EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-043-13

(UNFAIR LABOR PRACTICE)

RICHARD BELL, Complainant, v. TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON and PENSION PLAN FOR BARGAINING UNIT EMPLOYEES of TRIMET, Respondents.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On December 29, 2015, this Board heard oral argument on Complainant's and Tri-County Metropolitan Transportation District of Oregon's (TriMet) objections to an October 28, 2015, recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing held on January 7, 8, 9, and 21, 2015, at the offices of TriMet in Portland, Oregon. The record closed on July 13, 2015, following receipt of the parties' post-hearing briefs.

Stephen L. Brischetto, Attorney at Law, Portland, Oregon, represented Complainant Bell.

Kimberly A. Sewell, Director of Legal Services for TriMet, Portland, Oregon, represented Respondent TriMet.

Aruna A. Masih, Bennett, Hartman, Morris & Kaplan LLP, Portland, Oregon, represented Respondent Pension Plan for Bargaining Unit Employees of TriMet (Plan).

On October 3, 2013, Bell filed this unfair labor practice complaint, which alleged that TriMet and the Plan violated ORS 243.672(1)(g) and (2)(d) by denying Bell certain pension

benefits upon his retirement. During the hearing, an evidentiary issue arose regarding the Plan's attorney-client privilege. Under Oregon Evidence Code (OEC) 503, the ALJ ruled that the matters at issue were not subject to the privilege. As such a ruling is subject to an action for mandamus under ORS 34.110[1], the matter proceeded first to this Board. We concluded that the evidence at issue was protected by attorney-client privilege, and remanded the case to the ALJ. The parties advised the ALJ that no further evidence was required, and the record closed upon receipt of the parties' post-hearing briefs.

The issues are:

1. Regarding the calculation and payment of Bell's pension, is the Plan a public employer, labor organization, or designated representative under ORS 243.672, and therefore a proper party to this action?

2. Has Bell failed to name a party essential to his claim against TriMet?

3. Did TriMet and the Plan violate the 1982, 1985, and 1988 Amalgamated Transit Union, Division 757 (ATU)-TriMet collective bargaining agreements in calculating and paying Bell's pension checks? If so, did this conduct violate ORS 243.672(1)(g) and (2)(d)?

4. Are Bell's claims timely?

5. Did Bell exhaust the grievance procedure before filing this complaint?

We conclude that this Board has no jurisdiction over the complained-of actions of the Plan and dismiss the claims against it. We also conclude that Bell has not established that TriMet breached the 1982, 1985, or 1988 agreements, as alleged.

RULINGS

Attorney-Client Privilege

During these proceedings, Bell subpoenaed certain documents from the Plan, which then filed a motion to quash, asserting that some of the subpoenaed documents were subject to attorney-client privilege. The ALJ subsequently issued a ruling that denied the Plan's motion to quash and ordered that the requested documents be disclosed. That ruling concluded that the attorneys at issue represented the Plan, but not the trustees of the Plan. Therefore, according to the ruling, the communications between the attorneys and those trustees were not privileged within the meaning of OEC 503(2), because the Plan's trustees were not the "client" of the attorneys. The Plan subsequently requested an interlocutory review from this Board. We granted the Plan's

[1]*See Longo v. Premo*, 355 Or 525, 326 P3d 1152 (2014); *State ex rel. Oregon Health Sciences University v. Haas*, 325 Or 492, 942 P2d 261 (1997).

request for review and, for the reasons set forth below, granted the motion to quash the subpoena and remanded the matter to the ALJ for further processing of the case consistent with this ruling.[2]

Background

The Plan is a trust that is comprised of a six-member board of trustees, with three members appointed by TriMet and three members appointed by ATU. The members are trustees of the Plan and are authorized "[t]o consult with legal counsel with respect to the meaning or construction of [the] Trust or their obligations * * * or with respect to any action or proceeding, or any question of law, and shall be fully protected with respect to any action taken or omitted by them in good faith pursuant to the advice of counsel." The trustees are not compensated for their services and have a fiduciary obligation to administer and maintain the Plan "solely in the interests of the participants and beneficiaries for the sole exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the Plan."

The Plan does not have any employees and acts through the actions of the trustees, as well as through the actions of certain TriMet employees who perform administrative functions for the Plan. Historically, the Plan trustees have retained two attorneys to provide them with legal advice. Under the terms of the Trust Agreement, the Plan pays for those legal services. From at least 2009, attorneys Knapp and Hartman have been the two attorneys hired to represent the Plan and provide legal counsel to the trustees in administering the Plan.

As set forth above, Bell issued a subpoena that, by its terms, would call for the disclosure of communications between Knapp/Hartman and the Plan trustees, as well as for communications between Knapp and Hartman. The subpoena also covers an email between Hartman and the general counsel for ATU regarding Bell's claim.

