

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-001-13

(UNFAIR LABOR PRACTICE)

|                            |   |                     |
|----------------------------|---|---------------------|
| TRI-COUNTY METROPOLITAN    | ) |                     |
| TRANSPORTATION DISTRICT OF | ) |                     |
| OREGON,                    | ) |                     |
|                            | ) |                     |
| Complainant,               | ) |                     |
| v.                         | ) |                     |
|                            | ) |                     |
| AMALGAMATED TRANSIT UNION, | ) |                     |
| DIVISION 757,              | ) |                     |
| Respondent.                | ) |                     |
| <hr/>                      |   |                     |
| AMALGAMATED TRANSIT UNION, | ) | RULINGS,            |
| DIVISION 757,              | ) | FINDINGS OF FACT,   |
|                            | ) | CONCLUSIONS OF LAW, |
| Complainant,               | ) | AND ORDER           |
| v.                         | ) |                     |
|                            | ) |                     |
| TRI-COUNTY METROPOLITAN    | ) |                     |
| TRANSPORTATION DISTRICT OF | ) |                     |
| OREGON,                    | ) |                     |
|                            | ) |                     |
| Respondent.                | ) |                     |

On October 2, 2014, the Board heard oral arguments on objections filed by the Amalgamated Transit Union, Division 757 (ATU), to a recommended order issued by Administrative Law Judge (ALJ) Larry L. Witherell on June 18, 2014.<sup>1</sup>

<sup>1</sup>A hearing was held before ALJ Wendy L. Greenwald on August 7 and 8, and October 8, 2013, in Portland, Oregon. The record closed on February 11, 2014, following receipt of the parties' post-hearing briefs. The filing of the briefs in this matter was delayed after a problem was discovered with the hearing recordings. Transcripts of the three days of hearing were ultimately produced in early February 2014. In a periodic reassignment of cases due to workload adjustment, this matter was transferred to ALJ Witherell for the issuance of the recommended order.

Aruna A. Masih, Attorney at Law, Bennett, Hartman, Morris & Kaplan LLP, Portland, Oregon, represented the Amalgamated Transit Union, Division 757.

Shelley Devine, Attorney at Law, Tri-County Metropolitan Transportation District of Oregon, Portland, Oregon, and Keith Garza, Attorney at Law, The Law Office of Keith Garza, Oak Grove, Oregon, represented the Tri-County Metropolitan Transportation District of Oregon.

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On January 3, 2013, the Tri-County Metropolitan Transportation District of Oregon (TriMet) filed an unfair labor practice complaint against ATU. The complaint, as amended on May 30 and June 6, 2013, alleges that ATU: (1) failed to bargain in good faith with TriMet in violation of ORS 243.672(2)(b) by refusing to meet with TriMet on agreed-upon bargaining dates; and (2) refused to bargain in good faith with TriMet in violation of ORS 243.672(2)(b) by engaging in dilatory tactics or practices designed to delay the start of bargaining.<sup>2</sup> ATU filed timely answers to the original and amended complaints.

On June 24, 2013, ATU filed a counterclaim alleging that TriMet refused to bargain in good faith under ORS 243.672(1)(e) based on a series of alleged actions.<sup>3</sup> TriMet filed a timely answer to the counterclaim, which set out a number of affirmative defenses, including an affirmative defense that some of the claims were untimely under ORS 243.672(3).

As agreed to by the parties, the issues are:

1. After demanding to bargain in September 2012, did ATU engage in a series of dilatory tactics or practices designed to delay the start of collective bargaining? If so, did this amount to refusal to bargain collectively in good faith with TriMet in violation of ORS 243.672(2)(b)?
2. After demanding to bargain a new contract in September 2012, did ATU agree to bargaining dates, and then refuse to meet with TriMet to collectively bargain on any of those agreed dates? If so, did this amount to a refusal to bargain collectively in good faith with TriMet in violation of ORS 243.672(2)(b)?
3. If ATU violated ORS 243.672(2)(b), what is the appropriate remedy?
4. Did TriMet refuse to bargain in good faith in violation of ORS 243.672(1)(e) by:

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<sup>2</sup>TriMet originally alleged that ATU violated ORS 243.672(2)(c) by engaging in tactics and practices designed to delay the start of the 150-day bargaining period under ORS 243.712. However, TriMet subsequently withdrew the claim and we are not considering it.

<sup>3</sup>ATU also originally alleged that TriMet failed or refused to provide ATU with requested health insurance information in violation of ORS 243.672(1)(e). However, ATU withdrew this claim prior to the hearing.

- a) conditioning bargaining on scheduling bargaining sessions after first receiving and reviewing ATU’s proposals, on ATU agreeing to sessions closed to the public, limited access to certain members of the media, or on locations with security checks and security checks by TriMet’s security personnel;
  - b) taking inconsistent positions about its bargaining team’s authority or intent to enter into or recommend tentative agreements;
  - c) providing ATU an unsatisfactory caucus room on April 27, only one copy of its proposal, no access to a copy machine, and abruptly and prematurely ending that meeting;
  - d) providing only one date for bargaining in May and June (and then withdrawing that date) and proposing dates in July that ATU had already rejected; or
  - e) offering no dates between July 22 and September 7, 2013?
5. If TriMet violated ORS 243.672(1)(e), what is the appropriate remedy?

For the reasons discussed below, we dismiss TriMet’s amended complaint and ATU’s counterclaims.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. ATU is a labor organization and the exclusive representative of a strike-prohibited bargaining unit of employees at TriMet, a public employer.

2. During the relevant time and events, or where otherwise specified, Neil McFarlane was the TriMet General Manager, and the following individuals served on TriMet’s bargaining team:

|                       |                                                                                 |
|-----------------------|---------------------------------------------------------------------------------|
| Dan Caufield          | Director of Operations Support                                                  |
| Shelly Lomax          | Executive Director of Operations                                                |
| Evelyn Minor-Lawrence | Labor Relations Director                                                        |
| Tom Nielsen           | Maintenance Director                                                            |
| Claire Potter         | Director of Finance                                                             |
| Lucy Shipley          | Director Compensation, Benefits, HRIS                                           |
| Randy Stedman         | Executive Director of Human Resources and Labor Relations (since November 2011) |
| Cynthia Wegesend      | Legal Analyst and Notetaker for TriMet Bargaining Team                          |

3. During the relevant time and events, or where otherwise specified, the following individuals represented ATU:

|                           |                                                                                                                                |
|---------------------------|--------------------------------------------------------------------------------------------------------------------------------|
| Bruce Hansen              | ATU President-Business Representative (since July 1, 2012)                                                                     |
| Ron Heintzman<br>Jon Hunt | Consultant for ATU and former ATU officer<br>ATU Vice-President/Assistant Representative<br>(ATU President until July 1, 2012) |
| Susan Stoner              | ATU General Counsel and Notetaker for ATU Bargaining team                                                                      |

4. TriMet and ATU were parties to a collective bargaining agreement effective from December 1, 2003 to November 30, 2009 (2003-09 Agreement). The negotiations for the 2003-09 Agreement and the successor to the 2003-09 Agreement took place at local hotels. These negotiations were closed to the media and public.

5. The negotiations for a successor to the 2003-09 Agreement were contentious and resulted in a number of unfair labor practice complaints.<sup>4</sup> Both parties issued press releases during the bargaining process that resulted in a certain amount of press coverage. Some of TriMet's press releases outlined its perspective on how employee benefits were too expensive, which factored into TriMet's need to cut public services. Some ATU members, including Bruce Hansen, who at that time was an operator, experienced an increase in negative comments from the public about employee wages and benefits.

6. The parties were unable to reach an agreement on a successor to the 2003-09 Agreement and proceeded to interest arbitration before Arbitrator David Gaba. During the interest arbitration hearing, TriMet offered numerous newspaper articles, press releases and letters to the editor concerning TriMet's budget problems as evidence in support of its last best offer (LBO). On July 12, 2012, Arbitrator Gaba awarded TriMet's LBO as the parties' successor agreement (2009-12 Agreement or Gaba Award). The Gaba Award designated November 30, 2012, as the expiration date for the 2009-12 Agreement. After the arbitrator issued his interest arbitration award, the parties filed unfair labor practice complaints regarding TriMet's LBO and the implementation of the Gaba Award.<sup>5</sup>

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<sup>4</sup>See, e.g., *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), *compliance order*, 24 PECBR 602, *nunc pro tunc order*, 24 PECBR 610 (2012) (new issues in final offer); *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, UP-56-09, 25 PECBR 152 (2012) (information request); *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-39-10, 25 PECBR 325 (2012) (cost of living, health care plan, and health care premium status quo issues).

