

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-035/036-20

(UNFAIR LABOR PRACTICE)

TRI-COUNTY METROPOLITAN
TRANSPORTATION DISTRICT OF
OREGON,

Complainant,

v.

AMALGAMATED TRANSIT UNION,
DIVISION 757,

(UP-035-20) Respondent.

RULINGS,
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

AMALGAMATED TRANSIT UNION,
DIVISION 757,

Complainant,

v.

TRI-COUNTY METROPOLITAN
TRANSPORTATION DISTRICT OF
OREGON,

(UP-036-20) Respondent.

Jeffrey P. Chicoine and Matthew Tripp, Attorneys at Law, Miller Nash Graham & Dunn LLP, Portland, Oregon, represented Tri-County Metropolitan Transportation District of Oregon.

Whitney Stark, Attorney at Law, Albies & Stark, LLC, Portland, Oregon, represented Amalgamated Transit Union, Division 757.

On November 4, 2020, Tri-County Metropolitan Transportation District of Oregon (TriMet) filed an unfair labor practice complaint against Amalgamated Transit Union, Division 757 (ATU) (Case No. UP-035-20). The complaint alleged that ATU violated ORS 243.672(2)(b) by unlawfully including proposals containing permissive subjects of bargaining in its final offer over TriMet's objections and, thus, conditioning settlement of the parties' successor agreement on bargaining over these permissive subjects. TriMet requested that this Board expedite the complaint under OAR 115-035-0060.

On November 6, 2020, ATU filed an unfair labor practice complaint against TriMet (Case No. UP-036-20). The complaint alleged that TriMet violated ORS 243.672(1)(e) by engaging in direct dealing and surface bargaining. ATU opposed TriMet's request to expedite Case No. UP-035-20, requested that the Board consolidate the cases, and indicated that if we did so, ATU would agree to an expedited process that would allow the parties adequate time to prepare for a hearing.

On November 12, 2020, this Board issued a letter ruling consolidating and expediting the cases for hearing and decision. On November 16, 2020, we issued a prehearing order, which set forth the parties' agreed upon schedule. Also on that date, TriMet filed an amended complaint. Both parties filed timely answers to the complaints. The parties filed pre-hearing briefs on December 7, 2020. The parties jointly submitted a stipulated statement of issues and facts on December 11, 2020. The Board conducted a hearing on December 11, 14, 15, and 17, 2020, which included oral closing arguments. The record closed on December 17, 2020.

The issues as stipulated by the parties are:

1. Did ATU violate ORS 243.672(2)(b) by unlawfully including proposals containing permissive subjects of bargaining in its final offer over TriMet's objections and, thus, conditioning settlement of the parties' successor agreement on bargaining over these permissive subjects?

2. Did TriMet violate ORS 243.672(1)(e): (1) through the totality of its conduct during bargaining for a successor contract; or (2) by engaging in direct dealing with ATU-represented employees?

RULINGS

Neither party has raised any objections to this Board's rulings.

FINDINGS OF FACT

1. TriMet is a public employer under ORS 243.650(20).

2. ATU is a labor organization as defined in ORS 243.650(13) and is the exclusive representative of a bargaining unit of employees at TriMet. ATU bargaining unit employees work in several different TriMet departments, including transportation, maintenance, training, finance, and customer information services.

3. From December 1, 2016 to November 30, 2019, TriMet and ATU were parties to a collective bargaining agreement titled the Working and Wage Agreement (the “2016-2019 WWA”). The parties have had numerous prior agreements.

4. Kimberly Sewell is TriMet’s Executive Director of Labor Relations and Human Resources. Laird Cusack is TriMet’s Labor Relations Director and chief negotiator in successor bargaining.

5. Shirley Block is ATU’s President. Krista Cordova is ATU’s Labor Relations Coordinator. Whitney Stark is ATU’s outside counsel. Block, Cordova, and Stark shared responsibility for leading negotiations for ATU in successor bargaining.

TriMet’s Maintenance Department and Apprenticeship Programs

6. TriMet’s Maintenance Department is responsible for maintaining and repairing various types of TriMet equipment, including buses, light rail vehicles, tracks, maintenance of way (MOW) equipment (such as signals), and field fare equipment. Some years ago, TriMet split the mechanics and other employees who are responsible for maintaining its facilities into a separate Facilities Maintenance Department. For ease of reference, we refer to those departments collectively as the “maintenance departments.”

7. Bargaining unit employees in the maintenance departments include service workers, apprentices, journey workers, and assistant supervisors.

8. TriMet has offered apprenticeship programs in its maintenance departments for many years. Broadly speaking, apprentices are TriMet employees who receive a mix of on-the-job training and classroom instruction. They are paid collectively bargained-for wages for both their on-the-job and classroom training. When an apprentice successfully completes a program, the graduating apprentice is eligible to bid for journey worker positions in the maintenance departments.¹

9. TriMet has two apprenticeship programs that are registered with the State of Oregon, which administers apprenticeship programs through the Bureau of Labor and Industries (BOLI). Registered apprenticeship programs in Oregon operate pursuant to ORS Chapter 660 and OAR Chapter 839, Division 11, as well as the National Apprenticeship Act, 29 USC Section 50, and 29 CFR Parts 29 and 30.

¹As explained in more detail below, the parties have had a series of related disputes, including *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Local 757*, Case No. UP-020-16 (2018), *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-019-18 at 9-11 (2019) (*appeal pending*), *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757*, Case Nos. UP-001/003-20 (2020) (*appeal pending*), and the instant case. The hearing transcript from each case was admitted into the record for the subsequent case. For context, we include some of the undisputed findings of fact from the prior cases here.

10. TriMet's registered apprenticeship programs train apprentices in a total of seven journey worker classifications or "occupations."

11. The TriMet Heavy Duty Bus Mechanic JATC program (registered as MA 1061) was approved in 1985 and trains apprentices in two occupations: Heavy Duty Bus Mechanic (a two-year program) and Plant Maintenance Mechanic (a four-year program, in which apprentices also earn their Limited Maintenance Electrical License through Portland Community College).

12. The second apprenticeship program is the TriMet Rail Maint/Vehi/Mech/Tech JATC program (MA 1078). It was registered in 1987 and trains apprentices in the following disciplines: Rail Vehicle Maintenance Tech (a three-year program); Traction Substation Tech (a three-year program); Overhead Catenary Tech (a three-year program); Signal Tech (a three-year program); and Field Equipment Tech (a two-year program). In this matter, the parties commonly referred to the Signal Tech program as the MOW program.

13. In Oregon, the State Apprenticeship and Training Council (SATC) approves and oversees registered apprenticeship programs. The SATC is a nine-member council comprised of the Commissioner of the Bureau of Labor and Industries and eight members appointed by the Governor. The SATC has the authority to develop, administer, and enforce statewide apprenticeship program standards for the operation and success of apprenticeship programs in the State of Oregon.

14. Each registered apprenticeship program in Oregon is overseen by its own Joint Apprenticeship Training Committee (JATC). An apprenticeship program's JATC is the policymaking and administrative body responsible for the operation and success of the program. Each TriMet JATC is comprised of eight members, including four TriMet management representatives and four non-management employee representatives. TriMet's Director of Training serves as the chair of the JATC.

15. Upon successful completion of a registered TriMet apprenticeship program, the apprentice receives a certificate of completion from the SATC and a journey certificate (colloquially referred to as a journey card) from the BOLI Apprenticeship and Training Division. The card identifies the card holder as a journey worker who has completed a registered apprentice program. A journey card is recognized by employers nationally as evidence that the worker possesses journey-level skill in the apprenticeable discipline. A journey card is therefore perceived as a valuable occupational qualification.

16. During the on-the-job training, apprentices perform work in the apprenticeable discipline under the supervision of journey workers. There are three models of apprenticeship programs: time-based, competency-based, or a hybrid of both. TriMet's apprenticeship programs currently use a time-based model. Under that model, apprentices must complete a specified number of on-the-job training hours to graduate from the program. Until then, after apprentices gain sufficient training and experience, they may perform their assigned tasks with less direct supervision, but journey workers still must review and sign off on their work. Under a competency-based model, after apprentices demonstrate competency in a particular work area, the

apprentices may work independently (*i.e.*, without supervision by journey workers) in that work area.

17. The TriMet JATC could modify various aspects of its apprenticeship programs, including by switching from a time-based model to a competency-based or hybrid model. However, because the apprenticeship programs are registered, such changes are subject to SATC/BOLI approval.

18. Generally, a registered apprenticeship program must meet state and national standards, and SATC/BOLI exercises oversight to ensure that registered programs meet those standards. However, a JATC may request SATC/BOLI approval for a “modification” of (*i.e.*, or deviation from) the applicable standards. In some respects, TriMet’s registered apprenticeship programs exceed state or national standards.

19. TriMet operates the classroom training component of its apprenticeship programs in conjunction with Mt. Hood Community College. Apprentices register for required classes through the Mt. Hood Community College web portal and receive credit from the college for their completed coursework. Apprentices do not pay tuition or fees for this college coursework. An apprentice who completes a TriMet apprenticeship program typically will have completed all but a few (commonly 9 to 12) of the credits necessary to receive an associate’s degree from Mt. Hood Community College.

20. The ATU bargaining unit includes bus maintenance trainers, whose job duties include providing classroom instruction to registered apprentices.

21. Once an apprentice graduates from a TriMet apprentice program, the apprentice is qualified for a journey position in the discipline. TriMet conducts “sign-ups” at which journey workers, including new graduates, are eligible to bid for posted journey worker positions in their classification. Sign-ups typically occur twice a year, with one sign-up occurring in the spring and the other in the fall. If a newly graduated journey worker successfully bids for a position, the journey worker’s classification seniority begins to accrue on the date that the journey worker begins working in that classification.

22. Until the 2012-2016 WWA, the almost exclusive path for an employee to become a journey worker was to begin as a service worker, next become an apprentice, and only then, upon completion of the apprenticeship program, become a journey worker. Under the 2016-2019 WWA, TriMet and ATU agreed that TriMet could hire up to half of its apprentices annually from outside TriMet.

23. Until the 2012-2016 WWA, TriMet also drew its journey workers exclusively from the ranks of TriMet’s own apprenticeship programs (except on a few occasions, when ATU agreed to the external hiring of journey workers). Under the 2012-2016 WWA, the parties agreed to a new provision, Article 3, Section 1, Paragraph 10, which states: “Notwithstanding any other provision of this Agreement, the District shall have the right to hire up to five (5) journey workers annually from outside the District to fill positions in any apprenticable discipline within the District.” The

parties refer to journey workers who are hired from outside of TriMet's apprenticeship programs as "outside journey workers."

24. Service workers are entry-level, frontline employees who get buses ready for runs or provide service on transit platforms. The opportunity to participate in one of TriMet's registered apprentice programs is an important feature of TriMet employment that motivates some job applicants to apply for and accept a service worker position. Historically, for service workers, the apprenticeship programs have been the main source of promotional opportunities in the maintenance departments.

25. To become an apprentice, a service worker must first pass a mechanical aptitude test. Historically, TriMet has used a particular brand of mechanical aptitude test called the Bennett Test. Service workers who pass the test are placed on the "Bennett list." Service workers on the Bennett list must wait for an opening in an apprentice program, and then bid into one of TriMet's apprentice programs based on their seniority from their date of hire by TriMet. Over the course of TriMet's history, service workers have typically waited from one to six years for an opportunity to enter an apprentice program.

26. TriMet has not placed any service workers into a TriMet apprenticeship program, or administered mechanical aptitude testing, since about September 2018.² There are approximately 64 employees who have passed the mechanical aptitude test and are waiting for an opportunity to participate in a TriMet apprenticeship program. ATU believes that there are also service workers who want to participate in an apprenticeship program but have not yet taken the mechanical aptitude test.

27. In fiscal year 2018, TriMet's then-Director of Bus Maintenance, Edmund Bennett, determined that TriMet needed to hire a substantial number of journey bus mechanics to meet its then-current bus maintenance needs, and that the shortage of journey bus mechanics would become more pressing because TriMet was required to greatly expand its bus services under legislation referred to as House Bill 2017. House Bill 2017, which took effect on October 6, 2017, created a new employee-paid payroll tax in Oregon.

28. TriMet's Director of Rail Equipment Maintenance, Daniel Blair, determined that TriMet also needed to hire a substantial number of journey rail mechanics.

Related Disputes

29. TriMet filed a prior unfair labor practice complaint on June 29, 2016 (Case No. UP-020-16). In that case, TriMet alleged that, in May 2016, ATU violated ORS 243.672(2)(d) by refusing to approve a "classification seniority list" affecting outside journey workers. TriMet alleged that ATU's conduct violated the parties' 2012-2016 WWA, and therefore, (2)(d). On July 24, 2018, the Board concluded that ATU did not violate the 2012-2016 WWA and dismissed the complaint. In that case, the Board found that, when the parties negotiated the 2012-2016 WWA,

²The most recently placed apprentices graduated or will graduate from their apprenticeship programs at varying dates (depending on the length of the program) between June 2020 and March 2022.

they agreed to defer bargaining over the classification seniority of the new outside journey workers until after the contract was ratified. As of the date of the hearing for these consolidated cases (Case Nos. UP-035/036-20), the parties were still negotiating over how classification seniority should be determined for outside journey workers. In particular, the parties disagree over whether outside journey workers' seniority should be ranked above or below that of apprentices who were working for TriMet at the time the outside journey workers were hired.

30. ATU filed a prior unfair labor practice complaint (Case No. UP-019-18) on August 13, 2018. In that case, ATU alleged that TriMet violated ORS 243.672(1)(g) by hiring more than five journey workers from outside of TriMet in 2018 in violation of Article 3, Section 1, Paragraph 10 of the 2016-2019 WWA. ATU also alleged that TriMet violated ORS 243.672(1)(e) by making a unilateral change to a longstanding practice of not hiring journey workers from outside of TriMet. On December 31, 2019, the Board concluded that TriMet violated ORS 243.672(1)(g) by hiring more than five journey workers annually from outside TriMet to fill positions in any apprenticeable discipline, in violation of Article 3, Section 2, Paragraph 10 of the 2016-2019 WWA. The Board declined to reach the ORS 243.672(1)(e) claim.

Successor Bargaining Before the COVID-19 Pandemic

31. In April 2019, the parties discussed and exchanged emails about reserving dates for successor bargaining in the fall and winter of 2019-2020. On April 2, 2019, Cusack emailed Block, notifying her that he had reserved space for 19 potential bargaining dates, ranging from September 2019 to February 2020.

32. On April 15, 2019, Cordova responded, stating that ATU was available on 10 of the dates offered by Cusack. Cordova also reiterated ATU's request that the parties meet in smaller groups before formal bargaining commenced, and indicated that ATU could meet as early as June.

33. The same day, Cusack and Cordova spoke by phone, and Cusack sent an email to Cordova and other ATU representatives summarizing his understanding of their conversation. Cusack expressed his "concern at the lack of agreeable dates," noting that ATU had agreed to only 10 bargaining sessions over 140 days. Cusack also noted that Cordova had agreed to see if ATU could schedule additional sessions. The parties also agreed that October 10, 2019, would be considered the first day of bargaining, and that the parties would conduct small group meetings before then.

34. On April 16, Block responded to Cusack's email, indicating that ATU was close to voting on three open contracts and that additional dates might free up as a result.

35. That same day, Cusack responded, stating, "I'm really concerned. It seems you are suggesting we only meet 10 times during the first 140 days of bargaining. I originally offered 19 days at Center Street with the idea that ATU would propose additional dates at a facility of your choice. I conveyed this idea to Krista when I gave her the dates. Maybe we should start regular bargaining in the last week of June or probably more realistically, late July so we can get more days scheduled."

36. On June 13, 2019, Cusack sent Block a letter documenting the parties' agreements and issues still in discussion regarding successor bargaining. In relevant part, Cusack reiterated his concern about the number of scheduled bargaining sessions, stating: "I offered 19 dates with rooms at Center Street. ATU accepted the 10 above and suggested that half be at ATU. I have requested that ATU propose alternative dates to hold bargaining at ATU. The current agreed dates would only give us 10 days in the first 140 days of bargaining. Even with a lot of small group work, I don't believe that is sufficient for the level of complexity of our contract. As the District's Chief Negotiator, I'm willing to commit to meet on any day after the start of bargaining on October 10, except actual holidays, and be prepared to bargain on open topics."³ Regarding small group meetings, Cusack indicated that he would be open to more dates in September, and invited ATU to propose some.

37. In his June 13 letter, Cusack also suggested that the parties discuss "full ground rules" for bargaining "so everyone knows how to proceed." Ultimately, ATU declined to establish additional ground rules. Consequently, there was no agreed deadline for the exchange of proposals.

38. On June 27, 2019, TriMet filed a petition for declaratory ruling on scope of bargaining issues before this Board, *In the Matter of the Declaratory Ruling Petition Filed by Tri-County Metropolitan Transportation District*, Case No. DR-002-19 (2019). TriMet's petition sought declaratory rulings on 12 questions, each of which presented the issue of whether the subject of an existing WWA or Supplemental WWA provision is mandatory, permissive, or prohibited for bargaining. The first four questions in the petition related to TriMet's apprenticeship and training programs.

39. On August 13, 2019, the parties held a small group discussion regarding the maintenance departments, including the apprenticeship programs, before formal bargaining over the successor agreement to the 2016-2019 WWA, which would expire on November 30, 2019. Cusack and Block both attended the small group discussion. Over the course of that meeting, Cusack described various potential changes to the maintenance departments, including, but not limited to, the elimination and creation of classifications, and the elimination or modification of the existing apprenticeship programs. (Other changes that TriMet discussed include, for example, the elimination of tool allowances for some journey workers; splitting the service worker classification into three classifications, which would limit service workers' ability to work in different divisions; and removal or modification of existing CBA provisions governing warranty work and subcontracting.) When the parties started discussing the number of journey worker vacancies, Bennett indicated that there is a "pause on the apprenticeship program," but that TriMet "may open that back up." Among other topics, the parties discussed their respective views about the existing apprenticeship programs, as well as potential ways to improve them and address the journey worker shortage. In the course of the discussion, TriMet explained to ATU that it was sharing its plans for the maintenance departments to explain its end goals and get feedback from ATU, and that the plan details were "not set in stone." When ATU raised concerns about TriMet

³The record does not contain a written response from ATU to TriMet's offer to schedule additional bargaining dates. Ultimately, the parties had a total of nine formal bargaining sessions in the 150-day period from October 10, 2019 to March 8, 2020. The parties' correspondence indicates that they agreed to postpone one of the ten scheduled sessions from February 27, 2020, to March 12, 2020, because of their pending unfair labor practice litigation, Case Nos. UP-001/003-20.

eliminating the bus mechanic training program, TriMet responded that it “may do a small apprentice for bus, but that is still [a] work in progress.”

40. On August 30, 2019, the Board held a hearing on TriMet’s petition for declaratory ruling. On September 30, 2019, this Board “decline[d] to issue a declaratory ruling” on the 12 questions presented by TriMet’s petition. Describing TriMet’s attempt to seek a determination of its bargaining obligations as “laudable,” the Board nonetheless declined to issue a ruling on the petition, in part because the “purposes of [the Public Employee Collective Bargaining Act (PECBA)] would be better served” if the parties attempted to resolve the scope of bargaining issues through bargaining. *See In the Matter of the Declaratory Ruling Petition Filed by Tri-County Metropolitan Transportation District*, DR-002-19 at 3. The Board noted that TriMet had not submitted any proposals outlining specific proposed changes to the existing contract provisions at issue, and that the parties had not yet exchanged proposals or commenced successor bargaining, and thus the petition appeared premature. *Id* at 2-3.

41. The parties generally agreed to determine in advance which articles of the WWA would be discussed at each bargaining session, so that each party could bring the appropriate bargaining team members and subject matter experts.

42. On October 10, 2019, the parties initiated formal bargaining over the successor agreement to the 2016-2019 WWA.

43. At the October 10 initial bargaining session, the parties exchanged some initial bargaining proposals, including TriMet’s proposals on Article 1, 2, and 3, and ATU’s proposals on Articles 1, 2, 3, 9, and 10.

44. After the parties discussed preliminary matters, Cusack described each of TriMet’s proposals. Article 1 contains generally applicable provisions regarding matters such as representation rights, grievance and arbitration, discipline, vacations, holidays, and benefits. TriMet proposed approximately 11 substantive changes to Article 1, including modifying the continuation of service provision to reduce employee eligibility for benefits, limiting holiday pay to employees who work or are on paid leave status the day before or after a holiday, extending the probationary period for new hires from 120 days to 180 days, and creating a promotional probationary period of 90 days.

45. Article 2 contains provisions applicable to Transportation Department employees, who are primarily bus and rail operators. Operators are scheduled through various “boards.” Operators who are regularly assigned to a particular route work on a “fixed route board.” Operators who fill in when a regular operator is absent work on an “extra board.” TriMet proposed approximately nine changes to Article 2. Most significantly, TriMet proposed substantially changing how the bus extra board works; reducing the number of operator sign-ups to three per year; and merging the boards for two rail yards into one (so that TriMet could require an operator to work at either location).

46. TriMet also proposed substantial changes to Article 2, Section 1, Paragraph 9, which is the provision that defines the scope of ATU bargaining unit work. Under the 2016-2019 WWA, Paragraph 9 states:

“All vehicles on the lines of the District shall be run by Operators should they be operated; and any other type of transportation service with the exception of elderly and disabled (paratransit) service; vehicles traveling between offices, shops, or garages of the District; supply and service trucks of the Maintenance, Facilities Maintenance, and Stores Departments, and delivery trips and necessary pull ins.”

TriMet proposed replacing that existing language with the following:

“Only buses requiring a CDL driver and providing service to the public on a fixed route of the District will be operated by Bus operators. LRV’s requiring an operator will operated [*sic*] by LRV operators. No other service, including paratransit, will be operated by bargaining unit members.”

47. Article 3 contains some provisions that are applicable to all maintenance employees, include those in the Facilities Department, and some provisions that apply only to specific areas, such as bus or rail maintenance. Article 4 contains additional provisions specifically applicable to Facilities Department employees.

48. Many of TriMet’s proposed changes to Article 3 were generally consistent with the potential changes that TriMet had discussed when the parties met in August. Regarding the apprenticeship programs, TriMet’s proposal stated that TriMet would “maintain the status quo for mandatory subjects of bargaining for employees currently in Apprenticeship positions, until such time as they complete or otherwise leave their program.” TriMet also proposed to strike all of the provisions of Article 3 of the 2016-2019 WWA that address the apprenticeship programs, including Article 3, Section 15, Paragraph 8. Cusack explained that TriMet was “proposing not having an apprenticeship program,” and that if there were no apprenticeship programs, all of those contract provisions would be unnecessary.

49. TriMet also proposed numerous other changes to Article 3, including (1) provisions that would expressly authorize TriMet to mandate overtime; (2) substantial modifications to Article 3, Section 2, Paragraph 1, which would reduce existing employees’ rights related to the filling of open positions; (3) changes that would affect assistant supervisors,⁴ and Cusack explained that TriMet was considering replacing bus and rail assistant supervisors with more non-represented supervisors; (4) eliminating the tool allowance for equipment maintenance and maintenance of way employees, and (5) splitting the service worker classification into three: bus service worker, rail service worker, and facilities service worker. Under the existing system,

⁴In its October 10, 2019, proposal, TriMet proposed amending Article 3, Section 2, Paragraph 8, relating to assistant supervisors, to specify that Paragraph 8 “applies to the Maintenance Sections that decide to use Assistant Supervisors.” TriMet appended a footnote to that proposed language that stated, “A section may decide not to have Assistant Supervisors.”

service workers could bid on positions in different areas; TriMet's proposal would generally eliminate such movement. TriMet also proposed substantially reducing existing protections against the contracting out of bargaining unit work in relation to warranty repairs.

50. TriMet also proposed adding a provision to expressly exclude various types of work on electric or hybrid buses from bargaining unit work and to exempt the contracting out of such work from existing limits.⁵ TriMet is in the process of transitioning to an all-electric or hybrid fleet, and anticipates having an all-electric fleet in 2040.

51. During the discussion about electric buses, Cusack explained that TriMet currently is testing three types of electric buses, but is not sure which type of bus it will eventually purchase. Cusack explained that, until then, TriMet wants to have the maintenance of such buses (including warranty work) done externally and, after TriMet selected a model, TriMet would talk about whether to train TriMet employees on the new bus technology so that some bus maintenance work could be brought back in house. In response, an ATU representative stated that TriMet did not think TriMet employees were "trainable." Bennett described the charging issues that TriMet had with five electric buses, and remarked that the problems were addressed by software engineers supplied by the vendor who wrote new software code to fix the problems, and made a remark to the effect of "this is high quality engineering, writing code." TriMet's October 10 proposal included the following provision, "At the time TriMet determines which new bus technology to adopt and initiates orders for significant numbers of new buses to replace the diesel fleet, the parties will meet to discuss whether this work should be brought in house."

52. ATU also made its first proposal on October 10, 2019. ATU proposed a four-year contract, with four annual wage increases of five percent, as well as an increase in TriMet's contribution to health insurance premiums from 95 percent to 100 percent. In addition, ATU proposed increasing the extended sick leave benefit from \$150 per week to a benefit equal to 60 percent of the employee's base pay.

53. ATU also proposed changes to TriMet's retirement benefits. Specifically, for employees hired after July 31, 2012, ATU proposed that TriMet make a monthly contribution on behalf of each employee of 12 percent of employee base pay (an increase from eight percent, which was the amount non-represented employees received). ATU also proposed that TriMet adopt an early retirement benefit, which would allow employees at any age with at least 30 years of employment to retire with no pension reduction.

54. ATU proposed that TriMet increase its annual contribution to a recreation trust fund from \$55,000 to \$75,000. It also proposed that TriMet revive a child/elder care assistance program, and increase its annual contribution from \$55,000 to \$75,000. ATU also proposed a change to

⁵On October 10, 2019, TriMet proposed to amend Article 3, Section 9 by adding a new Paragraph 5, which would provide, "Notwithstanding the above, the maintenance and repair of the electric propulsion systems, high voltage batteries and connections, and high tech exteriors on electric or hybrid buses has not and will not be done by District employees. This work shall not be counted as part of the District's MAF allotment. At the time TriMet determines which new bus technology to adopt and initiates orders for significant numbers of new buses to replace the diesel fleet, the parties will meet to discuss whether this work should be brought in house."

Article 1, Section 7, relating to vacations, that would allow salaried classifications to be permitted to convert all weeks of vacation each year to use one day or hours at a time, and “shall be considered floaters for end of year payoff.”

55. ATU also proposed increasing “road relief” pay. Road relief is compensation for an operator who starts or ends a run in the field. ATU proposed that road relief would equal the time allocated by the TriMet trip planner plus (a) 25 minutes for operators reporting to a shift in the field, and (b) 10 minutes for operators ending a shift in the field. ATU also proposed that road relief would be considered pay for time worked.

56. ATU also proposed adding five minutes to operator “prep” time, increasing the permitted time from 10 minutes to 15 minutes. “Prep” time is the time between when an operator signs in and when the operator leaves with the coach.

57. ATU also proposed a number of changes to the discipline and grievance provisions in the contract. ATU’s proposals included a requirement that any new rules be developed by a rules committee comprised of three union and three management representatives; a new verbal warning step; precluding certain terminations unless there were two instances of similar suspensions; and precluding the use of warnings for progressive discipline after six months. ATU also proposed new language for the grievance provisions.

58. ATU’s October 10 proposal including a proposal to increase TriMet’s “extended sick leave benefit,” but it did not include a proposal for short- and long-term disability plans. In the course of discussing the extended sick leave provision, Stark noted that ATU had asked for quotes for such plans.

59. On October 31, 2019, the parties held a bargaining session regarding Article 2 (Transportation). TriMet provided ATU with a revised version of its Article 2 proposal. The parties spent a substantial amount of time discussing TriMet’s proposal regarding the “extra board.” The extra board is used to schedule operators who will cover bus routes when regular (or “fixed route”) operators are absent. TriMet currently uses one extra board, and operators may work shifts at varying times of day. TriMet proposed splitting the extra board into AM and PM shifts, referred to as an “AM/PM board” model. TriMet provided some related data regarding extra board operator shifts, which TriMet contended showed that the majority of operators would prefer the AM/PM board model. ATU disagreed with TriMet’s interpretation of the data, and represented that the majority of operators preferred the flexibility afforded by the existing model. ATU proposed that the parties jointly survey the operators regarding TriMet’s proposal so that TriMet could help ensure the questions were neutral. TriMet declined to do a joint survey, so ATU indicated that it would conduct one independently.

60. At some point before the October 31 session, Manager of Service Delivery Steven Callas had asked an ATU bargaining unit member, Mike Arronson, to provide him with factual details about the extra board. Arronson is one of the chief station agents that “runs” the extra board for TriMet; in that role, he determines which routes need coverage due to an operator’s absence or other reasons, such as a bus breakdown. Arronson, formerly a TriMet manager, is very knowledgeable about the technical details of how the extra board operates. He also had prior

experience with an AM/PM model. At some point before the start of bargaining, TriMet asked Arronson to help develop TriMet's proposal to convert the extra board to an AM/PM model, and Arronson did so.

61. TriMet invited Arronson, the chief station agent at the Powell garage and a bargaining unit member, to attend the October 31 bargaining session as a "subject matter expert" on TriMet's extra board proposal. TriMet did not seek ATU's consent or disclose to ATU that it would be inviting Arronson to attend bargaining.

62. When Arronson arrived at the October 31 bargaining session, no one on the ATU bargaining team was aware that he had been invited by TriMet. ATU's bargaining team members were confused by Arronson's presence. When Arronson asked where he should sit, someone on ATU's bargaining team said he should sit with ATU. When the parties caucused, Arronson asked which party he should go with, and he caucused with ATU. ATU's bargaining team included other bargaining unit members who are also very knowledgeable about how the extra board operates, including a station agent and operators.⁶

63. At hearing, Cordova explained that there are different models of AM/PM boards. Decades ago, TriMet used one model of an AM/PM board. Cusack told ATU that Seattle Metro used another model of an AM/PM board. During the October 31 bargaining session, ATU asked TriMet whether it was proposing an AM/PM board like the one TriMet used in the past or the one used by Seattle Metro. Cusack responded that TriMet was proposing neither of those models, but a model suggested by Arronson.

64. The parties also addressed Cusack's questions about ATU's Article 2 proposal, which included increasing "road relief" pay, which compensates operators who are required to start and end their shift in different locations.

65. On November 7, 2019, the parties held an information session (not a bargaining session) and discussed the Maintenance Department. ATU's officers, but not its bargaining committee members, attended. At that meeting, Cusack explained in more detail TriMet's proposed changes to the Maintenance Department, including but not limited to the elimination of the apprenticeship programs. ATU Vice President Jon Hunt explained that, because of the June 2016 amendments to ATU's bylaws, a majority vote of represented employees in the Maintenance Department (not just a majority vote of the bargaining unit as a whole) was necessary to ratify a contract. Hunt expressed his view that it would be difficult to persuade the majority of Maintenance Department employees to ratify a contract with all of the changes described by Cusack, which the Maintenance Department employees would view as significant takeaways without any counterbalancing benefits.

66. On November 14, 2019, Cordova and Cusack exchanged emails about the extra board. Cordova wrote that ATU was "still waiting for information regarding your plans for the proposed am/pm board." Cusack responded, "I'm not sure what else to provide as information. Our AM/PM board is explained in our proposal, probably better than the current system[.]"

⁶When operators bid for schedules, they choose whether to bid for a schedule on the regular fixed route board or the extra board.

Cordova replied that she was confused by the response. She wrote, “As I said then, there are many iterations/understandings of an ‘am/pm board’ just within the room that day: the one TriMet used in the past, the one you saw at Metro, and the one that Mike Arronson suggested to you.”

67. On November 21, 2019, the parties continued collective bargaining. TriMet gave ATU a proposal regarding Article 6 (Customer Information Services), which largely preserved the existing provisions. The parties also broadly discussed issues related to the bargaining unit employees who are referred to as “supervisors” or “white shirts.” Cusack explained that TriMet was in the process of developing proposals that would limit trades and vacation scheduling to address scheduling and staffing issues. The parties also broadly discussed potential ways to address attendance issues.

68. On December 2, 2019, Cusack emailed ATU’s bargaining team a chart showing TriMet’s anticipated changes to classifications in the maintenance departments and the associated new and amended descriptions for these classifications. The email included a chart and draft job descriptions that provided more detail about TriMet’s planned changes to the maintenance departments. For each of the five divisions within the maintenance department (Bus Equipment Maintenance, Rail Equipment Maintenance, Facilities Maintenance, Maintenance of Way, and Field Fare Equipment), TriMet planned to eliminate all of the apprentice classifications. For employees who were currently working in apprentice classifications, TriMet stated that it intended to keep those employees in their respective apprentice classifications (and in the apprenticeship programs) until they complete or leave the program.

69. Broadly speaking, TriMet indicated that it intended to eliminate all of the registered apprenticeship programs, and hire experienced mechanics from the outside instead of training existing TriMet service workers to be mechanics. TriMet would also rename all of the existing journey worker mechanic classifications to “technician” classifications, and in some cases, TriMet would split existing classifications into more specialized classifications. The minimum qualifications for the “technician” classifications would be lower than those for journey worker mechanic classifications; technicians would not be required to have journey cards or journey-level experience. However, the minimum qualifications for technicians would still require some mechanic-related training and experience.

70. TriMet would establish non-registered training programs for technicians in the rail, maintenance of way, and field fare equipment divisions, and corresponding “trainee” classifications.⁷ The minimum qualifications for the new trainees would be substantially higher than those for existing apprentices. Essentially, the training programs would teach new hires who already have some mechanic training and experience how to maintain TriMet’s specialized equipment.

71. TriMet would no longer have bus or facilities mechanic training programs. TriMet would not create a “diesel mechanic trainee” classification because it anticipated that new hires who meet the revised minimum qualifications will need only limited training to perform TriMet-specific diesel mechanic work.

⁷TriMet’s plan for the Maintenance Department, as presented to ATU on December 2, 2019, is described in detail in our order in Case Nos. UP-001/003-20 at 9-11 (Findings of Facts 36-46).

