

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-001/003-20

(UNFAIR LABOR PRACTICE)

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

AMALGAMATED TRANSIT UNION, )  
 DIVISION 757, )  
 Complainant, )  
 )  
 v. )  
 )  
 TRI-COUNTY METROPOLITAN )  
 TRANSPORTATION DISTRICT OF )  
 OREGON, )  
 )  
 Respondent. )  
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Jeffrey P. Chicoine and Taylor Richman, Attorneys at Law, Miller Nash Graham & Dunn LLP, Portland, Oregon, represented Tri-County Metropolitan Transportation District of Oregon.

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

On February 4, 2020, Tri-County Metropolitan Transportation District of Oregon (TriMet) filed an unfair labor practice complaint (Case No. UP-001-20) against Amalgamated Transit Union, Division 757 (ATU). The complaint alleged that ATU violated ORS 243.672(2)(b) by conditioning settlement of the parties' successor agreement on bargaining over TriMet's proposed elimination of its apprenticeship programs, which TriMet contends is a permissive subject. TriMet requested that this Board expedite the complaint under OAR 115-035-0060.

On February 6, 2020, ATU filed an unfair labor practice complaint (Case No. UP-003-20) against TriMet, alleging that TriMet violated ORS 243.672(1)(e) by hiring outside workers instead of apprenticeship graduates into "diesel technician" positions, which ATU contends was a unilateral change to the status quo. In response to TriMet's request to expedite Case No. UP-001-20, ATU contended that TriMet did not make the required showing, but ATU also requested that this Board consolidate the two cases. ATU further indicated that, if we consolidated the cases, it would agree to an expedited process that would allow the parties adequate time to prepare for a hearing and provide post-hearing briefing.

On February 10, 2020, this Board issued a letter ruling consolidating and expediting the cases for hearing and decision. On February 14, 2020, we issued a prehearing order, which set forth the parties' agreed upon schedule. ATU and TriMet each filed timely answers to the complaints. The parties jointly submitted a stipulated statement of issues and facts on February 26, 2020. This Board conducted a hearing on March 2 and 3, 2020. The parties submitted post-hearing briefs on March 27, 2020, at which point the record closed.

The issues as stipulated by the parties are:

1. Did ATU condition bargaining in violation of ORS 243.672(2)(b) by continuing to insist on bargaining over TriMet's proposal to eliminate the Maintenance Department apprenticeship programs (and not withdrawing from its proposals those that relate to the apprenticeship programs), over TriMet's objections?

2. Did TriMet violate ORS 243.672(1)(e) by externally posting ten job openings for Diesel Technicians while the parties were engaged in bargaining a successor agreement to the 2016-2019 Working and Wage Agreement?

For the following reasons, we conclude that ATU did not violate ORS 243.672(2)(b), and TriMet did not violate ORS 243.672(1)(e).

### RULINGS

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

### FINDINGS OF FACT

#### The Parties and the Working Wage Agreement

1. TriMet is a public employer within the meaning of ORS 243.650(20).

2. ATU is a labor organization within the meaning of ORS 243.650(13) and is the exclusive representative of a bargaining unit of employees at TriMet, which includes employees in TriMet's Maintenance Department.

3. TriMet and ATU were parties to a collective bargaining agreement in effect from December 1, 2016 to November 30, 2019 (2016-2019 Working Wage Agreement or WWA). They have been collectively bargaining for more than 40 years, and have had numerous prior agreements.

#### The Apprenticeship Programs at TriMet

4. TriMet has offered apprenticeship programs in its Maintenance Department for many years. Broadly speaking, apprentices are TriMet employees who receive a mix of on-the-job training and classroom instruction. They are paid bargained wages for both their on-the-job and classroom training. When an apprentice successfully completes a program, the graduating apprentice is eligible to bid for journey worker positions in the Maintenance Department. With limited exceptions set forth in the parties' collective bargaining agreements, TriMet has hired journey workers in its Maintenance Department solely from the ranks of workers who have completed a TriMet apprenticeship program.

5. TriMet's apprenticeship programs are registered with the State of Oregon, which administers apprenticeship programs through the Bureau of Labor and Industries (BOLI). Registered apprenticeship programs in Oregon operate pursuant to ORS Chapter 660 and OAR Chapter 839, Division 11, as well as the National Apprenticeship Act, 29 USC Section 50, and 29 CFR Parts 29 and 30. ORS 660.002 provides that it is the policy of the State of Oregon to "encourage the development of an apprenticeship and training system through the voluntary cooperation of management, labor and interested state agencies, and in cooperation with other states and the federal government," and to "encourage the preparation of persons with skills that will enable them to find gainful employment in an ever-changing society and ensure the continued growth and development of the economy of Oregon by contributing to the maintenance of an adequate supply of skilled workers." ORS 660.002(1) and (3). A registered apprenticeship program provides individuals with the opportunity to learn a skilled trade that employers need, while individuals work and earn income, without paying tuition costs for credits that can be used toward a college degree.

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

7. Each registered apprenticeship program in Oregon is overseen by its own Joint Apprenticeship Training Committee (JATC). An apprenticeship program's JATC is the policymaking and administrative body responsible for the operation and success of the program.

8. TriMet has two registered apprenticeship programs, which train apprentices in a total of seven journey worker classifications or “occupations.” Each TriMet JATC is comprised of eight members, including four TriMet management representatives and four non-management employee representatives. TriMet’s Director of Training serves as the chair of the JATC, and the chair has the authority to make decisions if the committee does not reach consensus or is evenly split on an issue.

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

10. The second apprenticeship program is the TriMet Rail Maint/Vehi/Mech/Tech JATC program (MA 1078). It was registered in 1987 and trains apprentices in the following disciplines: Rail Vehicle Maintenance Tech (a three-year program); Traction Substation Tech (a three-year program); Overhead Catenary Tech (a three-year program); Signal Tech (a three-year program); and Field Equipment Tech<sup>1</sup> (a two-year program).<sup>2</sup>

11. Each JATC is governed by written committee policies and procedures, which are developed by the JATC and approved by the SATC. The policies and procedures describe both the operation of the JATC and the administration of the apprenticeship programs overseen by that JATC. For example, policies and procedures describe the expectations of apprentices, the components of the on-the-job training and classroom instruction, the award of credit to apprentices for prior experience, and the review and evaluation of apprentices.

12. Each JATC also adopts program-specific standards, which are set forth in a document entitled “Standards of Apprenticeship.” The JATC submits proposed program-specific standards (including proposed modifications) for approval by the SATC. The SATC must “[a]pprove and register program standards and modifications to program standards that are submitted by appropriate local joint committees as provided in ORS 660.126, if the standards and modifications are in substantial conformity with the statewide standards approved under ORS 660.155.” ORS 660.120. Each “Standards of Apprenticeship” document describes the apprenticeable occupation to be taught, the minimum qualifications required of apprentice applicants, the minimum eligible starting age, the statement of work processes, wages and wage progression, and the requirements for completion of apprenticeship.

13. For each Standards of Apprenticeship, some components are legally required, and some components may be customized by the JATC. For example, the SATC requires that minimum qualifications “be clearly stated and applied in a nondiscriminatory manner,” while the JATC determines what those minimum qualifications are for its programs. The minimum qualifications for each of TriMet’s seven apprenticeship programs, as determined by the JATC

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<sup>1</sup>The Field Equipment Tech program is not within TriMet’s Maintenance Department.

