

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-42-10

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION,)
DIVISION 757,)
)
Complainant,)
)
v.)
)
TRI-COUNTY METROPOLITAN)
TRANSPORTATION DISTRICT,)
)
Respondent.)
_____)

RULINGS,
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

Both parties waived oral argument on Complainant's objections to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on June 25, 2012, after a hearing was held on November 9 and 10, 2011, in Portland, Oregon. The record closed on January 9, 2012, following receipt of the parties' post-hearing briefs.

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

Shelley Devine, Senior Deputy General Counsel, Tri-County Metropolitan Transportation District, Portland, Oregon, represented Respondent.

On August 24, 2010, Complainant Amalgamated Transit Union, Division 757 (ATU) filed this unfair labor practice complaint against Tri-County Metropolitan Transportation District (TriMet).¹

¹This case was originally scheduled for hearing in April 2011, following briefing and decision over whether the original complaint stated a claim for relief. That hearing was postponed while the parties attempted to reach a stipulation of facts. The parties ultimately filed cross motions related to the need for certain evidence to decide the matter. Those motions were denied leaving disputes of fact between the parties, necessitating a hearing.

TriMet filed a timely answer to the complaint.

The issues presented for hearing, based on the amended complaint and amended answer, are:

1. Did TriMet violate the terms of signed agreements with ATU regarding Fare Inspectors in June 2010 by removing three Fare Inspectors from their Fare Inspector positions, and later placing two of them on more onerous schedules? If so, did TriMet violate ORS 243.672(1)(g)?
2. If ATU prevails, should TriMet be required to pay ATU a civil penalty?²

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. TriMet is a public employer as defined by ORS 243.650(20). ATU is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of approximately 2,000³ TriMet employees.
2. ATU and TriMet have been parties to a series of collective bargaining agreements beginning in the 1980s through the agreement in effect at the time of hearing. The latter agreement covered the period December 1, 2003 through November 30, 2009, and remains as the *status quo* governing the events at issue in this case.⁴
3. The TriMet classification of Fare Inspector has been in the ATU bargaining unit since 1982. The primary duty of the position is fare enforcement on the TriMet system, which involves contact with passengers and issuing citations if the passengers fail to produce evidence of fare payment. Until recently, they were the only TriMet employees who did this form of fare enforcement. In 2008, there were 15 employees doing this work, 11 Fare Inspectors, and four Lead Fare Inspectors. The most senior Fare Inspectors had approximately 10 years of seniority within that

²In its amended answer, TriMet raised defenses that (1) ATU waived its right to challenge the layoff through the collective bargaining agreement; and (2) ATU failed to exhaust the grievance procedures in the collective bargaining agreement, or this matter should be deferred pending resolution of the grievance process. TriMet did not present argument on these issues in its post-hearing brief and the ALJ did not consider those affirmative defenses. TriMet did not object to the Recommended Order so we also decline to consider these affirmative defenses.

³*Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05, 22 PECBR 911 (2009), *aff'd on petition and cross-petition*, 250 Or App 681, 282 P3d 2 (2012).

⁴At the time of hearing, the parties' bargaining process was wending its way through the Public Employee Collective Bargaining Act (PECBA) interest arbitration procedures. *See Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-016-11, 24 PECBR 412, *recons*, 24 PECBR 488 (2011).

classification and more than eight additional years of seniority in their previous classifications with TriMet. The previous classification of the employees at issue was Bus Operator.

4. In 2007, Steve Banta became TriMet Executive Director of Operations. After reviewing the TriMet Operations Division organization of work, Banta decided to eliminate the Fare Inspector classification and move those employees and their duties into the Road and Rail Supervisor classifications, which were also in the ATU bargaining unit. Road and Rail Supervisors already performed a variety of duties in the field, including assisting at accident and incident scenes. Combining the functions would increase the number of employees available to perform fare inspection and road/rail supervision.

5. In the spring of 2008, Banta met with the Fare Inspectors in person and told them of his plans, and ATU and TriMet agreed to bargain over the impact of the changes.

The August 2008 Fare Inspector Agreement (FIA)

6. As described in more detail below, the parties bargained over the impact of the transfer of the Fare Inspectors during the summer of 2008. There were two issues concerning the language of the final agreement relevant to this unfair labor practice proceeding: position security for the remaining Fare Inspectors and premium shifts for the transferred employees.

7. On July 16, 2008, representatives of ATU and TriMet first met to bargain the impact. TriMet was represented by Peggy Hanson, TriMet Manager of Operations. ATU was represented by Jon Hunt, ATU President; Sam Schwarz, ATU Vice President; and Jim Fowler, an ATU Executive Board officer representing the bargaining unit work group which included the Fare Inspectors.