72. On December 5, 2019, the parties continued collective bargaining. They discussed Article 3 (Maintenance). At that meeting, Stark explained that the ATU bargaining team was planning on drafting a counterproposal to TriMet's proposal to eliminate the apprenticeship programs, but in order to do so, ATU wanted to "understand [TriMet's] goal and intentions" and the reasons why TriMet was proposing "so many changes." Cusack explained TriMet's view that, given the constraints of the existing apprenticeship programs, TriMet was unable to hire sufficient numbers of workers who could be trained quickly enough to meet TriMet's needs. Cusack also explained that TriMet was not an educational institution and that the apprenticeship programs were too costly. In response, ATU pointed out that TriMet is a public agency that successfully provided significant job training for many years, and that many TriMet managers went through the apprenticeship program. ATU generally, and Block in particular, also expressed concerns about existing service workers who have been waiting to enter the apprentice programs. Over the course of the discussion, TriMet representatives from the various maintenance divisions discussed their specific concerns about their respective apprenticeship programs. ATU representatives explained the reasons why they believe that the problems would be better addressed by improving, rather than eliminating, the apprenticeship programs, and pressed TriMet to explain why it was "jumping" to elimination "instead of fixing" the programs. During that session, Cusack asked Stark if ATU would not approve a contract if the BOLI-registered apprenticeship programs were eliminated. Stark responded that she was not conditioning the contract on any one item.

73. At the December 5 bargaining session, Cusack stated that there was hazing going on, and Stark responded that it was an insulting comment. TriMet's bargaining notes indicate that Ruffin explained, in response to the hazing allegation, that the outside hires did not know how to maintain TriMet's specialized equipment, like fare boxes, and that the outside hires were asking the inside journey workers to train them, but the inside journey workers were not getting paid to train the outside hires. At hearing, Cusack testified that one or two outside hires had complained that they were ignored by TriMet journey workers, and that Cusack had asked Bennett to attend to this problem.

74. On December 12, 2019, the parties continued collective bargaining. At that session, they discussed multiple topics, including subcontracting of maintenance work, the grievance procedure, discipline, and representation rights (including implementation of amendments to PECBA that were enacted under legislation commonly referred to as House Bill 2016). TriMet offered an Article 1 proposal regarding discipline that eliminated Step 2 of the grievance process and proposed other changes. The parties also discussed side letters to the 2016-2019 WWA, and exchanged lists of side letters that they were respectively moving forward. The parties also discussed the bargaining schedule. Several times, Stark explained that ATU wanted the parties to make "substantive counterproposals," or to engage in "more substantive back and forth" regarding existing proposals, in the upcoming bargaining sessions.

75. On December 19, 2019, the parties met again for a bargaining session that included discussion of the maintenance departments. ATU presented a proposal concerning the maintenance departments. Stark explained that she had not drafted contract language, but that the proposal was "a concept of what [ATU] would agree to." ATU proposed that all current service workers be provided an opportunity to enter an apprenticeship program after passing the Bennett test or, if

they decline the opportunity, receive a one-time \$5,000 bonus. Once all current service workers had the opportunity to enter an apprenticeship program, TriMet could establish different minimum qualifications and hire from the outside for journey positions. In order to protect promotional opportunities for ATU workers, ATU also proposed that there be a trainee program for all journey worker classifications, including bus mechanic, and that TriMet limit its hiring of outside journey workers to the number of TriMet employees who enter the apprenticeship program.⁸ ATU also proposed that TriMet retain JATC and BOLI standards for the training programs, so that employees would receive certification when they completed their training. However, ATU noted that BOLI has “non-apprentice” programs, and that the TriMet training programs would not have to be “apprenticeship” programs. ATU’s proposal also included provisions to address qualification and retention issues raised by TriMet. ATU’s proposal also addressed seniority and current journey workers. Specifically, ATU proposed that outside journey workers hired before the date of the signing of the successor WWA go behind any apprentices in the program at the time they were hired. ATU also proposed removing requirements that journey workers stay in their current disciplines; increasing pay for journey workers assigned to train apprentices and temporary journey worker training assistants; and bringing all journey workers up to the highest journey worker pay rate.

76. After a caucus, TriMet responded to ATU’s proposal with a document entitled, “A Concept for Discussion, Not a Proposal 12-19-19.” TriMet’s concept outlined a two-stage process for transitioning to its plan. The first stage addressed conditions while there were still employees on the “Bennett list,” *i.e.*, current service workers who had already passed the Bennett test but had not yet participated in an apprentice program. Current employees on the Bennett list would be offered (in seniority order) a “trainee opportunity” in bus, rail, MOW, or fare equipment (but not facilities maintenance), or \$2,500 to “waive the opportunity.” The training programs would not be BOLI-registered apprenticeship programs. The bus trainee program would be temporary, and offered only to those current employees on the Bennett list. Additionally, all current apprentices would be converted to trainees, and TriMet could use outside classes, instructors, and training organizations to provide the training. TriMet could hire journey workers in an open, competitive process “so long as all trainees are hired to a journey worker position when they graduate.” Seniority for outside journey workers would be set below anyone in a trainee class at the time they were hired.

77. The second stage of TriMet’s concept addressed what would happen after all employees on the Bennett test list had started in a trainee classification. At that point, TriMet would implement the new trainee positions in REM, MOW, and fare equipment (with the higher minimum qualifications described above), and cease offering bus mechanic trainee positions. Hiring for all TriMet positions would be based on minimum qualifications and conducted as open, competitive recruitments. If there were equally qualified internal and external candidates, the internal candidate would be hired. Seniority for all employees (including outside hires and graduating trainees) would start on the date of hire into the classification.

⁸In response to questions from TriMet, Stark explained that ATU was not necessarily proposing that TriMet hire one apprentice for every outside hire, and that its intent was to propose that TriMet maintain the apprenticeship programs.

78. The parties engaged in a substantive discussion to address ATU's questions about TriMet's concept. For example, ATU asked TriMet whether current service workers who were not already on the Bennett list would have the opportunity to enter a training program under the first stage of TriMet's concept. Cusack indicated that it was something TriMet might consider, but it could depend on how many more service workers would be added to the list.

79. Stark also asked why TriMet was opposed to BOLI registration of the training programs. Sewell responded by asking why ATU wanted BOLI oversight. Stark explained that ATU's reasons include BOLI's safety requirements, accountability, and the value of a journey worker certification. Stark also asked about the status of TriMet's other maintenance-related proposals under its concept. Cusack explained that TriMet had focused on the apprenticeship programs, but indicated that some of those proposals could "go away" if the parties reached an agreement about the apprenticeship programs.

80. After a caucus, ATU responded to TriMet's concept. Stark explained that ATU wanted there to be bus and facilities maintenance training programs because one of ATU's priorities is to ensure there will be training available for employees. Stark also explained that ATU believed it was "critical" for BOLI and JATC to be "involved." Stark also explained that ATU had not yet heard from TriMet the reasons why it was so opposed to BOLI/JATC involvement, and that ATU believed that TriMet could address its needs by modifying the current apprenticeship program requirements while still working within the BOLI/JATC system, and that ATU would support those efforts.

81. Cusack responded that TriMet would take a caucus to consider ATU's position once TriMet had heard everything. Stark responded that she had given ATU's complete response. Cusack replied, "So we are at impasse?" Stark replied, "I'm not saying at impasse," but that if TriMet did not offer something "really big," then ATU could not agree to the concept described by TriMet. Stark also asked TriMet to explain what "the barriers to BOLI" are.

82. Cusack asked whether there was anything else the parties could discuss at that time. Stark responded that ATU was willing to discuss service workers. She explained that ATU understood the reasons for TriMet's proposal to split the service worker classification into three separate classifications but was concerned about restricting service workers' mobility, and that ATU had ideas for an alternative proposal that would address both parties' concerns. Specifically, ATU suggested that TriMet, rather than splitting the classification, require service workers who bid into certain positions that require more training to stay in those positions for a longer period, such as two or three years.

83. After a caucus, Cusack informed ATU that TriMet liked the idea of restricting certain service workers' movement for two- or three-year periods, as a potential alternative to splitting the service worker classification. The parties agreed that ATU would further develop that concept by drafting a list of service worker positions that would be restricted.⁹

84. Cusack then stated that BOLI-registered apprenticeship programs were "just as much a non-starter" for TriMet as for ATU. Stark asked why. Cusack replied that the registered

⁹ATU did not subsequently provide TriMet with a list.

apprenticeship system was developed for a multi-employer system, TriMet wanted to develop its own training standards and tailor training to specific needs, and there were administrative overhead costs associated with BOLI registration. The parties then discussed dates for their next bargaining session.

85. On December 30, 2019, Cusack emailed a letter to Block that addressed the parties' bargaining over TriMet's apprenticeship programs. In the letter, Cusack wrote, "TriMet understands that ATU is conditioning a contract settlement on the continuation of the apprenticeship programs." Cusack also wrote, "TriMet declines to bargain over the permissi[ve] subjects of bargaining that it has identified and struck in its proposals." Cusack attached a "listing of the classifications and associated language that TriMet believes is permissive and over which TriMet declines to bargain." The attachment listed all of the existing "apprentice" classifications, as well as the non-registered apprentice "laborer/track trainee" classification, and all of the existing contract language related to apprenticeships and training programs in Article 3 (Section 1, Paragraphs 10 and 11; Section 7, Paragraphs 1-11; Section 11, Paragraphs 1-3; Section 15, Paragraphs 1-9; and Section 21, Paragraphs 1-4), and Article 4 (Section 5, Paragraph 1). In addition, Cusack wrote, "TriMet will bargain how current apprentices can continue in the programs until they journey out or leave, but that can be bargained in a side letter to memorialize our mutual understandings about those employees."

86. For the health benefit plan year starting January 1, 2020, fully insured rates for the HMO (Kaiser) plan went up, and the Regence rates went down. Pursuant to ORS 243.756, TriMet maintained the status quo by passing those rate changes through to the employees. Specifically, according to Cusack, "during open enrollment for 2020, ATU members saw the full amount of the Kaiser medical increase passed through to employee premium and the Regence employee medical premiums go down."

87. On January 6, 2020, Block sent Cusack a letter regarding the parties' bargaining over TriMet's apprenticeship programs. Block disputed Cusack's statement that ATU was conditioning bargaining on a permissive subject, maintaining that ATU was lawfully expressing its legal position, providing relevant information, and explaining its bargaining position.

88. On January 10, 2020, the parties continued collective bargaining. They primarily discussed Article 1 proposals, including proposals regarding representation rights and implementation of HB 2016, the grievance procedure, and discipline. ATU provided a revised version of its Article 1 proposal. That proposal continued the same proposed amendment to Article 1, Section 7 relating to end-of-year payoff for vacation that ATU had proposed in its October 10, 2019, proposal. TriMet provided a revised list of side letters that it was electing to move forward. Regarding the grievance procedure, the parties generally agreed that they needed to address a grievance backlog, but they had different ideas about how to expedite the grievance and arbitration process. TriMet proposed eliminating the second step of the parties' existing two-step procedure; under TriMet's proposal, the parties would move from Step One to arbitration. Cusack explained that, in TriMet's view, the second step was "a paper chase" that did not resolve much. Cusack indicated that TriMet was open to some aspects of ATU's proposal (such as different procedures for different types of grievances), but not others, such as multiple arbitrations with the

same arbitrator on the same day. The parties agreed that ATU would make a revised grievance procedure proposal based on the parties' discussion.

89. At the January 10 session, Cusack also asked for ATU's feedback regarding TriMet's October 10 proposal regarding Article 2, Section 1, Paragraph 9, which defines and preserves bargaining unit work for operators. ATU asked why the parties could not retain the existing provision. Cusack stated that TriMet's proposal anticipated a future when "non-transit vehicles will people pick up" on TriMet lines. Cusack explained, for example, that Uber might sometimes pick people up, and that TriMet wants to provide van shares. TriMet intended its proposal to make clear that ATU operators would not operate such non-transit vehicles, and that ATU members drive only buses or trains. Cusack also explained that TriMet's proposal anticipated a future with driverless transit vehicles (such as light rail trains), which would not require operators. ATU objected to bargaining over merely potential future changes without adequate information, and suggested that the parties bargain over such changes if and when they were occurring. TriMet noted that the parties have disputed the interpretation of Paragraph 9, and ATU responded that the parties had resolved those disputes. At the end of the discussion, ATU agreed to make a counterproposal.

90. The parties also engaged in an extensive discussion of their respective proposals regarding disciplinary standards.

91. On January 13, 2020, the parties continued collective bargaining. TriMet provided ATU with a benefits proposal. The front page of the proposal stated that there were "[n]o proposals" in Article 10, the article that relates to the TriMet pension plan. Under the expired contract, TriMet agreed to contribute 95 percent of premiums for two different plans, a PPO plan and a more expensive HMO plan. TriMet proposed capping its premium contribution for both plans to 95 percent of the PPO plan (*i.e.*, the employee premium share for the HMO plan could be greater than 5 percent). TriMet's proposal also reduced the amount of, or eligibility for, certain stipends paid to some retirees to help pay for health care costs, and eliminated life insurance benefits for retirees under TriMet's defined contribution plan (*i.e.*, most future retirees). TriMet also continued to propose a revision to the "continuous service definition," which would reduce employees' medical leave rights and benefits. TriMet also proposed eliminating the benefits coordinator provision, under which TriMet had paid ATU \$1,500 per month "for the purpose of employing and paying a benefits coordinator whose sole duty will be to assist and advise individual employees with insurance-related problems."

92. The parties also discussed short-term disability benefits. TriMet proposed ending its existing extended sick leave benefits on January 1, 2023, when Oregon's new paid family medical leave law will take effect. Stark explained that the new law would require only 12 weeks of paid leave, and that ATU wanted TriMet to provide a short-term disability benefit that would start after the 12 weeks required by law. Cordova noted that ATU had asked TriMet to obtain a quote for such a benefit, and Stark stated that she thought TriMet would make a proposal on short term disability. Cusack responded something to the effect of, "Absenteeism is a problem. We are not going to make a proposal on short term disability so they can miss more time." Stark reiterated ATU's request that TriMet obtain quotes for short- and long-term disability benefits, and Cusack agreed to do so.

93. After a break, ATU expressed disappointment in TriMet's proposal because it represented only "takeaways." ATU also noted that TriMet did not respond to ATU's proposal to reinstate a child and elder care benefit that TriMet used to provide. The parties also discussed potential labor management committees regarding benefit issues, and Cusack agreed to email a description of his idea to ATU.

94. On January 23, 2020, the parties held another bargaining session. ATU provided TriMet with an Article 6 proposal (regarding customer service and public affairs employees). Cordova explained the proposal, which accepted some changes proposed by TriMet and countered with others, such as an increased training premium, a night shift differential, and uniform costs.

95. TriMet gave ATU multiple proposals. Regarding Article 1, TriMet made revised proposals regarding its hours of service policy and the term of the successor agreement.

96. TriMet also made additional proposals regarding Article 2. Most significantly, TriMet made a new proposal to impose various limits on how many employees in various "white shirt" classifications could take vacation at the same time. Cusack stated that the limits were needed because work was not being done. ATU representatives suggested that the problem stemmed from an insufficient number of employees, and asked TriMet to provide documentation of the alleged problem. ATU also expressed concern that TriMet's proposed limits would prevent employees from using all of their accrued vacation.

97. TriMet also gave ATU some information related to road relief (which is part of Article 2), and TriMet made a verbal counterproposal to ATU's road relief proposal by offering to increase pay for every "relief point" by \$2. Stark and other ATU representatives contended that the \$2 increase was not sufficient to adequately compensate operators.¹⁰

98. TriMet made a new proposal regarding Article 4, which applies to Facilities Maintenance employees. TriMet's proposed revisions to Article 4 generally reflected its plan to reorganize the maintenance departments and end the apprenticeship programs, including the facilities maintenance mechanic program. Cusack explained that TriMet had determined that the majority of facilities maintenance work did not require a license to perform electrical work, and that TriMet was creating a non-licensed facilities technician classification. TriMet's proposal struck all apprenticeship-related provisions. Cusack indicated that if ATU wished to make an alternative training proposal, TriMet would discuss it.

¹⁰The record indicates that the road relief issue had been the subject of wage and hour litigation between the parties and negotiations that preceded successor bargaining.

99. Additionally, TriMet proposed striking all of Article 4, Section 2, Paragraph 1,¹¹ and a portion of Article 4, Section 3, Paragraph 6. Cusack explained that TriMet proposed modifying Paragraph 6 because some maintenance employees had objected to being assigned to work at a different garage. ATU's representatives explained that ATU agreed such assignments were permitted under the existing contract language, and that TriMet's proposed revision was unnecessary to address the issue.

100. TriMet also proposed new Article 4 provisions regarding overtime and callout. TriMet also proposed ending a mediated grievance settlement agreement, dated March 5, 2007, regarding Plant Maintenance Techs and Plant Maintenance Mechanics.

101. Regarding wage rates, which are addressed in Article 9, TriMet proposed two across-the-board increases: 2.4 percent on December 1, 2019, and 2.2 percent on December 1, 2020. TriMet Director of Budgets and Grants Nancy Young-Oliver stated that TriMet's fare revenues were down for multiple reasons, revenues from the employer payroll tax were down by \$7.5 million, and that passenger revenue was down because of fare evasion and underperforming revenue from Hop cards. She also noted that TriMet was required to use HB 2017 funds, also referred to as "STIF" funds, for new service.

102. TriMet also proposed striking all of Article 9, Section 2, Paragraph 1, which primarily requires TriMet to offer open positions in new bargaining unit jobs and classifications to existing TriMet employees, "if they can meet the qualifications of the job."

103. TriMet also proposed some revisions to the parties' existing Memorandum of Agreement (MOA) regarding Portland Streetcar operators. The City of Portland operates the Streetcar service, but TriMet employs the Streetcar operators, maintenance employees, and controllers. Under the existing MOA, existing light rail operators and mechanics could essentially bid into open streetcar operator and mechanic positions by seniority. TriMet proposed changes that would give TriMet discretion to choose among applicants. TriMet also proposed adding a new provision that would authorize TriMet to "choose to remove any District employee from streetcar at any time and return them to their prior work location."

104. TriMet also proposed a new MOA that would establish two labor management committees. A "benefits committee" would review and discuss potential options for union benefits plans. A "scheduling committee" would review operator work schedules and discuss potential improvements.

105. During the January 23, 2020, bargaining session, Jonathan Hunt, ATU Vice President and Assistant Business Representative, explained that ATU was concerned with the extent to which TriMet's proposals simply struck existing contract language because TriMet did

¹¹Article 4, Section 2, Paragraph 1 states, "It is understood and agreed that in filling vacancies that are not filled by promotion within the Department, preference will be given to employees or laid off employees of the Maintenance or Stores Department. Such vacancies will be posted on all department bulletin boards for five (5) days. If unable to fill the vacancy, it may be filled according to seniority within the District."

not like it or viewed it as permissive for bargaining. Hunt explained ATU's view that TriMet's approach to bargaining was "not effective for a collaborative relationship."

106. On February 4, 2020, TriMet filed an unfair labor practice complaint against ATU, Case No. UP-001-20. TriMet contended that its proposal to eliminate the maintenance department apprenticeship programs (and ATU's proposals regarding those programs) involved a permissive subject of bargaining, and alleged that ATU was conditioning settlement of the parties' successor agreement on bargaining over those proposals, in violation of ORS 243.672(2)(b). On February 6, 2020, ATU filed an unfair labor practice complaint against TriMet, Case No. UP-003-20. ATU contended that TriMet made a unilateral change, in violation of ORS 243.672(1)(e), by externally posting ten job openings for Diesel Technicians while the parties were engaged in successor bargaining. The Board granted TriMet's request for expediting and consolidated the cases for hearing and decision. The Board conducted the hearing on March 2 and 3, 2020.

Emergence of the COVID-19 Pandemic and Subsequent Successor Bargaining

107. On March 8, 2020, Oregon Governor Kate Brown issued Executive Order 20-03, declaring an emergency due to the coronavirus ("COVID-19") outbreak in Oregon.

108. On March 12, 2020, the parties held another bargaining session. At the start of the session, Stark asked to discuss COVID-19 issues. ATU representatives asked questions and raised concerns about some aspects of TriMet's response. ATU also asked TriMet to start communicating first with ATU, particularly regarding issues affecting employees' employment terms. Sewell and Cusack acknowledged that communication was important and should be improved, but disagreed that it needed to discuss all COVID-19 communications to employees with ATU first.

109. ATU then gave TriMet a revised Article 2 proposal. Specifically, ATU countered TriMet's proposal to change the extra board to an AM/PM model by proposing alternative ways to address TriMet's stated concerns. ATU explained that it had surveyed employees regarding TriMet's AM/PM model proposal, and that the majority opposed it. ATU also countered TriMet's road relief proposal; ATU proposed basing road relief pay on the amount of travel time indicated by TriMet's trip planner system.

110. TriMet also gave ATU a revised Article 2 proposal. TriMet withdrew its proposal to create a single rail board; Cusack explained that there had been a change in rail management, and the new rail manager did not want a single board. TriMet continued to propose changing the extra board to an AM/PM model, but withdrew one of the proposed rules that ATU had explained operators objected to (a rule that would have required trades across the AM and PM board to be for full weeks). TriMet provided ATU with more information regarding the reasons why it had proposed changes to the extra board rules. ATU disputed how TriMet was interpreting the information, and represented that the majority of surveyed employees preferred the flexibility afforded by the existing single-board model.

111. After a caucus, ATU made a verbal counter to TriMet's AM/PM board proposal. Stark explained that ATU continued to believe that changing to an AM/PM board would have many negative impacts, but that ATU would agree to a non-contract based pilot project in which employees would be barred from trading into a "pass-up" on the extra board, and potentially a revised pilot project for a second period.

112. The parties then returned to discussing TriMet's proposals. Cusack explained that TriMet wanted to set up a formal conversation between contracts, to address matters that needed to be discussed before bargaining. Cusack again proposed that the parties establish a labor management committee to address operator scheduling. The parties tentatively agreed to that proposal.

113. The parties then discussed TriMet's response to ATU's Article 2 proposals, including the issues of road relief, and operator meal and rest breaks. After a break, Stark explained that ATU heard TriMet's feedback and explained how ATU would revise its Article 2 proposals in response.

114. The parties then discussed TriMet's Article 1 proposal regarding hours of service. The parties also engaged in lengthy discussion of TriMet's Article 1 proposal regarding the Service Improvement Program (SIP), and ATU's earlier proposal on the same topic. In particular, the parties debated when and how SIP complaints (essentially customer complaints) could be used in the disciplinary process, and alternatives to discipline for responding to SIP complaints (such as training or a peer committee). At the end of the discussion, Stark stated that ATU appreciated the SIP information that TriMet provided, and that ATU would consider TriMet's proposal, review its own proposal, and respond.

115. On March 16, 2020, the parties exchanged emails confirming that, due to the COVID-19 pandemic, they would cancel the in-person bargaining session scheduled for March 19, 2020, and instead conduct a brief session by telephone. In an effort to "keep things moving," Stark also emailed Cusack and Sewell ATU's latest Article 1 proposals.

116. On March 19, 2020, the parties conducted a brief negotiation session by telephone. The parties first discussed COVID-19 issues. Regarding successor bargaining, the parties agreed that they needed to prioritize COVID-19 issues. They also agreed that bargaining over the pandemic-related restrictions presented challenges, and discussed how successor bargaining would proceed. Cusack also indicated that he had some information regarding union release time that he would send to ATU for review.

117. Beginning approximately March 23 through December 2020, the parties attended approximately 84 phone meetings outside of successor bargaining to discuss numerous issues regarding operating the transit system during the COVID-19 pandemic. Cusack and Sewell attended on behalf of TriMet, occasionally accompanied by higher-level managers. Block and Cordova represented ATU, occasionally accompanied by an ATU officer such as Hunt. Stark did not attend these meetings.

118. On April 21, 2020, the Board issued a final order in Case Nos. UP-001/003-20, dismissing both parties' claims. Regarding TriMet's claim, the Board found that ATU did not unlawfully condition agreement on bargaining over the apprenticeship program proposals, and did not reach the issue of whether those proposals involved a permissive subject of bargaining. Regarding ATU's claim, the Board concluded that TriMet did not make an unlawful unilateral change because the subject of the change (exceeding a numeric limit on the external posting of mechanic positions) involved a permissive subject (the standards by which the employer fills vacancies).

119. In May and early June 2020, Stark and Cusack exchanged numerous emails regarding implementation of HB 2016, and related Article 1 proposals regarding representation rights. On May 21, 2020, Cusack wrote, in pertinent part, "Could you provide me with your thoughts about how to deal with the employees who are not on full time union release time, but are spending up to 75% of their non-vacation/holiday time doing union business." Cusack questioned whether that amount of time was reasonable under the law. On May 21, 2020, Stark responded that ATU did not believe it was "an efficient use of our bargaining time to rehash how officers previously spent their time. You made a proposal regarding how reasonableness will be accepted moving forward and we agreed to that proposal. Should issues arise, we will address them pursuant to your proposal."

120. On June 3, 2020, a negotiation meeting was conducted by telephone. ATU provided a revised proposal regarding representation rights (part of Article 1). The parties discussed their respective proposals on that topic and implementation of HB 2016. Cusack agreed to send ATU a revised proposal based on the discussion.

121. On June 4, 2020, Cusack emailed Stark TriMet's proposal for the Article 1 provision governing dues deduction. On June 9, 2020, Stark emailed Cusack a counterproposal.

122. On June 7, 2020, Cusack emailed Stark, stating that he was "not sure how to word a proposal or form" regarding union release time, and asked Stark seven questions on that topic. On June 9, 2020, Stark responded. Stark provided substantive responses to some questions, and objected to the remaining questions, contending that the inquiries sought irrelevant information and interfered with activity protected under PECBA.

123. On June 9, 2020, Sewell sent an email to Block, Cordova, and Hunt suggesting that the parties meet to "try for a little earlier" and meet to bargain on June 18, rather than in late June. The parties did not bargain on June 18.

124. On June 24, 2020, the parties held another bargaining session by telephone. The parties discussed bargaining logistics, including switching to video conferencing, and reprioritizing successor bargaining. ATU made written proposals on Articles 1, 9, and 10. It offered an Article 1 proposal with proposals regarding the discipline and grievance provisions of the WWA, including a proposal that made expedited arbitration mandatory for certain grievances. Its proposal on Article 1, Section 7, relating to vacation leave, continued to propose the language it proposed on October 10, 2019, permitting vacation to be considered "floaters for end of year payoff" for salaried classifications. Stark reviewed the proposals that ATU had sent "before

Covid,” and highlighted where ATU had made changes to address TriMet’s concerns or moved off their previous positions.

125. Stark also discussed ATU’s proposal for short- and long-term disability benefits. ATU proposed eliminating the extended sick leave benefit and replacing it with a short-term disability benefit and proposed adding a long-term disability benefit. It proposed adding the following language to Article 1, Section 9, Paragraph 4:

“b. TriMet shall provide a short-term disability coverage to all employees in the bargaining unit that provides a minimum of 60% of pre-disability earnings for a benefit period of 6 months that provides coverage for all non-occupational accident or sickness, including maternity leave.

“h. TriMet shall provide and administer a long term disability policy and pay for 50% of the costs to employees who may elect to purchase it that provides coverage if employees are partially or totally disabled due to a covered physical disease, injury, pregnancy, or mental health condition.”

126. Stark reiterated that ATU needed TriMet to cost out the proposed disability benefits, and Cusack indicated that he would do so.

127. The parties then turned to TriMet’s June 24 proposals.¹² TriMet gave ATU a revised Article 9 proposal, which reduced its proposed wage increases to 1.8 percent on December 1, 2019, and 0 percent in 2020. Nancy Young-Oliver, TriMet Director of Budget and grants, was unable to attend the bargaining session because she was attending the meeting of the TriMet Board of Directors. Cusack presented the proposal, and said that TriMet reduced the wage proposal due to changed circumstances. Cusack also explained TriMet’s view that 1.8 percent was close to the expected change in the consumer price index, and that ATU employees are already well compensated compared to other jurisdictions.¹³ Cusack also indicated that TriMet was anticipating layoffs in 2021.

128. Cusack reviewed TriMet’s June 24, 2020, Article 9 proposal. Cusack explained that TriMet wanted a separate agreement regarding the apprenticeship classification, which would apply until all of the existing apprentices graduated. Cusack stated that depending on when the parties settled the WWA, the parties “may not need to include the bus maintenance apprentices October,” because all of the existing bus apprentices would graduate by October 2020.

129. Cusack also noted there is a new “bus battery electric technician” that TriMet anticipated needing to hire before the end of the contract term. He stated that he would send the job description soon.¹⁴ He also stated, “We aren’t intending to hire very many, but will hire some.”

¹²These proposals are dated June 25, 2020, but were provided to ATU on June 24, 2020.

¹³TriMet’s non-represented employees also received no wage increase in 2020.

¹⁴The record includes no evidence that Cusack provided ATU with a job description for the “Battery Electric Bus Technician” classification, or that ATU requested one.

130. Cusack explained that he was proposing moving all provisions regarding longevity increases and tool allowances from Article 3 to Article 9, and clarifying that anything applicable to the journey worker classifications would apply to the new “technician” classifications. Cusack also indicated that TriMet was withdrawing its proposal to cease paying the tool allowance to light rail mechanics. Cusack also noted that ATU had not made proposals on the new trainee classifications that TriMet was creating in the maintenance departments.

131. The parties confirmed that ATU was expecting TriMet to send ATU a revised proposal regarding Article 1 representation rights and implementation of HB 2016, and that TriMet intended to do so within the next few days.

132. Cusack then reviewed TriMet’s June 24, 2020, proposals on Articles 1, 2, 3, 4, and 6, and the Portland Streetcar MOA, and identified changes from the previous versions. Regarding health care benefits, TriMet revised its proposal to return to the status quo of TriMet covering 95 percent of the premiums for both the PPO and HMO plan options. In its Article 1 proposal, TriMet did not incorporate ATU’s proposed change to Article 1, Section 7 respecting vacation benefits. TriMet withdrew its earlier proposal to change the “continuous service” definition to reduce employee eligibility for benefits while on leave.

133. Cusack also noted that TriMet’s proposal included the elder/child care benefit that ATU had proposed. Cusack explained that TriMet would pay for this benefit with savings it anticipated from changing the extra board to the AM/PM model.

134. For Article 2, TriMet agreed to increase operators’ paid preparatory time from 10 minutes to 13 minutes. Cusack explained that this increase would also be paid for with anticipated savings from changing the extra board. TriMet added a new proposal regarding reassignment when operators’ runs are cancelled. TriMet increased its road relief proposal from \$2 to \$3 and added new relief points.

135. Cusack also reminded ATU that TriMet was anticipating layoffs, and asked ATU to make a proposal if it wanted any changes to the existing 2016-2019 WWA provisions.

136. TriMet’s proposals regarding Articles 3 and 4 remained largely the same. Cusack explained that TriMet was removing all references to “journey worker” from the WWA because that classification name would no longer exist. After Cusack finished reviewing all of TriMet’s June 24 proposals, the session ended.

137. Also on June 24, 2020, the Board issued an order on reconsideration in Case Nos. UP-001/003-20. The Board further explained and adhered to the conclusions in its final order. Per TriMet’s request, the Board also addressed whether the continuation (or elimination) of TriMet’s apprenticeship programs involves a mandatory or permissive subject of bargaining. The Board concluded that the subject of BOLI registration of an apprenticeship program is a severable component and a permissive subject of bargaining. In so holding, the Board noted that “TriMet must bargain over any impact of deregistering from BOLI on mandatory subjects of bargaining before implementing such a decision, including but not limited to the impacts on existing service workers.” Case Nos. UP-001/003-20 at 6 (Recons Order). The Board also “conclude[d] that the

subject of TriMet's proposed elimination of the parties' longstanding apprenticeship program has a greater impact on employees' terms and conditions of employment than on TriMet's management prerogatives," and "is, therefore, mandatory for bargaining." *Id.* at 10.

The Parties' Bargaining After the Reconsideration Order

138. On July 6, 2020, Stark emailed Cusack to state that ATU was prepared to bargain on July 23. Stark suggested that the parties address Article 1 issues. Stark noted that ATU had sent a proposal on discipline and grievance matters and "have not heard back," and that the parties had exchanged benefit proposals that "have not been responded to." Stark also invited Cusack to suggest other topics and propose additional dates.

139. Cusack responded on July 9, agreeing to bargain on July 23. Cusack also expressed disappointment that ATU had offered only one date for bargaining, and one that would occur a month after the June 24 session. Cusack wrote, "It's almost like ATU doesn't want to bargain." He also wrote, "In regard to the proposals that you have not heard back about, TriMet thought we might actually discuss our proposals in a bargaining session." He indicated that he would send ATU a revised Article 3 proposal in light of this Board's June 24 order. He also offered five additional dates for bargaining in July.

140. Later that day, Stark responded, indicating that July 23 would not actually work for ATU, and she proposed bargaining on July 29 and 31.

141. Over the following weeks, Stark and Cusack exchanged multiple emails about bargaining over the apprenticeship programs. In relevant part, on July 13, Cusack wrote,

"We can discuss whether the currently proposed trainee jobs remain as trainees or instead are titled as "unregistered apprentices" and what trainee jobs there will be. TriMet is not interested in pursuing an unregistered apprenticeship, which is why we continue to propose trainee classifications. Consistent with ERB's ruling, TriMet will discontinue *any* BOLI certified apprenticeship programs after the current apprentices graduate or leave the program. If ATU is interested in unregistered apprenticeship classifications, please make a proposal and provide some detail about what that entails.

"If ATU wishes to make proposals regarding the change of apprenticeship to trainee or the proposed end of training classifications in Bus Maintenance or Facilities, it would be helpful for those to be sent as well." (Emphasis in original.)

142. On July 24, Cusack wrote,

"Given ERB's ruling on BOLI registration being permissive and TriMet's clear decision to remove BOLI as soon as possible, I also need to know ATU's proposal for future trainee classifications; trainee or unregistered apprentice? If it is the latter, what exactly would the components be to such a system. Please note, TriMet would prefer REM and MOW trainees who are trained, evaluated and supervised by the

current TriMet non-represented trainers with curriculum developed by TriMet with our outside educational partners.

“* * *

“I also wanted to ask about Tuition reimbursement. When I have raised this before both you and Jon Hunt have been less than positive about the topic; to put it kindly. Both REM and MOW believe there are community college classes which would both prepare and demonstrate that an employee had the potential to be successful in the LRV Technician Trainee and MOW trainee classifications. I haven’t worked on the details of this because of seriously negative reaction it elicited. If ATU indicates it’s interested in tuition reimbursement, I’d put some effort into what it would look like.”

143. Stark responded on July 27. Regarding tuition reimbursement, she wrote, “ATU continues to believe that it offers little, if any, value to employees and that TriMet’s insistence on a tuition reimbursement in replace of an apprentice program shows a significant misunderstanding of what provides an actual benefit to employees. That said, we can discuss that further on Friday.”

144. On July 29, 2020, bargaining negotiations continued. TriMet made a proposal regarding Article 1. As it had in its January 10, 2020, and June 24, 2020, proposals, TriMet did not incorporate ATU’s requested change to Article 1, Section 7 to enhance vacation benefits by allowing certain vacation hours to be considered “floaters” for “end-of-year payoff.”