<sup>2</sup>TriMet trains employees for journey level “track maintainer” positions through a training program that is not a BOLI-registered apprenticeship program. Pursuant to the WWA, there is a laborer/track trainee classification, which is filled from the laborers classification by seniority. Track trainees are given both “formal training” and on-the-job training.

and approved by the SATC, are (a) a minimum age of 21 (because TriMet requires all apprentices to obtain a commercial drivers' license); (b) a high school diploma or GED certification; (c) successful completion of a mechanical aptitude test; and (d) a three-year acceptable driving record.

14. The SATC also requires each program to pledge not to discriminate against applicants or apprentices "on race, color, religion, national origin, sex (including pregnancy and gender identity), sexual orientation, genetic information, or because they are an individual with a disability or a person 40 years old or older"; to "take affirmative action to provide equal opportunity in apprenticeship"; and to offer any "out of work apprentices in good standing" the opportunity for re-employment before registering new apprentices. The remainder of the apprentice selection process is determined by the JATC; for example, the Standards of Apprenticeship for TriMet's heavy duty bus mechanic program provide that "[n]ew apprentices will be selected from a pool of current employees or outside new hire in accordance with the Tri-Met/ATU Working and Wage Agreement."

15. For the "term of apprenticeship," the SATC sets a minimum standard of 2,000 hours of work experience in the apprenticeable occupation. The JATC determines the actual term of apprenticeship for a particular program. For example, according to the Standards of Apprenticeship for the TriMet Heavy Duty Bus Mechanic, the term of apprenticeship is 4,000 hours of employment. The TriMet Heavy Duty Bus Mechanic JATC also developed a "schedule of work experience" that every bus mechanic apprentice must "follow as closely as conditions will permit," which includes 470 hours of lab (simulated) work and 2,910 hours of on-the-job training (*i.e.*, "actual" work) in specified work processes, including air systems, rear axle and brakes, heating and cooling/HVAC, Cummins and Detroit engines, electrical, suspension, transmission, and similar systems. The Standards of Apprenticeship also include the following qualification: "The committee realizes that the completion of 4,000 hours of on-the-job training is the ideal, but recognizes that most apprentices will not be able to fulfill the total amount of hours specified in every work process as set forth in this standard. When an apprentice is unable to fulfill the total work hours in each work process the committee will evaluate the apprentice's knowledge, skills and abilities and provide appropriate additional related instruction to ensure that competency is acquired in each work process."

16. The SATC requires that apprentices be paid for all hours of on-the-job training, but not classroom instruction. Pursuant to the 2016-2019 WWA, TriMet pays apprentices the same bargained-for hourly wages for both on-the-job and classroom training.

17. According to the current standards set by TriMet's JATCs for its apprenticeship programs, the on-the-job training component requires direct supervision of each apprentice by a TriMet journey worker on a 1:1 ratio.<sup>3</sup> Journey workers who train apprentices receive a pay

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<sup>3</sup>Stephen Sims, the Administrator of the Apprenticeship and Training Division at the Bureau of Labor and Industries, explained that the 1:1 journey worker to apprentice ratio is consistent with the recommended guidelines for non-construction/non-industrial apprenticeship programs. Sims further explained that a JATC may request a "modification" to (*i.e.*, deviation from) those recommended ratios (as well as other recommended guidelines), and that many such modifications in different occupations have been approved.

differential for providing that training. During the on-the-job training, apprentices perform work assigned by their supervising journey workers, and after they gain enough training and experience, apprentices may perform their assigned tasks with less direct supervision. However, under TriMet's current program model, apprentices are not permitted to "sign off" on any of the work that they complete; their supervising journey worker must review and sign off on all work completed by the supervised apprentice.<sup>4</sup> To review the work of an apprentice, the supervising journey worker could, for example, ask the apprentice to explain what they did, or ask other questions to confirm that they completed the assigned work properly.

18. Pursuant to the 2016-2019 WWA, journey workers receive premium pay when they are supervising and training apprentices.

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

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

21. Upon successful completion of a TriMet apprenticeship program, the apprentice receives a certificate of completion from the Oregon State Apprenticeship and Training Council and a journey certificate (colloquially referred to as a journey card) from the BOLI Apprenticeship and Training Division. The card identifies the card holder as a journey worker who has completed a registered apprentice program.<sup>5</sup> A journey card is recognized by employers nationally as evidence that the worker possesses journey-level skill in the apprenticeable discipline. A journey card is therefore perceived as a valuable occupational qualification.

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<sup>4</sup>Sims explained that there are three models of apprenticeship programs used in Oregon: time-based, competency-based, or a hybrid of both. TriMet currently uses a time-based model. Under a competency-based model, after an apprentice demonstrates competency in a particular work area, the apprentice may work independently (*i.e.*, without supervision by a journey worker) in that work area. Sims further explained that the TriMet JATC could change any of its apprenticeship programs to a competency-based or hybrid model. Such a change would be subject to SATC/BOLI approval. Sims testified that he saw no reason why it would not be approved.

<sup>5</sup>As defined by OAR 839-011-0070(12), a journey worker is "a fully skilled practitioner who can work independently in a given trade or occupation in accordance with ORS chapter 660.010(4). Generally, a skilled crafts person has a minimum of four years of verifiable trade-specific experience or has completed a state certified apprenticeship program in the applicable trade and holds a license where required. Use of the term may also refer to a mentor, technician, specialist or other skilled worker who has documented sufficient skills and knowledge of an occupation, either through formal apprenticeship or through practical on-the-job experience and formal training."

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

23. Until the 2012-2016 WWA, the almost exclusive path for an employee to become a journey worker was to begin as a service worker, next become an apprentice, and only then, upon completion of the apprenticeship program, become a journey worker. Correspondingly, before ratification of the 2012-2016 WWA, TriMet had to obtain virtually all of its apprentices from within the ranks of eligible service workers, and virtually all of its journey workers from graduates of TriMet apprenticeship programs.<sup>6</sup>

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

25. To become an apprentice, a service worker must first pass a mechanical aptitude test. Historically, TriMet has used a particular brand of mechanical aptitude test called the Bennett Test. After passing the test, the service worker must wait for an opening in an apprentice program, and then bid into one of TriMet’s apprentice programs based on their seniority from their date of hire by TriMet. Over the course of TriMet’s history, service workers have typically waited from one to six years for an opportunity to enter an apprentice program.<sup>7</sup>

26. Under the 2016-2019 WWA, TriMet and ATU agreed that TriMet could hire up to half of its apprentices annually from outside TriMet.<sup>8</sup>

27. TriMet has not placed any service workers into a TriMet apprenticeship program, or administered mechanical aptitude testing, since about September 2018.<sup>9</sup> There are approximately 64 employees who have passed the mechanical aptitude test and are waiting for an opportunity to participate in a TriMet apprenticeship program. ATU believes that there are also

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<sup>6</sup>See *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Local 757*, Case No. UP-020-16 at 4, \_ PECBR \_ (2018).

<sup>7</sup>See *Amalgamated Transit Union, Local 757*, UP-020-16 at 4.

<sup>8</sup>See *Amalgamated Transit Union, Local 757*, UP-020-16 at 4 (describing the addition of the contract language permitting hiring of apprentices from outside TriMet).

<sup>9</sup>The most recently placed apprentices will graduate from their apprenticeship programs at varying dates (depending on the length of the program) between June 2020 and March 2022.

service workers who want to participate in an apprenticeship program but have not yet taken the mechanical aptitude test.

28. The record includes an email from a TriMet service worker hired in November 2014. The service worker indicates that he was promised an opportunity to participate in a Plant Maintenance Mechanic apprenticeship program, but has never been provided one.

