

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-49-06

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL)	
UNION, LOCAL 503,)	
OREGON PUBLIC EMPLOYEES UNION,)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
PORTLAND PUBLIC SCHOOL)	
DISTRICT NO. 1,)	
Respondent.)	
_____)	

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on December 28, 2007, following a hearing before ALJ Vickie Cowan on May 16, 2007, in Portland, Oregon. The record closed on June 5, 2007, upon receipt of the parties' post-hearing briefs.

James S. Coon, Attorney at Law, Swanson, Thomas & Coon, 820 S.W. Second Avenue, Suite 200, Portland, Oregon 97204, represented Complainant.

Richard F. Liebman, Attorney at Law, Barran & Liebman, 601 S.W. Second Avenue, Suite 2300, Portland, Oregon 97204-3159, represented Respondent.

On October 6, 2006, Service Employees International Union, Local 503, Oregon Public Employees Union (Local 503 or Union) filed this complaint against Portland Public School District No. 1 (District). The complaint, as amended on November 16, 2006, alleges that the District violated ORS 243.672(1)(e), (f), and (g) when it applied the terms of contracts other than the 1999 Service Employees International Union Local 140 (Local 140) Contract to custodians who were reinstated

to their District jobs pursuant to a decision of the Oregon Supreme Court. The District filed a timely answer on March 19, 2007, which admitted and denied certain allegations.

The issues are:

1. Did the District violate ORS 243.672(1)(e) by unilaterally changing the *status quo* as established by the 1999 Local 140 collective bargaining agreement?
2. Did the District violate ORS 243.672(1)(f) by applying the provisions of the 2002 Contract and subsequent contracts to the returning custodians before it completed the statutory impasse procedures?
3. Did the District violate provisions of the 1999 Local 140 collective bargaining agreement, and hence ORS 243.672(1)(g), by applying the provisions of the 2002 Contract and subsequent contracts to the returning custodians?

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. Local 503 is a labor organization that currently represents a bargaining unit of custodial and cafeteria employees who work for the District, a public employer.
2. Local 140 previously represented the bargaining unit of custodial and cafeteria workers now represented by Local 503. Local 140 and the District entered into a collective bargaining agreement dated February 29, 2000 (1999 Contract) which, by its terms, continued in effect until June 30, 2004.
3. Most of the language in the 1999 Contract referred generally to an “employee,” “employees,” or “bargaining unit” employees. The 1999 Contract also included the following specific references to custodial employees:
 - (a) The contract cover stated, in part: “THIS AGREEMENT IS APPLICABLE TO NUTRITION SERVICES AND CUSTODIAL EMPLOYEES OF PORTLAND PUBLIC SCHOOLS.”
 - (b) Article 1, “RECOGNITION AND APPLICATION OF AGREEMENT,” stated in part that, “[t]he District recognizes the Union as the sole and exclusive bargaining representative for all cafeteria and custodial employees * * *.”

(c) Article 5, "UNION RIGHTS," Section K, provided: "Upon request of the Union, the District shall provide an unpaid leave of absence not to exceed two (2) years to a custodial or cafeteria employee to serve as an officer of the Union."

(d) Article 21, "REDUCTION OF STAFF," Section A.3, provided in part: "A custodial employee laid off may bump the least senior (department seniority) employee in the next lower classification if he/she has greater department seniority "

(e) Appendix B, "SALARY SCHEDULE FOR CUSTODIANS," included custodian wage rates and related salary provisions. (Capitalization in original.)

4. The 1999 Contract also included the following relevant provisions:

(a) Article 7, "MANAGEMENT RIGHTS CLAUSE," included a one paragraph general statement of rights retained by the District.

(b) Article 10, "MAINTENANCE OF BENEFITS," provided that no employee "shall suffer any reduction in rate of pay or fringe benefits solely as a result of the execution of this Agreement."

