

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-016-11

(UNFAIR LABOR PRACTICE)

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

On May 18, 2011, this Board conducted an expedited hearing. The record closed on June 1, 2011, upon receipt of the parties' post-hearing briefs.

Michael Tedesco, Attorney at Law, Lake Oswego, Oregon, represented the Complainant.

Adam S. Collier, Attorney at Law, Bullard Law, Portland, Oregon, represented the Respondent.

On August 11, 2010, the Amalgamated Transit Union, Division 757 (Union) filed an unfair labor practice complaint (UP-039-10) against the Tri-County Metropolitan Transportation District of Oregon (TriMet). As amended, the complaint alleged violations of ORS 243.672(1)(a),(b), and (e). TriMet filed a timely answer to the amended complaint.

On March 24, 2011, the parties agreed to bifurcate the claims in UP-039-10. One claim, that TriMet violated ORS 243.672(1)(e) by including new issues in its final offer, became a separate case, UP-016-11. At the parties' request, the Board granted expedited

consideration to UP-016-11. The other claims in UP-39-10 are being separately processed according to the regular procedures for hearing an unfair labor practice complaint.

The issue is: did TriMet violate ORS 243.672(1)(e) by submitting new issues in its final offer that were not reasonably comprehended within, or logically evolved from, its last written proposal?

### RULINGS

All rulings were reviewed and are correct.

### FINDINGS OF FACT

1. TriMet, a public employer and transportation district, and the Union, a labor organization, were parties to a collective bargaining agreement in effect from December 1, 2003 through November 30, 2009.

2. In 2007, the Oregon legislature amended the Public Employee Collective Bargaining Act (PECBA) to prohibit employees of mass transit districts, transportation districts, and municipal bus systems from striking. ORS 243.738(1).

3. Union officers and representatives include the following disclaimer in all e-mails sent to TriMet managers:

**"OFFICIAL NOTICE:** Because of cyber attacks ATU 757 **does not** accept official notice via email from employers on matters involving collective bargaining, grievance timelines, member discipline or policy changes. If you intend to rely on the fact notice was sent, please mail that official notice or send your notice via facsimile machine. (503) 230-2589. Thank you."  
(Emphasis in the original.)

4. By letter dated September 14, 2009, TriMet General Manager Fred Hansen gave Union President Jon Hunt notice that TriMet wished to open negotiations for a successor collective bargaining agreement. By letter dated September 30, 2009, Hunt also notified Hansen that the Union wanted to open negotiations on a successor contract.

5. Some time during the first two weeks of September 2009, Hansen and Ronald Heintzman spoke about the upcoming Union contract negotiations. Heintzman is a former Union President and Business Representative. In 2002, he was elected Vice President of the International Amalgamated Transit Union (International). In

August 2009, he began serving as Executive Vice President of the International, a position he held until August 2010. Heintzman and Hansen had been involved in two previous Union contract negotiations—in 1998 and 2003. In these prior negotiations, Heintzman and Hansen met separately, and discussed and reached agreement on the major bargaining issues. They then brought their agreements to their bargaining teams, and the bargaining teams tentatively agreed to the terms that Heintzman and Hansen had reached.

Heintzman worked out of the International's Washington, D.C. office; he and Hansen met on September 22, 2009 when Hansen was in the D.C. area. At their meeting, Heintzman and Hansen discussed health insurance benefits; both knew that this would be the most important and most contentious issue in the upcoming negotiations. Hansen told Heintzman that because of the financial difficulties TriMet faced, TriMet needed to reduce the cost of health care benefits. Heintzman explained that the Union was strongly opposed to any reduction in current benefit levels.

6. On October 22, 2009, the parties met for their first formal negotiation session. Hansen did not attend this meeting, so TriMet Executive Director of Operations Steve Banta served as TriMet's spokesperson. Although Hansen planned to involve himself in negotiations, he and Banta thought it best if Hansen maintained some distance from the table bargaining sessions. Accordingly, Banta and Hansen agreed that Hansen would not attend the first two bargaining sessions.

On October 22, the parties discussed ground rules and made no contract proposals. The ground rules to which they agreed included the following provisions:

- "1. All proposals shall be in writing, or promptly reduced to writing if initially made verbally at the bargaining table.
- "2. The parties agree to structure the negotiation to provide for major issues to be negotiated by the parties' respective principals at the 'Big Table' and all other negotiations to be dealt with by negotiating teams with subject matter experts at 'Small Tables.'<sup>1</sup>

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<sup>1</sup>In the past, bargaining issues that involved a high degree of technical expertise to understand and resolve were referred to these "Small Tables." At the "Small Tables," representatives from each party, who had specialized knowledge of the issues under consideration, met and attempted to reach agreement. Any agreements made at a "Small Table" were then presented to the parties' bargaining teams. The parties did not use any 'Small Tables' during their 2009-2010 negotiations, however.

“3. The respective negotiating teams possess authority to bargain to a tentative agreement which each party will be willing to recommend to their respective principals at the ‘Big Table’. All tentative agreements will be subject to final approval by the respective principals of the negotiating teams. Tentative agreements will remain tentative pending ratification of an overall agreement. Tentative agreements must be reduced to writing and initialed by the parties’ authorized representatives.

“4. The District and ATU each have authority to bargain to a tentative agreement which each is willing to recommend to the TriMet Board and to the membership of the ATU respectively. Any such tentative agreement is subject to review and approval, or rejection, by the TriMet Board and the membership of the Union.

“\* \* \* \* \*

“6. The parties agree that bargaining is most effective when conducted at the bargaining table. Thus, each party agrees to not involve the press in bargaining matters. This agreement shall expire in the event the parties proceed to mediation. During mediation, each party reserves the right to issue press statements or to otherwise communicate with the press in a truthful manner independent of review or approval by the other party.

“\* \* \* \* \*

“9. The parties agree that the statutory 150-day bargaining period commenced on October 22, 2009. Proposals or counter proposals by either party shall be reduced to writing. No new proposals will be submitted by either party after the fourth bargaining session, except that each side reserves the right to modify any proposal or submit counter proposals during the course of bargaining on items already opened for discussion. Wholly new items may be allowed subsequent to the fourth negotiation session by written mutual agreement between the spokespersons.”

7. On October 31, 2009, TriMet notified Union bargaining unit members that beginning January 1, 2010, bus or train operators caught texting or talking on their cell phones would immediately be discharged. This was a change in TriMet’s disciplinary policy; prior to October 31, Union operators were not disciplined for cell phone use until

they received more than three complaints. A reporter for *The Oregonian* newspaper interviewed Hansen and published an article about the policy on November 13, 2009. The reporter quoted Hansen several times in the article.

8. Union President Hunt and the other members of the Union bargaining team were angered by the November 13 newspaper article. They believed that by speaking to the reporter, Hansen violated the parties' ground rule that specified that neither party would "involve the press in bargaining matters." When the parties met to negotiate on November 20, 2009, Hunt accused Hansen of violating the parties' ground rules. Hunt and the other members of the Union team then ripped up copies of the ground rules to demonstrate that the Union believed they were no longer valid.

Hansen was not present at this meeting, and Hunt asked Banta if Hansen planned to attend. Banta replied that given the purpose of the meeting—to exchange proposals and ask questions to clarify the proposals—he had recommended that Hansen not attend. Hunt was unhappy about Hansen's absence, and questioned Banta's authority, since Hansen had served as TriMet's chief spokesperson in past negotiations. Banta explained that he had authority to negotiate for TriMet. At Hunt's request, Banta agreed to send Hunt proof of his (Banta's) authority to bargain.

The parties discussed TriMet's change in policy regarding cell phone use, and Hunt said that because of a lack of trust and a failure to communicate, relations between the two parties had broken down. The parties then talked about how to exchange proposals, and ultimately agreed to a mutual exchange.

9. On November 20, 2009, the Union proposed that the parties extend their current collective bargaining agreement for two years.

Also on November 20, TriMet made the following proposal:

"CONFIDENTIAL

"TRI-COUNTY METROPOLITAN TRANSPORTATION DIS[T]RICT  
OF OREGON

"This is TriMet's initial contract proposal for provisions to be included in the New Working and Wage Agreement ('new WWA') [collective bargaining agreement] that will replace the current WWA expiring on November 30, 2009.

"TriMet reserves the right to amend or modify its Proposal during negotiations and will negotiate its Proposal and the terms and conditions of a new WWA in good faith. The citations to the provisions of the WWA

in this initial proposal are for ease of reference only to help facilitate negotiations and are not intended to limit discussion of the issues raised to only those cited provisions. TriMet is committed to striving for a fair and equitable outcome for both parties. We recognize that the negotiation for a new WWA is a process that will take a concentrated, continuous, and focused effort on the part of both TriMet and the ATU to reach mutual agreement on the issues. The negotiations will be governed by the applicable provisions of ORS Chapter 243 and other state law that may apply.

“Both parties must approach the negotiation in an open, respectful and transparent manner. TriMet believes that Labor negotiations involve frank, open, and oftentimes sensitive discussion, on a wide variety of issues, between representatives from TriMet and the ATU. The provisions of 2009 Negotiations Ground Rules mutually agreed to on October 22, 2009 shall also apply to our negotiations.

**“Proposal #1<sup>[2]</sup>”**

**“Article I, Section 3 - Adjustment of Grievances and Arbitration”**

(Pages 5-9) REVISE

“Par. 1: ATU will become responsible for paying union officers to attend grievance hearings at all levels of the grievance process.

CHANGE

“Par. 2-3: Revise grievance procedure to fewer steps:<sup>[3]</sup>”

- “1. Eliminate the prefiling conference as Step 1 from the grievance procedure. DELETED

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<sup>2</sup>The parenthetical page numbers in each proposal refer to the corresponding page in the parties’ expired contract.

