

# SUMMARY OF THE CASE

by  
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## Background

The following is an account of the labor law case originally filed in U.S. District Court in Salt Lake City, Utah in October 2004. The plaintiffs were a group of light rail employees who work for the Utah Transit Authority, a state transit district that is one of the defendants. UTA operates buses and has over one thousand bus employees. The light rail system is called TRAX and has about one hundred fifty employees. The other two defendants were the Amalgamated Transit Union Local 382 and the United States Department of Labor (DOL). UTA had operated only busses until the new light rail division was created in 1999. In 1995, UTA signed an agreement with the existing union, ATU Local 382, allowing the local to represent the future light rail workers along with the bus employees. This was contrary to established National Labor Relations Board case law which holds that a group of workers who do not yet exist cannot be bound by a contract. A contract was later ratified in 1998 (one year before the opening of the TRAX light rail division) which decreed that the future rail employees would be represented by ATU Local 382. Thus, the light rail division workers were denied the ability to choose for themselves who would represent them. Once again, this is contrary to established NLRB case law. Because transit districts are state agencies, they are not under the jurisdiction of the National Labor Relations Act, however, Section 13(c) of the Urban Mass Transportation Act decrees that any transit district that obtains federal funds must protect the collective bargaining rights of its employees. **Those employees have equivalent rights to those accorded workers in the private sector.** Courts have always looked to the NLRB for guidance in deciding these types of labor issues. Because the state of Utah has no labor agency to interpret labor law or decide collective bargaining rights disputes, and because UTA refused all requests for meetings to try to resolve the issues and forbade the TRAX employees from posting material or discussing the controversy while at work, a class action lawsuit was filed.

The suit alleged that UTA had imposed a union on the TRAX rail employees and denied them their First Amendment rights to free speech. Modern NLRB case law and doctrines hold that workers in new facilities and new jobs have the right to choose their representatives and not be “accreted” into a labor union against their will. The claims against ATU Local 382 were for breach of fiduciary duty for failing to represent the rail workers. The claims against the U.S. Department of Labor were because the federal agency certified “protective arrangements” that do not protect the bargaining rights of the rail workers. Certification of protective arrangements, mandated under Section 13(c) of UMTA, are a condition for state transit agencies to collect federal funding. The DOL, which approves the certifications, certified the protective arrangements for UTA although there is no mechanism in the state of Utah to resolve state agency labor disputes. During this lawsuit, the DOL re-certified the protective arrangements with full knowledge that the dispute was in federal court. Interestingly, after this case was filed, there was a failed attempt in Congress to abolish the 13(c) protections, and an attempt to shorten the statute of limitations for similar claims from five years to three months. The SOL was reduced to

six months. There were indications that a member of the Utah congressional delegation initiated those changes.

The class action lawsuit was filed in federal district court in Salt Lake City and was assigned to Judge Paul G. Cassell. Judge Cassell, a member of the Federalist Society, denied discovery to the plaintiffs and created numerous procedural obstacles for the plaintiffs in an attempt to prevent them from having the ability to appeal to the Tenth Circuit Court of Appeals. The tactics that Judge Cassell used included refusing to sign his own minute entry order thereby creating problems with appealing the decision, refusing to release state claim defendants (Local 382) when federal claim defendants were released and refusing to address an amended complaint before granting summary judgment to UTA. Thus, Judge Cassell decided a complicated labor law case, involving issues of first impression, by summary judgment. He did this despite the plaintiffs being denied an opportunity to conduct discovery. Moreover, the plaintiffs requested a jury trial but were denied this right when Judge Cassell decided a factually intensive inquiry, the interpretation of an "appropriate bargaining unit," by ignoring an established labor law test for deciding appropriate bargaining units that has been created by National Labor Relations Board. Under that test there were multiple disputed issues and factors pointing in the plaintiffs' favor. Instead of using this test, Judge Cassell created his own test without notice to the plaintiffs and then found that there were no disputed facts. Essentially, Judge Cassell discarded seventy years of established NLRB case law and doctrines and invented his own legal standard so that he could rule against the plaintiffs.