<sup>5</sup>*Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757 and Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-42/50-12, 25 PECBR 640 (2013)(interest arbitration issues).

7. On June 16, 2012, Bruce Hansen was elected ATU President-Business Representative. His term commenced on July 1, 2012. Hansen had been a member of the ATU executive board from 2007 to 2009.

8. On September 25, 2012, Hansen wrote to TriMet General Manager Neil McFarlane seeking to reopen negotiations over terms of a new agreement. Executive Director of Human Resources and Labor Relations Randy Stedman answered on September 27, proposing that the parties meet for an initial bargaining session on October 30, 2012. Stedman added that due to budgetary issues, TriMet was not willing to incur costs to rent space to conduct negotiations. He also provided a list of TriMet's eight-person bargaining team.

9. On October 9, 2012, Hansen responded, offering November 30, December 19, 20, and 21 as dates for an initial bargaining meeting. On October 16, on behalf of Stedman, Director of Labor Relations Evelyn Minor-Lawrence responded to Hansen and accepted November 30 for an initial meeting.

10. On October 26, 2012, Stedman wrote Hansen to confirm the meeting on November 30, at 9:00 a.m. to 1:00 p.m. at the State Office Building on NE Oregon in Portland. Stedman offered additional meetings on December 20 and 21. On October 29, 2012, Hansen responded, confirming negotiations on those dates, but asking TriMet to notify him if the location for negotiations changed.

11. ATU was concerned that the upcoming negotiations for a successor contract would be difficult. Based on information that ATU had received from its members and outside sources, ATU believed that Stedman, who was hired in November of 2011, was anti-union. ATU was also troubled by a financial plan timeline that it asserted Stedman had created.<sup>6</sup> Although bargaining had not yet started, the document projected that an interest arbitration decision was possible in October 2013. Due to these and other concerns, Hansen sent out a letter to members of the TriMet bargaining unit on November 6, 2012, warning that bargaining was likely to be difficult and asking the members "to approve a temporary, 12-month dues increase of \$25 per month for full time members and \$15 per month for part time members." ATU intended to create a "war chest" with the additional funds to "[l]aunch a public relations campaign to educate the public about the truth of TriMet management," and "[h]ire the experts and legal help needed to win the fight."

12. During bargaining for previous contracts, ATU officials and members came to believe that TriMet issued a number of misleading press releases regarding the negotiations. ATU officials and members believed that TriMet's press releases falsely portrayed ATU and its members as greedy and recipients of overly generous benefits. As early as the summer of 2012, ATU representatives became interested in bargaining in public. ATU members also had expressed their unhappiness over the public's negative response to TriMet's press releases issued during the

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<sup>6</sup>ATU did not prove that Stedman created the document. However, it is likely that someone at TriMet created the document because Stedman had seen it once before the hearing and Lomax recalled it being discussed in a TriMet leadership meeting.

prior bargaining. ATU members and TriMet passengers had also expressed an interest in the bargaining process, as well as a desire to participate in bargaining sessions.

13. Based on this past experience, ATU decided at some point in 2012 to demand public bargaining. In the autumn of 2012, Hansen asked ATU Attorney Susan Stoner to research the topic of ground rules for the successor negotiations. At the time, Stoner and Hansen discussed ATU's ability to demand to bargain with TriMet in public during the negotiations for a successor to the 2009-12 Agreement. Stoner subsequently researched whether bargaining sessions were subject to the Oregon Public Meetings Law, ORS 192.610 through 192.690 (PML).

14. On November 15, 2012, Stedman wrote Hansen again confirming the upcoming meetings for December 20 and 21, and informing ATU that the December negotiations would take place in a different location.<sup>7</sup> On November 16, 2012, Hansen responded, confirming the November 30 date and location, and stating that he would take TriMet's "suggestions of the other dates under advisement."

15. On November 19, 2012, Stedman wrote Hansen noting that on October 29, ATU agreed to the November 30, December 20, and December 21 dates. Stedman provided the details for the rooms and locations for November 30, December 20 and 21. Hansen subsequently informed Stedman that he had "viewed the proposed location and, assuming the caucus room is for the Union's use, that location will be fine."

16. Sometime before November 19, Stoner advised Hansen that she believed that there was legal support to demand to bargain in an open meeting, that is, with the public and press in attendance. As a result, in his November 19 letter to Stedman, Hansen informed TriMet that it expected bargaining sessions to be conducted under the PML, and that ATU did not consent to conducting bargaining in "executive sessions."

17. On November 21, 2012, Stedman sent Hansen a letter setting forth various reasons that TriMet did not agree that the negotiations sessions between the parties were subject to the PML. Among other things, Stedman explained that

"[o]ur negotiating team includes no TriMet Board members. No negotiation session will be a public 'meeting' because it will not include a 'convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter.' ORS 192.610(5)."

18. On November 21, 2012, Hansen responded to Stedman's letter, citing ORS 192.660(3) in support of ATU's assertion that negotiations were subject to the PML.<sup>8</sup> He further stated that

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<sup>7</sup>Tri-Met proposed to hold the November 30 session at the State Office Building on NE Oregon; and the December 20 and 21 sessions at the Oregon Department of Transportation (ODOT) Building on NW Flanders, both located in Portland.

<sup>8</sup>ORS 192.660(3) provides that "[l]abor negotiations shall be conducted in open meetings unless negotiators for both sides request that negotiations be conducted in executive session."

“[u]nless TriMet provides written notice of its intention to abide by Oregon law and conduct negotiations in the open meeting format, with all legal rights accorded those in attendance, the Union will not participate. The Union has made a moral commitment to its members, community stakeholder groups and members of the media that its negotiations with TriMet will be conducted in the full light of day. We intend to honor that commitment.”

19. On November 26, 2012, Stedman again asserted in a letter to Hansen that labor negotiations were not subject to the PML. Stedman argued that the issue had been decided by the Oregon Court of Appeals in *SW Ore. Pub. Co. v. SW Ore. Comm. Coll.*, 28 Or App 383, 559 P2d 1289 (1977). However, Stedman also expressed a willingness to continue discussing the issue of transparent and open negotiations:

“That said, it seems to me that you are picking a fight where there is no fundamental disagreement about the desire for transparency in the negotiations. TriMet has no objection to bona fide members of the press, unaffiliated with either party, being allowed to attend the negotiation sessions and cover the story. You may wish to propose such a ground rule. TriMet likely would be willing to negotiate such a ground rule with an agreement that they are invited outside the requirements of ORS 192.610, *et seq.* TriMet would not agree to bloggers or affiliated members of the press.”

20. In his November 26 letter, Stedman also informed ATU that TriMet was planning on providing “security personnel” for the November 30 bargaining session. Stedman asked Hansen to provide TriMet the names of any people on ATU’s bargaining team beyond the ATU officers and e-board members so that TriMet could inform security of those additional names.

21. On November 27 through 29, the parties engaged in a number of communications regarding the applicability of the PML and discussed whether negotiations should be open to the public and the press. ATU continued to demand that negotiations were subject to the PML and should be conducted in public. TriMet insisted that the negotiations were not subject to the PML because no member of TriMet’s negotiating team was a member of TriMet’s governing body. However, Stedman expressed a willingness to take certain steps to promote transparent negotiations, stating

“[r]egarding your press release, the ATU is tilting at windmills where there is no fundamental disagreement about the desire for transparency in the negotiations. TriMet has no objection to bona fide members of the press, unaffiliated with either party, being invited to sit in on negotiations. TriMet likely would agree to a ground rule inviting such members of the press with the understanding and agreement they are being invited outside the requirements of the [PML]. To assist with public interest and disclosure, both parties also are free to make public all proposals, exhibits, and their minutes of the negotiations. TriMet certainly intends to do so.”

22. On November 29, 2012, Hansen again wrote Stedman about ATU’s continued concerns about the application of the PML and TriMet’s statements about providing security

services for bargaining sessions. Hansen stated that the parties were “at an impasse as to the conditions under which the negotiating process can begin.” Hansen suggested that the parties resolve the dispute concerning the PML by submitting the issue to Employment Relations Board (ERB) for decision.

23. Later on November 29, 2012, Stedman declined ATU’s proposal to submit the public access issue to this Board because he did not believe that the ERB had jurisdiction to decide the dispute. As an alternative, TriMet offered to submit the question of the PML’s applicability to negotiations to the Multnomah County Circuit Court. TriMet proposed that the parties “stipulate to facts necessary to the decision and a briefing schedule so that the court can decide the matter on an expedited basis.”