<sup>3</sup>The parties’ 2003-2009 contract provides for a multi-step grievance procedure. These steps are: Step I—an informal meeting of the grievant, Union representative and supervisor; Step II—submission of the grievance to the “appropriate Department Director”; Step III—submission of the grievance to a Union-TriMet Grievance Committee; and Step IV—submission of the grievance to an arbitrator. In addition, the expired contract established a Joint Labor Relations Committee (JLRC); one of the duties of the JLRC was “[t]o attempt to resolve/settle grievances that have been considered by the grievance committee and have been moved to and are pending arbitration.”

“2. Increase the District’s time to provide a written answer to the Association from 7 days to 15 days after the date the grievance was first heard by management. CHANGE

“Par.4: Keep expedited arbitration as an option instead of formal arbitration. RETAIN

“Par. 5: Use regional arbitrators instead of Federal Mediation and Conciliation Service (FMCS). CHANGE

“Proposal #2

“Article I, Section 9 – Health and Welfare Benefits (Page 17) DELETE

“(See also, Retiree Benefits Summary) (Page 138) ALSO DELETE

“The provisions relating to health and welfare benefits need to be rewritten. TriMet will provide to all active union employees health coverage that is consistent with plan design and coverages provided to all other active TriMet employees. TriMet agrees to advise and discuss with the ATU prior to implementing any plan changes.

“Proposal #3

“TriMet Direct Pays to ATU

“Article I, Section 7, Par. 2 – Benefits Coordinator (Page 19) DELETE

“Article I, Section 19, Par. 12 – Child Care/Elder Assistance Program  
(Page 33) DELETE

“Article I, Section 19, Par. 13 – Portland Activities Bus (Page 34) DELETE

“Article I, Section 19, Par. 14 – Transit Exchange Program  
(Page 34) DELETE

“Proposal #4

“Article I, Section 12, Par. 2, b.(5) – Continuous Service Definition  
(Page 26) REVISE

“Proposal #5

“Article I Section 13 — Seniority Provisions (See Par. 1) (Page 27)  
CHANGE/CLARIFY

“Any union employee promoted to a non-union position will retain seniority as a union employee for a period not to exceed two (2) years from the effective date of the promotion. After a period of two years, the employee no longer retains any union seniority or the right to return to their former union position.

“Proposal #6

“Retirement and Permanent Disability Plan

ADD

“All employees hired on or after January 1, 2010 are only eligible for the TriMet Defined Contribution Plan for Union Employees. Vesting Period for the Defined Contribution Plan for Union Employees: Five (5) years of continuous service with the District. Those employees that leave TriMet before they vest in the DC Plan will have all of their employee contributions returned.

“The parties also need to discuss the qualifications for full retirement benefits.

“Proposal #7

“Article II, Section 3 – Station Agents/Clerks (Pages 57-58) REVISE

“Par. 5 – Change contract language to make the Chief Station Agent an appointed position through a competitive selection process.

“Proposal #8

“Article III, Sections 11, 12, 15 – Rail Maintenance Apprentice Programs (Pages 86 and 90) REVISE

“Combine light rail apprentice and training programs LRV and MOW into one section.

“Eliminate Section 15, obsolete language in Par. 7, a. 1, 2 regarding passed up mechanics. All passed up mechanics have received a chance to enter an apprenticeship program. **DELETE**

“Keep language that says journey mechanics lose longevity pay when they bid into a new apprenticeship and must establish seniority as a new journey worker before being eligible for longevity pay. **RETAIN**

“Revise Article III as specified by the February 10, 2009 TriMet and ATU Memorandum of Agreement for consolidation of light rail Fare Technician and Communications Technician. **ADD**

“Employees who have left an apprenticeship for any reason prior to earning journey level status forfeit the right to re-enter apprentice programs for 5 years. In individual cases where the facts and circumstances surrounding

the employee's voluntary separation from the program mitigate the separation, the General Manager may grant an employee re-entry into apprenticeship program waving the 5-year requirement. CHANGE

"Proposal #9

"Article III, Section 9 and 14; Article IV, Section I; and Supplemental WWA relating to Contracting Out

(Pages 83, 87, 103, and 125-129) REVISE

"Consolidate Bus Maintenance, Rail Maintenance, and Facilities Maintenance contracting out provisions into a single section of the WWA. CHANGE

"Proposal #10

"Article III, Section 17 – Bus Maintenance Overtime (Pages 95-98)

REVISE

"Develop new overtime and call-out language to include all maintenance operations: Bus Maintenance, Rail Equipment Maintenance, Maintenance of Way and Facilities Management.

"Proposal #11

"Article V, Section 2 – General

(Page 106) CHANGE

"The District has the option to contracting-out the money room function.

"Proposal #12

"Article VI, Section 1 Par. 6 – Overtime

(Page 108) REVISE

"Clarify how overtime is assigned in Customer Service: TTO and Holladay Street facilities, etc.

"Proposal #13

"Article VII, – Options Planning and Scheduling Department

(Page 111) REVISE

"Incorporate language from 9/7/2004 Agreement between Fred Hansen and Al Zullo that the Computer Technology Specialist will become a non-represented position when either of the current incumbents retires or leave TriMet employment.

“Proposal #14

“Article VIII – Pay Schedule (Operations Division)(Page 121) DELETE

“The COLA should be deleted. In its place, agreement on periodic and agreed upon pay adjustments will be added.

“SEE ALSO Retirement Benefits Summary Pensions (Page 138) CHANGE  
Retiree pay shall be adjusted only on the basis of 90% of CPI.

“Proposal #15

“Memorandum of Agreement – Emergency Operations  
(Page 142) REVISE

“Emergency operations – further clarify this language.

“Proposal #16

“Memorandum of Agreement Supplemental Working and Wage Agreement by and Between Tri-County Metropolitan Transportation District of Oregon and Division 757, Amalgamated Transit Union Related to Portland Streetcar Special Project (Pages 143-150) REVISE

“Incorporate Supplemental WWA Related to Portland Streetcar, as an Article of the WWA. REVISE

“Streetcar classifications: Earning Streetcar seniority is conditional on completing Streetcar training. ADD

“Transfers from Streetcar are at next regular signup following initial commitment (this is established practice). ADD

“Increase initial commitment for Streetcar vehicle mechanics from 1 year to 2 years. REVISE

“Transfers to or from Streetcar are not permitted when on time loss or other discipline status. ADD

“Incorporate 8/22/08 side letter regarding fill-in Operators. ADD

“Incorporate 6/11/04 side letter regarding Streetcar Training Maintenance Technician. ADD

“The District also has a number of other issues that will be addressed in the small groups such as obsolete/redundant language along with review of the viability of existing side letters (Article I, Section 19, Par. 10, Page 33).”

10. The parties scheduled a bargaining session for December 3, 2009. By letter dated November 30, Hunt cancelled the meeting. Hunt explained that the Union would not be ready to meet in December because it needed more time to analyze TriMet’s health benefits proposal. Hunt also asked TriMet to provide him with information and a number of documents regarding health benefits and premium costs.

11. On December 1, 2009, Hunt wrote all bargaining unit members and retirees about the negotiations process. In his letter, Hunt criticized TriMet’s proposals and its treatment of employees, and asked that members sign an attached letter to the Governor expressing “no confidence” in Hansen.

12. By letter to Hunt dated December 1, 2009, Banta urged Hunt “to keep the previously scheduled December 3 bargaining session.” Banta told Hunt that Hansen would attend the December 3 session.

13. By letter to Banta dated December 2, 2009, Hunt expressed the following concerns about Banta’s role:

“[Y]ou will recall that given your likelihood of leaving TriMet<sup>[4]</sup> employment in the very near future, we expressed concern that you were serving as TriMet’s chief negotiator. You indicated that Fred Hansen would be addressing our concern in writing. His response was not received. You also state that Fred Hansen will be at the bargaining table on the 3<sup>rd</sup> but it is our understanding that he is scheduled to be deposed on the 3<sup>rd</sup>.”

14. On December 4, 2009, Hansen talked with Hunt about scheduling another bargaining session. Hansen reminded Hunt that the ground rules specified that no new proposals could be introduced after the fourth bargaining session, and Hunt indicated that he understood and would comply with the ground rules. When Hansen pressed Hunt to schedule a bargaining session in January, Hunt was unwilling to do so. Hunt said that the next step should be for him, Hansen, and International Vice-President Heintzman to meet and discuss bargaining issues.

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<sup>4</sup>Banta left TriMet in January 2010.

Hunt did not consider Heintzman to be the Union's official representative at this stage of the negotiations process. Hunt understood that if he wanted Heintzman's official assistance with bargaining, he must make a written request to the International for Heintzman's help. Hunt believed, however, that if Heintzman and Hansen reached agreement on the most important issues, the TriMet and Union bargaining teams would (as they had in the past two negotiations) tentatively agree to their agreements.

Heintzman, Hunt, and Hansen scheduled a meeting for January 14, 2010.

15. In a December 31, 2009 e-mail, Heintzman asked Hansen for information about pension benefits and current and proposed health insurance premium costs for active or retired employees based on a number of different plan designs. Heintzman cautioned that "[a]lthough I am requesting this information, it does not point to any clear idea or position the union may have regarding insurance and pension \* \* \*."

16. On January 14, 2010, Heintzman, Hunt, and Hansen met. They discussed various approaches to health insurance in an attempt to find plans and benefit levels that would be acceptable to both the Union and TriMet.

17. Some time in January 2010, Heintzman and Hansen talked about the possibility of providing Union bargaining unit members with the same health insurance plans as those that the Lane Transit District (LTD) provided to employees.