The case was later appealed to the Tenth Circuit Court of Appeals in Denver. The case was accepted despite the procedural problems created by Judge Cassell. A briefing schedule was ordered and oral arguments were held. The chief judge on the three judge panel was Timothy Tymkovich, also a member of the Federalist Society. (Judge Tymkovich had recently employed Judge Cassell's former law clerk.) Curiously, the other two judges were Senior Judge Robert McWilliams who, at the time of the hearing, was ninety years old and retired from active status since 1984 and Judge Claire V. Eagan, a district court judge from the Northern District of Oklahoma. With the exception of Judge McWilliams, all of the judges that were assigned to the case in both district and appeals court were appointed by George W. Bush and are known to be extremely conservative. In their decision, the Tenth Circuit panel, in an effort to uphold Judge Cassell's decision, changed important facts of the case and continued to discard seventy years of established labor law cases and doctrines supporting the plaintiffs. They then upheld Judge Cassell's newly invented legal standard. The new standard has no basis in case law. Thus, the plaintiffs, who raised issues of disputed fact under the old and time honored standard were blindsided in their opposition to summary judgment. Fairness and due process required that if the Court was going to use a newly invented legal standard the Court reveal that to the plaintiffs prior to the plaintiffs having to file their opposition to summary judgment. This was not done. The panel affirmed the district court decision on September 1, 2006. The decision effectively allows state transit districts to select the bargaining representative for the workers. It has stripped the most basic rights from workers which have been protected for seventy years in this country. A petition for en banc rehearing was requested and denied.

Because the Federalist Society judges involved in this case have ignored the law, UTA has been able to negotiate with a union that it dominates and controls, ATU Local 382. UTA now has a new contract that will pay commuter rail engineers, in an as yet unfinished commuter rail system, substantially less than the national average. This new contract mandates that commuter rail engineers will be paid the same as UTA bus drivers. This contract was passed by the far more numerous bus employees on September 6, 2006 over the objections of many of the light rail employees who understand the differences between running railroads and busses. ATU Local 382 has negotiated wages down to a shockingly low level for railroad employees. This is despite the requirement that the future commuter rail be under the jurisdiction of the Federal Railroad Administration. (UTA had attempted to evade the jurisdiction of the FRA for commuter rail but was unsuccessful.) An FRA license demonstrates that the holder understands all applicable areas of railroad operation and knows railroad general code, usually referred to as the “rule book.” (Railroad general code has many “blood rules” that came about due to terrible accidents.) The license requires considerable education and training, a lack of which can easily have catastrophic results. Nationally, railroad wage standards reflect the knowledge and skills necessary to safely operate trains. Lowering wages and standards is extremely dangerous but ATU Local 382 has made no effort to force UTA to adequately train or compensate its railroad workers or address safety issues. In fact, ATU Local 382 has allowed UTA to eliminate conductors on its commuter trains, although it remains to be seen if the FRA will permit this.

### **The Federalist Society and its Implications to this Case**

Of course, the savaging of workers’ rights and wages is one of the prime objectives of the Federalist Society. A brief history of the Federalist Society is illuminating. The Federalist Society has as one of its main financial backers the Koch Foundation. This foundation was formed by the heir of Fred Koch who was one of the founders of the John Birch Society. The Federalist Society shares the ideological zeal of the John Birch Society. In its approximately 25-year history it has become the “single most influential organization in the conservative world.” One of its most influential members, Republican Senator Orrin Hatch of Utah, used his position as the ranking Republican and Chairman on the powerful Senate Judiciary Committee to block numerous judicial appointments of President Clinton. Senator Hatch has been instrumental in appointing Federalist Society judges to the bench and his son Brent Hatch has enjoyed positions of power within the Federalist Society. In fact, Judge Cassell worked in the law firm of Brent Hatch prior to being appointed to the bench. Judge Cassell also knows the opposing counsel of this case, Scott Hagen, who represented UTA. Mr. Hagen was the head of the Utah branch of the Federalist Society when Judge Cassell, a member, came to Utah.

It is impossible to know whether ambition or ideology was the primary motivation of Judge Cassell. The Federalist Society is opposed to labor rights, safety standards and federal government actions taken under the commerce clause of the United States Constitution. All of these are implicated in this case. Richard Epstein, a University of Chicago professor of law affiliated with the Federalist Society, has assailed two 1937 United States Supreme Court opinions which allowed for federal regulation of labor relations and market. He stated that a ruling that “enabled the federal government to regulate labor markets was unjustified he wrote, even if the purpose was to protect the public health and safety. ‘If someone wants to take risks

with health and safety in order to obtain a higher wage, then so much the better.” What ideologues such as Epstein and the Federalist Society judges involved in this case ignore is that the impact of such decisions do not end with the workers that accept such a trade-off due to the unfair bargaining advantage of the company. Because TRAX workers are denied their free association right to a representative of their choosing, their ability to demand adequate safety rules and training is weakened. This weakness carries with it the potential for injury and death of the workers themselves as well as the riding public. Unfortunately, the U.S. Department of Labor, has ignored both the workers’ and public’s safety.