8. After the July 16 meeting, Hanson created a draft agreement dated July 18.⁵ The draft divided the Fare Inspectors into two groups. The members of one group, with less than 18 years of service at TriMet, were to become Road/Rail Supervisors. The members of the second group, with 18 or more years of service at TriMet, were to remain in the Fare Inspector position. ATU officials believed that this structure reflected an assumption by the parties that the Fare Inspector position would disappear through attrition. The draft did not contain position security or premium shift provisions.⁶

9. On July 30 and 31, the parties met for further bargaining. ATU representatives believed that the parties were in agreement that the remaining Fare Inspectors would not have to work "bad" shifts. The parties had difficulty, however, defining a premium shift because a shift desired by one employee might not be considered desirable by another employee.

⁵Hanson created three draft agreements, dated July 18, August 7, and August 14. Hanson also created the final agreement on August 18.

⁶The parties had agreed to provide position security for other positions in the past. The collective bargaining agreement provides that TriMet will retain 14 Facilities Maintenance positions and three Shelter Maintenance positions. Past side agreements protected other positions.

10. After the July 31 meeting, Hanson wrote a memo to Hunt describing the proposals made and agreements reached during these meetings. Hanson never sent this memo to Hunt, however. In her memo, Hanson stated:

“The purpose of this Memo is to list ATU’s proposed changes and address each of them specifically, as per our conversation this morning:

“* * * * *

“ATU Proposed Change: All current Fare Inspectors with 18 or more years TriMet seniority (i.e. hire date) who wish to remain as Fare Inspectors must declare in writing their intent to remain as Fare Inspectors. *Premium shifts for those who stay at Fare*. Sign up will be approved by TriMet and ATU. *Premium shift is a shift that reflects the Fare Inspector’s choice that they enjoy*. These Fare Inspectors still have the right to move over to Supervisor before October 1, 2008. All Fare Inspectors will have the opportunity to work holidays. [Emphasis added.]

“TriMet Response: Agreed. All current Fare Inspectors with 18 or more years TriMet seniority will be incorporated into the revised agreement.”⁷

11. On August 7, Banta, Hanson, and Hunt met. Later that same day, Hanson wrote a second draft agreement and sent it to ATU. This draft did not contain position security or premium shift provisions. ATU did not object to these omissions.

12. On August 11, Hanson sent Hunt a letter stating that the August 7 draft agreement had to be signed by ATU no later than August 14. Hanson and Hunt understood that TriMet would unilaterally merge the Fare Inspectors into the Road/Rail Supervisor Department if ATU did not meet the deadline. Later that day, Hanson wrote Hunt memorializing a telephone conversation. Hanson wrote, “you and I agreed that the ATU will have until Thursday, August 14, 2008 at 5:00pm PDT to sign and return the agreement to me for authorization. The 8/7/08 agreement identifies all terms and conditions of the agreement in its entirety, and is agreed to only on a non-precedent setting basis.”

13. On the morning of August 14, 2008, notwithstanding the agreement’s silence regarding position security and premium shifts, ATU President Hunt met with the Fare Inspectors to discuss Hanson’s August 7 draft. In addition to Hunt, Executive Board member Fowler and 14 of the 15 Fare Inspectors attended the meeting.

⁷ATU argues that this language in Hanson’s unsent memo is evidence of TriMet’s agreement regarding premium shifts. We conclude that the memo is insufficient to support such a finding. Hanson’s next draft agreement did not contain this language and ATU did not object to the omission or contend that it failed to reflect their agreements.

14. During the meeting, the Fare Inspectors expressed concerns about position security, stating that they feared TriMet would sign the agreement and then abolish their positions anyway.⁸ They also raised the issue of premium shifts. Hunt then had the Fare Inspectors vote on the agreement with the understanding that the modifications that they requested would be included. The Fare Inspectors approved the agreement contingent upon the final draft's inclusion of position security and protection for premium shifts.

15. After the meeting, Hunt called Hanson to inform her of the Fare Inspectors' response. Hunt specifically asked Hanson to add language to ease some Fare Inspectors' concerns that TriMet would sign the agreement and then eliminate the Department anyway.

16. Hanson asked Evelyn Minor-Lawrence, TriMet Director of Labor Relations, for language that would address ATU's concerns about eliminating the remaining Fare Inspector positions. Minor-Lawrence gave Hanson language that Hanson believed meant the Fare Inspectors would continue in their positions until they resigned, retired, or involuntarily left TriMet. Hanson placed this language in a revised draft, creating a new paragraph which read as follows:

"All current Fare Inspectors with 18 or more years TriMet seniority (i.e., hire date) who declare in writing their desire to remain as Fare Inspectors by the above-mentioned deadline may choose to remain in that position until they resign, retire or involuntarily leave the District."

17. Hanson believed that this language did not, in fact, reduce TriMet's ability to terminate the Department at will and transfer the Fare Inspectors to other classifications. Hanson did not share this belief with Hunt. Hunt and Hanson never specifically discussed layoffs or workforce reductions during any of their discussions, except as noted above, and did not specifically discuss the meaning of the phrase "resign, retire or involuntarily leave the District."

