

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-016-11

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION,)
DIVISION 757,)

Complainant,)

v.)

TRI-COUNTY METROPOLITAN)
TRANSPORTATION DISTRICT)
OF OREGON,)

Respondent.)

COMPLIANCE ORDER

On September 12, 2011, this Board issued an Order holding that the Tri-County Metropolitan Transportation District of Oregon (TriMet) violated ORS 243.672(1)(e) when it included proposals concerning new issues in the July 21, 2010 final offer it made in negotiations with the Amalgamated Transit Union, Division 757 (ATU). 24 PECBR 412. We ordered TriMet to submit a revised final offer that was the same as its July 21 final offer with the exclusion of certain proposals we held were new.

On October 3, 2011, TriMet filed a motion to reopen the record, a petition for reconsideration, and a request for oral argument. On November 17, 2011, we issued an order in which we denied the motion to reopen the record and the request for oral argument. We granted reconsideration and adhered to our original Order, but modified it to correct two typographical errors. 24 PECBR 488.

On December 16, 2011, ATU filed a motion to compel compliance with our Order. TriMet responded to the motion, and at our request, both parties submitted written argument in support of their respective positions.

The issue is: Did the proposal concerning wages in TriMet's December 12, 2011 revised final offer comply with this Board's Order?

FINDINGS OF FACT

The following facts are undisputed by the parties:

1. TriMet and ATU were parties to a collective bargaining agreement in effect from December 1, 2003 through November 30, 2009. The agreement provided that bargaining unit members' wages would be 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.

2. On November 20, 2009, in negotiations for a successor to the 2003-2009 collective bargaining agreement, TriMet made the following initial proposal concerning wage increases:

"The COLA [cost-of-living adjustment] should be deleted. In its place, agreement on periodic and agreed upon pay adjustments will be added."

3. At a July 19, 2010 meeting with a mediator, the parties reached impasse in their negotiations for a successor contract.

4. By letter dated July 21, 2010, TriMet submitted its final offer and cost summary to the State Conciliator. The final offer proposed to continue language from the expired contract, with the exception of several changes. Among these changes was a proposal that beginning December 1, 2009, wages would be increased 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.

5. In a September 12, 2011 Order, we held that TriMet violated ORS 243.672(1)(e) by including proposals concerning new issues in its final offer. We ordered TriMet to "submit a revised final offer to the mediator that is the same as its July 21, 2010, final offer" with the exclusion of certain proposals. Among the proposals we ordered TriMet to exclude from its revised final offer was "[t]he 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." 24 PECBR 453.

6. On December 12, 2011, TriMet submitted its revised final offer which proposed no cost-of-living wage increases, except for one that had already been granted on June 1, 2010.

DISCUSSION

ATU contends that TriMet's revised final offer concerning wages is inconsistent with our September 12, 2011 Order. According to ATU, compliance with our Order requires TriMet to revise its final offer to include language from the expired 2003-2009 contract concerning periodic cost-of-living wage increases for bargaining unit members. We begin our analysis of ATU's claim by reviewing the conclusions we reached and the remedy we imposed in our Order.

In our Order, we examined each of the proposals in TriMet's final offer and held that some presented new issues because the proposals were not "reasonably comprehended within" or did not "logically evolve" from TriMet's prior positions. 24 PECBR 432, quoting *Roseburg Education Association v. Roseburg School District No. 4*, Case No. UP-26-85, 8 PECBR 7938, 7957 n 8 (1985).

One of the final offer proposals we considered concerned cost-of-living wage increases. The parties' 2003-2009 contract provided for wage increases every six months based on the Portland CPI-W, with a minimum increase of three percent and a maximum increase of five percent. TriMet's initial wage offer proposed replacing cost-of-living increases with periodic and agreed upon pay adjustments. TriMet's July 21 final offer proposed wage increases every six months based on the Portland CPI-W, with a minimum increase of one percent and a maximum increase of five percent.

