not explain how, based on evidence in the record, the existing system-wide bargaining unit is inappropriate. They merely argue that it is a factual issue. Aplt. Brief at 10. Specifically, Burke and Carper argue that the existing unit is improper because it is an improper accretion, and that the district court could not decide this as a matter of law because accretion analysis is "factually intensive" and not "amenable to summary judgment." Aplt. Brief at

10. In addition, Burke and Carper add that even the question of “severance” is inherently factual. Id.

However, Burke and Carper do not explain how, based on the facts that they have alleged, and considering the undisputed facts stated by UTA, accretion applies here and why it means that the existing bargaining unit is not appropriate. More importantly, although Burke and Carper point out factual disputes based on the denials in UTA’s answer, they do not point to the evidence in the record that supports their allegations. Their argument regarding severance is flawed for the same reason. A severance analysis requires consideration of several factors, see generally *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387, 397 (1966) (listing six areas of inquiry), but Burke and Carper have not pointed to any evidence in the record that weighs in favor of a severance in this case.

4. Burke and Carper’s Accretion Analysis is Flawed.

Furthermore, Burke and Carper’s accretion analysis is fundamentally flawed for several reasons explained in UTA’s brief in the companion appeal (No. 05-4079). First, the question under Utah Code Ann. § 17A-2-1031 is simply whether UTA has recognized and bargained exclusively with the representative of a majority of employees in “an appropriate bargaining unit.” Utah Code Ann. § 17A-2-1031, Exh. B hereto. There is simply no dispute that the existing system-wide unit is “an appropriate unit.”

Second, even if the National Labor Relations Board had jurisdiction, accretion analysis would not be relevant because too much time has gone by. Back in 1995-1999, when UTA bargained with Local 382 over the new TRAX jobs, came to agreement that Local 382 would have jurisdiction over those jobs, staffed the TRAX division with a representative complement of employees, and began TRAX service, no one objected. In fact, the first objection was lodged several years later, in August 2004. Thus, the objection was made after several years of established bargaining history, not at the time of the alleged wrongdoing. If this were before the Board, it would evaluate the situation as it existed in 2004 at the time of the objection, not back in 1998 or 1999. See Gibbs & Cox, Inc., 280 N.L.R.B. 953 (1986). Burke and Carper have not cited any case or offered any rationale for their assertion that an election was required where there was no request.

Third, even if, consistent with Burke and Carper's theory, the TRAX employees were in a hypothetical separate unit when the TRAX division was formed, Local 382 would have continued to serve as bargaining representative, Gitano Group, Inc., 308 N.L.R.B. 1172 (1992), and could have agreed to a combined unit. White-Westinghouse Corp., 229 N.L.R.B. 667 (1977). The end result is the same.

Fourth, so long as Local 382 had majority support in the TRAX division at the time when a representative complement of employees had been transferred to the new job, UTA was free to recognize Local 382 based on the 1998 Contract. See Kroger Co., 219 N.L.R.B. 388 (1975). The Gitano presumption and the lack of objection at the time demonstrates that Local 382 had that majority support.

Given (1) UTA's 100-year history of bargaining with a single union representing all employees in an employer-wide bargaining unit; (2) the agreement to continue that same arrangement with the opening of TRAX service, which agreement was ratified by employees; (3) the near-universal practice in the United States of including both TRAX and bus employees in system-wide bargaining units; and (4) the fact that UTA provides a single product to the public through a unified system; the district court correctly determined as a matter of law that the existing bargaining unit is appropriate.