The Plan objected to the disclosure of those communications, citing attorney-client privilege, and submitted a privilege log that listed 53 documents covered by the privilege. Bell does not dispute that 15 of the 53 documents are protected by the attorney-client privilege. Bell asserts, however, that the 38 remaining documents are not protected by the privilege.

Legal Analysis

With that background in mind, we turn to analyzing whether the disputed documents are covered by the attorney-client privilege under OEC 503, which is codified at ORS 40.225. Under OEC 503(2):

[2]After receiving the Plan's request and reviewing the file, we asked Bell to show cause why the complaint against the Plan should not be dismissed for lack of jurisdiction. All parties filed submissions in response to that show cause letter. We declined to make such a determination at that time, particularly as the record was still open.

"A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

> "(a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;
> "(b) Between the client's lawyer and the lawyer's representative;
> "(c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;
> "(d) Between representatives of the client or between the client and a representative of the client; or
> "(e) Between lawyers representing the client."

For purposes of OEC 503(2), unless the context requires otherwise:

"(a) 'Client' means a person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.
"(b) 'Confidential communication' means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
"(c) 'Lawyer' means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
"(d) 'Representative' of the client means:

> "(A) A principal, an officer or a director of the client; or
> "(B) A person who has authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client, or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the person's scope of employment for the client." OEC 503(1).

Finally, under OEC 503(3):

"The privilege created by this section may be claimed by the client, a guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client."

We first address the emails between Hartman/Knapp and the trustees of the Plan. There is no dispute that Hartman and Knapp are "lawyers" within the meaning of OEC 503(1)(c). Bell also does not dispute that Hartman and Knapp were retained to represent the Plan. Thus, in Bell's view, the Plan is the "client" of Hartman and Knapp. According to Bell, therefore, Hartman and Knapp

only represent the Plan and not the trustees of the Plan. Consequently, according to Bell, communications between Hartman/Knapp and the trustees are not privileged.[3] As set forth below, we conclude that the trustees: (1) are clients of Hartman and Knapp; (2) are representatives of the client; or (3) may individually claim such a privilege. Because the attorney-client privilege may be asserted in any of these situations, the disputed documents need not be disclosed.

The Plan, a trust, acts through its trustees, and the trustees (albeit, not the current trustees) hired Hartman and Knapp. A "client" includes "a person * * * who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer." OEC 503(1)(a). The record confirms that Hartman and Knapp "rendered professional legal services" to the trustees and that the Plan's trustees "consult[ed] with [Knapp and Hartman] to obtain professional legal services * * *." *See id.* Thus, we conclude that the trustees of the Plan are "clients" of "lawyers" Hartman and Knapp.

Moreover, OEC 503(2) also privileges from disclosure communications between the lawyer of the client and the client's representative. A "representative of the client" means "a principal, an officer or a director of the client," or a "person who has authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client, or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the person's scope of employment for the client." OEC 503(1)(d). There can be little doubt that, at a minimum, the trustees of the Plan have "authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the [Plan]." *See id.* Indeed, the trust agreement specifically provides that authority.

Finally, OEC 503(3) provides that the attorney-client privilege "may be claimed by the client, a guardian or conservator of the client, the personal representative of a deceased client, or the successor, *trustee*, or similar representative of a corporation, association, *or other organization*, whether or not in existence." (Emphasis added.) Here, the trustees of the Plan are entitled to claim the privilege regarding their email exchanges with Hartman and Knapp.

In sum, we conclude that the attorney-client privilege may be asserted with respect to the emails between Hartman/Knapp and the trustees of the Plan. Because there is no dispute, and we conclude, that the emails are otherwise "confidential communications" as defined by OEC 503(1)(b), the emails are protected by the privilege and need not be disclosed.

We turn to the emails between Hartman and Knapp, the lawyers for the Plan and the trustees (*i.e.*, the client). OEC 503(2)(e) provides that confidential communications "between lawyers representing the client" are privileged from disclosure. Here, Hartman and Knapp are lawyers representing the client Plan/trustees. Thus, the emails between Hartman and Knapp are privileged under OEC 503(2)(e).

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[3]Bell initially suggested that the attorney-client privilege was unavailable in this context, relying on the so-called "fiduciary exception" to that privilege. Bell acknowledged, however, that *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or 476, 326 P3d 1181 (2014), concluded that Oregon law does not recognize that exception.

