

IN THE MATTER OF THE)
INTEREST ARBITRATION)
BETWEEN)
TRI-COUNTY METROPOLITAN)
TRANSPORTATION DISTRICT)
OF OREGON)
(The Employer))
AND)
AMALGAMATED TRANSIT)
UNION, DIVISION 757)
(The Union))

ARBITRATOR'S

OPINION

AND

AWARD

RECEIVED

OCT 11 2016

EMPLOYMENT
RELATIONS BOARD

ERB Case No. ME-05-16L

ARBITRATOR:

Sylvia Skratek
3028 Western Avenue
Suite 405
Seattle, Washington 98121

REPRESENTING THE EMPLOYER:

Adam S. Collier
Bullard Law
200 SW Market Street, Suite 1900
Portland, OR 97201

REPRESENTING THE ASSOCIATION:

Whitney Stark
Gene Mechanic
Mechanic Law Firm
Attorneys at Law
6420 SW Macadam Avenue, Suite 208
Portland, OR 97239

APPEARING AS WITNESSES FOR THE EMPLOYER

Christopher Tucker, Director of Revenue Operations
Rosalinda Wells, Manager, Compensation Human Resources Information System
Nancy Young, Director of Grants and Budget
Randy Stedman, Executive Director of Labor Relations and Human Resources

APPEARING AS WITNESSES FOR THE UNION

Mary Longoria, Financial Secretary-Treasurer, ATU 757
Georgea Edwards, Fare Revenue Specialist
Ian Debow, Trip Planner

BACKGROUND

This matter came before the Arbitrator pursuant to ORS 243.746 and its Administrative Rules. In June of 2014, the Tri-County Metropolitan Transportation District of Oregon (hereafter “the Employer” or “TriMet”) representatives met with the President of the Amalgamated Transit Union Division 757 (hereafter “the Union”) to provide the Union with a conceptual overview of the electronic fare (e-fare) system that TriMet was developing in conjunction with the C-Tran agency that provides bus services in Clark County, Washington and the Portland Streetcar. On July 22, 2015 TriMet sent a letter to the Union notifying it of TriMet’s intent to incorporate e-fare job duties into the Trip Planner job description and change the job title to Customer Experience Agent. (Ex. J10) The e-fare system is an account-based electronic payment system that will replace paper tickets and allow riders to pay their fare using a smart card, bankcard, or a smart phone at an electronic reader. If a rider has a question about their smart card or the e-fare system they will be able to call an 800 number and receive assistance from a Customer Experience Agent. On July 29, 2015, the Union sent a written demand to bargain to the TriMet over the revisions to the position of the Customer Service Trip Planner to Customer Experience Agent. (Ex. U1) The demand was made pursuant to Article 1, Section 2, Paragraph 1 of the Collective Bargaining Agreement (Agreement). (Ex. J1) After unsuccessful meetings and written communications (Exs. U2-U4) the Union filed a grievance dated November 5, 2015 alleging that “TriMet refuses to bargain over the newly created Customer Experience Agent position.” As a remedy the Union requested “Bargain over the proposed position.” (Ex. U4) By letter dated November 12, 2015 the Employer, through Christine Stevens, Senior Manager of Labor Relations, denied the grievance. (Ex. U5) A further denial of the grievance dated December 8, 2015 was issued by Ms. Stevens. (Ex. U6) A negotiation session was held on January 20, 2016. (Ex. U7) Following that session Mr. Randy M. Stedman, the Executive

Director of Labor Relations and Human Resources, advised the Union by letter dated February 2, 2016 that if there was no resolution of the issue then “TriMet will petition the Employment Relations Board for binding interest arbitration to resolve the matter pursuant to ORS 243.742(2)”. (Ex. U8) The Union responded by letter dated February 4, 2016 maintaining that “this is a grievance in violation of Article 1, Section 2, Par 1 and Article 9, Section 2, Par 2 and the Union will proceed to arbitration accordingly.” (Ex. U9)

By email dated March 7, 2016 Arbitrator Sylvia Skratek was advised by the parties that she had been selected for an interest arbitration case “...which involves a mid-term bargaining issue pertaining to one position”. A hearing was convened by the Arbitrator in Portland, Oregon on August 9, 2016.