18. On February 11, 2010, Hansen sent Heintzman an e-mail, which he copied to Hunt. In his e-mail, Hansen provided Heintzman with the health insurance information he had requested. Hansen attached spreadsheets from the current insurance providers for Union bargaining unit members, Regence and Kaiser, that showed

"the percent change in monthly premiums if certain plan design Options are selected. I have also enclosed the latest numbers that outline the cost for union retirees in each health care plan and a spreadsheet on [sic] that shows how the cost of union retirees has changed from 2005 through 2010. Lastly, enclosed is a chart showing utilization of Rx drugs by categories and a spreadsheet that has cost comparison data for the union and management plans at TriMet and LTD [Lane Transit District]."

Hansen also raised the following "other issue" in his e-mail:

"We are just launching another round of budget reductions for FY11 (July 1, 2010 – June 30, 2011). The reductions are about \$27 million (this is on top of the \$31 million we reduced in the current fiscal year). We have

reduced the amount of cuts we need to make by about \$7 million by applying ARRA funding to offset preventative maintenance costs. By taking additional reductions on the administrative side (about 10% since the beginning of the recession in management head count compared to about 4% for the union ranks). The additional \$20 million (\$27 million minus \$7 million ARRA) translates to needing \$8.7 million reductions in direct service on the street (something that is always the last place we want to reduce). It is hard to imagine that we can achieve this level of service reductions without layoffs. An alternative would be for ATU to agree to a freeze on the salary increase due June 1, 2010. As you know, inflation was essentially at 0% if not negative meaning members would not be giving up any buying power. This would reduce the necessary service reductions by about half. Is this possible?"

19. In an e-mail dated February 11, 2010, which was copied to Hunt, Heintzman responded to Hansen:

"Thanks Fred. We will analy[z]e the iinformatioin [*sic*] you provided. Preliminarily, though, we would not be interested in the LTD plan design. Any changes, if agreed to, would be based on existing plans currently in place for TriMet employees. Any wage freeze would have to be approved by the membership, and and [*sic*] such, would most likely be part of a total agreement. That would be a local decision."

20. In a February 25, 2011 e-mail to Heintzman, which was copied to Hunt, Hansen explained TriMet's position as follows:

"To help ensure that we move forward on a new WWA, our goal, as indicated in our Initial Proposal, is that the health care plan design, including medical, hospital, prescription drugs, optical, and other health care benefits, be consistent for both union and management employees. We recognize that it is essential that our workforce receive quality benefits. For our total compensation program to remain sustainable, we need to have a benefit program that reflects a partnership between TriMet, employees and future retirees where each party shares in the responsibility for the cost of health benefits.

"TriMet is not proposing that health benefits for retirees currently on Medicare be changed. Rather, on a going forward basis, we are proposing a health care plan design for active union employees and retired union employees under the age of 65 that is the same as the management plan

design, and that changes to union plan design remain consistent with the changes in the management plan design. This means that the proposed union and management health plan design would have annual deductibles, co-payments, and co-insurance for both medical, hospital, RX, and other health care benefits, with the same annual limit on out of pocket expenses. (The specifics of the management plan in these regards are detailed in the spreadsheet contained in the background information I provided on February 11, 2010). For future management and union retirees that reach the age of 65 and become eligible for Medicare, we propose a fixed monthly payment in lieu of TriMet provided insurance. For union employees, we clearly understand that the fixed monthly payment is a matter that we would bargain with you.

“I am also not proposing that all of the agreed upon plan design changes occur immediately. Within the new WWA [collective bargaining agreement], we are willing to negotiate a phased approach over time that gives current employees a clear outline of any changes in health care benefits and the effective dates of these changes. This phased approach would be part of the WWA and would not change during its term.” (Emphasis in original.)

21. Heintzman responded to Hansen on February 25, 2010, with the following e-mail:

“My view of a proposal that members would accept in lieu of arbitration, unfortunately, falls significantly short of the expectations you put forward. I will forward in a few days, an outline of what I ‘think’ might be acceptable from the union’s standpoint. I am afraid that it won’t come close to what your [*sic*] after, and I at this point believe that the contract will have to be settled by arbitration.”

22. On March 8, 2010, Heintzman sent Hansen the following e-mail, which he copied to Hunt:

“Sorry for the delay. In consultation with the local union leadership, the following would be in the framework for an agreement to avoid arbitration. It is made with the understanding that the membership would have to approve it, in lieu of moving the contract dispute to arbitration. Based on where the parties are at this point, the local is interested in shaping an agreement with only the changes outlined below, and because of the magnitude of these changes, feel that including any other items would hinder their chance of winning membership approval.

- “1. Put a \$100 single and \$300 family deductible, or a \$200 single and \$500 deductible in both medical plans offered. This would require an amount equal to the deductible deposited annually by the employer, into a VEBA<sup>[5]</sup> account for each employee.
- “2. Increase prescription co-payments by \$5.00 over current co-pay requirements.
- “3. For all future retirees (a date to be established by mutual agreement of the parties) would receive the same health care plan benefits as received by active employees. In other words, what ever the level of benefits are for active employees at the time an employee retires, would be what that retired member would receive, and would change whenever there was a change to the active employee plans.
- “4. Increase the retiree sick leave conversion to pension to \$0.35 for each unused hour, increased by as *[sic]* additional \$0.05 each year of the contract thereafter.<sup>[6]</sup>
- “5. Union would agree to a one to six year agreement, employer’s choice.

“All other contract items remain unchanged, including uninterrupted continuation of six month wage increases/adjustments.”

23. Although Hansen and Heintzman planned to meet on March 19, 2010, they were unable to do so because Hansen had urgent and unexpected business to which he needed to attend.

24. In a March 22, 2010 e-mail, in which he identified the subject as “Proposal” and which he copied to Hunt, Hansen responded to Heintzman as follows:

“As a starting point, I do not think that the specific changes that you made accomplish the goals that I outlined in my February 25 e-mail. I recognize

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<sup>5</sup>VEBA (Voluntary Employees Beneficiary Association) is a voluntary employees’ association under Internal Revenue Code 501(c)(9) that pays life, sick, accident, and similar benefits to members or their dependents, or designated beneficiaries.

<sup>6</sup>Article I, Section 9, Health and Welfare Benefits, paragraph 5(d) in the parties’ 2003-2009 contract specified that employees with at least 10 years of continuous service who retired or suffered a permanent disability would have unused sick leave converted to provide additional monthly pension benefits at the rate of \$0.25 per each hour of unused, accrued sick leave.

that your proposed changes expanded the discussion to other WWA provisions and I want to be responsive to these other changes. Without repeating everything in our Initial Proposal, I'll highlight the key provisions of TriMet's Initial Proposal we need to discuss:

- "1. We need to address health care costs in a meaningful way. TriMet will provide to all active union employees health coverage with plan design and coverages provided to all other active TriMet employees and that is consistent with the health plan design for active management employees. As for TriMet employees that retire in the future, we need to discuss how we are going to handle this issue on a going forward basis. For employees over 65, we are proposing they would, as they are now, be required to have Medicare A and B and would have a choice to add Medicare D coverage. TriMet's supplemental insurance for employees over 65 would be replaced by a fixed monthly sum. For employees under 65, we propose providing these employees the same health plans as active employees. For anyone retiring before 65 we are proposing that the District pay up to three years of healthcare coverage. If they want more they would need to pay the District's rate. I have said before, we are not proposing to change the retirement benefits for current retirees and would be very amenable to a phased approach for the group of employees approaching and eligible for retirement.
- "2. As is the case with management employees, all new union employees, hired after a certain date, to be agreed upon, will be eligible for a TriMet Defined Contribution Plan. The current Defined Benefit plan for union employees would be closed, as is the Defined Benefit Plan to management employees.
- "3. With respect to the current COLA, we propose periodic pay adjustments during the term of the new WWA in lieu of any COLA's.
- "4. It would also be very beneficial to agree upon other proposals and issues such as how long a union employee promoted to a non-union position will retain seniority as a union employee, how we can streamline and make more efficient and deliberative the grievance process and how the apprenticeship and training programs can be made better for all those that participate.

“5. By way of specific comment on one element of your proposal; increasing the retire [*sic*] sick leave conversion. On a present value (PV) basis, assuming the pension plan’s assumed earning rate of 8%, this would cost over \$34 million dollars. I am not sure that you have calculated the cost of your proposal but I would be pleased to review your analysis.”

25. Heintzman and Hansen decided that they needed the assistance of a mediator. By letter dated April 28, 2010, Hunt wrote Heintzman and requested his assistance for upcoming mediation sessions.

The parties agreed to employ a private mediator in addition to the state-appointed mediator, and obtained the consent of the State Conciliator to do so. By letter dated May 4, 2010, to the State Conciliator, TriMet General Counsel M. Brian Playfair requested mediation and confirmed that the parties understood “it is acceptable for the parties to use Paul Stuckenschneider as a mediator while also utilizing the ERB conciliation process.”

26. The parties participated in a total of five mediation sessions in June and July 2010; two of these five sessions were conducted by telephone. Heintzman participated in all but one of these sessions. The parties reached impasse at their July 12 meeting. By letter to the State Conciliator dated July 13, 2010, TriMet General Manager Neil McFarlane<sup>7</sup> declared impasse.

27. By letter dated July 21, 2010, TriMet submitted its final offer and cost summary to the State Conciliator. The final offer proposed the following changes in the 2003-2009 collective bargaining agreement:

**Cover Page & Term of Agreement (Article I, Section 1, Par. 1)**  
Change effective dates of the contract to December 1, 2009 through November 30, 2012.

**Joint Labor Relations Committee [JLRC] (Article I, Section 1, Par. 6)**  
Schedule meetings of this committee “frequently as mutually agreed.” Under the expired contract, the committee met monthly. Make the Union responsible for paying the cost of its members’ attendance at the meetings; under the expired contract, TriMet paid the cost of two members’ attendance.