Finally, we address the email between Hartman and the general counsel for ATU. According to the privilege log, that email concerns a May 17, 2010, letter from Bell's counsel. OEC 503(2)(c) provides an attorney-client privilege for confidential communications by "the client's lawyer to a lawyer representing another in a matter of common interest." Here, the email at issue is between the client's lawyer (Hartman) and a lawyer representing another (ATU). ATU appoints half of the Plan's trustees. Moreover, ATU members are beneficiaries of the Plan. Under these circumstances, we conclude that this email is a confidential communication by the client's lawyer (Hartman) to a lawyer representing another (ATU general counsel) in a matter of common interest (Bell's claim against the Plan). Therefore, the document is privileged and need not be disclosed.

In sum, as all 38 of the disputed documents are protected by attorney-client privilege, they need not be disclosed. Therefore, we grant the Plan's motion to quash Bell's subpoena with respect to those documents.[4]

The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties and Relevant Actors

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). TriMet and ATU have been parties to a series of collective bargaining agreements since before 1980.

2. From 1975 to 1981, TriMet contracted with Firestone Tire and Rubber Company (Firestone), a private employer, to provide certain tire services through a group of Firestone employees stationed at TriMet maintenance facilities. From 1981 to 1991, TriMet contracted with Goodyear Tire & Rubber Company (Goodyear), a private employer, to provide those services through a group of Goodyear employees stationed at those same TriMet maintenance facilities.

3. The Plan was formed by, and continues in operation under, a series of collective bargaining agreements between TriMet and ATU beginning before 1980, and a plan document created by the trustees to implement the collective bargaining agreements. As set forth in the collective bargaining agreements, the Plan is directed by six trustees, three appointed by TriMet and three appointed by ATU. Any deadlock among the trustees is to be resolved by binding arbitration.

Firestone and Goodyear Tire Shops at TriMet

4. Beginning no later than the mid-1970s, TriMet leased its bus tires from Firestone. Firestone provided tire service work through employees on TriMet property under a service agreement. On September 3, 1975, Bell became a Firestone employee working in a tire shop at a TriMet facility. As a Firestone employee, Bell reported to a Firestone supervisor and was part of

[4]In his objections, Bell did not object to this ruling.

a collective bargaining unit under a collective bargaining agreement between Firestone and ATU. The Firestone-ATU agreement provided for pension benefits under a Firestone pension plan.

5. In 1981, TriMet ended its leasing and service arrangement with Firestone. Bell did not vest in the Firestone pension plan because the Firestone pension plan required 10 years of service for vesting. On February 1, 1981, TriMet entered into an agreement with Goodyear. The TriMet-Goodyear agreement required Goodyear to recognize ATU as the exclusive bargaining representative for the former Firestone tire service employees working on TriMet premises, and to reach agreement with ATU regarding their terms and conditions of employment. Goodyear and ATU entered a collective bargaining agreement effective April 1, 1982.

6. The Goodyear-ATU agreement included pension benefits under a Goodyear pension plan. That plan required 10 years of service for vesting. The Goodyear-ATU agreement also provided that "[w]henever reference is made to 'continuous service' in this Agreement, it shall be interpreted to mean the most recent date of hire with the Goodyear Tire & Rubber Company." As a result, Bell and the other tire service employees lost vacation and sick leave accrual, and pension credit, for the years of service that they had provided to Firestone before February 1, 1981.

7. In 1986, Goodyear and ATU entered into another collective bargaining agreement, which included a previously negotiated Letter of Understanding. The Letter required Goodyear to recognize the tire service employees' original dates of hire with Firestone for purposes of "seniority within their wage classifications for job preference" and "vacation eligibility." The Letter included a service date for Bell of "11/03/75." The ATU-Goodyear agreements continued through October 1, 1991, and Bell accrued enough continuous service to vest in the Goodyear pension plan. That plan still exists, and eligible tire service employees are receiving pension benefits from that plan.

TriMet-ATU Collective Bargaining in the 1980s

8. The TriMet-ATU collective bargaining agreements effective in 1982, 1985, and 1988 contained the following language under a section entitled "Tire Service":

> "In the event [TriMet] discontinues its use of the Goodyear Company as its contractor for tire service, the employees of Goodyear working on [TriMet's] properties as of April 27, 1982 shall be deemed to have a [TriMet] seniority date the same as each employee's most recent date of hire at [TriMet] by Goodyear or its predecessor company. They shall be entitled to employment by [TriMet] to the extent required by their seniority date and the terms and provisions of the labor agreement."

9. The "Tire Service" language was initially proposed by ATU at the request of the tire service employees, who had persuaded the ATU membership to vote in favor of seeking contractual protection for them. Tony Bryant, a member of the 1982 ATU bargaining team, understood that the purpose of this provision was to protect the tire service employees against losses of service credit, like the loss suffered when TriMet changed its tire service provider from Firestone to Goodyear. Bryant specifically recalls discussing the loss of pension credit at the

bargaining table. He believes that the proposal was not controversial because, at the time, employees of other transit-related companies were periodically taken over by TriMet. Bryant believes that neither party intended that tire service employees receive pension credit under the TriMet plan and the Goodyear plan for the same years of service, which he called "double dipping." Bryant understood that the specific prior service pension credit for tire service employees would be negotiated if and when the tire servicers became TriMet employees.