At the hearing the parties had full opportunity to make opening statements, examine and cross examine witnesses, introduce documents, and make arguments in support of their positions.

The parties were provided the opportunity to submit their closing arguments in the form of post hearing briefs which were received in a timely manner. The record was closed as of September 9, 2016. The award in this case is based upon the evidence, testimony, and arguments put forward during the hearing and the arguments presented by the parties in their post hearing briefs.

STATEMENT OF THE ISSUE

The parties stipulated that the only matter for the Arbitrator to resolve is:

What should be the wages of the Customer Experience Agent?

THE LAST BEST OFFERS

The Employer submitted the following final offer dated July 27, 2016:

Pursuant to ORS 243.746 and OAR 115-040-0015, TriMet’s Last Best Offer for the wages of the new Customer Experience Agent position (replacing the Trip Planner position) is a 2.3 percent increase over the wages of the Trip Planner position. (Ex. J2)

The Union submitted the following final offer dated July 27, 2016:

Increase wages of all Trip Planner/Customer Experience Agents to \$27.61 beginning with the implementation of the new job description. (Ex. J3)

ANALYSIS

Applicable Statutes

Pursuant to ORS 243.746 (4):

Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, unresolved mandatory subjects submitted to the arbitrator in the parties' last best offer packages shall be decided by the arbitrator. Arbitrators shall base their findings and opinions on these criteria giving first priority to paragraph (a) of this subsection and secondary priority to subsections (b) to (h) of this subsection as follows:

- a) The interest and welfare of the public.
- b) The reasonable financial ability of the unit of government to meet the costs of the proposed contract giving due consideration and weight to the other services, provided by, and other priorities of, the unit of government as determined by the governing body. A reasonable operating reserve against future contingencies, which does not include funds in contemplation of settlement of the labor dispute, shall not be considered as available toward a settlement.
- c) The ability of the unit of government to attract and retain qualified personnel at the wage and benefit levels provided.
- d) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance, benefits, and all other direct or indirect monetary benefits received.
- e) Comparisons of the overall compensation of other employees performing similar services with the same or other employees in comparable communities. As used in this paragraph, "comparable" is limited to communities of the same or nearest population range within Oregon. Notwithstanding the provisions of this paragraph, the following additional definitions of "comparable" apply in the situations described as follows:
 - A. For any city with a population of more than 325,000, "comparable" includes comparison to out-of-state cities of the same or similar size;
 - B. For counties with a population of more than 400,000, "comparable" includes comparison to out-of-state counties of the same or similar size;
 - C. Except as otherwise provided in subparagraphs (D) and (E) of this paragraph, for the State of Oregon, "comparable" includes comparison to other states;
 - D. For the Department of State Police troopers...
 - E. For Department of State Police telecommunicators...
- f) The CPI-All Cities Index, commonly known as the cost of living.
- g) The stipulations of the parties.

- h) Such other factors, consistent with paragraphs (a) to (g) of this subsection as are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment. However, the arbitrator shall not use such other factors, if in the judgment of the arbitrator, the factors in paragraphs (a) to (g) of this subsection provide sufficient evidence for an award.

POSITION OF THE UNION

The Union contends that TriMet has substantially expanded the job responsibilities of the Trip Planners without reasonably increasing their compensation. When Trip Planners become Customer Experience Agents their responsibilities will be increased to sell fares, handle customer credit cards, have access to customer accounts, and take e-Fare related customer service calls. These responsibilities are currently assigned to the higher paid customer service employees. In effect TriMet is attempting to circumvent the parties' collectively bargained wages and assign higher paid responsibilities to one of its lowest paid employees.