18. In response to the Fare Inspector's concerns about premium shifts, Hanson also included the following new paragraph in her revised draft:

"The District will maintain or improve the current Fare Inspector work shifts comparable with the actual workforce that exists."

19. On August 14, 2008, at approximately 5:00 p.m., Hanson sent Hunt a third draft agreement which included the new provisions described above. Hanson included a demand that the agreement be signed that day. Hunt responded that ATU could not sign this draft because it needed some additional, but minor, changes. On August 15, Hunt telephoned Hanson with the corrections. Hanson agreed to all but one.

⁸It does not appear that the parties contemplated that any Fare Inspectors would be subject to layoff from employment with TriMet. Not only did all of them have significant seniority as Bus Operators or other positions, but TriMet had not laid off any ATU bargaining unit members since the 1980s.

20. On Monday, August 18, Hanson sent the fourth and final draft to Hunt. The agreement, in letter form, bore a subject line stating "Settlement Agreement — Fare Inspectors" (FIA). Attached were lists of the Fare Inspectors and Road and Rail Supervisors and their TriMet and classification seniority dates. The parties signed the agreement that day.

21. Pursuant to the FIA, the Fare Inspectors with less than 18 years seniority at TriMet had the option to become Road or Rail Supervisors or, if they failed to do so, return to the position they held prior to becoming Fare Inspectors. Seven Fare Inspectors became Road or Rail Supervisors.

22. Because they had less than 18 years of service, Fare Inspectors Coryell and Thake were not entitled to remain Fare Inspectors under the FIA, and they complained to Hunt and filed grievances on the issue.⁹ By letter dated September 10, Hunt told Coryell and Thake that ATU's options in impact bargaining had been limited, and that he had "received [Hanson's] assurance that the intent is that those remaining in the department will determine what hours will be worked by the fare inspectors."

The January 2009 Coryell/Thake Agreement (Coryell/Thake Agreement)

23. In October 2008, Coryell and Thake transferred to the Road Supervision Department, as required by the FIA. Both men continued to object to their transfer and sought to return to their Fare Inspector positions. Hunt asked TriMet to consider their return to fare inspection. On November 18, 2008, Hanson wrote Hunt, stating that:

"I believe the work that you and I achieved with the Agreement signed on August 18, 2008 is sound and based upon strong care and principles. To that end, I will not not consider a modification of our Agreement and will not return Mr. Coryell or Mr. Thake to their former positions."

24. In January 2009, Hunt asked Hanson if TriMet would meet with the former Fare Inspectors. TriMet agreed, and on January 28, 2009, Banta and Hanson met with the group as a whole. Banta and Hanson then met with Coryell and Thake. At this meeting, Coryell and Thake stated that they wanted to return to fare inspection. Banta and Hanson tried to convince Coryell and Thake that returning was not in their best interests. Banta and Hanson repeatedly referred to the Fare Inspection Department as "a dying department" where "you would be at the bottom of the seniority forever" even though they had 20 to 25 years left in their careers. (Coryell Testimony, Tr. 36-7.) Hanson told them that if they chose to go back to fare inspection, they would not be permitted to transfer or bump out of that position back into a Road Supervisor, but would be bumped or transferred to their last full time position, *e.g.*, bus driver or rail operator. Coryell and Thake remained adamant about returning.

⁹ATU rejected the grievances as inconsistent with the August agreement.

Banta and Hanson agreed to place Coryell and Thake in Fare Inspector positions, and also agreed to give them the protections of the 2008 FIA.¹⁰

Hanson talked briefly with Coryell a few days after the meeting and Coryell reiterated his desire to return.

25. On January 30, 2009, the parties signed an agreement in letter form entitled "Fare Inspector Settlement Modification." (Coryell/Thake Agreement.) The agreement was drafted by TriMet officials, and states:

"This modification of the August 18, 2008 Fare Inspector Settlement Agreement will allow John Coryell and James Thake to return to their prior positions of Fare Inspector, effective Sunday, February 1, 2009. * * * They will return with the seniority and status previously held as Fare Inspectors. They forfeit any seniority they held in the Road and Rail Supervisor position. In the future, should any of these individuals wish to become a Road or Rail Supervisor, they will be required to apply when there is an open position, go through the competitive recruitment process, complete the required training and establish seniority in their new classification based on their new appointment date. This agreement identifies all the terms and conditions of the settlement in its entirety, and is agreed to only on a non-precedent setting basis."

26. Coryell and Thake returned to Fare Inspector positions in February 2009.

¹⁰We base this Finding of Fact on the unrebutted testimony of Coryell and Thake regarding matters discussed during their meeting with Banta and Hanson. Coryell and Thake testified that although Banta and Hanson initially tried to dissuade them from returning to Fare Inspector positions, they eventually agreed to allow them to do so, and also agreed that Coryell and Thake would have the protections provided by the FIA. (Coryell Testimony, Tr. 37; Thake Testimony, Tr. 93.)