10. Gary Brentano, a member of TriMet's 1982 bargaining team, did not recall any specific discussion of pension credit during bargaining, and believed that TriMet would have been reluctant to adopt any prior service pension credit proposal based on advice of counsel. Brentano understood that the purpose of the clause was to: (1) promise tire service employees employment with TriMet if TriMet and Goodyear ended their arrangement (TriMet had hired the most junior Firestone tire service employee when Goodyear did not hire the employee); (2) provide the tire service employees with a TriMet seniority date that would protect them against layoff; and (3) allow the tire service employees to bid for jobs and vacation days and retain accrued vacation.[5]

1991 TriMet-ATU Tire Service Negotiations

11. In December 1990, officials of TriMet and ATU met with tire service employees and told them that TriMet and ATU planned to negotiate tire service employee wages, seniority, health and welfare, pension, and job classification.

12. Effective October 1, 1991, TriMet ended the agreement with Goodyear and took over the employment of all the Goodyear tire service employees. At that time, TriMet and ATU were in successor contract negotiations. The parties entered into a separate letter agreement in January 1992 regarding the transition of Goodyear tire service employees to TriMet employee status effective October 1, 1991.

13. The agreement, memorialized in the form of a letter from TriMet manager Debra Maercklein to then ATU Business Representative Ron Heintzman, provided that tire service employees would be covered by all terms of the TriMet-ATU collective bargaining agreement effective October 1, 1991, "unless otherwise stated in this agreement or in any other agreement between the parties." The letter agreement also provided in part:

> "Tire Service employees will receive pension rights as described in the Pension Plan and Permanent Disability agreement effective October 1, 1991. Tire service employees shall receive no credit for pension benefits prior to October 1, 1991, nor shall any prospective pension rights be subject to adjustment as a result of any change in a new agreement which applies to service rendered prior to October l, 1991."

[5]Our disposition of this case does not require that we resolve any contradiction between the recollections of Bryant and Brentano about the 1982 TriMet-ATU negotiations.

14. Heintzman responded by letter to Maercklein, stating in part that the letter "clearly addressed the agreement reached between the Union and TriMet in regard to seniority, wages, benefits, and pension."

TriMet-ATU Collective Bargaining Agreements from 1992 to 2012

15. The 1992-1995 collective bargaining agreement changed provisions regarding tire service employees to the following:

> "Par. 1. Effective October 1, 1991, Tire Service will be established as a separate classification in the Maintenance Division.
>
> "Par. 2. On October 1, 1991, current tire service employees will have established both District [TriMet] seniority and Tire Service seniority as date of hire with Goodyear or their predecessor. District seniority shall be used as the basis for determining vacation benefits only."

16. Bell reviewed the proposed 1992-1995 agreement just before ATU members voted to accept it. He reacted with disbelief. Bell was unaware of the letter agreement until 2008.

17. The 1992 collective bargaining agreement language regarding tire service employees remained unchanged in successor agreements through the effective date of Bell's retirement (April 30, 2013).

18. After the 1992 tire service employee collective bargaining agreement language was adopted, Bell understood that it could have a negative impact on his pension benefits. Bell asked at least five ATU officials, including Jon Hunt, about the new language. Hunt told Bell that ATU would review the matter, but Hunt also said that he did not think ATU "can get anything" and that the 1992 changes reflected a decision to "sacrifice a few for the many." As a result, Bell believed that the issue had been resolved against the tire service employees and that he had no recourse.

19. Bell did not file an internal appeal with ATU, a grievance under the TriMet-ATU collective bargaining agreement, or an unfair labor practice complaint regarding the adoption of the 1992 tire service employee provisions.

Pension Plan Structure

20. The Plan is a trust that is and has been, since 1986, comprised of a six-member board of trustees with three members appointed by TriMet and three members appointed by ATU. The members are trustees of the Plan and are authorized "[t]o consult with legal counsel with respect to the meaning or construction of [the] Trust or their obligations * * * or with respect to any action or proceeding, or any question of law, and shall be fully protected with respect to any action taken or omitted by them in good faith pursuant to the advice of counsel." The trustees (*i.e.*, appointed board members) are not compensated for their services and have a fiduciary obligation to administer and maintain the Plan "solely in the interests of the participants and beneficiaries for

the sole exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the Plan."