### **Judge Cassell’s Courtroom Wonderland**

The experience of TRAX workers attending the three hearings at the federal courthouse in Salt Lake City would be enough to shake anyone’s faith in the American judicial system. It certainly has shaken ours. The specter of a judge demonstrating his contempt for working class plaintiffs, in one instance, by actually conferring with the defense attorneys as to how best rule against the TRAX workers right in front of them, has shown clearly that average citizens will not receive fair treatment under the law from George W. Bush appointed judges. Indeed, an explanation of the tactics used by Federalist Society judges such as Judge Cassell appeared in an article by People For the American Way. The following quote describes exactly what was done to the TRAX workers by Judge Cassell and demonstrates a shocking contempt for average Americans seeking justice.

In addition, our research showed the continuation of another damaging trend discussed in our earlier reports -- appellate judges nominated by President Bush, controversial and non-controversial, have in a number of cases prevented, or through dissents sought to prevent, individual Americans from having their day in court and presenting their claims to a jury. As discussed previously, this has often occurred through summary judgment, a procedure that allows a judge to rule on a case as a matter of law only when there is no genuine dispute of material fact. In a number of these cases, Bush judges have been criticized by their colleagues for improperly applying the summary judgment standard and denying plaintiffs their day in court, despite the existence of important evidence supporting their claims. More often than in our earlier reports, these Bush judges have cast the deciding vote that has denied access to justice to Americans.

People for the American Way; - *Confirmed Judges, Confirmed Fears* p.4

The first hearing in front of Judge Cassell took place on January 24, 2005 in federal court in Salt Lake City. This hearing was to address an injunction filed by the TRAX workers seeking to prevent violations of the workers’ rights to freedom of speech under the First Amendment and the transfer of improperly trained workers to the light-rail operation that endangered both the existing workers and the general public. The TRAX employees had requested an evidentiary hearing to demonstrate both the danger and the free speech violations. However, without formally ruling on the request, Judge Cassell had a clerk inform the attorneys that no evidentiary hearing would occur. At the beginning of the hearing Judge Cassell handed down a tentative decision to deny the injunction. Judge Cassell is notorious for handing down tentative decisions at the beginning of hearings. His mind is made up before he listens to the arguments by the

parties. While he claims that he will consider the arguments, it is doubtful he ever changes his tentative decision. Although the hearing was supposed to address only the requested injunction, Judge Cassell attempted to use the hearing to decide a requested dismissal by the U.S. Department of Labor. The U.S. Justice Department attorney representing the DOL actually had to object to Judge Cassell's proposal, noting that it would be unfair to the plaintiffs since they had not yet received the DOL's reply brief. Judge Cassell would have been quite willing to hold a hearing on the requested dismissal by the DOL without the plaintiffs having the opportunity to read the brief.

The second hearing was held on March 9, 2005. Shortly after the first hearing the plaintiffs filed a motion for a second injunction. The plaintiffs, realizing that they would not be granted an evidentiary hearing, asked that UTA be prohibited from imposing a union representative, ATU Local 382, on the TRAX workers. This request could have been supported without an evidentiary hearing. Without allowing any oral argument, Judge Cassell treated this request for a different injunction as a request for reconsideration of the first injunction. The hearing then addressed the motion to dismiss by the DOL. Judge Cassell, as is his usual practice, issued a tentative ruling at the beginning of the hearing denying the second requested injunction and taking under advisement the motion to dismiss. After the hearing Judge Cassell issued no formal order but summarily denied the second injunction in an unsigned, one sentence minute entry on the docket. When close to thirty days for an appeal had run, the plaintiffs filed a motion requesting that if the unsigned minute entry was indeed a final order, that it be signed, since persuasive case law suggested that an unsigned order was not a final order for appellate purposes. Judge Cassell not only failed to comply with that reasonable request, he then filed an order granting the DOL's motion to dismiss. Thus, despite the motion, the plaintiffs had to file an appeal of the denial of the injunction with an unnecessary procedural cloud to avoid losing the ability to appeal at all. The plaintiffs believe that Judge Cassell deliberately created obstacles in an attempt to prevent them from having the ability to appeal to the Circuit Court of Appeals. When the plaintiffs filed the motion requesting that Judge Cassell sign his own order, they believe that Judge Cassell's response, to dismiss the DOL, was purely retaliatory.