Banta provided no detailed testimony regarding the content of the discussion at the January 2009 meeting. (Banta Testimony, Tr. 365.) Hanson, however, corroborated Coryell and Thake's understanding that TriMet modified the provisions of the FIA to cover Thake and Coryell. She testified as follows regarding the January meeting and her subsequent discussions with Hunt about Thake and Coryell's positions:

"So that was the subsequent, and the whole time Jon and I are still talking back and forth at the end of this ongoing dialogue, it was my position that we had executed in good faith the settlement agreement described here, and to not revert back or make an exception in the case of Mr. Thake and Mr. Coryell. But at the end of the day we did; Steve decided that we would modify it a their request and at Jon's request, and we did so." (Hanson Testimony, Tr. 388.)

The August 2010 Workforce Reduction

27. In January 2010, Banta left TriMet to become Chief Operating Officer of Phoenix's Metrorail. Shelly Lomax, a 23-year TriMet employee with 14 years of work as a manager in the Operations Department, replaced Banta as TriMet's Executive Director of Operations.

28. In the spring of 2010, TriMet faced a \$27 million budget shortfall and began several cost-cutting measures, including reducing bus and rail service, placing some managers on furloughs, and freezing unrepresented employee wages. TriMet eliminated 18 positions in the Operations Division's Field Operations Department, which includes Road and Rail Supervisors and Fare Inspectors.

29. Lomax and ATU officials had several discussions about TriMet's cuts, including the impact on Fare Inspectors. They discussed the FIA's phrase "resign, retire or involuntarily leave the district." ATU officials told Lomax that "involuntarily leave the district" did not include reductions in force. Lomax disagreed, noting that a reduction in force was involuntary for the employees. The parties agreed to disagree.

30. The Field Operations Department position reductions were proportionate to the number of employees in each workgroup. However, because TriMet also had a shortage of Bus Operators, the number of employees who would "bump-back" to Bus Operator was also a factor in TriMet's decisionmaking.¹¹ TriMet eliminated seven Road Supervisor positions, seven Rail Supervisor positions, and three Fare Inspector positions. The selection of specific employee positions for elimination was based on seniority. The three Fare Inspectors with the the least amount of seniority were Coryell, Sandy Raney, and Thake.

31. On June 21, 2010, TriMet issued Coryell, Raney, and Thake written notice that TriMet was eliminating their Fare Inspector positions effective August 29, 2010.

32. The content of the notice, which was in letter form provided a box at the top of the letter with the following information:

Current Position: Fare Inspector
Bump-back Position: Bus Operator
Previous Position Seniority Date: 9/6/92."

The body of the letter stated, in part:

"As you know, TriMet has had to implement service reductions over the past two years due to the ongoing recession and revenue shortfall. In order to avoid deeper service cuts, TriMet also took steps to reduce non-union and union positions that indirectly support service.

¹¹Lomax and Field Operations Manager Jay Jackson believed that TriMet could not have eliminated any additional Road or Rail Supervisors without significantly affecting service to TriMet customers.

“I regret to inform you that due to a reduction in Fare Inspector positions in TriMet’s 2010-2011 budget, *you will be returned to your previous seniority class of Bus Operator* effective Sunday, August 29, 2010. [Emphasis added.]

“You will be added to the signup queue for Bus Operators with a seniority date of 9/6/92, for Fall Service effective 9/5/10. The Fall service signup for Bus Operators begins 7/12/10 * * *.

“If you believe your previous position seniority class or date information is incorrect, or if you do not intend to sign in the Bus Operator seniority class for Fall service, you must notify Executive Administrator Allison Horn * * * no later than 5:00pm on June 30, 2010.

“As of May 29, 2010, our records indicate you have * * * hours of vacation. You are eligible to hold back up to two weeks of vacation for the remainder of the 2010-2011 vacation year. Please complete and return the enclosed Vacation Request Form for the remainder of the 2010-2011 vacation year to Lora Francis * * * by July 9, 2010. You will be advised whether your vacation weeks have been approved based on your Bus Operator seniority.

“In addition, our records indicate that you have been away from performing safety-sensitive duties in excess of 30-days, so you are required to take a drug test prior to returning to duty operating a District vehicle. Please see me or Assistant Manager Dan Stokes no later than July 30, 2010 to arrange for the test.

“You are to report to the Bus Operator Training department (Holgate Plaza) at 8:00am on Monday, August 30, 2010 for 4 weeks of Bus Operator training. You must have a valid CDL or CDL instruction permit and DOT medical card by Sunday, August 29, 2010 * * *.

“At the end of your shift on the last day of your work as a Fare Inspector prior to Sunday, August 29, 2010, please return your Fare Inspector radio, safety vest and any other TriMet-issued equipment to me, Assistant Manager Dan Stokes or to a Lead Supervisor.

“Please contact me * * * if you have any questions about your bump-back. I will notify you if any change occurs in your bump-back situation.

