EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 555, Petitioner.	Case No. DR-002-22

BRIEF OF LINN COUNTY AS *AMICUS CURIAE*

IN OPPPOSITION TO PETITIONER'S PETITION FOR DECLARATORY RULING

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STATEMENT OF THE CASE

On June 22, 2022, United Food and Commercial Workers, Local 555 ("Petitioner") filed a petition for declaratory ruling on whether "a party can insist, over the other party's objection, that some of its bargaining committee members will participate virtually or via telephonic means if the other party requests that bargaining should only occur via face-to-face, in-person meetings" and whether "an employer can insist, over the union's objection, that the bargaining unit employees, who are not part of either party's chosen bargaining team, must be allowed to attend negotiation sessions as observers." These questions arise from Petitioner's course of bargaining with Bay Area Hospital ("BAH"), the employer, who has not joined the Petition. On June 9, 2022, the Employment Relations Board issued a Notice of Invitation to Submit Amicus Briefs on the two questions presented by Petitioner.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Linn County ("Amicus") is a public employer who employs represented employees and is subject to the Public Employees Collective Bargaining Act. Amicus has engaged in collective bargaining in in-person, virtual, and hybrid (consisting of a mix of in-person attendees and remote attendees) formats and wishes to assist the Board in deciding the present matter in light of Amicus' experience and analysis of the law.

QUESTIONS PRESENTED

Amicus addresses the Petitioner's first question in substance and declines to address the merits of Petitioner's second question.

1. Should the Board create a substantive rule declaring in-person bargaining to be the default bargaining format, such that a party's refusal to bargain in person is a *per se*

violation of its duty to bargain in good faith and parties must mutually agree to bargain in a different format?

2. Should the Board decline to issue a declaratory ruling on Petitioner's questions when the employer, Bay Area Hospital, has not joined the Petition or agreed to be bound by a ruling?

ARGUMENT

I. The Board should not create a substantive rule declaring in-person bargaining to be the default bargaining format.

Under the Public Employees Collective Bargaining Act ("PECBA"), parties have a duty to bargain in good faith over mandatory subjects of bargaining. ORS 243.650(4). The PECBA does not prescribe a particular format for bargaining, it only requires the parties to "meet at reasonable times and confer in good faith with respect to employment relations for the purpose of negotiations concerning mandatory subjects of bargaining." *Id*. Parties have no duty to bargain over permissive subjects of bargaining, which are "matters other than mandatory subjects of bargaining that are not prohibited by law." *Id.* However, parties may not condition their participation in bargaining over mandatory subjects upon a permissive subject. *Washington Cty. Dispatchers Ass'n. v. Washington Cty. Consolidated Commc'ns Agency*, Case Nos. UP-015/27-14 at *5 (2014). Therefore, a party that insists on a particular permissive subject of bargaining violates its duty to bargain in good faith insofar as its insistence constitutes a refusal to bargain over mandatory subjects of bargaining. ORS 243.672(1)(e), ORS 243.672(2)(b).

Petitioner asserts that the format in which parties attend bargaining sessions is a permissive subject of bargaining over which no party may to refuse to bargain. Petition at 7. However, Petitioner has refused to participate in any bargaining sessions unless both parties

attend in Petitioner's preferred format.[1] Petitioner has requested that the Board create a *per se* rule to resolve the substance of the parties' controversy: Bargaining must take place in-person, parties must mutually agree to a different bargaining format, and a party who refuses to attend bargaining in-person violates its duty to bargain in good faith. Absent such a rule, Petitioner, by refusing to bargain unless both parties are in-person, has violated its duty to bargain in good faith as much as it alleges BAH to have.

To avoid this double-edged sword, Petitioner characterizes in-person bargaining as the "norm" under the National Labor Relations Act ("NLRA") and Petitioner asks the Board to follow NLRB precedent as it did in *Washington Cty. Dispatchers Ass'n* to elevate the "norm" to substantive law. However, a closer reading of this Board's decision in *Washington County Dispatchers Ass'n* and the NLRB precedent it followed do not support Petitioner's position.