During the second hearing it became very clear to the plaintiffs the extent of Judge Cassell's bias against them. One of the attorneys for the plaintiffs asserted that they had exhausted all administrative remedies before filing the lawsuit. Although Judge Cassell was required to accept this assertion as the truth until discovery had taken place, he immediately challenged it and disputed that the plaintiffs had sought relief from the state labor commission. A letter was produced from the Utah Labor Commission stating that it does not handle collective bargaining disputes within state agencies.

The third, and final, hearing in district court took place on May 20, 2005. Judge Cassell, in the view of the plaintiffs, had ceased to create even the appearance of a fair court. Once again, he issued his tentative order at the beginning of the hearing, to grant summary judgment to UTA. He even claimed that there were no disputes of material fact. This was despite the repeated assertion by plaintiffs that ATU Local 382 does not have a majority of members in the company-wide bargaining unit. According to Utah state law, a union must have a majority of members from the bargaining unit to be legal and without that majority, UTA and ATU Local 382 had no valid

defense. Since Utah is a right to work state and union membership is voluntary, it would be a simple matter to determine the number of members ATU Local 382 has but Judge Cassell relentlessly prevented the plaintiffs from having discovery. Interestingly, neither UTA nor ATU Local 382 ever disputed the assertion that there were insufficient members for the union to be legitimate. They simply ignored it and continued to make the argument that ATU Local 382 was an appropriate bargaining unit. Judge Cassell also prevented discovery on another serious matter. A few years before, a UTA bus driver had been terminated from the company, reportedly for good cause. This terminated employee then ran for, and was elected, president of ATU Local 382. Shortly after this election, the general manager of UTA restored the new union president's position, seniority and benefits and a series of contracts, very favorable to the company, followed. Although the plaintiffs repeatedly argued that discovery was necessary to learn the facts surrounding this very questionable event, Judge Cassell ignored the requests for discovery, maintaining that there were no genuine disputes of material fact. In one of the most surreal moments in the hearing, Judge Cassell actually asked the attorneys for UTA and ATU Local 382 to give him additional grounds to rule against the plaintiffs. He wanted a "belt and suspenders" so he would be able "to announce that the case would be dismissed for two independent reasons." He then asked the attorney for ATU Local 382 to provide him with a memorandum outlining the contractual remedies that the plaintiffs had allegedly failed to exhaust. (The TRAX workers had made it abundantly clear that they did not recognize ATU Local 382 as their bargaining representative and had no intention of filing grievances asking that union to resolve the matter.)

Nearly three months passed and no order was issued by Judge Cassell. The attorney for the plaintiffs, Dan Moquin, began to suspect that he would simply not issue an order for as long as possible thus preventing the plaintiffs from filing an appeal. It was clear that Judge Cassell had no intention of ruling in favor of the plaintiffs despite the strength of their case. During that time new information regarding the union had come to light and the DOL had re-certified new protective arrangements even though the case had not yet been decided. An amended complaint, which is allowed, was prepared reflecting the changed circumstances that strengthened the plaintiffs' case. Mr. Moquin explained to Lisa Burke, one of the named plaintiffs, that he believed that Judge Cassell would immediately rule against the plaintiffs when the amended complaint was filed leaving them free to appeal to the Tenth Circuit. Judge Cassell had the duty to consider the amended complaint and address it, however Mr. Moquin doubted that would happen. The amended complaint was filed at 11:48 p.m. on Sunday, August 14, 2005. It was docketed Monday, August 15, at 9:17 a.m. and Judge Cassell issued an order that afternoon at 2:13 p.m. just as Mr. Moquin had predicted he would. The order was essentially the same one issued at the beginning of the May 20 hearing. It did not address the exhaustion of contractual remedies brief ordered by Judge Cassell nor did it address the issue of dismissal of Local 382, an issue Mr. Moquin had raised both in oral argument and a supplemental filing and essential for a proper dismissal of the case. These omissions suggest that the order was hastily issued as soon as Judge Cassell saw the amended complaint. Judge Cassell had seven days to *sua sponte* change his order to reflect the amended complaint but did not do so.