29. Christopher Tyson, a TriMet service worker since approximately September 2018, explained that his duties include cleaning and maintaining the interior of buses, servicing the bus (e.g., refilling engine fluids), conducting safety inspections, and performing mechanical triage. When he first considered employment at TriMet, he noticed information about TriMet's training programs in its literature. During new employee orientation, TriMet discussed the apprenticeship programs in detail, including the various options and requirements for entering the program. Tyson recalled that he had many discussions with other new employees about the apprenticeship programs and which program they would try to enter. Tyson passed the mechanical aptitude test, and his name was placed on an apprenticeship eligibility list (by seniority), copies of which were posted on various TriMet bulletin boards. Aside from completing an apprenticeship and becoming a journey-level mechanic, Tyson is not aware of any other promotional path for service workers at TriMet. He testified that, without the apprenticeship programs, the service worker position "appears to be a dead end."

#### Relevant Collective Bargaining Agreement Provisions

30. The 2016-2019 WWA, in Article 3 and Article 4, contains numerous provisions that relate to TriMet's Maintenance Department apprenticeship programs. Those provisions address a variety of topics, including, for example, what kinds of training programs TriMet will operate; apprentice mechanics' hourly wage rates; premium pay for journey level mechanics who are assigned to train apprentice mechanics; and how apprenticeship openings are filled. All of those contract provisions are set forth in an appendix to this order.

#### TriMet's Planned Changes to the Maintenance Department

31. As has been the case for many years, TriMet's Maintenance Department is shorthanded due to a combination of staffing cutbacks during the 2008 recession and retirements, and TriMet's growth since then. Additionally, House Bill 2017, which took effect on October 6, 2017, created a new employee-paid payroll tax in Oregon, and the revenues from that tax now provide TriMet with millions of dollars in additional funding every year. House Bill 2017 also requires TriMet to greatly expand its bus services.<sup>10</sup>

32. In fiscal year 2018, TriMet determined that it was understaffed by 16 bus mechanics. TriMet projected that it would need to hire an additional 17 to 25 bus mechanics in fiscal year 2019, 20 to 26 in fiscal year 2020, and 23 to 25 in fiscal year 2021. Assuming that 12

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<sup>10</sup>See *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-019-18 at 9-11 (2019), *appeal pending*, for a description of House Bill 2017. The transcript from the hearing in *Tri-County Metropolitan Transportation District of Oregon*, UP-019-18, was admitted into the record in this case.

apprentices would graduate per year, TriMet projected that it would need to hire a total of 40 to 55 additional bus mechanics in those three years.

33. Edmund Bennett, Director of Bus Maintenance, testified that TriMet needs one bus mechanic for every five or six buses in operation. Bennett testified that, at the time of hearing, TriMet was understaffed by 49 journey bus mechanics. Bennett testified that the shortfall of journey level mechanics will become more pressing because of the requirement in House Bill 2017 that TriMet increase bus service.

34. Daniel Blair, Director of Rail Equipment Maintenance, testified that Rail Equipment Maintenance was understaffed by 13 or 14 journey workers. Blair testified that the shortage was exacerbated by the apprenticeship programs because some of TriMet's existing journey workers are required to train apprentices, which reduces the amount of work time that those journey workers have available to perform maintenance work themselves.

35. At some point, TriMet decided to make a number of changes in the Maintenance Department. In relevant part, TriMet's plans include changing many of the journey worker classifications, and phasing out the apprenticeship programs, at least in part because those programs, in their existing forms, have not been able to train enough apprentices fast enough to meet TriMet's maintenance staffing needs. In addition, TriMet wishes to modernize what Laird Cusack, TriMet's Labor Relations Director, described as "archaic" or outdated components in some Maintenance Department classifications.

36. On December 2, 2019, TriMet emailed ATU a chart and draft job descriptions that provided more detail about TriMet's planned changes to the Maintenance Department.<sup>11</sup> For each of the five divisions within the Maintenance Department (Bus Equipment Maintenance, Rail Equipment Maintenance, Facilities Maintenance, Maintenance of Way, and Field Fare Equipment), TriMet plans to eliminate all of the apprentice classifications. For employees who are currently working in apprentice classifications, TriMet has stated that it intends to keep those employees in their respective apprentice classifications (and in the apprenticeship programs) until they complete or leave the program.

37. In the Bus Equipment Maintenance and Facilities Maintenance divisions, TriMet intends to eliminate the apprentice classifications without creating new trainee classifications. This means that TriMet will no longer provide bus mechanic or facilities mechanic training to individuals who do not already have some training or experience as mechanics from outside of TriMet. Instead, for diesel technicians, for example, TriMet has lowered the minimum qualifications and will hire applicants who already have 18 months of diesel mechanic training and two years of experience working as a heavy duty diesel mechanic, or any equivalent combination of experience and training. A minimum of a high school diploma is also required.

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<sup>11</sup>The chart attached to Cusack's December 2 email showed the elimination of the apprentice classifications in each division of the Maintenance Department by striking through those classifications and their associated wage rates. Each eliminated apprentice classification was accompanied by an asterisk, and the associated text read, "The plan for current apprentices is to continue them as apprentices until they pass or leave the program." In some divisions, the chart indicated that there would be "new" trainee classifications. The chart also indicated that there would be title changes to existing journey worker classifications.

This means that service workers or other entry level employees who do not have these minimum qualifications would not pass the minimum qualification screening for these jobs. TriMet does not plan to create a “diesel mechanic trainee” classification because it anticipates that new hires who meet the revised minimum qualifications will need only limited training to perform TriMet-specific diesel mechanic work.

38. In the Rail Equipment Maintenance, Maintenance of Way (MOW), and Field Fare Equipment divisions, TriMet intends to create new “trainee” classifications. For example, in the Maintenance of Way division, TriMet intends to eliminate the classifications of overhead traction apprentice, signal maintainer apprentice, and traction substation technician apprentice, and create the new classifications of overhead power maintainer trainee, signal maintainer trainee, and traction substation trainee. TriMet will also continue to have a MOW track maintainer trainee classification.

39. According to the job descriptions that TriMet shared with ATU, the new “trainee” classifications (in the rail-, MOW- and fare-equipment divisions) will have greater “prerequisites” or minimum qualifications than the existing apprentice classifications: generally, at least two years of related work experience (as opposed to none, although TriMet apprentices must be at least 21 years old). For example, for the light rail trainee classifications, an associate’s degree, equivalent military training, two years’ experience, or any equivalent combination of training or experience is required (as opposed to a high school diploma or GED). Applicants for the new trainee classifications will need to obtain the minimum required training and experience from outside of TriMet. TriMet will provide the new trainees the additional training and more specialized training that they will need to maintain TriMet’s rail- and fare-related equipment.<sup>12</sup>

40. The new training programs will not be registered apprentice programs. As a result, the programs will not need to comply with SATC standards, and upon completion of training, the employees will not receive journey cards or college credit.

41. In addition, for each of the five Maintenance Department divisions, TriMet is eliminating or modifying journey worker classifications and creating new, corresponding classifications that will perform journey-level skilled work. Generally, TriMet is retitling each journey-level classification by replacing the term “journey worker mechanic” with the term “technician.”<sup>13</sup> In some instances, the existing journey worker classification will be replaced by several new classifications, because TriMet intends to allocate the body of work currently performed by the particular journey worker classification among multiple new classifications.

42. For example, TriMet will separate the functions of the existing journey worker bus mechanic into three positions: diesel technician, bus electronics technician, and bus body and paint

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<sup>12</sup>ATU representatives have expressed concern (at hearing and in bargaining) that it will be substantially more difficult for service workers, and community members in general, to meet the minimum education and work experience requirements for the new “trainee” positions (compared to the apprentice positions).