A. Distinguishing *Washington County Dispatchers Ass'n* and *Bartlett-Collins Co.*

Petitioner's reliance on this Board's decision in *Washington Cty. Dispatchers Ass'n* to justify the creation of a substantive *per se* rule is misplaced. *Washington Cty. Dispatchers Ass'n* created a *per se* substantive rule concerning the audio recording of bargaining sessions to address the legitimate risk of stifling collective bargaining that audio recording poses. Bargaining format presents no similar risk. Additionally, Petitioner's concerns over the potential risks of bargaining

[1] Petition at 3, para. 6 ("[Petitioner] responded that it had 'no interest in virtual meetings'"); Petition at 4, para 8. ("[Petitioner] reiterated that it would not agree to virtual or hybrid negotiations because 'those participating in the bargaining process at the bargaining table need to be physically present'"); Petition at 5, para. 12 ("[Petitioner] continued its refusal to agree to any negotiations ground rule permitting virtual or hybrid meetings"). It should be noted that BAH has attempted to compromise with Petitioner by offering the option of "hybrid" meetings, in which some of its bargaining team members would appear remotely and some would appear in-person. Petition at 4, para. 7. Petitioner rejected this compromise. *Id.* at para. 8.

in a virtual or hybrid format are insufficient grounds to justify the creation of a *per se* substantive rule.

1. *Washington Cty. Dispatcher's Ass'n* and *Bartlett-Collins, Co.* created a *per se* substantive rule to address the legitimate "chilling" effects of audio recording bargaining sessions.

In *Washington County Dispatchers Ass'n*, a party insisted on audio recording its bargaining sessions over the other party's objections. Each party filed an unfair labor practice complaint alleging that the other violated their respective duties to bargain in good faith under the PECBA. This Board and the parties agreed that audio recording is a permissive subject of bargaining and that refusing to participate in bargaining because of a permissive subject of bargaining is a *per se* violation of their duties to bargain in good faith. *Washington Cty. Dispatchers Ass'n* at *5. However, each party asserted that the other's substantive position on the permissive subject of bargaining constituted a violation of their duties to bargain in good faith. To reconcile the irreconcilable, this Board turned to the NLRB's decision in *Bartlett-Collins Co.*, 237 NLRB 770, *enf'd* 639 F2d 652 (10th Cir. 1981), *cert. den*. 452 US 961 (1981).

In *Bartlett-Collins Co.*, the NLRB created a *per se* rule regarding the use of court reporters to record bargaining sessions: Under Sections 8(a)(5) and 8(b)(3) of the NLRA, the use of a court reporter during bargaining is a permissive subject of bargaining over which no party can refuse to participate in bargaining. This was a departure from the NLRB's previous decisions, in which it held that a party does not *per se* violate its duty to bargain in good faith by insisting on the use of a court reporter during bargaining sessions unless it insists in bad faith. *Id.* at 772. In its previous decisions, the NLRB evaluated parties' conduct in bargaining to determine

if the party was insisting in bad faith to, for example, delay or avoid its obligation to bargain in good faith. *Id.*

The difficulty in applying the NLRB's new rule is obvious: What happens when parties take opposite positions on a permissive subject of bargaining and refuse to bargain unless their position prevails? It would seem that both parties have equally violated their duties to bargain in good faith. Rather than resolving the question through a bad faith analysis, the NLRB chose a side and created a substantive *per se* rule. *Id.* at 773. Despite saying that "neither party [was] lawfully entitled to insist" on their positions to the point of refusing to bargain, the NLRB held that the party who refuses to bargain without a court reporter present violates its duty to bargain in good faith while a party who refuses to bargain with a court reporter present does not. *Id.*

To support its selection, the NLRB considered which parties' position better advanced the NLRB's "statutory responsibility to foster and encourage meaningful collective bargaining." *Id.* It noted that "many experts in the field" reported that a reporter's presence has a chilling effect on the "free and open discussion necessary to conduct successful collective bargaining." *Id.* at fn. 9. In enforcing the NLRB's decision, the 10th Circuit affirmed the NLRB's concerns and further explained the chilling effects of recording:

> "It may cause parties to talk for the record rather than to advance toward an agreement. The proceedings may become formalized, sapping the spontaneity and flexibility often necessary to successful negotiations. When a court reporter is demanded over objection, bargaining is likely to begin on a discordant note. The request may give notice that one party lacks confidence in the collective-bargaining process, anticipating litigation rather than agreement."