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<sup>7</sup>On July 1, 2010, McFarlane replaced Hansen as TriMet General Manager.

**Adjustment of Grievances & Arbitration (Article I, Section 3, Par. 1)**  
Make the Union responsible for paying its representatives who participate “in any step of the grievance procedure.” Under the expired contract, TriMet paid the salary of one Union representative participating in Steps I through III of the grievance procedure.

**Health and Welfare Benefits (Article I, Section 9, Par. 1-3 and 5)**  
Specify that during the term of the agreement, benefits for active employees and retirees will be provided in accordance with the provisions of the “Active Employee Health Benefits Summary,” below.

Provide retirees who retire on or after February 1, 1992 and before April 1, 2012, with the same health benefits as active employees. The expired contract provided all post-1992 retirees with these benefits.

Provide retirees who retire on or after April 1, 2012 with the same coverage as active employees for three years or until Medicare eligible, whichever first occurs. After that date, pay each retiree \$500 per month toward the cost of health benefits for the retiree and dependents. For retirees hired by TriMet after April 1, 2011, the monthly payment will be four percent of the fixed monthly amount paid to post-April 1, 2012 retirees multiplied by the retiree’s years of service.

Eliminate reimbursement to retirees for the cost of monthly Medicare premiums. Under the expired contract, TriMet reimbursed retirees for the cost of these premiums.

Require that TriMet pay the Union \$500 per month for the position of Benefits Coordinator; under the expired contract, the monthly amount TriMet paid for this position increased each year of the contract—to \$1,400 in 2007. Funds for the position will be held in a dedicated account and subjected to periodic TriMet audits. If the Union uses the funds for anything other than the Benefits Coordinator position, TriMet’s contributions will end. The expired contract imposed no conditions on payments for the Benefits Coordinator position.

Require that TriMet contribute \$65,000 to the Union-operated Employee Assistance Program. Under the expired contract, TriMet increased the amount of its contribution by \$2,000 each year—up to \$65,000 in 2008.

Add domestic partners to retiree benefits coverage, and add domestic partner to the list of relatives for whom an employee may use sick leave.

### **Seniority Provisions (Article I, Section 13, Par. 1)**

Allow a Union employee promoted to a non-Union position to retain seniority acquired in the employee's last Union position for five years from the date of promotion. Under the expired contract, an employee never lost Union seniority after a promotion.

### **Recreation Trust Fund and Child Care/Elder Assistance Program (Article I, Section 15, Par. 4 and 12)**

Require TriMet to make a \$55,000 annual contribution to the Recreation Trust Fund and the Childcare/Elder Assistance program. Under the expired contract, TriMet's contributions to these funds increased annually—up to \$55,000 to the Recreation Trust Fund in 2008 and \$65,000 to the Childcare/Elder Assistance program in 2008.

### **Transit Exchange Program (Article I, Section 15, Par. 14)**

Eliminate TriMet's monthly payment to the Union for a program that provided for exchange of information and ideas between national and international transportation association executive officers.

### **Pay Schedules (Article VIII)**

Delete a minimum progression pay schedule for new hires.<sup>8</sup>

Beginning December 1, 2009, increase wages every six months by the same percentage amount as the Portland CPI-W, with a minimum increase of one percent and a maximum increase of five percent. The expired contract provided the wage increases every six months based on the Portland CPI-W, but specified minimum increases of three percent and maximum increases of five percent.

### **Pension Plan and Permanent Disability Agreement (Section 1, Par. 2-17)**

Delete all references to "full" retirement benefits throughout the article.

Require that an employee must be 55 with 30 years of service to retire. The expired contract allowed an employee to retire at any age as long as the employee had 30 years of service, and specified that this contract provision expired with the contract and must be renewed in successive agreements.

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<sup>8</sup>Article 1, Section 19 of the expired contract contained an identical minimum progression pay schedule for new hires.

Require that a mini-run operator have a minimum of two years service as a full-time regular operator before becoming eligible for full-time retirement benefits.

Annually increase retirement pay for existing retirees by an amount equal to the percentage increase in the CPI-W for the preceding year, with a maximum increase of seven percent. The expired contract increased retirees' pay by the same amount as active employees' wages were increased for the preceding year.

Annually increase retirement pay for employees who retire on or after April 1, 2011, by an amount equal to 90 percent of the increase in the CPI-W for the preceding year, with a maximum increase of seven percent.

Require that only employees hired before April 1, 2012, would receive retirement pay computed in accordance with the provisions of the expired contract, i.e., calculated by multiplying \$42 per month by each year of the employee's service.

Require that employees hired after April 1, 2012, participate in the same Defined Contribution Plan in which all non-union TriMet employees participate. Under the expired contract, all employees participated in a Defined Benefit Plan.

#### **Active Employee Health Benefits Summary**

Incorporate into the agreement by reference specific plan designs and coverages provided by Regence and Kaiser; these plan designs and coverages are the same as those provided to non-Union TriMet employees.

Require employees enrolled in Regence plans to contribute the following amounts toward the cost of their monthly insurance premiums:

Employee only	- \$0
Employee & Spouse	- \$30
Employee & Children	- \$25
Employee & Family	- \$50

Provide that TriMet pay 100 percent of the premium costs for employees enrolled in Kaiser plans. Under the expired contract, no bargaining unit employees paid any portion of their monthly insurance premiums.

Eliminate payment for continued medical coverage to widows, widowers, and orphans of retirees. The expired contract obligated TriMet to pay medical coverage after a retiree's death to the retiree's spouse and dependents; length of the coverage varied, depending on the date of the retiree's death.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. TriMet violated ORS 243.672(1)(e) by introducing proposals in its final offer concerning new issues.

### Introduction

This case arose from the failure of TriMet and the Union to reach agreement on a successor to their 2003-2009 collective bargaining agreement. The parties began their negotiations with two relatively unproductive table bargaining sessions in October and November 2009. At the suggestion of Union President Hunt, International Vice President Heintzman involved himself in the parties' bargaining. From December 2009 through March 2010, Heintzman and TriMet General Manager Hansen met and exchanged e-mails in an attempt to resolve major contract issues. Their efforts did not produce an agreement, and the parties proceeded to mediation. Mediation was unsuccessful and the parties declared impasse. As required by law, the parties submitted their final offers to the mediator within seven days of their declaration of impasse. ORS 243.650(11) and 243.712(2)(b). The Union alleges that TriMet breached its good-faith bargaining duty by including several proposals on new issues in its final offer.

A public employer violates its duty to bargain in good faith under ORS 243.672(1)(e) if it presents proposals on new issues in its final offer. *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 581-82 (1996). An issue is a "general subject matter of bargaining." A proposal presents new issues if the proposal was not "reasonably comprehended within" or did not "logically evolve" from the party's prior position. *Roseburg Education Association v. Roseburg School District No. 4*, Case No. UP-26-85, 8 PECBR 7938, 7957 n 8 (1985).

Our approach to determining whether a final offer contains new issues is usually straightforward. We compare a party's final offer with the party's prior proposals and decide whether the proposals in the final offer logically evolved from or were reasonably

comprehended within these prior proposals. Here, our analysis is more problematic because the parties do not agree what proposals TriMet made before submitting its final offer to the mediator.

The Union contends that the only proposals TriMet made before its final offer were presented on November 20, 2009, at the parties' last table bargaining session. TriMet, however, asserts that the parties' bargaining did not end on November 20. According to TriMet, Heintzman and Hansen continued the parties' negotiations from December 2009 through March 2010. TriMet contends that the proposals in its final offer logically evolve from or are reasonably comprehended within proposals that Hansen made to Heintzman during these December-March discussions.

The Union disagrees with this description of Hansen and Heintzman's discussions. The Union contends that Heintzman and Hansen never "bargained"; instead, the Union claims that they engaged in "interim discussions." The Union asserts that the parties' ground rules restricted bargaining to table bargaining sessions at which the parties' authorized representatives met and exchanged written proposals. The Union contends that "[n]one of the communications between Mr. Heintzman and Mr. Hansen" fulfill these requirements: Heintzman and Hansen did not participate in table bargaining sessions, did not have authority to negotiate for their respective parties, and did not make written proposals.

So, before we consider whether any of the proposals in TriMet's final offer are new, we must first answer two questions: (1) did Heintzman and Hansen "bargain" during their December 2009-March 2010 discussions? and (2) did Hansen make proposals for TriMet during these discussions? We begin our analysis by addressing the first of these questions—did Hansen and Heintzman bargain?

### Heintzman and Hansen's December 2009 to March 2010 Discussions

In support of its argument that Hansen and Heintzman did not bargain, the Union cites the following ground rule to which the parties agreed on October 22, 2009:

"The parties agree to structure the negotiation to provide for major issues to be negotiated by the parties' respective principals at the 'Big Table' and all other negotiations to be dealt with by negotiating teams with subject matter experts at the 'Small Tables.'"

According to the Union, this rule restricts negotiations to "Big Table" bargaining sessions. The Union's interpretation of this ground rule is mistaken, however.