The Union emphasizes that of all of the statutory factors to be considered it is the comparison of compensation to other employees that is most critical. TriMet is not arguing affordability. Although both parties have presented evidence of comparable jobs in other transit districts the Union maintains that looking to other districts carries less weight because the comparable jobs within TriMet demonstrate that the Union's Last Best Offer (LBO) should be adopted.

The Union's LBO would increase the wage for the new position by 27% for all of the current Trip Planners who are paid at the top rate. The Union intends to maintain the wage step progression that is specific to Trip Planners even though that is not explicitly stated in its LBO. The Union arrived at the rate increase by calculating a weighted average of the Trip Planner and Fare Revenue Specialists top wages.

In the Union's analysis of the LBO based upon the statutory criteria it determines that:

- A. Financial ability is not a factor to be considered;
- B. Ability to attract and retain qualified personnel is unproven. Current retention of Trip Planners is of little relevance because the Customer Experience Agent is a new position

for which there is no evidence regarding hiring or retention. The additional responsibility of the job without an equivalent increase in pay may affect the ability to attract and retain employees. Additionally a shrinking department has resulted in individuals staying longer in a Trip Planner position due to the few openings for customer service positions at TriMet;

- C. Overall compensation is not a material consideration because the overall costs of indirect and direct benefits are not in dispute;
- D. A comparison of the overall compensation of employees performing similar services strongly supports ATU's LBO. The most relevant comparable positions are TriMet's Fare Revenue Specialists (FRS) and Customer Service Representatives (CSR). The FRS tasks involve selling tickets and passes and the CSR tasks include responding to customer inquiries and concerns. A Trip Planner currently provides only trip planning. They do not use a database or track phone calls. They do not handle money, sell tickets, take credit cards or deal with customer complaints. When a Trip Planner becomes a Customer Experience Agent they will have many of the same job responsibilities as an FRS and a CSR. They will become the frontline response for all inquiries about the e-Fare system and Hop Fastpasses. They will use a new Customer Relationship Management system, register or make changes to customer accounts, accept and process bank card payments and process refund requests. (Ex. J5) Customer Experience Agents (CEAs) will be fielding calls from hundreds of callers about their cash equivalent Fastpasses and personal account information and will necessarily engage in a more difficult level of customer management and response than Trip Planners. TriMet is wrong when it asserts that the only added tasks will require Trip Planners to answer calls about a new subject matter without any additional responsibility. By Tucker's own admission in negotiations, the difference between Trip Planners and FRSs has always been the credit card and money issue. (Ex. U10) The addition of PCI compliant phone lines for the CEAs is a security feature that is indicative of the additional level of accountability that will be required of CEAs. TriMet's attempt to minimize the importance of handling credit cards and the significant customer service work that CEAs will be required to perform should be seen as an intent to assign the new e-Fare tasks and hire new employees into one of its lowest paid positions. The additional level of responsibility for handling credit cards,

accessing customer accounts, and providing customer service regarding customer's money distinguishes the Trip Planner's role from the CEAs even if the anticipated training is brief. The Union further provides an analysis of the evidence regarding comparable positions concluding that TriMet's comparison charts are critically flawed and should be disregarded and that the evidence regarding out of State comparable positions supports the Union's last best offer.

The Union concludes that its LBO is seeking a reasonable wage range and that the truest comparison for finding the appropriate pay of the Customer Experience Agent is within TriMet itself. In accordance with ORS 243.746 and for all of its cited reasons the Union maintains that its Last Best Offer should be adopted.

POSITION OF THE EMPLOYER

The Employer emphasizes that the Union may not change its last best offer having failed to adhere to the statutory requirements of 243.746(3). (Ex. J4) Until the arbitration hearing TriMet was unaware of the Union's intent to include steps for the Customer Experience Agent position. The Union's LBO makes no reference to steps but rather states that "all" CEAs will be paid at the rate of \$27.61 leading to the Employer's understanding that the CEA position would be treated like other single rate of pay bargaining unit positions. While the Union may not have intended to mislead TriMet the simple fact of the matter is that it did mislead TriMet.