**II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING BURKE AND CARPER'S RULE 56(f) MOTION BECAUSE THEY NEVER EXPLAINED HOW THE PROPOSED DISCOVERY MIGHT PREVENT SUMMARY JUDGMENT.**

Burke and Carper argue that the district court abused its discretion in denying their motion for a continuance under Rule 56(f) of the Federal Rules of Civil Procedure. Rule 56(f) provides that the district court may order a continuance or deny the motion for summary judgment if it appears from the non-moving party's affidavits that the party cannot "present by affidavit facts essential

to justify the party's opposition." Fed. R. Civ. P. 56(f), Exh. C hereto. The non-moving party "must demonstrate 'how additional time will enable him to rebut movant's allegations of no genuine issue of fact.'" Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828, 833 (10<sup>th</sup> Cir. 1986) (quoting Weir v. Anaconda Co., 773 F.2d 1073, 1083 (10<sup>th</sup> Cir. 1985)). In this case, Burke and Carper filed an affidavit in the district court that identified what they described as factual issues or disputes. However, they did not show how the facts they hoped to get in discovery would prevent summary judgment. Burke and Carper's appeal brief also fails to explain how these facts would help prevent summary judgment.

First, Burke and Carper argue that they would have conducted discovery regarding individual employee preferences for the existing bargaining unit and representative. Aplt. App. at 147, ¶¶ 6-7. However, those questions were resolved in favor of the existing bargaining unit and representative by the August 2004 ratification of the latest collective bargaining agreement, which identified Local 382 as the collective bargaining representative of the existing bargaining unit.

Second, Burke and Carper argue that they requested discovery on bus and TRAX jobs, but they did not explain how any such information would prevent summary judgment. Aplt. Brief at 14. In addition, they failed to explain why this information was not already in their possession, as both Burke and Carper, like the vast majority of other TRAX employees, transferred over from bus jobs.

Third, Burke and Carper argue that they asked to conduct discovery regarding employee benefits granted to Steve Booth, then-president of Local 382, in a meeting with John English, and that such information would have helped them resist summary judgment on “Count I,” which alleges violations of 42 U.S.C. § 1983 and the First Amendment. Aplt. Brief at 14. However, Burke and Carper do not explain how the information would have helped prevent summary judgment, particularly in light of the fact that Count I contains no allegations regarding any improper inducement or favoritism. See Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264-65 (10<sup>th</sup> Cir. 1984) (56(f) motion should be denied if information sought is irrelevant to summary judgment motion).

Fourth, Burke and Carper claim that they needed discovery on safety issues, “which demonstrates the ineffectiveness of the present representation.” Aplt. Brief at 14. Again, they do not explain how such information would have helped resist summary judgment. In fact, they do not even explain what specific discovery they would have sought. A proper Rule 56(f) motion must describe what discovery is sought and what information is expected to be discovered. Allen v. Bridgestone/Firestone, Inc., 81 F.3d 793, 797-98 (8<sup>th</sup> Cir. 1996); Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 842 (9<sup>th</sup> Cir. 2002).

Finally, Burke and Carper argue that they would have pursued discovery of whether John English, in riding a TRAX train and writing a letter to employees,

intended to intimidate them. Aplt. Brief at 15. UTA admitted that English rode the train and wrote the letter to employees, which was part of the record. In doing so, he acted well within his right to express his opinion on unions or any particular union. Missouri National Ed. Ass'n v. New Madrid County R-1 Enlarged School Dist., 810 F.2d 164, 166-67 (8<sup>th</sup> Cir. 1987) (public employers are free to express opinion on unions so long as they do not discriminate against employees based on union activities). There is no evidence that any employee was ever discharged, demoted, or otherwise discriminated against based on any pro-union or anti-union activities. Accordingly, discovery of English's intent was unnecessary.

**III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO ALLOW LEAVE TO AMEND BECAUSE THE NOTICE OF APPEAL DEPRIVED IT OF JURISDICTION AND BECAUSE THE AMENDMENT WOULD NOT HAVE PREVENTED SUMMARY JUDGMENT.**

Burke and Carper next argue that the district court abused its discretion in denying their motion for leave to amend. The motion for leave to amend was filed at 11:48 p.m. on Sunday, August 14, 2005. Because the motion was served by mail, UTA's memorandum in opposition to the motion was due on September 1, 2005. See DUCivR 7-1(b)(3) (opposition due 15 days after service of motion) (Exh. D hereto); Fed. R. Civ. P. 6(e) (three days added for service by mail). The district court order granting UTA's motion for summary judgment and administratively closing the case was issued on Monday, August 15, 2005.