NLRB v. Bartlett-Collins Co., 639 F2d 652, 656 (10th Cir. 1981).

This Board in *Washington Cty. Dispatchers Ass'n* agreed with and reiterated the NLRB's and 10th Circuit's concerns over the chilling effects of recording on bargaining sessions as the rationale for adopting the NLRB's precedence. *Washington Cty. Dispatchers Ass'n* at *7 (stating that the *Bartlett-Collins Co.* precedent continues to be relevant and the "detrimental and deleterious" effects of audio recording were "overwhelmingly endorse[d]").

2. Bargaining format is not analogous to audio recording bargaining sessions.

Petitioner seeks to analogize the bargaining format at controversy in this matter with audio recording bargaining sessions at issue in *Washington County Dispatchers Ass'n* and *Bartlett-Collins Co.* to support the creation of a *per se* substantive rule that would establish in-person bargaining as the default bargaining format. Petition at 8. However, virtual or hybrid bargaining formats do not have the chilling effect that audio recording has upon bargaining sessions; instead, they are tools that facilitate bargaining by providing greater flexibility and accessibility to the bargaining process. Additionally, Petitioner's specific concerns about virtual or hybrid bargaining are insufficient to support the creation of a *per se* substantive rule in favor of in-person bargaining.

a. Virtual and hybrid bargaining are tools that facilitate, not chill, bargaining.

The NLRB in *Bartlett-Collins Co.* evaluated the issue of court reporters recording bargaining sessions under its "statutory responsibility to foster and encourage meaningful collective bargaining" by interpreting the NLRA. *Bartlett-Collins Co.*, 237 NLRB at 773. This Board has a similar duty under the PECBA. *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 290 Or 217, 231 (1980). The Oregon supreme court explained that "[the PECBA] declares as policy the interest of the people in harmonious and cooperative labor relations in government,

free from interruption and unresolved disputes, through a system of labor organization and collective bargaining. The Employment Relations Board is mandated by ORS 243.766 to oversee that system." *Id.*

Petitioner would have the Board fulfill its duty by creating a hard-and-fast substantive rule to establish how the parties should fulfill their obligations to bargain in good faith. Such a rule is a poor fit for the collective bargaining process, particularly in present times. The purpose of the PECBA is to "obligate public employers, public employees and their representatives to enter into collective negotiations with willingness to resolve grievances and disputes relating to employment relations." ORS 243.656(6). It is process oriented—parties must "meet at reasonable times and confer in good faith" (ORS 243.650(4))—but it does not require specific outcomes from that process. *Id.* Parties are free to fill in the blanks with whatever works best for them in light of their particular bargaining needs.

There are many factors that can impact bargaining logistics: for example, staffing, schedules, travel restraints, budget restrictions, illness, and the availability of representation. Virtual and hybrid bargaining are powerful tools that help overcome the ill effects of these factors. As these last two years have taught us, parties must be flexible, adaptable, and cooperative. The process of collective bargaining must remain similarly unrestricted to best facilitate bargaining between parties. Without the option of virtual or hybrid bargaining, parties might have to delay bargaining, bargain without team members, risk exposure to illness, or forgo representation. Of course, parties can choose to absorb those risks and proceed in-person— it is their choice to do so and it should remain their choice. This Board should not remove a tool from their toolkit by creating a rule that establishes one form of bargaining over another.

b. Petitioner's concerns about virtual and hybrid bargaining do not justify the creation of a *per se* substantive rule.

According to Petitioner, only in-person, face-to-face communication in which both parties can make eye contact and observe each other's body language can guarantee candid, honest, and effective bargaining. Petition at 9. Additionally, Petitioner asserts that in-person format is the only way to ensure that neither party is recording without the other's permission or to ensure that no unauthorized persons attend bargaining. *Id.* at 9–10.