We held that TriMet's initial proposal contained no specific offer of a wage increase and constituted only a "general promise" of such an increase. 24 PECBR 445, citing *Marion County Law Enforcement v. Marion County and Marion County Sheriff's Office*, Case No. UP-65-92, 14 PECBR at 25 (1992). Based on this "general promise," we concluded that ATU could not have reasonably anticipated the specific wage increase TriMet proposed in its July 21 final offer. Accordingly, we held that the cost-of-living wage proposal in TriMet's July 21 was new and violated subsection (1)(e). To remedy TriMet's violation of subsection (1)(e), we ordered TriMet to submit a revised final offer that was "the same as" its July 21 final offer but omitted all proposals we held were unlawfully made—including the cost-of-living wage increase proposal.

On December 12, 2011, TriMet submitted a revised final offer that proposes only one cost-of-living wage increase, one that had already been granted on June 1, 2010. TriMet offers the following justification for this wage proposal. TriMet notes that in our Order, we held that its initial offer concerning wages was only a "general promise" of a wage increase that failed to give ATU adequate notice of the specific cost-of-living increases TriMet proposed in its July 21 final offer. TriMet argues that under the terms of our Order, a proposal for *any* wage increase would be unlawful:

“[b]ased upon the Board’s order in this case, it would not matter whether TriMet proposed a 1%, 3% or 5% minimum increase in its Revised Final Offer because, as required by the Board’s decisional law, none of them would be permissible as there is no previous offer from which it can be said that a **specific** increase logically evolves.” (TriMet’s Written Argument, p. 3-4.) (Emphasis in original.)

We disagree and hold that TriMet’s December 12 cost-of-living wage increase proposal does not comply with the terms of our Order.

Our September 12, 2011 Order requires TriMet to submit a revised final offer that is the “same as” its July 21, 2010 offer with the exclusion of specific proposals. As discussed above, TriMet’s July 21 final offer proposed certain changes to the parties’ 2003-2009 contract; TriMet proposed continuation of any language from the expired contract it did not seek to change. To comply with our Order, TriMet must remove the cost-of-living wage increase proposal from its July 21 final offer. Since TriMet’s final offer no longer includes the change in cost-of-living wage increases included in its July 21 final offer, TriMet is obligated to continue language from the expired contract concerning this issue. Only then will TriMet’s revised final offer be the “same as” the July 21 final offer with the omission of the unlawful wage increase proposal. Language in the expired contract required TriMet to increase bargaining unit members’ wages 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. This, then, is the wage proposal TriMet must include in its revised final offer.

ORDER

TriMet must include the following proposal regarding cost-of-living wage increases in its revised final offer:

“OPERATIONS DIVISION

“Wages for all classifications covered by this Agreement to be increased beginning December 1, 2009, and every six (6) months during the term of this Agreement by the most recent six-month Portland CPI-W figures as reported by the US Department of Labor. On each June 1, the increases will be so computed for the period from the previous June 1 so as to provide a minimum of one percent (1%) or a maximum of five percent (5%). The increases shall be based on the most recent six-month Portland CPI-W figures as reported by the US Department of Labor, which for January through June are reported in mid-August and for July through December are reported in mid-February of every year. Yearly increases to

be applied on base year salary. Longevity premiums for all employees (except maintenance journey workers, senior parts-persons, and streetcar superintendents) shall be \$0.30 per hour after 15 years of service; an additional \$0.35 per hour after 20 years of service; an additional \$0.65 per hour after 25 years of service; and additional \$0.50 per hour after 30 years of service; and an additional \$0.50 per hour after 35 years of service.”

DATED this 16 day of February 2012.



Susan Rossiter, Chair

*Paul B. Gamson, Board Member

*Member Gamson Concurring

I agree with the result but find that my colleague’s “new issue” rationale has become increasingly and unnecessarily complex, particularly on the wage issue. I would use a simpler analysis.

