

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-037-12

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION, DIVISION 757,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON,)	CONCLUSIONS OF LAW, AND ORDER
)	
Respondent.)	
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On October 29, 2013, the Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald, after hearings held on February 26, 27, 28, and March 13, 2013, in Salem, Oregon. The record closed on May 20, 2013, following receipt of the parties' post-hearing briefs.

Susan L. Stoner, General Counsel, Amalgamated Transit Union, Division 757, Portland, Oregon, represented the Complainant.

Shelley Devine, Attorney at Law, Tri-County Metropolitan Transportation District of Oregon, Portland, Oregon, represented the Respondent.

On July 25, 2012, the Amalgamated Transit Union, Division 757 (ATU) filed an unfair labor practice complaint against the Tri-County Metropolitan Transportation District of Oregon (TriMet). The complaint alleges that, in March 2012, TriMet unilaterally changed the *status quo* regarding mandatory bargaining subjects in violation of ORS 243.672(1)(e) when it required road/rail supervisors (who are represented by ATU) to: (1) demand to see proof of fares from customers; (2) issue citations; and (3) meet a daily quota on such contacts without providing training on how to perform those duties. TriMet filed a timely answer to the complaint.

The issues are:

1. Did TriMet unilaterally change the *status quo* in March 2012, in violation of ORS 243.672(1)(e), by allegedly requiring all road/rail supervisors to demand to see proof of fares from customers and to meet a daily quota on such contacts without training those supervisors on how to perform those duties safely?
2. If TriMet violated ORS 243.672(1)(e), what is the appropriate remedy?

For the reasons discussed below, we conclude that ATU failed to establish that TriMet unilaterally changed the *status quo* in March 2012 in violation of ORS 243.672(1)(e) as alleged. Rather, at that time, we conclude that TriMet merely reminded 11 of the 55 road/rail supervisors that their job responsibilities included filing code enforcement reports, aiming for 35 passenger contacts per day, performing fare inspections, and issuing citations for fare violations, all of which were consistent with the *status quo*.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. ATU is a labor organization as defined in ORS 243.650(13) and the exclusive representative of certain employees of TriMet, including the employees in the Field Operations Department classifications of operator, fare inspector, road supervisor, rail supervisor, and lead supervisor.
2. TriMet is a public employer as defined in ORS 243.650(20).
3. The TriMet Code (TMC) codifies TriMet's general ordinances. TriMet provides its fare inspectors and road/rail supervisors with a TMC general reference book, which includes TMC Chapters 28, 29, and 30 and the Administrative Rules for exclusions and interdiction commands.¹ TMC Chapter 28 governs conduct on TriMet property related to such activities as smoking; consuming food or beverages; playing radios or other sound-emitting devices; bringing non-assistance animals or pets into vehicles; riding bikes, skateboards, in-line skates, or roller skates in a vehicle or station; engaging in disruptive, intimidating, or threatening behavior; and possessing an open container of an alcoholic beverage. TMC Chapter 29 makes it unlawful for passengers to use TriMet vehicles without paying the applicable fare; failing to carry or exhibit proof of fare payment upon demand; or failing to provide their name, address, and identification. TMC Chapter 30 establishes regulations related to TriMet parking facilities.

¹Interdiction commands are written notices to vacate TriMet premises for up to four hours.

4. The TMC reference book also includes a general overview of employees' enforcement authority, including information on warnings, citations, exclusions, and arrests. TMC Sections 28.20(C), 29.40(A), and 30.30(E) authorize inspectors, Tri-Met appointed peace officers, and State of Oregon peace officers to issue citations to anyone who violates a provision of TMC Chapters 28, 29, or 30. "Inspectors" are defined as "a person other than a 'peace officer' authorized by the General Manager or by the provisions of TMC Chapters 28, 29, or 30 to demand proof of fare payment and to issue citations as provided hereunder."