<sup>13</sup>Cusack testified that the term “technician” is merely a more modern term for “journey worker,” and that, in TriMet’s view, any terms of the WWA that apply to “journey workers” should apply equally to “technicians.”

technician. A revised job description for the classification historically referred to as a “journey worker mechanic” in the bus maintenance division substituted the term “diesel technician” for “journey worker mechanic,” and eliminated from the “knowledge, skills, and abilities” section of the document “[k]nowledge of body repair practices and procedures.” The revised description also reduced the minimum qualifications (from two years of training plus five years of heavy duty diesel mechanic work experience, to 18 months of training and two years of heavy duty diesel mechanic work experience (or any equivalent combination of experience and training).

43. In the Rail Equipment Maintenance division, TriMet intends to eliminate the journey worker LRV mechanic classification, divide the work into three bodies of work, and create the new classifications of LRV maintenance technician, LRV overhaul technician, and LRV electronic technician.

44. In the Facilities Maintenance division, the current journey worker classification requires an LME electrician license, but only a small portion of the work performed by current journey workers requires that license. The plant maintenance technician classification will be replaced by the classifications of facilities field maintenance worker (which does not require an LME license) and facilities technician—LME (which requires an LME license).

45. In the Maintenance of Way division, TriMet intends to replace each of the existing four journey worker classifications (overhead power maintainer journey worker, signal maintainer journey worker, traction substation technician journey worker, and track maintainer journey worker) with a new corresponding “maintainer” or “technician” classification (overhead power maintainer, signal maintainer, traction substation technician, and track maintainer).

46. In the Field Fare Equipment division, TriMet intends to replace the field technician journey worker classification with a new field technician classification.

47. On August 13, 2019, the parties held a small group discussion regarding the Maintenance Department, including the apprenticeship programs, in advance of formal bargaining over the successor agreement to the 2016-2019 WWA, which would expire on November 30, 2019. Cusack and Block both attended the small group discussion. Over the course of that meeting, Cusack described various potential changes to the Maintenance Department, including, but not limited to, the elimination and creation of classifications, and the elimination or modification of the existing apprenticeship programs, as described above. (Other changes that TriMet discussed include, for example, the elimination of tool allowances for some journey workers; limiting servicer workers’ ability to work in different divisions; and removal or modification of existing CBA provisions governing warranty work and subcontracting.) When the parties started discussing the number of journey worker vacancies, Bennett indicated that there is a “pause on the apprenticeship program,” but that TriMet “may open that back up.” Among other topics, the parties discussed their respective views about the existing apprenticeship programs, as well as potential ways to improve them and address the journey worker shortage. In the course of the discussion, TriMet explained to ATU that it was sharing its plans for the Maintenance Department to explain its end goals and get feedback from ATU, and that the plan details were “not set in stone.” When ATU raised concerns about TriMet eliminating the bus mechanic training program, TriMet responded that it “may do a small apprentice for bus, but that is still [a] work in progress.”

## The Parties' Successor Bargaining and Discussions about the Maintenance Department

48. On October 10, 2019, the parties initiated formal bargaining over the successor agreement to the 2016-2019 WWA and held an initial bargaining session. The parties exchanged initial bargaining proposals. Both Kimberly Sewell, TriMet's Executive Director of Labor Relations and Human Resources, and Cusack attended the October 10 bargaining session, along with other members of TriMet's bargaining team. ATU's attorney Whitney Stark, as well as Krista Cordova, ATU's in-house attorney, and Shirley Block, ATU President, attended on behalf of ATU, along with other members of ATU's bargaining team.

49. TriMet presented a proposal that included a number of changes to Article 3 of the WWA, which addresses the Maintenance Department. TriMet's proposed changes to Article 3 were generally consistent with the potential changes that TriMet had discussed when the parties met in August. Regarding the apprenticeship programs, TriMet's proposal stated that TriMet would "maintain the status quo for mandatory subjects of bargaining for employees currently in Apprenticeship positions, until such time as they complete or otherwise leave their program." TriMet also proposed to strike all of the provisions of Article 3 of the 2016-2019 WWA that address the apprenticeship programs. Cusack explained that TriMet was "proposing not having an apprenticeship program," and that if there were no apprenticeship programs, all of those contract provisions would be unnecessary.<sup>14</sup>

50. ATU presented a proposal on October 10 that included a number of changes to Article 3, including provisions that increased the pay differential (referred to as "allowances") for journey workers who train apprentices, as well as proposals regarding seniority and wage increases.

51. At the October 10 session, after Cusack had reviewed several of TriMet's proposed changes to Article 3, Block addressed Sewell and asked, "Kim, do you want a contract?" Block also said something to the effect of, "This is a waste of time. There is no way I'm going to sign this. Let's just go to interest arbitration right now."

52. Block testified that her comment was a reference to possible difficulties that ATU would have obtaining member ratification of a tentative agreement because TriMet was proposing so many changes that Maintenance Department employees would view as "takeaways," without offering counterbalancing benefits. Block further explained that the Maintenance Department employees could effectively block ratification because of a June 2016 change to ATU, Division 757's bylaws. Specifically, those bylaws now provide, "Regarding the TriMet Working and Wage Agreement, there will be three separate groups within the bargaining unit; Transportation, Maintenance and all non-Maintenance and non-Transportation employees. Before an agreement can be ratified with TriMet, all three groups must individually approve the tentative agreement before a total agreement can be reached with TriMet."

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<sup>14</sup>At the hearing, Cusack testified that TriMet intended that, under its proposed changes to Article 3, Section 2, Paragraph 8, the Maintenance Department would still have Assistant Supervisors, but that they would come from the new classifications that replaced the journey worker classifications. In addition, although TriMet's initial proposal eliminated all of Article 3, Section 5, Paragraph 1 (providing longevity pay for journey workers), Cusack testified that the employees in the newly created classifications replacing the journey worker classifications would receive longevity pay.

53. After Block addressed Sewell, Stark indicated that the parties should finish reviewing the remainder of TriMet's proposed changes, and they did so. After Cusack reviewed more of TriMet's proposals, he reached what TriMet labeled as "Proposal 5," and stated, "[W]e are proposing eliminating the apprenticeship program. The current apprentices will complete the program." Cusack asked whether the parties "still have a disagreement as to whether an apprenticeship program is a permissive subject," and Stark confirmed that they did.

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

55. On December 2, 2019, Cusack emailed ATU's bargaining team a chart showing TriMet's anticipated changes to classifications in the Maintenance Department and the associated new and amended descriptions for these classifications (as described in more detail above). Cusack also attached revised or new job descriptions for 23 classifications. Cusack explained that the information was offered "to flesh out the information I provided during the November 7 informational session."

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

57. On December 19, 2019, the parties met again for a bargaining session that included discussion of the Maintenance Department. ATU presented a proposal concerning the Maintenance Department. Stark explained that she had not drafted contract language, but that the proposal was “a concept of what [ATU] would agree to.” ATU proposed that all current service workers be provided an opportunity to enter an apprenticeship program after passing the Bennett test or, if they decline the opportunity, receive a one-time \$5,000 bonus. Once all current service workers had the opportunity to enter an apprenticeship program, TriMet could establish different minimum qualifications and hire from the outside for journey positions. In order to protect promotional opportunities for ATU workers, ATU also proposed that there be a trainee program for all journey worker classifications, including bus mechanic, and that TriMet limit its hiring of outside journey workers to the number of TriMet employees who enter the apprenticeship program. ATU also proposed that TriMet retain JATC and BOLI standards for the training programs, so that employees would receive certification when they completed their training. However, ATU noted that BOLI has “non-apprentice” programs, and that the TriMet training programs would not have to be “apprenticeship” programs. ATU’s proposal also included provisions to address qualification and retention issues raised by TriMet. ATU’s proposal also addressed seniority and transfer by current journey workers between apprenticeable disciplines.