21. The trustees received training about their fiduciary obligations to the Plan and the difference between their obligations as a trustee for the Plan and their previous role as an ATU or TriMet representative. The Trust Agreement allows the board of trustees to act through a two-board-member subcommittee and to delegate the day-to-day administration of the Plan.

22. Historically, the board of trustees has retained two attorneys to provide legal advice to the trustees. Under the terms of the Trust Agreement, the Plan pays for those legal services. Since 2009, or earlier, attorneys Knapp and Hartman have been the two attorneys hired to represent the Plan and provide legal counsel to the trustees in administering the plan.

23. The Plan does not have any employees and acts through the actions of the trustees. However, the Plan trustees have delegated day-to-day administration of the Plan to TriMet employees who perform actions such as calculating Plan benefits, responding to employee questions, and processing applications regarding pension benefits. The ultimate decision regarding the calculation and payment of pension benefits rests with the Plan trustees.

24. Under the applicable collective bargaining agreements and Plan documents, TriMet is required to contribute funds to the Plan as "necessary to establish an amortization period of forty (40) years or less. * * * The necessity of such funding and the amounts necessary shall be determined in accordance with accepted actuarial principles." Under those same documents, the Plan (through its trustees) is vested with the authority to make determinations on the proper calculation and payment of pension benefits.

Tire Service Employee BK Retirement (2006-2007)

25. In September 2006, TriMet employee BK retired. BK retired as a "Helper," but had previously worked as a tire service employee with Firestone, Goodyear, and, briefly with TriMet. The Plan initially used BK's Firestone hire date (1979) to calculate those benefits. BK told Bell and other tire service employees about this. The decision to use the 1979 Firestone hire date surprised Bell.

26. In August of 2007, the Plan concluded that it had erred in using BK's Firestone hire date and requested that BK repay the benefits resulting from this error (approximately $6,500).

27. BK repaid the funds did not contest the request for repayment.

Bell's Investigation and Response Regarding Tire Service Employee Pensions

28. Near the time of BK's pension payment and repayment, tire service employee DW asked the Plan about his benefit amount, and was initially told that he had more than 30 years of pension credit. When DW stated that he was a tire service employee, he was told to come back for a new calculation because there was a letter agreement regarding pension credit for tire service employees. When DW did so, he was told that the January 1992 letter agreement required that DW

receive pension service credit only back to October 1991, his TriMet hire date. DW was also told that David Auxier, TriMet Director of Business and Finance, had a copy of the letter agreement.

29. On September 5, 2008, DW and Bell met with Auxier regarding the letter agreement. Bob Johnson and Bruce Miller, TriMet garage managers who had worked with the tire service employees, were also present. During this meeting, Bell first learned of the text of the January 1992 TriMet-ATU letter agreement.

30. A few days later, Bell and DW decided to seek letters of support regarding pension benefits reflecting their pre-TriMet tire service work. They obtained letters from TriMet managers Johnson, Miller, MG, and TN. They also obtained an email from Bryant (who was a member of the 1982 ATU negotiating team), stating in part:

> "When we (ATU) were successful in getting TriMet to bring the tire service work into the TM workforce, it was ATU's intent that granting you seniority back to the beginning of your tire service on TriMet property would include all forms of back benefits, including job bids, classification seniority vacation accrual and pension. As you know, many of you had lost pension credit from both Firestone and Goodyear when contracts changed hands. At that time the vesting requirement was 10 years and most of you had nowhere near that level of service with either company. Our intent was for TriMet to make good those lost pension years."

31. After collecting their letters of support, Bell and DW asked then ATU President Hunt to assist them in having a meeting with TriMet General Manager Fred Hansen regarding the issue.

32. On June 10, 2009, Hunt provided Hansen with the information collected by Bell and DW. Hunt, Hansen, Bell and DW also met and discussed the issue. On June 16, 2009, Hansen responded by letter, stating that the January 1992 letter agreement and 1992 collective bargaining agreement required that pre-TriMet employment years of service were to be used "for determining *vacation benefits only*." Accordingly, Hansen wrote, the tire service employees were not entitled to TriMet *pension* credit for service before October 1, 1991.

<u>Communications Between Bell's Attorney and the Plan</u>

33. During the events below, the Plan's trustees consisted of ATU-appointed trustees Hunt, Schwarz, and Farra, and TriMet-appointed trustees Playfair, DeHamel, and Lehrbach.

34. In early January 2010, Bell's attorney, Stephen Brischetto, contacted attorneys Knapp and Hartman to request certain Plan information.

35. Knapp had been selected by the TriMet-appointed Plan trustees to represent the Plan. His fees are paid for by the Plan. Knapp also generally coordinates the work of the TriMet trustees.

36. Hartman had been selected by the ATU-appointed Plan trustees to represent the Plan. His fees are paid for by the Plan. Hartman also generally coordinates the work of the ATU trustees.