5. In 1998, then TriMet General Manager Tom Walsh appointed all road/rail supervisors as "[i]nspectors authorized to demand proof of fare payment and to issue citations for violations of Tri-Met Code Chapters 28, 29 and 30," subject to the completion of appropriate training. At the time, road/rail supervisors understood that they had been given the authority to demand proof of fare payment and issue fare citations, but were not required to exercise this authority. Road/rail supervisors sometimes asked to see a fare when responding to an operator call for assistance and wrote citations for fare violations. They also used the lack of a fare as a reason to request a passenger's identification and run an "R-check" or remove a troublesome person from a vehicle.² Road/rail supervisors also participated in fare missions with fare inspectors, checking fares in a specific location or high-volume area. Police officers also participated in some of these fare missions.

6. Historically, the fare inspector classification had been charged with ensuring compliance with TMC Chapter 29, which, as noted above, primarily concerns fare evasion. In late 2002, TriMet developed a plan for fare inspectors and road/rail supervisors to increase the frequency of fare missions. As a result, ATU raised a concern that road/rail supervisors were performing fare inspector work during fare missions. At that time, ATU and TriMet agreed that road/rail supervisors would limit their role in fare missions to "support, visibility and enhanced customer service" and would not engage in or issue fare-evasion citations. TriMet also notified ATU, however, that TriMet would "continue with current and acknowledged practices of [road/rail] supervisors writing citations for non-mission fare evasion when necessary, and at the discretion of the [road/rail] supervisor."

7. In 2007, Steve Banta became TriMet's Executive Director of Operations. In late January 2008, Banta notified ATU President Jonathan Hunt that TriMet intended to expand the authority of individuals working for TriMet's private security contractor, Wackenhut, to issue citations, exclusions, and interdiction commands. At the same time, he confirmed that road/rail supervisors were authorized to demand proof of fare payment and issue citations and notices of exclusion for all TMC Chapter 28, 29, and 30 violations, and notified Hunt that TriMet intended to authorize those supervisors to issue interdiction commands, subject to the completion of appropriate training.

²In an R-Check, a fare inspector or supervisor contacts the TriMet command center to check a violator's record of exclusion status and prior offenses.

8. In early 2008, Banta notified Hunt that TriMet intended to eliminate the fare inspector classification, move the current fare inspectors and their duties into road/rail supervisor classifications, and provide the road/rail supervisors with enhanced TMC and fare enforcement responsibilities. Banta explained that combining the classifications would increase the number of employees available to perform fare inspection and supervision work. Hunt understood that TriMet wanted “to have all these [rail/]road supervisors do the same work as fare inspectors” and that TriMet was not legally required to bargain over the redistribution of the fare inspector duties to the rail/road supervisor classifications, but was required to bargain the impact of this change.

9. On June 11, 2008, Transportation Director Peggy Hanson met with Hunt to discuss TriMet’s strategy for building a “dynamic, integrated, highly trained and cross-functional” field response team, which included the police, Wackenhut employees, fare inspectors, and road/rail supervisors. Hunt understood that the focus of this meeting was to discuss TriMet’s intention of giving broader work to road/rail supervisors and creating a new “hybrid” position that would perform both fare inspector and road/rail supervisor duties.

10. On June 20, 2008, a fare inspector notified Hunt that Banta had said that road/rail supervisors were now “inspectors” who would work on missions and do the job of an inspector while on missions. The fare inspectors complained that TriMet was using road/rail supervisors to fill in work on missions and that none of the road/rail supervisors had gone through the extensive fare inspector training. A few days later, Hunt forwarded the e-mail to Banta and told Banta that they needed to meet and discuss “Wackenhut, leads, work assignments and training.”

11. Beginning on July 16, 2008, TriMet and ATU bargained over the consolidation of the fare inspectors into the road/rail supervisor classifications. During this and subsequent bargaining meetings, the parties discussed the impact on employees, how that impact could be mitigated, who would do what jobs, titles for the fare inspector positions, shifts, and other issues. ATU’s primary focus during bargaining was the encroachment of Wackenhut on bargaining unit work and the current fare inspectors’ seniority.