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

59. The second stage of TriMet’s concept addressed what would happen after all employees on the Bennett test list had started in a trainee classification. At that point, TriMet would implement the new trainee positions in REM, MOW, and Fare Equipment (with the higher minimum qualifications described above), and cease offering bus mechanic trainee positions. Hiring for all TriMet positions would be based on minimum qualifications and be conducted as open, competitive recruitments.

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

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

62. After a caucus, Cusack informed ATU that BOLI-registered apprenticeship programs were "just as much a non-starter" for TriMet as for ATU. Stark asked why. Cusack replied that the registered apprenticeship system was developed for a multi-employer system, and TriMet wanted to develop its own training standards, which it viewed as more cost-effective. The parties then discussed dates for their next bargaining session.

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

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

"ATU has not ever stated that it will not agree to a contract without the apprenticeship program, nor that it will refuse to engage in further bargaining. To be clear: ATU is not conditioning either bargaining or a settlement of the contract on specific proposals regarding the apprenticeship program.

"\* \* \* \* ATU's statements to TriMet (and to its bargaining unit members) make clear that maintaining apprenticeship programs are a high priority to ATU during bargaining, which is not unlawful."

65. Cusack and Block subsequently exchanged additional letters regarding the parties' bargaining over TriMet's apprenticeship programs. Cusack sent Block a letter on January 21, 2020. Cusack reiterated TriMet's position, and wrote, "If ATU does not concede that bargaining over

maintaining the apprenticeship programs is permissive, TriMet intends to file a ULP to resolve this dispute.”

66. Block replied on January 27, 2020. Block reiterated ATU’s position that ATU was not conditioning bargaining on a permissive subject, and wrote, “Despite the dispute over the mandatory versus permissive nature of TriMet’s proposal to strike all aspects of the apprenticeship programs from the Working and Wage Agreement, ATU has and continues to bargain in good faith with TriMet.” Block did not withdraw ATU’s proposal related to continuing the apprenticeship programs. Block also discussed the upcoming bargaining sessions, and wrote that “ATU is amenable to [a] further exchange of proposals, or designating a topic for February 27 at a later date.”

67. The parties had a bargaining session scheduled for February 13, which TriMet cancelled because one of its key bargaining team members was unavailable.

68. ATU has not withdrawn its December 19, 2019, proposal to bargain over TriMet’s apprenticeship programs in the Maintenance Department.

#### TriMet’s Hiring of Diesel Technicians

69. On January 17, 2020, TriMet posted, for internal hire only, ten job openings for diesel technicians. The job opening lists the position’s minimum qualifications as including 18 months of training in diesel technology and power systems at an accredited school or training program, and two years’ experience working as a heavy duty diesel mechanic, or any equivalent combination of experience and training (*i.e.*, the minimum qualifications listed in the draft “diesel technician” job description that Cusack emailed to the ATU bargaining team on December 2, 2019). Three internal applicants applied; one subsequently withdrew.

70. On January 24, 2020, TriMet posted ten job openings for diesel technicians as open, competitive positions. At the time of this posting, the parties had not reached an agreement for a successor agreement to the expired 2016-2019 WWA and had not completed the dispute resolution procedures required by the Public Employee Collective Bargaining Act (PECBA).

71. As of the date of the hearing, the parties had additional bargaining sessions planned.

#### The Parties’ Other Recent Disputes Related to Apprentice and Journey Worker Hiring

72. TriMet filed a prior unfair labor practice complaint (Case No. UP-020-16) on June 29, 2016. In that case, TriMet alleged that, in May 2016, ATU violated ORS 243.672(2)(d) by refusing to approve a “classification seniority list” affecting journey workers hired outside of the parties’ apprentice program. TriMet alleged that ATU’s conduct violated the parties’ 2012-2016 WWA, and therefore, (2)(d). On July 24, 2018, the Board concluded that ATU did not violate the 2012-2016 WWA and dismissed the complaint. As of the date of the hearing for these consolidated cases (Case Nos. UP-001/003-20), the parties were still negotiating how seniority should be handled for outside hires.

73. ATU filed a prior unfair labor practice complaint (Case No. UP-019-18) on August 13, 2018. In that case, ATU alleged that TriMet violated ORS 243.672(1)(g) by hiring more than five journey workers from outside of TriMet in 2018 in violation of Article 3, Section 1, Paragraph 10 of the 2016-2019 WWA.<sup>15</sup> ATU also alleged that TriMet violated ORS 243.672(1)(e) by making a unilateral change to a longstanding practice of not hiring journey workers from outside of TriMet. On December 31, 2019, the Board concluded that TriMet violated ORS 243.672(1)(g) by hiring more than five journey workers annually from outside TriMet to fill positions in any apprenticeable discipline, in violation of Article 3, Section 2, Paragraph 10 of the 2016-2019 WWA. The Board declined to reach the ORS 243.672(1)(e) claim. The Board ordered the parties to bargain in good faith over the appropriate make-whole remedy for 60 days and, if the parties were unable to agree during that time, to submit to the Board the last proposal each party made. The parties were unable to agree on a remedy and, on March 6, 2020, submitted their last proposals to the Board.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The record does not establish that ATU violated ORS 243.672(2)(b).

Under ORS 243.672(2)(b), it is an unfair labor practice for a labor organization or its designated representative to refuse to bargain collectively in good faith with a public employer if the labor organization is an exclusive representative. Paragraph (2)(b) is the “mirror provision” of ORS 243.672(1)(e), which applies to public employers, and this Board applies the same standards when determining whether an employer or a union has violated the duty to bargain in good faith. In this case, TriMet contends that ATU refused to bargain in good faith by insisting on bargaining, over TriMet’s objection, about the continuance of TriMet’s apprenticeship programs (as opposed to their elimination), which TriMet contends is a permissive subject. ATU contends that the continuance of the apprenticeship programs is a mandatory subject, and that, in any event, it has not unlawfully pursued bargaining on that subject. We conclude that ATU has not unlawfully pursued bargaining about the apprenticeship programs, and therefore, ATU has not violated (2)(b). Because we find no violation of ORS 243.672(2)(b), regardless of whether the continuance of the apprenticeship programs is a permissive or mandatory subject of bargaining, it is unnecessary for this Board to rule on the scope of bargaining issue, and we decline to do so. *Oregon City School District No. 62 v. Oregon City Education Association*, Case No. C-179-79 at 15 n 10, 5 PECBR 4246, 4260 n 10 (1981) (*Oregon City*).

In *Oregon City*, this Board addressed the question of, “[u]nder what circumstances does an attempt to bargain over a permissive subject become a refusal to bargain in good faith over mandatory items and, thereby, constitute an improper practice under the PECBA?” *Id.* at 8, 5 PECBR at 4253. On the one hand, “[a] party may urge inclusion of permissive matters in an agreement so long as it remains willing to negotiate and execute a bargaining agreement that does not include such matters.” *Id.* at 10, 5 PECBR at 4255. On the other hand, “it is a violation of ORS 243.672(1)(e) or (2)(b) for a party to precondition a bargain upon the inclusion of a permissive subject in a collective bargaining agreement or to insist that a permissive subject be discussed

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<sup>15</sup>The full text of that contract provision is included in the appendix to this order.

before that party will negotiate over mandatory subjects.” *Id.* “Whether a party is merely proposing and urging negotiations on a permissive subject or is unlawfully pursuing a permissive subject is an issue of fact.” *Id.*<sup>16</sup> “Barring express admissions” by a party’s representative that they “refuse[] to negotiate unless permissive items are bargained over or included in a contract, a finding of unlawful conditioning must be based on the totality of circumstances surrounding the [party’s] conduct in bargaining.” *Eugene School District No. 4J v. Eugene Education Association*, Case Nos. UP-32-87/DR-2-87 at 25, 9 PECBR 9455, 9479 (1987) (*Eugene*).