Following issuance of that order, Burke and Carper made no effort to seek a decision on the motion for leave to amend, but simply filed their notice of appeal on August 22, 2005, before any opposition memorandum was due.

**A. The District Court Lacked Jurisdiction To Allow The Amendments.**

It is well-settled that the filing of a notice of appeal deprives the district court of jurisdiction to take further action in the case. “The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S. Ct. 400, 402 (1982). This Court has further stated that the filing of a timely notice of appeal “transfers the matter from the district court to the court of appeals. The district court is thus divested of jurisdiction. Any subsequent action by it is null and void.” Garcia v. Burlington Northern R.R. Co., 818 F.2d 713, 721 (10<sup>th</sup> Cir. 1987) (citations omitted). After the notice of appeal is filed, the district court has jurisdiction to deal only with “collateral matters not involved in the appeal.” Id.

In this case, Burke and Carper’s proposed amendment affects claims that are under appeal. The amendment modifies the allegations and causes of action against the defendants, and Burke and Carper have appealed the dismissal of all claims, whether pursuant to the DOL’s motion to dismiss or UTA’s motion for

summary judgment. Thus, the subject matter of the amendment is the same as the subject matter of the appeal. Accordingly, as soon as the notice of appeal was filed on August 22, 2005, the district court was without jurisdiction to allow Burke and Carper's proposed amendment to the complaint. See Denny v. Barber, 576 F.2d 465, 469 (2d Cir. 1978) (district court properly denied motion for leave to amend on grounds that, upon filing of notice of appeal, it lost jurisdiction to allow an amendment). Therefore, the district court did not err in failing to act on Burke and Carper's motion for leave to amend.

**B. The Proposed Amendment Would Not Have Prevented Summary Judgment For UTA.**

Furthermore, the motion for leave to amend fails on its merits. In Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227 (1962), the Supreme Court held that:

In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be “freely given.”

371 U.S. at 182, 83 S. Ct. at 230. In this case, the amendment would have been futile, in that it would not have prevented summary judgment for UTA. Burke and Carper did not specify the changes made in the proposed amended complaint. They stated that it was “primarily driven by the decision of the DOL to certify new protective arrangements during the pendency of this action.” Aplt. App. at 173.

Burke and Carper described the new allegations against UTA as “minor and result[ing] primarily from a decision to reduce the meager training given to bus operators to become rail operators.” Id. at 173-74.

Burke and Carper have not explained on appeal how their amendment would have affected the decision on the motion for summary judgment dismissing their claims against UTA. Although they cite a 12-part analysis applied by the National Labor Relations Board in determining appropriate bargaining units, the ability to bargain for better safety or any other specific term or benefit is not one of the factors for consideration. See Aplt. Brief at 9-10 n.2 (quoting Baltimore Sun Co. v. N.L.R.B., 257 F.3d 419, 429 (4<sup>th</sup> Cir. 2001)). In fact, Burke and Carper did not attempt to oppose the motion for summary judgment on any such ground. Aplt. App. at 132-42. Accordingly, any such amendment would not have prevented summary judgment and is therefore futile.

#### **IV. TRAX EMPLOYEES WERE PROPERLY INCLUDED IN THE EXISTING BARGAINING UNIT THROUGH THE PROCESS OF NEGOTIATION AND RATIFICATION.**

Burke and Carper allege that UTA and Local 382 engaged in a “backroom deal” when they agreed that Local 382 would have jurisdiction over TRAX positions that were similar to existing bargaining unit work. They go on to claim that this agreement resulted in the TRAX employees’ choice of bargaining representative being “waived” on their behalf, and the grant of summary judgment

was in error because it allowed this to happen. Aplt. Brief at 19-23. This view of the facts and the law is incorrect and must be rejected.

