

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-55-05

(UNFAIR LABOR PRACTICE)

TRI-COUNTY METROPOLITAN)	
TRANSPORTATION DISTRICT)	
OF OREGON (TRIMET),)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW
)	AND ORDER
AMALGAMATED TRANSIT UNION,)	
DIVISION 757,)	
)	
Respondent.)	
_____)	

On February 6, 2008, this Board heard oral argument on Respondent’s objections to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on December 13, 2007, following a hearing on June 13, 15, and 27, 2006 in Portland, Oregon. The record closed on August 14, 2006, with the submission of the parties’ post-hearing briefs.

Keith M. Garza, Attorney at Law, 15033 S E. McLoughlin Boulevard, #312, Milwaukie, Oregon 97267-2800, represented Complainant.

Monica A. Smith, Attorney at Law, Smith, Diamond & Olney, 1500 N.E. Irving, Suite 370, Portland, Oregon 97232-4207, represented Respondent.

On October 13, 2005, Tri-County Metropolitan Transportation District of Oregon (TriMet) filed this complaint against the Amalgamated Transit Union, Division 757 (ATU). TriMet alleged that ATU had entered into a final side letter agreement with TriMet regarding transit operator meal and rest breaks on June 14, 2005

(the Side Letter); that ATU officials intentionally repudiated the agreement by submitting it to a vote of the membership; that this conduct violated ORS 243.672(2)(b) and (d); and that this, and prior similar conduct, warranted the imposition of a civil penalty against ATU.¹

ATU filed a timely answer on January 12, 2006. The Answer included an affirmative defense that the Side Letter was never a final agreement. The Answer also included several counterclaims, which alleged that: (1) TriMet imposed a unilateral change in working conditions and violated the parties' collective bargaining agreement by implementing the Side Letter; (2) ATU President Al Zullo had advised TriMet that he had limited authority regarding agreeing to the Side Letter, and that TriMet filed this action in order to interfere with ATU's internal governance; (3) Zullo was impaired and TriMet officials were aware of, and took advantage of, Zullo's impairment and misrepresented the contents and impact of the Side Letter; (4) TriMet's conduct therefore violated ORS 243.672(1)(b), (e), and (g); and (5) TriMet's conduct, including filing this frivolous action, warranted the imposition of a civil penalty against TriMet.

TriMet filed a timely reply to the union's counterclaims with a filing fee on January 25, 2006. TriMet denied any wrongdoing and alleged that ATU's claim that misrepresentation caused Zullo to sign the Side Letter was untimely; that Zullo had apparent authority to sign the Side Letter; and that ATU had waived any dispute regarding the Side Letter by failing to file a timely grievance.²

The issues in this case are:

1. Did ATU repudiate a final agreement regarding transit operator meal and rest breaks in violation of ORS 243.672(2)(b) or (d)?
2. Did TriMet violate the collective bargaining agreement and ORS 243.672(1)(g) when it implemented the September 2005 run schedule?
3. Did TriMet unilaterally change a mandatory subject of bargaining in violation of ORS 243.672(1)(e) by implementing the September 2005 run schedule?
4. Did TriMet file this unfair labor practice complaint in an attempt to interfere with ATU's internal governance in violation of ORS 243.672(1)(b)?

¹TriMet withdrew its request for a civil penalty, and reimbursement of its filing fee, in its post-hearing brief (TriMet's post-hearing brief at 51.)

²TriMet withdrew this claim at the start of the hearing.

5. Did TriMet officials violate ORS 243 672(1)(e) by misrepresenting the contents and effect of the June 14 Side Letter to avoid ATU's ratification requirements and taking advantage of ATU President Zullo's impaired state?

6. Is ATU's counterclaim regarding alleged misrepresentations to Zullo timely?

7. Should TriMet be required to pay a civil penalty to ATU?

RULINGS

1. The ALJ properly dismissed as untimely the ATU counterclaims based on events prior to July 16, 2005

ATU filed its Answer on January 12, 2006. In the same document, it included four counterclaims. ATU paid its \$100 answer fee³ on January 12, and, after being advised by this Board's staff that the counterclaims were subject to the filing fee applicable for a new action, paid an additional fee on January 31, 2006.⁴

TriMet argues that the counterclaims are untimely, based on ATU's January 31, 2006 filing of the counterclaim payment.

Under ORS 243 672(3), a complaint must be filed with this Board "not later than 180 days following the occurrence of an unfair labor practice." The law also provides that the appropriate filing fee must be paid at the time a complaint or answer to a complaint is filed, and that a complaint or answer filed without the fee is subject to dismissal. OAR 115-035-0000(4); and OAR 115-035-0035(4).

This Board has repeatedly held that a complaint or answer is filed when the pleading is received by this Board *and* the appropriate fee is paid. *Knowland v. TriMet*, Case No. UP-38-97, 17 PECBR 413, 415 (1997); *OPEU v. Jefferson County*, Case No. UP-19-99, 18 PECBR 245, 249-50 (1999); and *Mt. Hood Community College Faculty Association v. Mt. Hood Community College*, Case No. UP-7-99, 18 PECBR 636, 638 (2000).

³This Board's rules have been amended since the Answer was filed in this case, setting the filing fee for both the complaint and the answer at \$250. OAR 115-035-0000(4) and 115-035-0035(4)

⁴This Board's practice has been to require a fee in addition to the answer fee when the document contains an answer and an actual counter or cross claims

However, this Board has not directly addressed the issue of the filing date of a counter or cross claim in its rules or in a reported decision. In *Redmond Police Officers' Association v. City of Redmond*, Case No. UP-62-02, 20 PECBR 250 (2003), the city filed what it called "an answer, affirmative defense, and counterclaim." The city did not pay any fee for filing the counterclaim, but the association tendered a fee for filing an answer to the counterclaim, and argued that this Board should not consider the city's pleading and evidence because no fee was paid. This Board stated,

"Board rules do not contemplate the circumstances that arose here. It is rare for parties to file counterclaims. Since the advent of filing fees in 1995, we have reviewed such filings on a case-by-case basis to determine whether additional fees were necessary.

"The Association contends that we should disregard the City's pleading and evidence because the City did not pay the required filing fee. We examined the City's pleading in this case and determined that it was more in the nature of an affirmative defense than a complaint. Therefore, no fee was required. The Association's fee for answering the City's pleading was returned." *Id.* at 252.

As part of this case-by-case review, it is the practice of this Board's staff to contact respondents to inform them that a particular pleading is a counter or cross claim for which an additional fee is required. It has not been the practice of Board staff to advise parties that the counter or cross claim will not be treated as filed until the additional payment is received.

Accordingly, under the unique circumstances of this case, we will use the filing date of ATU's Answer (which included ATU's answer and its counterclaims) as the filing date of the counterclaims. That date was January 12, 2006, and claims which accrued more than 180 days prior to that date are untimely. Thus, any claim which accrued before Saturday, July 16, 2005, is untimely.

ATU's first and second counterclaims allege that, by implementing the Side Letter in the schedule published in September 2005, TriMet imposed a unilateral change in working conditions and violated the parties' collective bargaining agreement and ORS 243.672(1)(e) and (g). These counterclaims are timely filed since they concern events that occurred well within 180 days of the date on which TriMet filed its complaint.

The third counterclaim alleges that ATU President Al Zullo had advised TriMet that he had limited authority to agree to a side letter, and that TriMet filed this unfair labor practice complaint with that knowledge, intending to interfere with ATU's internal governance. TriMet filed this complaint on October 13, 2005, well within the limitations period.

ATU's fourth counterclaim alleges that TriMet officials misrepresented the "contents and impact" of the Side Letter "in order to avoid the Union's requirement of ratification, and in order to take advantage of Zullo's impaired state." ATU alleges that this conduct was bad faith bargaining in violation of ORS 243.672(l)(e).

This claim arguably accrued when Zullo signed the Side Letter on June 14, 2005. However, Zullo denied signing the Side Letter when asked at the June 17, ATU Executive Board meeting. Zullo gave the Side Letter to the ATU Executive Board during its July 15, 2005 meeting, along with his interpretation of its contents. At that time, the board learned that Zullo had lied to them about signing the Side Letter on June 17 and had tried to conceal his signing for over a month.

To be timely, an unfair labor practice complaint must be filed no "later than 180 days following the occurrence of an unfair labor practice." ORS 243.672(3). In certain circumstances, we have applied a "discovery rule" to determine the beginning of the limitations period, holding that it is the discovery of wrongdoing that triggers the 180-day period. *Association of Professors of Southern Oregon State College v. Oregon State System of Higher Education and Southern Oregon State College*, Case Nos. UP-13/118-93, 15 PECBR 347, 357 (1994); and *Rasmussen v. Federation of Parole and Probation Officers*, Case No. UP-54-90, 12 PECBR 299 (1990). However, in a number of cases we have refused to apply this discovery rule and held that the 180-day period for filing begins when the unlawful change occurs. *Oregon AFSCME Council 75 v. Morrow County*, Case No. UP-38-96, 17 PECBR 17, 18-19 (1996), *ruling and order on reconsideration*, 17 PECBR 75 (1997) (citing *Salem-Keizer Association of Classified Employees v. Salem-Keizer School District*, Case No. UP-104-90, 13 PECBR 89 (1991)); and *Oregon School Employees Association v. Clatsop Community College*, Case No. UP 13-87, 10 PECBR 774 (1988)); and *Washington County Police Officers' Association v. Washington County Sheriff's Office*, Case No. UP-12-02, 20 PECBR 274, 276 (2003) (citing *OSEA v. Astoria School District*, Case No. UP-40-02, 20 PECBR 46, *adhered to on reconsid.*, 20 PECBR 63 (2002)).⁵

Here, ATU concedes that its fourth counterclaim is untimely if we count the 180-day limitation period from the date on which the alleged misrepresentation

⁵The Oregon Supreme Court has held a facially similar statute did not include the discovery rule. *Huff v. Great Western Seed Co.*, 322 Or 457, 909 P2d 858 (1996).

occurred. However, ATU argues that we should apply the discovery rule and conclude that the 180-day period began to run on the date ATU discovered TriMet's allegedly unlawful misrepresentation concerning the Side Letter. According to ATU, the union only discovered the full nature of TriMet's wrongdoing some time after July 15. Although it appears that any further use of the "discovery rule" may be inappropriate, we need not decide this issue here. Even if we were to apply the "discovery rule," ATU's fourth counterclaim regarding TriMet's alleged misrepresentation would be untimely. ATU learned of TriMet's allegedly unlawful conduct at its July 15 Executive Board meeting when Zullo confessed that he had signed the Side Letter. Although ATU may have later discovered additional details about the Side Letter agreement, the union knew enough about TriMet's conduct on July 15 to conclude that it allegedly violated the Public Employee Collective Bargaining Act (PECBA). Accordingly, ATU knew about the facts upon which its fourth counterclaim is based more than 180 days from the date on which the counterclaim was filed. We dismiss the fourth counterclaim as untimely.

2. The ALJ erred by dismissing ATU's claim that TriMet violated ORS 243.672(1)(b) for failure to state a claim for relief.

ATU alleges that TriMet filed this unfair labor practice complaint in an attempt to interfere with ATU's internal governance, in violation of ORS 243.672(1)(b). That statute provides that it is an unfair labor practice for a public employer to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." ATU argues that the employer's complaint interfered with the union because it "punished" ATU for seeking member ratification of the Side Letter. TriMet contends that this charge should be dismissed for failure to state a claim for relief. TriMet argues that specific remedies for misconduct in filing an unfair labor practice complaint are addressed by portions of the PECBA other than subsection (1)(b). Under ORS 243.672(3), this Board may order filing fee reimbursement to a prevailing party if we find that a complaint or answer was frivolously filed. Under ORS 243.676(4)(b), this Board may award a civil penalty if we find that an unfair labor practice complaint was "frivolously filed, or filed with the intent to harass the other person, or both." In its brief, TriMet asserts:

"* * * Having elected to provide that specific remedy, then, it is not plausible to assume that the legislature impliedly sought to make such bad faith litigative conduct an unfair labor practice itself. See ORS 174.020(2) (specific intent controls over general). * * *"

TriMet's argument is not well-taken. ORS 174.020(2) applies only to a situation where statutes conflict. Here, there is no conflict among the relevant statutes.