24. Hansen first saw Stedman’s November 29 letter on the morning of November 30. At approximately 8:30 a.m. that day, Hansen faxed a letter to Stedman informing TriMet that ATU’s bargaining team would not be attending that day’s bargaining session because of the dispute regarding the conditions under which the parties would negotiate. ATU did not show up for negotiations on November 30, 2012. However, TriMet’s bargaining team went directly to the state office building where the bargaining session was scheduled. Sometime after they arrived, an employee informed Wegesend about Hansen’s letter. A news reporter informed Stedman that ATU had issued a press release announcing that ATU would not attend the bargaining session.

25. Later on November 30, 2012, Stedman wrote Hansen that TriMet was extremely disappointed that ATU did not show up for negotiations that morning, and once again reasserted TriMet’s belief that the PML did not apply to the parties’ bargaining sessions. Stedman enclosed TriMet’s contract proposals with a memorandum summarizing the key proposals. He advised Hansen that with the submission of TriMet’s proposals to the ATU, TriMet considered that the 150-day statutory period for negotiations had commenced.<sup>9</sup>

26. On November 30, 2012, Hansen responded to Stedman’s letter, affirming ATU’s position on the PML and arguing that the 150-day bargaining clock had not begun because the parties had not met for the first bargaining session and each party had not received the other party’s initial proposal. Hansen further expressed surprise that TriMet showed up at the scheduled meeting because, Hansen claimed, ATU “has made clear in prior communications, at least five times,” that ATU would not attend. Hansen concluded by stating that

“[w]e certainly hope the parties will be able to obtain a judicial determination in time for the scheduled meeting [on] December 20, 2012. As an interim option, if TriMet agrees to hold public negotiations until such time as the legal determination is made, the Union is prepared to meet prior to December 20th at a mutually-agreeable place and time that accommodates those interested in attending.”

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<sup>9</sup>ORS 243.712(1) provides that a party may ask the Employment Relations Board to assign a mediator after the parties have completed 150 days of good faith bargaining and that “[t]he 150 days of negotiation shall begin when the parties meet for the first bargaining session and each party has received the other party’s initial proposal.”

27. On December 3, 2012, Stedman complained to Hansen that TriMet “did not know in advance that the ATU would not show up to negotiate as the parties had previously agreed. That is because you chose to send a fax to our office at 7:57 a.m., a time that you knew, or should have known, we would be traveling to the negotiations site to meet with you.” On December 3, Hansen challenged Stedman’s purported lack of knowledge that ATU’s bargaining team would not show up at the November 30 meeting. In doing so, Hansen cited to previous correspondence between the parties that he believed put TriMet on notice that ATU would not be showing up for the bargaining session until the parties agreed on the PML issue. Hansen again conveyed ATU’s willingness to obtain a judicial resolution of the PML question, stating that “[o]ur legal counsel is ready to work with TriMet to obtain a court decision on the applicability of ORS 192.660(3). Please have your legal counsel contact ours.”

28. On December 4, 2012, Stedman asked Hansen to provide the name of ATU’s legal counsel. On December 5, Greg Hartman, who was representing ATU in the Multnomah County Circuit Court proceeding, contacted TriMet’s legal counsel.

29. On December 7, 2012, TriMet filed a complaint for declaratory judgment in Multnomah County Circuit Court requesting a declaration that the parties’ negotiations were not public meetings subject to the PML. In its complaint, TriMet stated, in part, that

“[t]he negotiating team does not have the authority to enter into a labor contract with the ATU nor does it make recommendations to the Board. Authorization to enter into a collective bargaining agreement is by resolution of the Board on recommendation of the General Manager.”

30. On December 11, 2012, Hansen wrote to Stedman about concerns arising from this paragraph, stating that “TriMet’s submission to the Multnomah County Circuit Court, \* \* \* is extremely troublesome. Parties negotiating labor agreements are required to have a bargaining team that is empowered to carry on meaningful bargaining.” Hansen, citing to Board case law, asserted that it appeared that the TriMet bargaining team “does not have authority to enter into a tentative agreement that must be presented to the TriMet Board of Directors for ratification.” Hansen insisted that “TriMet must either state that your team has authority to reach a tentative agreement [that] it will send to the Board for ratification or TriMet must provide the Union with Mr. McFarlane’s and/or the [TriMet] Board’s dates and times of availability to bargain.”

31. On December 12, 2012, General Manager Neil McFarlane responded to Hansen, affirming that, “TriMet’s negotiating team has the authority to carry on meaningful collective bargaining in good faith to tentative agreement consistent with the requirements of [the Public Employee Collective Bargaining Act (PECBA)].” McFarlane further acknowledged that TriMet’s negotiating team was obligated to present and support the ratification of any tentative agreements reached.

32. On December 13, 2012, Hansen informed McFarlane that ATU was prepared to meet with TriMet on December 20 and 21. Hansen reiterated, however, ATU’s belief that the law required that those negotiations take place in a “public meeting.” Hansen requested TriMet’s

“immediate reassurance that the negotiation sessions scheduled for December 20<sup>th</sup> and 21<sup>st</sup> will be open public meetings and that there will be no ‘security’ screening of attendees.” Hansen noted that TriMet’s team was entitled to propose ground rules addressing the provision of security and closing negotiations to the public at the initial session on December 20.

33. On December 14, 2012, Stedman responded, confirming TriMet’s prior position that the negotiations were not subject to the PML, “unless and until the parties mutually agree otherwise.” He continued, stating that, “[o]f course, the ATU can propose a ground rule allowing public access at the December 20 session.” Stedman also suggested two alternatives regarding the PML dispute. First, Stedman stated that TriMet was willing to agree to ground rules in advance of the December 20 session. TriMet proposed two ground rules, including one that provided that “[r]eporters from news organizations unaffiliated with either party shall be allowed to sit in and report on the negotiation sessions in order to ensure both transparency and an orderly process of good faith negotiations.” Second, Stedman suggested that the parties could mutually agree to submit their last best offers immediately and proceed directly to binding interest arbitration. With respect to the security issues, Stedman explained that “ATU’s unreasonable position regarding open sessions has created safety concerns. The ATU repeatedly has refused to provide the names of its bargaining team, and it has communicated its intent to invite the public to closed meetings.” Stedman also informed Hansen that the Department of Transportation, which was providing space for the negotiation session, required that a list of attendees be provided to its security office in advance of the meetings.

34. On December 18, 2012, Hansen claimed that “it is our understanding that, at this time, TriMet is refusing to bargain unless the public and rider advocates are excluded, and will allow only the media *it* deems acceptable.” (Italics in original.) In addition, Hansen notified Stedman that ATU did not agree to security screenings and that if a building owner required such screenings, then ATU did not want to use that location for bargaining. Hansen announced that ATU “rejects these conditions” and, therefore, “[t]he continuing disagreement as to whether the negotiations must be public leaves the parties at an impasse.” Hansen informed Stedman that ATU would not attend bargaining sessions on December 20 and 21 if those conditions remained in place.

35. The TriMet bargaining team showed up on December 20. ATU’s bargaining team did not show up to the bargaining session.

36. On December 21, 2012, Stedman challenged what he called the “manufactured preconditions” to bargaining that Hansen purportedly “attribute[d] to TriMet. \* \* \* TriMet has never said only members of the press it considers acceptable can attend.” Instead, Stedman asserted that “TriMet has said it would agree to a ground rule admitting reporters from news organizations unaffiliated with either party to sit in and report on the negotiation sessions” and that “TriMet has never said that the public and rider advocates are barred from attending.” Although Stedman stressed TriMet’s belief that the PML did not apply to the parties’ negotiations, he invited ATU “to offer a ground rule proposal regarding public attendance.”

37. The parties jointly requested that the Multnomah County Circuit Court expedite the process. In late December 2012, the parties' attorneys began the process of expediting the discovery that they anticipated would be necessary for the circuit court proceeding.

38. On January 3, 2013, TriMet filed the original unfair labor practice complaint in this matter.

39. On January 7, 2013, Stedman and Hansen exchanged letters about ATU's information requests from December 3, 2012, as well as the parties' positions with respect to the delay in negotiations.

40. On January 22, 2013, McFarlane testified at a deposition that the TriMet bargaining team had the authority to enter into a global tentative agreement, which would be submitted to McFarlane for his review. McFarlane would then submit the tentative agreement to the Board with "either a yea or nay recommendation." The TriMet Board had authority to ratify the final and binding collective bargaining agreement and authorize McFarlane to sign it. During the hearing in this matter, McFarlane explained that Stedman, on behalf of the TriMet bargaining team, would present McFarlane with a recommended contract and McFarlane would consider the recommendations of the bargaining team and then exercise independent judgment about whether or not he would present the recommended contract to the TriMet board.