(c) Article 19, Section A required the District to contribute, for full-time employees, an amount to the Health and Welfare Trust (Trust) equal to the cost of maintaining the benefits in existence on June 30, 1999, and for eligible part-time employees, 50 percent of the full-time amount. Article 19 also provided retiree insurance for eligible employees who elect early retirement. The early retirement benefit included District contributions in the amount necessary to maintain the retiree's medical/hospitalization plan as of June 30, 1999, plus one half the cost of plan benefits for the retiree's spouse or domestic partner for up to 60 months.

(d) Article 19, Section B provided a supplemental District payment for employees absent due to an on-the-job injury, and the right to continue to accrue sick leave and vacation time while on such leave.

5. In 2002, the District was in the midst of a significant budget crisis. It predicted a shortfall between \$30 and \$50 million. The District conducted a custodial salary survey, from which it concluded there would be significant cost savings if it contracted out custodial services. On February 5, 2002, the District notified Local 140 that it was proposing to contract out its custodial services. The parties bargained over the contracting out, but reached no agreement. In July 2002, the District contracted with Portland Habilitation Center, Inc. (PHC) to perform the custodial work. The initial contract with PHC was for a period of one year, ending on July 14, 2003. This contract was subsequently renewed.

6. By the end of August 2002, as a result of contracting out the custodial work, the District had “laid off” all of its approximately 250 to 300 custodial employees, and its custodial services were being performed exclusively by PHC contract workers.¹ As of September 2002, the District had no custodial employees on its payroll and Local 140 had no members in active employment as custodians at the District.

7. On April 19, 2002, Local 140 and the District filed a petition for a Declaratory Ruling before this Board. The petition sought “a ruling on whether the District’s proposal to contract out all of its custodial services is a prohibited subject of bargaining under the PECBA [Public Employee Collective Bargaining Act] because of the provisions of the CCSL.”² The CCSL is the Custodians’ Civil Service Law (CCSL), ORS 242.310 to 242.640. By ruling dated June 7, 2002, this Board concluded that the contracting out of the custodial work was not a prohibited subject of bargaining. On May 12, 2004, this Board’s decision was affirmed by the Oregon Court of Appeals.³ Local 140 then sought review by the Oregon Supreme Court.

8. Article 24 of the 1999 Contract provided for “mid-term negotiations” to begin in March 2002. The issues subject to the mid-term negotiations included: insurance, the salary schedules for nutrition services and custodial employees, and two additional articles selected by each party.

9. Local 140 and the District began the mid-term negotiations in the Fall of 2002. Local 140 selected its own bargaining team for the mid-term negotiations, which initially included D. Grant Walter, a laid-off custodial employee and the President of Local 140. However, the Local 140 bargaining team decided that all bargaining decisions were to be made solely by the nutrition services employees. No District management custodial staff served on the District’s negotiation team.

10. During the mid-term negotiations, the District proposed to remove the references to custodians from the contract. Local 140 proposed to retain contract references to the custodians, so as not to harm the litigation it was pursuing over the

¹The District and the Union disagree over whether the custodians were “laid off” and then “recalled,” or instead “dismissed” and subsequently “reinstated.” The terms used are not critical to our decision. We will use the term “laid off” here because the District used the contract lay-off procedures when it terminated the employment of the custodial employees. We will refer to the returning employees as “reinstated” because any recall rights for these employees had expired.

²See *In the Matter of the Petition for Declaratory Ruling filed by D. Grant Walter and Service Employees International Union Local 140*, Case No. DR-4-02, 19 PECBR 850, 853 (2002).

³*Walter v. Scherzinger*, 193 Or App 355, 89 P3d 1265 (2004).

contracting out of the custodial services. The District and Local 140 did not otherwise negotiate over the custodians' wages or working conditions. The District had no custodial employees on its payroll during the negotiations for this contract and had no intent of employing custodial workers during the term of the contract

11. The parties signed a new contract on November 25, 2002 which, by its terms, continued in effect through June 30, 2004 (2002 Contract). The 2002 Contract retained the language specifically referring to custodial employees on its cover and in Articles 1, 5, and 21. "APPENDIX B, SALARY SCHEDULE FOR CUSTODIANS," was included in the contract, but the contents were limited to the statement: "(Intentionally Left Blank)." (Parentheses and capitalization in original)

12. The 2002 Contract included the following relevant changes, all of which reduced rights or benefits of the covered employees:

(a) Article 7, "MANAGEMENT RIGHTS CLAUSE," was expanded to a list of 14 specific rights retained by the District, including the right to contract out or subcontract any past, current, or future work performed by its employees.