ORS 243.672(1)(b) addresses employer actions that “[d]ominate, interfere with or assist in the formation, existence or administration” of a labor organization. ORS 243.672(3) and 243.676(4)(b) address employer actions (filing a complaint or answer) that are frivolous or harassing. The ALJ erred by dismissing ATU’s allegation that TriMet violated subsection (1)(b) on the basis that it fails to state a claim for relief.

3. The ALJ properly denied TriMet’s motion to reopen the record to admit a document regarding Wallace’s alleged embezzlement of ATU funds

On March 6, 2007, after the evidentiary record in this case was closed, TriMet sought to introduce a document into the record regarding ATU witness Tom Wallace. During the events at issue in this case, and at the time he testified at the hearing, Wallace was the financial secretary/treasurer/recording secretary of ATU, one of the union’s three full-time executive officers.

The document at issue, marked as Exhibit C-64, is a February 2007 letter from ATU President Jonathan Hunt to ATU members concerning Wallace’s alleged embezzlement of ATU funds. The letter itself bears no date, but copies of articles from *The Oregonian*, also provided by TriMet’s counsel, include an article dated February 21, 2007, which quotes from Hunt’s letter.

The letter provides some details of the alleged embezzlement. The letter’s statements about Wallace generally appear to be based on statements obtained from other, unnamed parties.

After a record has closed, we will reopen it to consider additional evidence only if the party offering the evidence shows that the evidence is material to the issues and was unavailable at the time of the hearing, or there is some other “good and substantial reason” the evidence was not presented at the hearing. *Graduate Teaching Fellows Federation Local 3544, AFT, AFL-CIO v. Oregon University System*, Case No. UP-18-00, 19 PECBR 496, 498 (2001) (citing *Cascade Bargaining Council v. Bend-LaPine School District No. 1*, Case No. UP-33-97, 17 PECBR 609, 610 (1998))

The evidence that TriMet seeks to offer was unavailable at the time of the hearing. We next consider whether it is material to the issues in this case. Under OAR 115-010-0050, this Board admits “[e]vidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs,” and excludes evidence that is irrelevant, immaterial, or unduly repetitious.

Under Rule 609 of the Oregon Evidence Code, the only evidence of a crime committed by a witness that may be used to impeach the witness is proof of conviction

of a crime “punishable by death or imprisonment in excess of one year” or a crime involving “false statement or dishonesty.”

Hunt’s letter is not material to the issues in this case, which concern the negotiation and implementation of the Side Letter. It is offered as evidence of a crime of dishonesty by ATU witness Wallace in order to attack his credibility. It contains no evidence that Wallace was convicted of embezzling ATU funds, or even that Wallace’s conduct met the elements of that offense. Rather, the letter is Hunt’s report to the membership that an initial investigation demonstrated that Wallace had embezzled funds.

We conclude that the Hunt letter is inappropriate impeachment evidence and immaterial to the issues in this case. The ALJ acted within his discretion in declining to reopen the evidentiary record to accept Exhibit C-64.

4. The remaining rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT

Parties

1. TriMet is a public employer under ORS 243.650(20) and a transit district under ORS Chapter 267. It operates a transit system in the tri-county area surrounding Portland. TriMet is headed by a board of directors appointed by the governor. Fred Hansen has been TriMet’s general manager for more than seven years; he reports to the board. Hansen’s duties include the negotiation and execution of collective bargaining agreements with ATU.

2. ATU is a labor organization under ORS 243.650(13) and Section 501 *et seq.* of the Landrum-Griffin Act⁶ representing a bargaining unit of approximately 2,000 TriMet employees. ATU also represents 18 other bargaining units working in Oregon and Washington under 22 contracts, for a total membership of approximately 4,100 employees.

3. ATU is organized pursuant to its own *Bylaws* and the *Constitution & General Laws* of the International ATU. ATU is governed by an elected Executive Board with 3 full-time officers and 15 other officers representing the various employers or

⁶ATU represents public and private employees and is therefore subject to both federal and state labor laws

“properties” that are parties to contracts with ATU, including 7 officers representing various groups of TriMet unit employees

4. During 2005, when the events at issue occurred, ATU’s three full-time officers were Zullo, president/business representative; Jon Hunt, vice president/assistant business representative; and Wallace, financial secretary-treasurer/recording secretary.

5. ATU’s in-house general counsel is Susan Stoner, who has held that position since 1991. Stoner worked daily with the elected officers. Among other duties, Stoner assisted ATU officers in drafting correspondence and legal documents, and reviewing proposed agreement language

6. During the events at issue in this case, the parties had a collective bargaining agreement in effect from December 1, 2003 through November 30, 2009. The agreement was ratified by a vote of the ATU TriMet members in March of 2004, and was signed by ATU’s three full-time officers in April 2005.

7. ATU’s chief negotiator for the 2003-2009 collective bargaining agreement was Ron Heintzman, then president of ATU and now a vice-president of the International Union. The District’s chief negotiator was TriMet General Manager Hansen.

Powers and duties of ATU officers: president

8. The powers and duties of the ATU president are set forth in the International *Constitution & General Laws* and *ATU Bylaws*. The International Constitution states,

“13.9 President’s Duties. The president-business agent (or financial secretary-business agent or recording secretary-business agent, if applicable) shall be the chief executive officer of the L.U. [Local Union] and shall have general supervision over all its affairs between the executive board and membership meetings. It shall be the duty of the president-business agent to preside at all meetings of the L.U.; to preserve order and enforce this Constitution and the local bylaws; to see that all officers perform their respective duties; to authorize lost time for executive board or other members to carry out their L.U. duties; and to appoint health

and safety committees and all other committees not otherwise provided for. * * *

The International Constitution also states,

“The L.U. bylaws shall provide for the handling of all grievances and complaints of the membership and for the taking up of disputes arising between the membership and the company. The bylaws may empower the president or any other officer to handle such matters, or may empower the executive board to handle such matters, or may empower any officer to handle such matters subject to the approval of the executive board.”

9. ATU’s bylaws describe the powers and duties of the ATU president in language that is virtually identical to the section of the International Constitution regarding the president’s duties quoted above, including this statement:

“Section 5 - Office of President-Business Representative

“The President-Business Representative shall be the chief executive officer of the L.U. [Local Union] and shall have general supervision over all its affairs between the Executive Board and membership meetings. * * *

10. ATU’s bylaws also identify the entities that have the power to enter into agreements which bind ATU:

“Section 30 - Disclaimer of Authority

“No member, agent, representative or officer of this Union or any other entity shall have the power or authority to represent, act for, accept legal service for, commit or bind this Local Division in any matter or proceeding except upon express written authority having been granted therefor by the Local Division President, the Local Division Executive Board or by authority granted by the International Constitution and General Bylaws.”

Powers and duties of ATU officers: Executive Board

11. The powers and duties of the ATU Executive Board are set out in the International Constitution and ATU bylaws. The International Constitution states, in relevant part:

“13.14 Duties of Local Executive Board. It shall be the duty of the executive board to supervise and direct the management of the L.U.* * * They shall have the authority to submit the results of negotiations on agreements or other matters of importance to the entire membership for a referendum vote of the members to be conducted under conditions and at times and places determined by the executive board. * * *”

ATU’s bylaws describe the powers and duties of the Executive Board as follows:

“Section 8 - Executive Board

“The Executive Board shall consist of the President-Business Representative who shall act as chairman, the Vice President-Assistant Business Representative, the Financial Secretary-Treasurer/Recording Secretary, and the Executive Board Officers listed in Section 3.

“It shall be the duty of the Line Officers to look after their respective subdivisions, handling all grievances, complaints, and other matters in their respective subdivisions. The Line Officers shall have full knowledge of all grievances and complaints and shall participate, if needed, in all steps of the grievance procedure with the President-Business Representative or a designee. * * *

“The Executive Board shall meet when in the opinion of the officers it shall be considered necessary. Special board meetings may be called by a majority of the Executive Board or the President-Business Representative. They shall consider all grievances and complaints that may arise that the President-Business Representative cannot adjust with the employer and decide upon the proper course to pursue in dealing with them.”

ATU's internal bargaining practices and requirements: comprehensive collective bargaining agreements

12 ATU negotiates collective bargaining agreements with TriMet through a bargaining team, called a "Wage Committee," established pursuant to its bylaws.

ATU's bylaws state:

"Section 22 - Wage Committee

"The Tri-Met Wage Committee shall be composed of the President-Business Representative, Vice President-Assistant Business Representative, Financial Secretary-Treasurer/Recording Secretary, Line Officers, and the Extra Board Liaison Officers. The Wage Committee shall draft separate demands for each department, all to be presented at the same time. They shall be empowered to collect such data and increase or decrease the number of their committee whenever they deem it necessary.

"The President-Business Representative shall appoint Wage Committee members for all other properties represented by the Division.

"The Wage Committee shall be empowered to draft and negotiate agreements between the Division and employers, subject to approval of the membership as provided in the Constitution and General Laws, as amended.

"The Negotiations [Wage] Committee shall prepare and present a synopsis of contract changes to members when presenting a contract for ratification."

13. After the wage committee reaches a tentative agreement on a collective bargaining agreement with TriMet, the tentative agreement is presented to the Executive Board. After Executive Board approval, the tentative agreement is referred to the members for a ratification vote. ATU followed this procedure for the 2003-2009 collective bargaining agreement. ATU believes that membership ratification of collective bargaining agreements is required by its bylaws and by the International Constitution.

ATU's internal bargaining practices and requirements: mid-term agreements

14. ATU's governing documents do not address mid-term agreements as a separate subject. The governing documents refer to grievance handling and negotiation of agreements generally.

15. For mid-term agreements, ATU has sometimes created a smaller wage committee, representing the employee groups affected by the subject matter under discussion. However, actual discussions with the employer regarding mid-term agreements are generally carried out by one or more full-time officers.

16. The word "takeaway" is not formally defined in ATU's governing documents or any ATU policy documents. The ATU Executive Board generally considers an agreement a takeaway if it reduces or diminishes members' rights under the collective bargaining agreement. After a mid-term agreement is reached with TriMet, the ATU Executive Board examines the agreement to decide if the agreement represents a takeaway. If the Executive Board decides that a mid-term agreement is not a takeaway, the president, full-time officers, or the full Executive Board signs the final agreement and binds ATU. If the Executive Board decides that a mid-term agreement is a takeaway, the agreement is submitted either to the affected group of employees or to the entire membership for a ratification vote.

17. ATU officials believe that member ratification is needed for any mid-term agreement that constitutes a takeaway in order to protect ATU from potential liability under state and federal law. As a practical matter, ATU officials consider it to be "political suicide" for an elected officer to enter into an agreement reducing the contractual rights or benefits of members without membership approval.

TriMet's knowledge of ATU policies regarding takeaways: past practice

18. Since 1997, the parties have negotiated a variety of mid-term or side agreements. The ATU Executive Board decided to submit some, but not all, of these agreements to the membership for a ratification vote.

19. TriMet officials are aware that ATU submits all collective bargaining agreements to the membership for a ratification vote before signing the document. TriMet officials are also aware that ATU has submitted some mid-term agreements, but not all, to all or part of the membership for ratification.

20. In 1997, an issue arose regarding the seniority of an individual ATU mechanic. ATU submitted the issue to a vote of the maintenance department members

because the grant of additional seniority to the mechanic caused a relative reduction in the seniority of other employees. TriMet did not implement the change until after the vote.