12. On August 18, 2008, ATU and TriMet signed a document entitled “Settlement Agreement - Fare Inspectors” (Fare Inspector Agreement). Under the Fare Inspector Agreement: fare inspectors with 18 or more years of service remained in the fare inspector classification; a process, including training and seniority provisions, was established for fare inspectors with fewer than 18 years to transfer into the road/rail supervisor classifications; 10 new road/rail supervisor positions would be added at the beginning of 2009; and nine new road/rail supervisor positions would be added with the opening of the Green Line rail service in the fall of 2009.

13. That same day, Hunt provided Hanson with a signed copy of the Fare Inspector Agreement and notified her, “[n]ow that we have this piece done, we next need to address the issue of [the] change’s impact, if any, on the bus and rail supervisor job duties. Let me know when we are going to start that discussion.”

14. On September 23, 2008, Hunt sent Hanson a “Second Request to Bargain,” stating that pursuant to his August 18 letter, ATU was “requesting that the parties bargain over the impact of prospective changes in bus and rail supervisor job duties. I realize that those changes have not yet taken place, but it seems wise to begin bargaining before the supervisors come out of training.” Hunt asked Hanson to let him know when they would begin those discussions and indicated that he was not waiving ATU’s statutory right to notice of changes in mandatory bargaining subjects.

15. On October 2, 2008, Hanson sent Hunt a letter entitled “ATU Request to Bargain: Impact of Prospective Changes to Bus and Rail Supervisor Duties.” Hanson acknowledged Hunt’s request “to bargain over the impact of prospective changes, if any, in bus and rail supervisor duties.” She then confirmed that they had met on September 29 and talked on the phone on October 1 “regarding this issue” and agreed to continue their dialogue consistent with the requirement in the Fare Inspector Agreement that they discuss the final assignment for the Green Line supervisor positions.³

16. Sometime in November 2008, Tri-Met adopted revised road/rail supervisor job descriptions. In the summary description and the list of essential functions, TriMet added language reflecting that the supervisors’ duties included “[a]n exclusive focus on inspecting fares and enforcing TriMet code. Perform related duties as required.” TriMet did not provide ATU with a copy of the modified job descriptions.

17. On November 13, 2008, Banta sent a memorandum to all TriMet bus and rail operators inviting them to apply for fifteen new road/rail supervisor positions. Banta stated that the new road/rail supervisors would choose their work through a sign-up process for two types of assignments, one focused on the supervision of the daily bus or rail transportation system operations, including customer service, operator support, oversight duties, fare inspection, and code enforcement; and one exclusively focused on inspecting fares and enforcing TMC. On November 14, the positions were posted and a copy of the job postings was e-mailed to ATU President Hunt. The list of essential functions in the road/rail supervisor job postings was changed to include “[a]n exclusive focus on inspecting fares and enforcing TriMet code.”

18. After 2008, new road/rail supervisors were provided training in both district supervisor work and TMC enforcement, including fare enforcement. During the training for new supervisors in 2009, Chief Fare Inspector Gary Radford provided on-the-job training in a variety of areas, including TMC Chapter 29 fare violation issues, citations, and TriMet’s Standard Operating Procedures (SOPs).

³Regardless of the wording in Hanson’s letter, both Hunt and Hanson testified that they did not address supervisors performing fare inspection work in their September 29 and October conversations, but limited their discussion to the implementation of the Fare Inspector Agreement.

19. In July 2010, Field Operations Assistant Manager Dan Stokes notified road/rail supervisors and inspectors that some employees had failed to submit their weekly code enforcement activity reports, which were used to summarize code enforcement activities, including warnings, citations, exclusions, and passenger contacts. Stokes directed employees to submit this information on the “Visibility/Code Enforcement Stats” form and reminded them that this requirement was included in their shift sign-up.

20. In August 2010, TriMet eliminated road supervisor foot shifts and 17 supervisors returned to district supervisor work. On September 1, 2010, Operations Manager Jay Jackson sent road/rail supervisors, leads, and managers a memorandum entitled “TriMet Code Enforcement – Daily Activity and Reporting,” in which he stated that “[o]ur foot shifts no longer exist but that does not mean we are not responsible for doing fare inspections or enforcing TMC.” Jackson directed all road/rail supervisors to complete at least one hour of TMC enforcement per day in their district and complete and submit the weekly “Code Enforcement Stats” form tracking their activity. The form, which was attached, included spaces to enter hours and the number of citations, written warnings, verbal warnings, “jumpers,” exclusions, custodies, parking citations, and passengers contacted.