(b) A new Article 10, "ENTIRE AGREEMENT," replaced the prior maintenance of benefits article, and provided in part:

"This Agreement constitutes the sole and entire existing Agreement between the parties and completely and correctly expresses all of the rights and obligations of the parties. No prior oral or written past practices, agreements, procedures, traditions, and rules or regulations shall continue or be controlling. The Union, for the life of this Agreement, voluntarily and unqualifiedly waives its right and agrees that the District shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement, or with respect to any subject or matter which was or might have been raised in bargaining but which is not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of the Union at the time that it negotiated or signed this Agreement."

(c) Article 19, Section A retained the fully paid insurance benefits under the Trust through 2002. Beginning in January 2003, the contract provided for a District contribution of \$600 per month for full-time employees, and one-half that amount for

eligible part-time employees, toward the premium cost for insurance plans selected by the District. In addition, insurance contributions for early retirees were limited to those employees retiring on or before June 30, 2005, in the amount of \$200 per month for the retiree and \$100 per month for the retiree's spouse or domestic partner.

(d) Article 19, Section B eliminated the supplemental District payment to employees injured on the job and replaced it with the right of employees to supplement their worker's compensation benefit with accrued sick leave. This provision also eliminated the ability to accrue sick and vacation leave for employees who were absent from work due to an on-the-job injury.

13. Prior to entering into the 2002 Contract with Local 140, the District implemented an insurance cap for unrepresented employees, including management and confidential employees. Subsequent to reaching an agreement on an insurance cap with Local 140 in the 2002 Contract, the District also negotiated insurance caps for the bargaining units represented by the Portland Federation of Teachers and Classified Employees and the District Council of Unions. The District and its teachers' union did not negotiate an insurance cap, but did agree on some other cost-saving measures for health insurance.

14. Sometime during 2004, Local 140 merged with Local 503. As a result, Local 503 became the exclusive representative of the District's nutrition services workers and custodial employees.

15. After the merger, Local 503 and the District entered into contract negotiations. During bargaining, the District proposed to remove the language in the contract referring to custodians. Local 503 proposed to retain the language to ensure it did not give up any rights the custodial workers might have in the pending litigation. No custodial employees served on the Union's negotiation team and no District custodial management staff served on the District's negotiation team. The District and Local 503 did not negotiate over wages or any other terms related to custodial employees. The District did not employ any custodians during the contract negotiations and had no intention of employing custodians during the term of the contract.

16. The District and Local 503 executed a new agreement in December 2004 which, by its terms, continued in effect through June 30, 2005 (2004 Contract). The 2004 Contract retained the language in Articles 1, 5, and 21 which specifically referred to custodial employees. The new cover for the 2004 Contract eliminated the language referencing the application of the agreement to nutrition services and custodial employees. "APPENDIX B, SALARY SCHEDULE FOR CUSTODIANS,"

was again included in the contract, but was limited to the statement "THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK." (Emphasis in original.)

17. Article 19 of the 2004 Contract increased the District's insurance contribution for full-time employees to \$756 per month. The 2004 Contract included other changes which the Union viewed as reducing prior benefits under Article 11, "GRIEVANCE PROCEDURE," and Article 16, "OVERTIME AND CALL BACK." (Capitalization in original)

18. During 2005, the Union and the District negotiated for a successor contract. Under the negotiation ground rules, tentative agreements on proposals were not binding until an entire agreement was reached. In June 2005, the Union proposed deleting all references to custodial employees from the contract because it had no expectation that these employees would return to District employment. The Union and District reached tentative agreement on this proposal.