21. Also in 1997, the parties negotiated an agreement regarding the TriMet Bus Data System (BDS) Policy, which implemented computer and GPS monitoring of transit vehicles and operators. The agreement allowed TriMet to discipline and require monetary reimbursement from ATU bargaining unit members who lost TriMet BDS computer cards. The agreement was not submitted to the members for ratification. It was signed by the ATU president and four ATU Executive Board members. ATU believed that the agreement was not a takeaway because employees were already subject to discipline for lost TriMet property, and the parties agreed that the BDS system data would not be used in disciplining employees.

22. In 1999, the parties negotiated an agreement permitting an experimental four, 10-hour-day work week. The parties agreed that TriMet managers would determine who could work the experimental shifts. They also agreed to changes in accrual and use of leave, and provided that disputes under the agreement were not subject to the grievance and arbitration procedure of the collective bargaining agreement. The agreement was signed by Secretary/Treasurer Wallace for ATU. The agreement was not submitted to ATU members for ratification, although the agreement states that the change to four, 10-hour shifts "will need to be acceptable to the majority of workers in that area selected to test 4/10 shifts." ATU was not sure whether this agreement was a takeaway.

23. In April 2000, the parties agreed to limit the number of hours that operators could work. ATU Executive Board members signed this agreement, which was not submitted to the members for ratification. The agreement negatively affected ATU members who were working, or wanted to work, additional hours. At the hearing, Stoner acknowledged that it was a takeaway.

24. In February and August 2000, without the knowledge of the ATU Executive Board, then newly-elected ATU President Wally Feist reached agreements with TriMet regarding Medicare Part B co-payments. The agreements reduced retirement insurance benefits for active and retired employees by requiring current and future retirees to pay the Medicare Part B premium themselves. Under the collective bargaining agreement in effect, TriMet paid these premiums. When it learned of the agreements, the ATU Executive Board decided that the agreements were takeaways and referred them to the membership in September 2000 for a vote. TriMet learned of the proposed vote from ATU's announcement to members dated September 22. The members rejected the agreement.

25. TriMet took the position that “[t]he [Medicare Part B co-payment] agreement is final and binding and will not be affected by any ratification vote.” Meanwhile, Feist was removed from office after an internal ATU challenge to his election and former President Heintzman returned to that position. Although TriMet believed that the agreement was final, it agreed to negotiate a resolution of the dispute. The subsequent version of the agreement, which did not require employees to pay the medical premiums, was also signed by the ATU president. The Executive Board decided that the subsequent agreement did not reduce member benefits and was not a takeaway, and did not submit this agreement to the membership for a vote.

26. At some point during Feist’s presidency, he discharged Stoner from her position as ATU counsel. The Executive Board ordered her rehired, and she was.

27. In January 2001, ATU and TriMet reached a “Supplemental Working and Wage Agreement” which modified the collective bargaining agreement for operators taking positions running the Portland Street Car, an activity not previously performed by TriMet employees. The agreement included a lengthy list of provisions in the collective bargaining agreement that would not apply to street car operators, such as wage rates, and restrictions on vacation time and layoff order. It was not submitted to members for a vote. The agreement was signed by then ATU President Heintzman and three Executive Board officers representing TriMet employees.

28. In January 2002, the parties agreed on the order of call-out for certain work. The agreement, signed by Heintzman and the ATU Executive Board member representing the affected TriMet employees, was contingent upon approval by a majority vote of the affected ATU employees. The affected employees voted to ratify the agreement.

29. In September 2002, the parties reached a tentative agreement changing a provision of the collective bargaining agreement regarding light rail operator seniority. Before reaching the tentative agreement, ATU informed TriMet that approval by its membership would be required. The final agreement refers to that vote, in which the membership ratified the change.

30. In March 2003, the parties reached agreement on a one-year pilot program relating to TriMet’s customer service policies, which included provisions regarding the effect of customer complaints about individual operators. ATU never referred the agreement to the membership for a vote.

31. In October 2003, ATU and TriMet entered a side letter agreement changing the procedures for grievances filed after discipline for alleged rule violations

and vehicle accidents. The parties agreed that (1) step one for rule violation grievances was that the “[e]mployee will exhaust request for removal procedures;” and (2) step one for accident grievances was that the “[e]mployee will use accident determination procedures.” ATU never put this side letter to the members for a ratification vote.

32. Prior to the members’ vote on the 2003-2009 collective bargaining agreement, the parties negotiated changes in the contractual grievance process. The agreement was submitted to the ATU membership for a vote along with the collective bargaining agreement. However, the agreement also contained the following language:

“* * * The District and the ATU have jointly agreed on the actions listed in the attached agreements and it is understood by both parties that the ATU membership approval is simply a procedural process and that all agreements reached as identified in the attached agreements are binding.”

33. In June 2004, pursuant to a provision in the 2003-2009 collective bargaining agreement, ATU’s TriMet rail equipment maintenance (REM) employees voted on whether to change the method of distributing overtime in their work unit.

34. In April 2005, President Zullo and a TriMet director signed an agreement adjusting the seniority dates of certain apprentices and temporarily reducing the number of apprentices in the apprentice program. ATU did not put this agreement to a membership vote. ATU was uncertain if this agreement was a takeaway.

35. In August 2005, the parties signed an agreement implementing the provisions of the collective bargaining agreement regarding a joint labor relations committee. In part, the agreement stated that a joint committee would attempt to resolve grievances which had been considered by the step-three grievance committee, were still in dispute, and moved to or pending arbitration. ATU never submitted this agreement to the members for ratification. ATU did not believe that the agreement changed the contractual grievance process.

Grievance Settlements

36. In 1998, ATU filed an unfair labor practice complaint in which it claimed that TriMet had taken advantage of inexperienced ATU Executive Board members by urging them to accept grievance settlements favoring TriMet. In December 1998, ATU and TriMet signed a settlement agreement resolving the ULP complaint. The agreement stated, in part:

“TriMet agrees that the Union, through the office of its President, has the sole authority to determine who, on behalf of the ATU, may enter into and sign grievance settlements and other agreements that have the capacity to bind the Union.”

37. In early 2005, ATU and TriMet were scheduled to mediate some outstanding grievances. Prior to this meeting on February 24, 2005, President Zullo sent TriMet General Manager Hansen a comprehensive statement of the ATU president’s authority regarding the settlement of grievances. Zullo’s letter states, in part:

“* * * Given the confusion that arose out of the last such settlement efforts I thought it would be helpful for you to know the scope of the Union team’s authority in such matters.

“The Union is a member-directed democratic organization. What this means is that although the Union president has day-to-day executive authority, his decisions in some matters are subject to ratification and approval of the entire membership. With regard to disputes with employers, the president’s authority is as follows:

- “1. The Union president has no authority to bind the Union to any agreement that diminishes any bargaining unit member’s rights under the labor agreement unless the agreement is ratified by a vote of the bargaining unit members. An example of this was when there was an effort to make Union retirees pay some portion of their health insurance.
- “2. The Union president has full authority to settle ATU-generated grievances, the resolution of which will not impact particular identifiable union members. An example of this is the pending paratransit audit grievance.
- “3. The Union president’s authority to settle individual members’ grievances is conditional on the individual members’ ratification of that settlement. An example of this is the recent snow and ice grievances.

“With regard to the third circumstance listed above, the Union president can agree to strongly recommend a settlement to the grievant. But the grievant can still refuse the settlement and appeal to the membership — asking that the grievance be moved forward. The membership’s decision would prevail and the tentative settlement agreement between the Union president and the TriMet team would be void.

“With this upcoming round of settlement discussions, the Union has already begun a process whereby there will be discussions with the grievant prior to the talks so that we have a grasp of what will be acceptable to the grievant in advance of the settlement.”

ATU communications to TriMet about the bargaining authority of ATU representatives

38. When Heintzman was ATU president, he told TriMet General Manager Hansen, previous general managers, and other high level TriMet representatives that mid-term proposals Heintzman characterized as takeaways would be submitted to a membership vote. In most cases, that statement caused TriMet to drop its proposed change.

39. In March 2003, ATU President Zullo wrote TriMet Maintenance Manager Tom Nielsen and others regarding a possible change to a 1999 memorandum of agreement regarding a sign-up order. Zullo stated, “Because the practices under that Agreement have been so long in effect, it would take a vote of the membership to change them.”

40. In June 2003, Zullo wrote Hansen regarding some new union officers. Zullo stated, “We also want you to understand that during the training period, the new executive board officers will not be making any decisions on bargaining unit issues without first consulting with the Union office.”

41. In November 2004, Zullo wrote Hansen that “[u]nion officers do not have the individual authority to agree to a lessening of contractual benefits without a vote of the membership.”

42. On April 29, 2005, Zullo wrote Hansen that ATU was willing to discuss an addition to the contractual grievance procedure, but stated that “we are not

able nor willing to change or diminish the rights guaranteed members under the TriMet labor contract.” (On May 20, Zullo wrote Ford about the same issue, stating that “[t]he Union cannot and will not change the contractual grievance procedure without a vote of the membership.”) Hansen considered Zullo’s statements to be “overheated rhetoric.”

Zullo’s mental and physical condition

43. Zullo worked for TriMet as a bus operator for 40 years, retiring in September 2005. He had long-term relationships with ATU officers and members, as well as many TriMet managers.

44. Zullo succeeded Heintzman as ATU president/business representative in 2002.

45. In early 2004, Zullo’s ATU colleagues became concerned about changes in Zullo’s behavior and mental acuity. Zullo became forgetful and disorganized, often forgetting conversations from the previous day. During negotiations over the collective bargaining agreement, Zullo sometimes forgot whether a topic had been raised in bargaining, or the terms of agreements that had been reached. He frequently lost documents, including ones given to him the day before. (Zullo’s office organization, never impressive, was also compounded by ATU support staff transition issues.) Zullo also displayed an inability to connect thoughts, such as recognizing the impact of one event on another.

46. ATU members reported that some of Zullo’s comments at meetings did not seem to make sense. Hunt and Wallace, the other full-time officers, and Stoner decided to intervene through the assistance of an organizational development consultant hired to address communication issues within ATU.

47. During the fall of 2004, Zullo and other ATU officials met with the consultant. Through that process, Zullo’s workload was reduced. Zullo agreed that he would not go alone to any meetings with employer representatives that could result in an agreement. Zullo also agreed that he would discuss matters with the Executive Board before making important decisions.

48. ATU officials decided not to inform TriMet officials of Zullo’s difficulties or the agreements they had made with him. They feared disclosure would humiliate Zullo and lead to charges that they were attacking him or undermining his authority. ATU officials initially believed that Zullo was keeping his agreements with them regarding communications with TriMet officials. However, there is no evidence that ATU officials monitored or followed up with Zullo to ensure that this was so. When

it became apparent that Zullo was not adhering to these agreements, ATU officials took no significant steps in response.

49. Zullo was hospitalized in January and April 2005. Zullo learned that his medical problems, including severe anemia and uncontrolled diabetes, were affecting his cognitive functioning.⁷ Zullo was relieved to learn that there was an explanation for his condition, and began to discuss it freely. Zullo told TriMet managers that his brain was not working correctly because it was not getting enough oxygen. At times, Zullo commented to TriMet representatives and others that he could remember events from 25 years ago as if they were yesterday, but events from yesterday seemed like 25 years ago. At least some of these remarks were intended to be humorous; in explaining a lapse on his part, he sometimes referred to having “Alzheimer’s.”⁸

50. Throughout the 2005 Side Letter negotiations, Zullo read, approved, and signed ATU’s written proposals and letters about its positions. Zullo also talked alone with TriMet Senior Station Manager Shelly Lomax regarding a variety of labor-management issues, including the Side Letter.