21. Beginning in October 2010, the road/rail supervisor sign-ups specified that all shifts were required to conduct one hour of code enforcement each day and document this activity on a “Field Ops Code Enforcement Stats” form, including their hours, number of passengers contacted, train number, and applicable notes. TriMet moved from using the term “visibility missions and stats” to the term “code enforcement” because the latter was more consistent with its expectation that road/rail supervisors focus on enforcing the TMC and tracking the number of warnings, citations, exclusions, and contacts during their required hour of code enforcement work. After October 2010, no separate reference was made in the sign-ups to fare enforcement.

22. At the time that the one-hour code enforcement requirement was imposed, road/rail supervisors had the discretion to issue citations, exclusions, or warnings for fare evasion. Some supervisors issued fare citations regularly and some never issued fare citations or checked fares. Others checked fares and issued citations for fare evasion on their own, in pairs, or during fare missions. For example, during December 2010, 16 supervisors wrote at least one citation or exclusion for a fare violation and, during January 2011, 25 supervisors wrote at least one citation or exclusion for a fare violation.

23. On November 12, 2010, Assistant Manager Stokes sent letters to approximately 25 road/rail supervisors who had failed to submit any code enforcement reports for October. Stokes notified the employees that he expected them to accomplish and document a minimum of one hour of code enforcement daily and submit their weekly reports. He stated further, “[t]ypically, supervisors have contacted approximately 35 passengers per hour. You should aim for this number of contacts each day during your hour’s work.” The number of 35 passenger contacts in Stokes’ letter was based on an approximate average of the number of district supervisor contacts on the weekly code enforcement reports between February 2010 and October 2010, including reports that reflected no contacts.

24. When road/rail supervisor James Fowler received his November 12, 2010 letter, he told Stokes that he did not understand what TriMet wanted with regard to fare inspection and code enforcement and that he felt that he had insufficient training. He was frustrated with TriMet's decision in September to eliminate the foot shifts, but still push for code enforcement and fare inspection work. A few days later, Stokes arranged for Fowler to meet with Chief Fare Inspector Radford to determine what code enforcement training Fowler needed and suggested to Fowler that this might be an opportunity to identify training that others needed. Fowler told Stokes that he had interviewed 25 other Field Operations members and 95 percent of them felt they had not been properly trained. Fowler was unable to meet with Radford due to a personal emergency, did not reschedule the training, and notified Stokes that he saw no value in being trained on how to write citations and "[l]ike the others I will get in line and muddle along with my own self training. You will get your reports and all will be fine until something goes terribly wrong." Fowler began filing code enforcement reports.

25. Road/rail supervisor Jay Frye also received a November 2010 letter. He subsequently filed reports reflecting his hours of code enforcement, but did not indicate any contacts or information about those contacts.⁴ Frye contacted up to 60 passengers in an hour, but did not record this information.

26. Then road/rail supervisor Mohsen Jalalipour also received a November 12, 2010 letter. Before receiving that letter, Jalalipour had been performing one hour of code enforcement per day, but failed to file his reports. After receiving the letter, he filed his reports. Jalalipour understood that he was not required to write citations and did not issue any in December 2010 or January 2011 before becoming the assistant manager in February 2011. Jalalipour did not believe that checking fares during code enforcement impacted his workload because if a bus was full, he could have 35 contacts on one bus. He also had been told that he could do his one hour of code enforcement in increments and that emergencies, accidents, incidents, service blockages, and calls for assistance took precedent over code enforcement work.

27. In the December 2010 foot-mission-statistics report, 43 road/rail supervisors reported 834 hours of code enforcement statistics, resulting in 77 citations, 602 written warnings, 1501 verbal warnings, and 53 expulsions. The citations were issued by 11 road/rail supervisors, five of whom only issued one or two citations. The other 32 road/rail supervisors issued no citations. The statistics did not specify the section of the TMC that had been violated.