19. On October 13, 2005, the Oregon Supreme Court issued its decision in *Walter v. Scherzinger*, 339 Or 408, 121 P3d 644 (2005). The Court reversed the decisions of this Board and the Oregon Court of Appeals. It held that the CCSL required the District to employ custodians and prohibited it from contracting out custodial work.

20. At the bargaining table in February 2006, the District raised the issue of the custodial employees. In March 2006, the District submitted a proposal to include the reinstated custodians as part of the bargaining unit. There was no discussion about this proposal. In April 2006, the District included this proposal in its final offer. The parties did not discuss this proposal or any terms or conditions of employment for custodians at the bargaining table. Neither party proposed wage rates for custodians. There were no custodial employees on the Union's bargaining team and no custodial management staff on the District's bargaining team

21. On May 31, 2006, the District and the Union reached a tentative agreement on a new contract which would expire on June 30, 2007 (2006 Tentative Agreement). The relevant terms of this tentative agreement include:

(a) Article 19 requires the District to contribute \$779 per month towards health insurance premiums for employees working .75 or more of a full-time equivalent (FTE) and \$389.50 per month for current employees working from .5 to .74 FTE. It eliminates the District contribution for all employees hired after ratification who work less than .75 FTE. These employees would be allowed to purchase

coverage at the District's premium cost. For the second year of the contract, eligible Local 503 bargaining unit members receive the same insurance cap as the District's unrepresented employees.

(b) Compensation: Effective July 1, 2005, bargaining unit members receive a three percent general wage increase. Effective July 1, 2006, or upon ratification, bargaining unit members receive a three percent general wage increase.

(c) Custodian Language: "Agreement that custodians are part of the bargaining unit **and custodian language in the agreement will be retained.**" (Emphasis in original.)

(d) Lump Sum Stipend: Effective with the June 2006 payroll, active employees currently enrolled in insurance plans receive a one-time cash stipend as follows: employees working from .75 to 1.0 FTE would receive \$135; employees working from .5 to .74 FTE would receive \$67.50.

22. On or about July 6, 2006, the District sent the Union a letter regarding the recall of the laid off custodians. The letter stated in part:

"The initial terms and conditions of employment upon recall will be as stated in the 1999-2004 Collective Bargaining Agreement and successor agreements between the District and SEIU. This means that the District will recall the individuals to their prior classifications based upon their seniority within the classification from which they were laid off. Individuals who accept recall will be reinstated with seniority rights accumulated as of their dates of layoff, but without back pay or back benefits. The 1999-2004 Collective Bargaining Agreement and successor agreements are enclosed with this letter as Attachments A, B, and C. Individuals who accept recall will receive a starting wage rate equal to the rate they were paid at the time of the layoff adjusted upward based on bargained wage adjustments provided to other members of the bargaining unit who remained employed with the District.

"* * * * *

"This is an unconditional offer of recall, meaning that the individuals to whom it applies will not be required to

waive any legal claims they may have against the District (including any claims for back pay and benefits or other damages) as a condition of accepting the offer.”

23. By letter dated July 19, 2006, the Union objected to the District’s decision to base the terms and conditions of employment for returning custodians on contracts entered into after the 1999 Contract. By letter dated August 4, 2007, the District responded that it was willing to “agree to disagree” over the issues raised by the Union, but suggested that such disagreements need not be resolved before the custodial employees returned to work for the District. By letter dated August 11, the Union indicated it too was willing to focus on the return of the custodial employees and wait to resolve the issues it raised in the July 19 letter until after the custodians returned to work.

24. On or about September 24, 2006, the first group of custodians returned to work. During the subsequent months, additional custodians were reinstated. Approximately 133 custodians have returned to employment with the District under the terms of the 1999 Contract as those terms were modified by subsequent agreements.