145. The parties discussed the term of the agreement. TriMet continued to propose a two-year contract term. Cusack stated that federal COVID-19 relief funds from the CARES Act would be used up by September 2020, and that TriMet expected problems to continue after that. Stark responded that ATU a two-year contract could be acceptable if it were basically a rollover with wage increases, but not a two-year contract with the amount of changes TriMet was proposing. Stark questioned whether TriMet was taking into account the legislative change that permits using STIF funds for existing services. Cusack said that TriMet was aware of how STIF funds could be used, but would be short funds every year even with those funds. Cusack again raised the issue of anticipated layoffs and asked ATU to make sure layoff language was what it wants. During the session, Cusack asked why ATU was asking for five percent wage increases; Stark responded that ATU was not ask pessimistic as TriMet on the effects of the pandemic. She stated that ATU was willing to come down from five percent, but would not agree to 1.8 percent. After a caucus, Stark stated that ATU would move to four percent.

146. The parties discussed the Article 1 proposals regarding representation rights and implementation of HB 2016. Stark noted on several occasions that the parties were getting close to agreement on aspects of the contract language.

147. The parties also discussed at length ATU’s revised proposal regarding grievance and arbitration procedure and discipline standards. They discussed promotional probation, deleting outdated language, whether the contract should contain a list of conduct that constitutes cause for immediate suspension or discharge, and precluding the use of written warnings, reprimands and suspensions for progressive discipline after 12 months. In response to the last item, Cusack stated that TriMet’s response was “no.”

148. The parties also discussed the use of SIPS complaints, particularly unsubstantiated complaints, in discipline, and discussed a compromise in which unsubstantiated SIPs could be used for evidence (such as credibility) but not for discipline. The parties also discussed ATU's proposal requiring mandatory expedited arbitration for discipline. Cusack explained TriMet's reluctance to agree to expedited arbitrations if there were more than one hearing per day. Stark and Cordova stated that ATU tried to address TriMet's concerns, and repeatedly asked Cusack to make a counteroffer or propose language that would address those concerns.

149. The parties also discussed ATU's vacation proposal. Cordova explained that ATU was attempting to put MOU language in the contract to make "permanent" salaried employees' ability to get vacation payout. With regard to mini-run operators, Stark explain that ATU believed very few people would be affected by ATU's vacation proposal.

150. The parties also discussed ATU's proposal regarding short- and long-term disability. Cusack noted that he owed ATU a quote for the proposed disability plans. In the course of this discussion, Cusack explained his belief that if a plan provided more disability pay, more people would take disability leave, and remarked to the effect of "more people will take time off because it's a good benefit." Stark responded that it was her understanding that disability benefit plans require individuals to demonstrate they are qualified for the disability pay, and questioned why TriMet would want employees who qualify for disability benefits to continue working. Cusack said that he would research what the screening process is for disability benefits.

151. The parties also discussed other benefits issues, including the employee assistance program and benefits for retirees.

152. The parties also discussed reviving the elder/child care fund. Cusack explained that TriMet would agree to fund a benefit for a two-year term with the ability to audit the contract. The parties also discussed TriMet's proposed Article 1 seniority provision. Cusack explained he intended the language to apply prospectively, after apprenticeship programs ended. Stark indicated that seniority was a difficult conversation without settling maintenance seniority.

153. The parties also discussed TriMet's proposed changes to Article 9, Section 2, which is titled, "New Jobs and Classifications." Cusack explained that TriMet wanted to be able to hire individuals who meet the minimum qualifications and are the most qualified. Cusack also represented that elsewhere it had proposed that TriMet would hire a TriMet employee over an outside candidate "if everything else is the same."

154. Cusack explained that TriMet was moving the tool allowance provision (and others) for organizational purposes only, and that TriMet was no longer proposing to take the tool allowances away from anyone. Cusack also noted that TriMet was applying the tool allowance to "the new battery/electric bus technician as well."

155. The parties briefly discussed ATU's proposals regarding retirement benefits, and agreed to incorporate the existing eight percent contribution rate for (for non-represented employees) for the defined contribution plan into the 2016-2019 WWA for ATU employees.

156. The parties discussed the wage schedule for various classifications. Cusack asked whether ATU was going to make a wage proposal for the new technician classifications. ATU clarified that its proposal was for the new “technicians” to be paid the same as “journey worker” classifications, and also proposed that the “electric bus technician” would be paid the same as “diesel mechanic.” Stark also stated that ATU would make a proposal for apprentices (referred to by TriMet as “trainees”).

157. The parties also discussed TriMet’s plan to split service workers into three classifications, and its related proposal. Stark said she thought that ATU’s idea about the alternative of locking an employee into a position for period of time had been well-received. Cusack explained that the problem with keeping one classification is that it required a CDL, and not all service workers need a CDL. Stark said that the parties could discuss how to address that, but did not want TriMet to return to a split. Cusack acknowledged that the parties had discussed ATU’s alternative, but reiterated that it did not solve the CDL issue. Stark said the parties would need to “rebargain” this issue at the following session, which would address Articles 3 and 4.

158. Cusack asked if ATU would withdraw its proposal to continue BOLI registration of the apprenticeship programs. Stark said that ATU would not withdraw its proposal to continue BOLI registration of the apprenticeship programs, but that it was not conditioning settlement of the agreement on BOLI registration.

159. Cusack asked for ATU’s thoughts about calling in a mediator. The parties generally agreed mediation would be helpful.

160. Stark and Cusack agreed that it would be helpful to clarify where the parties were on the various issues, and identify where they were close versus far apart. Stark indicated that she believed the parties were close on some of the topics discussed that day. Cusack agreed, and noted that they could continue corresponding to work out details. Cusack also noted that he owed ATU some information, including information regarding the short-term disability benefit that ATU sought.

161. On July 30, 2020, Cusack emailed Stark regarding the status of bargaining, particularly addressing the parties’ respective positions regarding the apprenticeship programs and their scope of bargaining disputes. Regarding the apprenticeship programs, Cusack stated,

“To avoid any misunderstanding, TriMet refuses to bargain or consider any continuance of BOLI apprenticeship beyond the time it takes for current employees to complete or leave the programs. Any future hires of Trainees will not be in a BOLI system. TriMet further demands that ATU withdraw its BOLI proposal. Additionally, TriMet refuses to discuss or bargain any proposal, concept, or idea that BOLI would continue to have any role in our training program for new hires or future training.

“You have told me often that I don’t understand how badly ATU perceives TriMet’s position that there will be no more BOLI apprenticeship. I would say in return that

TriMet's resolve to end the BOLI's participation is absolute and will not change. Not even our "not a proposal" contemplated the continuance of BOLI participation. "My concern is that if ATU persists in raising BOLI and other permissive subject like hiring limitations, we won't be able to bargain about realistic settlement options."

Stark responded,

"ATU shares your concern that this contract is unlikely to be settled given TriMet's proposals. As you know, ATU believes that TriMet's positions are unrealistic, unfair to employees, and include significant takeaways to employees. Unless you are willing to remove all of the takeaways from your proposals, including the elimination of apprenticeship programs, we agree we won't be able to bargain about realistic settlement options."

162. Also on July 30, 2020, Cusack emailed Arronson (the ATU-represented chief station agent), copying TriMet manager Callas, but not anyone from ATU. Cusack wrote, "ATU had said there was a change in language which would eliminate most pass ups[.] I think it was something about no trades into pass ups by extra board operators, but the notes are a bit sketchy[.] * * * If you are on the board can you make trades prior to being assigned work?" Arronson responded early on July 31, stating, "Yes you can trade days off on the board which could create pass ups. What is not allowed would be trading operators off the extra board with operators on the board that create pass ups. That is the language change I remember." Cusack responded to Arronson and asked, "Do you have a number I can call to talk with you right now?"¹⁵

163. On July 31, 2020, bargaining continued. The parties first discussed their Article 2 proposals, which relate to operators in TriMet's transportation department. The parties discussed their proposals related to operators' hours of service and noted they were close to agreement.

164. The parties also discussed their proposals regarding operator "prep time." ATU had previously proposed increasing prep time to 15 minutes. Cusack noted that TriMet's July 31 proposal included a counteroffer that increased operator prep time from 10 to 13 minutes.

165. Cusack noted that TriMet's proposal regarding road relief remained the same as before. Stark explained that ATU revised its proposal to address TriMet's concerns, including by clarifying that it would not create overtime scenarios. Stark also explained the reasons why ATU preferred its proposal, which based road relief pay on the operator's wage rate, over TriMet's proposal, which paid road relief at a flat rate. The parties debated their respective proposals, and whether TriMet was legally obligated to compensate operators for road relief time. Cusack noted that TriMet had proposed the labor-management committee on operator schedules in part to address road relief.

166. Callas invited Arronson, the ATU-represented chief station agent, to the July 31, 2020, bargaining session, which was conducted via a video platform, to answer questions

¹⁵ATU was not aware of this exchange between Cusack and Arronson until it received TriMet's exhibits for this matter.

about the technical details of TriMet's extra board proposal. Callas was on the TriMet bargaining team. Arronson spoke via telephone from Callas's office. Other individuals attending the session appeared by video, but Callas and Arronson dialed in by telephone, and thus Arronson's presence was not visible to others. At some point, ATU asked a question, and Callas stated that Arronson was with him and asked Arronson to answer ATU's question. Arronson's presence surprised ATU representatives when he spoke. Arronson made several comments during the session about the operation of the extra board.

167. In several instances, ATU asked a question about TriMet's proposal, and Arronson answered it. There were also some extended exchanges between Arronson and other bargaining unit employees on ATU's team, wherein Arronson had different interpretations of proposed contract language or different views of how proposals would affect TriMet's operations or the operators' working conditions. Cordova testified that normally, if bargaining unit employees involved in table bargaining had different views, ATU would caucus, to avoid appearing divided or undermining its own position in bargaining. At times, Block and others on ATU's team responded to the exchanges with Arronson by stating that ATU needed to discuss the matter in caucus. Arronson did not caucus with either party at this bargaining session.

168. Regarding TriMet's proposal to split the extra board into AM/PM boards, Stark noted that TriMet had not responded to ATU's last proposal, which ATU believed would make changing to the AM/PM board model unnecessary. Cusack reiterated that TriMet believed the change would reduce operators' need to make trades and save TriMet money, which TriMet could transfer to road relief. Cusack contended that TriMet's data showed that the majority of operators would prefer the AM/PM model, and ATU contended that its survey demonstrated that the majority of operators did not want to switch, and that TriMet's prior experience with an AM/PM board demonstrated that it did not work.

169. The parties moved on to discuss other details of the Article 2 proposals. When the parties discussed the layoff provision, Cusack reiterated that ATU should review it and make a proposal because he believed there were going to be layoffs.

170. The parties also discussed TriMet's proposed revision to Article 2, Section 1, Paragraph 9, which addressed the scope of ATU's bargaining unit work. TriMet's proposed language remained the same as it was in TriMet's October 10, 2019, Article 2 initial proposal. Sewell represented that TriMet's intent was to clarify ambiguous contract language, not to open the door to more contracting out of ATU bargaining unit work. ATU representatives explained why they believed TriMet's proposed language would reduce the scope of ATU's bargaining unit work and permit more contracting out. Specifically, they pointed out that TriMet replaced "all lines of the District" with "fixed route," and "all vehicles" with "buses," and that the rail provision anticipated driverless vehicles. Sewell represented that TriMet was working on a revision to address ATU's concerns.

171. The parties then discussed the remaining Article 2 issues, including TriMet's proposals to change the number of operator sign-ups and impose vacation limits. After a caucus, ATU explained that it would agree to certain aspects of TriMet's proposal if TriMet agreed to drop

some aspects of its own proposal and agreed to some aspects of ATU's proposals, including ATU's prep time and road relief proposals.

172. After a lunch break, the parties discussed TriMet's maintenance proposal (Articles 3 and 4). Stark asked Cusack to review its July 24 proposal again because ATU's maintenance representatives were not at the July 24 session, and he did so. In relevant part, Cusack identified various provisions of the existing WWA that TriMet struck and would not bargain over on the ground that they were permissive subjects. Cusack stated that it was TriMet's intent to hire for various positions from the outside, and to replace certain assistant supervisors with non-bargaining unit supervisors. He reiterated TriMet's reasons for proposing to split the service worker classification into three new ones. Regarding layoffs, Cusack stated that TriMet was not interested in allowing someone to bump back into a prior classification.

173. Regarding the contracting out section of Article 3, Cusack explained TriMet's operational reasons for striking the warranty work provisions, and also contended that they are "permissive." Cusack also explained TriMet's reasons for proposing to Paragraph 5, which if added to the WWA, would expressly state that ATU bargaining unit employees "will not do the maintenance and repair of the electric propulsion systems, high voltage batteries and connections, and the high tech exteriors on electric or hybrid buses," and provided that the contracting out of such work would not count against the cap on contracting out imposed by a different provision of the WWA. Cusack asserted that TriMet lacked the expertise and facilities to perform that work, and that the electric buses would be on warranty for a long time. Cusack stated, "Down the road, once we figure out which buses to buy, then at that point we will have a discussion as to what can be brought in house." He also stated that mechanics would continue to work on the parts of those buses that are "like the diesel fleet," and acknowledged that "is ATU work."

174. Cusack reiterated TriMet's intent to eliminate the BOLI registered apprenticeship programs. He indicated that if, at some point, ATU wanted to have an unregistered program or trainee program, the parties could have that discussion.

175. ATU representatives reacted strongly to TriMet's maintenance proposal, expressing their belief that TriMet was taking away significant rights and benefits for maintenance employees and "doing away with 40 years of bargaining." Stark stated that TriMet was proposing many takeaways without offering anything in exchange. Cusack responded that he believed that bargaining would be better if ATU identified what the "price is." The parties debated the merits and impacts of TriMet's proposal. Hunt explained that ATU members in transportation and other departments wanted the contract settled, but that TriMet's maintenance proposal was a "poison pill" that would lead to interest arbitration. ATU requested a caucus, and ATU later informed TriMet that they would not return from caucus.

176. The same day, on July 31, 2020, ATU sent a written letter to the Oregon Employment Relations Board requesting assignment of a mediator pursuant to ORS 243.712(1).

177. On August 4 and 5, 2020, Cusack and Stark exchanged a series of emails. Cusack asked ATU to explain whether its December 19, 2019, proposal regarding apprenticeships was its current proposal, and if so, to address various contract language details. In response, Stark

stated that “ATU is not prepared to bargain with TriMet about anything related to maintenance or Articles 3 or 4 outside of mediation,” and addressed Cusack’s questions by reiterating that ATU’s December 19, 2019, proposal was a concept proposal and “never intended to replace specific contract language.” Stark also expressed her view that “it could be beneficial to schedule a call to discuss whether we can make any bargaining progress prior to our scheduled mediation dates, and what issues to address on which dates of the currently scheduled mediation,” and asked Cusack to contact her if he was “interested in having that call.” Cusack responded, “Yes, I intend to use this time between to make progress.”

178. On August 11, 2020, Cusack sent Block a letter stating that TriMet was declining to bargain over 33 categories of provisions in ATU’s proposals for Articles 1, 3, and 4, contending that they all involved permissive subjects of bargaining. Most of the objected-to provisions consisted of contract language to be carried forward from the parties’ existing WWA. TriMet also objected to multiple aspects of ATU’s December 19, 2019, concept proposal regarding the apprenticeship programs, which TriMet understood to be ATU’s current proposal.

179. On August 16, 2020, Cusack emailed ATU to forward quotes for short- and long-term disability plans. Cusack asked ATU to identify which plan options it intended to propose, or to provide descriptions and quotes for the plans ATU intended. Stark responded on August 31. Regarding the short-term disability (STD) plan quotes, Stark asserted that the quotes were pricier than they needed to be, in part because the plans would provide benefits for one year (versus three to six months). Stark also questioned whether the quotes were based on the assumption that, if such a plan were offered, more employees would participate, and disputed the validity of that assumption. Stark also wrote, “There are numerous ways to provide a meaningful short and long term disability to its employees that are more cost effective than this, such as with voluntary plans, or a fully insured plan of a limited amount with the option of an employee to buy up.” She indicated that ATU would obtain its own quotes, but also asked TriMet to request additional plan options from its preferred broker.

Regarding the long-term disability (LTD) quotes, Cusack noted that the LTD plans included a “minimum enrollment” requirement. Stark responded, “ATU proposes Group LTD Plan 23 from the choices presented, however, in reviewing these policies they also appear to require a minimum participation and that the employer contribute 100 percent of the policy (unless we are reviewing that incorrectly). As stated in our proposal below, ATU is agreeable to a LTD plan that is made available to employees and for which they contribute 50 percent of the premium. We did not see that as an option in the quotes TriMet had prepared. These plans also seem significantly limiting compared to what we believe are available from LTD providers.”

180. On September 2, 2020, Stark responded to Cusack’s August 11, 2020, letter regarding the parties’ scope of bargaining disputes. Stark expressed ATU’s view that TriMet’s approach, *i.e.*, contending that 33 existing provisions of the WWA are permissive, was counterproductive to bargaining. Stark also responded to each objection. In some instances, ATU agreed to withdraw objected-to provisions. In other instances, ATU maintained that the objected-to provisions involve mandatory subjects of bargaining. And in other instances, ATU contended that TriMet could not simply strike (or demand that ATU strike) the existing contract language,

and that if TriMet wished to remove provisions from the existing WWA, TriMet first needed to bargain over the impacts of such changes on mandatory subjects.

181. On September 2, 2020, Cusack emailed ATU representatives, stating, “We had some discussions about an alternative to the AM/PM board.” Cusack then briefly described the alternative approach, and stated, “I’ve talked to both Steve [Callas] and Mary [Hill] about it, but Arronson has been out so haven’t run it by him.” Cusack represented that this alternative would be “much simpler because it uses the current system.” He also wrote, “I wanted to send this so you could share it with your group when you are putting your Article 2 proposal in writing tomorrow. Don’t consider this an official proposal yet because it needs some work, but if your group has input or ideas, we would like to hear them.”

Mediation with the State Conciliator

182. The parties held mediation sessions on September 3, 10, 17, and 23, 2020. On or about September 1, ATU made a revised proposal regarding meal and rest break periods and restroom facilities, and an Article 2 package proposal.

183. On September 3, TriMet made a revised Article 1 proposal regarding SIP complaints. Specifically, TriMet added a provision addressing how unsubstantiated complaints could and could not be used in disciplinary matters.

184. TriMet also made a revised Article 2 proposal. Among other revisions, TriMet withdrew its proposal to change the extra board to an AM/PM board model. TriMet’s proposed replacement language for Article 2, Section 1, Paragraph 9, regarding the scope of ATU bargaining unit work (the “lines of the District” provision), remained the same.

185. Also on September 3, ATU made a revised Article 1 and benefits proposal. In the margin, ATU noted that that TriMet had not provided a response to ATU’s proposed revisions to Article 1, Section 7, which addressed paid vacation for salaried employees and certain mini-run operators. ATU also withdrew or modified other aspects of its benefits proposal. For example, ATU withdrew its proposal that TriMet increase its share of health benefit premiums from 95 percent to 100 percent.

186. ATU also gave TriMet a counterproposal regarding SIP complaints. ATU proposed language precluding TriMet from disciplining employees based on unsubstantiated complaints, but provided that TriMet could use “unsubstantiated complaints of a similar nature as evidence in credibility determinations between complainants and operators or of past operator behavior.” ATU also proposed that complaints would be removed after 12 months.

187. On September 8, ATU made a proposal for a pilot project to trial converting the extra board to an AM/PM board model.

188. On September 8, TriMet made a proposal regarding its track trainee program. On September 9, TriMet made a mediation proposal regarding maintenance (Articles 3 and 4) that was generally the same or substantially similar to its preceding proposal.

189. On September 17, ATU gave TriMet a concept apprenticeship proposal. In this proposal, ATU expressed its concerns about TriMet's plan to change the title of "journey worker" to "technician" and "respectfully ask[ed] that TriMet revisit" that issue. Regarding the apprenticeship programs, ATU proposed the following:

- For current apprentices, ATU (like TriMet) proposed to maintain the status quo.
- For current helpers and service workers, ATU proposed that they be provided an opportunity to enter a training program "as status quo with current programs," after passing a mutually agreed on qualifying test. Employees who declined the opportunity would receive a one-time \$4,000 bonus. Employees who left the program would have the right to return to their former position, but with a loss of seniority (with a limited exception for personal hardship).
- After opportunities were provided to current employees, TriMet would establish minimum qualifications and hire from the outside. All journey worker classifications would have a training program, including bus mechanic, but the facilities maintenance training program would no longer include electrical licensure. "All Trainee programs shall meet the minimum standards for nationally or state certified competency-based model for the specific program. All Trainee programs shall provide minimum in-class hours for competency-based model for the specific program, for which TriMet shall ensure they receive course credit through a local college for the classroom hours." TriMet would retain a joint committee to "provide oversight" to the training program, and employees would receive certification upon completion of training. The hiring panel for outside hires would include representation from the union members of the joint committee. The training program would "include new product training in order to maintain in-house ability to perform maintenance work."
- Regarding hiring outside hires into current journey worker or "technician" classifications, ATU proposed that TriMet would have the right to hire from the outside, provided that outside hires received at least 12 months of on-the-job training (unless the joint committee agreed to an exception), and so long as TriMet maintained apprenticeship/training programs positions in equal number to outside hires. Outside journey workers/technicians would receive seniority behind any apprentice/trainee in program at the time of hire.
- ATU also proposed increasing training premiums, and bringing all journey workers to the highest journey worker rate.
- ATU's concept proposal was conditioned on TriMet withdrawing all of its other Article 3 and 4 proposals.

190. That same day, TriMet countered ATU's concept. TriMet's concept included the following:

- All current service workers and helpers who passed the Bennett test but have not received an opportunity to become an apprentice, and those hired after the last Bennett test was given, would receive \$2,500.
- Agreeing to ATU's seniority proposal, but with a date of January 1, 2019 and the deletion of the "JATC language."
- TriMet will promote bus, rail, and MOW apprentices to their technician classification immediately, but they would still be required to complete their training.
- Proposing a tuition reimbursement program. In essence, TriMet would reimburse tuition for certain classes that could help employees meet some of the minimum qualifications for the new MOW and rail trainee classifications. TriMet would pay for half of the tuition for specified classes up front, and the remainder if the employee achieved a certain grade. TriMet indicated that the tuition reimbursement would be limited to "15(?) participants at a time."
- The parties would agree that all bargaining regarding the new technician and trainee classifications "is completed."
- The service worker classification would be spilt as TriMet proposed.
- ATU would agree to the end of BOLI apprenticeship, the Bennett test, and the JATCs.
- ATU would agree that "hiring is a permissive subject of bargaining and to the deletion" of Articles 3.1.10, 3.2.3, and 3.21.
- Regarding overtime, TriMet's concept asked whether a "subgroup" could "identify the status quo so both parties know exactly what can be 'clarified' to end disputes as opposed to what 'changes' TriMet would propose?"
- Regarding the "MAF" contracting out fund, TriMet asked, "What is the ATU's proposed exclusion list? Is ATU open to mandatory overtime for items not on the exclusion list?"
- TriMet also asked a series of questions about ATU's proposed increases in training premiums.
- TriMet also indicated that ATU's proposal to bring all current journey workers to the highest level "is a monetary proposal that needs to be discussed with all other monetary proposals," and "equals about 1.25% across the board increase."

191. On September 22, TriMet made a series of Article 2 proposals.

192. Also on September 22, Cusack wrote Stark and other ATU representatives regarding health benefit premium increases. Cusack notified ATU that premium rates for all plans would increase for 2021 plan year, and noted that, "[u]nder the state law, until the parties reach an agreement, TriMet could pass along the full amount of the increase to employees and continue to only pay the 2019, 95% employer rate." He then presented TriMet's "proposal to reach an early agreement for open enrollment":

- "1. TriMet will run the 2021 open enrollment with ATU employees and retirees using the 2021, 95/5% premium split that both parties have proposed
- "2. ATU will withdraw its proposal for retroactive 2020 premiums.
- "3. The topic of benefit premiums will be settled for the new contract."¹⁶

¹⁶Although ATU did not accept TriMet's September 22 offer, TriMet did not pass on the 2021 premium increases to employees.

193. On September 23, ATU countered TriMet's Article 2 proposal, and made a revised road relief proposal.

194. On September 24, 2020, Cusack emailed ATU to forward additional information about long-term disability plan options. He wrote, "Mercer did a survey about the availability of voluntary LTD; minimum participation is required." The attached information consisted of a chart titled, "Market survey of carriers who offer standalone voluntary LTD - 2020." The chart identified 11 carriers that offer "voluntary" LTD plans, and then specified the minimum participation requirements for each voluntary LTD plan.

195. On October 6, 2020, TriMet Senior Labor Relations Representative Sarah Browne met with MOW managers for a recurring meeting between TriMet labor relations and MOW managers to discuss labor relations. Casey Goldin, MOW Manager of Signals, and Keith Bounds, MOW Manager, attended the meeting. Goldin had promoted from a supervisor to MOW Manager of Signals only the day before.

196. After the planned agenda items were discussed, an MOW manager requested that Browne provide an update on the collective bargaining mediation with ATU. Browne indicated that the parties were at a "standstill," and that TriMet was waiting for ATU to declare impasse or agreement by TriMet's General Manager's "agreement to declare impasse."

197. Bounds asked, on Goldin's behalf, whether TriMet had "negotiated" about MOW apprentices who want to leave the apprenticeship program and returning to the service worker classification. Browne asked whether this was an individual person or more common in the group of apprentices. Bounds said that there were two or three apprentices out of five that wanted to do this. Browne's notes state, "So Keith raised as an issue for negotiation," and, "Have we thought about letting them out of apprenticeship program and getting seniority they would have if they had graduated."

198. Goldin then explained to Browne his concern that, "if they [some MOW apprentices] don't want to be there," there could be a "negative attitude" issue with the group, and his view that this should be addressed because MOW signals work is "safety sensitive." Browne asked whether this was something that MOW had brought up previously, when working on proposals for Cusack, or was something that came up more recently. Bounds responded that it came up more recently.

199. Bounds told Browne that some MOW apprentices wanted to leave the program based on information he had received from Goldin. At hearing, Goldin testified that he believed some apprentices wanted to leave the program, because he had "overheard" MOW signals apprentices Jason Breedlove, Irving Doctrine, and Robert Baker say that they felt "stuck" in their positions, or something similar, on approximately three to five occasions over the course of two

or three years. Goldin recalled only one such comment with specificity. According to Goldin, Breedlove “basically said he didn’t want to be there but he couldn’t leave because of seniority.”

200. At hearing, Breedlove testified that he had told Goldin that he “felt stuck.” and that he probably had made such a comment on multiple occasions. Breedlove explained that he made such comments as “part of [his] fight for the seniority thing,” referring to ATU’s opposition in bargaining to TriMet’s proposal to place outside journey workers ahead of existing apprentices on the seniority list.¹⁷ Breedlove explained that he “was really upset about the seniority thing,” and he “felt stuck” because he “had to wait to get into the [apprenticeship] program and then they want to hire people to go in front of [him] and [he] couldn’t just leave.” Breedlove further explained that “[l]eaving is not really an option for [him],” because the apprenticeship program involves higher pay and the other advantages of learning a skilled trade.” He also testified, “I’m going to stay regardless even if ten people go in front of me. I’m just unhappy about it.” Breedlove never said that he wanted to leave the apprenticeship program, and he never asked TriMet to allow him to leave the program and retain his service worker seniority.

201. After the labor relations meeting, Browne sent Cusack an email reporting on the October 6 meeting, and described the MOW apprentice discussion as “a suggestion of [Bounds] for proposal to ATU.”

202. Browne and Cusack conferred about how to proceed. They decided that they would go to ATU to share the information provided by the MOW managers, but they believed that they first needed to get the names of the apprentices who would be interested in leaving the apprenticeship program if the parties agreed that they could retain their seniority.

203. Browne asked Bounds to obtain the names of the apprentices, and Bounds delegated that task to Goldin.

204. On October 8, 2020, Goldin met briefly with each signals apprentice, individually, to check their interest in the potential option of returning to their former service worker positions without loss of seniority.¹⁸ Goldin’s understanding of the purpose of the questioning was so that TriMet could see if the apprentices were interested in this option, before taking the issue up with ATU, because ATU would have to agree to the option before it could actually be offered. Goldin essentially asked each apprentice, “If this was an option for you, would you be interested in this option?”

¹⁷Relative placement on the seniority list is a significant issue because journey workers bid for schedules and other terms of work by seniority. As of October 2020, the parties had been bargaining for several years over the issue of whether outside journey workers should be placed ahead of or behind existing apprentices. The parties continued to bargain over this issue during successor bargaining, and it remained unresolved at the time of hearing.

¹⁸Goldin testified that he chose to talk to all the MOW apprentices individually to be, as he viewed it, “equitable.”

205. Goldin also told each apprentice that he would share their responses with TriMet's labor relations, and that TriMet would take it up with ATU. Goldin also told the apprentices that he was sharing "the company's perspective" (referring to TriMet), and that if they were interested in this option, they could also bring it up to ATU.

206. Goldin testified that Lucy Barbosa, Frank Morris, Robert Baker, and Irving Doctrine (all of the MOW apprentices, except Breedlove) responded to his question by saying that their interest in leaving the apprenticeship program depended on how contract negotiations regarding the seniority issue went: if additional outside hires bypassed the apprentices in seniority, they would be interested in the option, but if the outside hires did not bypass them in seniority, then they would not be interested. Goldin testified that Breedlove declined to indicate whether he was interested in the option or not.

207. Baker testified that, when Goldin met with him, Goldin made it sound like it was "possible" for him to leave the apprenticeship program and return to his service worker classification without losing seniority, and asked him for a definite answer on whether he would like to leave the apprenticeship program or not. Baker further testified that he responded by stating, "No, I would like to stay and finish what I started. I do not want to go back."

208. Breedlove testified that shortly after he started work on Thursday, October 8, Goldin called him into a meeting and asked if he was interested in leaving the apprenticeship program. If he was interested, he needed to let Goldin know by Friday, and Goldin would let TriMet labor relations know, and labor relations could "make a deal that I would be able to leave the program." Goldin also told Breedlove that he was going to "talk to all the other apprentices, too." Breedlove also testified, "The problem wasn't that we couldn't leave the program, because any of us can leave the program at any time, but he made it clear that we would be able to keep our service worker seniority as a possible deal, if we were interested."

209. One or two days later, Breedlove filled out an ATU grievance form regarding his October 8 meeting with Goldin. He wrote:

"On 10/8/20 I was approached by Casey Goldin in a private meeting in his office to discuss me leaving the apprenticeship and they'd negotiate with labor relations for me to keep my service worker seniority. I have top seniority in the apprenticeship, yet I was approached second to last of 5 with this empty promise. I'm claiming a grievance on seniority for one. For two, no one else who is currently a journeyman has had such an offer. This is not SOP. Why are we treated differently during a year where the company is trying to rid themselves of the apprenticeships AND we have an ongoing fight for our seniority against one outside hire and, from what I hear 10 additional new hires. I feel bullied and intimidated that management is trying to push me out of something I waited 3.5 years to enter and an additional 25 months in this program. I feel this creates hostility in the workplace."

210. At hearing, Breedlove testified that he was upset about the meeting with Goldin because “we had been in the program two years at that point and we still hadn’t had any of our classroom training. And I know they’re trying to hire people off the street. And they’re fighting them on seniority and if we dropped out then they wouldn’t have to provide training and these people could go—they wouldn’t have to fight for seniority.”

211. Breedlove gave his grievance to ATU representative Joe Ruffin. Ruffin said that the issue Breedlove was raising was not a grievance, and he explained, “It is bigger than a grievance, it is a ULP.” Based on Ruffin’s explanation, Breedlove agreed that they should not actually file his grievance form with TriMet.

212. On Friday, October 9, 2020, Goldin conveyed his understanding of the apprentices’ responses to Browne. Browne testified that Goldin gave her the names of four apprentices, Lucy Barbosa, Frank Morris, Robert Baker, and Irving Doctrine, and it was her understanding that those four apprentices were interested in leaving the apprenticeship program if they could retain their seniority. Shortly after receiving the information from Goldin, Browne relayed it to Cusack.

213. On October 11, 2020, TriMet filed a written declaration of impasse with the Oregon Employment Relations Board.

214. Also on October 11, 2020, TriMet forwarded ATU an estimate of the cost of ATU’s early retirement proposal.

215. On October 13, Browne called Shirley Block and indicated that four of the MOW apprentices were interested in leaving the apprenticeship program if they could retain their seniority.¹⁹ Block asked Browne to send her an email. That same day, Browne emailed Block and wrote:

“The names of the MOW Apprentices who are interested in leaving the apprenticeship program if they can retain the seniority they would have had prior to the accrual of 6 months in the apprenticeship program are as follows:

“Lucy Barbosa

“Frank Morris

“Robert Baker

“Irving Doctrine

“I will let Keith Bounds know that Joe and you will have a discussion about this. The District would agree that they all get their Service Worker seniority back. Hopefully we can reach a mutual agreement.”

Browne then wrote, “The contract language is as follows,” and quoted Article 3, Section 15, Paragraph 8 of the 2016-2019 WWA:

¹⁹Browne testified that she perceived that Block “seemed fine” with the information.

“Upon six (6) months’ accrual in an apprenticeship program, an employee shall forfeit seniority held in the employee’s previous classification. Prior to such six (6) months’ accrual, however, an employee may elect to return to his/her previous classification, whereupon the employee’s seniority held upon return shall be the same as if he/she has remained in the previous classification; this provision may also be effective following six (6) months’ accrual for a particular employee by mutual agreement between the District and the Union.”

216. As of the date of hearing, all five of the MOW apprentices were still in the apprenticeship program. Goldin testified that he hoped the apprentices would stay in the program because the MOW signals group is short-handed.

Final Offers

217. On October 19, 2020, the parties exchanged final offers.

218. TriMet’s final offer included the following:

- It withdrew its proposal to revise Article 1, Section 1, Paragraph 9, regarding the scope of ATU bargaining unit work (the “lines of the District” provision)
- With regard to Article 1, Section 7, it proposed to permit salaried employees to have up to two weeks of vacation paid out at the end of the vacation year.
- It withdrew its proposal to change Article 1, Section 8, Paragraph 1, which limited employee eligibility for holiday pay.
- In Article 1, Section 19, Paragraph 11, TriMet proposed that Service Improvement Program complaints that are not substantiated (a) shall not be used as the basis for higher levels of discipline for future substantiated complaints, but may be used as evidence, such as in determining credibility, and (b) shall not be included in the employee’s record (incorporating ATU’s concepts from its June 24, 2020, proposal).
- In Article 2, it added \$4.00 to road relief payments, and three minutes to operator sign-in time.
- Regarding the maintenance department, the mediation concepts were not incorporated, so TriMet’s proposals regarding Articles 3 and 4 were substantially the same as TriMet’s initial proposals.
- TriMet proposed a separate MOA to transition current employees from the current classifications to the new classification system, which transitions the service workers from the current sole classification into three new classifications, and the current journey worker mechanic and journey worker LRV mechanic into the new technician classifications.
- TriMet also proposed a tuition reimbursement pilot project, “To provide ATU employees with funding to learn the basic concepts necessary for Trainee positions in REM and MOW, and demonstrate an aptitude to be successful in a trainee program[.]” TriMet would pay tuition for up to five classes at PCC, three specified and up to two prerequisites, if needed. TriMet would pay tuition upfront, but employee must maintain C grade to be eligible for pre-payment of the next class. The proposal specifies that only twenty employees may be enrolled in any given school term. The proposal also specifies, “If an employee successfully passes the three required classes and meets attendance, discipline and driver licenses requirements, they may apply for

Trainee vacancies when they are open for recruitment. An internal candidate meeting these requirements will be hired before an external trainee is hired.”