37. On January 11, 2009, Knapp provided Brischetto with the information responsive to his request, including the 1979 and 1986 Trust Agreements and the Plan Document, and Hanson's June 2009 letter denying service credit to tire service employees for service before October 1991. Knapp also told Brischetto that if he provided Knapp with the names of his clients, Knapp would provide their individual pension credit calculations.

38. On March 9, 2010, Brischetto told Knapp that he represented Bell and DW. Brischetto requested any claim forms used by the Plan. On March 17, Knapp asked Brischetto to provide: (1) relevant language from the Plan Document defining "continuous service"; (2) the individual service credit calculations for DW and Bell; (3) the kinds of information to include on behalf of his clients "so that the Trustees can fully evaluate the merits of your position"; and (4) information about the Plan appeal process. Knapp told Brischetto to contact him with any questions.

May 6, 2010-March 2011: Bell's Pension Appeal Review/Denial

39. On May 6, 2010, Brischetto filed an appeal with the Plan over the Plan's calculation of Bell's benefits. The appeal included a cover letter making legal arguments and the 1982 Goodyear-ATU and TriMet-ATU collective bargaining agreements, declarations of Bell, DW, and Bryant, and the letters of support from the TriMet garage managers.

40. On May 10, 2010, the trustees held a regular quarterly meeting, but had not yet received the appeal. On May 17, Hartman, having received the appeal, requested additional information from Brischetto. Brischetto then provided the 2009 letter from Hansen and copies of the 1992 TriMet-ATU letter agreement as memorialized by Heintzman and Maercklein.

41. On August 23, 2010, at the trustees' next quarterly meeting, Bell presented his appeal documents.

42. The trustees appointed a subcommittee comprised of a TriMet-appointed trustee, Playfair, and an ATU-appointed trustee, Schwarz, to meet with Brischetto, gather information, and report to the full board, which would then decide the appeal. The trustees also requested that Knapp coordinate the subcommittee meeting with Brischetto and that Hartman also attend.

43. On September 2, 2010, Playfair, Schwarz, Knapp, and Hartman met with Brischetto at Knapp's office. The Plan representatives expected Brischetto to present witnesses or additional evidence, but Brischetto appeared alone and presented legal argument. The meeting lasted less than an hour.

44. After Brischetto left, Playfair and Schwarz discussed Brischetto's arguments. They were dubious because they understood that the term "seniority," emphasized by Brischetto, was not used in the pension calculation provisions of the collective bargaining agreements or the Plan document.

45. Playfair and Schwarz decided to further investigate the issue by speaking with ATU and TriMet representatives who were at the bargaining table in 1982. Playfair agreed to speak with TriMet representatives, including Brentano, and Schwarz agreed to speak with ATU representatives (other than Bryant who had already submitted a declaration), such as Doug Renfro and Wally Feist.

46. Schwarz was unable to obtain any information from Renfro or Feist. Playfair communicated by phone and email with Brentano. Brentano provided Playfair with a signed declaration regarding his recollections. Brentano's memory was that the parties had discussed the term "seniority" in the 1982 collective bargaining negotiations for purposes of their "employment rights" only: "[H]owever, there was no discussion of providing pension credit to Goodyear employees who came to work for TriMet for periods of time when they were employed by a prior employer (whether that be Firestone or Goodyear). The 1982 [collective bargaining agreement] accurately reflects the employment status of the former [tire service] employees–they were to be given seniority for employment purposes, but not for pension purposes."

47. After reviewing the Plan document, the parties' past practice, Brischetto's submissions, and the information from Playfair, the subcommittee decided to recommend that the trustees deny Bell's appeal.

48. On November 10, 2010, Knapp advised Brischetto that the subcommittee had completed its investigation and would be making its recommendation to the full board.

49. Knapp drafted a subcommittee report reflecting the investigation and recommendation. The report was not ready by the November 2010 board meeting. On January 18, 2015, Knapp told Brischetto that the trustees would address the matter at a February meeting.

50. The completed report formally recommended that the trustees deny Bell and DW's appeal for additional pension credits. The report stated in part: "[T]he subcommittee focused on the actual language of the 1982 [collective bargaining agreement] and, in particular, the use of the term 'seniority.' This is not a term associated with pension service in the 1982 [collective bargaining agreements] or in subsequent [collective bargaining agreements]. Rather, when discussing pension service, the term 'continuous service' is used."

51. The report also stated that the relevant 1982 provision used the concept of "seniority date" in reference to a right to employment, but not in reference to any employee benefits. TriMet-ATU agreements regarding pension credits for employment with other bus lines that had merged into TriMet used the term "continuous service," not "seniority," and have been included in the Plan section of the relevant collective bargaining agreements.