CONCLUSIONS OF LAW

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

DISCUSSION

This case reaches us through a somewhat circuitous route. In 2002, the District and the Union sought a declaratory ruling from this Board. The question was whether the District’s decision to contract out its custodial services was a prohibited subject of bargaining because it violated the Custodians’ Civil Service Law (CCSL), ORS 242.310 to 242.640.⁴ This Board decided that the contracting out of custodial work was not a prohibited subject of bargaining. *In the Matter of the Petition for Declaratory Ruling*

⁴The parties also presented two other cases to this Board concerning the District’s decision to contract out custodial services. *In the Matter of the Joint Petition for Declaratory Ruling filed by Multnomah County School District No. 1 and School Employees Local Union 140, SEIU, AFL-CIO, CLE*, Case No. DR-2-02, 19 PECBR 837 (2002) (the expedited bargaining process in ORS 243.698 applies to bargaining over the District decision to contract out custodial services); and *School Employees Local Union 140, SEIU, AFL-CIO, CLE v. School District No. 1, Multnomah County*, Case No. UP-44-02, 20 PECBR 420 (2003) (District did not bargain in bad faith over its decision to contract out custodial services).

Filed by D. Grant Walter and Service Employees International Union Local 140, Case No. DR-4-02, 19 PECBR 850 (2002). The Oregon Court of Appeals affirmed this Board's decision in *Walter v. Scherzinger*, 193 Or App 355, 89 P3d 1265 (2004), but the Oregon Supreme Court reversed the decisions, 339 Or 408, 121 P3d 644 (2005). The Oregon Supreme Court held that the CCSL required the District to maintain custodians as its employees and prohibited it from contracting with an outside entity for custodial services. The Court explained:

“We conclude that, when the 1937 legislature defined custodians and assistant custodians as ‘employe[e]s,’ it intended to define the legal status of those workers. That definition served to facilitate the civil service board’s control over that workforce. Finally, ORS 242.520(1) requires the district to employ custodians pursuant to the terms of the CCSL.” 339 Or at 426.

After the Oregon Supreme Court decision, the District reinstated those custodial employees who chose to return to the District. It reinstated them under the terms of the 1999 Contract and subsequent contracts. The Union took the position that the District was obligated to bargain before it could impose working conditions other than those in the 1999 Contract, the contract which was in effect when the District contracted out the custodial work.⁵ It filed this unfair labor practice complaint alleging that the District’s reinstatement of the custodial employees under the terms of the contracts subsequent to the 1999 Contract violated ORS 243.672(1)(e), (f), and (g).

It is important to note at the outset that the matter before us is neither an enforcement proceeding nor a compliance proceeding arising from the case ultimately decided by the Oregon Supreme Court. The issue of an appropriate reinstatement remedy for the returning custodial employees under the Oregon Supreme Court’s decision is not before us. Therefore, we do not, as the District urges, attempt to discern the terms and conditions of work that would have applied to the custodial employees if they had not been terminated. The issue before us is whether the District committed

⁵A number of working conditions established in contracts entered after the 1999 Contract were less favorable to employees. For example, the 1999 Contract obligated the District to pay the entire cost of health insurance premiums for full-time employees; subsequent contracts placed a dollar cap on the District’s contribution and the employee paid any amount that exceeded the cap. The 1999 Contract required the District to pay the full cost of insurance premiums for qualified retirees and half the cost for the retired employee’s spouse or domestic partner; subsequent contracts capped the contributions and eliminated all insurance benefit payments for those who retired after June 30, 2005.

an unfair labor practice under ORS 243.672(1)(e), (f), or (g) when it imposed terms and conditions of employment on returning custodians based on contracts negotiated after the 1999 Contract. We will consider each of these allegations in turn.

2. The District did not refuse to bargain in good faith, in violation of ORS 243.672(1)(e), by unilaterally changing the *status quo* as established by the 1999 Contract.

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to “[r]efuse to bargain collectively in good faith with the exclusive representative.” The duty to bargain in good faith prohibits unilateral changes in mandatory subjects of bargaining. One recognized defense to a unilateral change claim is language in a collective bargaining agreement that expressly permits the employer to act as it did. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, 209 Or App 761, 149 P3d 319 (2006); and *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323 (2008). The District asserts this defense, arguing that the terms and conditions of employment for the returning custodial employees had already been negotiated by the parties and are encompassed in the 1999 Contract and subsequent agreements.