“An employee’s return to the work group bumped from, is governed by Article I, Section 14, Paragraph 1 of the [collective bargaining agreement]:

“‘Employees’ department seniority shall govern in laying off and reemployment of employees. Employees . . . shall be returned in the inverse order in which they were laid off, as the need for their classification, or classification of work, permits.’ [Emphasis omitted.]

“A voluntary informational meeting to answer your questions will be held on Friday, June 25, 2010 * * *.

“I wish you the very best *in your continued work at TriMet.*” (Emphasis added.)

The letter was signed by TriMet Manager of Field Operations Jay Jackson.

33. The three Fare Inspectors chose to return to their former Bus Operator positions because each of them knew that failing to “bump-back” would result in their layoff.

Raney’s return to Bus Operator

34. Lomax was aware that Raney’s bump-back was a hardship for her. On June 30, 2010, Lomax asked Hunt if ATU would agree to allow TriMet to laterally transfer Raney to a Road Supervisor position. This would allow Raney to earn the same wages she did as a Fare Inspector.¹² Hunt stated he would think about it, but did not raise the issue afterwards. On July 29, 2010, Raney met with Lomax. Raney told Lomax that returning to a Bus Operator would be a financial hardship for her. Lomax told Raney that it would be possible for her to make a lateral transfer to a Road Supervisor position if ATU agreed. Raney believed that applying her seniority outside the Fare Inspector classification conflicted with longstanding ATU/TriMet seniority rules (under which she had zero seniority as a Road Supervisor) and would be unethical. Raney knew that accepting the offer would disadvantage the seniority of approximately 30 Road Supervisors. Raney told Lomax that she was not interested in that option. On August 30, 2010, Lomax wrote to Hunt regarding her meeting with Raney and the possibility of a transfer. Lomax asked Hunt to contact her if he was interested in discussing it further, but Hunt did not do so.

35. Raney had not worked as a Bus Operator since leaving the position for Fare Inspector 12 years before. She found the work extremely difficult, and experienced a series of anxiety attacks and related physical issues while driving, and stress-related absences from work. As a result, Raney’s physician recommended that she leave the position in the interests of her health and the safety of her passengers. On March 18, 2011, Raney accepted that recommendation and retired from TriMet.

Coryell and Thake’s return to Fare Inspection

36. In the spring of 2011, TriMet determined that it had sufficient funds to restore some Operations Department positions, including two Fare Inspector positions. The collective bargaining agreement provided that employees would be returned to their previous positions by seniority. Because Raney had retired, the two employees to be restored were Coryell and Thake. During June, TriMet Manager of Field Operations Jackson contacted both employees and offered them Fare Inspection positions, and they both expressed interest in returning.

¹²Hanson determined that this process would not work for Coryell and Thake, because even if their level of seniority as Fare Inspectors was transferred, they would still have less seniority than employees already bumped out of Road Supervisor positions.

37. However, on July 1, 2011, Thake objected to the Fare Inspector shift and location sign-up posted on July 1, 2011.¹³ Thake told Assistant Operations Manager Dan Stokes that under the proposed sign-up, he would not return to Field Operations as a Fare Inspector. He said that he was willing to return to work only if he was given work on the eastside. He also stated that he preferred daytime work, Monday through Friday, but would accept evening work.

Thake also told Stokes that the proposed sign-up was retaliation for filing an unfair labor practice complaint, and that if the sign-up was not changed he would file a grievance and complaint with the Bureau of Labor and Industries (BOLI).

38. Stokes asked Thake to state his position in writing, which Thake did in an e-mail to Stokes on July 5, 2011. That email states in part:

“This communication will not affect any grievances pending or future. Also, any unfair labor practice suits or Bureau of Labor and Industries inquiries.

“* * * In Aug. of 2010 I was told I would be demoted and given a pay cut due to budget constraints. At that time I was working am shifts with weekends off and able to sign out of my preferred garage, Ruby Junction. Prior to that I was able to hold weekend am shifts and able to sign out of Ruby Junction. In June of 2011 I was told I could return to fare inspection and a sign up would be posted on June 30th. After looking at the sign up and spoken [*sic*] to all of the inspectors I will have no other option but to sign pm shifts, sun. mon. days off and will have to sign out of Elmonica garage. **Being that this effectively does away with all the privileges that I had acquired in approx. 13 years of seniority in the department I am given no choice but to refuse my reinstatement to fare inspection status and will remain a bus driver.** If however a delay in the sign up can be granted and a new sign up posted I ask only that I be allowed to work out of Ruby Junction, a garage that I have, for a number of years and sign ups, shown that I prefer.” (Emphasis added.)

39. Granting Thake’s request would, among other issues, have delayed the sign-up by one week, although such delays had occurred in the past for other reasons.