**A. There Was No “Backroom Deal.” The Agreement Was Properly Negotiated And Ratified By Employees Without Objection.**

It is undisputed that at the time of this alleged “backroom deal,” Local 382 represented all UTA operators, parts employees and maintenance employees. When Local 382 learned that UTA was preparing to provide TRAX service, it sought, on behalf of the employees it represented, to keep the new jobs within the existing bargaining unit, so that the new jobs would be union jobs. Local 382 succeeded in obtaining agreement with UTA that existing bargaining unit employees would have a preferred right to transfer into the new TRAX jobs, and that such jobs would be included within the existing bargaining unit. This agreement was then incorporated into a new collective bargaining agreement, the 1998 Contract, which was negotiated by Local 382 and ratified by employees in 1998.<sup>2</sup>

Pursuant to the 1998 CBA, Burke and Carper both transferred into the TRAX unit and are now TRAX operators. Neither Burke nor Carper have ever

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<sup>2</sup> Counsel for Local 382 stated at oral argument on the motion for preliminary injunction that Local 382 also sought to include transit security officers and landscapers in the existing bargaining unit, but was unable to secure agreement with UTA on those proposals. Aplt. App. at 18-19. Local 382’s inability to get everything it sought undermines Burke and Carper’s contention that this was some kind of a “backroom deal.”

claimed to have voted against the 1998 Contract or objected at the time to the arrangement through which they became TRAX operators. In fact, there was no formal objection until August 2004, when Burke and Carper presented their petition demanding separate representation after a tentative collective bargaining agreement had been negotiated.

In short, the facts show that at the time of the 1998 Contract, Local 382 represented all employees affected by any “backroom deal,” and that those employees, including Burke and Carper, ratified the agreement and then took advantage of its favorable provisions to transfer into the TRAX unit and obtain the jobs they sought. They waived no rights at all, whether individual or collective, and they voted on the very language stating that TRAX employees would be encompassed within the existing system-wide bargaining unit and Local 382 would be their exclusive bargaining representative. The TRAX employees therefore chose their bargaining representative and endorsed the scope of the bargaining unit.

**B. The Scope Of The Bargaining Unit Was Properly Addressed In The Agreement.**

Burke and Carper’s legal argument is also incorrect. First, contrary to their argument, representation issues can and often are addressed in collective bargaining agreements. As stated in a respected labor law treatise, the scope of the bargaining unit is a permissive subject of bargaining:

Whenever bargaining takes place without a prior Board definition of the unit, the parties must agree upon the unit to be covered by the contract they negotiate. “The parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining.” Even when the Board has defined a unit, the parties are free to agree on a negotiated unit different from the certified or recognized unit. . . . The Board accepts as lawful the bargaining units that the parties establish by consensual agreement.

1 Patrick Hardin & John E. Higgins, Jr., *The Developing Labor Law*, 1257-58 (4<sup>th</sup> ed. 2001). Indeed, in Kroger Co., 219 N.L.R.B. 388, 389 (1975), the Board approved a collective bargaining agreement that provided for inclusion in the existing bargaining unit of future employees in future locations, so long as the union had majority status at the time those locations had a full complement of employees.

The cases cited by Burke and Carper are consistent with these principles. The case of N.L.R.B. v. Magnavox Co., 415 U.S. 322, 94 S. Ct. 1099 (1974) stands for the proposition that a union cannot waive the right of employees to disseminate handbills regarding their choice for bargaining representative. There is no claim in this case that any employee has been barred from passing out handbills or otherwise speaking out in favor of a particular bargaining representative. Moreover, N.L.R.B. v. Paper Manufacturers Co., 786 F.2d 1163 (3<sup>rd</sup> Cir. 1986), also cited by Appellants, is merely an assertion of the Board’s jurisdiction, as opposed to arbitrators, in representation matters. It does not mean that the Board

will not uphold contractual agreements regarding representation matters, as evidenced by the Kroger case, among others.