41. On March 20, 2013, the Multnomah County Circuit Court ruled that only collective bargaining negotiations held as meetings of governing bodies within the meaning of ORS 192.660(3) are required to be conducted in public under the PML.<sup>10</sup> Because the judge was unable to determine whether the parties' bargaining sessions constituted such a meeting based on the facts before her, she denied the parties' cross motions for summary judgment.

42. In April 2013, the parties filed renewed cross motions for summary judgment with supporting affidavits. Attached to TriMet's motion was Stedman's affidavit, in which he stated that he selected TriMet's bargaining team members, who are individuals from different divisions with subject matter expertise and that "[t]here is no minimum number of members of the bargaining team that must be present before the bargaining team can engage in negotiations or take any action."

43. On April 8, 2013, Hansen wrote to both McFarlane and Stedman that he believed that the parties should begin bargaining before resolution of the Multnomah County Circuit Court case. Hansen stated that the ATU's team would include at least the 18 officers mandated by its bylaws and proposed that the parties agree to a series of bargaining sessions on weekends and weeknights to minimize the impact on the employees' pay. Hansen suggested that the parties

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<sup>10</sup>ORS 192.610(3) defines a "[g]overning body" as "members of any public body which consists of two or more members, with the authority to make decisions for or recommendations to a public body on policy or administration." ORS 192.610(4) defines a "[p]ublic body" as "the state, any regional council, county, city or district, or any municipal or public corporation, or any board, department, commission, council, bureau, committee or subcommittee or advisory group or any other agency thereof." ORS 192.610(5) defines the term "[m]eeting" as "the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter."

alternate their meetings between TriMet properties and ATU-selected facilities, and that TriMet schedule the location of the first meeting.

44. On April 10, 2013, Stedman agreed to the proposed number of additional bargaining sessions and offered to meet in order to establish the meeting schedule. Stedman also requested that ATU submit its proposals to TriMet, noting that ATU had received TriMet's proposals months earlier. Stedman wrote that the parties could begin by addressing ground rules, but "before substantive bargaining can occur, obviously TriMet needs to consider the ATU's contract proposals." Stedman proposed that he and Hansen meet for coffee to discuss scheduling and ground rules. Later that day, Stedman also sent Hansen a request for information regarding four programs for which TriMet provides funds to ATU.

45. On April 11, 2013, Hansen rejected Stedman's offer for an informal meeting over coffee. He said "that the Union believes negotiations should be transparent," and that "such a private meeting is inappropriate. The Union membership, in particular, would strongly object to that approach." Hansen informed Stedman that ATU was available to bargain on April 25-27, May 1-2, 17-19, and 28-31. Hansen proposed to discuss ground rules at the first meeting and, in response to a media-related ground rule that TriMet had proposed, asked Stedman to "[p]lease provide a list of what you consider to be 'mainstream' media."

46. On April 15, 2013, Stedman notified Hansen that he had hoped to meet informally to agree on ground rules so that members of the press could attend the first bargaining session, but because ATU was not willing to meet informally, TriMet proposed to discuss ground rules in a closed session on April 27 and 28 from 9:00 a.m. to 5:00 p.m. Stedman stated that TriMet hoped that the ground rules "can be agreed to promptly so that members of the press agreed to by the parties can attend all subsequent sessions and report on the proceedings." He again stated that TriMet preferred to wait until ATU had provided it with its proposals before scheduling substantive bargaining sessions.

47. On April 17, 2013, Hansen sent Stedman a list of at least 20 media organizations that ATU proposed be invited and allowed to attend the ground rules meeting and subsequent bargaining sessions.<sup>11</sup> Hansen agreed to meet on April 27 and indicated that one day was sufficient for the discussion of the ground rules. He stated that TriMet could schedule the meeting location subject to ATU's prior approval and that there would be no security checks. Hansen also claimed that Stedman was "refus[ing] to schedule future bargaining sessions until [Stedman] receive[d] the union's proposal."

48. On April 18, 2013, Stedman responded to Hansen that TriMet still disagreed with ATU's interpretation of the PML, and that, therefore, TriMet was only willing to have the press attend bargaining sessions if the ground rules had been agreed to in advance. Stedman also indicated that rather than limiting attendance to a list of named media organizations, TriMet

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<sup>11</sup>ATU proposed to invite representatives from the *Asian Reporter*, *Beaverton Valley Times*, *Gresham Outlook*, *Hillsboro Tribune*, *Hollywood Star*, *Labor Press*, *NW Examiner*, *Oregonian*, *PDX Memo*, *Portland Afoot*, *Portland Mercury*, *Portland Observer*, *Portland Transport*, *Portland Tribune*, *SE Examiner*, *Sellwood Bee*, *Skanner*, *SW Connection*, *Willamette Week*, and reporters from various television stations.

preferred to agree on a definition of what types of media organizations could attend. TriMet intended to give its two proposed ground rules, including press attendance, to ATU at the April 27 meeting. Stedman also explained that TriMet selected conference room number one at the Holladay Street station, and reminded Hansen that all TriMet facilities are secured-access locations. He stated that ATU's officers and Executive Board members have Tri-Met badges that would be activated on April 27.

49. On April 23, 2013, Hansen agreed to the meeting details but added that because TriMet was refusing to allow media to attend, ATU would not invite any media organizations. On April 24, Hansen asked that Stedman provide five parking spaces and an adequately-sized breakout room at the bargaining location in order to accommodate the ATU bargaining team.

50. On April 25, 2013, Stedman provided Hansen with five parking passes. He notified Hansen that an adequately sized break out room would be available, and listed the names of the 12 ATU officers and Executive Board members whose badges would be activated to allow access to the building. Stedman developed this list of names after Lomax and Minor-Lawrence told him that ATU usually brought its elected officers and Executive Board members to bargaining.

51. The parties met on April 27, 2013, to consider ground rules and other preliminary matters. TriMet bargaining team members Lomax and Wegesend arrived at approximately 8:15 a.m. They found that the air conditioning was not operating because it was a weekend and, as a result, the air was stifling. Lomax contacted the facilities director, who attempted to address the issue. He later notified Lomax that he was unable to have the air conditioning turned on and, instead, offered to bring fans. Lomax declined his offer because she thought that the parties would finish by early afternoon. The remainder of TriMet's team, including Minor-Lawrence, Nielsen, and Stedman, arrived at approximately 8:30 a.m. They arranged the second floor conference room for the parties' discussions, and set up coffee and refreshments. There were also smaller conference rooms on the second floor, one of which was set aside as a caucus room.

52. ATU's 18-member bargaining team arrived shortly before 9:00 a.m. The team included Hansen, Hunt, Heintzman, Stoner, the members of ATU's Executive Board, and the extra board liaison officers. The parties met in the large conference room. Lomax apologized for the lack of air conditioning. The ATU members were offered refreshments and introductions were made.

53. ATU confirmed that Hansen was its chief negotiator and TriMet confirmed that Stedman was its chief negotiator. The parties then exchanged their initial ground rules proposals. TriMet provided ATU one printed copy of its ground rules proposal and projected the proposal onto a screen. The screen was difficult to read and Hansen requested a copy of TriMet's proposal for each team member. Stedman was reluctant to make so many copies, but after the parties discussed the issue, Wegesend made and provided copies of TriMet's proposal to the ATU members. Hansen read ATU's proposal aloud and Stedman read TriMet's proposal aloud.

54. ATU initially proposed eight ground rules, including proposals that "[a]ll negotiation sessions will be open meetings that can be attended by the public and any interested parties"; and that "[a]ll provisions of the current or most recently expired labor agreement for

which no change is proposed will be carried into the successor agreement.” Minor-Lawrence and Stedman asked if the phrase “the current or most recently expired labor agreement” referred to the 2009-12 Agreement resulting from the Gaba Award. The ATU team did not precisely answer. Instead, Hansen or another team member replied that they were still waiting for this Board’s decision on a then-pending unfair labor practice complaint.

55. TriMet initially proposed two ground rules, including provisions allowing media representatives to attend bargaining between the parties while stipulating that the PML did not apply to bargaining sessions.

56. At approximately 9:20 a.m., the parties adjourned to caucus. An ATU team member asked if they should stay in the large conference room because they had the larger team. Stedman replied that because TriMet was the host, the TriMet team would stay in the conference room and ATU would leave for its caucus and use the other conference room; and the next time, when ATU was the host, TriMet would leave. One of ATU’s team members said that the room next to the large conference room was pretty small. Someone on TriMet’s team said that ATU could use the first floor conference room that was identical to the room in which they were currently meeting. There is an elevator and stairs between the first and second floors. Someone from ATU’s team said that it would take three elevator trips for the ATU team to get down to the first floor. The ATU team decided to use the small second floor conference room for their caucus.