## The Tenth Circuit Hearing

An appeal to the Tenth Circuit Court was filed on August 22, 2005. It was accepted by that court and fully briefed. Oral argument was scheduled for May 10, 2006 in Denver. In their briefs, both UTA and ATU Local 382 continued to make the argument that they had a contract mandating that ATU Local 382 represent the TRAX workers. They continued to ignore all modern labor cases and doctrines holding that a new facility such as TRAX, is a separate bargaining unit and the workers can select their own representative. The DOL simply continued to argue that they are required to do nothing. All three defendants tried to defend Judge Cassell's actions in issuing his order less than five hours after the amended complaint was docketed. They all attempted to suggest that Judge Cassell had not seen it. Mr. Moquin pointed out in the plaintiffs' reply brief that statistically there was, at most, about a 2% chance of that happening randomly.

The hearing in Denver took place. Circuit Judge Timothy Tymkovich was on the panel as well as Senior Circuit Judge Robert McWilliams and District Court Judge Claire Eagan. Judge McWilliams asked no questions and never said a word during the hearing. He gazed out vacantly at the spectators. Judge Eagan was very aggressive in her questions to Mr. Moquin, who argued the case for the plaintiffs. She angrily asserted that Judge Cassell, in failing to address the amended complaint before issuing his order, had not seen it. She even asserted that judges often issue orders before having seen amended complaints. "It happens all the time," she claimed. No, it does not although that may be true in the Northern District of Oklahoma where Judge Eagan presides. She ignored that Judge Cassell had seven days to revise his order to reflect the amended complaint and she ignored the numerous other procedural obstacles that Judge Cassell created to prevent the plaintiffs from having a trial and later the ability to appeal. While Mr. Moquin was not bothered by the perceived hostility Judge Eagan expressed, it truly shocked the plaintiffs, who watched it. Judge Tymkovich asked many questions about labor law, all of which Mr. Moquin was able to explain. UTA continued to argue that they had a contract, ATU Local 382 continued to parrot UTA and the DOL continued to argue that they had no responsibility to force UTA to adhere to federal labor law. All three argued that Judge Cassell's decision was correct, ignoring all the labor law cases and doctrines cited by the plaintiffs. They continued to claim that there were no issues in dispute and summary judgement was appropriate.

Shortly after the hearing but before the decision was handed down, UTA began a crackdown of all communication by its employees regarding the lawsuit and the effort to form a new rail union. They forbade employees from passing out any material or even speaking of the matter on company property. Any material posted on a small bulletin board in the lunchroom was quickly torn down by supervisors.

On September 1, 2006, the panel handed down its decision, authored by Judge Tymkovich upholding the district court decision. (Interestingly, the decision was handed down just days before a union contract vote and a scheduled UTA board meeting to ratify it.) The decision altered the facts of the case. It claimed that the TRAX workers had never shown that they supported an effort to form a new union and that they had voted for a contract negotiated by ATU Local 382 in 2003. In fact, a petition signed by 63% of the workers and affidavits that they had voted against the contract, not once but twice, had been presented to the panel. The decision

ignored the first amendment issues and Judge Cassell's actions. The panel upheld applying a new legal standard created by Judge Cassell despite a well established labor law standard that was ignored. The plaintiffs had resisted summary judgment based on this. Simple due process would require that if a court evaluates a motion for summary judgment under a radically new legal standard it should identify that standard to the plaintiffs. Of course, logic and fairness dictate that this occur prior to requiring that plaintiffs identify material facts in dispute and identify additional discovery that is needed. Instead, Judge Cassell and the Tenth Circuit panel denied all discovery and created their own legal standard after the plaintiffs had identified disputes using the established standard and requested additional discovery under that standard. Ironically, in its decision, the Tenth Circuit panel did not even mention the primary defense argued by UTA; that the company and union had contracted for the accretion. Apparently even the panel could not ignore the established law that such a contract is illegal.

## **CONCLUSION**

We believe that justice was denied us in a shockingly brazen manner by Judge Cassell and the Tenth Circuit panel. The judges involved ignored seventy years of established labor law and created procedural obstacles to shut down the case, denying the plaintiffs all due process. Judicial misconduct complaints have been filed with the Tenth Circuit Court of Appeals and copies have been forwarded to numerous members of congress, including all members of the Senate Judiciary Committee, numerous members of the House Judiciary Committee as well as others. It is too late for us to obtain justice but this case should serve as a red flag to others. Judges who have extremist ideologies, such as those who belong to or are affiliated with the Federalist Society, should be immediately disqualified from consideration for higher judicial posts or government positions.