Similarly, UTA does not dispute the general principle that employees in a bargaining unit retain individual economic rights. However, they do waive the right to represent themselves in negotiating terms of employment with management, and they cannot individually dictate the scope of their bargaining unit, the choice of their bargaining representative, or bargaining goals and strategy. Those rights are collective rights, and must be exercised as a group.

Finally, Aramark Services, Inc., 2002 N.L.R.B. LEXIS 521 (Oct. 21, 2002) (copy attached as Exh. E), also cited by Burke and Carper, strongly supports UTA's position. In Aramark, the employer recognized a union as bargaining representative in a new location before a "representative complement" of employees was present, thus shutting out another union with a legitimate claim of representational status. The Board held that such recognition was unlawful, but it explained that its decision would have been different if only one union had been involved or if the union and employer had previously entered into an agreement providing for recognition so long as the union had majority status. 2002 N.L.R.B. LEXIS at \*\*7-8 (distinguishing Kroger Co., 219 N.L.R.B. 388 (1975) and Gitano Distribution Center, 308 N.L.R.B. 1172 (1992)).

In this case, only one union was involved and the Gitano presumption of continuing majority status applies because all employees in the initial complement came from the existing bargaining unit. Thus, under Aramark, the determination of the scope of the bargaining unit and of the bargaining representative in this case complied with federal labor policy.

**V. THE DISTRICT COURT DID NOT IMPROPERLY WEIGH THE EVIDENCE IN GRANTING UTA’S MOTION FOR SUMMARY JUDGMENT BECAUSE BURKE AND CARPER PRESENTED NO EVIDENCE TO WEIGH.**

Burke and Carper also argue that the district court erred because it improperly weighed the evidence in granting UTA’s motion for summary judgment. Aplt. Brief at 23-26. This argument fails because Burke and Carper’s evidence failed as a matter of law to create any genuine dispute of material fact.

Burke and Carper first argue that the district court “ignored affidavits that the [existing] unit was not appropriate.” Aplt. Brief at 24. The cited affidavit excerpts, however, were conclusory and thus not sufficient to create a genuine factual dispute. The affidavit excerpts stated as follows:

9. The approximately 150 workers at TRAX share a community of interest that is separate and apart from those of the bus operations at the UTA. Rail operations are different than bus operations. They involve different rules and different skills.

Affidavit of Michael Lee Carper, Aplt. App. at 72, ¶ 9.

15. I transferred from UTA bus operations to TRAX in late summer of 1999 and was among the first TRAX operators. Since

TRAX went into service in 1999, many if not most, TRAX personnel have complained about the unfair seniority system and the lack of representation of the interests of TRAX employees by the incumbent local 382. Although TRAX was a new division and, in fact, an entirely different craft, local 382 asserted its authority over the unit and accreted the TRAX employees into Local 382 without a vote of the employees. In my opinion, and the opinion of those who signed the petitions, TRAX employees do not share a community of interest with the bus employees due to the different demands inherent in the operation of a rail unit.

Affidavit of Lisa Jeanne Burke, Aplt. App. at 77, ¶ 15.

Both of these statements are conclusory. The determination whether a “community of interest” exists requires consideration of twelve criteria, as Burke and Carper state elsewhere in their brief. See Aplt. Brief at 9 n.2 (citing Baltimore Sun Co. v. N.L.R.B., 257 F.3d 419, 429 (4<sup>th</sup> Cir. 2001)). The affidavits cited by Burke and Carper, however, do not address any of these twelve criteria. They merely state the conclusion that TRAX employees do not share a community of interest with bus employees. Conclusory statements are not admissible and cannot create a genuine dispute of fact. Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10<sup>th</sup> Cir. 1995) (“To survive summary judgment, nonmovant’s affidavits must be based upon personal knowledge and set forth facts that would be admissible in evidence; conclusory and self-serving affidavits are not sufficient.”) (citation and internal quotes omitted). Therefore, the district court properly ignored these conclusory statements in granting UTA’s motion for summary judgment.