According to the Employer the statutory criteria overwhelmingly support the selection of TriMet's LBO.

- A. Interest and Welfare of the Public is a criterion that is best viewed in light of the public policy statement underlying the interest arbitration statutes which leads to the conclusion that interest arbitration is provided as an alternate to the right of certain safety-sensitive employees to strike. It should not be used to achieve more than what could have been gained through collective bargaining and the strike process. If all things are equal, a strike-prohibited union resorting to interest arbitration should receive the same wages and benefits that it would have received had it been strike-permitted. There is no conceivable way that the Union would have voted to strike over the issue of wages for

the Customer Experience Agent position which only affects three or fewer current employees. Furthermore it is not in the interest and welfare of the public to reward the Union for overreaching.

B. Application of the Secondary Statutory Criteria demonstrates that the Interest and Welfare of the Public favors TriMet's LBO.

1. TriMet's LBO best meets its reasonable financial ability to meet costs and maintain balance with other competing demands. This is not a situation where the Employer is presenting an inability to pay but ability to pay is not a criterion for awarding a higher proposal than is reasonable. As Employer Exhibit 3 illustrates the Union's LBO would cost TriMet approximately \$306,000 more than TriMet's LBO through November 30, 2018. The issue in this matter is what constitutes a reasonable and fair wage for the Customer Experience Agent.
2. TriMet's recruitment and retention history favors its LBO. TriMet does not have a recruiting or retention problem in the current Trip Planner position and it is highly unlikely that TriMet will experience recruitment or retention problems in the Customer Experience Agent position either. The unrebutted evidence illustrates that employees have not voluntarily left TriMet to accept work elsewhere but rather employees accepted promotion positions or retired. Only one was terminated for violating a last chance agreement. The three current Trip Planners have all been in the position for approximately four years or longer. (Ex. E6 and E4) There is also no shortage of applications to fill vacant Trip Planner positions. (Ex. E5)
3. Comparison of the overall compensation favors TriMet's LBO. TriMet's proposed wage rate for the CEA position compares favorably to the wages received by employees elsewhere who perform similar work. TriMet's market data compared the wages of employees who perform similar work to the Trip Planner/Customer Experience Agent as well as employees who perform work similar to the Customer Service Representative. (Exs. E9 and E10) The data show that the current wage of a Trip Planner at \$21.72/hour is higher than the average salary for employees who perform similar work at a rate of \$20.37/hour. Under TriMet's LBO the CEAs will earn \$22.22/hour at the top step which is

approximately 9 percent more than the market average. (Ex. E2) Additionally TriMet offers a strong benefits package. (Ex. E15)

4. The Employer also emphasizes that the Union's data does not account for geographical differences in salaries and cost-of-living.
5. Other factors that favor TriMet's LBO:
 - a. The Fare Revenue Specialist position is significantly different than the CEA and requires far more responsibility; The Employer highlights these differences;
 - b. The Customer Service Representative position is also significantly different than the CEA position and the Employer highlights these differences;
 - c. Taking credit card payments does not justify the enormous wage increase the Union is seeking;

In conclusion the Employer emphasizes that the only question is whether the new job duties assigned to the Customer Experience Agent are of such importance and/or such a complex nature that it justifies increasing the wages of the position by nearly \$6/hour and only slightly less than an FRS or CSR. For all of the reasons that it has set forth TriMet contends that its LBO should be awarded. It generously provides for a 2.3 percent increase and is in the interest and welfare of the public because it represents what the employees would have received if they were permitted to strike. The Union presented no justification for the enormous increase that it has proposed. The nature of the work is not changing. The additional job duties are simple tasks. TriMet's LBO constitutes what is most fair given the nature of the changes to the position. The Employer requests that the Arbitrator award its last best offer.