51. After Zullo’s April 2005 hospitalization, Stoner continued to believe Zullo was mentally impaired.

52. Despite his impairment, Zullo continued to perform most of the tasks that fell to him as president of a large union.⁹ Aside from the Side Letter, neither ATU nor Zullo contend that any other documents he signed during 2004-2005, in his professional or personal capacity, should be undone as a product of his impairment.

⁷TriMet notes that ATU introduced no medical records or testimony to substantiate Zullo’s testimony regarding the effects of his medical conditions on his cognitive functioning. We conclude that Zullo suffered some mental impairment during 2004-2005, and that the ATU officials who worked closely with him were aware of that fact. ATU did not establish, however, the degree or specific nature of Zullo’s impairment.

⁸Zullo testified that at meetings with TriMet officials, “I would say, Now, go easy on me, remember I don’t have much oxygen up there, things like that. It would be a joke that I tried to make.”

⁹During the relevant time period, Zullo was at the bargaining table for most sessions for five separate collective bargaining agreements, was very involved in an ATU strike against the Lane Transit District, and was dealing with a contentious Executive Board and internal staff transitions, despite time away from work for two hospitalizations and a vacation.

53. Although he has received treatment for the medical issues discussed above, Zullo has continued to suffer from significant medical problems. These problems led to Zullo's retirement from TriMet in September 2005 and his December 2005 decision not to seek re-election as ATU president. At the time of his testimony on June 27, 2006, Zullo appeared lucid and in control of his thoughts.

Transit operators, restroom availability, and break time

54. The nature of transit work makes operator breaks and restroom availability important labor-management issues. Until recently, both ATU and TriMet officials believed that transit operators were exempt from state and federal wage and hour laws requiring meal and rest breaks for employees

55. Past and current collective bargaining agreements between ATU and TriMet have not contained language that directly addressed rest or meal breaks for operators. The only language in the parties' 2003-2009 collective bargaining agreement that concerns rest and meal breaks is the following language in Article II, Par. 9(f):

“All District schedules will have built into them a recovery or layover time of five (5) minutes within each one (1) hour of running time. Because of traffic conditions, mechanical failures, and other related reasons, a five (5) minute recovery time cannot be guaranteed. All Operators will endeavor to maintain their schedules at all times.”

The language above has been part of every collective bargaining agreement since the 1979-1982 agreement.

56. Layover or recovery time is used for correcting late vehicles or operator breaks. When an operator is late in one stage of his or her route, the layover/recovery time may be completely used up.

57. In addition to the contractual layover/recovery time, TriMet schedules an additional 10 percent, or six minutes per hour, into each of its schedules. This time may also give an operator time for a break. TriMet statistics show that between May 2004 and June 2006, operator break time, on average, exceeded 10 minutes per hour (80 minutes for an eight-hour shift) per month. Operator break time totaled less than 50 minutes in approximately two percent of full-time workdays in September through December 2004. These breaks totaled more than 90 minutes

in approximately 60 percent of paid, full-time workdays during the same period. Layover/recovery time and the additional 10 percent of time added to schedules is paid time.

58. ATU officials believe that lack of break time and restroom access creates significant medical risks and problems for operators. In 2003, ATU began a campaign to obtain more restroom break time for its operators. ATU activists sought to bring the restroom break time issue to the attention of its members, employers, and governmental agencies. ATU officials also sought to enforce existing legal rights and obtain contractual protections for ATU members.

59. ATU addressed the restroom break issue through a variety of strategies, including educating bargaining unit members about the need to take breaks, litigating the issue of break time before Washington Occupational Safety & Health Division (OSHA), and providing information to TriMet about operators voiding in bus seats or bus stairwells.

60. Although TriMet had a policy that encouraged drivers to stop when they needed to use the restroom, ATU officials believed this policy was inadequate and unworkable. Operators were usually uncomfortable stopping and leaving a bus for this reason, because they were concerned about privacy, pressure from passengers, and discipline for running late.

61. ATU surveyed its membership on these issues in 2003, and shared the results with TriMet officials. In July 2003, Zullo wrote Hansen and stated that the restroom break issue was “at the forefront of our members’ concerns,” and asked that TriMet provide ATU with TriMet’s plans for addressing the problems. In August of 2003, ATU analyzed fall “paddles” (schedules) to determine which runs appeared to have problems with break time, restroom availability, and running time. Zullo sent that information to TriMet and asked that TriMet correct the problems.

62. During the restroom break campaign in late 2004, an experienced TriMet driver was killed by her own bus after she failed to set the bus brake at her customary restroom stop. Her family and coworkers believed that she was distracted by a need to use the restroom hastily. ATU distributed yellow drop-shaped pins to members that the driver had designed during the break campaign in her memory as a reminder to be careful and use the restroom. The pins were attached to cards which contained Bureau of Labor and Industries (BOLI) regulations regarding meal and rest breaks.

63. TriMet made no significant changes in response to ATU's requests.

BOLI involvement regarding meal and rest breaks

64. In late 2003, ATU leaders decided to seek assistance from BOLI in increasing operator break time.

65. During the parties' 2004 negotiations for a successor collective bargaining agreement, neither ATU nor TriMet raised the subject of meal and rest breaks. After the parties reached a tentative agreement in February 2004, Hansen asked Heintzman for a provision that would require any complaints related to restroom use or meal breaks to go through the grievance arbitration procedure and not through a court. Heintzman declined Hansen's request.

66. In early 2004, ATU officials met with BOLI representatives as well as Dan Gardner, state labor commissioner, and Peter De Luca, administrator of Oregon OSHA. BOLI representatives also met and talked with TriMet representatives about the issue of rest and meal breaks for operators. In a letter dated April 21, 2004, Gardner told Hansen that applicable law required TriMet to give all operators a paid rest period of not less than 10 minutes for every four hours of work, and a 30-minute, duty-free meal break for each work period of six to eight hours.

Gardner stated that there was no exemption for transit workers under state law. Gardner also mentioned one exception to the statute's mandate of rest and meal breaks—a collective bargaining agreement which “specifically addresses meals and rest periods, which I understand the current agreement between Tri-Met and ATU does not.”¹⁰

67. In June 2004, Gardner wrote to Hansen again, stating that he had not received a reply to his April 21 letter. Gardner asked that someone contact him to “discuss how Tri Met plans to address this very important matter.” From August through November 2004, TriMet attorneys communicated with BOLI and contended that, for

¹⁰ORS 653.261(3) provides, “Rules adopted by the commissioner pursuant to subsection (1) of this section do not apply to individuals employed by this state or a political subdivision or quasi-municipal corporation thereof if other provisions of law or collective bargaining agreements prescribe rules pertaining to conditions of employment referred to in subsection (1) of this section [referring to, among other things, minimum meal periods and rest periods], including meal periods, rest periods, maximum hours of work and overtime.”

a variety of reasons, TriMet did not need to take any action to provide operators with rest and meal breaks.

68. In a letter to TriMet dated November 30, 2004, Gardner told TriMet that BOLI did not accept TriMet's arguments that it need take no action to provide rest and meal breaks to operators and that BOLI would begin an investigation into TriMet's "apparent violation of ORS 653.261(1)" on December 10, 2004.

69. In November 2004, Hansen made an offer to Zullo that TriMet would "trade off" ATU concessions on restroom and meal break rights in exchange for partial coverage for new prescription drugs under the health and welfare plan, a benefit that TriMet had recently denied. Zullo rejected Hansen's proposal. ATU told BOLI that the parties had not negotiated a solution to the rest and meal break problem.

70. On December 10, 2004, Hansen wrote Gardner that he planned to meet again with ATU, and confirmed that all enforcement actions would be stayed while meetings continued.

71. During the winter of 2004-2005, ATU and the Lane Transit District (LTD) reached agreement on a new contract which addressed break time. Hansen, aware of the LTD collective bargaining agreement, suggested to Heintzman that TriMet and ATU agree to similar language. Heintzman rejected Hansen's proposal.

72. On February 25, 2005, Hansen sent Heintzman¹¹ a proposal for a Side Letter "Relating to Meal and Break Periods and Restroom Facilities." Heintzman gave Hansen's proposal to Zullo. Hansen proposed that operators receive a 20-minute layover, between the second and sixth hour of any straight run, to be used as a meal break. Hansen also proposed that these breaks would be "[i]nclusive of the minimal layover periods provided under the [collective bargaining agreement]," that there would be no other scheduled break periods "except other layover/recovery periods as set forth in the [collective bargaining agreement]," and that the collective bargaining agreement's layover requirements "shall be deemed to be met" by the Side Letter.

73. The first paragraph of Hansen's proposed agreement stated, "This side letter shall be effective upon mutual and complete execution by the Parties and shall remain in effect until the expiration of the [collective bargaining agreement] in 2009."

¹¹Heintzman was international vice president at this time, but assisting ATU was part of his responsibilities in that position.

The proposal concluded with the following language: "IN WITNESS THEREOF, TriMet and the ATU have caused these presents to be executed by their duly authorized officers on this _____ day of _____, 2005." The proposal contained signature lines for Hansen and Zullo.

74. Hansen's February 25 proposal also provided that TriMet was to respond to ATU or operator reports that an agreed upon meal or restroom break "cannot be consistently achieved as scheduled for a particular run." The proposal required TriMet to investigate and determine: "(i) the frequency of failure to achieve a meal period of 20 minutes during the six (6) month period preceding the report and (ii) the cause [of] any failure to achieve a consistent meal period of 20 minutes." Where such failures occurred at least 80 percent of the time, if caused by "route factors," the remedy was that TriMet would adjust the run schedule "at the next available sign up," or, if impractical, the next sign up after that.¹²

75. Hansen's February 25 proposal also provided:

"3. Operators shall be entitled to unscheduled break periods for necessary restroom use and shall be permitted such time as is necessary for use of the restroom, despite that such use may cause the operator to run late. Operators are further entitled to briefly depart a scheduled route for the purpose of accessing a restroom when an on-route designated restroom is not readily available or physical needs of the operator require a restroom break. * * *

"4. [TriMet] is committed to ensuring there are clean, convenient and sufficient bathroom facilities available for all operators on all lines. * * * To ensure that [TriMet's] goal of providing sufficient bathroom facilities is consistently met, an operator, or the ATU on behalf of an operator(s), may submit a notice to [TriMet] about the lack of sufficient bathroom facilities. [TriMet] will respond within 30 days to any such notice with either a plan and timetable for when such additional facilities shall be provided or why, in [TriMet's] opinion, the current facilities are sufficient."

¹²Sign-ups for operators take place at least four times a year, when TriMet adjusts its schedules; however, the collective bargaining agreement provides that "[a] new sign-up shall take place on the request of the representatives of the [ATU]."

76. On March 16, 2005, Zullo gave Hansen a written response to his proposal. Zullo agreed to TriMet's 20-minute meal break provision between the second and sixth hours of the run, the unscheduled restroom breaks, the notice and response system regarding lack of restrooms, and the 80 percent standard for action regarding scheduled meal breaks. Zullo proposed to add language requiring that TriMet schedule 10-minute restroom breaks "as close [as possible] to the middle of any four hour work block * * *." Zullo's proposal deleted the language in Hansen's proposal that there would be "no other scheduled break periods * * * except other layover/recovery periods as set forth in the [collective bargaining agreement]," and deleted language providing that the layover/recovery requirements in the collective bargaining agreement would be considered met by the Side Letter. In his cover letter that accompanied his proposal, Zullo stated that "I am willing to consider alternative language" but ATU's "bottom line" was the "runs must have adequate rest break time built into them at a location where there is a restroom facility."

77. Zullo's March 16 proposal included the same language in the first paragraph regarding "mutual and complete execution" and the same signature statement as Hansen's February proposal. Neither the draft document nor the cover letter stated that unit member approval would be required for ATU's agreement to the proposal.

