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Case No. UP-053-11

Date Filed 8/5/11

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STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

UNFAIR LABOR PRACTICE COMPLAINT
Public Employment

COMPLAINANT Amalgamated Transit Union, Division 757 c/o Michael Tedesco Naomi Loo Tedesco Law Group 14183 Taylor's Crest Lane Lake Oswego, OR 97035 866-697-6015	COMPLAINANT'S REPRESENTATIVE Michael Tedesco Naomi Loo Tedesco Law Group 14183 Taylor's Crest Lane Lake Oswego, OR 97035 866-697-6015
RESPONDENT Tri-County Metropolitan Transportation District of Oregon c/o Adam Collier Bullard Smith Jernstedt Wilson 1000 SW Broadway, Ste. 1900 Portland, OR 97205 503-248-1134	RESPONDENT'S REPRESENTATIVE Adam Collier Bullard Smith Jernstedt Wilson 1000 SW Broadway, Ste. 1900 Portland, OR 97205 503-248-1134

Complainant alleges that Respondent has committed unfair labor practices under ORS 243.672(1)(a), (e) and (g) of the Public Employee Collective Bargaining Act. The following is a clear and concise statement of the facts involved in each alleged violation, followed by a specific reference to the section and subsection of the law allegedly violated.

1.

Complainant Amalgamated Transit Union, Division 757 ("ATU" or "the Union") is a labor organization as defined in ORS 243.650(13). ATU is the exclusive representative of certain employees employed by Respondent.

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2.

Respondent Tri-County Metropolitan Transportation District of Oregon (“TriMet”) is a public employer as defined in ORS 243.650(20).

3.

TriMet and ATU are parties to a collective bargaining agreement that expired on November 30, 2009. The parties bargained to impasse over a successor agreement, and are currently awaiting interest arbitration.

Counts 1, 2 and 3

4.

On April 13, 2011, TriMet employee T.P.¹ made a safety and health related complaint to TriMet based on concerns associated with his job. T.P. informed TriMet that he had experienced pain associated with ergonomic problems with the Type 4 rail car he operates. These same ergonomic problems have repeatedly been communicated to TriMet by the Union and the Bureau of Labor and Industries (“BOLI”), as well as through previous workers compensation claims.

5.

Also on April 13, 2011, T.P. alerted TriMet to mechanical and electronic problems endemic to the Type 4 rail cars. Specifically, T.P. informed TriMet that audible alarms were being triggered on the rail car, up to 30 times per day. These alarms caused rail car operators to operate the train while distracted.

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¹ The Union is using this employee’s initials to protect privacy.

6.

T.P. did not report that he had been injured on the job or that he was unable to perform his work, and therefore there was no legitimate reason to place him on administrative leave.

7.

In response to T.P.'s safety-related concerns, TriMet immediately placed T.P. on paid administrative leave, effective April 13, 2011. As a condition to returning to work, TriMet required T.P. to be seen and medically released by TriMet's contracted physician, Dr. Harris. TriMet officials scheduled an examination with Dr. Harris for April 18, 2011. Contrary to past practice, the Union was not notified of the situation.

8.

After T.P. was released to work, TriMet returned T.P. to the same route he was on before he lodged his complaint without addressing T.P.'s concerns over the ergonomic problems or the electrical/mechanical issues associated with Type 4 rail cars.

9.

In the event that TriMet does have a legitimate concern about an employee's ability to perform his or her work, or when an employee indicates that he or she might have an inability to perform the work, the past practice between the parties was to use a specific procedure. This procedure tracked the parties' agreed-upon and written Third Doctor Opinion Process that has been used by the parties for a number of years. That process required the employee to be seen by a physician of that employee's own choice to determine ability to work. If that physician deemed the employee able to work, but TriMet disagreed, then the employee was sent to TriMet's long-term contracted occupational doctor. If TriMet's doctor disagreed with the employee's

physician's opinion. The parties would then send the employee to a mutually-agreed-upon third doctor with expertise in the particular medical condition at issue. *See* Attachment 1. The initial step in the Third Doctor Opinion Process requires TriMet to contact the Union and explain the situation

10.

By requiring T.P. to initially see and then obtain a release from TriMet's contracted physician, TriMet unilaterally altered the past practice described in paragraph 9, thereby violating ORS 243.672(1)(e).

11.

In the alternative, by requiring T.P. to initially see and then obtain a release from TriMet's contracted physician, TriMet violated a written agreement with the Union in violation of ORS 243.672(1)(g).