In this case, the evidence establishes that ATU has urged TriMet to continue the apprenticeship programs, but it does not establish that ATU conditioned settlement of the successor agreement on continuation of those programs, or that ATU has insisted on discussing that subject before negotiating over other subjects. Specifically, the parties exchanged proposals at their first formal bargaining session on October 10, 2019. TriMet proposed a large number of changes to Article 3 of the WWA, which relates to the Maintenance Department; those proposed changes included, but were not limited to, elimination of the apprenticeship programs (for all employees but the current apprentices). After TriMet described some of its proposed changes, ATU President Shirley Block commented by saying something to the effect of, “this is a waste of time,” and the parties should “just go to interest arbitration right now.” Block testified that her comments were intended to reflect that ATU would not be able to obtain member ratification of an agreement because TriMet was proposing so many changes that Maintenance Department employees would view as “takeaways,” without offering counterbalancing benefits. Block further explained that the Maintenance Department employees could effectively block ratification because, under ATU’s bylaws, that group had to individually approve any agreement.

On December 5, the parties met to bargain about Maintenance Department issues, and ATU explained that it needed more information to develop a counterproposal to TriMet’s proposal to eliminate the apprenticeship programs. In response to ATU’s questions, TriMet explained further why it wanted to eliminate the programs, and what it hoped to accomplish by doing so. On December 19, the parties met to bargain about Maintenance issues again, and ATU presented a “concept” (instead of formal contract language) for its counterproposal regarding the apprenticeship programs. TriMet countered with its own “concept document,” instead of a formal counterproposal. ATU explained its concerns about TriMet’s concept, and stated that it would not accept that concept without modifications. TriMet asked whether the parties were at impasse. ATU stated that they were not at impasse, but explained that ATU would not agree to TriMet’s concept unless TriMet also offered something else “really big.” The parties then continued to discuss the reasons for their respective positions about the apprenticeship programs, and scheduled additional bargaining sessions.

In correspondence following the December 19 bargaining session, TriMet stated that it was “declin[ing] to bargain” over the permissive subjects of bargaining that it had identified (*i.e.*, all of the existing contract provisions that it contends are related to the apprenticeship programs). TriMet also demanded that ATU withdraw any proposals that “relate to maintaining the apprenticeship program,” and indicated that if ATU did not do so, TriMet would file an unfair

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<sup>16</sup>The Board further held that, because “[m]ediation is a continuation of negotiations between the parties,” “[i]t is not unlawful \* \* \* merely to attempt to bargain over permissive matters during mediation.” *Id.* at 11, 5 PECBR at 4256.

labor practice complaint. In response, ATU maintained that it had never stated that it would not agree to a contract without the apprenticeship program, or that it would refuse to engage in further bargaining. ATU further clarified that it was “not conditioning either bargaining or a settlement of the contract on specific proposals regarding the apprenticeship program,” and reiterated that it wanted to continue bargaining. ATU did not withdraw its prior proposals related to the apprenticeship program.

TriMet contends that “ATU’s refusal to withdraw its December 19, 2019, counterproposal” after TriMet objected to it as permissive and refused to bargain over it, “constitutes unlawful conditioning in violation of the duty to bargain in good faith,” notwithstanding “ATU’s purported willingness to bargain over other subjects.” We disagree. To begin, “[w]hen negotiations are taking place over mandatory subjects, it is not unlawful to indicate that further compromises will be made if a permissive subject is bargained, so long as bargaining continues over the mandatory proposals.” *Oregon City*, C-179-79 at 12, 5 PECBR at 4257. *See also Eugene*, DR-2-87 at 27, 9 PECBR at 9481 (statement that union “could ‘sell’ an agreement to its constituents that included less money if the contract also contained provisions on other issues of importance to [them] \* \* \* does not constitute a demand that the employer waive” its “right to refuse to discuss permissive subjects in exchange for good faith negotiations and a reasonable settlement on mandatory items”). Indeed, “[a] party may continually propose discussions” of a purportedly permissive subject, “so long as it engages in good faith negotiations” over outstanding mandatory subjects. *Oregon City*, C-179-79 at 10, 5 PECBR at 4255. Further, good faith collective bargaining does not require a party to agree to any particular proposal or to make any particular concession. *Id.* at 12, 5 PECBR at 4257; ORS 243.650(4). Under the totality of the circumstances, ATU’s refusal to withdraw its December 19 proposal does not cross the line from attempting to bargain about the continuation of apprenticeships to conditioning bargaining on discussion of that subject. *See id.* (respondent “put[] forth allegedly permissive proposals,” including in mediation, but did not “condition[] meeting and conferring in good faith with respect to the outstanding mandatory items” on complainant’s “willingness to bargain over such allegedly permissive items”); *cf. Jackson County v. SEIU Local 503, OPEU*, Case No. UP-002-20 at 10-11 (2020) (“Including a permissive subject of bargaining in a final offer over the other party’s objection violates the obligation to bargain in good faith.”).

TriMet also contends that Block’s October 10 statements (that bargaining “is a waste of time” and that the parties should “go to interest arbitration right now”) establish that ATU refused to collectively bargain in good faith. Specifically, TriMet argues that these statements amounted to a refusal to bargain unless TriMet withdrew its proposals to discontinue the apprenticeship programs. We disagree. Block’s statements did not amount to an express refusal to bargain. Block testified that she was attempting to articulate that TriMet’s proposals, which ATU viewed as significant takeaways, would not be ratified by the Maintenance employees (and thus ATU membership), even if ATU’s bargaining committee were to accept them. ATU subsequently explained that it was not conditioning bargaining on TriMet’s withdrawal of its proposal. ATU also continued to engage in good faith negotiations over a broad range of subjects and contract proposals. Moreover, advocacy and bargaining posturing are commonplace at the bargaining table, and this Board generally gives parties considerable latitude to speak freely in that context, so long as the comments do not violate PECBA. *See Oregon School Employees Association, Chapter 20 v. Baker School Dist. 5J*, Case No. C-165-81 at 6, 6 PECBR 5103, 5108 (1982) (“[PECBA] is primarily designed to require the parties to bargain over the employment relations of represented

employees. ORS 243.656(5). That underlying policy requires this Board to make room for a vigorous exchange of views at the bargaining table.”). Here, Block’s spur-of-the-moment comments in response to TriMet’s first bargaining proposal, which proposed, among other things, eliminating the long-established apprenticeship programs that hold particular value for ATU and its members, do not amount to a violation of the obligation to collectively bargain in good faith.

In sum, based on the evidence at hearing, we conclude that TriMet did not prove that ATU’s bargaining conduct related to TriMet’s apprenticeship programs violated ORS 243.672(2)(b).

3. The record does not establish that TriMet violated ORS 243.672(1)(e) by externally posting ten job openings for diesel technicians while the parties were engaged in successor bargaining.