52. The subcommittee report also quoted the Brentano declaration: "[D]uring the collective bargaining sessions, we did discuss seniority for Goodyear's tire [service] employees, in the event Goodyear terminated Goodyear's contract. The purpose of this provision was to protect their employment rights. There was not discussions of crediting any pension rights accrued by tire service employees while they were employed by either Firestone or Goodyear for the purpose of calculating any pension benefits for those tire service employees if they were subsequently to become employees of TriMet." The subcommittee found Brentano's statement to be credible, explaining that the statement "was based on personal knowledge and because it is consistent with the actual language of the 1982 [collective bargaining agreement]. The subcommittee was not persuaded that the parties agreed to credit pre-TriMet service in the 1982 [collective bargaining agreement]."

53. On February 14, 2015, the trustees met and considered Bell's appeal, reviewing the subcommittee report and recommendation.

54. The trustees discussed that, under Brischetto's interpretation, the relevant tire service employees would earn pension credits under the Goodyear-ATU pension plan that would overlap with credits earned under the TriMet-ATU plan for approximately 10 years. Some trustees referred to this as "double dipping."

55. The trustees voted to adopt the subcommittee's recommendation and deny the appeal.

56. On February 16, 2011, Knapp and Hartman provided Brischetto with the trustees' decision. On March 8, Brischetto emailed Knapp and Hartman asking whether there were additional appeal rights. On March 11, Knapp responded that the review was the Plan's final decision and that there were no further appeal rights under the Plan. On March 18, Brischetto informed Knapp and Hartman that he believed it was the Plan's obligation to advise participants about their further appeal rights to contest the Plan's decision. The Plan did not provide any further appeal information.

<u>August 2011-August 2013: Court Proceedings</u>

57. On August 11, 2011, Bell filed a complaint in the U.S. District Court for Oregon seeking to enforce the 1982, 1985, and 1988 TriMet-ATU collective bargaining agreements under Section 301 of the federal Labor Management Relations Act (LMRA), and alleging a pendent state law claim for breach of contract. The complaint named the Plan, the individual trustees, and TriMet as defendants. The individual trustees were represented in the action by Hartman and Knapp. On July 31, 2012, the U.S. District Court dismissed the claims based on lack of jurisdiction.

58. On January 22, 2013, Bell filed a complaint in the Multnomah County Circuit Court alleging the following claims: (1) breach of the 1982, 1985, and 1988 TriMet-ATU collective bargaining agreements; (2) promissory estoppel; (3) breach of fiduciary duty; and (4) a wage claim. The complaint also sought a declaratory judgment regarding the meaning of the Plan documents and the 1982, 1985, and 1988 TriMet-ATU collective bargaining agreements. Bell's complaint named the Plan, the individual trustees, and TriMet as defendants. The individual trustees were

represented by Hartman. The defendants moved to dismiss the action, arguing that the claims required interpretation of the 1982, 1985, and 1988 TriMet-ATU collective bargaining agreements, and that such interpretation was in the exclusive jurisdiction of this Board. The defendants also argued that the action was untimely. On July 19, 2013, the Circuit Court ruled that interpretation of the 1982, 1985, and 1988 collective bargaining agreements and the timeliness issue were within the primary jurisdiction of this Board. On August 26, 2013, the Circuit Court placed the action in abeyance to allow Bell an opportunity to seek this Board's ruling on these issues. This action followed.

CONCLUSIONS OF LAW

1. Regarding the calculation and payment of Bell's pension, the Plan is not a public employer, labor organization, or designated representative under ORS 243.672; therefore, this Board lacks jurisdiction over the claim that the Plan failed to properly calculate and pay Bell's pension benefits.

Under ORS 243.672(1)(g) of the Public Employee Collective Bargaining Act (PECBA), "[i]t is an unfair labor practice for a public employer or its designated representative to * * * [v]iolate the provisions of any written contract with respect to employment relations * * *." The PECBA defines "public employer" to mean "the State of Oregon, and the following political subdivisions: Cities, counties, community colleges, school districts, special districts, mass transit districts, metropolitan service districts, public service corporations or municipal corporations and public and quasi-public corporations." ORS 243.650(20). No party argues that the Plan fits within this statutory definition. Bell argues, however, that the Plan is a "designated representative" of a public employer (TriMet), a labor organization (ATU), or both.