- TriMet proposed that only maintenance sections that decide to do so would have assistant supervisors (*i.e.*, bus, light rail, maintenance of way, and facilities would no longer have assistant supervisors).
- TriMet proposed to discontinue the service worker/helper classification and replace it with three new classifications (bus service worker, REM service worker (non-CDL), and facilities service worker (non-CDL)).
- With respect to bus warranty work, TriMet proposed that TriMet employees “will not do the maintenance and repair of the electric propulsion systems, high voltage batteries and connections, and the high tech exteriors on electric or hybrid buses. This work will not count as part of the District’s MAF allotment. After TriMet determines which new bus technology to adopt and initiates orders for significant numbers of new buses to replace the diesel fleet, the parties will meet to discuss whether parts of this work should be brought in house.”
- In Article 9, TriMet proposed an across-the-board two percent wage increase on December 1, 2019, and proposed no other wage increases for the remainder of contract. TriMet retained the tool allowance and included the battery electric bus technician classification in the list that receives that allowance. TriMet also proposed to contribute 95 percent of the cost of health insurance premiums for both the PPO and more expensive HMO plans. The final offer also states that TriMet would implement the 95 percent premium contribution (what was proposed by both parties), effective January 2021 regardless of the status of negotiations.

219. TriMet’s cost summary included the following costs associated with its final offer: (a) \$10,061,527 for the wage increase proposed in Article 9, Section 3; (b) \$390,000 for the addition of three minutes to operator sign-in time, as provided in proposed Article 2.1.2.a; (c) \$755,114 for the addition of \$4.00 to road relief pay, as provided in proposed Article 2.1.2.g; and (d) \$2,805,352 for implementation of TriMet’s 95 percent health insurance premium contribution on January 1, 2021.

220. ATU’s final offer included the following:

- A three-year contract from December 1, 2019 through November 30, 2022.
- Wage increases of 3.5 percent on December 1, 2020, 3.5 percent on December 1, 2021, and 3.5 percent on December 1, 2022.
- Continuation of TriMet’s 95 percent contribution to health insurance premiums, plus a requirement that TriMet “reimburse employees for the increased cost of health insurance they have incurred since the contract expired.”
- An increase in the extended sick leave benefit from \$150 per week to \$500 per week, and the addition of a “voluntary long term disability policy that would be available to employees after 52 weeks and pay for 50 percent of the costs to employees who may elect to purchase” the policy.
- An increase from \$55,000 to \$75,000 in TriMet’s annual contribution to the Recreation Trust Fund.

- A requirement that TriMet contribute annually to a Child/Elder Care Assistance Program operated by ATU in an amount sufficient to “replenish the fund to \$75,000.”
- A provision allowing salaried employees to convert “all weeks of vacation each year” to “floaters for end of year payoff.”
- Road relief allowance paid at 70 percent of the operator’s base rate calculated “based on the time estimated by TriMet, based on its trip planning estimate system.”

221. On November 2, 2020, Cusack emailed Stark with some questions regarding ATU’s final proposal, and Stark responded on November 5, and Cusack responded on November 13. The relevant parts of this correspondence are summarized below.

Regarding ATU’s proposal that TriMet offer a “voluntary” long term disability plan, Cusack asserted that ATU proposed “a program that doesn’t exist in the marketplace” because “all LTD programs have minimum participation requirements.” Cusack referred Stark to his September 24, 2020, email. Stark responded, “ATU understands that the type of LTD program it requested has a minimum participation requirement, and that it was it intended its offer to convey (e.g. employees can voluntarily participate – it is not a benefit provided across the board by TriMet). If that is not clear, we are happy to amend.” In response, Cusack continued to assert that ATU’s proposal for a voluntary plan was “impossible to implement” because “ATU’s proposal does not require a minimum participation level.”

In ATU’s final offer, it proposed revising Article 3, Section 7, Paragraph 4, to state that all trainee programs “shall meet the minimum standard for a nationally or state certified competency-based, time based hybrid [*sic*] model for the specific program.” Among other things, Cusack requested, “Please provide me at least one example of this type of program for each of the training program(s) you propose require them?”

In relevant part, Stark responded,

“With regard to providing an example, ATU declines to do so because that request seeks work product. I believe that ATU would consider providing that type of information voluntarily if it had any reason to believe that TriMet seriously considering engaging in good faith negotiations to maintain, but improve, the apprentice programs. However, TriMet has repeatedly insisted that its only position is complete elimination of the apprentice programs.”

In relevant part, Cusack responded,

“Our request for an example of “a nationally or state certified competency-based, time based hybrid model” for diesel technician is purely factual in nature and cannot possibly be a request for work product. TriMet does not seek any documents or analysis conducted by ATU on these programs, but an example of the existence of the “certified” programs that ATU seeks to implement in its final offer. The existence of a “certified” program is not a creation of work product. Any “certified” program would already exist outside the scope of these negotiations, and ATU could point me to where we could review the program, its requirements and its

certifications. Without examples of the ‘certified program’ ATU seeks to propose in its final offer, I can’t understand your proposal or its costs, from a bargaining or interest arbitration perspective.

“Based on your answer that [ATU’s proposed requirement] applies to all training programs, please provide all the ‘certified’ programs ATU is proposing in its final offer.”

At the time of hearing, ATU had not responded to this request for information about the certified programs referenced in its proposal.

222. On November 4, 2020, TriMet filed its complaint in this case, claiming that ATU violated its duty to bargain in good faith by including permissive subjects in final offer over TriMet’s objection. For readability, the objected-to proposals are set forth in the appendix in this order.

223. On November 6, 2020, ATU filed its complaint in this case, claiming that TriMet violated its duty to bargain in good faith by engaging in direct dealing and surface bargaining.

CONCLUSIONS OF LAW

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

2. ATU violated ORS 243.672(2)(b) by unlawfully including, over TriMet’s objections, permissive subjects of bargaining in its final offer, thereby conditioning settlement of the parties’ successor agreement on bargaining over these permissive subjects.

Under ORS 243.672(2)(b), it is an unfair labor practice for a labor organization or its designated representative to refuse to bargain collectively in good faith with a public employer if the labor organization is an exclusive representative. Including a permissive subject of bargaining in a final offer over the other party’s objection violates the obligation to bargain in good faith within the meaning of ORS 243.672(2)(b) (or ORS 243.672(1)(e), the “mirror” provision regarding public employer unfair labor practices). *Jackson County v. Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. UP-002-20 at 5 (2020). Here, TriMet alleges that ATU included multiple proposals covering permissive subjects of bargaining in ATU’s final offer proposals, despite TriMet’s objections. As discussed below, we conclude that some, but not all, of ATU’s final offer proposals at issue in this case concerned permissive subjects of bargaining in violation of ORS 243.672(2)(b).²⁰

We begin with the framework for how we assess the subject matter of bargaining proposals. We employ a subject-based approach when determining whether a proposal is mandatory or permissive for bargaining, using a two-step process. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-003-16 at 61 (2018)

²⁰ATU, in its answer to the complaint, contended that TriMet waived some or all of its objections to the provisions at issue. However, ATU did not pursue that contention in its prehearing brief or at hearing, except with respect to the parties’ grievance settlement agreement, which we decide on other grounds. Consequently, we do not address ATU’s waiver argument.

(*TriMet I*). First, we identify the subject of the proposal within the context of the collective bargaining agreement as a whole. *Id.* “In many cases (perhaps even a majority), a straightforward analysis of the language proposed—applying to it this Board’s expertise and experience in the field of labor-management relations—will reveal the actual nature of the proposal.” *International Association of Firefighters, Local 314 v. City of Salem and Dearborn, Personnel Director*, Case No. C-61-83 at 8, 7 PECBR 5819, 5826 (1983). In other cases, a proposal might reference or implicate multiple subjects, in which case we identify the core feature of the proposal as the subject of that proposal. *Jackson County*, UP-002-20 at 6 (citing *In the Matter of the Declaratory Ruling Petition Filed by Portland Firefighters Association, IAFF Local 43 and City Of Portland*, Case No. DR-001-19 at 3 (2019)). We then determine whether the subject is mandatory for bargaining. *TriMet I*, UP-003-16 at 61.

In making that determination, ORS 243.650(4) identifies two specific categories of subjects for bargaining (mandatory and permissive). A subject is mandatory for bargaining if it qualifies as “employment relations,” which “includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, labor organization access to and communication with represented employees, grievance procedures and other conditions of employment.” ORS 243.650(7)(a). Permissive subjects of bargaining include all other subjects that the parties may discuss and execute written agreements on, so long as those terms “are not prohibited by law.” *City of Portland*, DR-001-19 at 2 (quoting ORS 243.650(4)). The statute further clarifies that “employment relations” does not include (1) subjects that this Board determined before June 6, 1995, to be permissive subjects of bargaining; (2) after June 6, 1995, subjects that this Board determines to have a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment; or (3) subjects that have an insubstantial or de minimis effect on public employee wages, hours, and other terms and conditions of employment. ORS 243.650(7)(b)-(d). “Employment relations” also excludes specific enumerated subjects set forth in ORS 243.650(7)(g), such as “assignment of duties” and “determination of the minimum qualifications necessary for any position.”

With that framework in mind, we turn to TriMet’s objections to ATU’s proposals. In all, TriMet asserts that ATU included 36 proposals on permissive subjects of bargaining in its final offer, and that ATU did so over TriMet’s objections. Many of these objected-to proposals are repeated multiple times throughout ATU’s final offer to reflect their application to different areas of TriMet’s operations, sometimes with slight variations. For efficiency in analyzing TriMet’s claims, we have grouped those proposals together, as neither party has suggested that they should be treated differently.

Seniority/Assignment of Duties

TriMet first objects to the proposal in ATU’s final offer under Article 3.1.2. Specifically, TriMet objects to the underlined portion of the following proposal:

“Par. 2 Seniority by classifications as established herein shall prevail in the performance of the work done in Paragraph 1, qualifications considered. All Journeyworkers/Technicians hired from outside the District prior to the effective date of this Agreement shall establish classification seniority

behind any apprentice in the apprentice program on the date they were hired. All Journeyworkers/Technicians hired after the effective date of this Agreement shall establish classification seniority behind any Trainee in a Training program on the date they were hired. In the event of a dispute regarding seniority, ATU shall make the final determination of seniority placement.”

TriMet asserts that the subject of the underlined sentence concerns the “assignment of duties” because the sentence “dictates how work tasks in the Maintenance Department will be assigned.” ATU argues that the disputed provision is primarily definitional in explaining that seniority in the Maintenance Department is not determined by the Maintenance Department as a whole, but by classification. When read in conjunction with paragraph 1, ATU asserts that the proposal, which is longstanding language, “preserves the right for overtime call out to follow seniority” and for bidding on “postings to occur by seniority.” ATU further argues that the provision is also aimed at protecting job security and preventing contracting out, in that it prevents “TriMet from giving work traditionally performed in maintenance by bargaining unit members to non-union employees or contractors.” Thus, ATU argues that the disputed proposal is mandatory for bargaining. *See, e.g., Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673 (2007) (job security is a mandatory subject of bargaining); *Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC v. State of Oregon, Executive Department*, Case No. UP-64-87, 10 PECBR 51 (1987) (assignment of overtime, seniority shift bidding is mandatory for bargaining).²¹ For the following reasons, we agree with ATU that TriMet has not established that the disputed provision is permissive for bargaining.

We begin by observing that, when determining the subject of a disputed proposal, we must read the proposal in the overall context of the contract as a whole, as well as the parties’ understanding and application of longstanding contract language. TriMet’s approach with respect to this proposal is at odds with that framework. Specifically, TriMet isolates one sentence in the context of a much broader paragraph and article to advance its claim that the subject of the sentence is permissive for bargaining. It is not uncommon for parties to propose certain definitions in a contract or to describe contract terms for purposes of providing context for other contract terms and proposals. By way of example, a labor organization might propose what the duties of a particular classification are in order to advance wage proposals for those different classifications. Such a proposal is not read in isolation as dictating that an employer must create those particular job classifications with specific job duties (which would be permissive), but as part of the context for the labor organization’s wage proposal (which would be mandatory). The same is true with some of the disputed proposals in this case—TriMet has isolated a sentence or two that, when read in isolation, could be understood to concern a permissive subject. However, when read in context with surrounding provisions and the contract as a whole, the disputed provision is not attempting

²¹TriMet does not argue that these subjects are permissive. Relatedly, both parties generally agree with the mandatory/permissive characterizations of the competing subjects in the proposals at issue—*e.g.*, ATU acknowledges that “assignment of duties” is permissive and TriMet does not dispute that “job security” is mandatory. Rather, the parties’ disagreements concern what the subjects of the various proposals are (*e.g.*, is the subject of the proposal “assignment of duties” or “job security”). In situations where one of the parties has disagreed with whether a particular subject is mandatory or permissive, we have noted as much and provided additional analysis for our conclusion.

to dictate or curtail TriMet's management prerogatives in a particular area, but to address mandatory subjects of bargaining.

Additionally, the disputed sentence is not new contract language proposed by ATU, but rather longstanding contract language. Although TriMet is correct that existing contract language can concern either permissive or mandatory subjects (and is therefore not an answer to that question in and of itself), we disagree with TriMet's contention that the context of existing and longstanding contract language is entirely irrelevant to determining the subject of that contract provision. That is so because the parties' actions, understandings, and applications of existing contract language can illuminate the subject matter of that proposal through the parties' collective bargaining relationship. Ignoring that context would not aid our objective to determine what the true subject of a proposal is nor would it serve the policies and purposes of the PECBA.

With those observations in mind, we address TriMet's claim that ATU is making a proposal that infringes on TriMet's right in the assignment of duties. "[A]ssignment of duties" under ORS 243.650(7)(g) means the assignment of "tasks ordinarily performed by employees in the classification of the employee who is given an assignment." *TriMet I*, UP-003-16 at 62 (quoting *State of Oregon, Executive Department*, UP-64-87 at 21 n 4, 10 PECBR at 71 n 4). The disputed provision states: "Seniority by classifications as established herein shall prevail in the performance of the work done in Paragraph 1, qualifications considered." Paragraph 1, which is referenced by the disputed provision, states: "The Maintenance Department consists of those functions necessary to maintain and repair revenue and non-revenue rolling stock." Taken together, in the context of Article 3, which governs the Maintenance Department, the subject of the provision concerns the scope of work performed by the Maintenance Department employees and the role of seniority in the performance of that work. The proposal does not purport to govern the "tasks ordinarily performed by employees in the classification of the employee who is given an assignment," or the "distribution of normal duties among employees during the work day," meaning the assignment of duties. Therefore, we conclude that ATU did not violate ORS 243.672(1)(e) by including this provision in its final offer.

Tire Chains

TriMet next contests the underlined sentence of the following Article 3.1.5 proposal:

"Par. 5. Service Workers may be used by the District to install and remove tire chains after Helper's classification on shift at the facility has been exhausted and under a Mechanic's supervision."

TriMet contends that the underlined provision concerns "assignment of duties" in that it requires TriMet to assign a mechanic to supervise the task of a service worker installing and removing tire chains. ATU asserts that the subject of the proposal is "safety" because the "chaining process, if done incorrectly, can harm both the employee performing the work, or an operator driving the bus," and that "the requirement of a mechanic's supervisor protects the safety of employees." Under ORS 243.650(7)(g), safety issues are permissive for bargaining, "except those * * * safety issues that have a direct and substantial effect on the on-the-job safety of public employees." For

the following reasons, we agree with TriMet that the subject of this proposal is assignment of duties, and therefore, permissive for bargaining.

For the subject of a proposal to constitute a “safety issue,” the proposal must “reasonably be understood, on its face, to directly address a matter related to the on-the-job safety of employees.” *Multnomah County Corr. Deputy Ass’n v. Multnomah County*, 257 Or App 713, 734, 308 P3d 230, (2013) (*MCCDA*). Here, the proposal to require TriMet to assign a mechanic to supervise the task of a service worker’s installation and removal of tire chains is not, in our view, reasonably understood on its face to *directly* address a matter related to the on-the-job safety of employees.

As a factual matter, ATU maintains, and TriMet does not appear to dispute, that tire chains are a form of safety equipment and installing tire chains on a diesel bus is an activity that involves some risk of injury. Although those facts may be sufficient to establish that tire chain installation is a “matter related to the on-the-job safety of employees,” ATU’s proposal (that a mechanic supervise the installation and removal of tire chains), cannot reasonably be understood on its face to “directly” address that matter. Rather, at most, requiring mechanic supervision of the service worker is an *indirect* method of ensuring that the tire chains are installed properly (as opposed to, for example, requiring that the installer be adequately trained). Consequently, under the standard set in *MCCDA*, the subject of this proposal is not a “safety issue.”²² Rather, the proposal’s subject is “assignment of duties,” in that it requires TriMet to direct a particular employee (a mechanic) to perform a particular task (supervising) at any time that a service worker performs a work task (installing and removing tire chains).²³ Because this proposal concerns a permissive subject of bargaining, ATU was prohibited from including it in its final offer over TriMet’s objection. The record demonstrates, and ATU does not dispute, that TriMet objected to bargaining over this proposal. Accordingly, when ATU included this proposal in its final offer, it violated ORS 243.672(2)(b).

Work Trades and Overtime

TriMet next contests the underlined provision in Article 3.1.8 in ATU’s final offer:

“Par. 8. All trading days off is a privilege granted by the Union and the District and may be canceled at any time by mutual agreement.

“* * *

“b. A trade can only occur between two (2) people working at the same garage, during the same hours, within the same job classification, having similar sign-up responsibilities, e.g., overhaul mechanics can only trade with overhaul mechanics, body shop mechanics can only trade with body shop mechanics. Requests for trades

²²Because we conclude that the proposal does not involve a “safety issue,” we need not reach the question of whether the proposal has a substantial effect on the on-the-job safety of TriMet employees and thereby falls within the exception to permissive status for safety issues set forth in ORS 243.650(7)(g).

²³ATU does not allege that the tire installation is a task that is not “ordinarily performed by employees in the classification of” service workers.

are subject to approval by the Supervisor. The District reserves the right to approve requests on a case-by-case basis based upon operational needs.”

TriMet contends that the underlined section concerns the permissive subject of assignment of duties because the proposal gives employees “the right to pick their own work assignments on sign-up sheets that identify the work tasks to be performed.” ATU asserts that the proposal does not allow employees to choose whatever work assignments that they want, but rather govern when day-off “trades can occur,” which concerns the mandatory subject of hours of work. *See, e.g., State of Oregon, Executive Department*, UP-64-87 at 21, 10 PECBR at 71. Specifically, ATU notes that the provision limits an employee’s right to obtain the privileges of trade, and is therefore a term and condition of employment. We agree with ATU—the terms of the proposal do not speak to or allow an employee to perform any work assignment that the employee chooses or limit *TriMet’s* rights to assign duties, but rather limit *employees’* rights to trade days off with other similarly classified employees. Accordingly, the subject concerns hours of work, which is mandatory for bargaining, and ATU did not violate ORS 243.672(2)(b) by including this provision in its final offer.

Relatedly, TriMet also asserts that the following underlined provisions of Article 3.17.1 are permissive for bargaining in that they dictate assignment of duties:

“Par. 1. The function of overtime is to facilitate the continuity and completion of work under unusual or extraordinary circumstances. Overtime will be used on an exception basis and is the prerogative and responsibility of maintenance managers.
a. The criteria for making overtime assignments and paying employees at the overtime rate will be based on: classification, current signed job function with which the work would normally be associated, (i.e. body shop employees do body work, engine rebuild employees do engine rebuild, spotters do spotter work, etc.) then seniority. Overtime will not be offered to an employee who has been off sick until that employee has returned to work for one full workday.”

Similar to our above conclusion regarding work trades, we agree with ATU that this provision concerns overtime eligibility and is therefore mandatory for bargaining. *See, e.g., State of Oregon, Executive Department*, UP-64-87 at 21, 10 PECBR at 71. We disagree with TriMet that the subject of the proposal is to limit TriMet’s right to assign the tasks ordinarily performed by employees in the classification of the employee who is given an assignment. Rather, the proposal is directed as to how overtime eligibility is determined, which is mandatory for bargaining—the examples provided in the proposal that reference certain employees performing certain tasks is in aid of describing that eligibility, not to curtail TriMet’s right to assign daily tasks to employees given an assignment. Therefore, ATU did not violate ORS 243.672(2)(b) by including this proposal in its final offer.

Hiring/Internal Candidate Preference

We next address TriMet’s contention that the following proposal, which was new language included in Article 3.2.1 of ATU’s final offer, is permissive for bargaining:

“Par. 1. When the District plans to hire for any ATU classification in the Maintenance Department a notice shall be posted on all department bulletin boards for not less than five (5) days before posting externally. If the District determines an internal candidate is equally qualified as an external candidate, the District shall hire the internal candidate.”

According to TriMet, this proposal is permissive because its subject concerns how TriMet fills vacancies and sets the minimum qualifications for a job position. See ORS 243.650(7)(g) (“determination of the minimum qualifications necessary for any position” is a permissive subject of bargaining). ATU asserts that the subject concerns internal candidate preferences for vacant positions, which affects job security, and is therefore mandatory for bargaining. See *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-009-13 at 20, 26 PECBR 225, 244 (2014) (job security is a mandatory subject of bargaining) *Portland Fire Fighters’ Association, Local 43 v. City of Portland*, Case No. UP-14-07 at 30, 23 PECBR 43, 72 (2009), *rev’d and rem’d on other grounds*, 245 Or App 255, 263 P3d 1040 (2011) (proposals that affect job security are mandatory for bargaining).

We agree with ATU. The text and context of the disputed language is not aimed at, and does not restrict, TriMet’s ability to establish what minimum qualifications are necessary to be hired for a particular position. Rather, the proposal presumes that TriMet both establishes those qualifications and determines (in its sole discretion) who, among particular candidates, is the most qualified. The proposal then provides for the hiring of an internal candidate, in the event that the District determines that the internal candidate is equally qualified for the position when compared to an external candidate. The subject of the proposal, therefore, affects job security and is mandatory for bargaining. In reaching this conclusion, we disagree with TriMet that *Gresham Grade Teachers Association v. Gresham Grade School District No. 4 and Larson*, Case No. C-61-78 at 23, 5 PECBR 2771, 2793 (1980) (*Gresham*), provides otherwise. In *Gresham*, the Board found a proposal that required the school district to give a “transferred teacher priority over new hires in filling any vacancy” was permissive because it required the district to “adhere to certain standards in filling vacancies.” Here, unlike in *Gresham*, the challenged proposal does not require TriMet to adhere to certain qualification standards; rather, TriMet is free to set its own standards. ATU’s proposal provides a benefit to existing employees only *after* TriMet has made its own qualification determinations. Accordingly, ATU did not violate ORS 243.672(2)(b) when it included this proposal in its final offer.

TriMet similarly objects to the following ATU proposal in Article 3.3.9 of ATU’s final offer:

“e. If the District determines an internal candidate for any Service Worker classification is equally qualified as an external candidate, the District shall hire the internal candidate. Credit shall be given to employees who have worked in a Helper/Service Worker classification for prior experience equivalent to the time worked in that position for any Service Worker classification,”

This proposal is indistinguishable from the proposal discussed above in Article 3.2.5. Like that proposal, we conclude that this proposal affects job security and is mandatory for bargaining. For those same reasons discussed above, we disagree with TriMet's assertion that this proposal is directed at imposing minimum qualifications on a position.

Layoffs and Filling Vacancies

We turn to TriMet's objections to the following underlined language in Article 3.2.5:

"It is understood and agreed that in filling vacancies that are not filled by promotion within the Department, preference will be given to employees or laid off employees of the Facilities Maintenance or Stores Departments. Such vacancies will be posted on all department bulletin boards for five (5) days. If unable to fill the vacancy, it may be filled according to seniority within the District. Following selection, District employees shall receive preference for all bidding purposes over employees hired from the outside."

TriMet asserts that the underlined language "dictates how TriMet can fill vacancies in all classifications and sets a minimum qualification" for positions. ATU asserts that the underlined language, which is longstanding contract language, concerns job security, in that it provides a preference for internal candidates or laid off employees when filling vacancies not filled by promotion. As discussed above, proposals that concern preferences for internal candidates or existing employees affect job security and are mandatory for bargaining. These proposals are distinct in nature from a proposal that, for example, limits the number of external candidates that a public employer can hire, which we have deemed permissive for bargaining. *See Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757*, Case Nos. UP-001/003-20 at 20, *adh'd to on recons* (2020) (*TriMet II*) (*appeal pending*) (contract provision that set numerical limit on external hiring concerned the permissive subject of standards for filling vacancies). That is so because the core feature of the disputed proposal is aimed to providing job security benefits for existing employees, rather than barring TriMet from hiring external candidates to fill vacancies or setting a numerical limitation on external hirings without regard to TriMet's operational needs. Although there is some nuance in distinguishing between those types of proposals, the proposal at issue here falls on the mandatory side of the line in that it is fundamentally aimed at providing job security benefits for existing employees. We further note that the proposal does not dictate the minimum qualifications for a position, or require TriMet to fill a vacancy with an unqualified internal candidate, or otherwise require TriMet to fill vacancies in a manner that interferes with management prerogatives. Because the above proposal concerns employment relations, ATU did not violate ORS 243.672(2)(b) by including it in its final offer.

We reach the same conclusion on TriMet's objections to the underlined language below in Article 3.4.1 of ATU's final offer:

"Par. 1. Maintenance Department seniority shall govern in laying off and reemployment of employees. Employees so laid off because of lack of work shall be returned in the inverse order in which they were laid off, as the need for their classification, or classification of work, permits."

“a. If the District curtails the number of employees in any job, the employee with the least job seniority will be the first to be moved out of that job. That employee will then be entitled to exercise such job seniority s/he has on any other job in that department.

“b. Only in the event of layoff, Facilities Maintenance employees shall be allowed to exercise their departmental seniority for positions in Maintenance or Stores.”

TriMet argues that the underlined language concerns the minimum qualifications and limitations on its ability to fill vacancies. ATU counters that the language concerns job security in that it allows employees to exercise departmental seniority in the event of layoff. We agree with ATU. The disputed sentence from ATU’s proposal addresses how and when Facilities Maintenance employees may exercise departmental seniority in the event of a layoff. Such a proposal goes directly to job security. The proposal does not purport to curtail the minimum qualifications for a particular position. It also does not prohibit or limit the number of external hires necessary for TriMet to run its operations, such that it has a greater effect on TriMet’s management prerogatives than conditions of employment. Therefore, ATU did not violate ORS 243.672(2)(b) by including this proposal in its final offer.

Assistant Supervisors/Acting Supervisors

TriMet next objects to the following underlined language in Article 3.3.8 as permissive for bargaining, in that it concerns assignment of duties:

“Assistant Supervisors shall perform journey-level work in addition to their Assistant Supervisor duties, except when acting Supervisor.”

TriMet asserts that by dictating what work tasks are performed by assistant supervisors (who are bargaining unit members), ATU’s proposal concerns the assignment of duties. ATU contends that its proposal is directed at preventing TriMet from “eroding the promotional opportunity, pay, and responsibility of” assistant supervisors. Specifically, ATU states that, without the limitation in the proposal, an assistant supervisor will be performing two jobs (journey level mechanic and acting supervisor) while being compensated for one, and will also lose the value of being promoted into an assistant supervisor position. ATU adds that the proposal has a direct and substantial impact on the on-the-job safety of TriMet employees because a supervisor “is a first responder to any injuries, or emergencies,” and “[i]f that same person is unavailable because they are in the middle of their own work, it may significantly delay the response to an emergency or injury.”

Although ATU is correct that promotional opportunity, pay, and safety issues that have a direct and substantial impact on the on-the-job safety of public employees are all mandatory subjects for bargaining, we disagree with ATU’s characterization of this proposal. Here, the language of the proposal is directed specifically at limiting the work assignments that a bargaining unit employee ordinarily may perform when given an assignment, which constitutes the “assignment of duties.” The objectives that ATU asserts as the basis for the proposal are simply too attenuated from the language of the proposal for us to conclude that the subject concerns

promotional opportunities, pay, or mandatory safety issues. Accordingly, ATU violated ORS 243.672(2)(b) by including this proposal in its final offer.²⁴

Apprenticeship/On-the-Job Training

We next address a series of ATU's proposals that concern an apprenticeship or on-the-job training program. Before doing so, we review our prior holdings concerning the subject of proposals on such a program. In *TriMet II*, UP-001/003-20 at 5-10 (Recons Order), we concluded that TriMet could not unilaterally end its longstanding apprenticeship and on-the-job training programs because such a decision was mandatory for bargaining. We separately concluded that TriMet could unilaterally deregister those programs from the Bureau of Labor and Industries (BOLI) because BOLI registration was permissive for bargaining. *Id.* at 5-6. We noted, however, that TriMet still had to bargain over mandatory impacts of deregistering an apprenticeship program with BOLI. *Id.*

With that in mind, we turn to ATU's final offer proposals that TriMet has disputed. Because of the length and number of the proposals that are at issue (as well as the fact that several of the proposals are effectively repeated in different sections of the WWA), and because our conclusions concerning the mandatory or permissive nature of the proposals do not turn on the parsing of certain terms, we have grouped the disputed proposals into the following categories for purposes of this discussion: (1) proposals stating that there shall be an on-the-job training/apprentice program and specifying minimum in-class hours, local college course credit, and certificate of completion; (2) proposals to form a joint committee in conjunction with the program; (3) proposals providing that any employee selected to enter a TriMet apprenticeship program shall be provided an opportunity to attend program orientation before accepting the promotion (and further providing some details about the orientation); and (4) proposals stating that the training/apprenticeship program "shall meet the minimum standards for a nationally or state certified competency-based, time based hybrid model for the specific program."²⁵

a. Existence of an On-the-Job Training/Apprenticeship Program

In our prior order, we concluded that the subject of the elimination of TriMet's on-the-job training/apprenticeship programs, in part because of their longstanding nature, is mandatory for bargaining. *Id.* at 10. In doing so, we followed the reasoning in *Federation of Oregon Parole and Probation Officers v. Corrections Division, Field Services Section, Watson, Administrator & Executive Department, State of Oregon*, Case No. C-57-82 at 6-7, 7 PECBR 5649,

²⁴ATU does not argue that this proposal (which restricts the assignment of bargaining unit work to a bargaining unit employee who normally performs that work) concerns the preservation of bargaining unit work, as might be the case with a proposal that restricts assignment of bargaining unit work to *non-bargaining unit* employees.

²⁵As previously stated, the full proposals may be reviewed in the appendix.

5654-55 (1983), and considered “all relevant circumstances” surrounding the change.²⁶ *Id.* at 7-8. Here, ATU has included in its final offer, various proposals that call for an on-the-job training/apprenticeship program. TriMet objects to these proposals on numerous grounds, none of which we find availing.

First, TriMet asserts that proposals stating that there shall be an on-the-job training program require TriMet to create a trainee job classification, and that the subject of creating a particular job classification is permissive for bargaining. TriMet’s argument misstates the nature of ATU’s proposal. ATU’s proposals do not require TriMet to create a particular job classification, but rather propose the continuation of some sort of on-the-job training/apprenticeship program. By describing certain features of that program, ATU’s proposals do not purport to state that TriMet must create “classification X,” with certain specified duties assigned to that classification.²⁷ We particularly note that TriMet has proposed a Trainee classification in its final offer, and that any ATU proposal referencing a Trainee position cannot reasonably be read as requiring TriMet to create such a classification, but rather is reflective and responsive to TriMet’s position that it intends to create that classification.

TriMet alternatively asserts that the subject of the proposals is the minimum qualifications for a position. We disagree—the text and context of these proposals is for the continuation of some form of on-the-job training/apprenticeship program, which is mandatory for bargaining. ATU is not, in advancing such proposals, asserting or stating what the minimum qualifications for a particular position must be. That determination remains with TriMet. The fact that ATU’s proposals have some *effect* on TriMet’s determination of minimum qualifications *for positions in the proposed apprenticeship programs* does not change the core feature of ATU’s proposal. The core feature of the proposal is an on-the-job training/apprenticeship program, not minimum qualifications. And, as we have previously held, bargaining over the continuation or elimination of apprenticeship programs at TriMet is mandatory in part because of the particular way that these

²⁶We reasoned that “because apprenticeship has been treated by both parties for decades as an inextricable part of the classification structure, duty assignments, training, promotional path, seniority system, and benefits available at TriMet, the decision to end the existing apprenticeship programs (and all the attendant subjects encompassed within those programs) cannot, as a practical matter, be analyzed independently from its impacts.” *TriMet II*, UP-001/003-20 at 7 (Recons Order).

²⁷We note that, in reaching our conclusion in the Reconsideration Order that elimination of the apprenticeship programs is a mandatory subject, we rejected TriMet’s argument that, at its core, apprenticeship is simply a classification, and therefore a permissive subject. We explained that, at TriMet, the apprenticeship programs touched on “numerous components of the workplace, some of which, if analyzed individually, would be permissive[.]” but that, “for many years, both parties have treated these individual aspects of each apprenticeship program as elements that have coalesced into a single, integrated program.” *TriMet II*, UP-001/003-20 at 6 (Reconsideration Order). We reasoned that, as a result, it was “not practicable to select one individual element and conclude that, because that particular element is mandatory or permissive, the entire apprenticeship program is mandatory or permissive.” *Id.*

programs have become integrated into the TriMet workplace. Accordingly, ATU did not violate ORS 243.672(2)(b) by including these proposals in its final offer.²⁸

b. Joint Committee

TriMet also objects to ATU's proposals calling for a joint committee to be formed in connection with the proposed on-the-job training/apprenticeship program. TriMet acknowledges that proposals for joint committees on mandatory subjects of bargaining are, likewise, mandatory for bargaining. *See Service Employees International Union Local 503, Oregon Public Employees U v. State of Oregon*, Case No. UP-52-02 at 12-13, 20 PECBR 144, 155-56 (2002). TriMet, however, asserts that the scope of ATU's joint committee proposal is too amorphous to be limited to mandatory subjects of bargaining. We disagree. The disputed proposals each concern the formation of a joint committee as part of TriMet's on-the-job training/apprenticeship program, which we have already determined is mandatory for bargaining, and there is nothing in the proposals from which we can conclude that the committees will be directed at permissive subjects. Consequently, ATU did not violate ORS 243.672(2)(b) when it included its joint committee proposals in its final offer.

c. Orientation

TriMet objects to ATU's final offer proposal Article 3.7.8 that provides that any

"employee who has successfully met all the prerequisites established by the District and is selected to enter a District a training program pursuant to Article 3, Section 21 shall be provided an opportunity to attend a orientation of that program prior to accepting the promotion. The orientation will include a meeting with a trainer to cover job requirements and expectations, working conditions, and an interview with a journey level worker."