12.

By placing T.P. on administrative leave in response to his safety complaints when there was no report of an injury, forcing him to see TriMet's contracted physician before returning to work, and by returning him to the same position without addressing any of his safety concerns, TriMet interfered with, restrained or coerced T.P. in or because of the exercise of rights guaranteed in ORS 243.662243.672(1)(a).

Count 4

13.

On June 22, 2011, TriMet HR Representative Robin Rudiger sent out an email to all TriMet employees titled "Human Resources Policy Manual on TriNet." TriNet is a website

internal to TriMet that provides a large variety of different information and is difficult to navigate. The email from Ms. Rudiger advised all TriMet employees of their responsibility to review and be aware of all TriMet policies on the TriNet website. According to Ms. Rudiger's email, employees are responsible for keeping abreast of any changes to existing policies and of any new policies on the TriNet website. *See Attachment 2.*

14.

This new requirement affects all bargaining unit employees, most of whom do not use a computer as part of their TriMet job duties. A great number of bargaining unit employees do not know how to use and do not want to use TriMet computers for any reason. Additionally, the majority of the bargaining unit employees are bus and rail operators (hereinafter "field employees") who spend very limited, if any, time at TriMet facilities. While some, but not all, field employees may have periodic access to buildings containing two or four computers, there are a number of reasons why they would not access these computers except for the limited purpose of quickly reviewing matters pertinent to their daily assignment. Prior to beginning their driving duties, the field employees have very few minutes of paid time to physically report their attendance, get their work assignments and equipment, walk to their vehicles and conduct a State-mandated multiple-point vehicle inspection test.

The field employees' access to computers while on the job is limited to occasional use when they are on break or using the restroom. For most field employees, accessing a computer for this purpose would require them to use unpaid-time or their statutorily reserved break time. Additionally, there is generally a line of people waiting to use the few computers available to field employees.

Non-field employees, such as mechanics, are evaluated and promoted based on productivity levels. Time spent searching TriNet is not considered a work item for purposes of calculating their productivity. In the past, employees have been threatened with discipline if they are not at their work stations, which do not have computers.

Finally, while non-field employees have access to computers at their work sites, many refuse to use them because of prior computer-related discipline and privacy issues. Use of a computer for this purpose is not part of their job description.

15.

In the past, the Union and bargaining unit employees have not been required to self-notice policy changes. When TriMet created a new policy, it either handed out a hard copy of the policy change and requested that employees sign a document acknowledging receipt, placed a hard copy of the policy change in all employees' mailboxes, and/or posted the policy on a bulletin board which all employees have access to. Employees were also informed that the new policy was available on TriNet but they were not required to access TriNet to see the policy.

16.

This new requirement that employees self-notice by continually tracking TriMet policies to see if there have been changes constitutes a change in working conditions for TriMet employees and in the practices between the parties. The requirement places an affirmative duty on employees to log onto, and search, TriNet during off-duty time and to access a computer even if proficiency in computers is not part of an employee's job description. Additionally, this policy forces employees to search for changes to existing policies that may, if violated, justify disciplinary action. The change also negatively impacts the Union which was, in the past, given a

preview of policy changes such that it had the timely opportunity to object to the change and/or work with TriMet to change the policy before it was implemented.

17.

TriMet violated its duty to bargain in good faith with ATU, in violation of ORS 243.672(1)(e), when it unilaterally implemented a policy and procedural change without providing ATU with notice or an opportunity to bargain over the change.

Count 5

18.

The classification of Fare Inspector has existed for a number of years and through many collective bargaining agreements. At the time TriMet raised this issue, there were eleven fare inspectors and four lead fare inspectors. These individuals' seniority in the fare inspection department ranged from eight to ten years.

19.

In mid-2008, TriMet informed ATU that it wanted to eliminate the classification of Fare Inspector and merge those duties into the existing positions of Road and Rail Supervisors.

20.

Thereafter, TriMet and ATU bargained over the impact of merging the Fare Inspector duties into the duties of the Road and Rail Supervisors. The Fare Inspectors participated in these discussions. Their concern was the impact of being placed at the bottom of the seniority list should they be transferred over to the Road and Rail Supervisor classification. Lower seniority would have impacted a number of working conditions, including shifts, days off, vacations, job security and other mandatory subjects of bargaining.

21.

On or about August 18, 2008, the parties signed an agreement which addressed a number of the Fare Inspectors' issues. A copy of that Agreement is included as Attachment 3. This agreement does not contain a dispute resolution provision or procedure.