In *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, the Oregon Court of Appeals outlined the appropriate analysis to use when an employer asserts its authority under the current collective bargaining agreement as a defense to a unilateral change claim. In addressing the facts of that case, the Oregon Court of Appeals stated:

“* * * Whether the CBA [collective bargaining agreement] authorizes [the employer] to make unilateral changes in employee work schedules is a question for ERB [Employment Relations Board] to address in the first instance. As we said in *Marion Cty. Law Enforcement Assn.* [130 Or App 569, 883 P2d 222 (1994), *rev den* 320 Or 567, 889 P2d 1299, 1300 (1995)], the meaning of the CBA is determined under general rules of contract construction. 130 Or App at 575. ERB must determine whether, under the terms of the CBA, [the employer] was authorized to make the changes in the work schedule that it did. If the CBA is ambiguous, then ERB is required to resolve the ambiguity by examining extrinsic evidence of the contracting parties’ intent, if such evidence is available. *Arlington Ed. Assn. v.*

Arlington Sch. Dist. No. 3, 196 Or App 586, 103 P2d 1138 (2004). * * *

A contract is ambiguous “if it can reasonably be given more than one plausible interpretation.” *Portland Fire Fighters’ Association v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, *rev den* 334 Or 491, 52 P3d 1056, 1057 (2002). We apply this analysis here and conclude that the 2002 Contract, the 2004 Contract, and the 2006 Tentative Agreement apply unambiguously to the returning custodial employees.

The primary evidence that these contracts apply to the custodial employees is the specific contract references to custodial employees. As with the 1999 Contract, the 2002 and 2004 Contracts include “custodial employees” under Article 1, which is entitled “RECOGNITION AND APPLICATION OF AGREEMENT.” Those provisions specifically state that “[t]he District recognizes the Union as the sole and exclusive bargaining representative for all cafeteria and custodial employees * * *.” The 2006 Tentative Agreement specifically includes an “[a]greement that custodians are part of the bargaining unit and custodian language in the agreement will be retained.” (Emphasis omitted.) Article 5 addresses the right of “a custodial or cafeteria employee” to a leave of absence to serve as a union officer. Article 21 includes a specific bumping procedure that applies solely to custodial employees.

No language excludes custodial employees from these contracts. Just as the contracts include specific references to the custodial employees, they also include a number of specific references to cafeteria employees and a salary schedule that applies specifically to cafeteria employees. However, the majority of contract articles do not apply to a specific classification of employees, but use the general terms “employee” or “employees.” In light of the recognition clause language and other contractual references, the term “employee” would naturally include custodial employees of the District.

To support its position that the parties did not intend to include custodial employees under these contracts, the Union points to Appendix B in the 2002 and 2004 Contracts, the blank salary schedule for custodial employees. We do not find the Union’s interpretation plausible. If the parties did not intend the contract to cover the custodial employees, they would have removed Appendix B and eliminated references to custodial employees from the contract. Reading the contract as a whole, as we must,⁶ the only plausible interpretation is that the parties intended the contract to cover

⁶*North Pacific Insurance Co. v. Hamilton*, 332 Or 20, 25, 22 P3d 739 (2001).

custodial employees, and they kept the blank Appendix B as a place holder should the custodial employees return to the District.⁷

Because the contracts are unambiguous, there is no need to look at further indications of the parties' intent. But even if we assume, *arguendo*, that it is appropriate to look further, the Union would still lose. The Union asserts that even though the contracts subsequent to the 1999 Contract include specific references to custodians, it was not the Union's intent to apply the terms of the contracts to custodial employees.⁸ The language the Union agreed to does not support its assertion. In fact, it was the Union that proposed to continue including references to the custodial employees in the 2002 and 2004 Contracts. In both cases, the Union did not want to jeopardize the rights of custodial employees in the ongoing litigation. The Union proposed to remove the references in the contract only when it believed the custodians would never return to District employment.