40. On July 6, 2011, Field Operations Manager Jackson mailed a letter to Thake which states, in part:

“While I understand Ruby Junction to be your preferred garage as an Inspector, sign-ups are designed with a business need in mind. Further, the days off of Sunday and Monday are the same days off held by a Fare Inspector who holds higher

¹³Proposed schedules for Fare Inspectors are posted for about a week, and employees sign up for shifts, based on seniority.

seniority than you would have held had you returned to your Fare Inspector position.^[14]

“I have accepted your resignation as Field Operations Fare Inspector. In accepting your resignation you are reminded that you have forfeited your seniority in that position moving forward.”

41. On July 7, 2011, ATU filed a “Request for a Step 1 Pre-Filing Conference,” a necessary step in the grievance procedure under the parties’ collective bargaining agreement, on behalf of Fare Inspectors Gary Radford and Coryell. In its request, ATU alleged that the current Fare Inspector sign-up violated the FIA because it offered an insufficient amount of day shifts and weekends off to the Fare Inspectors.

42. On July 8, 2011, after consulting with ATU officials, Thake left a message on Jackson’s voicemail accepting a return to Fare Inspector, and the next day wrote an e-mail to Jackson stating, “I have decided to accept my reinstatement to Fare Inspector.” On July 12, Jackson wrote Thake that TriMet had not agreed to Thake’s conditions for reinstatement, had accepted Thake’s resignation from that reinstatement, and had accordingly held the sign-up as scheduled without his participation. Later in July, Thake wrote an e-mail to another individual stating in part, “I didn’t want to come back as I told both stokes and jackson” and “[ATU President] Hunt said I needed to go back to fare inspecting on the screwed up sign up because I was hurting myself. I told him I didn’t care and would fight it the way I wanted to.” Thake stated that Hunt had persuaded him to rescind his resignation, Jackson had refused it, and Hunt had asked him to file a grievance over that refusal. Thake told Hunt that he was no longer interested in helping anyone and that he would fight Jackson “my way. Today I filed it so we will see what kind of wasp nest I kicked.” Thake was apparently referring to a grievance he filed, which was ultimately denied.

43. On July 21, 2011, TriMet issued a “Pre-Filing Conference Meeting Determination Letter” in response to the ATU’s July 7 request for a Step 1 Pre-filing Conference. TriMet denied the grievance on the grounds that the current Fare Inspector sign-up process was consistent with the sign-up process in effect on the date the FIA was executed. TriMet noted that the August 17, 2008 Fare Inspector sign-up offered the following shifts and days off: 41 percent day shifts, 58 percent night shifts, and 29 percent schedules with Saturdays and Sundays off. TriMet also noted that the July 10, 2011 Fare Inspector sign-up offered the following shifts and days off: 60 percent day shifts, 40 percent night shifts, and 60 percent schedules with Saturdays and Sundays off.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

¹⁴Had he returned, Thake would have been the Fare Inspector with the least seniority.

2. TriMet violated the terms of signed agreements with ATU regarding Fare Inspectors by removing Fare Inspectors Raney, Coryell, and Thake from their Fare Inspector positions, in violation of ORS 243.672(1)(g).

ATU alleges that by removing Raney, Coryell, and Thake from their Fare Inspector positions, TriMet violated ORS 243.672(1)(g)¹⁵ by violating the terms of the signed agreements. At issue is that portion of the FIA that provides:

“All current Fare Inspectors with 18 or more years TriMet seniority (i.e., hire date) who declare in writing their desire to remain as Fare Inspectors by the above-mentioned deadline may choose to remain in that position until they resign, retire or involuntarily leave the District.” (Finding of Fact 16.)

ATU argues that the phrase “resign, retire or involuntarily leave the District” means that the Fare Inspectors were guaranteed positions as Fare Inspectors until they resigned, retired, or were involuntarily separated from their employment with TriMet. ATU contends that TriMet’s actions—eliminating Fare Inspector positions and requiring Coryell, Thake, and Raney to “bump-back” to previously held positions—did not constitute an involuntary separation from TriMet employment and was, therefore, not permitted under the terms of the FIA. TriMet, however, asserts that by eliminating the Fare Inspector positions it involuntarily separated the employees at issue from their jobs in accordance with the provisions of the FIA. Thus, we begin our consideration of ATU’s claims by analyzing the applicable provisions of the written agreements.

Our goal in a contract interpretation case is to discern the parties’ intent. To determine that intent, we apply the three-part analysis described in *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)). We first examine the text of the disputed contract language in the context of the document as a whole, and if the provision is clear, the analysis ends. Unambiguous contracts must be enforced according to their terms. *Portland Fire Fighters’ Assn. v. City of Portland*, 181 Or App 85 at 91, 45 P3d 162, *rev den*, 334 Or 491 (2002). Contract language is ambiguous if it can be given more than one plausible interpretation. 181 Or App at 91. If the provision is ambiguous, we proceed to the second step and examine extrinsic evidence of the parties’ intent. “[W]e will examine the parties’ prior actions or practice as an aid to contract interpretation *only if* the contract language is ambiguous.” *Oregon AFSCME Council 75, Local 2831 v. Lane County*, 23 PECBR 416, 425 (2010) (emphasis in original). Finally, if the provision remains ambiguous after applying the second step, we proceed to the third step and apply appropriate maxims of contract construction. *Yogman*, 325 Or at 364.