Unlike this Board's and the NLRB's concerns about the audio recording of bargaining sessions, Amicus believes Petitioner's concerns to be insufficient grounds to justify a substantive rule establishing in-person bargaining as the default format. Virtual and hybrid bargaining do not have the same risks as audio recording bargaining. Firstly, as the past two years have taught us, there are many situations in which in-person meetings do not guarantee typical face-to-face, non-verbal interactions: We have spent much of the last two years wearing masks whenever meeting indoors. Masks obscure facial expressions, corrupt nonverbal cues, muffle speaking tones, and otherwise limit nonverbal expression. In Amicus' experience, the software programs commonly used for virtual or hybrid bargaining provide much of the same "face-to-face" benefits that in-person bargaining does. In fact, in the context of witness testimony, the NLRB has observed that "modern videoconference technology enables the observation of the witness at all material times" as is required to make determinations of credibility. *West Morrison Healthcare*, 369 NLRB No. 76 (May 11, 2020).

It is true that the virtual and hybrid formats present some logistical difficulties, but after two years of hybrid and virtual meetings, Amicus has found that most individuals and bargaining parties have adapted their expectations, infrastructure, and bargaining process to resolve those

difficulties. For example, laptops and web-cameras are now standard-issue for a significant number of workstations. Additionally, many bargaining parties are creating and agreeing to rules that maximize the virtual and hybrid experience. For example, parties have agreed that web-cameras should be on whenever possible during bargaining sessions and that documents should be shared between the bargaining teams via both email and "screen share" functions that allow the parties to simultaneously review and collaborate.

Secondly, in-person bargaining does not materially reduce the risk of unauthorized recording of bargaining sessions. Unfortunately, an unscrupulous person can easily find a way to record bargaining, regardless of the format: An audio-recording app on a smartphone hidden in a pocket is just as effective as a recording device on a laptop. Additionally, most, if not all, of the software programs used to conduct virtual meetings actively notify users when someone is using the software's recording feature. These features can also be disabled.

Thirdly, Amicus concedes that it would easier for someone to "sneak into" a virtual or hybrid bargaining session, but the risk is still minimal. Most, if not all, software programs used for virtual meetings can be configured to make the meetings very secure by setting passwords, requiring attendees to register prior to joining the meeting, and displaying a real-time meeting attendee list. Amicus believes that the only true risk comes from an unauthorized person sitting with a bargaining team member who is attending a session virtually. This situation seems unlikely, in Amicus' experience, and does not justify creating a *per se* substantive rule to guard against it.

Petitioner cites to the Board's survey showing that participants preferred an in-person format for the Board's case hearings, oral arguments, mediations, Board-facilitated interest based bargaining, and trainings. Petition at 11. Petitioner does not mention that the participants

overwhelmingly reported being "highly/somewhat satisfied" with the past two years' virtual format and preferred that the Board maintain a virtual format. Amicus does not believe that the virtual format would have such positive feedback if reality reflected Petitioner's concerns.

B. A substantive, *per se* bargaining format rule lacks precedential support.

This Board's decision to create a *per se* substantive rule in *Washington Cty. Dispatchers Ass'n* was based upon the NLRB's decision to create the same *per se* substantive rule in *Bartlett-Collins Co.* However, parallel NLRB precedent does not exist for bargaining format. Petitioner cites to NLRB decisions that refer to in-person bargaining as the "norm," but none of those decisions establish that in-person bargaining is the rule. *See* Petition at 8–10. In the following decisions, all cited by Petitioner, the lack of in-person bargaining was but one of many factors that the NLRB considered when deciding if a party engaged in bad faith bargaining.

1. Unlike audio recording, NLRB decisions treat bargaining format as a single factor in an overall bad-faith analysis.

In *Aaron Newman et al. d/b/a Colony Furniture Co.*, 144 NLRB 1582, 1589 (1963), the Union filed an unfair labor practice complaint against the employers, a father and son, who each bargained separately and conflictingly with the Union over the same matters. Petitioner points to the fact that bargaining took place over the phone, but, according to the NLRB, it was the employers' "divided and fluctuating bargaining authority" that constituted the unfair labor practice. *Id.* at 1590. The Union being forced to negotiate over the telephone was simply an "effect" of the behavior that gave rise to the unfair labor practice, not the unfair labor practice itself. *Id.* Similarly, the unfair labor practice in *Success Village Apartments*, 347 NLRB 1065, 1068 (2006), was the employer's insistence on using mediation to bargain the contract instead of

direct negotiation between the parties, not that the negotiation was not face-to-face. The employer's insistence on bargaining only by phone in *Alle Arecibo Corp.*, 264 NLRB 1267, 1274–75 (1982) did not constitute bad faith bargaining itself, but contributed to the many acts by the employer that added up to bad faith bargaining.

