

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-56-09

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION,)	
DIVISION 757,)	
)	
Complainant,)	
)	FINDINGS AND ORDER
v.)	ON COMPLAINANT'S
)	PETITION FOR
TRI-COUNTY METROPOLITAN)	REPRESENTATION COSTS
TRANSPORTATION DISTRICT,)	
)	
Respondent.)	
_____)	

On October 10, 2012, this Board issued an Order that held that the Tri-County Metropolitan Transportation District (TriMet) violated ORS 243.672(1)(e) by failing to respond in a timely or adequate manner to requests for information concerning prescription drug insurance payments made by the Amalgamated Transit Union, Division 757 (ATU). 25 PECBR 152. On October 29, 2012, ATU petitioned for representation costs. On November 19, 2012, TriMet responded to the petition.

Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds:

1. ATU filed a timely petition for representation costs and TriMet filed timely objections to the petition.
2. ATU is the prevailing party.

In its complaint, ATU alleged that TriMet's failure to timely and adequately respond to information requests concerning prescription drug insurance payments violated ORS 243.672(1)(e) and (g). We concluded that TriMet's conduct violated its duty to bargain in good faith under subsection (1)(e). We dismissed ATU's claim that these same actions violated subsection (1)(g), which makes it an unfair labor practice for a public employer to "[v]iolate the provisions of any written contract with respect to employment relations * * *." TriMet contends that because we dismissed one of ATU's claims, TriMet is a partially prevailing party. We disagree.

Under Board rules, a party prevails if it succeeds on a separate charge. A charge is considered separate if it: (1) is “based on clearly distinct and independent operative facts; i.e. the charges could have been plead and litigated without material reliance on the allegations of the other(s);” and (2) concerns enforcement of rights that are independent of any other charges. OAR 115-035-0055(1)(b)(A). A charge is separate only if it meets both parts of this test. *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, 25 PECBR 90 (2012) (Rep. Cost Order). Here, the same facts—TriMet’s conduct in responding to ATU’s requests for information about prescription drug insurance payments—supported both the subsection (1)(e) and (g) charges. Accordingly, the charges are not separate and TriMet is not a partially prevailing party.

3. ATU seeks a total of \$27,357 in representation costs. According to the affidavit of counsel, this amount represents a total of 166 hours of attorney time billed at a rate of \$165 per hour.¹

The claimed hourly rate is average. *Id.* (Average rate for representation costs is \$165-170 per hour). The number of hours claimed is below average. This case involved four days of hearing. Cases take an average of 45-50 hours per day of hearing. *Clackamas County Employees’ Association v. Clackamas County*, Case No. UP-23-10, 25 PECBR 172 (2012) (Rep. Cost Order). We will consider these factors in determining ATU’s reasonable representation costs.²

4. As noted above, the complaint alleged that TriMet’s conduct in responding to ATU’s requests for information concerning prescription drug insurance benefits violated ORS 243.672(1)(e) and (g). We concluded that TriMet failed to respond promptly or adequately to certain of these information requests in violation of subsection (1)(e). We ordered TriMet to cease and desist from failing to respond to ATU’s information requests, and also ordered TriMet to pay a civil penalty of \$750 to ATU.

An award of representation costs may not exceed \$3,500. This limit does not apply, however, if we find that civil penalty is appropriate. OAR 115-035-0055(1)(a). In cases in which we impose a civil penalty, we typically award the prevailing party all its reasonable representation costs. *Wy’East*, (Rep. Cost Order). We infrequently award less than 100 percent of reasonable representation costs requested. In *Wy’East and Coos County Board of Commissioners and AFSCME Local 2936 v. Coos County District Attorney and State of Oregon*, Case No. UP-32-01, 20 PECBR 650 (2004) (Rep. Cost Order), we slightly reduced the amount of representation costs awarded because the cases presented issues of first impression and because we imposed civil penalties of only \$500, half of the statutory maximum. ORS 243.676(4).

¹166 hours of work at the rate of \$165 per hour equals \$27,390. Counsel does not explain the discrepancy between this amount and the amount she claims in the petition for representation costs. Accordingly, we consider the amount claimed by counsel in her petition—\$27,357—as the amount of representation costs sought.

²In its objections, TriMet contends that ATU should be awarded representation costs for only three days of hearing. According to TriMet, the hearing lasted no more than a few hours for two of the scheduled hearing days. Because the hours claimed by ATU are below average, we conclude that they reflect, with relative accuracy, the number of hours spent in hearing.

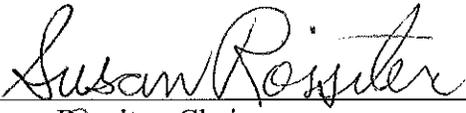
Here, we will reduce the amount of representation costs awarded for two reasons. First, the amount of the civil penalty we awarded is less than the statutory maximum. Second, we concluded that ATU withheld documents subpoenaed by TriMet for the hearing, and that this conduct “may have unduly prolonged the hearing.” 25 PECBR at 170 n 18.

Having considered the purposes and policies of the PECBA, our awards in prior cases, and the reasonable cost of services rendered, this Board awards ATU representation costs in the amount of \$26,000.

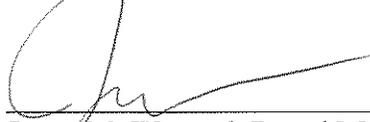
ORDER

TriMet will remit \$26,000 to ATU within 30 days of the date of this Order.

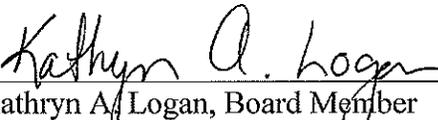
DATED this 28 day of December 2012.



Susan Rossiter, Chair



Jason M. Weyand, Board Member



Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.