28. On March 30, 2011, Operations Manager Jackson sent letters to seven road/rail supervisors who had received the November 12, 2010 letter and were still not submitting the reports, including road/rail supervisor Wheeler. Jackson reminded them of his directive to "accomplish a minimum of one hour of code enforcement daily, and submit a weekly report documenting those efforts." Jackson concluded: "A review of the signups you have participated in have clearly laid this out as part of your daily activities. Additionally, inspecting fares and enforcing TriMet code is also an essential function in your job description."

⁴Frye testified he did not recall the November 2010 letter.

29. On July 19, 2011, TriMet publicly announced its intent to add six new road/rail supervisors to perform fare enforcement and shift the focus of their work from warning and educating riders to issuing citations and exclusions. That day, Assistant Manager Stokes sent e-mails to all supervisors, inspectors, and leads entitled "R-checks and Fare Enforcement," to which he attached a copy of the news advisory announcing the addition of the new road/rail supervisors and the shift in focus from education to enforcement. Stokes asked the supervisors to be patient with delays that they might experience with R-checks responses from the command center during their one-hour of code enforcement.

30. The majority of road/rail supervisors who filed code enforcement reports several months before and after July 2011 showed an increase in the number of citations issued after July 2011. A number of the road/rail supervisors showing such an increase had worked in that position before August 2008. In August 2011, 31 road/rail supervisors wrote at least one citation for fare violations and, in February 2012, 36 road/rail supervisors wrote at least one citation or exclusion for fare violations.

31. Beginning with the July 2011 sign-ups, the specific duties for four new road supervisor shifts and two new rail supervisor shifts required employees to conduct code enforcement work and work with other inspectors or supervisors conducting code enforcement, including to "administer/enforce TriMet code and inspect fares, and address security issues as appropriate." Jackson created these shifts as training opportunities for the road/rail supervisors to learn from the fare inspectors and so that the fare inspectors would be working in pairs for their safety.

32. On July 26, 2011, Assistant Manager Jalalipour met with road/rail supervisor Wheeler about his failure to file weekly code enforcement reports. Wheeler indicated that he did not understand what it meant or how to do fare inspections and that he needed training on how to issue citations and warnings. Lead Fare Inspector Radford provided Wheeler training on July 29, but Wheeler still did not perform fare inspections or file code enforcement reports thereafter.

33. During late July and early August, Jalalipour also met individually with five other road/rail supervisors, including Fowler, and explained the obligation to perform TMC enforcement and file reports.

34. In August 2011, TriMet modified SOP 313, which was under the "Fare Inspector SOPs," to identify the proper responses to fare violations by "Code Enforcement supervisors." The revised SOP 313 provided that: (1) written warnings were to be rarely used and only when compelling reasons required leniency; (2) "clear violations of fare policy require issuance of a citation to ensure overall system compliance"; and (3) exclusions may be issued if temporary removal of the customer from TriMet property is warranted. SOP 313 stated further that "it is expected that the majority of fare violations warrant issuance of a citation."

35. On September 13, 2011, Manager Jackson notified all road/rail supervisors and field operations leads that he was concerned about reports that field operations personnel were chasing and pursuing people. Jackson stated that this was dangerous and reminded them of SOP 306, 307, and 312, which stated that they were not to pursue, detain, prevent departure of, block

the exit of, search, restrain, or use physical force against a person during code or fare enforcement activities.

36. During an unfair labor practice hearing on November 10, 2011, Manager Jackson testified that code enforcement work included fare evasion work.⁵ He also testified about the four supervisor shifts created in July 2011 in which supervisors worked directly with fare inspectors and other supervisors performing code enforcement and fare inspection.

37. During the training of new road/rail supervisors in 2011, Chief Fare Inspector Radford provided both classroom and on-the-job training on writing citations, filling out code-enforcement related forms, SOPs 300 to 314, making customer contacts, and asking customers for proof of fare payment.