Petitioner cites to a NLRB general counsel advice memorandum that recommended that a region issue a Section 8(a)(5) complaint against an employer who insisted on bargaining over video-conference instead of face-to-face. *United Restoration, d/b/a United Air Comfort*, 35 NLRB AMR 44, Case No. 36-CA-9318 (Oct. 30, 2003). Again, the advice memorandum's comments on the insufficiency of videoconferencing compared to in-person bargaining must be contextualized: This was to be the first contract between the parties, a situation that involved "special problems" and where the factors requiring in-person negotiation for the parties were "particularly germane." *Id.* It should also be noted that no Administrative Law Judge ("ALJ") or NLRB decision exists on this matter, so the advice memorandum was never used to adjudicate this issue.

Petitioner also misunderstands Chair Gamson's concurrence in *Rogue River Educ. Ass'n v. Rogue River Sch. Dist. 35*, Case No. UP-62-09 at *17 (June 8, 2010) (Chair Gamson, concurring). The issue in that matter was whether the employer violated its duty to bargain in good faith by using regressive bargaining techniques in light of the parties' agreed-upon bargaining process. *Id.* The bargaining format was not at issue. Petitioner's source of confusion, Amicus believes, is that the parties in this matter used interest based bargaining, which, according to Chair Gamson, is a process that "differs from the statutory scheme." Parties are free to engage in such a process, Chair Gamson said, and when they "put their process in writing, [the Board] will enforce it." *Id.* However, the parties here did not put their interest based bargaining

process in writing, so there was no standard for the Board to evaluate the parties' behavior against to determine if bad faith bargaining had occurred. *Id.* Based on this lack of standard, Chair Gamson would have dismissed the unfair labor practice complaint because "it is not this Board's job to impose new conditions or add new standards to the parties' agreed-upon bargaining process." *Id.* Chair Gamson reiterated his statements in his concurrence to the Board's decision upon reconsideration, adding that "negotiating in good faith requires more than simply e-mailing a proposal to the other side" to refute a party's argument that its emailed proposal that was not discussed prior to mediation indicated its good faith bargaining. *Rogue River Educ. Ass'n v. Rogue River Sch. Dist. 35*, Case No. UP-62-09 at *5 (Aug. 18, 2010) (Chair Gamson, concurring). His statements do not "stand[] for the proposition that the parties have flexibility under the PECBA to bargain in good faith via alternative methods, but only if *both sides agree* to those alternative methods." Petition at 10 (emphasis in original). Just like the other precedent Petitioner cites, his statements actually stand for the proposition that parties must bargain in good faith and what actions constitute good faith or bad faith will necessarily depend upon the parties' specific bargaining process and conduct.

2. Unlike *Bartlett-Collins Co.*, *Hood River Distillers, Inc.* has no precedential value.

Petitioner cites to *Hood River Distillers, Inc.*, NLRB Div. of Judges, Case Nos. 19-CA-260013 & JD-74-21 (Dec. 10, 2021), for the proposition that a party's refusal to participate in bargaining unless the bargaining is conducted in-person is not a *per se* violation of the party's duty to bargain in faith. However, at the time of this writing, there are cross exceptions pending before the NLRB on this matter.[2] Respondent Hood River Distillers, Inc.'s Brief in Support of

[2] The docket activity for *Hood River Distillers, Inc.*, Case No. 19-CA-260013, can be viewed on the NLRB's website: https://www.nlrb.gov/case/19-CA-260013.