The purpose of bargaining is to resolve labor disputes. ORS 243.656(5). Parties must, of course, identify their labor disputes before they can resolve them. Parties can identify their labor disputes “only if both sides fully and frankly state their bargaining positions.” *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 752 (2007). As a consequence, the Public Employee Collective Bargaining Act (PECBA) obligation to bargain in good faith requires parties to honestly reveal and explain their bargaining positions. *Blue Mountain Faculty Association*, 21 PECBR at 766 (citing *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8199-8200 (1985)). Further, the parties must reveal their positions soon enough to give the earlier steps in the bargaining process a reasonable chance to work. *Lane Unified Bargaining Council*, 8 PECBR at 8201. Holding back proposals or making significant last-minute changes in a party’s bargaining position indicates a lack of good faith. *City of Madras v. Madras Police Employees Association*, Case No. UP-63-02, 20 PECBR 258, 268 (2003).

TriMet hid the ball. It failed to reveal its position on wages until its final offer. As a result, it never gave the earlier steps in the bargaining process a chance to succeed. Its first wage proposal was: “The COLA should be deleted. In its place, agreement on

periodic and agreed upon pay adjustments will be added.” It stretches the definition to even call this a “proposal.” TriMet is simply saying that it will agree to whatever wages the parties agree to. TriMet does not identify a particular wage rate it would be willing to adopt.¹ If ATU accepted TriMet’s wage proposal, we would have no idea how much money bargaining unit employees would earn. The parties’ wage dispute would remain unresolved. TriMet was no more specific than this through the entirety of table bargaining and mediation. TriMet’s failure to reveal its position by making a specific wage proposal did not give table bargaining and mediation a chance to work.

Eventually, in its final offer, TriMet made its first concrete wage proposal. It offered wage increases every six months in an amount equal to the CPI-W, with a minimum of one percent and a maximum of five percent. The timing of the proposal eliminated any chance for the earlier steps in the bargaining process to work. Such a significant and last-minute change in position demonstrates TriMet’s lack of good faith. Parties are required to enter bargaining with a willingness to resolve disputes. ORS 243.656(5). Compensation is almost always a major issue in dispute, as it was here. TriMet’s failure to make any concrete wage proposal at the table or in mediation shows that it was unwilling to make a genuine attempt to reach agreement. Under a long and consistent line of Board cases, TriMet failed to bargain in good faith, a violation of ORS 243.672(1)(e).²

This brings us to the appropriate remedy. At hearing, the parties agreed that rather than send them back to bargaining, we should decide which proposals TriMet can lawfully take to interest arbitration. In our initial Order, we only partially did so. As to wages, we identified the proposal TriMet could *not* pursue. We held that TriMet could not take its last-minute proposal to interest arbitration. We did not, however, expressly address what wage proposal it was entitled to pursue.

¹See *Clackamas Intermediate Education District Education Association v. Clackamas Intermediate Education District*, Case No. C-141-77, 3 PECBR 1848, 1854 (1978) (a wage proposal that is vague, contradictory and confusing constitutes bad faith).

²Finding that TriMet’s wage proposal is lawful would start us down a slippery slope that inevitably leads to dire consequences for the bargaining process. Imagine if TriMet made a similar proposal not just on wages but for the entire contract. If we slightly modify the language of TriMet’s wage proposal, its complete proposal would be something like, “The entire contract should be deleted. In its place, an agreement on agreed upon provisions will be added.” If, as with its wage proposal, TriMet fails to reveal its position any more concretely than this until its final offer, it is impossible to imagine how any meaningful bargaining could occur. Yet TriMet’s position that its wage proposal is lawful would necessarily mean that this hypothetical complete contract proposal is also lawful. In my view, holding that a party could lawfully pursue such a proposal through mediation would effectively eliminate the requirement for meaningful good-faith bargaining and is therefore not a tenable interpretation of the PECBA.

After we issued our Order, TriMet submitted a revised wage proposal. It offers no cost-of-living wage increases for the life of the agreement other than the one already granted. This is the proposal at issue in the motion under consideration.

TriMet does not appear to have learned the lesson of the Board's Order. Its latest wage proposal unlawfully concerns a new issue for the very same reasons its earlier one did; and the timing of the proposal is unlawful because, as described above, it comes so late that the process never had a chance to work.

So what wage proposal can TriMet take to interest arbitration? I see two possibilities. First, I agree with my colleague that TriMet can pursue its fall-back position: it can propose to retain language from the most recently expired contract.