78. In a letter to Hansen dated March 21, 2005, Gardner warned him that several TriMet bus and light rail runs violated state law because operators assigned to these runs did not receive adequate rest or meal breaks. Gardner stated that BOLI could assess a civil penalty of up to \$1,000 for each violation, and that unless TriMet corrected the problems by May 19, 2005, BOLI would begin litigation to assess civil penalties "to the fullest extent possible."

Side Letter negotiations, April 2005 to June 14, 2005

79. ATU officials knew that BOLI had given TriMet a deadline of May 19 to comply with the law. ATU and TriMet then agreed to extend this deadline to June 17, 2005. ATU believed that TriMet needed a mid-term agreement (Side Letter) to avoid incurring a huge financial liability in the form of civil penalties. ATU officials did not want that outcome because TriMet's monetary losses could result in member layoffs and benefit reductions. However, ATU officials considered the union to be in an extremely advantageous negotiating position. ATU understood that through litigation, BOLI could seek damages for a two-year period, with potential penalties in the millions of dollars. *See* OAR 839-020-1000 through 1010.

80. Between March and June 14, 2005, ATU officials and TriMet representatives met several times over the meal and restroom break issue.¹³ ATU leadership did not create a bargaining team or designate a specific negotiator to participate in or coordinate negotiations on meal and rest breaks. Instead, a number of different ATU officers participated in the negotiations. Zullo was actively involved in these negotiations.

81. On April 19, 2005, TriMet's Bill Coffel, director of Transportation Services, and Neil Smith, manager of Base Operations, met with Zullo and ATU Executive Board Member Greg McGrew. Smith, who does not usually participate in negotiations, attended as a "buffer" because Zullo and Coffel had a history of conflict. The parties discussed some general concepts and options regarding breaks, including providing three 15-minute breaks as an alternative to the statutory 20-minute lunch and the two, 10-minute breaks. They also discussed preserving a limited number of high seniority runs that had a high amount of cumulative break time.

82. On April 20, 2005, Coffel wrote Zullo and outlined a number of options, including scheduling one 20-minute and two 10-minute breaks over the course of a full-time run. In his letter, Coffel stated his belief that the parties could reach an agreement that would satisfy BOLI's requirements and meet TriMet and ATU's concerns. Coffel suggested that Shelly Lomax, senior station manager, and Smith meet with Zullo in May. Zullo and Lomax had known each other for at least 10 years and had a good working relationship.¹⁴

83. The parties met again in early May at ATU. Zullo was on vacation, and Wallace took Zullo's place. McGrew also attended for ATU. Coffel was out of town, and Hansen directed Lomax to represent TriMet. During the meeting, Wallace spoke to his "big concern" that TriMet wanted the new breaks to be included in the collective bargaining agreement's layover/recovery time. Wallace said that ATU would not agree to break time unless it was separate from contractual layover/recovery time. Coffel and Smith indicated that they understood ATU's concern.

¹³The witnesses disagreed about the number of ATU-TriMet meetings which concerned operator breaks and who participated in those meetings. No single person attended all of the meetings. Most, if not all, of the witnesses also attended ATU-TriMet meetings on other subjects during this time period. Resolution of these conflicts in testimony is not material to resolution of the case.

¹⁴ATU contends that TriMet selected Lomax to work with Zullo because their good working relationship allowed Lomax to manipulate Zullo, and that this was part of TriMet's alleged misconduct. There is no evidence that TriMet officials had a wrongful motive in selecting Lomax to be its principal negotiator with Zullo

84. On May 4, Hansen and Zullo sent Gardner a joint letter prepared by Hansen. The letter reported “[s]ignificant progress” in reaching an agreement on “supplemental collective bargaining language pertaining to meal and break times,” and requested that BOLI extend its deadline until June 17, 2005. Gardner agreed to the request.

85. On May 13, 2005, Lomax e-mailed Zullo and Wallace another version of the Side Letter. Lomax asked that the draft be forwarded to Executive Board Member McGrew as well. The first numbered paragraph of the draft began, “Inclusive of the minimal layover periods provided under the [collective bargaining agreement], the District will insure adequate break/layover time” for meal breaks and restroom breaks. The draft defined the breaks as “1) a minimum of one 20 minute uninterrupted paid break and two ten minute breaks, or 2) three 15 minute uninterrupted breaks.” The breaks were not limited as to when they took place. The draft also stated that “[t]here shall be no other scheduled break periods or meal periods for operators except the remainder of the layover/recover periods as set forth in the [collective bargaining agreement]” and the collective bargaining agreement’s layover requirements “shall be deemed to be met” by the Side Letter.

86. Lomax’s May 13 draft retained those portions of Hansen’s February 25 proposal concerning the unscheduled restroom breaks and the notice and response system regarding lack of restrooms. It also retained the 80 percent standard for action regarding scheduled meal breaks, but stated that where scheduled breaks actually occurred less than 50 percent of the time, TriMet “shall endeavor to promptly adjust the run schedule.”

87. Lomax’s May 13 draft also added an exception to the meal and break rule:

“3. Notwithstanding any other provision in this Side Letter, the Parties recognize that a limited number of scheduled runs are desirable to operators without the provision of a meal break and restroom breaks described above * * *. Thus, the Parties agree that up to 15% of runs need not be scheduled in accordance with the requirements for meal and rest breaks described in paragraph 1, provided however that these exempt scheduled runs shall minimally provide the following:

“a. For an exempt scheduled run of at least eight (8) hours, but less than ten (10) hours,

the cumulative layover time scheduled for the run shall be at least sixty (60) minutes.

- “b. For an exempt scheduled run of ten (10) hours or greater, the cumulative layover time scheduled for the run shall be at least seventy-five (75) minutes.”

88. The first paragraph of the proposed agreement stated, “This side letter shall be effective upon mutual and complete execution by the Parties.” The draft included the same signature statement as Hansen’s February proposal

89. On May 17, the parties met at ATU’s office. TriMet was represented by Lomax, Smith, and Coffel. Michael Ford, TriMet’s director of Transportation, also attended because he was visiting ATU on another issue. Zullo was no longer on vacation, but did not attend the meeting. Lomax stated that the agreement had to be as cost neutral as possible for TriMet. Wallace replied that “[i]t’s going to cost you a bunch.” By the close of the meeting, Wallace believed the parties were close to agreement. He believed that TriMet had agreed that the rest and meal breaks created by the Side Letter would be in addition to contractual layover/recovery time.¹⁵

90. After the parties’ May 17 meeting, Stoner helped Zullo prepare a letter to Hansen and a draft agreement which was sent to Lomax on June 2. Stoner, Zullo, Wallace, and Hunt reviewed and discussed the letter before a final version was sent. The letter stated that the enclosed draft was a revision of Hansen’s February 25 draft because Lomax’s more recent revision “was less acceptable than the one you [Hansen] provided.” The letter continued,

“[T]he Union cannot morally or politically accept any language which even suggests that the customary recovery/layover time can in, [sic] any way, be rolled into the meal or restroom break time. We need language that makes that point crystal clear. There is one exception [regarding] * * * meal breaks * * * .”

91. The June 2 letter indicated that ATU was willing to compromise on some of the statutory meal and break standards. The letter concluded,

¹⁵Regardless of Wallace’s understanding, we do not find that TriMet ever agreed to keep all break time separate from layover/recovery time. Stoner testified that the parties were still divided on the issue of keeping break time separate from layover/recovery time after this meeting.

“Fred, although I am willing to consider additional suggestions from you, I need to warn you that we believe the Union has given as much as it can on this issue. This document will be closely scrutinized by our members, many of whom have taken the time to educate themselves on their legal rights. Once we have agreement I must present it to the transportation executive board officers before I can sign it. I believe they will accept it as the Union has proposed. * * *”

92. Neither Stoner and Zullo’s June 2 letter nor the enclosed draft stated that unit member approval would be required for ATU’s agreement to the proposal. The first paragraph of TriMet’s June 2 draft included the same language in the first paragraph regarding “mutual and complete execution,” and the same signature statement as Hansen’s February 25 proposal.

93. ATU’s June 2 draft of the Side Letter retained the unscheduled restroom breaks, the notice and response system regarding lack of restrooms, and TriMet’s proposal regarding the 80 percent (but not the 50 percent) standards for action regarding lack of scheduled meal breaks. It listed the primary break options as a 20-minute meal break between the second and sixth hours of the run and two rest breaks “built into the middle of each four hours” or three fifteen-minute breaks, not including the contractual layover/recovery time.) The June 2 draft permitted up to five percent of the runs to rely only on cumulative layover time for breaks so long as the total break time was 60 or 75 minutes, depending on the length of the work day.

94. ATU’s June 2 draft struck out the provision that the breaks were “[i]nclusive of the minimal layover periods provided under the [collective bargaining agreement].” It stated that the meal period “does not include the necessary recovery/layover period” and that the 10-minute breaks and three 15-minute breaks were “exclusive of the recovery time needed to keep the run operating consistently on schedule.” It also stated that there would be “no other scheduled break periods or meal periods for operators except other layover/recovery periods as set forth in the [collective bargaining agreement],” and that the collective bargaining agreement layover requirements “shall be deemed to be met” by the Side Letter.

95. On June 6, 2005, Lomax and Zullo talked on the phone about the Side Letter. During that phone conversation, Lomax typed notes into a draft Side Letter as “homework” from Zullo regarding issues that Zullo wanted Lomax to take back to TriMet. Among the changes Zullo proposed was a provision that breaks provided in the Side Letter would be exclusive of the layover periods provided in the collective bargaining agreement.

96. The first paragraph of Lomax's annotated draft included the following language:

“* * * This side letter shall be effective upon mutual and complete execution by the Parties. The Parties agree to meet in twelve months to evaluate the application of this agreement and discuss any areas requiring improvement.”

The annotated draft also included the same signature statement as Hansen's February proposal. The document did not state that unit member approval would be required for ATU's agreement to the proposal. Lomax e-mailed her notated draft to Zullo that same day.

97. Despite its unusual notations, Stoner reviewed Lomax's June 6 e-mail as if it were a formal TriMet proposal and concluded that TriMet had finally agreed to make meal and rest breaks separate from contractual layover/recovery time.

98. On June 10, Lomax provided a version of the proposed agreement to Zullo which bore Hansen's signature. Zullo wanted additional changes, and Lomax prepared and sent Zullo another draft, dated June 13.

Lomax's June 13 draft stated, in relevant part:

“* * * This side letter shall be effective upon mutual and complete execution by the Parties. The Parties agree to meet in twelve months to evaluate the application of this agreement and discuss any areas requiring improvement.

“1. TriMet will insure when it schedules runs, adequate break/layover time to be used for meal breaks and restroom breaks will be built into the schedule on any straight run that contains more than seven hours and thirty minutes of paid time. TriMet will space the meal breaks and restroom breaks reasonably throughout the course of the run. Adequate break/layover time is defined as; 1) a minimum of one 20 minute uninterrupted paid meal break and two ten minute breaks, or 2) up to 15% of scheduled runs may contain three 15 minute uninterrupted breaks. The recovery or layover time as provided for in Article II, Section I, Par. 9(f) of the [collective bargaining agreement] will not be included in the meal break time calculation. There

shall be no other scheduled break periods or meal periods for operators except the remainder of the layover/recovery periods as set forth in the [collective bargaining agreement]. The language contained in Article II, Section 1, Par. 9(f) regarding recovery or layover time shall be deemed fully met and satisfied by this side letter[.]

“2. Notwithstanding any other provision in this Side Letter, the Parties recognize that a limited number of scheduled runs are desirable to operators without the provision of a meal break and restroom breaks described above in paragraph 1. Thus, the Parties agree that up to 15% of runs need not be scheduled in accordance with the requirements for meal and rest breaks described in paragraph 1, provided however that these exempt scheduled runs shall minimally provide the following:

- “a. For an exempt scheduled run of at least eight (8) hours, but less than ten (10) hours, the cumulative layover time scheduled for the run shall be at least sixty (60) minutes.
- “b. For an exempt scheduled run of ten (10) hours or greater, the cumulative layover time scheduled for the run shall be at least seventy-five (75) minutes.
- “c. Prior to each sign-up TriMet will provide the ATU with a report detailing which category of meal break is contained within various runs.