Exceptions to the Administrative Law Judge's Decision, Case Nos. 19-CA-260013, 19-CA-265595, 19-CA-267920, 19-CA-268290, 19-CA-264083 at *14–15, 20–21 (Jan. 19, 2022) ("Brief in Support of Exceptions"). The NLRB will eventually render a decision on the issue and it may or may not adopt the ALJ's findings. Until that time, this ALJ's decision does not provide the same precedential support to Petitioner's position as the NLRB's decision in *Bartlett-Collins Co.* did for this Board's decision in *Washington Cty. Dispatchers Ass'n.*

Additionally, *Hood River Distillers* merely echoes the previous NLRB decisions discussed above: A party's insistence on a certain bargaining format is not a *per se* violation of its duty to bargain in good faith, but it is a factor to consider when evaluating whether a party has violated its duty. In the above-cited case, the ALJ evaluated the Union's insistence on bargaining in-person to determine if it was "unreasonable" or "designed to frustrate reaching an agreement" and found, based on the specific context, that it was not unreasonable or designed to frustrate reaching an agreement. It should be noted that the respondent in this matter has challenged this finding (Brief in Support of Exceptions at *14–15), but not to the manner by which the ALJ came to this finding.

C. <u>The Board should continue evaluating bargaining format disagreements for bad faith under its "totality-of-the-conduct" approach.</u>

This Board evaluates a complaint that a party is refusing to bargain in good faith by first determining if the conduct is so "destructive of the bargaining relationship or so inconsistent with the good faith required by the statute that those actions [are] *per se* [violations]." *Tri-County Met. Trans. Dist. of Oregon*, Case No. UP-001-13 at fn. 16 (Dec. 26, 2014). Examples of *per se* violations are "(1) unilaterally implementing a change in a mandatory subject of bargaining; (2) submitting a new proposal in mediation, which had not been subjected to bargaining; and (3)

submitting a new proposal in a final offer, which had not been subjected to bargaining." *Oregon Sch. Emp.s Ass'n,* Case No. UP-77-11 at *9 (May 23, 2013).

If the conduct does not amount to a *per se* violation, then the Board will consider the "totality of the bargaining conduct to see if the conduct demonstrated that the party had no serious intention of reaching an agreement." *Id.* at *22. Factors considered include "whether dilatory tactics were used; (2) contents of the proposals; (3) behavior of the party's negotiator; (4) nature and number of concessions made; (5) failure to explain a bargaining position; and (6) the course of negotiations." *Tri-County Met. Trans. Dist. of Oregon* at *19.

The Board's "totality-of-the-conduct approach" echoes how the NLRB has evaluated bargaining format disputes under the NLRA. The NLRB has repeatedly refused the opportunity to declare in-person bargaining the default bargaining format, thereby creating a *per se* rule. *E.g.*, *Success Village Apartments*, 347 NLRB at 1068; *Aaron Newman et al. d/b/a Colony Furniture Co.*, 144 NLRB at 1589; *Alle Arecibo Corp.*, 264 NLRB at 1274–75. Bargaining format, according to the NLRB, simply does not pose the same "detrimental and deleterious" effects on collective bargaining as, for example, audio recording bargaining sessions.[3] Instead, as discussed, the NLRB has consistently evaluated bargaining format disputes in the context of the parties' overall bargaining conduct to determine whether a party's insistence on a particular

[3] It is worth noting, however, that the Third Circuit reviewed the NLRB's decision in *Bartlett-Collins Co* and stated that it was "concerned" with the NLRB's decision that favored "one substantive result over the other." *Latrobe Steel Co. v. N.L.R.B.*, 630 F.2d 171, 178 (3d Cir. 1980). The correct way to resolve this issue, according to the court, was to not pick sides but to focus on the parties' conduct in the matter at hand: If a party's insistence on a permissive subject of bargaining results in a refusal to bargain over mandatory subjects, then the party has violated its duty to bargain in good faith. If a party's insistence on a permissive subject of bargaining does not result in a refusal to bargain in good faith on mandatory subjects of bargaining, no duty has been violated. *Id.* at 179.

bargaining format resulted in that party's refusal to bargain in good faith over mandatory subjects of bargaining.

The "totality-of-the-conduct" approach is the most appropriate way for the Board to resolve bargaining format disputes between parties. As discussed above, this is the NLRB's method for resolving these types of disputes. Unlike with audio recording in *Bartlett-Collins Co.,* the NLRB has not determined hybrid or virtual bargaining formats to be so chilling upon collective bargaining to require a *per se* substantive rule declaring in-person as the *per se* bargaining format. Also, as discussed, Amicus believes that hybrid and virtual bargaining formats to be tools that serve to facilitate bargaining by making it more accessible and that Petitioner's concerns about virtual or hybrid bargaining are insufficient to justify the creation of a *per se* rule. As such, the Board's responsibility to encourage successful collective bargaining is best served by this approach. *Springfield Educ. Ass'n*, 290 Or at 231.