57. At approximately 10:25 a.m., Stedman reviewed ATU’s second proposal, which was labeled “Union Ground Rule Counter – Second April 27, 2013 (9:45 am).” ATU proposed to abide by interim ground rules on the public meeting issue until a legal determination was made. As an interim ground rule, ATU proposed that the parties agree on locations that could accommodate “all qualifying media,” including the 20 named media organizations and all the television stations. In addition, ATU proposed that the parties be required to provide sufficient copies of proposals for each team’s members, bargain for a minimum of eight hours each session, and agree to all of the ground rules in ATU’s original proposal.

58. Stedman identified four ground rules from ATU’s original proposal to which TriMet could agree and several to which it could not agree. Stedman also explained that TriMet did not want to pick from ATU’s list of media and preferred a definition of the types of acceptable media. In addition, Stedman indicated that TriMet could not agree to ATU’s proposed ground rule that referenced the current or most recently expired labor agreement because it was unclear if ATU was referring to the 2003-09 Agreement or the 2009-12 Agreement (Gaba Award), which ATU was challenging before the ERB. At approximately 10:40 a.m., TriMet agreed to draft the next proposal and the parties adjourned to caucus.

59. At approximately 11:25 a.m., TriMet presented its second proposal, which included or accepted four of ATU’s eight original proposed rules and one modified ATU proposal, based on a change that the parties had agreed to during their prior discussion. TriMet also proposed its prior definitions addressing which news media representatives could attend bargaining sessions, but added a list of 17 “print media entities proposed by ATU” that the parties agreed met the definition. TriMet’s list included all of the organizations on the list that ATU proposed, except those that TriMet had determined were blogs. TriMet also proposed that the parties provide no

more than 18 copies of their proposals to the other team and that the parties meet at locations accommodating at least 35 individuals. At approximately 11:45 a.m., the parties adjourned to caucus.

60. At approximately 1:00 p.m., Stoner e-mailed ATU's third proposal to TriMet because ATU's printer ran out of ink and the parties then met to review the proposal. ATU's proposal included the five provisions on which the parties were in agreement. In addition to its previously proposed list of qualifying news media representatives, ATU added a modified version of TriMet's proposal that defined the media representatives eligible to attend and inserted a media advance notice requirement so that the parties could provide an adequately sized location. ATU also proposed a maximum of 21 copies of proposals to be presented to the other bargaining team. In response to Stedman's question about which agreement constituted the current agreement, ATU proposed that if ERB remanded or modified the Gaba Award, then all tentative agreements reached before that decision would be rendered null and void.

61. Stedman asked about ATU's inclusion of blogs on the media list and ATU's modifications of TriMet's definition of media representatives. Stedman suggested that the media list be designated as ATU's list, so as not to give the impression that it was TriMet's list. Someone from ATU's bargaining team said if TriMet wanted to exclude bloggers, it should propose it.

62. Hansen asked about TriMet's press credential requirement, which ATU had not included in its proposal, and noted that blogger Lane Jensen had created his own press credentials. Lomax stated that she did not think Jensen's press credentials would meet TriMet's definition. The parties adjourned to caucus at approximately 1:17 p.m.

63. At approximately 1:45 p.m., TriMet presented its counter proposal. Because the TriMet team was optimistic, they included signature lines on their proposal. In addition to the ground rules on which the parties agreed, TriMet proposed its original definition of news media and the list of enumerated print media entities proposed earlier by the ATU; increased its previously proposed room size from 35 to 40 persons; and increased the number of copies of proposals from 18 to 21. TriMet did not include ATU's proposals on the Gaba Agreement or the media advance notice requirement. When Hansen questioned TriMet's press credential requirement, Stedman responded by adding the word "legitimate." The parties then caucused at approximately 1:50 p.m.

At this point, the parties still had not had lunch and the rooms were becoming warm and stuffy. During its caucus, the ATU team decided that the parties were stuck on the definition of media and decided to focus on this issue in its next proposal. At 2:16 p.m., Stoner sent an e-mail to TriMet in which the "regarding line" indicated "Consolidated Ground Rules" and the document was entitled "Union 4th Counter to TriMet 'Proposal' (TM 3d)." The proposal stated that, pending the resolution of the PML dispute, the parties would allow specific media representatives to attend bargaining. It further stated that "[t]he Union understands that TriMet's acceptance of the above list is contingent on the Union agreeing that certain bloggers will be excluded, specifically, Lane Jensen, Al Margulies, Portland Transport, Ellen Fox, etc." She included the word "End" at the end of the message to signify the end of her e-mail message, but did not intend the word to mean this

was the end of their discussions or the only language on which ATU was willing to agree to that day.

64. The TriMet team became very confused and upset by ATU's proposal. Stedman and other team members considered the proposal to be offensive and inflammatory because it attributed the exclusion of named bloggers to TriMet, even though no TriMet team member had named any blogger who should be excluded and it was ATU that had brought up Jenson's name. The TriMet team was also unclear if the absence of the other proposed ground rules and the word "End" meant that this was ATU's entire proposal. Lomax, who had believed that the parties were really making headway, felt like she had been sucker-punched. Stedman became quite upset.

65. At 2:24 p.m. on April 27, 2013, Stedman e-mailed Stoner that "TriMet has not raised the issue of any specific bloggers, although the ATU did. While TriMet's proposed definition of the media does not include bloggers, we resent this comment and reject your insinuation that any specific bloggers were mentioned by TriMet." The ATU team did not see the e-mail at this time.

66. At approximately 2:30 p.m., Hansen came to the door of the main conference room, with one other person from the ATU team. As he came through the door, Hansen delivered a printed version of ATU's last proposal to Stedman and stated that "it looks like this is all we can agree to today."<sup>12</sup>

Stedman became angry. After the entire ATU team came into the room and was seated, Stedman read his 2:24 p.m. e-mail. ATU consultant Ron Heintzman asked whether TriMet's proposed definition of media would exclude bloggers. Stedman responded that it likely would, "but the way the ATU proposal was written was a f\*\*\*ing lie." At that point, as Lomax described it, "the room sort of erupted." ATU's team members were very upset at Stedman's response. Some members expressed offense at Stedman's use of an obscenity. One ATU team member noted that ATU employees were disciplined for using such obscenities. Stedman said that ATU's proposal was not acceptable and asked Hansen if the parties were done for the day. Hansen agreed that they were done for the day.<sup>13</sup>

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<sup>12</sup>Hansen believes he stated something else. He testified that he entered before the other ATU team members, and said something more like "if we look at this and we narrow this down, this is what it would look like" to the TriMet team members. Although Wegesend's notes do not include Hansen's comment, this is not determinative because her notes are limited to the parties' joint discussion of the proposals, and at the time Hansen made this comment, this discussion had not yet begun. ATU did not introduce either the testimony of ATU team member Dan Martin, who Hansen testified was with him when he first entered the room, or the notes of Stoner, who was ATU's official note taker, to support its witnesses' testimony.

The testimony of Lomax, Stedman, and Wegesend that Hansen made this statement when he first entered the room is most credible. They testified consistently and their testimony is supported by Lomax's notes, which were taken contemporaneously during the meeting and shown to be accurate in all other respects.

<sup>13</sup>Wegesend recorded in her notes that Hansen stated "this was all they could agree to today."

As ATU team members started gathering up their belongings, Lomax reminded everyone that they had already agreed on a lot of things and tried to talk everyone into staying. She finally asked, “[s]o that’s it, we are done?” Someone from ATU said “I guess so based on what Stedman just said,” and the ATU team left.

67. On April 27, 2013, at nearly 8:00 p.m., Mary Fetsch, TriMet’s media relations official, sent an e-mail press release to more than 40 journalists, reporters, and media organizations describing TriMet’s view of the day’s negotiations. It stated in part that “[a]fter nearly six hours of negotiating ground rules, both TriMet and the ATU could not reach agreement. However, TriMet agreed to the ATU’s final list of proposed representatives of the news media to attend and report on the proceedings.” ATU sent a similar press release that same evening.

68. On April 28, 2013, at about 4:00 p.m., Stedman e-mailed Hansen that

“[o]nce we have the union’s proposals, and a reasonable opportunity to review them, we are willing to schedule substantive negotiations. Before then, we remain hopeful we can reach agreement to open otherwise closed negotiations to the mainstream press so they can attend and report on them in accordance with our last ground rule proposal # 1.”