Discussion

ORS 243.746(4) requires that an arbitrator give first consideration to the interest and welfare of the public when evaluating the Last Best Offers of the parties however as numerous arbitrators have noted over the years the statute provides no direction regarding how to make a determination as to the interest and welfare of the public. Absent that direction arbitrators have reviewed the secondary criteria within the statute as a means of determining which LBO best

fulfills the interest and welfare of the public. In this matter the parties have focused on the following secondary criteria:

- a) The ability to attract and retain qualified personnel;
- b) The overall compensation;
- c) Comparisons of the overall compensation of other employees performing similar services with the same or other employees in comparable communities;
- d) The CPI-All Cities Index, commonly known as the cost of living.

The Employer has provided compelling evidence that it has no difficulty recruiting and retaining employees in the Trip Planner position and its argument that it does not anticipate any change in recruitment and retention when the position transitions to Customer Experience Agent is not without merit. As Employer Exhibit 5 illustrates there have been hundreds of applications for each Trip Planner position that has been posted since 2011. There is no reason to find that there will be insufficient applications once the position has transitioned to the Customer Experience Agent. Furthermore as Employer Exhibit 6 illustrates any turnover in the position has been the result of either a promotion or a retirement. Only one Trip Planner was terminated when they violated a Last Chance Agreement. While the Trip Planner position is an entry level position it provides opportunities for promotion that presumably will continue once the position has transitioned to the Customer Experience Agent. The Arbitrator appreciates the Union's argument that recruitment and retention for the new position is unproven however there is sufficient evidence to conclude that the Employer will have little difficulty attracting applicants for a position that provides reasonable compensation and promotional opportunities. If there are several hundred applicants for the Trip Planner position then it is not unreasonable to conclude that there will be a similar number of applicants for the higher paying position of Customer Experience Agent. Speculation that recruitment and retention will decline when the position transitions to Customer Experience Agent with greater responsibilities cannot be used to support a conclusion that the Employer will not have the ability to attract and retain qualified personnel. If indeed, recruitment and retention decline significantly then it would be appropriate to bring the issue forward in future negotiations however the Arbitrator can find no reason to rely upon speculation to make a determination in this matter given the testimony and evidence that supports a conclusion that retention and recruitment will most likely not be affected by the changes in the job.

The overall compensation for the position is not inconsequential as evidenced in Employer Exhibit 15 and while the Union argues that the overall compensation is not material because the overall costs of indirect and direct benefits are not in dispute that fails to take into consideration the affect that overall compensation may have on the ability to attract and retain employees. For that limited purpose the Arbitrator will not readily dismiss the overall compensation.

It is however the comparisons of the overall compensation of other employees performing similar services with the same or other employees in comparable communities as well as an analysis and comparison of the overall compensation being provided within TriMet for the Customer Service Representatives and the Fair Revenue Specialists that leads to the determination that the Employer's LBO is more consistent with the interests and welfare of the public.

The Employer focused its attention on outside comparators. Within those comparators there are many positions that simply do not have the same job duties as will be assumed by the Customer Experience Agents. In fact, the job duties of the comparators are more in line with the job duties of a Customer Service Representative. In her review of these comparators the Arbitrator concluded that the comparators that merited the most consideration are: the union positions City of Denver Information Specialist position and the Washington Metropolitan Area Customer Information Specialist I position (Ex. E13) and; the non-union position City of Sacramento Customer Service Representative position (Ex. E14). Even when the highest modified mean wage for the Denver and Washington positions was increased by 3% to reflect any possible wage increase since September of 2015 (the date of the Employer's comparator Exhibits 9 and 10) the hourly rate for the positions was below \$21/hour. The same is true of the highest actual wage increased by 3% of the Sacramento position. None of these three comparators were an exact or even reasonably sufficient match for the Customer Experience Agent position nor were any of the comparators offered by the Union. (Exs. U11, U12) While the Union offered King County's position of Customer Information Specialist as the closest match (Ex. U12, pp. 31-38) it also acknowledged that it is not identical. The Arbitrator therefore

reviewed the Union's focus on the internal comparators, the Fare Revenue Specialist and the Customer Service Representative positions.

