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

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

Plaintiffs,

vs.

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

Defendants.

ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT

Case No. 2:04-CV-00985 PGC

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

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

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

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

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

### **I. BACKGROUND**

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

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

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

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

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

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

## **II. STANDARD OF REVIEW**

Summary judgment should be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”<sup>1</sup> Further, in determining the appropriateness of summary judgment, the court must “view the evidence, and draw reasonable inferences therefrom, in the light most favorable to the non-moving party.”<sup>2</sup>

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

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

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

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

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

And this section also conditions federal funding on

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

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

- (A) the preservation of rights, privileges and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
- (B) the continuation of collective bargaining rights;
- (C) the protection of individual employees against a worsening of their positions related to employment.

Additionally, under Utah state law,

Employees of any public transit system established and operated by the district shall have the right to self-organization, to form, join, or assist labor organizations and to bargain collectively through representation of their own choosing provided, however, that such employees and labor organizations shall not have the right to join in any strike against such public transit system. The district *shall recognize and bargain exclusively with any labor organization representing a majority of its employees in an appropriate unit with respect to wages, salaries, hours, working conditions, and welfare and pension and retirement provisions*, and, upon reaching agreement with such labor organization, to enter into and execute a written contract incorporating therein the agreements so reached.<sup>3</sup>

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

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

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

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

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

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

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

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

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

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

Plaintiffs have failed to do so.

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

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

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

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

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

**B. Plaintiffs’ First Amendment Claims**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **VI. CONCLUSION**

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

DATED this 15th day of August, 2005.