According to TriMet, this proposal "infringes on TriMet's right to assign duties by (1) requiring that service workers who have been offered a position in a training program be assigned to attend an orientation session and (2) requiring TriMet to assign a trainer to provide an orientation session, which also imposes on TriMet's right to determine its staffing." ATU counters that the orientation proposal is simply an element of the overall training/apprenticeship program, and does not speak to the "tasks ordinarily performed by employees in the classification of the employee who is given an assignment," *TriMet I*, UP-003-16 at 62, or required "staffing levels." We agree with ATU—the objective reasonable reading of the proposal is not that ATU is attempting to dictate staffing levels or the daily tasks ordinarily performed by employees in a particular classification. Therefore, ATU did not violate ORS 243.672(2)(b) regarding its orientation proposals.

d. National/State Certified Minimum Standards

²⁸At points, TriMet asserts that these proposals are permissive because TriMet has stated its intention of not having an apprenticeship program. TriMet is certainly entitled to a bargaining position that it does not want such a program and its own final offer can reflect that bargaining position. Such a position, however, does not affect whether the subject of ATU's proposals is mandatory or permissive.

Finally, with respect to the training/apprenticeship proposals, we address TriMet's objection to ATU's proposal that the program "shall meet the minimum standards for a nationally or state certified competency-based, time based hybrid model for the specific program." TriMet contends that this proposal suffers from the same flaw that made the prior BOLI registration provision permissive for bargaining in our earlier order—namely, that it requires TriMet to relinquish to a third party its control over its own program, which has impacts on management prerogatives that outweigh the impacts on employees' terms of employment. ATU asserts that its proposal was intended to encompass only the mandatory aspects of TriMet's apprenticeship program, while not specifying an outside third-party overseer. The difficulty with ATU's position is that, when asked for further clarification of its proposal by TriMet as to what nationally or state-certified standards the proposal referenced, ATU did not respond. That lack of a response, coupled with the vagueness of the proposal, does not allow us to conclude that the proposal concerned "employment relations," such that ATU could include it in its final offer. In reaching that conclusion, we reiterate that the subject of the elimination of TriMet's on-the-job training/apprenticeship program is mandatory for bargaining, and like health insurance benefits, ATU is entitled to propose standards or minimum standards for such a program, but without specifying a particular provider or outside entity that TriMet must utilize. The vagueness, however, of ATU's proposal in its final offer does not allow us (or TriMet) to meaningfully conclude that its subject concerns employment relations. Therefore, we conclude that ATU violated ORS 243.672(2)(b) by including this proposal in its final offer.

Warranty Work

TriMet objects to the following underlined language in Article 3.9.3 and Article 3.14.2, as requiring TriMet to assign the duties of performing warranty work to trainees:

"Warranty work will be done by District employees when qualified, and District mechanical employees will participate in all types of warranty work where such participation will aid in the training of District employees, ensures that employees learn the skill to avoid future work being contracted out, and is not merely repetitive in nature, and

"a. Prior to commencing third party or vendor warranty work, including extended warranty work or retrofits that may include warranty work; the District will meet with the Union to explain the nature of the work and the warranty provisions covering the repairs. Documentation from this meeting in a manner and format acceptable to each party will be deemed to be a satisfactory record of the activity.

"b. The District will provide time for mechanics to work with the vendor on warranty work that will provide District mechanics a direct training benefit. Accordingly, the location maintenance manager and the Union executive board member will meet to agree on a plan that provides the optimal training benefit and ensures that employees learn the skills involved in the mechanic work under warranty.

"c. For declared campaigns, vendor 'policy' campaigns, and declared fleet defects where a significant portion of a fleet is affected (20% for Bus and 10% for Rail) the location maintenance manager and the Union will jointly, in good faith

and with all reasonable intent, determine whether the warranty work to be performed is repetitious with little or no continuing learning value. If so determined, in writing, the continued assignment of one mechanic per shift may terminate after the initial start of the work, but not before at least one mechanic per shift has been adequately trained. The District may thereafter allow the vendor to complete the campaign work on its own. In the event the location maintenance manager and the Union executive board member cannot agree on whether a specific warranty activity is ‘repetitious with little or no continuing learning value,’ the matter will be heard by the Contracting Out Committee, whose decision shall be final.”

ATU disagrees with TriMet’s assertion that the proposal is directed at the assignment of work tasks, but rather concerns job security and the protection of bargaining unit work, which are mandatory for bargaining. Specifically, ATU states that the proposal is directed at providing on-the-job training for maintenance employees that is relevant to their work at TriMet and ensures that maintenance employees are adequately trained to maintain and repair new vehicles or equipment that TriMet has purchased, so that such work can eventually be performed in-house, instead of being contracted out even after any warranty period has expired. We agree with ATU. The text of the proposal expressly states that mechanical employees will participate in warranty work where that work will aid in training, will ensure that employees learn skills to avoid future work from being contracted out, and is not merely repetitive in nature. Other provisions of the proposal provide further details on how to implement those objectives. We do not read those provisions as curtailing TriMet’s right to assign tasks ordinarily performed by an employee when given an assignment. Therefore, ATU did not violate ORS 243.672(2)(b) by including this in its final offer.

Facilities Maintenance Work

TriMet objects to the following carry-forward language in Article 4.1.2 of ATU’s final offer:

“Only those functions mutually agreed to be excluded shall be excluded. Facilities Maintenance employees retain the right to all work not specifically excluded. The District will maintain facilities, funding, staffing, and training for all functions necessary to maintain and repair buildings and grounds, owned or operated, in whole or in part, by or for the District. The District and the Union shall meet occasionally to add or delete items from the exclusion list by mutual consent.”

TriMet asserts that means that the underlined language limits its right to assign duties because the provision means that “only employees in Facilities Maintenance may perform certain duties, and other ATU employees cannot be assigned those duties.” ATU asserts that such an interpretation is incorrect and that, in context, the language is intended to provide job security by limiting TriMet’s right to contract out Facilities Maintenance work. In support of that position, ATU notes that the contract contains an “exclusion list” for subcontracting. Therefore, ATU asserts that the above-underlined reference to “work not specifically excluded” means that TriMet cannot subcontract out Facilities Maintenance work, unless it is on that exclusion list. We find ATU’s

explanation persuasive, as it is supported by the text of the proposal, in context with the parties' overall agreement. Because the proposal concerns job security and bargaining unit work, it is mandatory for bargaining, and ATU did not violate ORS 243.672(2)(b) when it included that proposal in its final offer.²⁹

New Jobs and Classifications

TriMet objects to the following underlined language in Article 9.2.1 of ATU's final offer:

"The District agreed on the following policy with reference to new jobs and classifications: In the event the District creates a job or classification within the bargaining unit but not presently covered by the Labor Agreement, openings shall first be offered to District employees and filled by these employees if they can meet the qualifications of the job as established by the District. In the event an employee has the basic qualifications necessary, s/he will be given a reasonable training period to learn the details of the job. In making its selection among qualified employees, seniority in the District will be considered. Reasonable rules and procedures to administer the above paragraph shall be worked out between the District and Union, as necessary."

According to TriMet, the underlined language dictates how it fills vacancies by requiring it to offer vacancies to current employees, without regard to whether those employees meet the minimum qualifications of the vacant position. Therefore, TriMet asserts that the subject of the proposal is minimum qualifications, which is permissive for bargaining. ATU asserts that the proposal expressly requires an employee to meet the minimum qualifications as established by TriMet, and that the proposal simply concerns promotional opportunities for existing employees, which is mandatory for bargaining. We agree with ATU. The proposal expressly recognizes TriMet's right to establish qualifications for a position, and merely provides that openings first be offered to existing employees who meet those qualifications. As such, the subject of the proposal concerns job security and promotional opportunities, which are mandatory for bargaining. ATU, consequently, did not violate ORS 243.672(2)(b) when it included this proposal in its final offer.

Mediated Settlement Agreement

On March 5, 2007, the parties reached a settlement agreement that reads, in relevant part, as follows:

"It is agreed that the Plant Maintenance Tech will not perform work of the Plant Maintenance Mechanic which involves the installation, removal, replacement, maintenance, repair, welding, assembly or disassembly of items described in a, d, and k through bb on the list on page 10 of the PMM apprentice program (see attached) including any lighting, electrical or mechanical system or equipment involving Tri-Met buildings or facilities."

²⁹TriMet expresses concern about the proposal being used more broadly to limit its rights to assign duties. ATU's representation before this tribunal, and our conclusion regarding the meaning of the provision, should assuage those concerns.

TriMet asserts that the subject of this settlement agreement is permissive because it requires TriMet to assign a specific set of duties to the classification of Plant Maintenance Tech. We need not reach the question of whether the subject of the settlement agreement concerns a mandatory or permissive subject of bargaining, because ATU did not include this agreement as part of its final offer. Therefore, we do not find that ATU violated ORS 243.672(2)(b), as alleged.

3. TriMet violated ORS 243.672(1)(e) by bypassing ATU and directly dealing with ATU-represented employees on matters concerning employment relations.

“The foundation of collective bargaining is the concept of exclusive representation of employees by a labor organization.” *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85 at 36, 8 PECBR 8160, 8195 (1985) (*McKenzie*). Accordingly, an employer’s duty to bargain in good faith with the employees’ exclusive agent “demands” that the employer “accept and respect the exclusivity of that agency.” *Obie Pacific Inc.*, 196 NLRB 458, 459 (1972). A public employer violates that duty, and therefore ORS 243.672(1)(e), when it deals directly with its represented employees. *Blue Mountain Community College*, UP-22-05 at 97, 21 PECBR at 769; *McKenzie*, UP-14-85 at 36, 8 PECBR at 8195. This Board has described direct dealing as conduct by an employer “that amounts to dealing with the [u]nion through the employees, rather than the employees through the [u]nion.” *Blue Mountain Community College*, UP-22-05 at 98, 21 PECBR at 769-70 (quoting *NLRB v. General Electric Co.*, 418 F2d 736, 759 (2d Cir 1969), *cert. denied* 397 U.S. 965 (1970)).³⁰

Direct dealing is a per se violation, which means it violates (1)(e) regardless of the employer’s subjective intent, because it is “inherently divisive.” *McKenzie*, UP-14-85 at 36, 8 PECBR at 8195. Direct dealing “tactics * * * make negotiations difficult and uncertain,” and “they subvert the cooperation necessary to sustain a responsible and meaningful union leadership.” *Id.* UP-14-85 at 36-37, 8 PECBR 8195-96 (quoting *General Electric Co.*, 418 F2d at 759). Further, “direct dealing violates the union’s statutory right to speak exclusively for the employees who have elected it to serve as their sole representative. This right necessarily includes the power to control the flow of communication between the employer and the represented employees concerning subjects as to which the union is empowered to negotiate.” *SEIU, AFL-CIO, Local 509 v. Labor Rels. Comm’n*, 431 Mass 710, 715-16, 729 NE2d 1100, 1104-05 (2000). When an employer bypasses the union to deal with employees directly, it “undermines [the] employees’ belief that

³⁰This Board has decided relatively few section (1)(e) direct dealing cases. For decades, PECBA, unlike the NLRA, expressly prohibited employers from directly communicating employees about bargaining during the period of negotiations, *see former* ORS 243.672(1)(i), and most conduct that would be direct dealing under (1)(e) would also be unlawful communications under (1)(i). Section (1)(i) was repealed in 1995 by the PECBA amendments commonly referred to as SB 750. However, both before and after section (1)(i) was repealed, this Board adopted the NLRA’s rule that direct dealing violates the duty to bargain, and therefore violates section (1)(e). *See McKenzie*, UP-14-85 at 35, 8 PECBR at 8194 (employer’s direct communications with employees did not violate (1)(i) because they occurred after “the period of negotiations,” but did violate (1)(e)); and *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95 at 16-17, 16 PECBR 559, 574-75 (1996) (direct dealing violates (1)(e) notwithstanding repeal of (1)(i)).

the union actually possesses the power of exclusive representation to which the statute entitles it.” *Id.*

In this case, ATU contends that TriMet impermissibly dealt with employees directly in two ways. First, ATU contends that TriMet engaged in direct dealing by asking a bargaining unit employee, a chief station agent named Arronson, to assist in drafting a TriMet bargaining proposal, and by continuing to consult that employee in the course of bargaining over that proposal. Second, ATU contends that TriMet engaged in direct dealing by approaching each employee currently in the Maintenance of Way (MOW) apprenticeship program and asking them whether they would be willing to leave the program and return to their former positions as service workers, if they could retain their seniority, contrary to an existing provision of the WWA. For the reasons discussed below, we conclude that both courses of conduct constitute direct dealing.

Before we address the specifics of each claim, however, we address TriMet’s and our dissenting colleague’s contention that, as a matter of law, an employer engages in direct dealing only if the employer “actually bargained or attempted to bargain directly with employees.” Although we find that TriMet’s dealings with Arronson and the MOW apprentices did amount to bargaining, or attempts to bargain, that issue is beside the point, because “[d]irect dealing need not take the form of actual bargaining.” *Allied Signal Inc.*, 307 NLRB 752, 754 (1992).³¹ In the labor law context, “the broad term ‘dealing with’” is not “synonymous with the more limited term ‘bargaining with.’” *NLRB v. Cabot Carbon Co.*, 360 US 203, 210-11, 79 S Ct 1015, 1020 (1959) (interpreting “dealing,” as used in the NLRA definition of “labor organization,” as encompassing more conduct than “bargaining”). Thus, for example, this Board held that an employer engaged in unlawful direct dealing by presenting a proposal directly to employees without first presenting it to the union, “[r]egardless of whether the meetings” between the employer and employees “were considered ‘bargaining.’” *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95 at 17-18, 16 PECBR 559, 575–76, *adh’d to on recons*, 16 PECBR 707 (1996). *See also Blue Mountain Community College*, UP-22-05 at 100, 21 PECBR at 772 (“The College asserts there was no violation because it never incorporated any of its ideas from the meetings into proposals. This misses the point. The issue is not whether the College made a formal proposal at the bargaining table concerning these issues. The violation is the discussion itself because the discussion was with bargaining unit members rather than their exclusive representative.”). In cases where, as here, the employer directly “solicit[ed] employee sentiment over working conditions,” the question is not whether the employer was “actual[ly] bargaining,” but whether the employer’s conduct “is likely to erode the Union’s position as exclusive representative.” *Allied Signal*, 307 NLRB at 754 (quotation marks and citation omitted)).

We turn to applying these standards to the facts presented in this case, beginning with TriMet’s dealings with a bargaining unit employee, Arronson, who was not a designated representative of ATU or a member of ATU’s bargaining team. The record establishes that TriMet dealt directly with Arronson in two ways: away from the bargaining table, and at the table. Away

³¹For guidance in determining what constitutes direct dealing, we may look to cases decided under the NLRA, “particularly to cases decided before 1973, the year in which PECBA was adopted.” *Portland Ass’n of Teachers v. Multnomah Sch. Dist. No. 1*, 171 Or App 616, 631 n 6, 16 P3d 1189 (2000). *See also AFSCME, Local 2043 v. City of Leb.*, 360 Or 809, 815-18, 388 P3d 1028 (2017) (reviewing PECBA’s legislative history and relationship to the NLRA).

from the table, TriMet consulted with Arronson to determine its own position in bargaining. TriMet asked Arronson for information when developing its initial extra board proposal, and it continued to consult with Arronson regarding potential revisions to that proposal, over the course of successor bargaining. Additionally, TriMet asked Arronson to explain or comment on ATU's bargaining positions. TriMet did not give ATU prior notice, or obtain ATU's consent, before consulting with Arronson in this manner. Further, TriMet did not fully disclose to ATU the extent to which it was consulting with Arronson.

TriMet also unilaterally invited Arronson to have a seat at the bargaining table. First, TriMet invited Arronson to the parties October 31, 2019, bargaining session, without giving prior notice to ATU or obtaining ATU's consent. Because TriMet invited Arronson to bargaining without ATU's prior knowledge or consent, Arronson and the ATU bargaining team members were confused about which "side" of the bargaining table Arronson should be sitting on. He ultimately sat and caucused with ATU. During the session, TriMet asked Arronson to respond to ATU inquiries about TriMet's extra board proposal.

At the July 2020 bargaining session, which was held via videoconferencing, TriMet again brought Arronson to the session without informing ATU. Specifically, Arronson was seated with Steven Callas, TriMet's Director of Service Delivery, who had asked Arronson to attend. Because Callas called into the meeting (and was therefore not visible), it was not immediately apparent to anyone on ATU's bargaining team that Arronson was with Callas at the bargaining session. ATU was not aware of Arronson's presence until ATU asked a question about the extra board proposal, and Callas stated that Arronson was with him and asked Arronson to answer ATU's question. During this session, Arronson and members of ATU's bargaining team expressed different views about the TriMet and ATU proposals under discussion. Normally, ATU would caucus to resolve differences among bargaining unit employees seated at the table, and ATU responded to the exchanges with Arronson by stating the need to caucus, but Arronson did not caucus with ATU at this session.

TriMet's direct dealings with Arronson violated ORS 243.672(1)(e). TriMet worked with Arronson to develop, explain, and revise TriMet's own proposal. TriMet engaged in this conduct without giving ATU prior notice or obtaining its consent. To the extent that TriMet disclosed some of this conduct, that disclosure was after-the-fact and incomplete. TriMet's actions put ATU in the position of bargaining against its own member.³² TriMet's actions were inconsistent with its obligation to deal exclusively with ATU, and likely to have the effect of eroding ATU's status as the exclusive representative of employees. Accordingly, we conclude that TriMet engaged in direct dealing in violation of ORS 243.672(1)(e).

In reaching that conclusion, we disagree with TriMet's argument that Arronson was brought in simply as a "subject matter expert" to aid in the parties' negotiations. This Board has not

³²TriMet contends that its consultation with Arronson could not constitute direct dealing because it did not directly concern Arronson's own terms of employment. That fact makes no difference. ATU, as the employees' exclusive representative, had the sole prerogative to choose which employees would participate in bargaining. TM unlawfully overrode ATU's choice by unilaterally selecting Arronson to help TriMet develop and bargain over a proposal that affects other bargaining unit employees.

previously approved or disapproved of a public employer bringing a represented employee to table bargaining as a subject matter expert, and we need not make any broad proclamations about such a practice in this case. TriMet's actions went well beyond the act of inviting an employee to answer potential questions from both sides about an operational issue. Rather, the record establishes that TriMet approached a bargaining unit member, explained to him TriMet's concept for a proposal, and then used that member to develop its proposal, all before bringing the matter to ATU, the exclusive representative. TriMet continued to consult with Arronson, away from the table, as the parties bargained over TriMet's proposal. And, TriMet unilaterally invited Arronson to table bargaining, and deferred to that employee to answer ATU's questions about TriMet's proposal. Such actions go well beyond asking an employee to answer questions about existing operations that arise at the bargaining table.³³ Therefore, we conclude that TriMet violated ORS 243.672(1)(e).

Next, we address TriMet's solicitation of the MOW apprentices as to whether they would be interested in leaving the apprenticeship program. As set forth in the facts above, on October 6, 2020, Sarah Browne, a TriMet labor relations representative, and MOW managers met for a regular monthly meeting. At that meeting, MOW manager Keith Bounds represented that some MOW apprentices wanted to leave the program, based on a representation made by Casey Goldin, who had just been promoted from MOW supervisor to MOW manager.³⁴ Bounds asked whether TriMet had negotiated with ATU about allowing the apprentices to leave the program and return to their former service worker positions without a loss of seniority.³⁵ Browne reported the issue to Cusack, and they decided to determine which apprentices were interested in leaving the program if they could retain their service worker seniority, before raising the issue with ATU.

³³We would expect in such circumstances that the public employer would notify the exclusive representative in advance about the need for such input at the bargaining table.

³⁴Viewing the record as a whole, we find that Goldin subjectively believed that some apprentices wanted to leave the program, but that his subjective belief was based on a misinterpretation of a comment made by an apprentice, Jason Breedlove, indicating that he "felt stuck" in the program because TriMet was proposing, in bargaining with ATU, to place outside hires ahead of apprentices on the journey worker seniority list. (Goldin also testified that he based his belief on a few other comments by apprentices that he "overheard" over a period of two to three years, but his testimony was too vague and unspecific to establish that any apprentice actually expressed interest in leaving the program.) We credit Breedlove's testimony that he did not tell Goldin that he "felt stuck" because he wanted to leave the apprenticeship program. However, even if some apprentices had indicated that they felt stuck because they wanted to leave the program but could not without a loss of seniority, as Goldin apparently believed, that would not change our conclusion that TriMet engaged in direct dealing when it engaged in the conduct described above.

³⁵Article 3, Section 15, Paragraph 8 of the expired CBA states: "Upon six (6) months' accrual in an apprenticeship program, an employee shall forfeit seniority held in the employee's previous classification" after six months in the program. Prior to such six (6) months' accrual, however, an employee may elect to return to his/her previous classification, whereupon the employee's seniority held upon return shall be the same as if he/she has remained in the previous classification; this provision may also be effective following six (6) months' accrual for a particular employee by mutual agreement between [TriMet] and the Union."

TriMet understood that this was an option that could not be offered to the apprentices unless TriMet and ATU mutually agreed to it, *i.e.*, it was a matter that was subject to bargaining.

Browne delegated the task of gauging the apprentices' interest in this bargainable option to Bounds, who delegated it to Goldin. Goldin met briefly with each of the five MOW apprentices, and he asked each one if they would be interested in leaving the program if it was an option to return to their service worker position without a loss of seniority. Goldin explained to each apprentice that, if they were interested in leaving the program, TriMet could "make a deal" with ATU so that they could retain their seniority. Goldin also explained to each apprentice that he was presenting TriMet's perspective, and that he would report their response to his question to TriMet. Subsequently, TriMet represented to ATU that four out of five of the apprentices wanted to leave the apprenticeship program, if they could return to their service worker positions without loss of seniority.³⁶ TriMet also informed ATU that TriMet "would agree that they all get their Service Worker seniority back."

At the time that Goldin questioned the apprentices, TriMet was engaged in successor bargaining with ATU, and the subject of ending the apprenticeship programs, including the MOW program at issue, was a significant, if not the primary, focus of the parties' bargaining.³⁷ Additionally, the parties had been bargaining for several years over whether outside-hired journey workers should be placed ahead of, or behind, existing apprentices on the seniority list. If all, or even just some, of the MOW apprentices left the program, that could enable TriMet to deregister or eliminate the MOW apprenticeship program sooner, and partly moot the parties' bargaining dispute over the journey worker seniority list.

Under these circumstances, we conclude that TriMet (through its manager), directly approached ATU-represented employees (the five MOW apprentices) to gauge their interest in changing a matter of employment relations (terminating their status as apprentices with the

³⁶In fact, the record establishes that none of the apprentices actually wanted to leave the program under the status quo. Baker testified unequivocally that he told Goldin that he did not want to leave the program, and that he wanted to "finish what he started." Further, even according to Goldin, the apprentices told him that they would be interested in leaving the program *only if* TriMet succeeded in bargaining to place the outside journey workers ahead of them on the seniority list. TriMet did not relay that aspect of the apprentices' responses to ATU; TriMet simply represented that the employees wanted to leave the program, even though the parties had not yet resolved the seniority issue (much less agreed to TriMet's proposal). Even assuming this omission was unintentional, it reveals another reason why TriMet should not have attempted to ascertain the employees' preferences by asking a manager to question them directly: because a management representative is more likely to view the employees' responses through the lens of the employer's management interests. Further, assuming that TriMet Labor Relations was unaware that Goldin omitted this information until the hearing in this matter, then TriMet's attempt to ascertain the employees' interest in leaving by questioning them directly caused TriMet to incorrectly believe that four employees wanted to leave the program—a belief that contradicted ATU's representations in bargaining that the employees highly value the apprenticeship programs and the journey worker status they convey.

³⁷With respect to the MOW apprenticeship program, TriMet intends to end BOLI registration after the current apprentices graduate or leave the program. Although TriMet plans to operate a MOW signals training program after it eliminates the registered apprenticeship program, the minimum qualifications for a trainee position in that program, and the content and nature of the program, will be substantially different.

condition of maintaining seniority), rather than discussing that matter with the exclusive representative (ATU). Such conduct amounts to direct dealing, and is therefore a *per se* violation of ORS 243.672(1)(e), under longstanding labor law doctrine and case precedent.

Since before PECBA was enacted, the NLRA (which PECBA was modeled on), has barred an employer's "direct effort to determine employee sentiment" about a mandatory subject of bargaining as unlawful direct dealing. *See Obie Pacific*, 196 NLRB at 458-59 ("An employer who by polling its employees, or otherwise, solicits employee sentiment with regard to a subject of collective bargaining instead of leaving such effort to the employees' representative tends to undermine the union's status as the employees' exclusive representative and thereby violates the Act."). That foundational principle has been reiterated as a core concept of labor law. *See, e.g., Harris-Teeter Super Markets, Inc.*, 310 NLRB 216, 217 (1993) (An employer "may not seek to determine for himself the degree of support, or lack thereof, which exists for a position that it seeks to advance in negotiations with the employees' exclusive bargaining representative." (internal quotation marks and citation omitted)); *Wallkill Valley Gen. Hosp., aka Alexander Linn Hospital Assn.*, 288 NLRB 103, 106 (1988) *enfd sub nom, NLRB v. Wallkill Valley General Hospital*, 866 F2d 632 (3d Cir 1989) (An employer's "actions in ascertaining employee sentiment constitute[s] a bypassing of the [u]nion."). Moreover, such direct efforts to determine employee sentiment constitute "direct dealing," even though such conduct is not "actual bargaining." *Allied Signal*, 307 NLRB at 754 (citing *Alexander Linn Hospital Assn.*, 288 NLRB at 106; *Jafco, a Div. of Modern Merchandising Inc.*, 284 NLRB 1377, 1379 (1987); and *Obie Pacific*, 196 NLRB at 458-59). As PECBA was modeled on the NLRA (and nothing in PECBA indicates a contrary approach), we find it consistent with the policies and principles of PECBA to apply those longstanding principles here.

In this case, as described above, TriMet "sought to ascertain employee opinion" about an issue that is subject to bargaining before bargaining about it—"a job that belonged to the Union." *Wallkill Valley*, 288 NLRB at 106.³⁸ TriMet could have informed ATU that it would agree to permit any MOW apprentice to leave the program without loss of seniority without first polling the apprentices to determine which ones would be interested in that option, and allow ATU to determine which, if any, apprentices would be interested. Instead, TriMet chose to deal with ATU through the employees, instead of dealing with the employees through ATU. Such conduct "plainly erodes the position of the designated representative." *Allied Signal*, 307 NLRB at 754. Accordingly, we conclude that TriMet engaged in direct dealing, a *per se* violation of the duty to bargain in good faith.

TriMet contends that, in questioning the MOW apprentices, it was merely engaged in contract administration, citing Article 3, Section 15, Paragraph 8 of the expired CBA. We disagree with that characterization of TriMet's conduct, for several reasons. To begin, the contract expressly provides that an employee can leave an apprenticeship program after six months without loss of seniority only "by mutual agreement between" TriMet and ATU. That is, TriMet ascertained employee interest in an option that was, by the express terms of the CBA, subject to bargaining with ATU. Additionally, the contract provision, by its express terms, applies to individualized circumstances, *i.e.*, when "a particular employee" "elect[s] to return to his/her previous

³⁸This is not a case in which the employees initiated a discussion with the employer.

classification.” TriMet was not merely responding to a particular employee’s request to leave the apprenticeship program after six months. Rather, TriMet initiated conversations with all of the MOW apprentices, and TriMet told ATU that TriMet would agree to allow all employees who wanted to leave the program to retain their seniority, without regard to any individualized circumstances. TriMet’s offer to ATU went beyond the express terms of the contract provision, and represented a change in a term of employment for the MOW apprentices as a group.³⁹

Even assuming that Paragraph 8 was applicable under these circumstances, the fact remains that TriMet attempted to determine whether the MOW apprentices would be interested in leaving the apprenticeship program pursuant to that provision, while the parties were engaged in bargaining over TriMet’s plan to eliminate that program and TriMet’s proposal to place outside journey workers ahead of the apprentices on the seniority list. Whether intended or not, TriMet’s proposal to allow any MOW apprentice to leave the program without loss of seniority would undercut ATU’s bargaining positions on those issues. When TriMet asked the apprentices about the option of leaving the program and retaining their seniority, and indicated that TriMet was willing or able to “make a deal” with ATU for that option, TriMet was effectively holding itself out as the party who is responsible for ascertaining the apprentices’ preferences and advancing their interest in bargaining—thereby usurping ATU’s role as exclusive representative. Further, when TriMet conveyed to ATU which employees were purportedly interested in leaving the program if they could retain seniority, TriMet placed ATU in an untenable position. If ATU agreed to allow four out of five (or potentially all) of the apprentices to leave and retain their seniority, it would be undermining its own positions in bargaining over the apprenticeship programs. If ATU refused, then ATU risked appearing to be the party standing in the way of the apprentices being able to leave the program without losing their seniority. “[D]irect employee communication which is conducted in such volume and under such conditions as to suggest to employees that ‘the Employer rather than the Union is the true protector of the employees’ interest,’ violates the duty to bargain in good faith and constitutes unlawful ‘direct dealing’ with employees.” *AMF Inc.-Union Mach. Div.*, 219 NLRB 903, 909 (1975) (quoting *General Electric Co.*, 150 NLRB 192, 194-95 (1964)). Accordingly, whether TriMet’s conduct can be characterized as an administration of Paragraph 8 or not, we conclude that it constituted direct dealing under the totality of the circumstances.⁴⁰

In arguing for a different result, TriMet relies on *Hood River Employees Local 2503-2/AFSCME v. Hood River County*, Case No. UP-92-94 at 16, 16 PECBR 433, 448 (1996), *aff’d without opinion*, 146 Or App 777, 932 P2d 1216 (1997). In that case, the Board dismissed a

³⁹We also note that TriMet, in successor bargaining, had proposed striking Article 3, Section 15, Paragraph 8 from the contract, and taken the position that it (along with all other apprenticeship-related provisions) involved permissive subjects of bargaining, which means that, in TriMet’s view, that provision was not part of the status quo at the time that TriMet questioned the apprentices (because the contract had expired).

⁴⁰Because TriMet did not fully disclose to ATU the nature and extent of its dealings with Arronson or the MOW apprentices, we do not construe any lack of immediate and express objections by ATU as a waiver (which, in any event, is an affirmative defense that TriMet did not plead), or as sufficient evidence that ATU consented to that conduct. Further, when ATU gained sufficient information about the nature and extent of those dealings, it did object—by timely filing the instant unfair labor practice complaint.

(1)(e) direct dealing allegation where (1) the union president, rather than the union's chief bargaining spokesperson, spoke directly with the county administrator "to discuss an extension of the [] deadline for the conclusion of negotiations and receipt of retroactive pay"; and (2) the county administrator wrote a letter to the union president, rather than the union's chief spokesperson, that the County was not willing to return to the negotiating table and was modifying its proposals on wages and insurance premiums. In both instances, the union's designated bargaining spokesperson had no objection to the contacts at issue. We find this case distinguishable, as it did not involve communications between ATU's president and a high-level bargaining representative at TriMet. Rather, this involved a manager (and immediate former supervisor of the apprentices) holding one-on-one meetings with represented employees to assess their interest in a matter subject to bargaining with ATU, and that related to other issues of great concern to ATU at the bargaining table.

Likewise, we are not persuaded that *Coos Bay Firefighters Association v. City of Coos Bay and Coos Bay Fire Department*, UP-41-98, 18 PECBR 515 (2000), warrants a different result. In *Coos Bay*, the employer informed individual captains and the union on the same day about a reorganization plan that would convert those captain positions to battalion chiefs. When the association demanded to bargain, the employer agreed to delay implementation and engage in impact bargaining over the reorganization. In concluding that the conversations with the captains did not violate ORS 243.672(1)(e), the Board explained that the City was informing the captains of a decision that the City had already made (a decision that was, in itself, a permissive subject of bargaining), and that there was "no evidence that the City sought any feedback or input from the captains about its plans." *Coos Bay*, UP-41-98 at 11, 18 PECBR at 525. Here, in contrast, the primary purpose of TriMet's discussions with the apprentices was to get feedback or input from the apprentices about TriMet's idea of permitting the apprentices to leave the program with the promise of retained seniority, which was an idea that was subject to ATU's mutual agreement. Therefore, *Coos Bay* is materially distinguishable.⁴¹

In sum, we conclude that TriMet violated section (1)(e) when it dealt directly with Arronson regarding its extra board proposal, and when it dealt directly with the MOW apprentices regarding its proposal to allow them to leave the apprenticeship program without loss of seniority.

4. The totality of TriMet's bargaining conduct did not amount to surface bargaining in violation of ORS 243.672(1)(e).

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to "[r]efuse to bargain collectively in good faith with the exclusive

⁴¹The facts that TriMet questioned the employees informally, that the MOW manager subjectively believed he was helping the employees, that TriMet lacked subjective intent to undermine ATU, that TriMet subsequently presented the information to ATU, or that the apprentices did not, ultimately, leave the program, have no bearing on the question of whether TriMet engaged in direct dealing by attempting to directly ascertain employee sentiment on an issue subject to bargaining. *See, e.g., Shenango Steel Bldg., Inc.*, 231 NLRB 586, 586 (1977) (concluding that employer engaged in direct dealing by "bypassing the Union to ascertain employees' desires for a 10-hour-a-day 4-day workweek," where the employer "subsequently submitted its proposal to the Union" and then "withdrew it," and the employer's actions were "designed to help employees * * * rather than to disparage the Union's status").

representative.” Under PECBA, “collective bargaining” means the “performance of the mutual obligation of a public employer and the representative of its employees 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[.]” ORS 243.650(4).