We also reject the Union's argument that the custodial employees should be treated like a new group of employees that has been added to an existing bargaining unit. In such a case, as the Union correctly points out, the terms of any existing contract do not automatically apply to the new group; the parties must bargain over the employment conditions for the new employees. *City of Portland Professional Employees Association v. City of Portland*, Case No. UP-49-02, 20 PECBR 406 (2003); and *Port of Portland v. Municipal Employees, Local 483*, 27 Or App 479, 485-86, 556 P2d 692 (1976) (citing *Federal-Mogul Corporation, Bower Roller Bearing Division*, 209 NLRB 343, 85 LRRM 1353 (1974)). As the NLRB explained:

⁷We note that the wage rates for the returning custodial employees are not at issue. The Union and District agree that the cost-of-living increases under the contracts subsequent to the 1999 Contract should be applied to the returning custodial employees. We agree that the cost-of-living increases in these contracts apply to the District custodial employees and, in fact, fill in the blanks left in Appendix B. The 2004 Contract increased the base wage rates for "all bargaining unit classifications," which under Article I includes the custodial employees. The 2006 Tentative Agreement also provides for a three percent "General Wage Increase" effective July 1, 2005 and July 1, 2006.

⁸The Union is asserting, in essence, that it did not understand the consequences of continuing to include the references to custodial employees in the contracts. This Board must base its decision on the objective manifestation of the parties' intent as expressed in the contracts themselves rather than on one party's subjective understanding of the terms. *International Association of Firefighters Local #1431 v. City of Medford*, Case Nos. UP-32/35-06, 22 PECBR 198, 207-208 (2007).

“Our decision promotes bargaining stability, since a major consequence of the opposite view would be that in contract negotiations both parties would be held to be making agreements for groups of persons whose identity and number would be totally unknown to, and unpredictable by, either party. Costs of wages and benefits under negotiation would thus become equally unpredictable, and informed negotiation of such benefits as health and pension plans would become well-nigh impossible. * * *” *Federal-Mogul Corporation*, 209 NLRB at 344.

The rationale underlying these cases does not apply here. The custodial employees are not new to the District. They are individuals who previously worked for the District and were members of the Union’s bargaining unit. The identity and number of these employees is neither unknown nor unpredictable. The parties negotiated regarding the specific needs and wages of custodial employees in the past. Although the District did not employ any custodians during the negotiations for the contracts subsequent to the 1999 Contract, the parties nevertheless included references to custodians in the contracts they bargained after 1999. The Union pursued litigation in which it asserted the custodial employees should never have been removed from the bargaining unit. Consistent with this position, the Union continued to act as the representative of these employees, and the contracts it bargained clearly and unambiguously address the terms and conditions of employment for the custodians. Under these circumstances, the custodial employees are not new and the cases the Union relies on do not apply.

The District did not unilaterally change working conditions when it reinstated the custodians under the terms and conditions of contracts subsequent to the 1999 Contract. The parties’ agreements specifically permit the District to act as it did. We will therefore dismiss this portion of the complaint.

3. The District did not refuse or fail to comply with any provision of ORS 243.650 to 243.782, in violation of ORS 243.672(1)(f), by applying the provisions of the 2002 Contract and subsequent contracts to the returning custodians before the completion of impasse procedures.

4. The District did not violate provisions of the 1999 Contract or ORS 243.672(1)(g) by applying the provisions of the 2002 Contract and subsequent contracts to the returning custodians.

We also dismiss the Union's allegations that the District violated ORS 243.672(1)(f) and (g) by applying the provisions of the contracts subsequent to the 1999 Contract to the custodial employees. As explained above, we reject the premise underlying these allegations, *i.e.*, that the contracts subsequent to the 1999 Contract do not apply to the returning custodial employees. Therefore, the District's application of those contracts to the reinstated custodial employees did not violate ORS 243.672(1)(f) or (g).

We will therefore dismiss the complaint.

ORDER

The complaint is dismissed.

DATED this 8th day of May 2008



Paul B. Gamson, Chair

*Vickie Cowan, Board Member



Susan Rossiter, Board Member

*Board Member Cowan has recused herself.

This Order may be appealed pursuant to ORS 183.482