Later that day, TriMet was asked by one of the recipients of its earlier press release, “‘what’s next’ after negotiation of ground rules did not result in an agreement to move forward.” Fetsch sent a response to the journalists, reporters, and media organizations, which reiterated what was communicated to ATU:

“After yesterday’s negotiation session with the Amalgamated Transit Union ended with no agreed upon ground rules, TriMet has communicated with the ATU that we remain open to negotiation. **Once we have the union’s proposals and a reasonable opportunity to review them, we are willing to schedule substantive negotiations.** Before then, we remain hopeful we can reach agreement with the union to open otherwise closed negotiations to the mainstream press to attend and report on them. [TriMet’s] ground rule proposals presented during yesterday’s session would have accomplished that.” (Bold in original.)

69. On April 29, 2013, Hansen offered six dates in May and nine dates in June on which ATU was available to bargain.<sup>14</sup> He asked Stedman if they could invite to the first meeting the media organizations that they had agreed on in their ground rule proposals. He also told Stedman that ATU “prefer[s] to present our initial proposals in the actual bargaining session so that we can explain them before any misinterpretation can arise.” He then stated his concern that an e-mail from Stedman “suggests that TriMet is conditioning its attendance at the first session on its prior

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<sup>14</sup>Lomax and Hansen met on an unrelated topic a few times before May 1. At some point, when they were trying to schedule subsequent meetings, Lomax told Hansen that June was the Rose Festival and the Sandy Day federal court trial, so it would be impossible for her to meet. The Sandy Day trial was a major civil trial in federal court involving a TriMet operator and pedestrians. Lomax was personally named as a party in the case.

receipt of the Union's initial proposals." Hansen cited to a prior Board case, and warned Stedman "that conditioning attending bargaining on prior receipt of the other parties' proposals would be a violation of PECBA."

70. On May 2, 2013, Stedman responded to Hansen's letter, reminding Hansen that ATU had had TriMet's proposals for five months. He stated that, although TriMet would prefer to receive and review ATU's proposals in advance, it would agree to schedule future bargaining sessions where ATU could provide and explain its proposals in person. Stedman had not yet identified dates at this time because he was reviewing his team's availability. This was around the time that he was scheduling knee surgery.

71. Stedman then turned to the media question. He stated that "[w]e remain hopeful an agreement can be reached to open to the mainstream media negotiations that are otherwise closed." He noted that the Multnomah County Circuit Court had scheduled another hearing, and suggested that perhaps ATU "wishes to postpone negotiations until the court rules. That is not ideal, but it is preferable to negotiation shenanigans." Stedman stated that ATU's "April 29 letter fails to disclose a substantive alternation [*sic*] to the list of media entities listed therein compared to your final proposal on April 27, or any earlier proposal." He continued, "as we explained at the table, your list of print media is acceptable only as one element of a ground rule regarding the media." Stedman included with his letter a new TriMet ground rule counter-proposal for media and press coverage of the negotiations, which included both a list of agreed-on media and press organizations, and a definition of eligible news media.

72. On May 6, 2013, Hansen notified Stedman that ATU was still waiting for dates from the TriMet team and cautioned that there was much competition for ATU's dates due to the contracts that ATU was bargaining with other employers. Hansen stated that "[t]he Union will be prepared to discuss both TriMet's and the Union's initial proposals at the first session." Hansen did not respond to the TriMet press proposal conveyed on May 2, but instead stated that ATU assumed that TriMet "will not agree to allow the attendance at our first session, of any representative from any of the media organizations listed by the Union in its letter of April 28, 2013."

73. Later that same day, Stedman informed Hansen that "[y]ou should understand from our May 2 letter that we remain hopeful an agreement can be reached to open to the mainstream media negotiations that are otherwise closed. In that regard, we await your response to the media proposal we transmitted with our May 2 letter." Stedman confirmed that TriMet was available on June 24, and would notify ATU of additional dates as they became available. Stedman did not offer other dates in June at this point because he was working around Lomax's schedule. He believed that TriMet needed Lomax for at least the initial meetings during which TriMet explained its proposal and ATU presented its proposal. The majority of employees covered by the parties' collective bargaining agreement work in the Operations Division. Lomax was unavailable during June due to the civil trial in federal court.

74. On May 6, 2013, Hansen notified Stedman that ATU agreed to the meeting on June 24 and would notify TriMet as soon as it found a location. He added:

“As noted in my April 28, 2013 letter, the parties did agree on the list of media representatives who could attend our bargaining sessions. The bargaining space the Union selects will be large enough to accommodate them. The ground rule you proposed has been proposed by you at least five times and the Union has rejected it each time as being capable of too narrow and restrictive an interpretation. Do not misconstrue this statement. The Union has accepted TriMet’s position that, pending a Circuit Court decision on the public meeting status, bloggers will not be allowed to attend.”

75. On May 8, 2013, Stedman had just learned that the schedule for the Sandy Day federal court trial had changed, and this made Lomax unavailable for the June 24 bargaining session. Stedman notified Hansen that TriMet was no longer available for the June 24 meeting due to changes in the federal court trial schedule and that he would provide Hansen with available dates in July and August as soon as possible.

76. On May 13, 2013, Hansen protested TriMet’s delay in scheduling meetings because ATU had asked to begin bargaining in early April. Hansen pointed out that TriMet only accepted one of the 16 dates that ATU offered in May and June, and that TriMet was now cancelling that date.

77. On May 16, 2013, Stedman responded that because most of TriMet’s proposals related to the Operations Division and ATU had indicated its intent to present its proposals during the first bargaining session, Stedman believed that it was necessary for Operations Director Lomax, an essential member of the TriMet bargaining team, to be present. Stedman claimed that Hansen knew that Lomax was unavailable from June 3 through 27 because of her role in the federal court trial, and suggested that ATU offered the June dates knowing that TriMet would not be able to meet on those dates.

78. On May 16, 2013, the Multnomah County Circuit Court granted TriMet’s motion for summary judgment, effectively concluding that the parties’ negotiations were not subject to the PML. The notice of judgment in the matter was filed on June 19, after which ATU filed an appeal with the Court of Appeals.

79. On May 17, 2013, Hansen advised Stedman that ATU was not aware of Lomax’s unavailability in June and also disputed the need to have Lomax at the bargaining table. Hansen indicated that ATU was not available on July 2 and 3, but offered 15, 16, and 20-26, August 1, and 14-20.

80. On May 21, 2013, Stedman notified Hansen that, subject to scheduling changes in the federal trial currently scheduled for June and July, TriMet was available on July 2, 3, and 22, August 27-29, and September 4-13, 16-20, and 22-30.

81. On May 30, 2013, Stedman notified Hansen that the federal civil trial had been set over for August 12 through September 6 (due to the hospitalization of a key witness). TriMet was now available on June 24, 26, and 27, but no longer available on the proposed August dates or September 4 through 6.

82. On June 3, 2013, Hansen notified Stedman that ATU was no longer available on the June dates and expressed concern that TriMet had offered no viable July dates except for July 22, and now offered no dates until September 7. He added that the number of changes proposed by TriMet would require an excessive amount of bargaining, and ATU did not want to exhaust the 150-day bargaining clock with one session in July and a huge gap in bargaining until September. Hansen told Stedman that ATU would meet on July 22 “only if TriMet agrees that the intervening time between July 22<sup>nd</sup> and September 7<sup>th</sup> is not counted as part of the 150-day time limit.”<sup>15</sup> Otherwise, Hansen proposed that the parties meet on September 7, 8, 10 through 13, 16 through 20, and 22 through 30. He also asked Stedman to propose dates in October.

83. On June 4, 2013, Stedman wrote to Hansen that TriMet now understood that ATU had accepted TriMet’s offer to meet on bargain on September 7, 8, 11-13, 16-20, 22-30. Stedman concluded his letter by stating that

“[d]uring our April 27 negotiation session, and in the days following, TriMet offered multiple ground rule proposals that would open to the press what are otherwise closed negotiations. The ATU has rejected all of those offers. TriMet has no further proposals to make in that regard, so unless the ATU offers a mutually acceptable ground rule, the negotiations will remain closed.”

84. On June 7 and July 25, 2013, Hansen asked Stedman to provide ATU with dates of TriMet availability in October. He reminded Stedman that ATU was bargaining 10 other contracts, which complicated scheduling. Hansen also indicated that ATU would determine the location for the September 7 meeting, after which the parties would alternate finding locations.

85. On July 31, 2013, Stedman responded that TriMet was still waiting for ATU to provide the location information for the September 7 meeting. He also stated that the parties had 20 meetings scheduled and, once TriMet had ATU’s proposals, “we can better judge what commitment of time will be required for October negotiation sessions.” Stedman suggested that the parties discuss October dates during the September meetings.