ATU contends that TriMet violated ORS 243.672(1)(e) by engaging in bad faith “surface” bargaining. Surface bargaining is going “through the motions of collective bargaining” without a “sincere desire—or ‘willingness,’ as called for in ORS 243.656(5)—to reach an agreement.” *McKenzie*, UP-14-85 at 37, 8 PECBR at 8196. In a case involving a strike-prohibited unit, the complainant must prove that the respondent “did not intend or desire to reach a negotiated settlement, but rather, throughout all or most of the process, planned to take its proposals to arbitration.” *City of Portland v. Portland Police Commanding Officers Association*, Case Nos. UP-19/26-90 at 44, 12 PECBR 424, 467, *adh’d to on recons*, 12 PECBR 646 (1990).

In reviewing a claim of alleged surface bargaining, we examine the totality of the circumstances to determine whether a party’s cumulative actions indicate a sincere willingness to reach a negotiated agreement. *Jackson County v. SEIU Local 503, OPEU/Jackson County Employees Association*, Case No. UP-027-14, 26 PECBR 501 (2015); *Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04 at 33-37, 21 PECBR 360, 392-96 (2006). We “judge the overall quality of bargaining[.]” *Lincoln County Employees Association v. Lincoln County and Glode, District Attorney*, Case No. UP-42-97 at 22, 17 PECBR 683, 704 (1998), and “carefully examine and weigh circumstantial evidence in order to draw an inference concerning good faith or bad faith bargaining.” *McKenzie*, UP-14-85 at 37, 8 PECBR at 8196.

In a surface bargaining case, we examine multiple factors, including (1) whether dilatory tactics were used; (2) the contents of the proposals; (3) the behavior of the party’s negotiator; (4) the nature and number of concessions made; (5) failure to explain a bargaining position; and (6) the course of negotiations. *Rogue Valley Transportation District*, UP-80-95 at 26, 16 PECBR at 584. We also consider other factors that might be relevant in any given case. *See, e.g., Rogue Valley Transportation District*, UP-80-95 at 29, 16 PECBR at 587. Ultimately, we our analysis is grounded in a careful assessment of the totality of the circumstances.

With this standard in mind, we turn to an analysis of ATU’s claim. Because the parties dispute many aspects of TriMet’s conduct, we first describe our assessment of the record with respect to the surface bargaining factors. Following that discussion, we assess TriMet’s conduct under the totality of the circumstances.

Whether Dilatory Tactics Were Used

To begin, we consider ATU’s contention that TriMet engaged in dilatory tactics. It “may indicate bad faith bargaining when a party engages in dilatory tactics that tend to unreasonably impede negotiations.” *McKenzie*, UP-14-85 at 38, 8 PECBR at 8197. ATU contends that TriMet engaged in dilatory tactics by engaging in direct dealing. Direct dealing, like other unfair labor practice conduct, may be evidence of surface bargaining, and we will consider that in our analysis of all relevant factors. However, we do not agree that direct dealing conduct is a type of “dilatory tactic” that causes delay or unreasonably impedes negotiations.

As ATU concedes, the record shows that TriMet did not engage in any dilatory tactics. To the contrary, TriMet was diligent in scheduling and engaging in bargaining sessions with ATU. In addition to table bargaining, TriMet informally met with ATU in small groups multiple times before formal bargaining started, and TriMet's chief negotiator exchanged numerous emails with ATU's chief negotiators to clarify proposals and share information.

Ultimately, the parties participated in a total of 15 bargaining sessions from October 10, 2019 to July 31, 2020, when ATU requested mediation. For most of four of those months, from March to June 2020, the parties had mutually agreed to put table bargaining on hold because of the COVID-19 pandemic. The parties also engaged in four mediation sessions, from September 3 to September 23, 2020, when TriMet declared impasse. Moreover, TriMet representatives repeatedly suggested to ATU that the parties schedule more bargaining sessions to allow sufficient time to deal with their complex contract.

For example, in April 2019, when the parties were preparing for the upcoming successor bargaining, TriMet proposed 19 bargaining dates, in the period from September 2019 to February 2020. ATU agreed to only ten of those dates. When TriMet requested that the parties schedule additional sessions and ATU declined, Cusack notified ATU that he was "really concerned" about the lack of scheduled bargaining sessions in the 150-day bargaining period provided for under ORS 243.712. Later, in June 2019, Cusack reiterated that he did not believe ten sessions were "sufficient for the level of complexity of our contract." Cusack committed that he would "meet on any day after the start of bargaining," except holidays, but ATU did not agree to schedule additional sessions.

After the parties agreed to resume bargaining in June 2020, TriMet again suggested scheduling more bargaining sessions. Specifically, on June 9, 2020, Kim Sewell, TriMet's Executive Director of Labor Relations and Human Resources, emailed ATU to suggest that the parties bargain earlier than scheduled, on June 18 (instead of in late June). ATU did not agree, and the parties then held a bargaining session on June 24, 2020. Then, TriMet stated that it wanted to schedule additional dates, but once again, ATU declined to provide more dates. Later, on July 6, 2020, when the parties discussed scheduling, Stark proposed only a single bargaining date: July 23, 2020. Cusack responded with disappointment, noting that it was "almost like ATU doesn't want to bargain[.]" and proposed five dates in addition to July 23. In response, ATU explained that July 23 did not work after all, and agreed to bargain only on two dates, July 29 and 31. After the July 31 session, ATU unilaterally requested mediation.

In sum, TriMet's diligence in bargaining, and its repeated efforts to engage in more bargaining, are indicative of intent to reach a negotiated settlement.

The Behavior of the Party's Negotiator

Next, we consider the conduct of TriMet's chief negotiator, Laird Cusack. In examining the conduct of a party's negotiator, "we focus on the effect that the negotiator's conduct had on the bargaining process." *Oregon School Employees Association v. Medford School District #549C*, Case No. UP-77-11 at 15, 25 PECBR 506, 520 (2013). Where, for example, "a representative

makes no proposals, offers no counterproposals, has no apparent authority to negotiate, is non-responsive to inquiries from the other party, and tinkers with contract language away from the bargaining table, such conduct indicates an intention not to bargain or reach agreement.” *Id.* (citing *Hood River County*, UP-92-94 at 22, 16 PECBR at 454). A party’s failure to respond to legitimate inquiries, or failure to be responsive “even when responding,” can illustrate “a lack of regard for the PECBA requirement that parties communicate with each other about their labor dispute in a forthright and timely manner.” *Id.*

Here, ATU alleges that Cusack made insulting or demeaning remarks about bargaining unit employees, and that he was unresponsive to ATU’s concerns and proposals. TriMet either denies that Cusack made the alleged statements, or contends that ATU misconstrues them. TriMet also denies that Cusack was unresponsive. We resolve those disputes as follows.

We begin with ATU’s allegation that Cusack effectively accused employees of faking illnesses to obtain disability benefits. Cusack denied that he made a statement to that effect, and TriMet contends that ATU is merely misinterpreting statements that Cusack made when explaining why the quotes for short-term disability plans were high. Cordova, one of ATU’s negotiators, testified that Cusack responded to ATU’s short-term disability proposal by stating something to the effect of, “then they’ll never come to work,” and that she understood him to be implying that employees would fake illnesses to access disability benefits. Additionally, TriMet’s bargaining notes reflect that, at the parties’ January 13, 2020, bargaining session, Stark stated that she thought TriMet would make a proposal on short-term disability, and Cusack responded, “Absenteeism is a problem. We are not going to make a proposal on short term disability so they can miss more time.” Those bargaining notes corroborate Cordova’s testimony to the extent that Cusack equated a new benefit with increased absenteeism, and Cordova’s interpretation of that statement as demeaning employees was understandable.

However, we also find that Cusack made distinct statements regarding the disability plan quotes, and that those statements do *not* reflect a belief that employees would fake illnesses, as ATU contends. In essence, Cusack repeatedly attempted to explain his understanding that the quotes were high because insurers assume that, when an employer provides a better disability benefit, more employees take disability leaves. We credit Cusack’s testimony that he was merely reporting to ATU what insurance brokers had told him. Further, we do not agree with ATU’s contention that by discussing that assumption, Cusack was again implying that employees will fake illnesses to get benefits. Rather, as ATU itself contends, it is reasonable to assume that, if employees have better disability benefits, more employees who have qualifying disabilities will be able to take disability leave. The assumption that, if TriMet offers better disability benefits, more employees will use those benefits, is merely an extension of the former.

Relatedly, ATU alleges that TriMet was unresponsive to ATU’s proposals for short- and long-term disability benefits, and further alleges that TriMet was unresponsive because Cusack believes that employees would abuse such benefits. TriMet denies that it was unresponsive, and asserts that ATU was proposing a type of long-term disability plan that does not exist in the market. Based on our review of the record, we find that the facts are more nuanced than either party acknowledges.

ATU alleges that the record shows “TriMet never made a short-term or long-term disability proposal, and never counteroffered ATU’s proposals on the same.” It is true that TriMet never made a proposal for short- or long-term disability benefits. However, TriMet had no duty to make a disability benefit proposal in the first instance, even if TriMet employees need disability benefits, as ATU maintains. TriMet declining to make an *initial* proposal for disability benefits is not unresponsive conduct. Further, we do not agree with ATU’s assertion that TriMet “never counteroffered” ATU’s proposal for disability benefits: TriMet counter-proposed the status quo. Further, significantly, ATU did not make a written proposal for short- and long-term disability benefits until June 24, 2020, which was approximately nine months after the start of bargaining.⁴² After the June 24 session, the parties had only two more table bargaining sessions, primarily because ATU declined to schedule more sessions before it requested mediation. Under these circumstances, we would not consider a failure to make a counteroffer to ATU’s June 24 proposal to be “unresponsive” conduct.

The record does reflect that Cusack did not timely respond to ATU’s request for quotes for short- and long-term disability benefits after he agreed to provide quotes. ATU made that request on or before January 13, 2020, and Cusack provided them on August 16, 2020.⁴³ By that time, the parties had ended table bargaining and were starting mediation. However, the record does not establish that Cusack was willfully unresponsive because he believed that a short-term disability benefit would encourage absenteeism, as ATU contends. There is no evidence that ATU reminded Cusack of its request for quotes, or otherwise pursued it, at any point between January 13 and June 24, 2020.⁴⁴ We also note that bargaining was on hold due to the COVID-19 pandemic from late March to early June. Under these circumstances, even considering Cusack’s statement regarding absenteeism, we decline to infer that the delay was willful.

We agree with ATU that the parties did not engage in much meaningful bargaining about its disability benefit proposal. It appears that, instead of discussing the proposal at the table, the parties exchanged emails late in the bargaining process, and they lacked a shared understanding of what kinds of disability benefits are available and what ATU intended to propose. However, we do not agree with ATU that those problems were caused solely or even primarily by Cusack. Both

⁴²ATU’s initial proposal, made on October 10, 2019, did not include a proposal for short- or long-term disability benefits. Rather, ATU proposed only to increase the amount of extended sick leave pay provided for under the existing CBA.

⁴³The parties’ bargaining notes suggest that ATU asked TriMet to obtain a quote for a short-term disability plan on or before October 10, 2019, but the notes are vague, and ATU provided no other testimony or evidence that clarifies when it first made the request.

⁴⁴ATU reiterated its request for quotes at the parties June 24 session, and Cusack acknowledged that he still owed ATU the quotes at the parties July 29 session.

parties bear responsibility for delaying bargaining over the proposal, and both parties bear responsibility for their poor communication.⁴⁵

We turn to ATU's allegation that Cusack stated in bargaining that TriMet maintenance mechanics are "not smart enough" or cannot be trained to maintain hybrid and electric buses (which, under TriMet's current plans, will eventually comprise TriMet's entire bus fleet). We find no evidence that Cusack actually made such statements. In support of this allegation, ATU points to one exchange reflected in the parties' bargaining notes: after TriMet made a proposal that would expressly exclude various types of electric bus maintenance from the scope of bargaining unit work, an ATU representative suggested that TriMet made the proposal because it does not think its employees are "trainable." Bennett, then TriMet's bus maintenance director, responded something to the effect of, "this is high quality engineering, writing code." At hearing, ATU did not dispute that TriMet lacks the specialized facilities and expertise needed to perform the type of engineering and coding work that Bennett was referring to. We also note that TriMet's proposal provided that, after TriMet determined which type of electric bus it would purchase, TriMet would meet with ATU "to discuss whether parts of this work should be brought in house." Under these circumstances, we do not construe Bennett's response, or TriMet's proposal, as demeaning the intelligence of TriMet employees.

ATU also notes that Cusack, at a bargaining session on December 5, 2019, accused TriMet employees of hazing other employees. Cusack did not deny he made that comment, but testified that, in his view, the comment was justified because some outside hires had complained that they were ignored by TriMet journey workers who had progressed through TriMet's apprenticeship programs. ATU also notes that Cusack accused bargaining unit supervisors of sleeping in their cars. Again, Cusack did not deny that he made such a comment, but testified that there had been an investigation of one supervisor who allegedly was sleeping in her car late at night. Cusack also recalled that he made the comment when discussing TriMet's desire to shift from a system in which supervisors waited in their cars to be called to address problems to a system in which they proactively visit platforms.

On the one hand, Cusack credibly testified that his comments were based on complaints or allegations against some employees, and ATU did not dispute that those complaints were made. On the other hand, Cusack's comments can fairly be characterized as overstating the nature or extent of the problem. We recognize why ATU considers overly negative

⁴⁵For example, in response to the quotes Cusack provided, ATU asserted that more cost-effective plans exist, including "voluntary" long-term disability (LTD) plans. Cusack then asked Mercer, TriMet's health care consultant, to research voluntary LTD plans, and provided ATU with Mercer's chart of "voluntary LTD plans," which indicated that all voluntary LTD plans have minimum participation requirements. Cusack's cover email stated, "Mercer did a survey about the availability of voluntary LTD; minimum participation is required." Cusack did not state, at that time, that voluntary LTD plans do not exist in the marketplace. After ATU submitted its final offer, which included a proposal that TriMet offer employees a "voluntary LTD plan," Cusack asserted that voluntary LTD plans do not exist in the marketplace, because all LTD plans have minimum participation requirements. In response, Stark clarified that ATU understood that voluntary LTD plans have minimum participation requirements, and that is the type of plan ATU was proposing. In response, Cusack again asserted that ATU was proposing a plan that does not exist, because ATU's proposal did not include a minimum participation level.

comments, or generalizations based on the conduct of a single employee, to be demeaning towards employees, and we do not condone them. However, as this Board has repeatedly observed, “Emily Post-approved deportment is not a requirement of good faith bargaining, even though discourteous or otherwise-offensive behavior is not necessarily desirable.” *McKenzie*, UP-14-85 at 39, 8 PECBR at 8198. Cusack’s comments do not rise to the level of incivility, falsity, or belligerence that indicates bad faith.

Finally, we address ATU’s allegation that, throughout bargaining, Cusack’s attitude was largely indifferent to ATU’s concerns and interests. For example, Hunt, ATU Vice President and Assistant Business Agent, testified that Cusack appeared to have no interest in understanding how TriMet’s proposals impacted ATU bargaining unit employees, and had little interest in collaborating with ATU to resolve problems, even when ATU made proposals in an effort to “meet TriMet’s interests.” The duty to bargain in good faith does not require the parties to adopt an interest-based or collaborative approach to bargaining. Nor does it require each party to have sincere interest in the concerns of the other. It requires only a sincere intent to negotiate an agreement. Thus, ATU bears the burden of proving not just that Cusack appeared indifferent, but that he was so indifferent or inattentive in bargaining that his conduct should be considered circumstantial evidence of bad faith. ATU did not meet that burden. ATU offers only conclusory and generalized testimony in support of this contention. Further, as discussed below, the record shows that TriMet modified at least some of its proposals in response to ATU’s concerns, which suggests that Cusack “heard” those concerns, even if he appeared indifferent to them at the table.

Factors Related to the Course of Bargaining

ATU contends that several factors related to the course of bargaining indicate that TriMet engaged in surface bargaining, including the contents of TriMet’s proposals, the nature and number of concessions and counteroffers made by TriMet, and TriMet’s overall approach to bargaining. Specifically, ATU contends that TriMet made many unduly harsh and unacceptable proposals, including proposals that would lead to increased contracting out of ATU work; proposals that would eliminate or limit job mobility and career opportunities for ATU bargaining unit employees; and a regressive wage proposal. ATU also contends that TriMet’s initial proposals, when viewed together, were unduly harsh, because they comprised an overwhelming number of significant “takeaways” that were counterbalanced only by TriMet’s wage proposal (which it subsequently reduced). Further, ATU contends that TriMet generally adopted a “take-it-or-leave-it” approach to bargaining. TriMet contends that its proposals were not unduly harsh, but instead addressed legitimate operational issues or other management concerns. TriMet also contends that it was merely engaged in hard bargaining, and that its proposals must be judged in light of ATU’s initial proposals, which were also aggressive. TriMet also contends that it made more significant concessions or counteroffers to ATU proposals than ATU asserts.

Below, we first address the content of the TriMet proposals that ATU contends were unduly harsh and predictably unacceptable. We then address ATU’s argument that TriMet made so many harsh “takeaway” proposals that it knew or should have known that those proposals would impede bargaining. We will then assess the nature and number of TriMet’s concessions and counteroffers, and the overall course of bargaining.

The Contents of TriMet's Proposals

Unduly harsh or unreasonable proposals can indicate bad faith bargaining, depending on the circumstances. The party attempting to prove bad faith must prove “not just that a particular proposal was harsh or unreasonable,” but that the terms of the proposals were so *unduly* harsh or unreasonable that it can be said that the employer “knew or should have known that the proposals were predictably unacceptable.” *Oregon AFSCME Council 75, et al. v. State of Oregon Executive Department*, Case No. UP-99-85 at 16, 9 PECBR 9085, 9100 (1986). An “unduly” harsh proposal is one that is harsh to an unwarranted degree. When proposals are unduly harsh or unreasonable, they do not in and of themselves establish bad faith, but they can be considered circumstantial evidence that indicates “that the employer engaged in negotiations with the intent to frustrate the bargaining process, rather than to reach agreement.” *Id.*

When we assess a claim that a proposal is unduly harsh or unreasonable, we do not look at a proposal in isolation; we look to the totality of the circumstances. *See Ass’n of Or Corr Emps v. State*, 213 Or App 648, 660, 164 P3d 291, *rev den*, 343 Or 363, 169 P3d 1268 (2007) (assessing employer’s wage freeze proposal in light of state budgetary shortfall); *Portland Association of Teachers v. Portland School District No. 1J*, Case Nos. UP-35/36-94 at 26-27 n 9, 15 PECBR 692, 717-18 n 9 (1995) (noting that wage cuts are always “predictably unacceptable,” but the Board looks to the totality of the circumstances to assess proposals).

Below, we consider each of the TriMet proposals that ATU contends were unduly harsh, first individually, and then in the aggregate.

We begin with TriMet’s proposal to eliminate the apprenticeship programs, which appears to be the crux of the parties’ conflict in this matter. There is no dispute that maintaining the apprenticeship programs was a core (perhaps *the* core) bargaining priority for ATU, and that, correspondingly, ending the existing apprenticeship programs was a similar priority for TriMet. In our prior order and elsewhere in this order, we have explained the significance of these programs, as part of our conclusion that TriMet must bargain over the decision to end any of the apprenticeship programs. That the subject of the proposal is mandatory or particularly meaningful for one party (or both) does not, however, mean that either party is precluded from making proposals that reflect its own interests, even when those interests conflict with those of the other party. Determining when a proposal has crossed the line from harsh to unduly harsh can be difficult, particularly when both parties attach significance to the subject.

We begin by assessing TriMet’s apprenticeship proposal in the context of the totality of the circumstances. Here, those circumstances included TriMet’s legitimate operational reasons for changing how it hires and trains employees. Just as preserving the apprenticeship programs was a core priority for ATU, eliminating the rigidity that TriMet perceived in both BOLI-certification and other apprenticeship components, including the JATC, was a core bargaining priority for TriMet. Further, TriMet explained the operational issues that elimination of the apprenticeship programs is aimed at addressing; in essence, TriMet seeks to reduce training costs and address a

current shortage of mechanics by hiring employees with outside mechanic training and experience, instead of training TriMet service workers to be mechanics.⁴⁶

ATU contends that elimination of the apprenticeship programs is unduly harsh because they constitute a substantial employment benefit at TriMet, without which, service workers have no career path at TriMet. However, ATU does not dispute that TriMet's stated reasons for eliminating the apprenticeship programs reflect legitimate management interests. Nor does ATU dispute that there are issues in the apprenticeship programs that need to be addressed, or that TriMet's proposal would address them. Rather, ATU contends that there are alternative ways to address those issues that would have less negative impacts on employees and still serve TriMet's management interests. However, even assuming that ATU is correct, *i.e.*, that there are alternatives that would better serve both parties' interests, the existence of such alternatives does not make TriMet's proposal unduly harsh. Rather, the proposal and consideration of alternatives, which may serve (or conflict with) the parties' respective interests to varying degrees, is precisely what the good faith collective bargaining process contemplates.⁴⁷

ATU next contends that TriMet's regressive wage proposal was unduly harsh and predictably unacceptable. In January 2020, before the emergence of the COVID-19 pandemic, TriMet proposed wage increases of 2.4 percent on December 1, 2019, and 2.2 percent on December 1, 2020. On June 25, 2020, several months into the COVID-19 pandemic, TriMet decreased its wage increase to 1.8 percent on December 1, 2019, with no other increases. The "zero increase" mirrored the wage freeze that TriMet's non-represented employees received. TriMet relied on "changed circumstances" when it described this proposal at the June 24, 2020, bargaining session. Cusack explained at the table that the proposal reflected TriMet's assessment of the consumer price index from December 2018 to December 2020. He also explained TriMet's view that ATU members would receive wages comparable to other jurisdictions. TriMet did not present specific financial data underlying its decision; Nancy Young-Oliver, TriMet's Director of Budget and Grants, was unable to attend that bargaining session because she was attending the meeting of TriMet's Board of Directors.⁴⁸ Ultimately, in its final offer, TriMet improved its wage proposal to an increase of 2.0 percent on December 1, 2019, with no other increases during the contract.

⁴⁶See, e.g., Finding of Fact 56 in *TriMet II*, UP-001/003-20 at 13 ("Cusack explained TriMet's view that, given the constraints of the existing apprenticeship programs, TriMet was unable to hire sufficient numbers of workers who could be trained quickly enough to meet TriMet's needs. Cusack also explained that TriMet was not an educational institution and that the apprenticeship programs were too costly.").

⁴⁷ATU also contends that TriMet presented its proposals related to elimination of the apprenticeship programs as a "done deal," and that the manner in which TriMet bargained over the programs indicates bad faith. We address that argument below.

⁴⁸Earlier during bargaining, on January 23, 2020, Young-Oliver had explained that TriMet was facing financial uncertainty. At the bargaining table, Young-Oliver explained that employer payroll tax revenue was down \$7.5 million for fiscal year 2020, and that passenger revenue was down because of fare evasion and underperforming revenue from Hop cards.

The historic nature of the COVID-19 pandemic resulted in not just an economic downturn, but also sustained uncertainty about how quickly use of public transit by the public would rebound. Under the historic circumstances that confronted these parties, TriMet's regressive wage proposal was not so unreasonable that it suggests bad faith bargaining.

ATU also argues that several of TriMet's proposals were unduly harsh and unreasonable because they limited job opportunities for bargaining unit employees for no reason. Although there is no real dispute that some TriMet proposals would limit job opportunities, the record shows that TriMet had legitimate reasons for making those proposals. For example, TriMet proposed to split its existing service worker classification into three new classifications, and TriMet does not dispute that doing so will limit the service workers' mobility within TriMet. TriMet, however, contends that the split is warranted because movement between different positions within the existing service worker classification caused inefficiencies and retraining costs, and also because not all of the positions require a commercial driver's license. In bargaining, ATU acknowledged TriMet's reasons for its proposal were legitimate and sought to meet those "interests."

ATU nonetheless argues that TriMet's service worker proposal was unduly harsh because ATU proposed a less harsh alternative that addressed TriMet's concerns, and TriMet expressed interest in that alternative but failed to act on it. As discussed above, the existence of a less harsh alternative does not necessarily mean that TriMet's proposal was unduly harsh or unreasonable. Further, we do not find that TriMet failed to act on ATU's alternative in a manner that suggests bad faith. Rather, the record indicates that ATU failed to diligently pursue the idea. Specifically, the record indicates that ATU orally suggested that, instead of splitting the classification, TriMet could require service workers who bid into specific jobs to stay in those jobs for a two- or three-year period. The parties discussed ATU's idea at the December 19, 2019, bargaining session, and after a caucus, Cusack informed ATU that TriMet liked the idea, and requested that ATU propose a list of positions that would be restricted. ATU agreed that an ATU bargaining team member would provide the list.⁴⁹ ATU never provided the list, however, and never formalized its idea into a proposal. At the parties' July 29, 2020, session, ATU questioned why TriMet was still proposing to split the service worker classification, instead of adopting ATU's alternative. Cusack recalled that the parties had discussed that alternative, but also noted that it did not address the CDL issue. The parties agreed that they would need to discuss those issues at the next bargaining session, but it appears that neither party remembered to do so. ATU did not make a formal proposal reflecting its concept until its final offer. Under these circumstances, neither TriMet's proposal, nor its response to ATU's alternative, are indicative of bad faith.

We turn to TriMet's proposal to change all references to "journey worker" in the WWA to "technician," to reflect TriMet's decision to change the corresponding classification titles.⁵⁰ ATU contends that the proposed terminology change diminishes the value and skill set of its current journey worker employees, harms morale, and serves no purpose. TriMet contends that the "technician" title better reflects the fact that applicants for positions in those classifications do not actually need to be certified journey workers, or have journey-level training and experience, to

⁴⁹ATU asserts that TriMet agreed to provide the list of affected positions, however, ATU's bargaining notes indicate that ATU agreed to provide the list.

⁵⁰ATU acknowledges that the classification titles are a permissive subject of bargaining.

meet the minimum qualifications. TriMet also represents that the “technician” title is more “modern” and consistent with the terminology used by other transit systems, and that it intended the title change to communicate a change to a “continuous learning” organizational culture. We recognize that it is contrary to the interests of certified journey-level mechanics to have the term “journey worker,” which connotes a particular level of skill and experience, removed from their title. We also recognize that TriMet appeared largely dismissive of ATU’s repeated efforts to explain the importance of that title to the employees. However, not every proposal that is contrary to the other party’s interests is an “unduly harsh or unreasonable” proposal that is indicative of bad faith. In this case, the record does not establish that the change to the journey worker classification title “serves no purpose,” as ATU asserts.

TriMet also made a proposal that expressly states that TriMet bus mechanics “will not do the maintenance and repair of the electric propulsion systems, high voltage batteries and connections, and the high tech exteriors on electric or hybrid buses,” and that expressly excludes the contracting out of such work from TriMet’s contracting out allotment. ATU contends that this proposal is unduly harsh because it excludes all work on electric buses from the scope of bargaining unit work, and, given TriMet’s plan to convert to an all-electric bus fleet, “essentially seeks to eradicate the bargaining unit in the future.” ATU also contends that the proposal is unduly harsh because it is premature and unnecessary. Given that TriMet has not yet determined what type of electric bus it will purchase, and the conversion of its fleet will not be complete for many years, ATU contends there is no need to determine the scope of bargaining unit work now, and that it is unreasonable for TriMet to expect ATU to do so when neither party has sufficient information about the buses to engage in meaningful bargaining over what maintenance work the bargaining unit members can and cannot do.

TriMet contends that the proposal was intended to expressly exclude only the work on electric-bus systems that ATU bargaining unit members do not currently perform and cannot perform because TriMet lacks the facilities and the technical expertise. TriMet notes that there is a parallel provision in the WWA permitting TriMet to contract out work on similar systems on the light rail system, including electrical distribution system equipment and propulsion system equipment. TriMet also notes that the proposal provides that the parties “will meet” in the future “to discuss whether parts of this work should be brought in house.”

This proposal is neither as harsh and unreasonable as ATU contends, nor as benign and reasonable as TriMet contends. On the one hand, ATU exaggerates when it asserts that the proposal excludes *all* work on electric buses and will eradicate the bargaining unit. Rather, the proposal, on its face, excludes work on specified systems, and will, at most, lead to the loss of bargaining unit bus mechanic positions (which may be a significant portion of the bargaining unit, but is far from the entire bargaining unit). Further, ATU does not dispute TriMet’s representation that at least some work on electric buses requires facilities or expertise that TriMet lacks and cannot readily acquire, and that ATU agreed to a similar exclusion for light rail vehicle maintenance.

On the other hand, the record also confirms that TriMet told ATU that it will need only a few bus mechanic positions in the future, which could mean a significant loss of bargaining unit positions. Further, TriMet’s proposal broadly excluded various types of work from the scope of bargaining unit work, without any limits. Consequently, TriMet’s proposal could be construed as

authorizing the contracting out of work that ATU members do perform, or could perform.⁵¹ Provisions that define the scope of bargaining unit work and limit contracting out are a form of job security protection, and “[f]or a labor organization, just cause and other job security protections are among the cornerstones of a collective bargaining agreement.” *Lincoln County*, UP-42-97 at 23, 17 PECBR at 705. Accordingly, such provisions are of particular importance to labor organizations and represented employees.

We also agree with ATU that TriMet’s proposal is premature. It is aimed at TriMet’s projected all-electric bus fleet 20 years from now. And, as TriMet acknowledges, the electric bus technology is not yet fully developed, and TriMet does not know what type of electric bus it will purchase. As a result, TriMet does not know what kind of maintenance the electric buses will require, or the extent to which the maintenance and repair work could be performed by TriMet employees (with or without reasonable training). Despite that uncertainty, TriMet broadly proposed that the maintenance and repair of various types of potential electric bus systems “would not be performed by ATU employees,” and instead would be contracted out, without limit. In essence, TriMet’s proposal requires ATU to broadly agree in advance to the contracting out of work, in anticipation of changes that are indefinite in many respects, and may not even occur during the CBA term. Under these circumstances, ATU lacks sufficient information to assess and engage in meaningful bargaining over the scope-of-work proposal. Consequently, we agree that the proposal is unduly harsh and unreasonable.

We turn to TriMet’s proposed revision to the existing WWA’s “lines of the District” provision, which defines the scope of bargaining unit work for operators. ATU contends that the proposal is unduly harsh because it reduces the scope of bargaining unit work (and thereby permits more subcontracting). TriMet contends that it was merely trying to clarify the existing language because it is ambiguous, and it has been the subject of multiple contract interpretation disputes. To the extent that TriMet’s proposal was aimed at addressing that problem, it was not unduly harsh or unreasonable.⁵² However, ATU also argues that the proposal is unreasonable because it is premature and vague, in two ways. First, as TriMet acknowledges, the proposal limits ATU’s scope of work in anticipation of technology that does not exist yet (self-driving buses and trains).⁵³ Second, as TriMet again acknowledges, the proposal was intended to address, in part, the unknown

⁵¹TriMet represents that it intends for ATU bargaining unit bus mechanics to continue performing work on the parts of electric buses that are the same as their counterparts on diesel buses (such as tires), and that it proposed a new classification titled “battery/electric bus technician” to reflect that intent. However, the record also shows that TriMet did not provide a job description for that new classification, and that Cusack informed ATU at the bargaining table that TriMet anticipates needing “only a few” such technicians.

⁵²ATU contends that TriMet’s proposal would not merely clarify the existing scope of bargaining unit work, but reduce it. The parties’ bargaining notes indicate that ATU voiced that concern at the table, and, in response, Sewell stated that was not TriMet’s intent, and that it would try to revise the proposal to address ATU’s concern. Although it does not appear that TriMet ever presented a revised proposal, the record establishes that TriMet withdrew the proposal when making its final offer.

⁵³ Cusack conceded at hearing that TriMet’s proposed change to the lines-of-the-district provision, with respect to possible autonomous mass transit vehicles, was “something of an overreach given the timing.”

future relationship between mass transit and ride-sharing services such as Uber. In essence, these aspects of the proposal ask ATU to bargain about the effect of this language on potential, future operational changes, when it cannot know whether those changes would cause a significant reduction in bargaining unit work. Thus, TriMet's lines-of-the-district proposal is premature and was predictably unacceptable on that basis.

In sum, TriMet offered aggressive proposals—most notably, its wholesale and immediate elimination of the apprenticeship programs for all employees, except current apprentices. However, the record also shows that most of the proposals were designed to address specific issues it identified in the workplace and discussed with ATU. Those proposals were not unduly harsh or unreasonable. TriMet's proposals regarding the scope of bargaining unit work were predictably unacceptable, and we will consider them as circumstantial evidence of surface bargaining in our analysis of the totality or the circumstances. However, we do not find that the scope-of-work proposals, in and by themselves, establish that TriMet engaged in surface bargaining. “In cases involving predictably unacceptable proposals, the generally recognized principle is that, viewed in isolation, such a proposal is an insufficient basis to find a lack of good faith, ‘provided the proposal does not foreclose future discussion.’” *Lincoln County*, UP-42-97 at 23, 17 PECBR at 705 (quoting Hardin, *The Developing Labor Law* at 618 (3rd ed 1992)). “Absent additional indicia of a lack of intention to reach an agreement, we cannot conclude that [predictably unacceptable] proposals constitute a bad faith violation, regardless of what we think of the proposals.” *Id.* In this case, TriMet's proposals did not foreclose future discussion. Rather, the record indicates that TriMet continued to engage in discussion regarding these proposals throughout bargaining. For example, TriMet acknowledged ATU's concerns about the lines-of-the-district proposal at the table, and eventually withdrew it.

The Number of “Takeaway” Proposals Offered by TriMet

Next, we turn to ATU's contention that TriMet's proposals, when considered in the aggregate, are indicative of surface bargaining. Specifically, ATU contends that TriMet made so many harsh proposals that would “take away” longstanding contractual benefits and rights (including the elimination of the apprenticeship programs), that TriMet knew (or should have known) that those proposals would consume most of the parties' bargaining time and impede the parties' ability to reach an agreement. Such conduct may be indicative of surface bargaining. *See, e.g., Rogue Valley Transportation District*, UP-80-95 at 27, 16 PECBR at 585.