“The parties agree to revisit the 15% threshold at their 12-month status review.

“3. An operator shall be permitted such unscheduled time as is necessary for use of the restroom, despite that such use may cause the operator to run late. Operators are further entitled to briefly depart a scheduled route for the purpose of accessing a restroom when an on-route designated restroom is not readily available or physical needs of the operator

require a restroom break. When an operator goes off route to access a restroom, he or she shall notify dispatch.

“4. TriMet is committed to ensuring there are clean, convenient, and sufficient restroom facilities available for all operators on all lines and will provide a list of designated facilities to the ATU prior to each sign-up. * * * To ensure that TriMet’s goal of providing sufficient restroom facilities is consistently met, an operator, or the ATU (on behalf of an operators [*sic*]), may submit a notice to TriMet about the lack of sufficient restroom facilities. TriMet will respond within 30 days to any such notice with either: (i) a plan and timetable for when such additional facilities shall be provided; or (ii) an explanation of why, in TriMet’s opinion, the current facilities are sufficient.

“5. An operator, or the ATU on behalf of an operator, may submit a report to TriMet if it is believed that their scheduled meal and break periods cannot be consistently achieved as scheduled for a particular run. Such reports shall be copied to the ATU. TriMet shall investigate the claim and determine: (i) the frequency of failure to achieve request [*sic*] meal and rest break periods during the six (6) month period preceding the report, and (ii) the cause of any failure to achieve a consistent meal and rest break(s). The analysis conducted by TriMet will be shared with the Union. TriMet will respond as follows:

- “a. If it is determined that the scheduled run cannot achieve the required meal and/or rest break(s) at least 80% of the time, and that the cause of such failure to achieve the meal and/or break(s) is attributable to route factors, then TriMet shall adjust the run schedule at the next sign up. * * *
- “b. If it is determined that the scheduled run cannot achieve the required meal and/or rest break(s) at least 50% of the time, and that the cause of such failure to achieve the meal and/or rest break(s) is attributable to route factors, as

defined in paragraph 5a, then the TriMet shall promptly adjust the run schedule or TriMet will meet with the ATU to discuss the situation and possible remedy.

- “c. In the event that TriMet requests a meeting with Transportation Executive Board Officers to assist in resolution of a scheduling problem, TriMet will pay for the time spent at the meeting.”

The Side Letter concluded, “TriMet and the ATU have caused these presents to be executed by their duly authorized officers” on June 14, 2005, followed by the signatures of Hansen and Zullo.

99. On June 13, Zullo met with the four TriMet transportation officers on the ATU Executive Board: McGrew, Sam Schwarz, Alan Eisenberg, and Michael Oliver. They reviewed the June 13 draft. Schwarz and the other officers objected to several provisions and suggested changes to the document. They had not completed this process before the meeting ended. The officers told Zullo not to sign the Side Letter until they had finished their discussion.

100. At the Executive Board meeting, Schwarz expressed two primary concerns about the June 13 draft. First, he believed that the Side Letter gave up contractual layover/recovery time because it failed to make meal and restroom breaks separate from the contractual layover/recovery time. Second, although Zullo claimed that the 15 percent exception for using cumulative time for breaks (instead of the 20-minute and two 10-minute meal and rest breaks or three 15-minute breaks) was for high seniority runs, Schwarz could not see any explicit protection for those runs.

101. Zullo told the transportation Executive Board members that the agreement had to be completed by June 17. He promised that he would not sign the document without first bringing it to the Executive Board for approval. The Executive Board understood that Zullo would make additional changes in the letter, send it to TriMet, and then bring it to the Executive Board at its next meeting on June 17.

102. On the morning of June 14, 2005, Lomax and Zullo spoke, and each understood that “things were good to go.”

Later that day, Zullo and Stoner discussed TriMet’s June 13 draft. Stoner believed this draft was worse than previous TriMet proposals. When Zullo didn’t seem

to understand her objections, Stoner read the draft aloud to Zullo and gave him her interpretation of it.¹⁶ Stoner told Zullo that Lomax's draft merged meal and rest breaks with layover/recovery time. Zullo responded that Lomax did not agree with that interpretation.

103. Zullo and Stoner decided to send another draft to Lomax. Stoner wrote a cover memo for the draft stating that ATU required that meal and restroom breaks be separate from layover/recovery time. Stoner wrote that ATU:

“[Had] no wiggle room where restroom breaks are concerned. People need a guaranteed 10 minute break in the first half of their shift and another in the second half. The Union cannot agree to anything less when it comes to the restroom breaks. We ran a campaign and have been very public making that point.”

104. Neither Stoner's memo nor the draft referred to member ratification or ATU Executive Board approval of the Side Letter. The draft Side Letter that Stoner prepared included the same language in the first paragraph regarding “mutual and complete execution” and the same signature line as Lomax's June 6 annotated draft.

105. ATU's June 14 draft addressed meal and rest breaks in separate paragraphs. It stated that contractual layover/recovery time would not be included in the meal break time, which would be 20 minutes or “up to 15% of scheduled runs may contain three 15 minute uninterrupted breaks.” Regarding the rest breaks, it stated,

“3. Ten minute breaks, exclusive of the recovery time needed to keep the run operating consistently on schedule, shall be built into the middle of each four hours or major part thereof in one work period. This requirement does not apply to operators who receive the three 15 minute uninterrupted breaks described in paragraph 1.”

ATU's June 14 draft retained the unscheduled restroom breaks, the notice and response system regarding lack of restrooms, and TriMet's proposal regarding the 80 percent and 50 percent standards for action if scheduled meal breaks did not take place.

¹⁶Stoner considered Zullo to be particularly mentally impaired during this meeting.

106. Zullo signed the memo, and the memo and draft were faxed to Lomax at 3:30 p.m. on June 14. Stoner understood that the next step was to wait for a response from Lomax.

107. After he sent the fax, Zullo talked with Lomax by phone. Zullo told Lomax that the memo was Stoner's, and that "we were still on track and going forward." Lomax and Zullo met in her office later that afternoon. Lomax did not believe that Zullo appeared to be impaired or that there were any obstacles remaining to signing the agreement.¹⁷ Lomax gave Zullo a final version of the Side Letter which contained language virtually identical to the June 13 draft to which the ATU transportation officers had objected. The only change Lomax made was to change the word "bathroom" to "restroom" to be consistent throughout the agreement. The Side Letter agreement that Lomax presented to Zullo on June 14 had been signed by Hansen. Zullo signed the agreement.¹⁸

Events after Zullo's June 14 signature

108. Zullo did not report to other ATU officials that he had signed the Side Letter. On Friday, June 17, Zullo attended an ATU Executive Board meeting. Schwarz asked Zullo whether he had signed a Side Letter. Zullo replied, "I told you I wasn't going to sign it. You don't see anything signed." Although ATU officials knew TriMet was facing a June 17 deadline from BOLI, and that Stoner, at least, believed

¹⁷At hearing, Zullo and Lomax disagreed about what took place during this conversation. Zullo contended that Lomax assured him that the new meal and rest breaks would be provided in addition to the contractual layover/recovery time, and that Lomax telephoned Coffel during the meeting to obtain his assurance of this as well. Lomax denied that she ever gave Zullo these assurances or spoke with Coffel. Because of Zullo's impairment and Zullo's false statements to the ATU Executive Board during the same time frame, we credit Lomax's version of events

¹⁸Zullo's motives for signing the Side Letter agreement are unclear, and cannot be explained by memory or cognitive problems alone. Zullo knew he had agreed not to negotiate with TriMet officials alone. Zullo knew that Stoner and ATU Executive Board members strongly opposed language identical to what he signed. Zullo knew that Stoner had drafted a memo that very morning which objected to the language he signed off on that afternoon. There was evidence, however, that Zullo did not trust Stoner and some of his board members. At hearing, Zullo described the Executive Board as "kind of a rebel bunch and I knew it [the Side Letter] was going to be an argument with them. They all had their own ideas and I was hesitant on bringing it to them." Stoner was heavily involved with the break time issue from the inception of ATU's campaign. She was clearly aligned with the "rebel" board members' ideas about the Side Letter. When speaking to Lomax, Zullo dismissed Stoner's June 14 draft and memo in terms which were consistent with this political division.

ATU had last responded to TriMet on June 14, no ATU official took any steps to determine the reason for TriMet's apparent silence.¹⁹

109. On June 24, Gardner wrote Hansen and Zullo to ask for a status report. On June 28, Hansen replied by letter. Hansen stated that the parties had reached an agreement that "modifies our currently effective [collective bargaining agreement] by specifically addressing meal and rest periods.") Neither Zullo nor any other ATU official ever responded to Gardner's letter.

110. On July 14, 2005, Zullo sent a letter to TriMet's Smith withdrawing a grievance regarding layover, recovery, and meal and rest break times that Executive Board Member Schwarz had previously filed. Zullo stated, "the Union recognizes the side letter signed on June 14, 2005 by the District and [A] relating to meal and break periods and restroom facilities resolves the grievance * * *." Schwarz was listed on the letter as the recipient of a copy.

111. Between June 14 and July 15, Coffel told Schwarz in a casual conversation that he was working on implementing the "meal break agreement." At the July 15, ATU Executive Board meeting, Schwarz again asked Zullo whether he had signed a Side Letter. Zullo admitted that he had, and provided copies to the members of the Executive Board. On Schwarz's motion, the board unanimously voted to file a grievance over the Side Letter.

112. Stoner learned that Zullo had signed the Side Letter after the July 15 meeting when several angry board members approached her. The board members were aware that Zullo had signed a document containing language that they had objected to and that Zullo had promised not to sign, and that he had broken his promise to bring the Side Letter to the ATU Executive Board first. Stoner and Schwarz believed that the signed agreement did not provide meal and rest break time in addition to contractual layover/recovery time.

113. Zullo insisted that Lomax had promised him that contractual layover/recovery time would not be used to meet the break time provided by the Side Letter. Stoner advised ATU officials to wait until TriMet issued the next transit schedules ("run cuts") and then determine what interpretation was correct.

¹⁹Stoner did not attend ATU Executive Board meetings, but she communicated regularly with ATU officials and played a substantial role throughout the meal and restroom break campaign and negotiations.

114. After the July 15 Executive Board meeting ended, Wallace telephoned Coffel, the TriMet manager in charge of scheduling, to ask how TriMet planned to implement the Side Letter. Wallace interpreted Coffel's remarks to mean that layover/recovery time would be separate from the breaks provided by the Side Letter. ATU officials never memorialized this conversation or this interpretation of the Side Letter.

115. From July 15 until September 28, ATU officials did nothing to repudiate Zullo's agreement to the Side Letter on behalf of ATU. ATU did not notify TriMet that Zullo was impaired, that Zullo was not authorized to negotiate with TriMet officials alone, or that Zullo's authority to sign the letter was in doubt. Nor did ATU officials take any steps to further restrict Zullo's ability to reach other agreements with TriMet.

116. On August 1, Schwarz spoke with Coffel about TriMet's implementation of the Side Letter. Coffel told Schwarz that in the new transit schedules, contractual layover/recovery time would be included in the meal and rest breaks provided by the Side Letter. Schwarz immediately filed a grievance over the issue of "Breaks & Lunch Breaks not Consistant [*sic*] with Agreement." The grievance was initially denied by TriMet, and then held in abeyance pending the outcome of the unfair labor practice proceeding.

117. On September 16, 2005, TriMet's Hansen issued a memo to bus and rail operators stating that "TriMet and the ATU recently signed a meal and break period agreement" which would be implemented with sign-up for the December transit schedules. The memo enclosed a three-page list of questions and answers (Q&A) about how the agreement would be implemented, and directed readers to the full text of the agreement on its website.