86. During September, the parties engaged in numerous communications concerning the scheduling of future negotiations, with ATU insisting that insufficient bargaining dates had been set and TriMet repeatedly requesting ATU’s proposals so that negotiations could progress.

87. By October 2, 2013, Stedman notified Hansen that TriMet was also available on October 16 and 30 to bargain. By this date, the parties had met for 19 days of bargaining, which the parties agreed had been productive. In his letter, Stedman also raised a concern about statements allegedly made by ATU team member Heintzman at the bargaining table “that the ATU’s strategy is to delay resolution of this contract until a new administration is in place at TriMet that may have priorities more aligned with the ATU’s interests.”

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<sup>15</sup>Hansen claims that ATU would have been prepared to present its non-economic proposal on July 22. He also admits that he scheduled July 22 for bargaining with another employer.

88. On October 3, 2013, Hansen notified Stedman that ATU agreed to meet on all of the six November and five December dates. Hansen complained that TriMet had not offered sufficient dates in November and December, and asked for dates in January.

89. On October 7, 2013, Hansen responded to Stedman's concerns about Heintzman's comments at the bargaining table, asserting that the statements were taken out of context, and that the statements accurately reflected a change in the management culture at TriMet.

90. ATU's bargaining team has authority to enter into a tentative agreement and make recommendations to its membership. The membership votes to ratify the contract. The ATU International also has to approve the contract.

91. As of the date of the hearing, ATU had not provided TriMet with its economic proposal. Since the April 27 meeting, the parties have held some negotiation sessions at the location of the April 27 meeting and ATU has used the first floor conference room for its caucus. The parties have also met at the ATU offices for negotiations sessions, during which there is no separate room designated for a caucus—one party either goes outside or uses the hall to caucus.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. ATU did not violate ORS 243.672(2)(b) as alleged in TriMet's complaint.
3. TriMet did not violate ORS 243.672(1)(e) as alleged in ATU's counterclaims.

#### DISCUSSION

TriMet and ATU have each alleged that the other violated its duty to bargain in good faith during negotiations for a successor agreement. TriMet's complaint alleges that ATU violated ORS 243.672(2)(b) by engaging in a variety of actions that TriMet characterizes as dilatory. ATU responded with counterclaims alleging that TriMet, not ATU, refused to bargain in good faith, thereby violating ORS 243.672(1)(e).

#### Legal Standards: ORS 243.672(2)(b) and (1)(e)

ORS 243.672(2)(b) makes it an unfair labor practice for a labor organization to refuse to "collectively bargain in good faith" with a public employer. ORS 243.672(1)(e) contains mirror provisions making it an unfair labor practice for a public employer to refuse to collectively bargain in good faith with a labor organization. In assessing whether a party has refused to collectively bargain in good faith, we generally examine the totality of the bargaining conduct to determine whether the party demonstrated a willingness to reach an agreement that is the result of good-faith negotiations. *Oregon School Employees Association v. Medford School District #549C*, Case No.

UP-77-11, 25 PECBR 506, 516-17 (2013).<sup>16</sup> The totality of a party's bargaining conduct typically includes: (1) whether dilatory tactics were used; (2) contents of the proposals; (3) behavior of the party's negotiator; (4) nature and number of concessions made; (5) failure to explain a bargaining position; and (6) the course of negotiations. *Id.* at 517; *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 584, *recons.*, 16 PECBR 707 (1996). We also consider other factors that might be relevant in any given case. *Medford School District #549C*, 25 PECBR at 517; *Rogue Valley Transportation District*, 16 PECBR at 587.

### TriMet's Allegations Under ORS 243.672(2)(b)

TriMet alleges that ATU violated ORS 243.672(b) by: (1) engaging in a series of dilatory tactics or practices designed to delay the start of collective bargaining; and (2) refusing to meet with TriMet to collectively bargain on dates that ATU had previously agreed to meet. Although identified as separate allegations, TriMet acknowledges that both nominally separate charges concern dilatory tactics. As succinctly summarized by TriMet in its brief, “[t]hat is almost all this case is about: ATU’s intentional delay.” Thus, although we look to the totality of ATU’s bargaining conduct, TriMet’s claims rise and fall on whether it has established that ATU engaged in dilatory tactics, and, if so, whether such conduct demonstrated that ATU had no intention of reaching an agreement. *See Medford School District #549C*, 25 PECBR at 516.

We first address TriMet’s claim that ATU agreed to November 30, December 20 and 21, 2012 bargaining sessions, but then, without justification, failed to show up and bargain on those dates. The crux of TriMet’s allegation is that ATU refused to attend these bargaining sessions in order to stall negotiations for improper strategic reasons, including: (1) to maintain the *status quo* with regard to wages and benefits for as long as possible; (2) to “wait out” current TriMet management; (3) to provide ATU extra time to build a “war chest” to fight possible cuts in wages and benefits; and (4) to allow time for ATU’s legal efforts to overturn a prior interest arbitration award.

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<sup>16</sup>In addition, we have recognized certain types of actions as being so destructive of the bargaining relationship or so inconsistent with the good faith required by the statute that those actions *per se* violate (2)(b) or (1)(e), regardless of whether subjective bad faith is proven. *Medford School District #549C*, 25 PECBR at 515. In its post-hearing brief, TriMet requested that this Board recognize a new *per se* violation to be applied in circumstances where the parties disagree over a legal question concerning bargaining, but agree to submit the question to a forum for resolution. We decline to add this to our limited group of existing *per se* violations. Rather, we believe that our totality-of-the-conduct approach is the better tool to assess whether ATU violated ORS 243.672(2)(b).

Additionally, the recommended order addressed a separate question of whether ATU violated (2)(b) by insisting to impasse on a permissive subject of bargaining—in particular, on a “ground rule” of whether the public and the media were allowed to attend the bargaining sessions under the PML. We agree with ATU that this issue is not before us, as the issue was not pleaded, agreed to in the issues statement, or briefed by the parties in their post-hearing briefs. Consequently, we decline to address it. We note, however, that the record does not appear to establish that the parties were ever at “impasse” over this issue.

ATU concedes that there was an initial agreement to meet on November 30, but asserts that there was no firm agreement to meet on December 20 and 21 because the location of those sessions had not been determined when ATU accepted those dates. In any event, ATU contends that even assuming that all three dates were agreed on, its failure to attend those bargaining sessions does not establish that it lacked serious intention to reach a bargaining agreement.

As a preliminary matter, we conclude that the parties did initially agree to bargain on November 30, December 20 and 21, 2012. ATU's subsequent claim that those dates were not agreed to because Hansen requested to be notified if the location for bargaining changed is not persuasive. It was ATU, not TriMet, that first offered the December 20 and 21 dates for bargaining. Additionally, Hansen's letter, which was in response to TriMet's agreement to those proposed dates, clearly stated that ATU agreed to bargain on those dates. A mere request to be informed if the location changed is not sufficient to render the agreement to meet on those dates as a "soft" commitment.

However, after the parties agreed on these three dates, they engaged in a protracted dispute about whether, and to what extent, the PML might apply to their negotiation sessions. ATU believed that the PML applied to the parties' negotiations and repeatedly expressed its desire to bargain under the auspices of the statute. From TriMet's perspective, the PML was inapplicable and ATU's arguments to the contrary were clearly wrong. Despite these firmly held positions, the parties continued to discuss possible compromises or solutions that would provide for some transparency for their negotiations. For example, TriMet had no objection to having some media attend ("bona fide members of the press, unaffiliated with either party"), and was willing to consider other "ground-rule proposals" from ATU on the issue of public and media access to negotiation sessions. Likewise, ATU invited TriMet to make ground rules proposals on the subject. Additionally, on November 29, ATU proposed to have this Board issue a declaratory ruling to resolve the dispute regarding the PML. TriMet rejected this option, but did offer to submit the dispute to the Multnomah County Circuit Court for an expedited determination.

Because the PML dispute had not been resolved before the November 30 bargaining session, ATU did not attend the first scheduled meeting consistent with its earlier communications to TriMet. TriMet's bargaining team, however, did show up. The parties were unable to resolve their dispute even after November 30, but ultimately agreed to submit the PML dispute to the Multnomah County Circuit Court. On December 7, TriMet filed a declaratory judgment action seeking a judgment that the parties' bargaining sessions were not subject to the PML. For its part, ATU committed to working with TriMet "to obtain a swift judicial determination on the issue." After this complaint was submitted, the parties continued to discuss possible ground rules for negotiations or alternative solutions to the dispute. When the parties were unable to reach an agreement before the December 20 or 21 bargaining sessions, ATU again elected not to show up to bargain on those dates.