22.

In relevant part, the August 2008 agreement effected the following relevant changes, causing an impact on the existing Fare Inspectors:

- a. One lead Fare Inspector would be retained in that position.
- b. Three other lead Fare Inspectors were demoted to Fare Inspector and paid \$2,500 each.
- c. Every Fare Inspector who had 18 or more years of TriMet-wide seniority was given the option to remain as in the position of Fare Inspector.
- d. Those with 18 or more years of TriMet-wide seniority who chose to remain as Fare Inspectors were given the right to remain in that position "until they resign, retire or involuntarily leave the District."
- e. Certain protections aimed at maintaining the status quo for Fare Inspectors' shifts, holidays, vacations, and sign-ups were guaranteed.
- f. Those Fare Inspectors with less than 18 years of TriMet-wide seniority were required to transfer into the Road and Rail Supervisor classification at the bottom of the seniority list. Those who refused transfer were required to return to the bus operator classification.

23.

The result of this agreement was that five individuals remained as Fare Inspectors and one as the Lead Fare Inspector. The remaining Fare Inspectors and leads transferred into the Road and Rail Supervisor position.

24.

On or about January 30, 2009, TriMet and ATU signed an agreement modifying the

original settlement document. A copy of this modifying agreement is included herewith as Attachment 4. The purpose of the modification was to allow two former Fare Inspectors, John Coryell and James Thake, to return to their prior positions of Fare Inspector. In exchange, they had to agree to give up any seniority they might have compiled in the Road/Rail Supervisor classification.

25.

On or about June 22, 2010, three Fare Inspectors, Sandy Raney, John Coryell and James Thake were informed that they were being laid off from the Fare Inspector department and had to resume working in the Bus Operator classification. The legality of this layoff is the subject matter of UP-042-10.

26.

In addition to the provisions described in Paragraph 20, the August 2008 agreement between the parties requires TriMet to provide two Fare Inspector bid sign-ups, effective in April and September. It also states that the "District will maintain or improve the current Fare Inspector work shifts comparable with the actual workforce that exists." Fare Inspectors always enjoyed what the parties called "premium shifts," which meant a weekend day off as well as a daytime schedule. Neither of these provisions was altered in the January 2009 amendment to the agreement.

27.

On or about mid-July, 2011, Coryell and Thake were told that they would be allowed to return from layoff but that if they did so, they would be working more onerous shifts. Thake initially refused to return under that condition but after consulting with the Union, said he would return but fight the violation of the August 2008 agreement's provision regarding schedules. He

was told that he was considered “resigned” from the department and could not return. Coryell said that he would return but dispute the scheduling. Coryell returned to fare inspection in mid July and has since been having to work schedules that are not in line with the August 2008 agreement’s scheduling provision. TriMet’s insistence on more onerous schedules violates the parties’ August 2008 agreement and therefore is an on-going violation of ORS 243.672 (1)(g).

Count 6

28.

Jeff Hunt is a Local 757 bargaining unit member who has worked at TriMet’s Merlo garage as a journeyman mechanic since 1995. In 2006, Jeff Hunt was appointed the Local 757 executive board officer to represent the Merlo maintenance bargaining unit members. He was then elected to that position in June 2009.

29.

The manager of Merlo’s maintenance garage is Robert Johnson. Ordinarily, Johnson instructs the bargaining unit members’ immediate supervisor to be the initial management contact when it comes to discipline. In the case of Hunt, however, Johnson typically handles most of the disciplinary-related admonitions and actions personally.

30.

As an Oregon employer, TriMet is required to have safety committees comprised of management and employee representatives and to regularly schedule and hold meetings of that committee. Employee representatives are appointed by the Union to serve on that committee. TriMet schedules the meetings during working hours and employee representatives to those meetings regularly attend without any problem. Jeff Hunt is a union-appointed employee member of the TriMet Safety committee.