Here, as in *Rogue Valley*, “the magnitude” of TriMet's proposed changes, “both in number and substance, was substantial,” and TriMet's proposals “included elimination of numerous contractual benefits and rights which had been enjoyed for years by unit members.” *Id.* TriMet's takeaway proposals included proposals to increase some employees' health care premiums; eliminate the benefits coordinator; modify the continuation of service provisions to reduce employee eligibility for benefits while on leaves; impose a new limit on employee eligibility for holiday pay; impose vacation leave limits on some employees; lengthen the probationary period; eliminate a step from the two-step grievance process;⁵⁴ eliminate or reduce various job mobility and job security provisions; split the operator extra board into AM/PM boards and limit shift

⁵⁴Both parties were trying to find ways to speed up the grievance and arbitration process.

trading; merge the rail operator boards; eliminate a tool allowance for rail maintenance employees; authorize mandatory overtime for some maintenance employees; and eliminate the apprenticeship programs. Additionally, TriMet made several proposals that would limit or reduce the scope of bargaining unit work, and permit more contracting out of bargaining unit work. Those proposals include the electric-bus scope-of-work proposal and the “lines of the District” proposal discussed above, as well as a proposal to eliminate existing provisions regarding warranty work in the maintenance departments. TriMet also represented in bargaining that it intended to replace some bargaining unit “assistant supervisors” with unrepresented supervisors. Additionally, as ATU points out, TriMet initially offered only one counterbalancing proposal: its proposal to increase wages across-the-board, which TriMet subsequently reduced.⁵⁵

Although a party may bargain on any subject that is not prohibited (absent objection by one party to permissive proposals), in this case, we note that TriMet attempted to substantially reduce or remove many significant contractual benefits for ATU employees, including job security protections, in one round of successor bargaining. ATU also correctly points out that the parties reached a tentative agreement on only one item, which lends some weight to ATU’s assertion that TriMet’s conduct impeded bargaining.

We also note that, in making the proposals described above, TriMet was striking many longstanding provisions the WWA (which Cordova described at hearing as “taking a Sharpie” to the contract). Further, TriMet refused to bargain over many of those provisions on the ground that they involve permissive subjects of bargaining, and ultimately contended that ATU violated the duty to bargain in good faith by proposing to carry over that existing language in its final offer. As discussed above, we conclude that the vast majority of those provisions involve mandatory subjects of bargaining. Although we agree that some of the provisions involve permissive subjects, and “a permissive subject does not become mandatory solely through inclusion in a prior collective bargaining agreement,” *Gresham*, C-61-78 at 7-8, 5 PECBR 2777-78, TriMet’s approach of selectively striking numerous provisions of the WWA as “permissive” is concerning, because it fails to recognize that parties typically agree to include permissive subjects to resolve problems, or to obtain other concessions. *See Oregon City School District No. 62 v. Oregon City Education Association*, C-179-79 at 10, 5 PECBR 4246, 4255 (1981). Striking only the permissive portions of a contract potentially upsets the balance the parties mutually achieved through collective bargaining.

TriMet does not dispute that it adopted an aggressive approach to bargaining, but contends that it was reasonable because ATU also opened the negotiations with its own substantial demands, including proposing four annual five-percent wage increases; an increase in TriMet’s health insurance premium contributions from 95 percent to 100 percent; an increase in TriMet’s contribution to its defined contribution retirement plan (for employees hired after July 31, 2012) from 8 percent to 12 percent of each employee’s base pay; and a new early retirement benefit. ATU’s initial proposals included other financial benefits for its members, including proposals to increase road relief pay, increase TriMet’s annual contribution to a recreation trust fund from \$55,000 to \$75,000 and to revive and increase TriMet’s annual payment to ATU from \$55,000 to \$75,000 for a child/elder care assistance program.

⁵⁵As detailed below, TriMet responded to some ATU proposals by offering to improve some existing economic benefits.

We agree that, when assessing TriMet's bargaining tactic of putting so many aggressive proposals on the table at the outset of bargaining, we must also take into account ATU's substantial proposed changes. The fact that both parties made aggressive initial proposals undermines ATU's argument that TriMet's decision to do so should be construed as circumstantial evidence of subjective bad faith. However, on balance, taking all the facts into account, we find that TriMet's tactic of proposing so many substantial changes to the WWA during negotiations went beyond typical hard bargaining. TriMet's decision to strike so many provisions in the contract did, to some degree, impede a possible settlement. That conduct was exacerbated by TriMet's overly aggressive contention that so many of those provisions were permissive for bargaining. On this record, we agree that TriMet's conduct of seeking so many concessions from ATU on so many issues (one of which sought to limit ATU's scope of work in anticipation of TriMet's projected operations 20 years from now), is one factor that suggests that TriMet bargained without a genuine intent to compromise its differences with ATU.

The Nature and Number of Concessions Made

We turn next to the nature and number of concessions that TriMet made. For clarity, we focus this discussion on the extent to which TriMet reduced or withdrew its own "takeaway" proposals, and we address the extent to which TriMet responded to ATU proposals in the next section.

The statutory obligation to meet and negotiate in good faith "does not compel either party to agree to a proposal or require the making of a concession." ORS 243.650(4). Consequently, we have said that this Board "cannot force an employer to make a 'concession' on any specific issue or to adopt any specific proposal or to adopt any particular position[.]" *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-37-08 at 22, 23 PECBR 895, 916 (2010); *Clackamas Intermediate Education District Education Association v. Clackamas Intermediate Education District*, Case No. C-141-77 at 8, 3 PECBR 1848, 1855 (1978) ("This Board has stated many times that a party may not be compelled to agree on any particular contract term."). Nonetheless, the employer "is obliged to make *some* reasonable effort in *some* direction to compose [its] differences with the union[.]" *McKenzie*, UP-14-85 at 39, 8 PECBR at 8198 (emphasis in original).

ATU notes that TriMet's initial proposals were almost exclusively "takeaways," and ATU contends that, in bargaining over those proposals, TriMet made concessions only on minor issues. TriMet contends that it made more significant concessions than ATU acknowledges.

The record demonstrates that TriMet made several concessions, including some that ATU did not acknowledge in its briefing or closing argument. Specifically, TriMet withdrew its proposals to increase the employee share of health care premiums; eliminate the benefits coordinator; modify the continuation of service provisions to reduce employee eligibility for benefits while on leaves; impose a new limit on employee eligibility for holiday pay; split the extra board into AM/PM boards; merge the rail operator boards; eliminate the tool allowance for rail mechanics; and revise the "lines of the District" provision. ATU identified most of those proposals as significant takeaways; thus, we consider TriMet's withdrawals of those proposals to be

significant concessions. TriMet's health insurance benefits proposal of maintaining its 95 percent health insurance premium contribution in 2021 alone amounted to a \$2.8 million projected increase in TriMet's share of insurance premiums.⁵⁶ At the same time, we note that the total number of takeaways that TriMet ultimately withdrew is relatively small compared to the total number that TriMet initially proposed.

TriMet's Responses and Counteroffers to ATU Proposals

We turn to ATU's argument that TriMet failed to make counteroffers, or even respond, to many of ATU's proposals. Although ATU acknowledges that the duty to bargain does not require a party to agree to any particular proposal, ATU contends that TriMet failed to engage in any give-and-take, made no effort to meet ATU's interests, and was so unresponsive that its conduct is indicative of bad faith. For the reasons described below, however, we conclude that the record indicates that ATU's perceptions in multiple instances are inaccurate.

In arguing that TriMet failed to engage in any give-and-take, ATU ignores several significant counteroffers that TriMet made. For example, in its initial proposal, ATU proposed increasing "road relief pay." Road relief pay is compensation paid to an operator who starts or ends a run in the field, rather than at a TriMet garage. The payment compensates the operator for that inconvenience. In its opening October 2019 proposal, ATU proposed that road relief pay would equal the time allocated by the TriMet trip planner plus (a) 25 minutes for operators reporting to a shift in the field or (b) 10 minutes for operators ending a shift in the field. ATU also proposed that road relief would be considered pay for time worked. At hearing, ATU described road relief pay as one of its most important bargaining priorities. The parties engaged in a significant back-and-forth throughout bargaining on road relief pay. TriMet countered by increasing the amount of road relief by \$2.00 and later by \$3.00 per location. In its final offer, ATU proposed that TriMet "pay road relief, based on its trip planning estimate system, for the trip at 70% of the operator's base rate." ATU also proposed that road relief pay would not make an operator eligible for overtime pay. In its final offer, TriMet added \$4.00 to every existing road relief location and added new locations. TriMet estimates that its final offer proposal to increase road relief pay will cost \$755,114.

ATU also proposed increasing "prep time" for operators by five minutes, to a total of 15 minutes. TriMet made a counter-proposal to increase by prep time by three minutes, to a total of 13 minutes. TriMet included that counterproposal in its final offer, and estimates that it will cost \$390,000.

ATU proposed provisions to limit the use of customer complaints (known as SIPS) in operator discipline. At the July 29, 2020, bargaining session, the parties discussed the use of SIPS in some detail, particularly the use of unsubstantiated complaints in discipline. They discussed a compromise in which unsubstantiated SIPs could be used for evidence (such as evidence of credibility) but not for discipline. ATU incorporated this compromise into a proposal it made in mediation. TriMet ultimately incorporated the compromise into its final offer, proposing that Service Improvement Program complaints that are not substantiated (a) shall not be used as the

⁵⁶TriMet chose to pass on to its employees the increases in health insurance premiums for 2020, but not 2021, as permitted by ORS 243.756.

basis for higher levels of discipline for future substantiated complaints, but may be used as evidence, such as in determining credibility, and (b) shall not be included in the employee's record (incorporating ATU's concepts from its June 24, 2020, proposal).

ATU proposed reinstituting an elder and child care benefit administered by ATU (which had been dormant since about 2015), to which TriMet would contribute up to \$75,000 annually. TriMet indicated it would agree to that proposal (among other things) in exchange for ATU's agreement to TriMet's extra board proposal. ATU continued to oppose TriMet's extra board proposal, and TriMet eventually withdrew both that proposal and its offer to accept ATU's elder and child care benefit proposal in exchange. ATU made similar package offers during bargaining.

ATU also identifies several proposals that it asserts TriMet never responded to. For example, ATU contends that TriMet never responded to ATU's short- and long-term disability proposals. However, as discussed above, ATU did not make a written proposal for such benefits until late in the bargaining process, and TriMet had no duty to make such a proposal in the first instance.

ATU also contends that TriMet did not respond to ATU's proposals on discipline and grievance, including its June 24, 2020, proposal to change the discipline provision in the WWA. The record indicates a substantial back-and-forth on both discipline and grievance topics. TriMet and ATU both proposed changes to the discipline language at the outset of bargaining on October 10, 2019. TriMet made its own grievance-related proposal on December 12, 2019, and ATU subsequently presented a revised grievance and discipline proposal on June 24, 2020. After those exchanges, the parties discussed both discipline and arbitration issues at length during their bargaining session on July 29, 2020. At that bargaining session, Cusack explained TriMet's reasons for declining to agree to ATU's proposals, and explained TriMet's positions about mandatory expedited arbitration and two arbitrations per day. Although ATU did not agree with the substance of Cusack's explanations, we cannot say that TriMet was unresponsive, as ATU asserts.

Next, ATU contends that TriMet did not provide sufficient responses to ATU's proposal regarding union representatives' rights, related to changes caused by House Bill 2016. ATU offered its proposal on January 10, 2020. The record indicates that Cusack and Stark corresponded repeatedly about various details regarding HB 2016. Cusack and Stark exchanged emails on January 12 and 13, 2020, regarding ATU's position that House Bill 2016 required TriMet to buy back union representatives' sick leave so that their retirement credit was not impaired by using release time. TriMet further responded on May 18, 2020, noting that the parties' agreement to toll HB 2016 implementation had "gone on too long," and included a new proposal. ATU responded on May 21, 2020, with its own revised proposal. Cusack and Stark continued to exchange emails, including proposed language, into early June 2020. On this record, we do not conclude that TriMet was insufficiently responsive. Rather, it appears that the parties "talked past each other," and we do not attribute that failure of communication solely to TriMet.

ATU also contends that TriMet failed to respond to other proposals it advanced. For example, it contends that TriMet did not respond to ATU's October 10, 2019, proposal regarding Article 10 to change TriMet's contribution to the defined contribution plan

from 8 percent to 12 percent of employee base pay, and to provide an early retirement benefit. On January 13, 2020, Cusack explained that TriMet did not want to make any changes to Article 10, and gave ATU a document that stated, “No Proposals in Article 10.” TriMet’s proposal to maintain the status quo can be construed as impliedly rejecting ATU’s proposal. Later, on June 24, 2020, ATU amended its proposal regarding TriMet’s contribution to the defined contribution plan, reducing the amount from 12 percent to eight percent. The proposed eight percent contribution was the status quo because the WWA entitles ATU employees to receive the same contribution as non-represented employees, and non-represented employees receive an eight percent contribution. Further, on October 11, 2020, TriMet shared with ATU a cost estimate it obtained regarding ATU’s early retirement proposal. A rejection of a proposal (or a decision not to adopt language proposed by the other party) is a legitimate bargaining option. Here, there is no other evidence to suggest that TriMet’s decision not to change retirement benefits was somehow indicative of bad faith. On this record, we cannot say that TriMet failed to respond to ATU’s proposal, as ATU contends.⁵⁷

ATU also contends that TriMet never responded to ATU’s Article 6 proposal (which covers customer service employees), or its Article 1, Section 7 proposal (relating to vacation benefits). The record shows that TriMet did respond. ATU proposed changes to Article 6 on January 23, 2020. TriMet made its own Article 6 proposal on June 24, 2020, and consequently it did respond to ATU’s proposal, albeit by proposing different changes to Article 6 and impliedly rejecting ATU’s proposed changes. After the June 24 session, the parties met only two more times before ATU requested mediation, and it appears that neither party tried to schedule or otherwise initiate further discussion of Article 6.

With regard to Article 1, Section 7, on October 10, 2019, ATU proposed to change Article 1, Section 7 to enhance vacation benefits, including by permitting vacation for salaried employees to be “considered floaters for end of year payoff.” TriMet made several proposals on Article 1 thereafter, but did not make a proposal related to Section 7. On January 10, 2020, ATU made another Article 1 proposal in which it continued to propose authorizing “end of year payoff,” and it continued that proposal in language it proposed on June 24, 2020. On June 24, 2020, TriMet offered a comprehensive multiple article proposal, including on employee benefits in Article 1. It did not incorporate ATU’s proposed change to vacation benefits. On July 29, 2020, TriMet proposed again on Article 1, and again did not adopt ATU’s proposed vacation language. The parties discussed ATU’s vacation proposal at some length on July 29, 2020. In mediation, on September 3, 2020, ATU again proposed its change to the vacation language in Article 1, noting in a margin comment on its written proposal, “Have not received a response on this.” On this record, we interpret TriMet’s continued proposals on Article 1 without incorporating ATU’s proposed change to Section 7 as a continued rejection of ATU’s proposal.

⁵⁷At hearing, Cusack testified that once ATU changed its proposal regarding TriMet’s contribution to the defined contribution plan to an eight percent contribution, Cusack regarded that change as “housekeeping,” because it merely documented the status quo. ATU contended at hearing that the change was substantive, because it “locked in” the contribution percentage for ATU employees, rather than merely stating that ATU employees would receive contributions equal to those of non-represented employees. Cusack acknowledged at hearing that he did not explain at the table his view of ATU’s June 24, 2020, proposed change to TriMet’s retirement contribution to ATU employees in the defined contribution plan. That would have been better practice, but we do not construe that omission as indicative of bad faith lack of responsiveness.

TriMet’s own proposals for Articles 1, 6, and 10 can be interpreted as silent or implied rejections of ATU’s proposals. To the extent that ATU argues that a rejection of a proposal is “not a response,” we disagree. A rejection is a response. To the extent that ATU argues that a party must *expressly* state its response to a proposal, we also disagree. However, even assuming that TriMet “failed to respond” at all to these ATU proposals, we would not consider that conduct to be evidence of intentional bad faith under the circumstances of this case. As discussed above, TriMet did respond to *other* ATU proposals, and we do not see a widespread pattern of unresponsiveness. At times, ATU told TriMet that it was waiting for TriMet to respond to its proposals in general, but ATU made many proposals, and we do not see any evidence that ATU specified that it needed responses to these particular proposals, either at the table or in correspondence. The record suggests that both parties had difficulty keeping track of the status of proposals, or when they owed a response to the other. The parties did not make a comprehensive list and identify the status of all pending proposals until they entered mediation.⁵⁸ On this record, we are not persuaded that TriMet’s failure to respond to some proposals was intended or willful.

The Course of Negotiations

Next, we consider the course of the parties’ negotiations. Evidence that a party never intended to reach a settlement but planned from the beginning to proceed to interest arbitration indicates bad-faith bargaining. *Portland Police Commanding Officers Association*, UP-19/26-90 at 44, 12 PECBR at 467. “Likewise, an employer who rushes through the negotiation process may demonstrate a lack of serious intention to reach agreement.” *Medford School District #549C*, UP-77-11 at 16, 25 PECBR at 521, citing *School Employees Local Union 140, SEIU, AFL-CIO, CLE v. School District No. 1, Multnomah County*, Case No. UP-44-02, 20 PECBR 420, 433 (2003).

Here, the course of bargaining does not indicate that TriMet planned from the beginning of bargaining to proceed to interest arbitration. TriMet did not avoid or rush through bargaining. To the contrary, TriMet engaged in informal sessions before bargaining, engaged in multiple formal bargaining sessions (and repeatedly suggested scheduling more frequent sessions), and corresponded extensively with ATU. After 150 days of bargaining, TriMet did not immediately request mediation. Around that time, the parties mutually agreed to pause bargaining because of the COVID-19 pandemic. After the parties resumed bargaining, TriMet again suggested scheduling more frequent sessions, and ATU again declined. Although TriMet raised the question of whether the parties should go to mediation, ATU did so unilaterally. After four mediation sessions, TriMet declared impasse.⁵⁹

⁵⁸After the parties were in mediation, ATU noted in the margin of its Article 1, Section 7 proposal, “Have not received a response on this.”

⁵⁹Under 243.712(2)(a) and OAR 115-040-0000(1)(c), either party may declare an impasse after 15 days of mediation.

Other Factors

ATU also asserts that TriMet adopted a take-it-or-leave-it approach to bargaining and presented nearly all of its proposals as “the way things are going to be.” A take-it-or-leave-it approach to bargaining can be indicative of bad faith. However, ATU did not prove that TriMet broadly adopted that approach. As discussed above, the record reflects more “give and take” than ATU acknowledges.⁶⁰

There is also evidence that TriMet presented its most controversial proposal—elimination of the apprenticeship programs—as a foregone conclusion, and ATU contends that TriMet’s approach to apprenticeship bargaining, in particular, shows bad faith. In support of this contention, ATU notes (and TriMet does dispute) that, before these successor negotiations, TriMet had touted the merits of its apprenticeship programs,⁶¹ and did not inform or work with ATU to address the problems that TriMet now contends justify ending the programs. There also is no real dispute that TriMet has taken a hard position on not just ending BOLI-registration, but eliminating the entry-level apprenticeship programs (and replacing them with training programs for experienced mechanics). The record also supports ATU’s allegation that Cusack repeatedly presented the elimination of the apprenticeship programs as “the way things will be,” and such language supports an inference that TriMet intends to end the apprenticeship programs irrespective of ATU’s views.⁶²

However, there is additional context that we must consider when assessing ATU’s claim that TriMet’s conduct and statements show an unwillingness to reach a negotiated agreement. Specifically, before successor bargaining began, TriMet filed a petition with this Board, on June 27, 2019, seeking a declaratory ruling on whether the elimination of the apprenticeship programs (and other subjects) was a permissive or mandatory subject of bargaining. Recognizing that TriMet’s attempt to seek a determination of its bargaining obligations was “laudable,” we nonetheless declined to issue a ruling on the petition, in part because the “purposes of PECBA

⁶⁰In support of the claim that TriMet generally bargained on a take-it-or-leave-it basis, ATU alleged that Cusack presented nearly all of TriMet’s proposals as “the way things will be.” However, ATU offered only non-specific and conclusory testimony in support of that allegation. Although ATU represented that there was more evidence of such statements in the bargaining notes, ATU did not identify any with specificity. We also note that the bargaining notes are not verbatim transcripts, and often are vague and ambiguous. Such notes standing alone, without any explanatory and corroborating testimony, would not be strong evidence of this disputed factual allegation.

⁶¹See, e.g., *Amalgamated Transit Union, Division 757, v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-019-18 at 7 (2019) (TriMet’s former Executive Director of Labor Relations and Human Resources testified that the apprenticeship programs were “the best”).

⁶²For example, at the parties’ June 24, 2020, bargaining session, Cusack stated that if the parties did not complete successor bargaining before October 2020, they would not need to include any provisions for bus mechanic apprentices, because all of the apprentices would graduate by then, and the program would end. For another example, Cusack repeatedly testified at the hearing in this matter that “there will not be” bus or facilities mechanic apprenticeship programs, notwithstanding the fact that bargaining over the decision to end the programs is not yet complete.

would be better served” if the parties attempted to resolve the scope of bargaining issues through bargaining. *See In the Matter of the Declaratory Ruling Petition Filed by Tri-County Metropolitan Transportation District*, DR-002-19 at 3. The fact that TriMet sought a ruling on its bargaining obligations indicates that it knew that it potentially had a bargaining obligation regarding the elimination of the programs, and that it would not simply ignore that obligation by making a unilateral decision.

After the Board declined to issue a declaratory ruling, the parties bargained for several months, with little progress.⁶³ Then, apprenticeship negotiations were essentially paused from February 4, 2020, when TriMet filed its unfair labor practice claim in Case Nos. UP-001/003-20, through June 24, 2020, when this Board issued a reconsideration order resolving the parties’ scope of bargaining dispute. TriMet asserted in that case (as it had in its declaratory ruling petition) that bargaining over the elimination of the programs was permissive. In the reconsideration order, we held that TriMet is not obligated to bargain over the decision to deregister an apprenticeship program from BOLI, but TriMet must bargain over the decision to eliminate an apprenticeship program.

After the Board issued the June 24, 2020, reconsideration order, the parties held only two more bargaining sessions, on July 29 and 31. At the July 31 session, ATU concluded the session during a caucus without discussing its own proposal or giving TriMet a chance to ask questions about it. ATU thereafter declined to bargain with TriMet about any maintenance department issues (Articles 3 and 4) “outside mediation.”

ATU contends that TriMet showed bad faith because it never offered a proposal that did not involve complete elimination of the apprenticeship programs, even after the June 24 order. That order, however, did not direct TriMet to stop proposing elimination of the apprenticeship programs. Rather, the order held that TriMet has a duty to bargain in good faith over that subject.

Further, although we agree the record shows that TriMet has been unwilling to consider alternative ways to address its concerns about the apprenticeship programs, the same can be said of ATU. TriMet has offered informal “concepts,” and a revised formal proposal, that include elements aimed at addressing at least some of ATU’s concerns. For example, ATU advocated for the interests of existing service workers who have been waiting for an opportunity to enter an apprenticeship program. In response, TriMet offered a concept that would maintain most of the apprenticeship programs for enough time to give at least some existing service workers the opportunity to participate. For another example, ATU pointed out that, going forward, service workers will have difficulty meeting the minimum qualifications for the new technician training programs that TriMet plans to create. In mediation, TriMet presented a “supposal” that included a limited tuition reimbursement benefit, which could help service workers (or other TriMet employees) take the community college classes needed to qualify for the training programs. TriMet’s supposal also included a commitment to hiring qualified internal candidates before external candidates.

⁶³It appears that one or both of the parties were unwilling to follow this Board’s suggestion that they focus on practical bargaining over the apprenticeship programs, instead of the legal scope of bargaining dispute. In other words, the parties continued to allow their legal dispute to determine their positions in bargaining, instead of engaging in bargaining to narrow their legal dispute.

ATU nonetheless asserts that TriMet “never made a proposal that addresses ATU’s identified interests.” Presumably, ATU asserts this because TriMet’s tuition reimbursement proposal does not meet the employees’ interests as well as the apprenticeship programs do. For example, in the existing apprenticeship programs, TriMet pays apprentices to attend classes on work time. Under the proposed tuition reimbursement program, employees would need to attend college classes on their own time, in addition to working full-time at TriMet. However, TriMet repeatedly invited ATU to bargain over tuition reimbursement and make its own proposal. Yet, ATU never made any counter-proposal for a tuition reimbursement program that it believes would better address the employees’ interests and provide benefits more comparable to those provided by the apprenticeship programs.

Additionally, we note that on July 13, 2020 (shortly after the reconsideration order was issued), TriMet invited ATU to make a proposal for unregistered apprenticeship programs.⁶⁴ However, when the parties bargained on July 29, ATU declined to withdraw its proposal that TriMet continue BOLI registration of the apprenticeship programs. When the parties bargained on July 31, Cusack again stated that TriMet was willing to discuss an unregistered apprenticeship program. ATU again declined to withdraw its proposal for continued BOLI registration of the apprenticeship programs. ATU did not make its first concept proposal for continuing the apprenticeship programs without BOLI registration until September 17, 2020, when the parties were in mediation. ATU did not make a formal proposal for unregistered apprenticeship programs until October 19, 2020, when the parties exchanged final offers, and even then its proposal was vague with respect to whether it was intertwined with the permissive subject of BOLI registration. Given these circumstances, we cannot conclude that TriMet refused to bargain in good faith over the mandatory subject of continuing the apprenticeship programs.

We are troubled by TriMet’s continued position that other individual aspects of ATU’s proposal for continuing the apprenticeship programs are permissive, notwithstanding our ruling otherwise in our June 24, 2020, order. By continuing to contend that ATU is committing an unfair labor practice by pursuing such unregistered apprenticeship program proposals, TriMet impedes the parties’ ability to bargain over the issue. However, as we discussed above, some aspects of ATU’s final offer apprenticeship proposal are vague, and when TriMet asked for additional information, ATU declined to provide it—hence, ATU’s conduct also impeded bargaining.

To summarize, some of TriMet’s conduct in bargaining over the apprenticeship programs tends to show that TriMet made a firm decision to eliminate the apprenticeship programs (not just deregister them), and lacked intent to bargain over that decision. However, our assessment of TriMet’s conduct is tempered by evidence that ATU was also generally unwilling to consider alternatives to its proposal, as well as other TriMet statements and conduct that are indicative of intent to bargain in good faith. Additionally, bargaining about apprenticeship was truncated in part due to the parties’ good faith dispute about the scope of bargaining, and that pause in bargaining

⁶⁴Specifically, in a letter dated July 13, 2020, Cusack informed ATU that TriMet would deregister the apprenticeship programs without bargaining over that decision (consistent with the reconsideration order), and stated that TriMet would not make its own proposal for unregistered apprenticeship programs because TriMet was “not interested in pursuing” them, but also wrote, “If ATU is interested in unregistered apprenticeship classifications, please make a proposal and provide some detail about what that entails.”

itself contributed, at least in part, to the parties not fully exploring possible alternatives to the existing apprenticeship before mediation.

Direct Dealing

In a surface bargaining case, a finding that the respondent committed other unfair labor practices may be circumstantial evidence that the respondent also engaged in surface bargaining. *Rogue Valley*, UP-80-95 at 29, 16 PECBR at 587. However, direct dealing is a *per se* violation, which means the conduct violates the duty to bargain in good faith because it has the objective effect of undermining the exclusive representative and impeding bargaining, regardless of the respondent's subjective intent. To determine whether direct dealing conduct is circumstantial evidence of surface bargaining—which includes a subjective intent element, we must consider the totality of the circumstances. *See McKenzie*, UP-14-85 at 43, 8 PECBR at 8202. In this case, after considering the totality of the circumstances of TriMet's direct dealing conduct, we do not find that the conduct indicates that TriMet lacked a sincere intent or desire to negotiate an agreement with ATU.⁶⁵

TriMet contends that its intent was to consult Arronson as a subject matter expert on the operator extra board. ATU does not dispute that Arronson is a subject matter expert, and that TriMet's available managers did not have as much knowledge and expertise. Although TriMet did not fully disclose to ATU the extent to which it dealt with Arronson, TriMet did not completely conceal the fact that it was consulting with Arronson. For example, Cusack disclosed to ATU at the outset of bargaining that he had talked to some chief station agents, and TriMet invited Arronson to the parties' initial bargaining session. Later, ATU learned that TriMet was still dealing with Arronson because Cusack told ATU that he wanted to consult Arronson. These actions indicate that TriMet did not subjectively believe that its dealings with Arronson were disruptive to the bargaining process.

Regarding the MOW apprentices, we note that the conduct at issue did not occur until early October 2020, after the parties had engaged in 15 bargaining sessions, and four mediation sessions. These circumstances weigh against drawing the inference that TriMet engaged in the conduct at issue as a tactic to avoid a negotiated successor agreement with ATU. Further, there is no other evidence that is sufficient to establish that TriMet engaged in the conduct with such subjective intent.

The COVID-19 Pandemic

In this case, we cannot overlook the fact that the COVID-19 global pandemic emerged during the parties' successor bargaining. Consequently, TriMet and ATU essentially paused their bargaining for approximately three months after Governor Kate Brown's declaration of emergency, the closure of businesses, and the widespread adoption of "social distancing." Because of the emergency caused by the pandemic, the parties met three to four times per week for recurring "COVID-19 meetings" from March 2020 through early December 2020 to confer about the effect

⁶⁵Because Member Umscheid would find that no direct dealing occurred, Member Umscheid also agrees that TriMet's conduct regarding the direct dealing allegations did not indicate that TriMet lacked a sincere intent to negotiate an agreement with ATU.

of the pandemic on the workplace. They met by phone a total of approximately 84 times outside of successor bargaining.

Given these facts, we do not construe the communications in which the parties “talked past” each other and those occasions where proposals languished as evidence that TriMet did not intend to reach agreement with ATU. Rather, the record indicates that the parties were simultaneously responding both to the extreme demands of a historic crisis and to the renegotiation of a complex collective bargaining agreement. To some degree, given the urgency and novelty of the pandemic, it is understandable that the parties’ focus and energies were diverted from successor bargaining. Although the global crisis does not excuse those aspects of TriMet’s conduct that we find concerning, we cannot ignore the effect that the diversion of the parties’ focus and energies had on bargaining.

The Totality of the Circumstances

We turn to assessing the totality of the circumstances, taking into account all relevant factors to determine whether there is sufficient evidence in the record that TriMet “did not intend or desire to reach a negotiated settlement, but rather, throughout all or most of the process, planned to take its proposals to arbitration.” *Portland Police Commanding Officers Association*, UP-19/26-90 at 44, 12 PECBR at 467. We “carefully examine and weigh circumstantial evidence in order to draw an inference concerning good faith or bad faith bargaining.” *McKenzie*, UP-14-85 at 37, 8 PECBR at 8196.

In making this assessment, we are mindful that PECBA does not require “either party to agree to a proposal or require the making of a concession[,]” ORS 243.650(4), and that hard bargaining is permitted. The line between hard bargaining and surface bargaining can be difficult to draw, particularly when both parties have strong positions. In this type of case, ATU bears the burden of establishing that TriMet’s conduct crossed that sometimes nebulous line, such that we can conclude that TriMet had no genuine intent to reach agreement. *State of Oregon, Executive Department*, UP-99-85 at 16, 9 PECBR at 9100.

On the one hand, some of TriMet’s conduct is indicative of bad faith. TriMet significantly impeded bargaining by proposing an unusually large number of “takeaways” and revisions to the existing CBA, including a massive reorganization of the maintenance departments and the elimination of well-established and much valued apprenticeship programs—programs that TriMet itself has previously described as “the best.” TriMet, on some occasions, presented elimination of the apprenticeship programs as a *fait accompli*. TriMet was also largely dismissive of the value of the apprenticeship programs and journey worker certification to employees. TriMet also took an overly aggressive approach to striking longstanding contract provisions (including but not limited to all provisions related to the apprenticeship programs), and objected to bargaining over those “carryover” provisions because they purportedly involved permissive subjects of bargaining. TriMet also made two unduly harsh or unreasonable proposals to limit the scope of ATU bargaining unit work in anticipation of vague and uncertain future possibilities.

On the other hand, some of TriMet’s conduct is indicative of good faith. TriMet tried to deal with some of these difficult and contentious issues before formal bargaining commenced,

including by engaging in multiple pre-bargaining discussions. TriMet also tried to resolve the parties' scope of bargaining dispute over the apprenticeship programs before successor bargaining formally commenced by seeking a declaratory ruling from this Board (instead of by simply refusing to bargain), which ATU opposed. TriMet also repeatedly made requests to schedule more formal bargaining, which ATU declined.

Additionally, although TriMet took a hard position regarding elimination of the registered apprenticeship programs, TriMet also repeatedly invited ATU to propose alternatives, but ATU declined to do so until the parties were in mediation. Generally, TriMet explained its proposals and established that it was trying to address legitimate concerns (with only the two exceptions noted above). ATU does not acknowledge all of the responses, concessions, and counteroffers that TriMet did make. In some instances, ATU claims that TriMet did not respond to ATU's concerns, but the record shows that ATU itself did not make proposals or counter-proposals that would address its own concerns, and instead expected TriMet to make such proposals in the first instance, which TriMet was not obligated to do.

Viewing the record as a whole, we find that both parties bear some responsibility for their failure to achieve a negotiated agreement. Although TriMet made aggressive proposals and engaged in hard bargaining, and at times communicated poorly or let things lapse, ATU does not acknowledge the extent to which it engaged in similar conduct. In our view, the parties also did not engage in enough bargaining, especially considering the complexity of the existing CBA, and the number and nature of the proposals made by both parties. However, as noted above, TriMet attempted to schedule more bargaining, and the parties did not in part because ATU repeatedly declined to do so, and in part because the parties paused bargaining while their litigation was pending and in response to the global pandemic. For these reasons, although there are some indicia of bad faith, on balance, we conclude that the evidence here does not establish that TriMet lacked a sincere intent or desire to reach a negotiated settlement.

Remedy

In addition to issuing a cease-and-desist order, this Board has "broad authority to fashion an appropriate remedy under the circumstances of each particular case to effectuate the purposes of" PECBA. *Oregon School Employees Association v. Parkrose School District*, Case No. UP-030-12 at 2, 25 PECBR 845, 846 (2013) (Recons Order).

Here, we must remedy two violations, ATU's violation of section (2)(b), and TriMet's violation of section (1)(e). For ATU's violation, we order ATU to strike the proscribed proposals from its final offer and to participate in an additional mediation session as described below. When submitting its revised final offer, ATU may replace the struck proposals with proposals that involve mandatory subjects of bargaining, consistent with this order and the duty to bargain in good faith.

We turn to TriMet's violation of section (1)(e). "The duty to bargain in good faith is not fulfilled when an employer is found guilty of a (1)(e) violation committed during the course of negotiations. This is so regardless of the employer's subjective good faith or bad faith. Commission of a per se (1)(e) violation taints the bargaining process and a remedy must be

provided. ORS 243.676(2)(b) and (c).” *McKenzie*, UP-18-45 at 43-44, 8 PECBR at 8202-03. Generally, we order the parties to resume bargaining at the step where the earliest violation occurred. *Id.* at 44, 8 PECBR at 8203; *Blue Mountain Community College*, UP-22-05 at 97, 21 PECBR at 7691. However, we also consider the extent to which ordering the parties to return to an earlier point in the bargaining process is warranted and helpful to the parties under the circumstances of the case. *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case Nos. UP-006/016-10 at 24, 24 PECBR 864, 886 (2012).