38. In January through March 2012, TriMet provided a one-day training for all road/rail supervisors and leads on safety and service. The training addressed topics including the role of the road/rail supervisors and safety job expectations, creating a safety management system, tools for effective interactions with customers, engaging operators, and personal safety/code enforcement.

39. In March 2012, there were 55 road/rail supervisors. Around the beginning of March 2012, Assistant Managers Stokes and Jalalipour met individually with 11 supervisors who were not consistently filing code enforcement reports. Nine of these employees had received the November 2010 reminder letter and four had also received the March 2011 reminder letter. Stokes reminded the employees of their code enforcement and reporting responsibilities. Stokes told the employees to aim for a goal of 35 passenger contacts each hour, how this number had been arrived at, how such contacts could be made, and that code enforcement included fare inspection work. Stokes also reminded them of TriMet's July 19 public notice shifting the agency's focus from fare education to fare enforcement and stated that TriMet has moved away from warnings and education to issuing citations and exclusions for riders without a fare. Neither Jalalipour nor Stokes set a quota for the number of citations to be written.⁶

40. On March 5, 2012, Stokes sent the eleven employees a letter regarding their meeting. Stokes indicated that the purpose of the meeting had been to "discuss how we could improve your efforts to enforce TriMet code, submit daily reports, and document your code enforcement efforts in the form of citations or exclusions." The letter summarized what had occurred at the meeting, including the prior notifications that the employees had received, their

⁵*Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-42-10, 25 PECBR 385 (2013).

⁶Fowler testified that Stokes set a quota for citations by telling him that 14 percent of the 35 contacts should result in a citation. However, both Stokes and Jalalipour testified that they did not tell the employees that there was a quota for citations during this meeting. The letter Stokes sent to the employees after the meeting confirms this testimony. In addition, although Wheeler recalled them saying that 25 percent of his 35 contacts should result in warnings or citations, he admitted that they also told him there was no quota for citations. Therefore, we find that Stokes and Jalalipour did not set a quota for citations during these meetings.

performance summary, the opportunity to have the code enforcement training provided to new employees, and the offer of additional training to be arranged if the employee felt that it was necessary. At the end of the letter, Stokes notified employees that failure to meet the expectation could result in additional training, corrective action, or discipline. The letter also stated:

“[i]t is our expectation that from this day forward you will complete a minimum of one hour of code enforcement work per shift. Additionally, during this hour you should attempt to contact approximately 35 passengers per hour, which records indicate is a reasonable contact rate. Of these contacts, it is our expectation that your activities will show you are enforcing TriMet code using the tools we have provided for you; citations and exclusions are expected now for fare violations.”

41. Stokes’ March 5, 2012 letter to road/rail supervisor William DeSimone also stated, in part:

“You asked if there was a quota or goal associated with citations, warnings and exclusions. I explained that there was no quota for these, but it was expected that you write citations or exclusions when you [en]countered a fare-evading passenger. I also explained that warnings would be the exception, not the rule, and that warnings were not to be issued for your convenience to avoid your responsibility to write citations or exclusions. I also explained that it was a goal to contact approximately 35 passengers during your one hour of code enforcement each day.”

42. On March 16, 2012, then ATU Vice President Samuel Schwarz sent TriMet a letter demanding to bargain over alleged changes to the road/rail supervisors’ job duties. On March 21, Executive Director Randy Stedman responded that TriMet refused to bargain on the basis that the demand was not made within 14 days of the addition of code enforcement duties to the supervisors’ job responsibilities. On April 2, 2012, ATU’s Hunt sent TriMet a second demand to bargain over alleged changes to the road/rail supervisors’ job duties. Executive Director Stedman responded on April 4 that TriMet had no duty to bargain because no change had been made to the road/rail supervisors’ enforcement duties.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. TriMet did not violate ORS 243.672(1)(e) in March 2012, by reminding 11 road/rail supervisors that they were expected to complete a minimum of one hour of code enforcement work per shift, contact 35 passengers per hour, and enforce the TMC, including issuing citations and exclusions for fare violations.