Furthermore, Burke and Carper never argued before the district court that their affidavits demonstrated that TRAX employees did not share a community of interest with bus employees. In fact, their memorandum in opposition to UTA's motion for summary judgment referenced the affidavits in paragraphs 1 and 2 of their "Statement of Material Disputed Facts," and then never mentioned them again. Aplt. App. 122-43. These affidavits were also never referenced in oral argument. Aplt. App. at 306-87.

Burke and Carper's failure to analyze whether the existing unit was appropriate was not accidental. Their only argument against the existing unit was that by virtue of the rules of "accretion," UTA and Local 382 were required to give the TRAX employees a right to vote separately on the issue of whether to be included in the existing bargaining unit. Indeed, they explicitly conceded in oral argument that the existing unit was appropriate; their only issue was the lack of a separate vote, which they argued was required regardless of whether the system-wide unit was appropriate:

If it is an accretion case, and we – we have cited many, many cases to this court that would show that it is the issue isn't whether the existing unit is an appropriate bargaining unit. We have no issue with that. Of course it is an appropriate bargaining unit if the TRAX people have had an opportunity to vote themselves into that union which they have not.

Aplt. App. at 369 (argument of Mr. Wells, counsel for Burke and Carper). For these reasons, the district court did not overlook any genuine disputes of material fact in determining as a matter of law that the existing unit was appropriate.

Burke and Carper also claim they presented evidence that John English and UTA's general counsel interfered with TRAX employees' freedom of association. Aplt. Brief at 25-26. However, they presented no evidence in support of their assertion that English "intimidated" TRAX employees by riding a TRAX train and sending a letter to all bargaining unit employees endorsing the proposed collective bargaining agreement, and that UTA gave the Local 382 president special treatment. Instead, Burke and Carper's brief cites only to their complaint and to oral argument. See Aplt. App. at 23, 321-25. Again, without admissible evidence, the claim must be rejected.<sup>3</sup>

Burke and Carper also assert that the district court weighed the evidence in rejecting their claim that UTA violated the First Amendment by refusing to allow Burke to post information regarding labor rights. Aplt. Brief at 25; Aplt. App. at 38-39, 75-76. Contrary to Burke and Carper's assertion, however, the district court did not weigh this evidence; it assumed it was true, but found it was legally

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<sup>3</sup> Burke and Carper may base their assertion that the district court weighed the evidence on the district court's statement that the evidence of intimidation was "very thin." Order Granting Defendants' Motion for Summary Judgment, Exh. C to Aplt. Brief, at 10. The district court noted, however, that the "evidence" consisted only of "allegations about John English." Id. Accordingly, there was no evidence to weigh, as the district court understood.

insufficient to establish a First Amendment violation. The district court granted summary judgment based on Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 103 S. Ct. 948 (1983), where the Supreme Court held that a public school district did not violate the First Amendment by allowing only the exclusive employee bargaining representative to have access to the district's internal mail system.

**VI. THE DISTRICT COURT PROPERLY DISMISSED THE CAUSE OF ACTION AGAINST THE DEPARTMENT OF LABOR BECAUSE THE SCOPE OF THE BARGAINING UNIT WAS NOT RAISED IN ADMINISTRATIVE PROCEEDINGS.**

The district court dismissed Burke and Carper's cause of action against DOL because any review of a DOL action would be limited to the record before DOL at the time of the action, and Burke and Carper never alleged "that the agency had any knowledge or information regarding the current labor dispute when it made the challenged certification in October of 2001." Order Granting U.S. Department of Labor's Motion to Dismiss, Exh. B to Aplt. Brief, at 1-2. Burke and Carper claim the district court erred in dismissing this cause of action because "[t]he 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." Aplt. Brief at 28.