We first look to the job security clause in the context of the FIA to determine the meaning of this provision as applied to the facts at issue. As a general rule, parties are strictly bound to agreements they have signed, and this Board will not rewrite or reconstitute the language of those

¹⁵ORS 243.672(1)(g) makes it an unfair labor practice for a public employer to “violate the terms of any written agreement with respect to employment relations * * *.”

agreements. *Gresham Grade Teachers Association v. Gresham Grade School District No. 4 and Larson*, Case No. C-184-78, 5 PECBR 2889, 2895 (1980), *remanded for further proceedings on other matters*, 52 Or App 881, 630 P2d 1304 (1981), *order on remand*, 6 PECBR 4953 (1981).

Here, the key phrase is the one that provides that Fare Inspectors “may choose to remain in that position until they * * * involuntarily leave the District.” The parties agree that “the District” means TriMet, not the Fare Inspection Department. We find the phrase clear and unambiguous; it guarantees Fare Inspectors the right to remain in their positions until they are separated, against their wishes, from employment with TriMet. On June 21, 2010, TriMet did not involuntarily remove the three Fare Inspectors from *the District*; instead, it involuntarily removed them from their former Department or work group. These actions violated the terms of the Coryell/Thake and FIA Agreements, resulting in a violation of subsection (1)(g).

TriMet argues, however, that Coryell and Thake had no position security under the FIA because that agreement did not apply to them. TriMet contends that Coryell and Thake returned to Fare Inspection under the Coryell/Thake Agreement, which states that it “identifies all terms and conditions of the settlement in its entirety” and does not include any guarantees regarding position security. ATU, however, argues that the Coryell/Thake Agreement simply added Coryell and Thake to the FIA and therefore provides the two employees with all protections in the earlier agreement. In support of its position, ATU points to the statement in the January agreement that it is a “modification” of the FIA.

We first review the language in the Coryell/Thake Agreement in context to determine whether it is clear and unambiguous. As noted above, an agreement is ambiguous if it is capable of more than one plausible interpretation. *City of Portland*, 181 Or App at 91. We conclude that the Coryell/Thake Agreement is ambiguous, as both TriMet and ATU advance plausible interpretations of the relevant language. Accordingly, we proceed to the second step of our analytical process: reviewing extrinsic evidence concerning the parties’ intent.

The evidence shows that the parties intended for Coryell and Thake to be subject to the FIA. Coryell and Thake provided un rebutted testimony that the parties intended to modify the FIA by specifying that the agreement now applied to them. (Finding of Fact 24 n 10.) Their testimony was supported by Hanson who testified that she and Banta agreed to modify the FIA to make an exception for Thake and Coryell.

Additional extrinsic evidence of the parties’ intent in executing the Coryell/Thake Agreement is provided by TriMet’s response to the grievances that ATU filed concerning the shifts assigned to Coryell and Thake after they were returned to Fare Inspector positions in July 2011. In their responses to these grievances, TriMet never raised the argument that Coryell and Thake were not subject to the provisions of the FIA and, therefore, not entitled to any of this agreement’s provisions concerning priority shift assignments. Instead, TriMet argued that they had, at all times, complied with the provisions of the FIA in assigning shifts to Coryell and Thake.

We do not agree with TriMet that language in the Coryell/Thake Agreement specifying that the agreement “identifies all terms and conditions of the settlement in its entirety” indicates that the

parties never intended for the terms of the FIA to apply to Coryell and Thake. This provision does not exclude the extension of the position security provisions in the FIA to Coryell and Thake. Instead, it merely makes clear that Coryell and Thake were promised no additional benefits or rights other than those provided in the FIA and Coryell/Thake Agreements.

In sum, we conclude that TriMet violated the terms of the FIA and Coryell/Thake Agreements with ATU and ORS 243.672(1)(g) when it removed Raney, Thake, and Coryell from their Fare Inspector positions in 2009.

3. TriMet did not violate the terms of signed agreements with ATU and ORS 243.672(1)(g) when, in July 2011, it assigned Coryell and Thake more onerous schedules.

ATU argues that TriMet violated ORS 243.672(1)(g) when, in July 2011, it required Coryell and Thake to work shifts both employees found unappealing, contrary to the terms of the two Agreements. We disagree.