DISCUSSION

ATU alleges that in March 2012, TriMet made a unilateral change in the *status quo* in violation of ORS 243.672(1)(e) by requiring all road/rail supervisors to demand to see proof of

fares from at least 35 customers per day and issue citations on all fare violations. ATU argues that under the established past practice, road/rail supervisors had the discretion to decide whether to request proof of fare payment and whether to issue a citation in response to a fare violation. ATU alleges that this unilateral change in the past practice impacted the mandatory bargaining subjects of safety and workload.

TriMet alleges that the complaint should be dismissed as untimely under ORS 243.672(3) because the change to the road/rail supervisors' duties occurred in 2008. TriMet also asserts that it did not make a change in the *status quo* in March 2012, but merely met with certain road/rail supervisors to notify them that they were failing to perform their required duties. In addition, TriMet argues that even if a change in the *status quo* occurred in March 2012, it did not impact a mandatory subject of bargaining.⁷ As explained below, we agree with TriMet that there was no change to the *status quo* in March 2012 when TriMet counseled 11 (out of 55) road/rail supervisors for not performing and documenting TMC enforcement, including fare inspection.⁸

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to “[r]efuse to bargain collectively in good faith with the exclusive representative.” An employer commits a *per se* violation of ORS 243.672(1)(e) if it makes a unilateral change regarding a mandatory subject of bargaining while it has a duty to bargain. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE*) (citing *Wasco County v. AFSCME*, 46 Or App 859, 613 P2d 1067 (1980)).

In analyzing a complaint alleging a unilateral change, this Board considers: (1) whether an employer made a change to the *status quo*; (2) whether the change concerned employment relations (*i.e.*, a “mandatory subject of bargaining”); and (3) whether the employer exhausted its duty to bargain. *AOCE*, 353 Or at 177. When asserted, we also consider any affirmative defense. *Id.*; see also *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008). However, we do not apply these steps mechanically and may proceed to a particular step if it would dispose of the issue. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-24-09, 24 PECBR 730, 761 (2012).

We begin with the “preliminary step in any unilateral change claim—whether there has been a change in the *status quo*.” *AOCE*, 353 Or at 184 (*italics added*). To make that determination, we consider “[w]hether the parties have, by their words or actions, defined their rights and responsibilities with regard to a given employment condition.” *Id.* (quoting *Coos Bay Police Officers’ Association v. City of Coos Bay and Coos Bay Police Department*,

⁷In light of our conclusion that there was no change in the *status quo* in March 2012, we do not address whether the alleged change concerned a mandatory subject of bargaining.

⁸Because ATU’s complaint is based on TriMet’s March 2012 actions (and not earlier actions in 2008, 2010, and 2011), we conclude that the July 25, 2012 complaint is timely with respect to the March 2012 actions. See *Rogue River Education Assn. v. Rogue River School*, 244 Or App 181, 189, 260 P3d 619 (2011) (under ORS 243.672(3), an injured party must file a complaint within 180 days of when that party knows or reasonably should know that an unfair labor practice has occurred).

14 PECBR 229, 233 (1993)). In doing so, we look “to a variety of sources, including not only the terms of a current or an expired collective bargaining agreement, but work rules, policies, and an employer’s ‘pattern of behavior.’” *AOCE*, 353 Or at 184 (quoting *Coos Bay*, 14 PECBR at 233); *accord Jackson County Sheriff’s Employees’ Association v. Jackson County Sheriff’s Department*, Case No. UP-023-11, 25 PECBR 449, 457-58 (2013).

We first analyze TriMet’s actions in March 2012, which ATU contends changed the *status quo*. Specifically, in March 2012, TriMet managers met with 11 road/rail supervisors to discuss how those supervisors could improve their TMC enforcement responsibilities and their documentation of those responsibilities. Those meetings were memorialized in letters sent by TriMet to the 11 road/rail supervisors, which informed those employees that they were expected to: (1) complete one hour of TMC enforcement per workday; (2) contact approximately 35 TriMet passengers during that hour of TMC enforcement; and (3) demonstrate TMC enforcement, noting that citations and exclusions were expected for fare violations. The letters further informed the employees that additional training or instruction could be arranged if requested.