In this case, although the earliest direct dealing conduct started before the parties’ initial bargaining session, we do not believe that a return to the start of the statutory bargaining process would be helpful to the parties or further the purposes of PECBA. Likewise, although it would be warranted to return the parties to the start of the mediation process required under ORS 243.712(2)(a) (which would require 15 days of mediation), we also do not believe that such a remedy is the most appropriate remedy here. In reaching that conclusion, we take administrative notice that the parties have already scheduled multiple mediation sessions out through March 11, 2020. Because the parties are already committed to engaging in mediated bargaining for a period of 13 days following the issuance of this order, it is largely unnecessary to order them to do so. Under these circumstances, we order the parties to participate in good faith in at least one additional mediation session (beyond those scheduled) to address ATU’s revised final offer, as well as to remedy TriMet’s (1)(e) violation.⁶⁶

ATU requests that we order TriMet to post a notice of its unfair labor practice conduct. We generally order a notice posting if we determine a party’s violation of 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 employees, (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, et al.* Case No. C-19-82 at 12, 6 PECBR 5590, 5601, *aff’d without opinion*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984). These factors are typically understood to be in the disjunctive and thus, not all of these criteria need be satisfied to warrant posting a notice. *Laborers’ Local 483 v. City of Portland*, Case No. UP-15-05 at 17-18, 21 PECBR 891, 907-908 (2007); and *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02 at 2, 19 PECBR 684, 685 (2002). However, we typically require the presence of multiple factors before requiring a posted notice. *See Wy’East Education Association/East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06 at 47, 22 PECBR 668, 714 (2008). In this case, although TriMet’s direct dealing conduct potentially impacted ATU’s functioning as the employees’ exclusive representative, no other factors or circumstances weigh in favor of requiring notice posting. Accordingly, we decline to order it.

ATU also requests that we order a civil penalty. ORS 243.676(4) authorizes us to consider awarding a civil penalty when “the party committing an unfair labor practice did so repetitively,

⁶⁶Counsel represented at hearing that the parties have scheduled an interest arbitration hearing in April 2021. To avoid unnecessary delay, the parties may mutually agree to continue reserving the hearing dates, notwithstanding this order.

knowing that the action taken was an unfair labor practice and took such action disregarding that knowledge; or that the action constituting an unfair practice was egregious.” In this case, we decline to order a civil penalty because the record does not establish that TriMet knowingly and repetitively engaged in direct dealing, or that its conduct was egregious.

ORDER

1. ATU is ordered to cease and desist its violation of ORS 243.672(2)(b), with respect to including, over TriMet’s objections, permissive subjects of bargaining in its final offer, and thereby conditioning settlement of the parties’ successor agreement on bargaining over those permissive subjects.

2. ATU is ordered to strike the proposals identified as permissive in this order from its final offer and submit a revised final offer.

3. TriMet is ordered to cease and desist its violation of ORS 243.672(1)(e), with respect to engaging in direct dealing with employees represented by ATU.

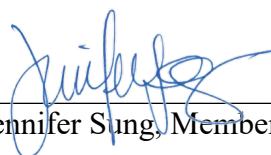
4. Both parties are ordered to participate in good faith in at least one additional mediation session (beyond those already scheduled), as set forth above in this order.

DATED: February 26, 2021.



Adam L. Rhynard, Chair

*Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Umscheid, Dissenting in Part:

I respectfully dissent from the conclusion that TriMet’s interactions with represented employees constituted a *per se* violation of ORS 243.672(1)(e). I read the record very differently from the majority.⁶⁷

⁶⁷ I also dissent from Findings of Fact 60 through 63 and 166 through 168 to the extent they suggest that TriMet sought anything from Mike Arronson other than factual information about the extra board.

Dealing directly with represented employees is unlawful under ORS 243.672(1)(e) when the public employer “attempts to negotiate directly with its employees.” *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05 at 97, 21 PECBR 673, 769 (2007) (citing *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85 at 36, 8 PECBR 8160, 8195 (1985)); see also *911 Professional Employees Association v. City of Salem*, Case No. UP-62-00 at 20, 19 PECBR 871, 890 (2002) (a public employer cannot “bypass the exclusive representative to negotiate and seek changes in mandatory subjects directly with employees”). To constitute *per se* bad faith bargaining, this Board has assessed whether the public employer’s conduct amounted to bypassing the labor organization by negotiating or attempting to negotiate directly with represented employees about terms and conditions of employment. In the absence of that type of conduct by the public employer—that is, conduct that, in some way, is tantamount to bypassing the labor organization in bargaining—there is no *per se* bad faith bargaining violation. See, e.g., *Oregon Public Employees Union v. Jefferson County*, Case No. UP-20-99 at 10, 18 PECBR 310, 319 (1999) (“direct communication with bargaining unit members can violate (1)(e) where the purpose of the communication is to bypass the union and *bargain* directly with employees,” citing *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559 (1996)).

For two reasons, I would dismiss ATU’s *per se* bad faith bargaining claim that arises from TriMet’s interactions with represented employee Mike Arronson. First, ATU never objected to TriMet’s interactions with Arronson. Second, there is no evidence that TriMet actually bargained with or attempted to bargain with Arronson. The evidence indicates only that TriMet (and ATU) relied on Arronson as essentially a fact expert on a subject that even ATU describes as highly technical. Both reasons are described below.

First, it is undisputed that ATU never objected to TriMet’s communications with Arronson, even though it knew about TriMet’s reliance on Arronson for more than a year. Specifically, at TriMet’s invitation, Arronson attended the bargaining session on October 31, 2019. TriMet viewed Arronson as its in-house expert on the AM/PM model of the extra board. The extra board is the method by which routes that are open because of an unexpected absence or need are assigned to backup operators. Both parties agree that the extra board is highly technical. At TriMet, assigning routes through the extra board includes applying 51 separate, highly technical rules.⁶⁸ Although a union-represented employee, Arronson is the chief station agent who administers the extra board. The extra board does not affect Arronson’s terms and conditions of employment.

Union officer Fred Casey and ATU Labor Relations Coordinator Krista Cordova both testified that Arronson’s presence at the October 31 session was awkward because Arronson had

⁶⁸As examples, Rule 11 and Rule 12 provide, respectively, “If a report Operator catches any short part, s/he shall fall back into first place if s/he does not have eight (8) hours work and returns before all the other work is out. The next report Operator up for work that has been cut off in the a.m., will be brought back first. Extra board Operators who relieve on the road and are asked to ‘check back’ will be permitted to call the Station Agent to see if they are needed to perform extra work[.]” and, “In case of double covered run or errors, comparable work is work completed within two (2) hours of the original assignment. If the new assignment gets off two (2) hours past original assignment, the Operator may reject the additional assignment without penalty. If Operator is used for report, they go before pass-up Operators.”

not been invited by ATU and was not on the ATU bargaining team. ATU acknowledged in its brief that it assumed “from conversations that day” that TriMet had “previously discussed” TriMet’s AM/PM board proposal with Arronson. Casey testified that several days after the session, he expressed his discomfort to Arronson. However, neither Casey nor anyone else from ATU objected to TriMet. Several weeks later, on November 14, when Cordova and Laird Cusack exchanged emails about ATU’s uncertainty about the specifics of the AM/PM board proposal, Cordova referred to three possible AM/PM models that TriMet could be considering: a previous model used by TriMet years earlier, a model used by Cusack’s previous employer in Seattle, or the model that, as Cordova put it, “Mike Arronson suggested to you.” Thus, by November 2019, at the latest, ATU understood that Arronson had provided information to TriMet about an AM/PM model for the extra board.⁶⁹ Yet ATU did not object.

Eight months later, the parties discussed the AM/PM board topic at a bargaining session on July 31, 2020. Because of social distancing required by the COVID-19 pandemic, the parties met via a video platform. TriMet manager Steve Callas attended by telephone. Arronson was working in another part of the building and, according to Casey, Callas “grabbed” Arronson and brought him into the room to sit in on the bargaining session. Arronson participated in the discussions between TriMet and ATU about how the extra board model under consideration would work. ATU’s three negotiators—Cordova, Shirley Block, and Whitney Stark—were all present, but ATU did not object to Arronson’s contributions, involvement, or participation. About a month later, on September 2, 2020, Cusack wrote to Cordova and Stark about the AM/PM board, and Cusack referred to “an alternative to the AM/PM board,” noting that he had not “run it by” Arronson yet. Cusack also noted that he was “checking with IT about implementation issues, but it’s much simpler because it uses the current system.” Again, ATU did not object to TriMet relying on Arronson.

I would conclude that TriMet did not commit an unfair labor practice because ATU never objected to TriMet communicating with Arronson. Previously, the Board has dismissed *per se* bad faith bargaining claims when a labor organization failed to object to alleged unlawful direct dealing. See *Hood River Employees Local 2503-2/AFSCME Council 75/AFL-CIO v. Hood River County*, Case No. UP-92-94 at 16, 16 PECBR 433, 448 (1996), *aff’d without opinion*, 146 Or App 777, 932 P2d 1216 (1997) (no (1)(e) violation where the contacts between employer and represented employees “did not involve any attempt at substantive negotiations” and the union “had no objection to the contacts”). Here, the evidence indicates that both parties understood that Arronson was acting as the fact expert on the particular model of AM/PM board TriMet put forward for discussion. Finding an unfair labor practice when ATU knew that Arronson was consulting with TriMet, but did not object, does not advance PECBA’s purpose to develop “harmonious and cooperative relationships between government and its employees[.]” ORS 243.656(1). Further, finding an unfair labor practice when a labor organization has remained silent does not promote PECBA’s policy, which recognizes that “unresolved disputes in the public service are injurious to the public, the governmental agencies, and public employees[.]” ORS 243.656(2). Concluding that TriMet violated subsection (1)(e) on these facts encourages parties to remain silent and litigate later if table bargaining proves difficult, which only prolongs

⁶⁹ATU’s claim is time-barred to the extent it is based on events before May 10, 2020, ORS 243.672(6), but its acquiescence before May 10, 2020, in Arronson’s involvement is relevant to both ATU’s lack of objection and the actual nature of Arronson’s contribution.

unresolved disputes. The better approach is to require a labor organization that believes a public employer is bargaining directly with represented employees to object promptly and clearly so that the public employer can explain why it is communicating with those represented employees.

Second, I would dismiss the claim arising from TriMet's communications with Arronson because there is insufficient evidence to conclude that TriMet did anything other than obtain facts from Arronson. ATU's own witness, union officer Fred Casey, testified that he learned on October 31, 2019, during an ATU caucus in bargaining, that Arronson had been invited to bargaining "as a subject matter expert." The most plausible explanation for why ATU did not object to Arronson's involvement for more than a year is that ATU knew Arronson was playing that limited, and permissible, role.

Further, the preponderance of the evidence does not indicate that TriMet did anything other than ask Arronson to provide information. Specifically, there was no impermissible direct dealing between TriMet and Arronson at the July 31, 2020, bargaining session itself because ATU's negotiators—Cordova, Block, and Stark—were present and engaged in the discussion at the bargaining table. With regard to TriMet's communications with Arronson *outside* that session (and within the statutory period beginning May 10, 2020), the record contains no written communications between TriMet and Arronson, no drafts of proposals, and no documents of any other kind showing that TriMet bargained with Arronson. There is, for example, no direct evidence that Arronson assisted in drafting proposals or formulating TriMet's bargaining strategy. Arronson did not testify.

The only way to conclude that TriMet bargained with Arronson outside the July 31 session is to infer from other evidence during the statutory period that TriMet's communications with Arronson were impermissible. For example, in his September 2, 2020, email to ATU representatives, Cusack referred to "an alternative to the AM/PM board," and stated that he had not "run it by" Arronson yet. It is possible that Cusack was divulging to ATU that he intended to negotiate with Arronson, but it is also possible that Cusack was telling ATU only that he intended to seek factual information from Arronson in his role as the subject matter expert—an approach both parties had accepted over the course of the negotiations. The latter conclusion is more likely. It is also the conclusion most consistent with ATU's continued acquiescence in TriMet's communications with Arronson. In sum, the weight of the evidence indicates that Arronson acted only as a subject matter expert—and this Board has never held that a public employer violates PECBA when it seeks factual information from a represented employee in that capacity. I would therefore dismiss this aspect of ATU's subsection (1)(e) claim.

In addition, I would also dismiss ATU's direct dealing claim that alleges that TriMet sought to bypass ATU and bargain directly with the MOW signals apprentices. The record as a whole indicates that the conduct of all the involved TriMet managers in fact sought to raise the matter *with ATU*, and promptly did so. Specifically, the record indicates that Casey Goldin, while a signals supervisor, became concerned about morale in his work group after he heard apprentices complain that they felt "stuck." Goldin's perception that the employees were dissatisfied was corroborated at hearing by ATU witness Jason Breedlove, an MOW signals apprentice, who acknowledged that he felt stuck for a number of reasons, including the lack of classroom training in the apprenticeship program, and had "probably" expressed that frustration to Goldin. Goldin took his concerns to his

manager, Keith Bounds. Notably, Goldin testified that he wanted the apprentices to remain in the MOW program because the work group is short-staffed.

Goldin and Bounds then took their concerns to a recurring, internal labor relations meeting with TriMet's labor relations department. The very purpose of an internal management meeting with labor relations staff is for department managers such as Goldin and Bounds to discuss with a public employer's labor relations experts how to properly address matters involving union-represented employees. TriMet Senior Labor Relations Representative Sarah Browne testified that the purpose of the recurring meeting was to discuss labor contract administration.

TriMet's labor relations staff, when presented with the matter, approached it as something that needed to be raised with ATU. Specifically, as Browne testified, and as documented in her contemporaneous notes from the meeting, Bounds understood that the apprentices' seniority forfeiture was an issue for "negotiation." Browne's email to her manager, Laird Cusack, within the hour after the meeting indicated that Bounds raised the issue as a suggestion "for proposal to ATU." There is no evidence that Browne counseled Bounds or Goldin that their understanding was incorrect or that they should somehow evade TriMet's duty to work with ATU when required. To the contrary—the evidence indicates that all the participants at the labor relations meeting considered the matter as one that would be presented to ATU.

After the meeting, Browne consulted Cusack. Cusack and Browne decided to ask Bounds to get the names of the particular employees interested in returning to their former classification. That approach was not arbitrary, baseless, or indicative of a scheme to bypass ATU. Instead, it arose directly from the language of the relevant section (Article 3, Section 15, Paragraph 8) of the parties' CBA, which provides, in relevant part:

"Upon six (6) months' accrual in an apprentice program, an employee shall forfeit seniority held in the employee's previous classification. Prior to such six (6) months' accrual, however, an employee may elect to return to his/her previous classification, whereupon the employee's seniority held upon return shall be the same as if he/she has remained in the previous classification; *this provision may also be effective following six (6) months' accrual for a particular employee by mutual agreement between the District and the Union.*" (Emphasis added.)

In other words, TriMet perceived this not as a broad, successor bargaining issue, but as an employee morale issue that, by its very nature, had been raised by particular employees. Logically, TriMet sought to ascertain which particular employees (if any) TriMet needed to discuss with ATU.

Goldin took on that task, and talked to each apprentice individually. There is no evidence that Goldin made offers, proposals, or promises to the apprentices, or in any way sought information in order to modify TriMet's successor bargaining proposals or strategies. In fact, Goldin hoped the apprentices would stay. Goldin simply told the apprentices that if they were interested he would provide their names "to labor relations" (which, in public sector workplaces, is generally understood to indicate that a matter may require the exclusive representative's involvement). Goldin then did exactly that, and provided the names to Browne. Browne did not

counsel Goldin to return to the employees and negotiate with them. Rather, she promptly and appropriately telephoned ATU President Shirley Block. Block did not object during the phone call, and asked Browne to send an email with the information. Browne did so, quoted the WWA language that permitted an exception to seniority forfeiture “by mutual agreement” between TriMet and ATU, and noted that “[h]opefully we can reach a mutual agreement.” After ATU objected two days later, TriMet dropped the matter.

This record indicates that Bounds, Goldin, Browne, and Cusack were seeking only to obtain a list of those particular employees who were interested in having TriMet and ATU discuss a possible “mutual agreement” pursuant to Article 3, Section 15, Paragraph 8 of the WWA. There is no evidence that any manager attempted to negotiate with the apprentices, or otherwise try to undercut ATU.⁷⁰ The evidence is more consistent with a conclusion that TriMet managers understood that the issue would need to be raised with ATU—which is exactly what TriMet promptly and appropriately did. This Board has previously concluded that there is no (1)(e) violation when the employer does not attempt to negotiate with represented employees and promptly notifies the union of the contacts, and we should do the same here. *See Coos Bay Firefighters Association v. City of Coos Bay and Coos Bay Fire Department*, Case No. UP-41-98 at 11, 18 PECBR 515, 525, *aff’d without opinion*, 171 Or App 523, 19 P3d 387 (2000) (no (1)(e) violation where there was “no evidence of a deliberate effort by the City to undercut the Association by dealing directly with bargaining unit members about contract proposals,” and where the employer promptly notified the union of its communications with represented employees).

Given the small size of the MOW signals apprentice group, presumably TriMet could simply have produced a list of all the employees in that group and provided it to ATU, leaving to ATU the task of determining which employees, if any, might be interested in returning to their former classification. That would have been a better approach. But the fact that Bounds, Goldin, Browne, and Cusack handled the issue as they did is not sufficient for me to infer that TriMet was bypassing ATU and unlawfully bargaining with employees. Rather, viewed in context, TriMet’s communications were merely the first step of several steps TriMet took in order to approach ATU to discuss a possible mutual agreement pursuant to the terms of the WWA. TriMet’s conduct is not the type of conduct that rises to the level of an unfair labor practice. It did not make proposals to employees, discuss its bargaining proposals with employees, change its proposals or bargaining strategy, use the issue to stall or complicate bargaining, or take any actions to undercut ATU—in fact it promptly notified ATU and sought to negotiate with ATU. In my view, we should require more before attaching unfair labor practice liability under subsection (1)(e) to the type of communications TriMet had here. *See, e.g., Rogue Valley Transportation District*, UP-80-95 at 18, 16 PECBR at 576 (“Bypassing the exclusive representative, meeting directly with employees to discuss its contract proposal, revising its proposal in response to issues raised in the meeting,

⁷⁰In fact, at hearing, ATU’s counsel asked apprentice Robert Baker whether Goldin made him an offer to leave the apprentice program and retain his seniority. Significantly, Baker did not adopt ATU’s counsel’s characterization that Goldin extended an “offer.” Instead, Baker testified that Goldin remarked that a return to the service worker classification without forfeiting seniority “was possible”—a remark consistent with the provision in Article 3, Section 15, Paragraph 8 that permits “mutual agreement” between ATU and TriMet.

and then submitting new proposals directly to bargaining unit members, as the District did, violates its obligation to bargain with the Union, the employees' exclusive representative, and is a *per se* violation of subsection (1)(e).").⁷¹

For all these reasons, I would dismiss ATU's claim that TriMet violated ORS 243.672(1)(e) by dealing directly with represented employees. Because I dissent from the conclusion that TriMet engaged in *per se* bad faith bargaining in violation of ORS 243.672(1)(e), I also dissent from that portion of the order that requires TriMet to cease and desist its violation of ORS 243.672(1)(e). I join the majority in requiring both parties to participate in at least one additional mediation session because that requirement is ordered as a remedy for ATU's violation of ORS 243.672(2)(b).



*Lisa M. Umscheid, Member

⁷¹I also would not interpret Goldin's conversations with the MOW signals apprentices as a survey or poll. Rather, Goldin was responding to what he perceived as a morale issue in his work group as a result of concern raised by the employees themselves. Following the lead of labor relations, he gathered names as TriMet's first step in taking the issue to ATU. Goldin provided the names to Browne, who passed them on to ATU, as previously planned, with the suggestion that ATU and TriMet discuss whether to reach an agreement as expressly envisioned in the WWA. There is no evidence that TriMet was assessing employee attitudes for the purpose of formulating proposals, responses, or strategy in successor bargaining.

APPENDIX OF RELEVANT ATU FINAL OFFER PROPOSALS

Article 3.1.2:

“Par. 2. Seniority by classifications as established herein shall prevail in the performance of the work done in Paragraph 1, qualifications considered. All Journeyworkers/Technicians hired from outside the District prior to the effective date of this Agreement shall establish classification seniority behind any apprentice in the apprentice program on the date they were hired. All Journeyworkers/Technicians hired after the effective date of this Agreement shall establish classification seniority behind any Trainee in a Training program on the date they were hired. In the event of a dispute regarding seniority, ATU shall make the final determination of seniority placement.”

Article 3.1.5:

“Par. 5. Service Workers may be used by the District to install and remove tire chains after Helper’s classification on shift at the facility has been exhausted and under a Mechanic’s supervision.”

Article 3.1.8:

“Par. 8. All trading days off is a privilege granted by the Union and the District and may be canceled at any time by mutual agreement.

* * *

b. A trade can only occur between two (2) people working at the same garage, during the same hours, within the same job classification, having similar sign-up responsibilities, e.g., overhaul mechanics can only trade with overhaul mechanics, body shop mechanics can only trade with body shop mechanics. Requests for trades are subject to approval by the Supervisor. The District reserves the right to approve requests on a case-by-case basis based upon operational needs.”

Article 3.2.1:

“Par. 1. When the District plans to hire for any ATU classification in the Maintenance Department a notice shall be posted on all department bulletin boards for not less than five (5) days before posting externally. If the District determines an internal candidate is equally qualified as an external candidate, the District shall hire the internal candidate.”

Article 3.2.5:

“Par. 5. It is understood and agreed that in filling vacancies that are not filled by promotion within the Department, preference will be given to employees or laid off employees of the Facilities Maintenance or Stores Departments. Such vacancies will be posted on all department bulletin boards for five (5) days. If unable to fill the vacancy, it may be filled according to seniority within the District. Following selection, District employees shall receive preference for all bidding purposes over employees hired from the outside.”

Article 3.3.8:

“Par. 8. Assistant Supervisor

f. Assistant Supervisors shall perform journey- level work in addition to their Assistant Supervisor duties, except when acting Supervisor.”

Article 3.3.9:

“Par. 9. Service Worker

*** * ***

e. If the District determines an internal candidate for any Service Worker classification is equally qualified as an external candidate, the District shall hire the internal candidate. Credit shall be given to employees who have worked in a Helper/Service Worker classification for prior experience equivalent to the time worked in that position for any Service Worker classification.”

Article 3.4.1:

“Par. 1. Maintenance Department seniority shall govern in laying off and reemployment of employees. Employees so laid off because of lack of work shall be returned in the inverse order in which they were laid off, as the need for their classification, or classification of work, permits.

a. If the District curtails the number of employees in any job, the employee with the least job seniority will be the first to be moved out of that job. That employee will then be entitled to exercise such job seniority s/he has on any other job in that department.

b. Only in the event of layoff, Facilities Maintenance employees shall be allowed to exercise their departmental seniority for positions in Maintenance or Stores.”

Article 3.7.1:

“Par. 1. There shall be a Bus Mechanic Training Program. The purpose of this program is to offer qualified trainees an opportunity to advance in the field of bus maintenance to a high level of proficiency.”

Article 3.7.2:

“Par. 2. This program is an on-the-job program. Routine assignments as well as training instruction will be delegated to trainees in this program.”

Article 3.7.4:

“Par. 4. All Trainee programs shall meet the minimum standards for a nationally or state certified competency-based, time based hybrid model for the specific program. All Trainee programs shall provide minimum in-class hours for competency-based model for the specific program, for which TriMet shall ensure Trainees receive course credit through a local college for the classroom hours. Trainees shall receive a certificate of completion.”

Article 3.7.5:

“Par. 5. A joint committee composed of three (3) representatives each, for both the District and the Union shall be established in conjunction with this training program.”

Article 3.7.8:

“Par. 8. Any District employee who has successfully met all the prerequisites established by the District and is selected to enter a District apprenticeship program, shall be provided an opportunity to attend program orientation of that program prior to accepting the promotion. The orientation will include a meeting with a trainer to cover job requirements and expectations, working conditions, and an interview with a journey level worker.”

Article 3.9.3:

“Par. 3. Warranty work will be done by District employees when qualified, and District mechanical employees will participate in all types of warranty work where such participation will aid in the training of District employees, ensures that employees learn the skill to avoid future work being contracted out, and is not merely repetitive in nature, and

a. Prior to commencing third party or vendor warranty work, including extended warranty work or retrofits that may include warranty work; the District will meet with the Union to explain the nature of the work and the warranty provisions covering the repairs. Documentation from this meeting in a manner and format acceptable to each party will be deemed to be a satisfactory record of the activity.

b. The District will provide time for mechanics to work with the vendor on warranty work that will provide District mechanics a direct training benefit. Accordingly, the location maintenance manager and the Union executive board member will meet to agree on a plan that provides the optimal training benefit and ensures that employees learn the skills involved in the mechanic work under

warranty.

c. For declared campaigns, vendor “policy” campaigns, and declared fleet defects where a significant portion of a fleet is affected (20% for Bus and 10% for Rail) the location maintenance manager and the Union will jointly, in good faith and with all reasonable intent, determine whether the warranty work to be performed is repetitious with little or no continuing learning value. If so determined, in writing, the continued assignment of one mechanic per shift may terminate after the initial start of the work, but not before at least one mechanic per shift has been adequately trained. The District may thereafter allow the vendor to complete the campaign work on its own. In the event the location maintenance manager and the Union executive board member cannot agree on whether a specific warranty activity is “repetitious with little or no continuing learning value,” the matter will be heard by the Contracting Out Committee, whose decision shall be final.”

Article 3.11.1:

“Par. 1. There shall be a Light Rail Technician Training Program. The purpose of the program is to offer qualified trainees an opportunity to advance in the field of light rail maintenance to a high level of proficiency. All light rail employees shall receive their regular rate of pay while training.”

Article 3.11.2:

“Par. 2. The LRT Mechanic Training Program shall be governed by the same provisions contained in Section 7 and 21 of this Article with the following exceptions:

a. Work assignments, shift hours, and areas of instruction will be decided by the Maintenance Manager.”

Article 3.11.3:

“Par. 3. A joint committee composed of three (3) representatives each, for both the District and the Union, shall be established in conjunction with this apprentice program.”

Article 3.14.2:

“Par. 2. Warranty work will be done by District employees when qualified, and District mechanical employees will participate in all types of warranty work where such participation will aid in the training of District employees, ensures that employees learn the skill to avoid future work being contracted out, and is not merely repetitive in nature, and

a. Prior to commencing third party or vendor warranty work, including extended warranty work or retrofits that may include warranty work; the District will meet with the Union to explain the nature of the work and the warranty

provisions covering the repairs. Documentation from this meeting in a manner and format acceptable to each party will be deemed to be a satisfactory record of the activity.

b. The District will provide time for mechanics to work with the vendor on warranty work that will provide District mechanics a direct training benefit. Accordingly, the location maintenance manager and the Union executive board member will meet to agree on a plan that provides the optimal training benefit and ensures that employees learn the skills involved in the mechanic work under warranty.

c. For declared campaigns, vendor “policy” campaigns, and declared fleet defects where a significant portion of a fleet is affected (20% for Bus and 10% for Rail) the location maintenance manager and the Union will jointly, in good faith and with all reasonable intent, determine whether the warranty work to be performed is repetitious with little or no continuing learning value. If so determined, in writing, the continued assignment of one mechanic per shift may terminate after the initial start of the work, but not before at least one mechanic per shift has been adequately trained. The District may thereafter allow the vendor to complete the campaign work on its own. In the event the location maintenance manager and the Union executive board member cannot agree on whether a specific warranty activity is “repetitious with little or no continuing learning value,” the matter will be heard by the Contracting Out Committee, whose decision shall be final.”

Article 3.15.1:

“Par. 1. There shall be a Light Rail Maintenance Department Training Program. The purpose of the program is to offer qualified trainees an opportunity to advance in the field of light rail maintenance to a high level of proficiency. Light Rail Maintenance Department shall have Training Programs in six (6) Journey Level Classifications:

Overhead Traction Electrification Maintainer
Traction Substation Technician Signal Maintainer
Track Maintainer
Rail Vehicle Mechanic
Field Equipment Technician”

Article 3.15.2:

“Par. 2. The District shall establish MOW Training Programs in the classifications of:

Signal Maintainer
Overhead Traction Electrification Maintainer
Traction Substation Technician
Field Equipment Technician”

Article 3.15.3:

“The parties acknowledge the joint committee as a source for training standards.”

Article 3.15.4:

“Par. 4. The District shall fill light rail apprenticeship openings consistent with Article 21 of this section.”

Article 3.15.9:

“Par. 9. In lieu of a Training program for Track Maintainer, the following provisions shall govern the filling of Track Maintainer openings.

a. Laborer/Track Trainees will be filled consistent with Article 3, Section 21. The Track Trainees will be given formal training as well as On The Job Training (OJT) in Track Maintenance. When not performing Track OJT they will perform their regular Laborer job duties.

* * *

d. The Light Rail Joint Committee shall participate in and provide oversight to the training, testing and qualifying of those persons holding positions.”

Article 3.15.11:

“Par. 11. Any District employee who has successfully met all the prerequisites established by the District and is selected to enter a District a training program pursuant to Article 3, Section 21 shall be provided an opportunity to attend a orientation of that program prior to accepting the promotion. The orientation will include a meeting with a trainer to cover job requirements and expectations, working conditions, and an interview with a journey level worker.”

Article 3.16.1:

“Par. 1.

d. Assistant Supervisors shall perform journey-level work in addition to their Assistant Supervisor duties, except when acting supervisor.”

Article 3.17.1:

“Par. 1. The function of overtime is to facilitate the continuity and completion of work under unusual or extraordinary circumstances. Overtime will be used on an exception basis and is the prerogative and responsibility of maintenance managers.

a. The criteria for making overtime assignments and paying employees at the overtime rate will be based on: classification, current signed job function with which the work would normally be associated, (i.e. body shop employees do body work, engine rebuild employees do engine rebuild, spotters do spotter work, etc.)

then seniority. Overtime will not be offered to an employee who has been off sick until that employee has returned to work for one full workday.”

Article 3.17.2: (“Carry forward” proposal)

“Par. 2. Callout

a. Each supervisor shall create a list of employees on their shift by seniority, classification, and job duties. This list is to be used for offering overtime opportunities to employees on the list on their RDO

1. Employees must indicate, at the beginning of each signup, if they want to be called for overtime. However, the supervisor must make an announcement at the beginning of each signup that they are preparing the overtime list.

b. If overtime is deemed necessary, the supervisor will:

1. Offer overtime on that shift to qualified employees currently working within that classification and job function (i.e. A/C, Brakes, Engine Overhaul, Janitor, Steam Cleaner, Sign-out Clerk, etc.) by seniority.”

Article 3.21.2:

“Par. 2. Any employee hired by the District between January 1, 2014 and October 9, 2020 as a Serviceworker/Helper and have not had an opportunity to enter an apprentice program, shall retain the right to be promoted into a Training program, which shall be offered on a seniority basis. Such employees who have already taken and passed the Bennett Test shall qualify for that promotional opportunity. Employees in this classification who have not yet been provided a qualifying test by the District, shall be provided at least two opportunities to pass a qualifying test established by the District, which shall determine their eligibility. Any employee eligible to be promoted into a Training Program under this provision who leaves the Training program for any reason, except a qualifying medical reason (including but not limited to leaves pursuant to OFLA, FMLA, or the ADA) or due to a military leave, may return to their Serviceworker/Helper classification and will receive a seniority date equal to the date of their return to the classification. For employees who leave a Training program for a qualifying medical reason or due to military leave, receive a seniority date in the equal to their first hire date at TriMet.”

Article 3.21.3:

“Par. 3. After an opportunity for promotion has been provided to current employees in the District shall have the right to hire from the outside all Trainees annually in each Training program within the District. All newly hired Trainees, whether from within or outside the bargaining unit, shall meet the minimum qualifications established by the District. If the District determines an internal candidate is equally qualified as an external candidate, the District shall hire the internal candidate for a Trainee position. If an internal candidate is hired into a Training position but leaves for any reason, except a qualifying medical reason (including but not limited to leaves pursuant to OFLA, FMLA, or the ADA)

or due to a military leave, they may return to most recent classification worked and will receive a seniority date equal to their previous classification seniority, less time spent in the training program.”

Article 4.1.2:

“**Par. 2.** Only those functions mutually agreed to be excluded shall be excluded. Facilities Maintenance employees retain the right to all work not specifically excluded. The District will maintain facilities, funding, staffing, and training for all functions necessary to maintain and repair buildings and grounds, owned or operated, in whole or in part, by or for the District. The District and the Union shall meet occasionally to add or delete items from the exclusion list by mutual consent.”

Article 4.2.1:

“**Par. 1.** It is understood and agreed that in filling vacancies that are not filled by promotion within the Department, preference will be given to employees or laid off employees of the Maintenance or Stores Department. Such vacancies will be posted on all department bulletin boards for five (5) days. If unable to fill the vacancy, it may be filled according to seniority within the District.”

Article 4.5.1:

“**Par. 1.** There shall be a Facilities Training Program. The purpose of this program is to offer qualified trainees an opportunity to advance in the field of facilities maintenance to a high level of proficiency.
After the current apprentices graduate from the program, the Facilities Training Program shall not include LME Licensure. The Facilities Training program shall be governed by the same provisions contained in Article 3, Section 7 and Section 21 of this Article unless stated otherwise in the collective bargaining agreement.”

Article 4.5.2:

“**Par. 2.** Any District employee who has successfully met all the prerequisites established by the District and is selected to enter a District training program pursuant to Article 21, Par. 2, shall, be provided an opportunity to attend program orientation of that program prior to accepting the promotion. The orientation will include a meeting with a trainer to cover job requirements and expectations, working conditions, and an interview with a journey level worker.”

Article 9.2.1:

“**Par. 1.** The District agreed on the following policy with reference to new jobs and classifications: In the event the District creates a job or classification within the bargaining unit but not presently covered by the Labor Agreement, openings shall first be offered to District employees and filled by these employees if they can meet

the qualifications of the job as established by the District. In the event an employee has the basic qualifications necessary, s/he will be given a reasonable training period to learn the details of the job. In making its selection among qualified employees, seniority in the District will be considered. Reasonable rules and procedures to administer the above paragraph shall be worked out between the District and Union, as necessary.”

Grievance #6449:

“Settlement Agreement March 5, 2007 (“Carry forward”)

It is agreed that the Plant Maintenance Tech will not perform work of the Plant Maintenance Mechanic which involves the installation, removal, replacement, maintenance, repair, welding, assembly or disassembly of items described in a, d, and k through bb on the list on page 10 of the PMM apprentice program (see attached) including any lighting, electrical or mechanical system or equipment involving Tri-Met buildings or facilities.”