Additionally, this Board has employed its "totality-of-the-conduct" approach to resolve disputes involving similar logistical disagreements. In *Tri-County Met. Trans. Dist. of Oregon*, the Board evaluated the parties' bargaining conduct to determine if either had committed an unfair labor practice by engaging in conduct intended to delay or frustrate the collective bargaining process by disagreeing over the application of public meeting law to bargaining, delaying setting bargaining dates, cancelling bargaining sessions, providing unsatisfactory bargaining rooms, and requesting proposals prior to bargaining sessions. The employer in this dispute asked the Board to "recognize a new *per se* violation to be applied [when] the parties disagree over a legal question." *Id.* at fn. 16. The Board declined, stating that it believed the "totality-of-the-conduct approach" was a better tool to assess bad faith than adding it to the

"limited group" of *per se* violations. *Id.* Instead, the Board considered the factors described above and found that neither party had engaged in bad faith bargaining. *Id.* at 21–23.

II. The Board should not issue a declaratory ruling on Petitioner's questions because Bay Area Hospital has not joined the Petition for Declaratory Ruling and has not agreed to be bound by the Board's decision.

ORS 183.410 gives the Board the power to issue a declaratory ruling "with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it." However, the Board should not issue a declaratory ruling on this Petition. Firstly, as ORS 183.410 states, the Board only has power to issue a declaratory ruling based on "any rule or statute enforceable by it." There is currently no enforceable "rule or statute" that declares in-person bargaining the default bargaining method; Petitioner, in its first question, is effectively asking the Board to create this new rule, which cannot be done through a declaratory ruling.

The Board should also not employ its "totality-of-the-conduct" approach for determining bad faith bargaining to issue a ruling on Petitioner's first question. The Board must rely on the facts stated in a petition or in a stipulated statement of alternative facts (OAR 137-002-0040(2)). Because of this, the Board has previously found that questions involving factual disputes or requiring a developed evidentiary record are ill-suited for declaratory rulings. *In the Matter of the Petition for Declaratory Ruling filed by the County of Jefferson, State of Oregon*, Case No. DR-003-17 (Dec. 11, 2017). The "totality-of-the-conduct" approach requires a fact-intensive inquiry into the parties' specific actions during the course of bargaining to determine if either violated its duty to bargain in good faith. Because BAH has not joined the Petition and has not submitted a stipulated statement of alternative facts, the Board can only consider the facts presented by Petitioner, which makes this question inappropriate for a declaratory ruling.

Additionally, the Board has been generally "cautious about issuing a declaratory ruling where the other affected party has not joined the petition or agreed to be bound by a ruling on the petition." *In the Matter of the Petition for Declaratory Ruling filed by Tri-County Metro. Transp. Dist.*, Case No. DR-002-19 at 2 (Sept. 30, 2019). Though Amicus' discussion has centered on Petitioner's first question, Amicus offers this precedent as grounds for the Board to deny issuing a declaratory ruling on both of Petitioner's questions.

III. Conclusion.

For the foregoing reasons, Amicus asks the Board to reject Petitioner's request to create a substantive rule declaring in-person bargaining to be the default bargaining format, such that a party's refusal to bargain in-person is a *per se* violation of its duty to bargain in good faith. In the alternative, Amicus asks the Board to decline Petitioner's request for a declaratory ruling on Petitioner's first question because a declaratory ruling is not the appropriate method for resolving it. Amicus also asks the Board to decline Petitioner's request for a declaratory ruling on both questions because BAH has neither joined nor agreed to be bound by any declaratory ruling issued.

Respectfully submitted this 15th day of July, 2022.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on the date below, I filed by electronic mail a true and accurate copy of the foregoing Brief of Linn County as *Amicus Curiae* with the following:

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I further certify that, on the date below, I served a true and accurate copy of the foregoing Brief of Linn County as *Amicus Curiae* by electronic mail on the following:

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