The relevant provision in the FIA requires TriMet to “maintain or improve the current Fare Inspector work shifts comparable with the actual workforce that exists.” (Finding of Fact 18.) Prior to the execution of this agreement, Fare Inspectors were never guaranteed any particular shift; instead, they were given the opportunity to sign up for particular shifts based on seniority. TriMet continued to use this signup system in July 2011, and offered Fare Inspectors more desirable day shifts and weekends off than had been offered in July 2008. (Finding of Fact 43.) Accordingly, TriMet complied with the terms of the FIA by improving the work shifts made available to Fare Inspectors.¹⁶

Remedy

We conclude that TriMet violated ORS 243.7672(1)(g) by removing Raney, Thake, and Coryell from their positions as Fare Inspectors in violation of the FIA and Coryell/Thake Agreements. We will order TriMet to cease and desist from violating subsection (1)(g) by failing to apply the terms of these Agreements to these employees. We will also order TriMet to offer Raney and Thake reinstatement to positions as Fare Inspectors, and to make all three employees whole for all lost wages and benefits they would have received had they not been removed from their positions as Fare Inspectors.¹⁷ Thake, however, will not receive any lost wages or benefits that accrued from

¹⁶Thake also objected to the work location to which he was assigned in July 2011. We note, however, that the FIA does not guarantee assignment to any particular work location. The agreement refers only to “work shifts”; *Roberts Dictionary of Industrial Relations* 713 (Fourth Edition 1994) defines a “shift” as “[a] regularly scheduled period of work during the 24-hour day for a plant.” Thus, the plain meaning of the relevant provision in the FIA provides some guarantee regarding the hours assigned to Fare Inspectors, but contains no guarantees regarding their assigned work location.

¹⁷TriMet argues that, by failing to accept TriMet’s offer to transfer Raney to a Road Supervisor position, Raney and ATU failed to mitigate her damages. We conclude that failing to negotiate an exception
(continued...)

the date he refused to return to a Fare Inspector position in July 2011 and the date of his reinstatement under this order, should he accept an offer of reinstatement. Although Thake disagreed with certain aspects of TriMet's offer to reinstate him to a Fare Inspector position, he should have mitigated his damages by "working now" and "grieving later."¹⁸

ATU also asks that this Board require TriMet to pay a civil penalty. This Board may assess a civil penalty of up to \$1,000 against a party that committed an unfair labor practice if (1) a party acted repetitively with knowledge its actions were unlawful, or (2) the party's conduct was "egregious." ORS 243.676(4)(a); *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206, 221 (2005). "Egregious" is defined as "conspicuously bad" and is synonymous with "flagrant." *East County Bargaining Council (David Douglas Education Association) v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9194 (1986), *supplemental order*, 9 PECBR 9354 (1987).

ATU does not claim that the actions at issue were repetitive. It argues that "the admitted actions of Hanson in deliberately misrepresenting the meaning of the contested language during negotiations, as well as subsequent actions by TriMet in violating the clear intent of the parties' agreement" were egregious. (ATU post-hearing brief at 38.) TriMet implemented the FIA in a manner consistent with its interpretation; there is no evidence in the record to demonstrate that the interpretation of the FIA was made in bad faith. ATU does not argue that TriMet's actions struck at core rights protected by the Public Employee Collective Bargaining Act (PECBA) or that TriMet knew that the conduct at issue violated the PECBA. *See Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, 21 PECBR 673, 783 (2007), and *Coos County Board of Commissioners and AFSCME Local 2936 v. Coos County District Attorney and State of Oregon*, Case No. UP-32-01, 20 PECBR 87, 104 (2002).

We conclude that TriMet's conduct was not egregious, and we will not award ATU a civil penalty.

¹⁷(...continued)

to longstanding ATU and TriMet seniority rules, to the disadvantage of approximately 30 employees, is not the type of step ATU or Raney was required to take to mitigate the consequences of TriMet's breach of an agreement.

¹⁸This Board and the courts have long recognized the "work now, grieve later" rule. The Oregon Supreme Court describes this principle as a "well recognized 'common law' rule of labor relations." *Whitney v. Employment Division*, 280 Or 35, 42 n 1, 569 P2d 1078 (1977). *See also Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95, 17 PECBR 54, 68 (1996), *recons*, 17 PECBR 93 (1997). This rule is subject to certain exceptions, none of which are applicable here.

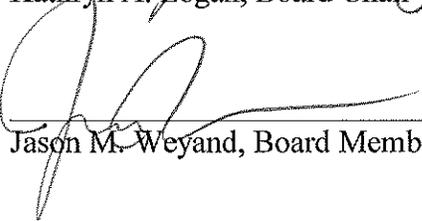
ORDER

1. TriMet shall cease and desist from violating ORS 243.672(1)(g).
2. TriMet shall offer Raney and Thake reinstatement to positions as Fare Inspectors, and make Raney, Thake, and Coryell whole for all lost wages and benefits they would have received had they not been unlawfully removed from these positions. Back pay shall be paid with interest at nine percent per annum and shall be offset by any interim earnings. The back pay award to Thake shall be paid from the date he was unlawfully removed from his position as a Fare Inspector until the date he refused TriMet's offer of reinstatement to a Fare Inspector position in July 2011.
3. The remainder of the Complaint is dismissed.

DATED this 15 day of January 2013.



Kathryn A. Logan, Board Chair



Jason M. Weyand, Board Member

This Order may be appealed pursuant to ORS 183.482.