Written and executed ground rule agreements are enforceable contracts. *City of Salem v. International Association of Fire Fighters, Local 314*, Case No. C-152-80, 5 PECBR 4237, 4242 (1980). As a result, we apply well-established rules of contract interpretation to determine the meaning of a ground rule. We use a three-step process to interpret contract language; our goal is to determine the parties' intent. We begin by analyzing the text of the language at issue in the context of the entire contract; if the provision is unambiguous, our analysis ends and we enforce the contract language according to its terms. *Eugene Police Employees' Association v. City of Eugene*, Case Nos. UP-038/41-08, 23 PECBR 972, 996-997 (2010) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)). If the language at issue is ambiguous, we proceed to the second step and examine extrinsic evidence of the parties' intent such as past practice and bargaining history. If the language remains unclear after this second step, we apply appropriate maxims of contract construction. *Id.*

We start by analyzing the language at issue, the statement that "[t]he parties agree to structure the negotiation to provide for major issues to be negotiated by the parties' respective principals at the 'Big Table.'" Unless the contract defines a term, we give words their ordinary meaning. *Federation of Oregon Parole and Probation Officers, Washington County Chapter v. Washington County*, Case No. UP-29-08, 23 PECBR 627, 634 (2010). Courts often rely on dictionary definitions to provide the possible meanings of words in their common usage. *State v. Moore*, 174 Or App 94, 98, 25 P3d 398 (2001). The dictionary definition of "provide" applicable here is: "to take precautionary measures: make provision – used with *against* or *for* \* \* \*." *Webster's Third New International Dictionary* 1827 (unabridged ed 2002) (emphasis in original). Relevant definitions of "provision" are: "the act or process of providing for \* \* \* the quality or state of being prepared beforehand \* \* \* a measure taken beforehand: preparation \* \* \*." *Id.*

Using these definitions, we find no ambiguity in the language under consideration. We read this ground rule as an agreement by the parties to structure their negotiations "to provide for," *i.e.*, make provision for, negotiation of important issues at table bargaining sessions. "Make provision for" means the parties will take "measure[s] beforehand" or make preparations for these sessions. Rather than limiting negotiations to table bargaining sessions, the language specifies that the parties will take measures to prepare for these sessions.

The parties complied with their ground rules when they referred major issues to Heintzman and Hansen to resolve in private discussions away from the bargaining table. In so doing, they made "provision for," *i.e.*, preparations for, table bargaining. Had Heintzman and Hansen reached agreement, their agreement would have been referred

to their bargaining teams for tentative agreement at the “Big Table.” This process was similar to the one used in two prior contract negotiations in which the parties’ bargaining teams tentatively agreed to terms Hansen and Heintzman had reached in private discussions. The only difference between 2009-2010 negotiations and previous negotiations was the result—Heintzman and Hunt did not reach agreement in 2010.

Thus, the parties’ ground rules did not restrict negotiations only to discussions at the parties’ table bargaining sessions.<sup>9</sup>

We turn next to the Union’s contention that Hansen and Heintzman lacked authority to negotiate for their respective parties. To determine whether an individual has actual or apparent authority to represent a party in collective bargaining matters, we apply common law agency principles. *Tri-County Metropolitan Transportation District of Oregon (TriMet) v. Amalgamated Transit Union, Division 757*, Case No. UP-55-05, 22 PECBR 506, 546 (2008). Actual authority is created when a principal expressly confers it on an agent. Apparent authority is created by conduct of the principal which, when reasonably interpreted, causes a third party to believe that the principal consented to have the apparent agent act for the principal. *Id.* (citing cases).

Here, the evidence shows that Heintzman had no actual authority to represent the Union during his December 2009-March 2010 discussions with Hansen. The Union did not confer actual authority on Heintzman until April 26, 2010, when Hunt wrote Heintzman and requested his assistance in mediation. There is no evidence, however, that TriMet was aware of Union and International rules that required a formal request for Heintzman’s involvement in bargaining. To the contrary, a review of Union President and chief negotiator Hunt’s conduct demonstrates that he led Hansen to reasonably believe that Heintzman had authority to negotiate for the Union.

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<sup>9</sup>The Union also argues that another of the parties’ ground rules restricted negotiations to formal table bargaining sessions. That ground rule states, in pertinent part:

“The parties agree that bargaining is most effective when conducted at the bargaining table. Thus, each party agrees to not involve the press in bargaining matters. This agreement shall expire in the event the parties proceed to mediation.”

We do not read this ground rule as restricting negotiations to table bargaining sessions. The rule states that bargaining is “most effective” when conducted at the bargaining table, not that it is *only* conducted at the bargaining table. In addition, the second sentence makes it clear that the rule is meant to prohibit either party from discussing “bargaining matters” with the press until mediation. The Union acknowledged this understanding of the rule when, at the parties’ November 20 bargaining session, Hunt accused Hansen of violating the ground rule by discussing a change in disciplinary policy with a reporter.

After the parties' second (and last) table bargaining session on November 20, 2009, Hunt cancelled a planned December 3 session and refused to schedule another one. Hunt talked with Hansen and told him the next step in negotiations should be Heintzman's involvement. Hunt participated in a January 14, 2010 meeting with Hansen and Heintzman. Hunt received copies of Heintzman's e-mails to Hansen in which Heintzman requested information about health insurance plans, responded to Hansen's offers, presented a "framework for an agreement" for the successor contract, and agreed that the parties should proceed to mediation.

Hansen reasonably inferred from Hunt's actions—cancelling a table bargaining session and refusing to schedule another one, and calling for Heintzman's involvement in negotiations—that Hunt wanted to suspend table bargaining and allow Heintzman to negotiate for the Union. The parties' past practice supported such an inference. As discussed above, at least two previous contract settlements were achieved after Heintzman and Hanson resolved major issues and referred these terms to the bargaining teams for tentative agreement.

In addition, Hunt was fully aware of Heintzman's discussions with Hansen. Hunt knew that Heintzman took significant steps in negotiations—asking for and receiving information about health benefits, accepting and responding to Hansen's offers, and moving the negotiations dispute to mediation. Hunt never objected to anything Heintzman did, and never told Hansen that Heintzman's authority in bargaining was in any way limited. Based on what Hunt did (and did not do), Hansen reasonably concluded that Heintzman had authority to negotiate for the Union.

Regarding Hansen's authority to bargain, which the Union also challenges, the record is devoid of evidence that TriMet ever explicitly gave Hansen actual or exclusive authority to negotiate on its behalf. Hunt reasonably interpreted the conduct of TriMet's representatives as indicating that Hansen was TriMet's authorized negotiator, however. At the November 20 bargaining session, in which Banta served as spokesperson, Hunt questioned Banta's role in bargaining and asked why Hansen was not present. In response, Banta agreed to Hunt's demand for written proof that he (Banta) had authority to negotiate for TriMet. Banta never gave Hunt the requested proof. Instead, Banta assured him that Hansen would attend the December 3 bargaining session. Based on Banta's statements and actions, Hunt reasonably concluded that Hansen had authority to negotiate for TriMet.

Contrary to the Union's assertion, then, Hansen and Heintzman bargained when they met and exchanged e-mails during the period from December 2009 through March 2010. The parties' ground rules permitted their negotiations away from the bargaining

table, and Hansen and Heintzman had apparent authority to represent their respective parties. We next consider what proposals, if any, Hansen made on behalf of TriMet during these discussions.

### TriMet's Pre-Impasse Proposals

The Union asserts that Heintzman and Hansen never presented proposals to one another. According to the Union, Heintzman and Hunt's "interim discussions" involved offers of "approaches" to settling the contract dispute that the Union characterizes as "what ifs" or "walks in the park." The Union argues that these "what ifs" were non-binding offers to settle contract issues; if not accepted, they disappeared from the process as if they had never been made and the parties reverted to previously held positions. Contrary to the Union's assertion, however, we conclude that Hansen offered proposals in the course of his discussions with Heintzman.

We begin our analysis by considering the definition of a proposal, a word with both legal significance and a well-accepted meaning in labor relations. *Southern Oregon Bargaining Council/Rogue River Education Association/OEA/NEA v. Rogue River School District* 35, Case No. UP-62-09, 23 PECBR 878, 879 (2010) (Order on Reconsideration). It is used in the PECBA to describe what the parties exchange to begin their bargaining; under ORS 243.712(1), the 150-day period of good-faith negotiations begins "when the parties meet for their first bargaining session and each party has received the other party's initial proposal." According to *Robert's Dictionary of Industrial Relations* 626 (Fourth ed 1994), a proposal

"[g]enerally applies to the specific offer made by either management or labor during collective bargaining. The proposal may be on the record or off the record, it may be the basis for discussion, or it may be submitted as the only offer one side is willing to accept."

Under the PECBA, a proposal is an offer of language to be included in a collective bargaining agreement. *See Portland Firefighters Association, Local No. 43, IAFF v. City of Portland*, Case No. UP-45-90, 12 PECBR 532, 545 (1990) (a union representative's demand that the city retract a general order is not a proposal, since the demand included "no mention of any proposal for inclusion in a new agreement.") (footnote omitted). Consistent with general contract principles of offer and acceptance, an enforceable contract is typically formed when a party proposes language to be included in a collective bargaining agreement and the other party accepts it. *Rogue River*, 23 PECBR at 879.

The Union charges that TriMet unlawfully made new proposals in its final offer. So, to determine the validity of the Union's claims, we must decide if Hansen and

Heintzman exchanged proposals during their discussions. We conclude that they did: they proposed language to be included in the successor contract, and they explicitly identified or referred to their offers as proposals.

In his February 25, 2010 e-mail to Heintzman, Hansen explained that for the successor contract, TriMet is “proposing” that active employees and retirees under 65 receive the same health care plans as TriMet management employees. Hansen also stated that TriMet “propose[s]” that retirees on Medicare receive a fixed monthly payment in lieu of TriMet provided insurance.

Hansen labeled his March 22, 2010 e-mail to Heintzman a “Proposal.” Hansen listed specific changes in health care and retirement benefits that TriMet sought to include in the successor contract, and emphasized his desire “to agree upon other proposals and issues.” Hansen also characterized Heintzman’s March 8 offer as a “proposal,” and indicated his willingness to meet with Heintzman to “discuss the issues and our proposals regarding the new WWA [collective bargaining agreement].”