Second, TriMet might argue that it can pursue the "agreement to agree" language it proposed at the outset of bargaining and maintained through table bargaining and mediation. On this issue, I believe my colleague and I would reach different conclusions because of the legal theories we rely on. My colleague's theory is that TriMet cannot pursue a new issue. It is difficult to see how it is "new" in any sense for TriMet to continue to pursue the proposal it made at the start of bargaining. But under my theory described above—the requirement for parties to honestly reveal their bargaining positions—TriMet cannot pursue its original proposal. The proposal is so vague that TriMet has failed to reveal its position on wages; it is so vague that the parties would be unable to identify their dispute with sufficient particularity to be able to meaningfully bargain over it. For that reason, I conclude that TriMet cannot lawfully pursue its original proposal in interest arbitration.³

I also offer a comment on the Board's ruling on reconsideration, 24 PECBR 488. I did not participate in that ruling. In my view, my colleagues used imprecise language that could cause confusion.

³As a practical matter, TriMet is unlikely to pursue its original proposal. Strategically, pursuing its original proposal would be a "poison pill" in its final offer—it would make the offer extremely unattractive to an interest arbitrator. An interest arbitrator must accept one party's package of proposals in its entirety. ORS 243.746(5). The purpose of interest arbitration is to resolve labor disputes. ORS 243.742(1). TriMet's original proposal would not effectively resolve the dispute concerning wages. It would merely require the parties to agree on periodic wage adjustments. Presumably, such an agreement would require further bargaining, and if the bargaining fails, a return to interest arbitration to resolve the dispute. In my view, an interest arbitrator would be extremely reluctant to choose a package of proposals which fails to resolve an issue as central to bargaining as wages.

The legal basis for our original Order is that TriMet unlawfully pursued “proposals on *new issues*” that it raised for the first time in its final offer. But in the ruling on reconsideration, my colleagues switched from condemning “new issues” to condemning “new proposals.” I count 13 times in that ruling where my colleagues use the phrase “new proposal” instead of “new issue.”⁴ My colleague does the same thing four times in the current ruling. This is not a mere semantic quibble; it goes to the heart of why TriMet’s proposals were unlawful. They were unlawful not because they were *new proposals*, but because the proposals concerned *new issues* that were not previously raised in table bargaining or mediation.

New proposals are the mother’s milk of bargaining. They help the parties move towards agreement. We generally encourage new proposals because they further the purposes and policies of the PECBA. Most new proposals concern issues that are already open for discussion. New proposals typically refine earlier ones and seek a compromise that brings parties closer to agreement on an issue in dispute.

There are, however, several narrow categories of new proposals that are nevertheless unlawful, predominantly because they move parties farther apart rather than closer together. As pertinent here, new proposals concerning new issues that were not raised prior to mediation are unlawful. *Blue Mountain Faculty Association*, 21 PECBR at 754-758 (explaining why new issues raised in mediation or later are unlawful).⁵ But in my view, parties and practitioners should not read my colleagues’ ruling on reconsideration too literally, *i.e.*, as generally condemning all new proposals. It is proposals on new issues offered late in the bargaining process that violate the PECBA.



Paul B. Gamson, Board Member

⁴For example, my colleagues state: “A public employer that submits a *new proposal* in a final offer engages in conduct so ‘inimical to the bargaining process’ that it commits a *per se* violation of subsection (1)(e).” 24 PECBR at 492 (emphasis added). As explained more fully in the text, this statement is overbroad and inaccurate. A “new proposal” is generally lawful. It only becomes unlawful when it concerns a new issue. Similarly, they characterized our initial Order as follows: “We held that TriMet’s final offer *proposal* regarding employee payment of insurance premiums was new.” *Id.* at 494 (emphasis added). This does not accurately describe our holding. We did not fault TriMet simply because its *proposal* was new; the flaw was that the proposal concerned a *new issue*.

⁵Another example is new proposals that are regressive can indicate bad faith. *Southern Oregon Bargaining Council/Rogue River Education Association/OEA/NEA v. Rogue River School District* 35, Case No. UP-62-09, 23 PECBR 767, 789-790 (2010).