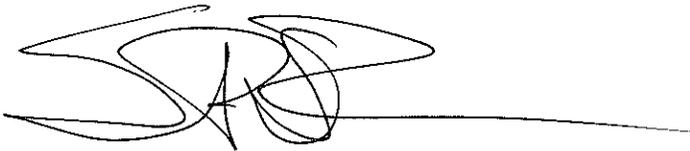
As the Union emphasized there are new duties being added to the Trip Planner position that had not previously been the responsibility of a Trip Planner. The Trip Planner will now be responsible for addressing questions and requests related to the new e-Fare system. An inherent part of this responsibility will be the selling of e-Fares, the handling of credit cards and the accessing of customer accounts. The Union's comparison of the wages for the new position of Customer Experience Agent that evolves from the Trip Planner position with the Fare Revenue Specialist and Customer Service Representative positions fails to take into consideration the significant additional responsibilities of the latter two positions. The essential function that has been added to the CEA Job Description (Ex. J5) is to *Assist regional electronic fare customers via telephone or email, and using a Customer Relationship Management (CRM) system. Inquires received will include but are not limited to: how the system works, how to register an account or make changes to an account; accurately process account changes, bank card payments, refunds requests or account adjustments; and answer any other questions about the customer's account.* This additional function is not insignificant and warrants an increase in wages however any increase in wages must be commensurate with the additional responsibility. The Union's suggestion that the additional function raises the position to within a few dollars of an FRS and a CSR has been reviewed however the job descriptions of these two positions indicate that the level of responsibility for both of these positions far exceeds the level of responsibility of the Customer Experience Agent. An FRS interacts both in person and by phone with users. An FSR: performs lost and found procedures; administers relevant programs such as bike locker rentals; handles customer complaints, commendations, suggestions; types reports and correspondence; and handles other critical functions as listed on Joint Exhibit 8. A CSR: responds to customer complaints, commendations, service requests; participates in committees or special projects intended to develop recommendations around customer comment database; generates activity reports; and handles other critical functions as listed on Joint Exhibit 9. These two positions have significantly more responsibilities than a Customer Experience Agent. None of this is meant to diminish the importance of the role of the Customer Experience Agent however an increase of 27% as proposed by the Union without an accompanying increase in

essential functions is unwarranted. The Arbitrator recognizes that there are bargaining notes that focus on the differences in the positions and that there had been discussion regarding the importance of the credit card payment responsibilities within a position. (Ex. U10) But there is nothing within the notes that indicate that the adding of that one responsibility would significantly alter the wage for any one position. While the Union is correct that an increase in pay is warranted for the new Customer Experience Agent position there is insufficient evidence that the new responsibility warrants an increase of 27%. While the Employer's LBO of an increase of 2.3% may be less than is warranted for the new position the Arbitrator finds that the Employer's LBO is closer to an appropriate rate of pay than the Union's LBO.¹ Given this finding the Arbitrator concludes that the Employer's Last Best Offer best meets the interest and welfare of the public.

CONCLUSION

Having carefully considered all evidence, authority and argument submitted by the parties concerning this matter, pursuant to ORS 243.746 (4), the Arbitrator concludes that the wages of the Customer Experience Agent shall be as set forth in TriMet's Last Best Offer.

Respectfully submitted on October 6, 2016 by

A handwritten signature in black ink, appearing to read 'S. Skratek', written over a horizontal line.

Sylvia P. Skratek
Arbitrator

¹ The Arbitrator has not ignored the Employer's contention that the Union's LBO was modified at the hearing however given the final determination in this matter there is no reason for her to reach any conclusion as to whether the Union's LBO was being clarified or modified.