Heintzman also used language to indicate that he and Hansen were making proposals; in a February 25 e-mail, Heintzman referred to his “view of a proposal that members would accept in lieu of arbitration.” Heintzman has extensive experience in labor relations and negotiations. Consequently, it is probable he understood both the legal significance and the commonly-accepted meaning of “proposal” when he and Hansen used that term. We also note that Heintzman never objected to or expressed any reservations about Hansen’s repeated use of the word “proposal.”<sup>10</sup>

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<sup>10</sup>The Union argues that Hansen and Heintzman’s e-mails did not contain proposals because its own policy prohibits e-mail submission of proposals. The Union contends that this policy is established by the disclaimer included in all e-mails Union representatives send to TriMet managers; the disclaimer states that “ATU 757 does not accept official notice via email from employers on matters involving collective bargaining, grievance timelines, member discipline or policy changes.”

Even if this disclaimer demonstrates a Union policy of refusing to accept bargaining proposals submitted by e-mail, the Union failed to prove that Hansen knew about it. Hansen testified that he was unaware of the policy, and none of the e-mails Heintzman sent to Hansen contained the disclaimer. In addition, the parties’ October 22, 2009 ground rules include no prohibition against sending proposals by e-mail. Accordingly, we hold that the Union’s policy of refusing to accept e-mails as official notice in “collective bargaining matters” does not apply to the offers Hansen submitted to Heintzman in February or March 2010.

Even if we agree with the Union's contention that Heintzman and Hansen exchanged "what ifs," we still conclude that these "what ifs" were proposals. A "what if" is, after all, an offer of language to be included in a collective bargaining agreement. The only difference between a "what if" and a more conventional proposal are the conditions attached to the "what if." These conditions are typically: the "what if" proposal establishes no precedent; if not accepted, the "what if" proposal disappears and the party making it reverts to a previously held position. Thus, whatever we choose to call the offers Heintzman and Hansen exchanged—"what ifs," "approaches," or "walks in the park"—they were proposals put forth to settle the successor contract. *See Rogue River School District*, 23 PECBR at 880 (an e-mail, which the school district identified as a proposal, is just that; contrary to the union's argument, the e-mail was not a "sneak preview" of a proposal that was actually made at a later date).<sup>11</sup>

Because Hansen's February and March 2010 offers are proposals, we will compare them and TriMet's November 20 initial proposal with TriMet's final offer to determine if any proposals in the final offer are new. We begin our analysis by reviewing the standards by which we decide whether an issue is new.

### Standards for Decision: Identifying a New Issue

We restrict the introduction of new issues late in the bargaining process to further the PECBA policy that requires parties to bargain about their labor disputes. *City of Portland v. Portland Police Commanding Officers Association*, Case Nos. UP-19/26-90, 12 PECBR 424, 465, *recons* 12 PECBR 646 (1990). We have explained the application of this principle to strike-permitted bargaining units as follows:

"The PECBA bargaining process is a series of carefully structured steps designed to help the parties identify and narrow their disputes. It begins

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<sup>11</sup>Our conclusion should not be interpreted as an attempt to restrict parties from making "what if" proposals. "What if" proposals are commonly made in table bargaining and mediation, and are often a useful tool to explore potential settlements and reach agreement.

In order to use "what if" proposals effectively, however, both parties must acknowledge what they are: proposals with conditions. In addition, both parties must clearly understand and accept these conditions.

Here, there was no evidence that Heintzman and Hansen placed *any* conditions on the offers they made. To the contrary and as discussed above, Hansen and Heintzman's February–March 2010 e-mails contain numerous references to "proposals" and contain no restrictions, conditions, or qualifications on the offers they made.

with table bargaining and then moves to mediation, final offers, cooling off, and self help. The goal is a negotiated agreement. A new issue injected late in the bargaining process frustrates the statutory purpose. It skips one or more of the statutory steps on the new issue, and it expands rather than narrows the scope of the parties' bargaining dispute, thereby making agreements less likely." *Blue Mountain Faculty Association/Oregon Education Association/OEA/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 754 (2007).

Good-faith bargaining requires that issues be subjected to the "crucible" of the PECBA dispute resolution procedure. *Roseburg School District*, 12 PECBR at 464.

A bargaining proposal presents a new issue if the proposal did not logically evolve from or was not reasonably comprehended within an earlier proposal. *Id.* To decide if a proposal is new, we look at the substance, and not just the wording, of the proposal. *Blue Mountain Community College*, 21 PECBR at 762.

Prior cases provide examples of how we apply these standards. In *Blue Mountain Community College*, we compared a final offer proposal to prohibit part-time employees from acquiring regular status to the college's earlier proposal to prohibit part-time employees from acquiring regular status for layoff purposes. The two proposals were identical except for three words. We looked to the substance of the final offer proposal rather than its form. We held that the final offer proposal raised an issue—part-time employees' entitlement to *all* contract rights—that was not reasonably comprehended within and did not logically evolve from the prior proposal, which only addressed part-time employees' *layoff* rights. *Blue Mountain Community College*, 21 PECBR at 761-762. Similarly, we held that a final offer proposal to exclude part-time employees from the contract recall provisions did not logically evolve from a table bargaining proposal to exclude part-time employees from the contract layoff provisions. We reasoned that

"[I]layoff and recall, although related, involve separate issues. In a layoff, the workforce gets smaller and the question is who should leave. In a recall, the workforce stays the same size (as when someone is replaced) or gets larger and the question is who gets hired." *Id.* at 758.

An important consideration in determining whether a proposal presents new issues is notice. A proposal made late in bargaining is new if a party could not reasonably have anticipated the terms of the proposal, based on positions previously taken in negotiations. In *Marion County Law Enforcement Association v. Marion County and Marion County Sheriff's Office*, Case No. UP-65-92, 14 PECBR 25 (1992), the county proposed, throughout table bargaining and mediation, to continue existing health and dental insurance plans; under this proposal, benefit levels and costs of the plans would be

determined by a committee. At interest arbitration, the county proposed, for the first time, to contribute specific dollar amounts toward the cost of employees' health and dental insurance premiums, and to require that employees pay a portion of their premium costs. We held that the county's arbitration proposal was new; it contained specific dollar amounts the employer was willing to offer and, therefore, "differed in substance" from earlier proposals. As a result, the union "could not have reasonably anticipated the nature" of the interest arbitration proposal. *Id.* at 31. *See also Blue Mountain Community College*, 21 PECBR at 760 (a mediation proposal requiring faculty advisors to attend training was new; based on an earlier proposal requiring faculty to advise students, the union "could not have reasonably anticipated that the College intended to further increase the instructors' workload by mandating training for the advisor duties.").

Our cases also explain how we determine that a later proposal is *not* new because it logically evolves from or is reasonably comprehended within an earlier proposal. In *Blue Mountain*, we compared an early proposal that specified that layoff did not apply to part-time employees to a final offer proposal that excluded part-time employees from notice of layoff. We held that the final offer proposal was reasonably comprehended within the earlier proposal, which removed part-time employees from all contract layoff procedures, including notice of layoff. The final offer proposal simply made "the notice exclusion explicit." 21 PECBR at 762. In *Rogue River*, we considered a school district's mediation proposal that required the parties to use PECBA expedited bargaining procedures to negotiate the use of state funds for educational programs. We noted that the school district's proposal was "directly responsive" to the union's mediation proposal that the parties bargain about the use of these state funds. Accordingly, we concluded that the school district's proposal "was reasonably comprehended within and logically evolved from the parties' prior discussions." 23 PECBR at 793.

With these principles in mind, we consider TriMet's November 20, 2009 initial proposal, the proposals Hansen made in February and March 2010, and the proposals in TriMet's final offer to determine if any final offer proposals are new.

### TriMet's Final Offer

#### *Contract Duration*

The parties' expired contract was in effect for six years, from 2003-2009.

TriMet made no proposals regarding contract duration, either in its November 20 initial proposal or in the February-March proposals Hansen made.

In its final offer, TriMet proposes a three year contract, effective from December 1, 2009 through November 30, 2012.

The Union made proposals concerning contract duration: in its November 20, 2009 offer, the Union proposed continuing the current contract for two years. In a March 8, 2010 e-mail to Hansen, Heintzman proposed a “one to six year agreement—employer’s choice.

TriMet’s final offer proposal for a two year contract was thus directly responsive to an issue raised by the Union in negotiations. As a result, this final offer proposal was reasonably comprehended within and logically evolved from the parties’ prior bargaining, and did not introduce a new issue.

### *Grievance Procedure*

The parties’ expired contract required meetings of the JLRC to be held monthly. It also required that TriMet pay the cost of two Union representatives’ attendance at these JLRC meetings. In addition, the expired contract required TriMet pay the cost of one Union representative to participate in Steps I through III of the grievance procedure.

TriMet’s November 20 initial proposal required that the Union pay the cost of its representatives’ attendance at hearings at all steps of the grievance procedure.

Heintzman and Hansen never discussed the grievance procedure, and Hansen made no proposals concerning the JLRC or the grievance procedure.

In its final offer, TriMet proposes the following changes in the parties’ grievance procedure:

- Require that JLRC meetings be held “frequently as mutually agreed.”
- Require that the Union pay its representatives who attend the JLRC meetings.
- Require that the Union pay its representatives who participate in any steps of the grievance procedure.

TriMet’s final offer proposal that the Union pay the cost of its representatives’ attendance at all steps of the grievance procedure is virtually identical to its initial proposal and is, therefore, not new. Its final offer proposal that the Union pay the cost

of its representatives' attendance at JLRC meetings logically evolves from its initial proposal requiring that the Union pay the cost of its representatives' attendance at all steps of the grievance procedure. Under the terms of the expired contract, the JLRC is a step in the grievance procedure: one of the JLRC's duties is to review and attempt to resolve grievances that "have been moved to and are pending arbitration."

TriMet's final offer proposal concerning the scheduling of JLRC meetings is new, however. This proposal was not included in TriMet's initial offer and Hansen and Heintzman never discussed it.