To be the "designated representative" of a "public employer," the "public employer must have taken specific action to indicate its intent to designate a particular representative to act in the public employer's interests in certain definitive matters: 'all matters dealing with employee representation, collective bargaining and related issues.'" *AFSCME Council 75 v. City of Lebanon*, 265 Or App 288, 296-97, 336 P3d 519, *rev allowed*, 356 Or 638, 342 P3d 1024 (2014) (citing ORS 243.650(21) and its definition of "public employer representative"); *Service Employees Int'l Union Local 503 v. DAS*, 202 Or App 469, 476, 123 P3d 300 (2005), *rev den*, 341 Or 140, 139 P3d 258 (2006) (same). The record does not establish that TriMet (the public employer) specifically designated the Plan to act in TriMet's interests in all matters dealing with employee representation, collective bargaining, and related issues. Consequently, we determine that the Plan is not TriMet's "designated representative" within the meaning of the PECBA.

Likewise, under ORS 243.672(2)(d), it is an unfair labor practice "for a labor organization or its designated representative to * * * [v]iolate the provisions of any written contract with respect to employment relations * * *." Again, no party here contends that the Plan is a "labor organization," which is defined as "any organization that has as one of its purposes representing employees in their employment relations with public employers." ORS 243.650(13).

That leaves the question of whether the Plan is a "designated representative" of ATU (a labor organization). This Board has not previously defined "designated representative" with respect to a labor organization, but its definition would seem to parallel that of a "designated representative" of a public employer (*i.e.*, an individual or individuals specifically designated by the labor organization to act on its behalf as the exclusive bargaining representative for certain public employees). Using this or a similar definition, the Plan would not be ATU's designated representative. As set forth above, the Plan is a trust comprised of a board equally appointed by TriMet and ATU. That alone would disqualify it from being ATU's designated representative, as three of the trustees are designated by TriMet. Moreover, the Plan is a trust formed for the exclusive benefit of certain TriMet *employees*; it does not act in the place of ATU as the exclusive bargaining representative of those employees.

Based on this analysis, the Plan is not a public employer, a labor organization, or the designated representative of either. As such, any actions taken by the Plan regarding this case are outside the purview of Bell's allegations under ORS 243.672(1)(g) and (2)(d).

Bell asserts that a different result should be reached in this case because the claim is one for pension benefits, and cites various federal authority based on decisions under Section 301 of the LMRA. Although the PECBA is based in part upon federal labor legislation, and this Board at times looks to such legislation for guidance, we do not do so here. Federal court jurisdiction under Section 301 is based on the existence (and alleged violation) of a *labor contract* (29 U.S.C. §185), whereas this Board's jurisdiction under the PECBA for this alleged unfair labor practice complaint requires the *respondent* to be a public employer or a labor organization that represents public employees (or a designated representative of either entity). *See* ORS 243.672(1)(g) and (2)(d). Because the PECBA does not provide jurisdiction in this action against the Plan, we will dismiss the complaint against the Plan.[6]

2. Bell has failed to establish that TriMet violated ORS 243.672(1)(g).

Where a complainant alleges both a duty-of-fair-representation claim against a labor organization (ORS 243.672(2)(a)) and a breach of contract claim against the employer (ORS 243.672(1)(g)), the complainant must establish a breach of the duty-of-fair-representation by the labor organization before proceeding with the contract claim against the employer. *Wright v. Local 2277, Portland Community College Federation of Faculty and Academic Professionals, AFT, AFL-CIO and Portland Community College*, Case No. FR-004-11, 25 PECBR 910, 911, *recons den*, 25 PECBR 951 (2014); *Stotler v. Teamsters Local 223 and City of Medford*, Case No. FR-003-12, 25 PECBR 70, 73 (2012), *AWOP*, 275 Or App 170 (2015). Here, however, Bell has not alleged a duty-of-fair-representation claim against the labor organization (ATU) or named ATU as a party. Bell avers that in this context—*i.e.*, a claim for pension benefits arising out of an alleged breach of a long expired collective bargaining agreement—he should not have to first plead and prove a duty-of-fair-representation claim as a prerequisite to his (1)(g) claim against the employer.

[6]Bell does not argue that TriMet violated the PECBA through the actions of the employees who calculate and issue benefits as directed by the Plan.

We need not decide whether there is any exception to our general approach because the record does not establish that TriMet violated ORS 243.672(1)(g). On this record, it is *the Plan, not TriMet*, that calculated and determined Bell's pension benefits. TriMet's obligations under the collective bargaining agreements are to *fund the Plan* in accordance with the Plan document. Bell has not asserted, and the record does not establish, that TriMet failed to fund the Plan under those terms. Rather, Bell's allegations of a contractual breach concern the calculations and payments made by *the Plan*. As set forth above, because the Plan is not a public employer (or its designated representative), any contractual breach by the Plan lies outside the authority of this Board with respect to ORS 243.672(1)(g). Accordingly, because Bell has not established that TriMet violated a contractual breach regarding the Plan's calculation and disbursement of Bell's pension benefits, we will dismiss the subsection (1)(g) claim against TriMet.

ORDER

The complaint is dismissed.

DATED this 29 day of January 2016.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.