118. The September 16 Q&A included the following question and answer:

"Will the District be required to provide layover and recovery time in addition to the meal and break periods?"

"It's possible that an operator may receive additional time for recovery or layover over and above the designated meal and break periods, however, if the break periods noted in this agreement are met, the recovery and layover provision of the Working and Wage Agreement also will have been achieved."

119. In September or October 2005, Schwarz, Eisenberg, and McGrew analyzed the break time provided for in the December schedules. They concluded that contractual layover/recovery time had been included in the Side Letter's break time.

120. On September 28, 2005, the ATU Executive Board members discussed the issue with Stoner. Stoner told them that the Side Letter was a takeaway of several different rights: (1) the contractual right to layover/recovery time; (2) the right to enforce layover/recovery time through the grievance procedure, and to more remedies than the Side Letter provided; (3) the statutory rights to meal and rest breaks; and (4) the right of individual members to enforce their individual statutory rights through BOLI. After Stoner's presentation, the Executive Board, including Zullo, voted unanimously to submit the Side Letter to the membership for a ratification vote.

121. ATU did not notify TriMet of the Executive Board's decision. Lomax learned of it when her husband, a member of the bargaining unit, received a ballot in the mail at home.

122. ATU conducted a mail ballot vote on ratification of the Side Letter. Each voter received a ballot and three additional items:

(1) A September 29, 2005 letter from Zullo, Hunt, and Wallace that explained that the Executive Board had reviewed the restroom/lunch break agreement recently published by TriMet, concluded that it was a takeaway, and decided to refer the agreement to the membership for approval;

(2) A page quoting existing contract provisions on layover/recovery time and the statutory requirements for meal and rest breaks;

(3) A copy of the Side Letter, which did not include the last page. The last page contained the statement: "* * * TriMet and the ATU have caused these presents to be executed by their duly authorized officers," and Zullo's and Hansen's signatures.

123. On October 4, 2005, Wallace left a voice message for Lomax about the Side Letter. In his message, Wallace told Lomax that he was concerned and disappointed by the way in which TriMet was implementing the meal and rest break agreement, and that members were going to vote on the agreement.

124. The October 7, 2005 edition of the ATU Bulletin, ATU's newspaper, contained statements from ATU Executive Board officers in opposition to the Side Letter agreement.

125. On October 13, 2005, prior to the results of the ratification vote, Zullo sent Hansen a letter in which he referred to problems with the schedules “[i]rrespective of how the membership vote turns out * * *.”

126. On October 17, Zullo notified Hansen by fax that ATU members had “overwhelmingly rejected” the Side Letter, and that ATU expected TriMet “to honor the statutory law pertaining to restroom and meal breaks.”²⁰

127. On November 7, Hansen responded that TriMet expected Zullo to “honorably abide by the bargain” that ATU had made and wait until bargaining for the successor collective bargaining agreement to raise ATU’s concerns about the agreement. Hansen stated that TriMet had “invested substantial amounts of resources to revise routes and will fully implement the provisions of [the] Side Letter.”

128. The results of the ratification vote were posted on November 9. In a letter dated November 10, Zullo notified Hansen that the bargaining unit members had rejected the Side Letter agreement, that the Side Letter was a “takeaway agreement since it reduces our members’ contractual and statutory rights,” and that Zullo lacked authority to bind ATU to such an agreement without membership ratification.

CONCLUSIONS OF LAW

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

2. ATU repudiated the June 14 Side Letter agreement with TriMet in violation of ORS 243.672(2)(b).

It is undisputed that ATU President Zullo and TriMet Representative Lomax agreed to and fully executed the June 14 Side Letter. The issue is whether the parties are bound by the agreement. TriMet contends that they are. It asserts that ATU violated its statutory duty to bargain in good faith when it insisted that the June 14 Side Letter agreement reached between ATU President Zullo and TriMet Representative Lomax was invalid unless the ATU bargaining unit members voted to ratify it, and then repudiated the Side Letter when the membership rejected the agreement.

ATU contends, however, that it is not bound by the June 14 Side Letter agreement because Zullo lacked authority to reach a final agreement without first

²⁰In the only other similar dispute between the parties, regarding Medicare payments, the ATU Executive Board had acted to refer the agreement to members promptly after learning of it.

submitting the agreement to the membership for a ratification vote. According to ATU, the membership's refusal to ratify the Side Letter invalidated any agreement that Zullo and Lomax may have reached.

Under ORS 243.672(2)(b), it is an unfair labor practice for a labor organization to "[r]efuse to bargain collectively in good faith with the public employer if the labor organization is an exclusive representative." In order to determine whether ATU's conduct in regard to negotiations for the Side Letter violated subsection (2)(b), we begin by considering the nature of the agreement Lomax and Zullo reached on June 14.

A contract made by negotiators for a labor organization and an employer will be enforceable without ratification when the parties give their negotiators authority to reach agreement. *South Benton Education Association v. Monroe Union High School District #1*, 83 Or App 425, 732 P2d 58, rev den, 303 Or 331, 736 P2d 565 (1987) (citing *Coliseum Employees Association/Oregon Independent Labor Council v. Exposition and Recreation Commission and Theatrical Employees Union, Local B-20*, Case No. C-83-78, 3 PECBR 1971 (1978)). Authority may be either actual or apparent. ATU contends, however, that Zullo had neither actual nor apparent authority to act on ATU's behalf in reaching such agreement on the June 14 Side Letter.

The applicable standards for determining whether an agent has actual or apparent authority are derived from common law. Actual authority is "that authority which the principal confers upon the agent in express terms." *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 686, 669 P2d 1132 (1983). Apparent authority is created "by some conduct of the principal which, when reasonably interpreted, causes a third party to believe that the principal consents to have the apparent agent act for him on that matter. The third party must also rely on that belief." *Jones v. Nunley*, 274 Or 591, 595, 547 P2d 616 (1976). The doctrine of apparent authority has been applied to complaints alleging a violation of the PECBA. See *Schmidt v. Jackson County Juvenile Department*, 49 Or App 349, 353, 619 P2d 1307 (1980) (court concluded that there was insufficient evidence that negotiators had apparent authority to bargain inclusion of an employee in the bargaining unit).

Here, the record clearly establishes that Zullo had no actual authority to act on ATU's behalf by executing the June 14 Side Letter agreement. During negotiations on the Side Letter in early June 2005, ATU and TriMet exchanged a number of proposals. When the transportation officers on ATU's Executive Board met on June 13 to consider TriMet's latest proposal, they objected to a number of provisions in the proposal and instructed Zullo not to sign any agreement until they had discussed

the subject further. Zullo's actions in signing the Side Letter agreement the following day were contrary to the board members' orders.

We are faced, then, with a question of apparent authority: did ATU conduct itself in a manner that led TriMet to reasonably believe Zullo had authority to act on behalf of the union in regard to the issues of meal and rest breaks? ATU contends that Zullo lacked apparent authority to sign the June 14 Side Letter. ATU asserts that past practice as well as numerous communications from the union put TriMet on notice that Zullo's authority as president was limited. According to ATU, TriMet knew (or should have known) that Zullo could agree to nothing that would take away or change members' contractual or statutory rights without submitting such an agreement to a ratification vote by all or part of the ATU membership. We disagree.

A party that wishes to condition the validity of an agreement reached by its representative on ratification must clearly indicate this requirement to the other party. See *AFSCME Council 75 and Worthington v. City of Sweet Home*, Case No. UP-107-89, 12 PECBR 224 (1990) (negotiators' exchange of letters regarding a settlement agreement indicate that ratification by the city council was a requirement for the agreement); and *Teamsters Local 223 v. City of Beaverton*, Case Nos. UP-17/67-89, 12 PECBR 164 (1990) (although parties had no past practice or ground rules regarding ratification, city negotiator's statement to his union counterpart—that he would only sign an agreement after the council ratified it—was sufficient notice that the agreement was conditioned on ratification).

Here, the parties did not agree on ground rules requiring ratification before they began negotiating about meal and rest breaks in February 2005. Nor did ATU ever express, either orally or in writing, its expectation that approval of the bargaining unit members was required for any agreement reached by its negotiators. As a result, we are left to determine from the evidence in the record whether TriMet knew, or should have known, that any agreement reached between Lomax and Zullo concerning meal and rest breaks would only be valid if ATU bargaining unit members ratified it.²¹

²¹As discussed above, the PECBA does not require collective bargaining agreements to be ratified by a negotiator's constituents in order to be enforceable. *South Benton Education Association v. Monroe Union High School District #1*, Case No. UP-97-85, 9 PECBR 8556 (1986), *aff'd*, 83 Or App 425, 732 P2d 58, *rev den*, 303 Or 331, 736 P2d 565 (1987). A party that intends to condition agreement on ratification must clearly indicate this intent. *Worthington v. City of Sweet Home*, 12 PECBR 224. This case illustrates the need for the parties to establish their positions early in the bargaining process regarding ratification. The clearest indication is written notice to the other party that, in addition to the negotiator's agreement, ratification by the constituents is required before an agreement is final. Written ground rules are an optimal example. The parties can express their mutual understanding of whether agreements are subject

The parties met often to bargain a resolution of the issues that resulted in the Side Letter, and exchanged numerous proposals between February and June 2005. ATU never indicated in any of its proposals, meetings, and discussions with TriMet that the validity of an agreement reached between the parties' representatives was contingent upon ratification by the ATU membership. The June 14 Side Letter that Zullo and Lomax signed appears to be a complete resolution of the parties' negotiations, and does not specify that the finality of the agreement is conditioned on a vote of ATU bargaining unit members. The agreement states that it is effective upon "execution" and that it has been executed by Zullo and Lomax who are identified as "duly authorized officers" for TriMet and ATU.

We are not persuaded by ATU's argument that TriMet should have known, based on prior communications from ATU and the parties' past practice, that ratification by the membership was an essential condition to any mid-term agreement that took away members' rights and benefits or modified the collective bargaining agreement. On a number of occasions, ATU Presidents Heintzman and Zullo told TriMet Manager Hansen *what* type of agreement must be ratified—one that changed or reduced members' contractual rights. However, no ATU officer ever explained *how* the union decided that an agreement met these criteria and must be voted upon by the bargaining unit members. The record shows that the Executive Board apparently determined, on a case-by-case basis, when an agreement should be submitted to the ATU bargaining unit for ratification, and never told TriMet (or the membership) the standards it used to make its decisions. Consequently, TriMet had no clear notice as to when ATU considered ratification as a prerequisite to an agreement.

The record shows that between 1997 and 2005, ATU negotiated approximately 13 mid-term agreements with TriMet; five of these were ratified by a vote of all or part of the ATU bargaining unit. From this record, it is difficult to determine how the Executive Board decided if a membership vote was required. For example, one of the agreements—one made in 2000 that required retired members to make Medicare payments—clearly involved a takeaway and ATU insisted that the membership vote

to approval by the employer's governing board or the union's membership. We will not establish a bright-line rule that requires all limitations on a negotiator's authority to be written. In the future, however, if a party has not provided timely written notice that its negotiator's agreements need to be ratified, it must demonstrate by clear and convincing evidence that it expressed this requirement early in the negotiations process. This furthers the underlying PECBA policy of "encouraging practices fundamental to the peaceful adjustment of" labor disputes ORS 243.656(3). A clear understanding of the authority of the other party's negotiator is essential to an orderly and effective bargaining process.

upon it.²² Yet another agreement that ATU admits involved a takeaway—one made in April 2000 that limited operators’ work hours—was never put to a membership vote. Other agreements—such as those made in 1999 and 2000 concerning employee work hours and another made in 2003 concerning procedures for grieving certain types of discipline—changed bargaining unit members’ contractual rights but were never voted upon. Thus, a number of actions taken by the ATU Executive Board were inconsistent with Heintzman and Zullo’s assertions to Hansen: that agreements involving a change or reduction in bargaining unit members’ contract rights required member ratification.