An employer commits a per se violation of ORS 243.672(1)(e) if it makes a unilateral change in the status quo concerning a mandatory subject of bargaining without first completing its bargaining obligation under PECBA. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE*); *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11 at 8, 25 PECBR 525, 534, *adh’d to on recons*, 25 PECBR 764 (2013) (*AEE*). This obligation to maintain the status quo applies equally during the term of a collective bargaining agreement and the “hiatus period,” the period between the expiration of an agreement and the completion of PECBA’s statutory bargaining process. *Id.* In this case, there is no real dispute that TriMet unilaterally changed the status quo when it externally posted ten job openings for diesel technicians during the hiatus period. The status quo may be determined by, among other things, an expired agreement. Here, the parties’ expired agreement limited the hiring of outside journey-level workers in apprenticeable disciplines (which includes diesel mechanics) to five per year; otherwise, the agreement required TriMet to fill such journey-level positions internally, generally by promoting graduating apprentices. TriMet changed the status quo by externally posting ten diesel mechanic positions in January 2020. The issue is whether that change was mandatory or permissive for bargaining.

We conclude that the subject of the change at issue is the permissive subject of standards for filling vacancies. This Board has previously determined that the subject of comparable restrictions against external hiring is “the standards by which the [employer] fills vacancies,” and that such standards are a permissive subject of bargaining. *Gresham Grade Teachers Association v. Gresham Grade School District No. 4 and Larson*, Case No. C-61-78 at 23, 5 PECBR 2771, 2793 (1980); *see also Eugene Education Association v. Eugene School District No. 4J*, Case No. C-279 at 7, 1 PECBR 446, 452-53 (1975), *aff’d after remand*, 290 Or 217 (1980). Under ORS 243.650(7)(b), subjects determined to be permissive by this Board before June 6, 1995, continue to be permissive.

ATU, in its brief, does not squarely address the issue of whether the external posting of diesel technician positions was, in and of itself, mandatory or permissive for bargaining. Rather, ATU contends that TriMet had a duty to bargain about the external posting because that act, ATU asserts, “effectively ended the apprenticeship program,” which ATU contends is a

mandatory subject.<sup>17</sup> However, even assuming that elimination of the apprenticeship program is both an impact of the external posting and mandatory for bargaining, that does not mean that TriMet had a duty to bargain about the decision to post more than five positions externally. An employer has a duty to bargain over the mandatory impacts of a permissive change before implementing it, including during the hiatus period. *See AEE*, UP-043-11 at 10, 25 PECBR at 536. But an employer does not have a duty to bargain the permissive change itself, just because it has mandatory impacts. *Id.*

Alternatively, ATU contends that TriMet made an unlawful unilateral change when it posted the diesel technician positions because, in doing so, it changed their classification's title from "journey worker" to "technician," and lowered the minimum qualifications. ATU does not dispute that the classification title and minimum qualifications are permissive subjects of bargaining. Rather, ATU contends that TriMet had a duty to bargain because those changes "involve compensation," citing *Oregon Public Employes Union v. City of Tualatin*, Case No. UP-122-85 at 8, 8 PECBR 8214, 8221 (1985) (holding that proposal concerning compensation after reclassification was mandatory), and *International Brotherhood of Electrical Workers v. City of Forest Grove*, C-201-75 at 7, 4 PECBR 2168, 2174 (1979) (concluding that employer violated (1)(e) by unilaterally reclassifying employees where "the evidence established that employees suffered a wage reduction by reason of the changes made in their classifications"). However, those cases are inapposite. Here, no employee is being moved from one classification to another because of the title change or change in minimum qualifications. Further, there is no evidence that those changes have directly caused, or will directly cause, any employee's compensation to change.

In sum, based on the evidence at hearing, we conclude that ATU did not prove that TriMet violated ORS 243.672(1)(e) by externally posting ten diesel mechanic positions.

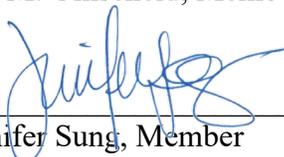
#### ORDER

The complaints are dismissed.

DATED: April 21, 2020.

  
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Adam L. Rhynard, Chair

  
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Lisa M. Umscheid, Member

  
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Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

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<sup>17</sup>We do not understand ATU to be claiming that TriMet violated (1)(e) by unilaterally ending (or deciding to end) the apprenticeship program, and, in any event, that issue is outside the scope of the stipulated issue statement. Accordingly, we do not address it.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-001/003-20

APPENDIX OF RELEVANT CONTRACT PROVISIONS

Article 3, Section 1, Paragraph 10 of the 2016-2019 WWA provides:

“Notwithstanding any other provision of this Agreement, the District shall have the right to hire up to five (5) journey workers annually from outside the District to fill positions in any apprenticeable discipline within the District.”

Article 3, Section 1, Paragraph 11 of the 2016-2019 WWA provides:

“Notwithstanding any other provision of this Agreement, all journey level workers shall be required to work for seven years in their discipline prior to moving to a different discipline unless there is a hardship established by the JATC.”

Article 3, Section 5, Paragraph 5 of the 2016-2019 WWA provides:

“Any Journey Level Mechanic who is assigned to train Apprentice Mechanics will receive an additional twenty-five cents (\$0.25) per hour over base rate of pay for each Apprentice assigned. This provision shall not apply to Assistant Supervisors.”

Article 3, Section 7 of the 2016-2019 WWA is entitled, “Mechanic Training Program.” It provides:

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

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

“Par. 3. Work assignments, shift hours, and area of instruction will be decided by the Training Manager.

“Par. 4. Applications will be accepted from employees of the District. A qualification test to determine mechanical aptitude will be given and appointments will be made based on seniority from those applicants receiving a passing test score. All Helpers on the payroll as of April 1, 1979, shall have a right to enter this training program with no reduction in wages, based on seniority and a passing test score before other applicants are appointed. Should no one apply, or

should all applicants fail to receive a passing test score, the District shall have the right to recruit applicants from outside the employee group.

“Par. 5. Trainees in the training program shall, except as otherwise provided in this section, operate in accordance to the rules and procedures previously entered into between the parties.

“Par. 6. Trainees will receive the Helper’s rate for the first two (2) years in the training program, the Maintenance Mechanic’s rate for the third year of training, and shall be advanced to the Journey Level Mechanic’s rate upon the successful completion of the third year.

“Par. 7. A log or diary will be kept to record the assignments and duties performed by the trainees, including comments and observations of Supervisors and instructing Mechanics. The Director of Maintenance, or his/her designee will evaluate trainees at the end of ninety (90) days. Unsatisfactory progress will necessitate dismissal from the training program. Helpers unsuccessful in the training program will be returned to their former assignment with no loss of seniority or rights in the former classification. Evaluation of the trainees resulting in continuation in, or dismissal from, the program will take place every ninety (90) days until training has been completed. All trainees retain their rights to the grievance procedure.

“Par. 8. A joint committee composed of three (3) representatives each, for both the District and the Union shall be established in conjunction with this training program.

“Par. 9. Nothing in this Agreement bars the District from promoting a Mechanic Trainee to a Journey Level Mechanic when qualified.

“Par. 10. Apprentice Mechanics may be promoted to a Journey Level Mechanic when qualified. If so promoted, the individual will be paid at the top rate at time of promotion.

“Par. 11. Any District employee who has successfully met all the prerequisites established by the District and is selected to enter a District apprenticeship program, shall, as a condition of entering an apprenticeship program, attend an apprenticeship program orientation of that program. The orientation will include a meeting with a supervisor to cover job requirements and expectations, working conditions, and an interview with a journey level worker. Any employee after entering a program and who leaves that program for any reason prior to attaining journey level status, shall forfeit their right to enter another program for one year or the length of time served in that program, whichever is lesser.”