ATU has not established that these March 2012 counseling sessions and letters changed the *status quo* regarding employment relations. To the contrary, since 2008, the essential functions of the road/rail supervisor included TMC enforcement, which also included fare inspection. As set forth above, in 2008, TriMet merged the fare inspector classification into the road/rail supervisor classifications. When that merger occurred, TriMet’s Banta expressed a clear intent to have road/rail supervisors perform a broader range of duties, including fare inspection work. TriMet then acted to implement this intent. Not long after the 2008 Fare Inspector Agreement was negotiated, TriMet included the fare inspection responsibilities in the new road/rail supervisor job descriptions. At the same time, TriMet notified the bus/rail operators, who were potential applicants for new road/rail supervisor positions, that the assignments that they could bid on included fare inspection duties. TriMet also included the fare inspection duties in the road/rail supervisor job posting and provided training on fare inspections and SOPs related to fare inspections to the successful road/rail supervisor job applicants.

Moreover, in September 2010, TriMet informed road/rail supervisors that one hour of TMC enforcement was expected per workday, and that weekly enforcement reports were required. As early as November 2010, Assistant Manager Stokes told road/rail supervisors who were not filing code enforcement reports to aim for contacting 35 passengers during their one hour of code enforcement. This goal was based on the approximate average of the number of contacts per hour made by road/rail supervisors filing code enforcement reports between February and October 2010. Those road/rail supervisors who continued to fail to file code enforcement work were reminded of this goal in March 2011. Therefore, TriMet’s March 2012 reminder that road/rail supervisors were expected to contact approximately 35 passengers during their hour of code enforcement work did not change the *status quo*.

Additionally, in July 2011, road/rail supervisors were told that citations and exclusions (as opposed to warnings and education) were expected for riders who lacked proof of a valid fare. Consistent with that July 2011 directive, TriMet modified SOP 313 in August 2011 to identify the proper responses to fare violations by road/rail supervisors. The revised SOP 313 provided that: (1) written warnings were to be rarely used and only when compelling reasons

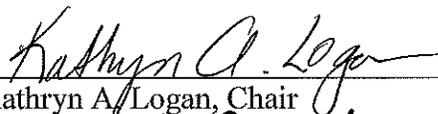
required leniency; (2) “clear violations of fare policy require issuance of a citation to ensure overall system compliance”; and (3) exclusions may be issued if temporary removal of the customer from TriMet property is warranted. SOP 313 stated further that “it is expected that the majority of fare violations warrant issuance of a citation.” Therefore, the March 2012 meetings and letters reminding 11 road/rail supervisors of the citation/exclusion expectation did not change the *status quo*.

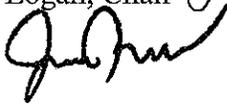
In sum, we conclude that TriMet did not change the *status quo* in March 2012. To the contrary, at that time, TriMet was merely reminding 11 road/rail supervisors of *existing* job requirements that had previously been in place. Indeed, nine of the 11 road/rail supervisors who were counseled in March 2012, had received similar counseling letters in November 2010, and four of those 11 had received an additional similar counseling letter in March 2011.⁹ Consequently, we hold that TriMet did not change the *status quo* when it met with 11 road/rail supervisors (and sent letters memorializing those meetings) in March 2012 to remind those supervisors of TriMet’s expectations of their job responsibilities.¹⁰ Therefore, we will dismiss the complaint.

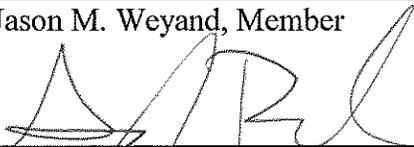
ORDER

The complaint is dismissed.

DATED this 2 day of December 2013.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

⁹The only meaningful addition in the March 2012 letter was the expectation that citations and exclusions be issued for fare evasion. As explained above, that added expectation arose out of a July 2011 directive.

¹⁰We also reject ATU’s allegation that TriMet changed the *status quo* by establishing a “daily quota” in March 2012 regarding passenger contacts and fare-evasion citations. The record does not establish that any such quotas were imposed.