A past practice in labor relations may only be established by showing a pattern of conduct that is clear, consistent, repeated over a long period of time, and mutually acceptable to both parties. *Wy’East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108, 151 (2007). Under this definition, ATU’s conduct in regard to requiring ratification for some, but not all, of the mid-term agreements it reached with TriMet cannot be characterized as a past practice. The evidence in the record does not demonstrate that the ATU Executive Board’s decisions regarding ratification of mid-term agreements demonstrate a clear or consistent course of conduct. ATU’s actions in regard to mid-term agreements did not establish a past practice that gave TriMet adequate notice that ratification of the June 14 Side Letter was necessary.

Both Zullo’s statements about his position as president and the role Zullo played in negotiations for the June 14 Side Letter constitute objective evidence that caused TriMet to reasonably believe that Zullo had authority to act for the union in this matter. During the years of his presidency—from 2003 through 2005—Zullo made a number of statements to Hansen and other TriMet managers regarding his authority to resolve both mid-term bargaining matters and grievances. Based on these representations, TriMet reasonably understood that Zullo had the power to determine his role as union president and act upon this interpretation of his authority.

The record also shows that Zullo played the lead role in negotiations regarding meal and rest breaks that resulted in the June 14 Side Letter. After Hansen made the first proposal regarding these subjects to Heintzman on February 25, Zullo responded on behalf of ATU with a counterproposal. In April 2005, TriMet suggested

²²ATU argues that the circumstances surrounding the 2000 Medicare agreement put TriMet on notice of its policy that any takeaway agreement must be submitted to a membership vote. TriMet, on the other hand, contends that these events put ATU on notice that TriMet would hold its president to the terms of any bargain struck. We conclude that the series of events that resulted in the Medicare agreement should have alerted both parties to the importance of having a clear understanding of the negotiators’ authority for any mid-term contract bargaining.

that Zullo and Lomax represent the parties in negotiations regarding meal and rest breaks, and ATU never objected.²³ ATU representatives other than Zullo met with TriMet managers in May, apparently because Zullo was on vacation. However, beginning on May 13, TriMet submitted all proposals regarding meal and rest breaks directly to Zullo, who then responded. All face-to-face negotiations and discussions concerning these proposals were conducted entirely by Zullo and Lomax.

The only condition Zullo ever placed on his authority was expressed in his June 2 letter to TriMet General Manager Hansen. In his letter, Zullo told Hansen that any agreement reached between the parties' negotiators on meal and rest breaks must be submitted to the ATU Executive Board for its review. Zullo did, however, fulfill this condition when he took TriMet's June 14 Side Letter proposal to the transportation officers on the Executive Board. Zullo then told Lomax that "things were good to go" and that "we were still on track and going forward." Based on these representations, Lomax reasonably concluded that Zullo had obtained authorization to sign the June 14 Side Letter.

The conduct of the ATU Executive Board *after* it discovered that Zullo had signed the June 14 Side Letter further reinforces the appearance of Zullo's apparent authority to act for the union. The ATU Executive Board, through its inaction, indicated that TriMet was either correct about Zullo's authority or had nevertheless accepted Zullo's decision to sign the Side Letter as a final agreement. At its July 15 meeting, the board knew that Zullo had lied to them about signing the letter and had concealed his actions for more than a month. The ATU Executive Board did not immediately repudiate the agreement and advise TriMet that Zullo had no authority to sign the Side Letter. Instead, the board decided to file a grievance over the Side Letter. By so doing, the board treated the Side Letter as a final and binding agreement and objectively indicated to TriMet that Zullo had authority to sign the agreement.²⁴

²³The record contains no evidence that ATU ever attempted to stop Zullo from meeting alone with Lomax under the terms of the agreement the Executive Board made with Zullo in the fall of 2004. That agreement specified that Zullo would not attend any meetings with employer representatives that could result in an agreement.

²⁴In its brief, ATU argues that the Executive Board's failure to promptly repudiate the June 14 Side Letter was justified by the strategy it adopted once it discovered the Side Letter's existence. When it learned that Zullo had executed the June 14 Side Letter, the ATU Executive Board decided, on advice of counsel, to wait and see if TriMet's September bus run schedules used contractual layover and recovery time to meet the meal and rest break time provided by the Side Letter. According to ATU, the Executive Board's course of action was reasonable and indicated that it did not accept the terms of the Side Letter. While the board's decision may have been an appropriate method of challenging TriMet's possible interpretation of the Side Letter,

In sum, the record establishes that Zullo had apparent authority to act for the union in negotiations for the June 14 Side Letter. All of ATU's actions—permitting Zullo to be the spokesperson on the topic of ATU presidential authority, allowing Zullo to serve as the principal ATU negotiator on the subject of meal and rest breaks, and failing to promptly repudiate the Side Letter—demonstrated to TriMet that Zullo was ATU's authorized representative in bargaining over meal and rest breaks. TriMet reasonably interpreted ATU's conduct as an indication of Zullo's power. It then relied upon this interpretation when it agreed to and executed the June 14 Side Letter, and expended the resources needed to implement it. ATU violated its duty to bargain in good faith under ORS 243.672(2)(b) when it repudiated this agreement.

3. ATU did not violate ORS 243.672(2)(d) when it repudiated the June 14 Side Letter agreement.

TriMet alleges that ATU's repudiation of the June 14 Side Letter violated not only the union's statutory duty to bargain in good faith under ORS 243.672(2)(b), but also subsection (2)(d), which makes it an unfair labor practice for a labor organization to “[v]iolate the provisions of any written contract with respect to employment relations * * *.”

An employer's conduct cannot violate both its duty to bargain in good faith under ORS 243.672(1)(e) and its obligation to comply with the provisions of a written contract with respect to employment relations under ORS 243.672(1)(g). A claim must be considered either a bad faith bargaining or breach of contract charge. *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections*, Case No. UP-63-04 20 PECBR 850, 851 (2005); and *Laborers' International Union of North America, Local 483 v. City of Portland*, Case No. UP-12-06, 22 PECBR 12, 15-16 (2007).

The same principle applies here. ATU's repudiation of the June 14 Side Letter violated its duty to bargain in good faith under subsection (2)(b). Accordingly, we will not determine whether the same conduct also constitutes a violation of a written contract under subsection (2)(d), and will dismiss this allegation.²⁵

it did nothing to indicate any ATU objections to the validity of the underlying agreement. As a result, TriMet continued to reasonably believe that the Side Letter agreement was valid, based on the authority ATU apparently gave to Zullo, and took steps necessary to implement the agreement in the September bus run schedules.

²⁵Our conclusion is limited to a determination that TriMet did not violate the provisions of the 2003-2009 collective bargaining agreement. ATU did not allege, and we will not decide, whether TriMet's implementation of the September 2005 run schedule violated the terms of the June 14 Side Letter agreement.

4. TriMet did not issue and implement the September 2005 run schedule in violation of the collective bargaining agreement and ORS 243.672(1)(g).²⁶

ATU alleges that when TriMet implemented its September 2005 run schedule, it deprived operators of layover time required by the parties' collective bargaining agreement. ATU contends that TriMet's actions violated the provisions of ORS 243.672(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 * * * "

The parties' 2003-2009 collective bargaining agreement provided that TriMet schedules would include five minutes per hour of recovery or layover time. This contractual language was superseded by the provisions of the June 14 Side Letter, which states that the contractual language "regarding recovery or layover time shall be deemed fully met and satisfied by this side letter." Because we have concluded that the June 14 Side Letter is a valid and enforceable agreement, we also conclude that the language in this agreement concerning recovery or layover time modifies and replaces the relevant language in the parties' contract. Accordingly, we find that TriMet did not violate the terms of the 2003-2009 collective bargaining agreement when it implemented the September 2005 run schedule.

5. TriMet did not unilaterally change a mandatory subject of bargaining in violation of ORS 243.672(1)(e) when it implemented the September 2005 run schedule.

ATU alleges that the September 2005 run schedule deprived drivers of rest and meal breaks required by state law, and that the union never agreed to any reduction of driver break time. According to ATU, TriMet's actions constituted a unilateral change in a mandatory subject of bargaining in violation of TriMet's duty to bargain in good faith under ORS 243.672(1)(e).

An employer's duty to bargain in good faith under subsection (1)(e) includes the obligation to bargain to completion before changing the *status quo* in regard to a mandatory subject of bargaining. *Association of Oregon Corrections Employees v.*

²⁶Although ATU filed a grievance in which it alleged that TriMet's implementation of the September run schedule violated the parties' collective bargaining agreement, we will consider the merits of ATU's (1)(g) counterclaim TriMet did not raise or plead exhaustion of the applicable grievance procedure, which is an affirmative defense. *Graduate Teaching Fellows Federation Local 3544, AFT, AFL-CIO v. Oregon University System*, Case No. UP-18-00, 19 PECBR 496, 504 n 9 (2001); and OAR 115-035-0035(1)

State of Oregon, Department of Corrections, Case No. UP-33-06, 22 PECBR 159, 165 (2007). Where an employer has allegedly made an unlawful change in violation of subsection (1)(e), we begin our analysis by identifying the *status quo*. *AFSCME Local 88 v. Multnomah County*, Case No. UP-18-06, 22 PECBR 279, *reconsid.*, 22 PECBR 444 (2008). ATU contends, and we agree, that the *status quo* in regard to meal and rest breaks was established by state law. TriMet changed the *status quo* if it violated the law concerning meal and rest breaks.

An employer is obligated to provide an employee with meal and rest periods of a specified length for each work period. OAR 839-020-0050. However, this rule does not apply to a public employer that is party to a collective bargaining agreement that specifically addresses the subject of meal and rest periods. ORS 653.261(3).

Here, ATU and TriMet collectively bargained the June 14 Side Letter, an agreement we have found to be valid and enforceable. This agreement specifies the meal and rest breaks operators will receive. As a party to this collective bargaining agreement, TriMet is exempt from the requirements of state law concerning meal and rest periods. TriMet did not change the *status quo* and violate subsection (1)(e) by denying employees any meal and rest breaks they were legally entitled to receive.

6. TriMet did not violate ORS 243.672(1)(b) by filing an unfair labor practice complaint in an attempt to interfere with ATU's internal governance procedure.

ORS 243.672(1)(b) makes it an unfair labor practice for an employer to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." In order to establish that an employer violated subsection (1)(b), a labor organization must demonstrate that the employer's conduct had a direct and adverse effect on a union's ability to represent its members. *Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05, 22 PECBR 372, 397 (2008). ATU alleges that TriMet's unfair labor practice complaint directly affected the union by nullifying the bargaining unit members' ratification vote in which they rejected the Side Letter. According to ATU, TriMet's action punished the union for seeking member ratification of the Side Letter.

As discussed above, we have concluded that TriMet and ATU reached an enforceable agreement concerning meal and rest breaks on June 14, when ATU President Zullo and ATU Representative Lomax agreed to the Side Letter. We also concluded that the validity of this agreement was not conditioned on ratification by ATU bargaining unit members. Since ATU bargaining unit members had no right to vote on the

Side Letter, TriMet's unfair labor practice complaint did not unfairly punish the union for conducting a ratification vote in violation of subsection (1)(b).

7. Neither party is required to pay a civil penalty to the other.

Since ATU has failed to establish that TriMet violated the PECBA, no civil penalty may be imposed on it. TriMet withdrew its request for a civil penalty in its post-hearing brief.

ORDER

1. ATU shall cease and desist from violating ORS 243.672(2)(b) by refusing to acknowledge the Side Letter as a binding agreement.

2. All other claims and counterclaims are dismissed.

3. Both parties' claims for civil penalties are dismissed.

DATED this 21st day of May 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.