TriMet construes ATU's absences from these three bargaining sessions as conclusive proof of ATU's desire to stall negotiations. TriMet dismisses ATU's legal arguments as pretext for the delays, calling the arguments "engineered" and "manufactured" in its post-hearing brief. However, under these circumstances, we do not conclude that ATU's cancellation of the November 30, December 20 and 21, 2012 bargaining sessions was a deliberate attempt to delay bargaining or that

ATU had no serious intention of reaching an agreement with TriMet. Rather, we conclude that the cancellations were motivated by a good-faith belief in ATU's interpretation of the PML, as well as its desire for open negotiations. Moreover, the record establishes that both parties continued to work towards a solution to the dispute, and that both parties advanced ground rules proposals over the course of several months that would allow for various levels of public and media attendance. That the parties did not reach an immediate agreement on those proposals does not establish that ATU was merely going through the motions of bargaining when it canceled the scheduled bargaining sessions. Accordingly, we will dismiss this claim.

We now turn to TriMet's second allegation, that ATU unlawfully delayed the start of collective bargaining through a series of actions that TriMet characterizes as dilatory. The majority of these alleged "dilatory" actions relate to the cancelled bargaining sessions in November and December, or to the lengthy dispute between the parties regarding the application of the PML. As set forth above, the primary reason for the delayed start of bargaining involved the parties' competing ground rules proposals over whether, and to what extent, the bargaining sessions would be open to the public. We have concluded that the parties' differences in that respect were rooted in good-faith positions, not out of a bad-faith desire to avoid negotiating a collective bargaining agreement. We have reviewed the remaining actions that TriMet asserts were dilatory, and we conclude that TriMet has not established that ATU intended to improperly stall collective bargaining. Consequently, we will dismiss this claim.

#### ATU's Counterclaims Under ORS 243.672(1)(e).

We next address ATU's counterclaims against TriMet. ATU points to a variety of allegations that it believes support a finding that TriMet did not intend to reach an agreement through collective bargaining, but rather intended to proceed as quickly as possible to interest arbitration. ATU argues that these actions, when viewed in totality, demonstrate that TriMet failed to bargain in good faith in violation of ORS 243.672(1)(e).<sup>17</sup> Specifically, ATU alleges that TriMet delayed bargaining in six primary ways, including: (1) conditioning bargaining on ATU's agreement to conduct bargaining sessions closed to the public, or with limited access to certain members of the media; (2) conditioning the scheduling of additional bargaining sessions on first receiving and reviewing ATU's proposals; (3) conditioning bargaining on ATU's agreement to bargain in locations with security checks and security checks by TriMet's security personnel; (4) taking inconsistent positions about its bargaining team's authority or intent to enter into or

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<sup>17</sup>TriMet asserted as an affirmative defense that several allegations in ATU's counterclaims were untimely and should be dismissed. The recommended order agreed, dismissing as untimely the allegations that TriMet's decision to hold bargaining at a location with security present, taking inconsistent positions on the authority of its bargaining team, and insisting that bargaining be closed to the public and (at least some) press. ATU objects to this portion of the recommended order, asserting that it did not allege these facts as stand-alone claims, but rather as evidence that should be considered as part of our "totality of conduct" review of its surface bargaining claim against TriMet. We agree with ATU that we should consider these allegations as evidence in this case. See *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 676 (2007) (evidence concerning events outside the statute-of-limitations period may be admitted in a bad-faith-bargaining complaint to better understand the course of bargaining and the evolution of the parties' positions).

recommend ratification of tentative agreements; (5) providing ATU an unsatisfactory caucus room on April 27, only one copy of its proposal, no access to a copy machine, and abruptly and prematurely ending that meeting; and (6) providing only one date for bargaining in May and June and then withdrawing that date, proposing dates in July that ATU had already rejected, and offering no dates between July 22 and September 7, 2013.

As set forth above, when examining whether a party has failed to collectively bargain in good faith, we look to the totality of the bargaining conduct to see if that conduct demonstrated that the party had no serious intention of reaching an agreement. *See Medford School District #549C*, 25 PECBR at 516. We begin by assessing whether TriMet conditioned bargaining on ATU's agreement to conduct bargaining sessions closed to the public and press. This allegation involves the same issue as TriMet's claim against ATU above, with the parties switching their roles as the complaining and responding parties.

As we indicated above in our discussion of ATU's conduct, it is not clear that the parties were ever truly at impasse regarding the PML issue. Moreover, TriMet did attend the initially scheduled bargaining sessions, and consistently stated that it was willing to entertain proposals from ATU for ground rules that would provide some measure of media or public access to negotiations. At different points, TriMet and ATU exchanged ground rules to that effect, indicating a willingness by both parties to compromise on the issue. Therefore, we conclude that TriMet did not condition further bargaining over ATU's agreement to bargain in private.

Similarly, we conclude that TriMet did not condition future bargaining on first receiving ATU's proposals or on ATU agreeing that TriMet-provided security personnel must be present during negotiations. To be sure, TriMet did on multiple occasions ask ATU to submit its bargaining proposals. TriMet did not, however, refuse to engage in further bargaining on that condition. Similarly, although TriMet did state that it would provide security at some of the initial negotiation sessions, it did not refuse to continue with negotiations unless ATU accepted this condition. This conduct falls short of conditioning bargaining, as alleged by ATU.

We next turn to ATU's complaints about the April 27 bargaining session. ATU alleges that TriMet demonstrated bad faith by providing it with an unsatisfactory caucus room with no access to a copy machine, and only one copy of its proposals. The facts regarding this claim are largely undisputed, but the PECBA does not require one party to provide a set number of copies of proposals to the other side, nor does it mandate what level of room accommodations must be provided for good-faith bargaining to occur. There may be hypothetical scenarios where inadequate accommodations for bargaining could be indicative of bad faith, but this is not such a case. Any inconvenience experienced by ATU was *de minimis*, and we do not find these instances to be persuasive evidence of bad faith. We are also not convinced that the premature ending of the April 27 bargaining was attributable solely to either party, and even if it was, it is not necessarily a sign of bad faith when bargaining sessions end early or for the parties to have tense interactions at the table. Again, this situation is not persuasive evidence of bad faith by TriMet.

Finally, we turn to the allegation that TriMet failed to provide bargaining dates for long periods in order to ensure that certain members of its bargaining team were available. It is undisputed that there were long periods that TriMet was unavailable to schedule negotiations, but

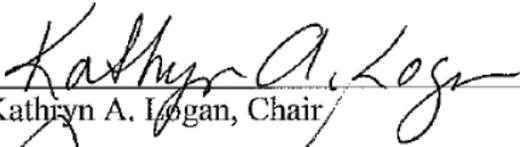
these delays were primarily caused by conflicting legal obligations and medical issues of key members of its bargaining team.<sup>18</sup> TriMet's desire to have all members of its team present is understandable, but this desire did contribute to the delay in negotiations. This delay was compounded by TriMet's initial refusal to schedule further bargaining sessions until ATU provided TriMet with its proposals in advance of negotiations. However, these delays in bargaining are not enough to establish that TriMet was unwilling to reach an agreement through collective bargaining. Ultimately, TriMet did provide sufficient dates for bargaining and the parties began the negotiation process in earnest. Moreover, in its correspondence with ATU, TriMet continually requested and even demanded that ATU return to the table and expressed a strong desire to continue negotiations. It also quickly filed the complaint with Multnomah County Circuit Court seeking to resolve the PML dispute, and appears to have tried to expedite that process. These facts demonstrate a willingness and a desire to reach an agreement and continue bargaining.

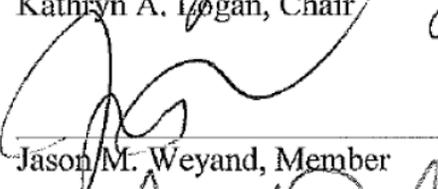
For these reasons, we conclude that TriMet did not violate ORS 243.672(1)(e), and we will dismiss ATU's counterclaims.

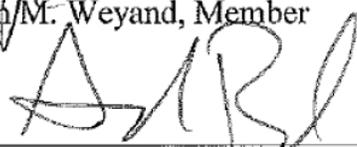
ORDER

1. TriMet's amended complaint is dismissed.
2. ATU's counterclaims are dismissed.

Dated this 26 day of December, 2014.

  
Kathryn A. Logan, Chair

  
Jason M. Weyand, Member

  
Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

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<sup>18</sup>ATU also had some difficulty in providing open dates due to other bargaining obligations during certain portions of the negotiation process.