On or about June 21, 2011, Jeff Hunt informed Johnson that he would be leaving his worksite the following day to attend a TriMet-scheduled safety committee training meeting. Merlo garage manager Johnson told Hunt that he could not attend the meeting. When Hunt protested, Johnson said Hunt worked for Johnson and not the Union, and Hunt was to do as he was instructed. This incident was a part of a pattern which shows discriminatory treatment of Hunt because of his Union-related activities. Specifically:

- a. Hunt held a specific job on the West Side light rail with a start time of 11:30 a.m. In Spring 2010, that job's start time was changed to 2 p.m. When Hunt asked Johnson why the start time was changed, Johnson responded that he changed it because he did not want Hunt to bid it since Hunt's union representation duties were resulting in too much overtime.
- b. Johnson told Hunt that Hunt spent too much time on Union business even though the triggering incident for this statement was a Step 3 grievance panel meeting mandated by the parties' CBA and even though TriMet paid for Hunt's attendance. Johnson, thereafter, stated that he would take actions in response to Hunt's union representation duties. For example, in March 2011, Johnson said that he was no longer going to allow the practice of side-signing on job bids whereby employees could bid on jobs as fill-ins for people who were likely going to be absent from that job. As a result, bargaining unit employees lost the opportunity to bid as a fill-in for Hunt's job while he was absent on union business. Also in March, Johnson said that he was going to contract out Hunt's job in the Body Shop because Hunt was absent. These actions had a negative impact on the bargaining unit and/or Hunt.
- c. Subsequent to the events described in paragraph (b), Johnson personally threatened Hunt with discipline for actions that are routinely taken by other bargaining unit members, such as using a particular work identifier code and mistakenly driving the wrong bus into the garage for repairs.
- d. Historically, Merlo maintenance employees who are late to work are given the opportunity to make up the lost minutes by working through their break time that day. When Hunt attempted to make up for lost time this way, he was told by Johnson that he could not do so, and, as a result, Hunt was subsequently given an attendance demerit.

- e. It is common for bargaining unit members in the Merlo garage to talk to each other and to use their cell phones for personal business while on the job. To the Union's knowledge, no employee has been threatened with similar consequences for these activities. No Merlo garage employee has ever suffered negative consequences from these activities. Hunt was informed by his supervisor that Hunt is now to be "time-slipped" anytime he is seen talking to another bargaining unit member or on his cell phone. This means the time spent is deducted from his wages. This time-slipping occurs even though no one can know the content of Hunt's conversations, and whether they are in fact of a personal nature.
- f. The first of July 2011, Hunt was informed by Johnson that he was to clock in and out whenever he was doing union representation business, even if the business was required under the CBA and even though the CBA required Hunt to be paid by TriMet for the activity. This represents a significant change in past practice and a potential loss of income to Hunt. On or about July 19, 2011, in violation of a district-wide, long time past practice, Johnson attempted to give Hunt an unexcused absence for time spent performing his duties as a union representative in the parties' grievance process even though that time was to be paid for by TriMet. The Union had to intervene and Johnson was instructed by TriMet to pay Hunt.
- g. It is not unusual for more than one mechanic to work on the same piece of equipment through the shifts. Johnson oversees the assignment of particular equipment to particular mechanics. Johnson assigned three people who have voiced their dislike of Hunt to work on the same equipment as Hunt. Johnson then conducted interviews during June and July with these individuals where the topic was Hunt and Hunt's job performance. Additionally, Johnson told bargaining unit members that Hunt was in serious trouble because Johnson had plenty of evidence that Hunt was falsifying work records and he asked the bargaining unit members to confirm this statement. It is presumed that this "evidence" came from the three individuals Johnson assigned to work on Hunt's equipment. It was only after these actions that Johnson told Hunt he was being accused of falsifying work records.

32.

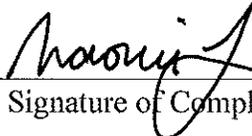
By these actions, TriMet has interfered with, restrained or coerced Mr. Hunt in or because of the exercise of rights guaranteed in ORS 243.662, in violation of ORS 243.672(1)(a).

WHEREFORE, ATU requests that the Board order the District to:

- A. Cease and desist its unlawful actions;

- B. Bargain in good faith with ATU;
- C. Make ATU bargaining unit members whole for any lost benefits, wages, and out-of-pocket costs, including medical expenses, caused by the TriMet's unilateral implementation of new policies;
- D. Make whole any former or current Fare Inspectors who have been affected by TriMet's failure to abide by the two relevant agreements;
- E. Rescind any unlawful disciplinary or discriminatory actions against Mr. Jeff Hunt;
- F. Post notices of its unlawful actions;
- G. Pay to ATU its reasonable representation costs under OAR 115-035-0055; and,
- H. Order any additional relief that the Board deems just and equitable.

I certify that the statements in this complaint are true to the best of my knowledge and information.

By:  _____
Signature of Complainant or Complainant's Representative

Naomi Loo
Counsel for ATU

August 4, 2011
Date