### *Payments for Special Programs*

Under the expired contract, TriMet paid the Union \$1,400 per month for a Benefits Coordinator position, \$1,500 a month for a Transit Exchange program, and \$65,000 per year for a Child Care/Elder Assistance program.

In its November 20 initial offer, TriMet proposed eliminating all payments for the Benefits Coordinator position and the Child Care/Elder Assistance and Transit Exchange programs.

Hansen and Heintzman never discussed the Transit Exchange or Child Care/Elder Assistance programs or the Benefits Coordinator position.

In its final offer, TriMet proposes paying the Union \$500 per month for the Benefits Coordinator position, \$55,000 annually for the Child Care/Elder Assistance program, and ending all payments for the Transit Exchange program. In addition, TriMet proposes that payments for the Benefits Coordinator position be kept in a separate fund and subjected to periodic TriMet audits. TriMet will end the payments if it finds the payments are not being used for the Benefits Coordinator position.

TriMet's final offer proposal concerning the Transit Exchange program is the same as its initial offer and is not new.

The final offer proposals reducing payments for the Benefits Coordinator and to the Child Care/Elder Assistance program also are not new. TriMet's initial offer specified the amounts it was willing to pay for these programs—zero. Based on this initial proposal, the Union could reasonably have anticipated TriMet's final offer proposal concerning the amounts it would pay for these programs. Accordingly, TriMet's final offer proposals concerning payments for the Benefits Coordinator and Child Care/Elder Assistance program logically evolve from and are reasonably comprehended within TriMet's initial proposal.

The other elements of TriMet's final offer proposal concerning the Benefits Coordinator position are new. After TriMet made its initial proposal, the Union knew that TriMet was concerned about the amount it had to pay for the position. The Union could not have understood that TriMet was also concerned how its money was spent, *i.e.*, whether the money it contributed for the position was properly used. As a result, the Union could not reasonably have anticipated TriMet's final offer proposal to impose conditions on payments made for the Benefits Coordinator position. For this reason, TriMet's final offer proposal concerning these conditions is new: it does not logically evolve from and is not reasonably comprehended within its prior proposal.

### *Seniority*

The expired contract specified that a Union bargaining unit employee promoted to a non-bargaining unit position would retain Union seniority in the last position worked prior to the promotion.

TriMet's initial November 20 proposal allowed a promoted Union bargaining unit member to retain Union seniority for two years.

Hansen and Heintzman never discussed retention of Union seniority.

In its final offer, TriMet proposes that a Union bargaining unit member promoted to a non-Union position retain Union seniority for five years.

TriMet's final offer proposal on seniority addresses the same issue raised by its initial proposal—the amount of Union seniority a bargaining unit member can keep after a promotion. TriMet's final offer proposal on seniority logically evolves from and is reasonably comprehended within its initial proposal and is not new.

### *Cost-of-Living Wage Increases*

In the expired contract, Union bargaining unit members' wages were increased every six months by an amount equal to the Portland CPI-W, with a minimum increase of three percent and a maximum increase of five percent.

In its November 20 initial proposal, TriMet stated that it wanted to delete cost-of-living increases and replace them with "periodic and agreed upon pay adjustments."

On March 22, 2010, Hansen proposed replacing cost-of-living increases in the expired contract with "periodic pay adjustments."

In its final offer, TriMet proposes to increase bargaining unit members' wages every six months by an amount equal to the Portland CPI-W, with a minimum increase of one percent and a maximum increase of five percent.

The circumstances here are like those in *Marion County*, 14 PECBR at 25, where the county waited until interest arbitration to make its first proposal regarding the specific amount it would contribute toward employee health benefits. We characterized the county's initial offer—to maintain current medical and dental plans and allow a committee to determine benefit levels and costs—as a “general promise.” Similarly, TriMet's initial offer—to periodically increase wages by an amount to be negotiated—contained no specific offer of a wage increase and was only a “general promise.” As the employer did in *Marion County*, TriMet waited until late in the bargaining process to tell the Union how much of a wage increase it was willing to offer. Based on the “general promise” TriMet made in its initial offer, the Union could not reasonably have anticipated the specific wage increase proposed in TriMet's final offer. Consequently, the cost-of-living wage proposal in TriMet's final offer is new: it does not logically evolve from and is not reasonably comprehended within TriMet's prior proposal.

TriMet argues, however, that it made a specific cost-of-living wage proposal: in a February 11, 2010 e-mail to Heintzman, Hansen asked if the Union would agree to give up a June 2010 cost-of-living increase. TriMet claims that its final offer proposal for periodic cost-of-living increases logically evolved from this wage freeze proposal.

Contrary to TriMet's assertion, Hansen's February 11 wage proposal was not an offer of language to be included in the successor collective bargaining agreement. Instead, it was offered to the Union as a means to avoid layoffs. In his e-mail, Hansen explained that budgetary problems would probably force TriMet to reduce service levels and stated:

“It is hard to imagine that we can achieve this level of service reductions without layoffs. An alternative would be for ATU to agree to a freeze on the salary increase due June 1, 2010. As you know, inflation was essentially at 0% if not negative meaning members would not be giving up any buying power.”

Heintzman understood that Hansen's proposal was made outside of successor contract negotiations: when Heintzman rejected the proposal, he told Hansen that any proposal for a wage freeze would “likely have to be part of a total agreement” and voted on by the Union bargaining unit membership.

Based on TriMet's February offer that the Union forgo a single cost-of-living increase to avoid layoffs, the Union could not reasonably have anticipated TriMet's final offer proposal for periodic cost-of-living increases based on the Portland CPI-W. Therefore, TriMet's cost-of-living proposal is new.

### *Retirement Pay*

Under the expired contract, all retirees participated in a defined benefit plan. Retirees' pay increased annually by the same percentage as active employees' wages.

In its initial November 20 offer, TriMet proposed that all retiree pay "be adjusted on the basis of 90% of the CPI." It also proposed that employees hired on or after January 1, 2010, participate in a defined contribution plan for Union employees.

In his March 22, 2010 e-mail to Heintzman, Hansen proposed that "[a]s is the case with management employees, all new union employees, hired after a certain date, to be agreed upon, will be eligible for a TriMet Defined Contribution Plan. The current Defined Benefit plan for union employees would be closed, as is the Defined Benefit Plan to management employees."

In its final offer, TriMet proposes the following changes in retirement pay:

- Increase retirement pay for existing retirees by an amount equal to the CPI-W for the previous year, up to 7 percent. Increase retirement pay for employees who retire after April 1, 2011 by an amount equal to 90 percent of the CPI-W for the previous year, up to 7 percent.
- Employees hired by TriMet before April 1, 2012 will participate in the defined benefit plan under the terms of the expired contract. Employees hired on or after April 1, 2012 will participate in a defined contribution plan identical to the plan offered to all non-Union TriMet employees.

TriMet's final offer proposal regarding retirement pay addresses the same issues raised in its initial and March 22 proposals—linking increases in retirement pay to the CPI and requiring that new employees participate in a defined contribution plan. Consequently, these final offer proposals are not new: they logically evolve from and are reasonably comprehended within TriMet's prior proposal.

### *Health Care Benefits—Active Employees*

Under the expired contract, Union bargaining unit members chose either a Kaiser or Regence health benefit plan to cover the employee and the employee's dependents; employees paid nothing out-of-pocket for the cost of their monthly insurance premiums.

In its initial November 20 proposal, TriMet stated that “[t]he provisions relating to health and welfare benefits need to be rewritten” and proposed that it provide Union active employees with “health coverage that is consistent with plan design and coverages provided to all other active TriMet employees.”

In a February 11, 2010 e-mail, Hansen gave Heintzman a spread sheet with specific information about a number of health care plans, including plans offered to TriMet management employees. In his February 25 and March 22, 2010 e-mails to Heintzman, Hansen proposed offering Union bargaining unit members the same health benefit plans as TriMet management employees.

TriMet's final offer proposes the following changes in active employees' health care benefits:

- Offer active employees the same health care plans as TriMet management employees.
- Require that employees who select certain levels of coverage pay part of their monthly premium costs. Employees who select a Kaiser plan or an employee-only Regence plan would pay nothing. Employees who select other Regence Plans would pay monthly amounts ranging from \$30 to \$50.

TriMet's final offer proposal regarding health benefit plans is the same as the proposal it made throughout negotiations: to provide Union employees with the same health care plans as management employees. Consequently, this final offer proposal is not new.

TriMet's final offer proposal to require that employees who select certain levels of coverage pay a portion of their monthly premium costs is new, however. TriMet never raised the issue of employee payment for insurance premiums in its initial proposal, and Hansen and Heintzman never discussed it.

### *Health Care Benefits—Retirees*

Under the expired contract, all post-February 1992 retirees received the same health care benefits as active employees. Retirees were also reimbursed for the cost of their Medicare monthly premiums.

TriMet's initial November 20 proposal did not address retirees' health benefits. In a February 25, 2010 e-mail to Heintzman, Hansen stated that TriMet proposed no change in health benefits for retirees currently on Medicare, but proposed that future retirees who are not eligible for Medicare receive the same health care benefits as management employees.

In a March 22, 2010 e-mail to Heintzman, Hansen explains TriMet's position regarding retirees' health benefits:

"[F]or TriMet employees that retire in the future, we need to discuss how we are going to handle this issue on a going forward basis. For employees over 65, we are proposing they would, as they are now, be required to have Medicare A and B and would have a choice to add Medicare D coverage. TriMet's supplemental insurance for employees over 65 would be replaced by a fixed monthly sum. For employees under 65, we propose providing these employees the same health plans as active employees. For anyone retiring before 65, we are proposing that the District pay up to three years of healthcare coverage. If they want more they would need to pay the District's rate."