It is well-established, however, that a litigant challenging an agency action is limited to the record developed before the agency during its review, and that

questions not raised during the administrative process cannot be raised during judicial review. United States v. Morton Salt Co., 338 U.S. 632, 652-54, 70 S. Ct. 357, 368-70 (1950). In this case, the district court correctly noted in its order that the agency action at issue was the October 2001 certification by DOL that UTA had provided for adequate protective arrangements for its employees. Order Granting U.S. Department of Labor's Motion to Dismiss, Exh. B to Aplt. Brief, at 1-2; Aplt. App. at 295-96.<sup>4</sup> Furthermore, the complaint does not allege that this dispute over the correct bargaining representative was ever raised during the process of certification of protective arrangements in 2001. Accordingly, that issue cannot be raised in judicial review.

Burke and Carper argue that the district court, by requiring that they allege having raised this issue with the Department of Labor at the time of the 2001 certification, imposed an "impossible burden" on them. Aplt. Brief at 28. However, Burke and Carper have caused their own problems by waiting so long to contest UTA's recognition of Local 382 as bargaining representative of a system-wide bargaining unit. If, as Burke and Carper complain, the bargaining unit was wrongfully imposed on TRAX employees in 1998, they had ample time to raise that issue in connection with the 2001 certification. The apparent fact that they had no dispute with this bargaining unit scope in 2001 not only makes it impossible to

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<sup>4</sup> A copy of Section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 5333(b), is attached as Exh. F.

challenge the 2001 certification based on that issue, it also demonstrates the inadequacy of their arguments challenging the existing bargaining unit.

Accordingly, Burke and Carper's arguments concerning the dismissal of their claim against the Department of Labor must be rejected.

**VII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE CLAIM AGAINST LOCAL 382 FOR LACK OF JURISDICTION.**

Finally, Burke and Carper argue that the claims against Local 382 should not have been dismissed. However, they base this only on their understanding that the district court dismissed the case against Local 382 when all other claims had been dismissed, and they argue that Local 382 should not have been dismissed because the claims against other parties should not have been dismissed. Aplt. Brief at 29-30. For the reasons stated above, the claims against other parties were properly dismissed. Furthermore, although a district court, in appropriate circumstances, may retain jurisdiction over a supplemental state law claim even after the federal claims have been dismissed, it is not an abuse of discretion for the district court to decline to exercise such jurisdiction. Lancaster v. Indep. Sch. Dist. No. 5, 149 F.3d 1228, 1236 (10<sup>th</sup> Cir. 1998). Accordingly, the district court did not abuse its discretion in dismissing the cause of action against Local 382.

## CONCLUSION

Based on the foregoing, UTA requests that the Court affirm the district court's grant of UTA's motion for summary judgment.

DATED this \_\_\_\_ day of November, 2005.

RAY QUINNEY & NEBEKER P.C.

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## REQUEST FOR ORAL ARGUMENT

UTA respectfully requests that this case be set for oral argument. This case involves important legal issues of Utah labor law and federal labor policy, and UTA believes oral argument would further illuminate the specific legal principles at stake.

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### **CERTIFICATE OF COMPLIANCE WITH RULE 31.3**

In accordance with Tenth Circuit Rule 31.3(B), counsel for UTA certifies that it is necessary to submit a separate brief because it is not practical to file a joint brief with Local 382. UTA and Local 382 have similar but not identical interests in this case and have differing positions on some of the issues at stake.

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,818 words.

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Authority and John English*

## CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the Emergency General Order filed October 20, 2004, as amended (the "Order"), the undersigned certifies: (1) all privacy redactions required by the Order have been made and that this electronically submitted document is otherwise an exact copy of the written document filed with the Clerk; and (2) that this electronic document has been scanned with the most recent version of Norton Antivirus 2004 (Virus Definition dated 11/23/2005) and according to that program is free of viruses.

RAY QUINNEY & NEBEKER P.C.

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Scott A. Hagen  
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*Attorneys for Appellees Utah Transit  
Authority and John English*

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEES UTAH TRANSIT AUTHORITY AND JOHN INGLISH** was mailed, postage prepaid, on this \_\_\_\_\_ day of November, 2005 to the following:

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