TriMet's final offer proposes the following changes in retirees' health care benefits:

- Provide employees who retire after February 1, 1992, and before April 1, 2012, with the same health care benefits as regular employees.
- End TriMet reimbursement to retirees for the cost of Medicare monthly premium.
- Provide employees who retire after April 1, 2012 with the same health care benefits as active employees for three years; after three years, TriMet would pay these retirees \$500 per month toward the cost of insurance benefits. For retirees hired after April 1, 2011, the amount of the monthly contribution would vary, depending on the retirees' length of service.

The only proposals TriMet made regarding retiree health benefits are contained in Hansen's February 25 and March 22 e-mails. When we compare these proposals with TriMet's final offer proposals, we conclude that the final offer proposals present new issues.

In his February 25 and March 22 e-mails, Hansen provides no clear or complete explanation of specific changes TriMet wants to make in retiree health benefits. Hansen indicates that he wants to end TriMet's payment of supplemental insurance for over-65 retirees and replace it with a monthly contribution; he does not state how much TriMet is willing to contribute. He tells Heintzman that he wants to change health benefits only for future retirees, but never defines who is a future retiree.

In contrast to Hansen's earlier proposals, TriMet's final offer proposals for retiree health benefits are extremely detailed. These proposals limit a retiree's eligibility for certain health benefits based on the individual's specific date of retirement or date of hire, and also specify how much TriMet will contribute toward particular retirees' health benefit costs.

Based on TriMet's earlier proposals, the Union could not reasonably have anticipated the substance of TriMet's final offer proposals for retiree health care benefits. Accordingly, TriMet's final offer proposals for retiree health benefits present new issues: they do not logically evolve from and are not reasonably comprehended within prior proposals.

### *Other Proposals*

The expired contract included the following provisions:

- Extended medical coverage for retirees' spouses and dependents. The length of the coverage varied, depending on the date of retirement.
- The requirement that TriMet annually increase its payments to the Union for the Employee Assistance Program (EAP) by \$2,000; in 2008, this payment was \$65,000.
- References to "full" retirement benefits throughout the contract.
- Retirement after 30 years of service, regardless of age; the contract also specified that this provision expired with the contract.

- The requirement that TriMet annually increase its payments for the Recreation Trust fund by \$2,000; in 2008, this payment was \$55,000.

The expired contract included no references to “domestic partners” and contained no restrictions on retirement by mini-run operators.

None of the above provisions in the expired contract were addressed in TriMet’s November 20 initial proposal, or in any of the proposals Hansen made in February and March 2010.

TriMet’s final offer includes the following proposals:

- Eliminate extended medical coverage for retirees’ widows, widowers, and orphans.
- Cap the annual payment to the EAP at \$65,000; this amount will not increase during the life of the contract.
- Require that a mini-run operator must work two years as a full-time regular employee before becoming eligible for full-time retirement.
- Require that an employee must be at least 55 and have 30 years of service to retire.
- Cap the annual payment to the Recreation Trust Fund at \$55,000; this amount will not increase during the life of the contract.
- Add domestic partners to retiree health benefits coverage and to the list of relatives for whom an employee may take sick leave.

We consider each of these final offer proposals in turn.

In its post-hearing brief, TriMet presents no argument or explanation how its final offer proposals to eliminate annual increases in payments to the EAP and to eliminate extended medical coverage for retirees’ dependents logically evolve from or are reasonably comprehended within prior proposals. We conclude, without difficulty, that these final offer proposals present new issues.

In regard to the proposals specifying a minimum retirement age of 55, deleting references to “full” retirement benefits, and restricting mini-run operators’ eligibility for retirement benefits, TriMet contends that these proposals are not new. TriMet notes that in its initial proposal, it stated that “the parties need to discuss the qualifications

for full time retirement benefits.” TriMet argues that its final offer proposals concerning retirement logically evolve from and are reasonably comprehended within this language in its November 20 proposal. We disagree.

Based on TriMet’s November 20 offer, the Union could have expected that TriMet wanted to discuss changes in retirement benefits. It could not, however, reasonably have anticipated the specific changes TriMet proposed in its final offer regarding the minimum retirement age, eligibility of mini-run operators, and elimination of references to “full” retirement benefits. Consequently, these proposals do not logically evolve from TriMet’s prior proposal and are new.

Regarding the final offer proposal that caps TriMet’s payments to the Recreation Trust Fund and eliminates the \$2,000 annual increase in this amount, and the proposal to add domestic partners to certain contract provisions, TriMet contends that these proposals benefit employees. According to TriMet, the Union should welcome new proposals that are advantageous for Union bargaining unit members.

A party commits a *per se* violation of its good faith bargaining duty if it makes a proposal late in the negotiations process. *Blue Mountain Community College*, 21 PECBR at 760 (citing cases). For this reason, the party’s motive or intentions in making the proposal are irrelevant. *Id.* The purported goal of TriMet’s proposals—to provide employees with additional benefits—does not justify the introduction of new proposals in its final offer.<sup>12</sup>

### Remedy

For the reasons stated above, TriMet violated its duty to bargain in good faith under ORS 243.672(1)(e) by including proposals that present new issues in its final offer. We now consider the question of an appropriate remedy. Under ORS 243.676(2)(b), we must issue a cease and desist order against a party that commits an unfair labor practice. We will order TriMet to cease and desist from including new proposals in its final offer.

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<sup>12</sup>The Union also contends that TriMet’s final offer proposal to delete a progression pay schedule for new employees raises an issue that was never addressed in a prior proposal. TriMet, however, contends that the only reason it proposes this change is to eliminate a redundancy in the expired contract. TriMet correctly observes that the progression pay schedule is listed in two separate places in the 2003-2009 contract; it asserts that its final offer proposal eliminates one of these schedules and retains the other.

We view the language in TriMet’s final offer concerning the progression pay schedule as an editorial revision rather than a proposal. Consequently, we do not hold that the elimination of duplicate contract language is a new proposal.

In addition, we must “[t]ake such affirmative action \* \* \* as necessary to effectuate the purposes of” the PECBA. ORS 243.676(2)(c). When a party unlawfully introduces new issues in the later stages of the bargaining process, we normally order the parties to resume bargaining at the step where the earliest violation occurred. *Blue Mountain Community College*, 21 PECBR at 781. Here, the earliest violation occurred after the parties completed table bargaining and mediation and when TriMet submitted its final offer. We will order TriMet to submit a revised final offer which does not include proposals that present new issues. Both parties agree that this remedy is appropriate if we hold that all or portions of TriMet’s final offer violates ORS 243.672(1)(e).

We will not order TriMet to post a notice of its wrongdoing. We generally order such a posting if we determine a party’s violation of the PECBA was: (1) “calculated or flagrant”; (2) part of a “continuing course of illegal conduct”; (3) committed by a significant number of the respondent’s personnel; (4) affected a significant number of bargaining unit members; (5) significantly (or potentially) impacted the designated bargaining representative’s functioning; or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, *AWOP 65 Or App 568*, 671 P2d 1210 (1983), *rev den* 296 Or 536, 678 P2d 738 (1984). Not all of these criteria need be satisfied to warrant posting a notice. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002).

Here, there is no proof that TriMet’s actions were either calculated or flagrant, or part of a “continuing course of illegal conduct.” TriMet’s unlawful acts did not involve a significant number of its personnel, and did not involve a strike, lockout, or discharge. TriMet’s new final offer proposals—which reduced bargaining unit members’ benefits and required some bargaining unit members to pay out-of-pocket for their health insurance premiums—had the potential to adversely affect a significant number of bargaining unit members. In addition, TriMet’s unlawful introduction of new proposals in its final offer could have adversely affected the Union’s ability to effectively represent its members in interest arbitration. These harms have been averted, however, by our order that TriMet submit a revised final offer that does not include the unlawful new proposals. TriMet’s violation of the law does not meet the criteria for posting a notice of its wrongdoing, and we will not order such a remedy.

#### ORDER

1. TriMet will cease and desist from violating ORS 243.672(1)(e).
2. TriMet will submit a revised final offer to the mediator that is the same as its July 21, 2010, final offer with the exclusion of the following proposals:

- The provision that the JLRC will meet “as frequently as mutually agreed upon.”
- The requirement that the Union place TriMet payments for the Benefits Coordinator position in a separate fund and allow the fund to be subjected to periodic TriMet audits, and the specification that TriMet will end payments to the fund if TriMet decides these payments are not being used for the Benefits Coordinator position.
- The provision that wages will be increased every six months by an amount equal to the most recent Portland CPI-W, with a minimum increase of one percent and a maximum increase of five percent.
- The requirement that employees who select Regence health insurance plans pay the following monthly amounts for the cost of their premiums: \$30 for employee and spouse coverage; \$25 for employee and child(ren) coverage; and \$50 for employee and family coverage.
- The elimination of reimbursement to retirees for the cost of Medicare premiums.
- The provision that employees retiring on or after April 1, 2012 will receive the same health care benefits as active employees for three years; after that, these retirees will receive \$500 per month for the cost of health care benefits.
- The provision that employees hired after April 1, 2011 will receive a monthly contribution for health care benefits equal to four percent of the fixed contribution amount multiplied by the employee’s years of service.
- The elimination of extended medical coverage for retirees’ widows, widowers, and orphans.
- The requirement that employees must be 55 to retire.
- The elimination of the \$2,000 annual increases in TriMet payments to the Union for the Employee Assistance Program and Recreation Trust Fund.
- The deletion of all references to “full” retirement benefits in the contract provisions regarding retirement pay and benefits.

- The requirement that a mini-run operator must work two years as a full-time regular employee before the mini-run operator is eligible for full-time retirement.
- The addition of domestic partners to retiree health benefits coverage and to the list of relatives for whom an employee may take sick leave.

DATED this 12 day of September 2011.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.