Article 3, Section 11 of the 2016-2019 WWA is entitled “LRT Maintenance Vehicle Mechanics’ Training.” It provides:

“Par. 1. All light rail employees shall receive their regular rate of pay while training.

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

- a. Work assignments, shift hours, and areas of instruction will be decided by the Maintenance Manager.
- b. A qualification test to determine mechanical, electrical and electronic aptitude will be given.
- c. The LRT Mechanic Apprentice may be promoted to Journey Level Mechanic when qualified, and if so promoted will be paid at top rate at time of promotion.

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

Article 3, Section 15 of the 2016-2019 WWA is entitled “LRT Apprenticeship Training Programs.” It provides:

“Par. 1. Light Rail Maintenance Department shall have six (6) Journey Level Classifications:

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

“Par. 2. Each Journey Level Mechanic shall hold seniority only with his/her specific classification. The District may administer cross training to light rail Maintenance of Way (MOW) employees for purposes of teamwork, optimum productivity, and mutual assistance among MOW disciplines, as well as to enhance safety

“Par. 3. The District shall establish MOW Apprenticeship Programs in the classifications of:

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

“Par. 4. The parties acknowledge the joint apprenticeship and training committees (or trade committees) as the exclusive source for apprenticeship and training standards as approved by the State of Oregon Apprenticeship and Training Council.

“Par. 5. The District shall fill light rail apprenticeship openings in order of seniority of applicants passing aptitude tests offered to District employees in the following priority order:

- a. Journey Level maintenance employees who have seven (7) or more years of Journey Level status.
- b. Other non-Journey Level maintenance employees who are not currently enrolled in a District apprenticeship program.
- c. All other District employees.
- d. If an apprentice opening remains open after offering aptitude tests to internal applicants, as outlined above, the District may offer such openings to outside applicants.

“Par. 6. District employees entering the light rail MOW Apprenticeship Program shall be paid according to the LRV Apprentice Mechanic schedule.

“Par. 7. In the event that the selection of the most senior Journey Level mechanic (bus or rail) applicant for a light rail MOW apprenticeship vacancy would result in a severe hardship on the District relating to the performance of a Journey Level’s regular work (i.e., the resulting Journey Level mechanic vacancy would result in the need to cut jobs or to contract out work under the terms of the Maintenance Assistance Fund), the District may pass over that mechanic and select the next qualified applicant. In such cases, the mechanic who has been passed over will be given the opportunity to fill the next light rail MOW Apprenticeship Program vacancy. Upon successful completion of the Apprenticeship Program, the passed-over mechanic shall be afforded the seniority s/he otherwise would have had if selected for the initial opening.

- a. ‘Passed Up Mechanics’:
  1. Journey-level mechanics from all disciplines, after meeting the seven (7) year requirement and other pre-qualifications, would go into apprenticeship at the top apprentice rate (equal to the top helper rate) under conditions in Article 3, Section 7, Paragraph 6, and as outlined in the Apprentice Mechanics pay schedule of this Agreement.
  2. Helpers from Bus and Rail would enter apprenticeships based upon Article 3, Section 7, Paragraph 6 and the existing pay schedule for Apprentice Mechanics of this Agreement.

3. The District may use the MOW hold back language for journey-level movement into any apprentice program.

“Where applicable, the above provisions also applies to Bus Maintenance.

“Par. 8. Nothing in the Agreement bars the District from promoting an apprentice to a Journey Level in less than four (4) years; however, promotion to Journey Level status from an apprentice program in four (4) years shall be based on District seniority in accordance with the collective bargaining agreement. Upon six (6) months’ accrual in an apprenticeship program, an employee shall forfeit seniority held in the employee’s previous classification. Prior to such six (6) months’ accrual, however, an employee may elect to return to his/her previous classification, whereupon the employee’s seniority held upon return shall be the same as if he/she has remained in the previous classification; this provision may also be effective following six (6) months’ accrual for a particular employee by mutual agreement between the District and the Union.

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

- a. Create a classification of Laborer/Track Trainee: Labor/Track Trainees will be filled from the Laborers classification. By seniority, Laborers will be offered the Track Trainee positions. The Track Trainees will be given formal training as well as On the Job training (OJT) in Track Maintenance. When not performing Track OJT they will perform their regular Laborer job duties.
- b. Those holding the Laborer/Track Trainee positions will be eligible for overtime call-outs, to assist when track work is being performed during off-hours. These call-outs would come after the regular Track Maintainers had been called but before other journeymen were called.
- c. Laborer/Track Trainees shall remain in those positions until such time as the District offers an opening for Track Maintainer. When such an opening occurs it shall be offered by seniority to qualified Laborer/Track Trainees. Those that decline to fill the offered positions will either fill a classification held prior to Laborer with loss of all seniority as Laborer and/or Laborer/Track Trainee. Once a person declines a Track Maintainers position they will not be eligible for another opportunity for a period of five (5) years.
- d. A maximum of four (4) Laborer/Track Trainee positions may be created. Additional positions, if needed, may be created with District/Union agreement.

- e. The State of Oregon Apprenticeship Council shall not govern the Laborer/Track Trainee program, but the Light Rail Apprenticeship Committee shall oversee the training, testing and qualifying of those persons holding these positions.
- f. Openings for Laborer/Track Trainees shall be filled [in] accordance with Article 3, Section 15, Paragraph 5.

“Par. 10. The payment of tool allowances to Journey Level Mechanics and Apprentices as provided in Article 3, Section 5, Paragraph 3 shall not apply to Maintenance of Way (MOW) classifications, including:

Signal Maintainer  
Overhead Traction Electrification Maintainer  
Traction Substation Technician  
Track Maintainer  
Plant Mechanic

All tools required by the classifications listed above shall be furnished by the District.

“Par. 11. Apprentices Programs.

“Any District employee who has successfully met all the prerequisites established by the District and is selected to enter a District apprenticeship program, shall, as a condition of entering an apprenticeship program, attend an apprenticeship program orientation of that program. The orientation will include a meeting with a supervisor to cover job requirements and expectations, working conditions, and an interview with a journey level worker. Any employee after entering a program and who leaves that program for any reason prior to attaining journey level status, shall forfeit their right to enter another program for one year or the length of time served in that program, whichever is lesser.”

Article 3, Section 21 of the 2016-2019 WWA is entitled, “Hiring Apprentices From Outside.” It provides:

“Par. 1. This Section applies to all District apprenticeship programs.

“Par. 2. Notwithstanding any other provision of this Agreement, the District shall have the right to hire from the outside up to ½ of all apprentices annually in each apprentice program within the District. All newly hired apprentices, whether from within or outside the bargaining unit, shall meet the minimum qualifications established by the District.

“Par. 3. As provided under standards of the State of Oregon Apprenticeship and Training Council, the Joint Apprentice Training Committee (JATC) for the respective apprenticeship program will evaluate placement of an apprentice hired from the outside into the appropriate progressions step of the program, and the District will pay such apprentice at the wage pertaining to that step.

“Par. 4. Any apprentice hired from the outside will establish classification seniority behind any apprentices currently in the respective apprenticeship program as of the date such apprentice is hired.”

Article 4 of the 2016-2019 WWA relates to the Operations Division/Facilities Maintenance. Section 5 is entitled, “Apprentice Programs.” It provides:

“Par. 1. Any District employee who has successfully met all the prerequisites established by the District and is selected to enter a District apprenticeship program, shall, as a condition of entering an apprenticeship program, attend an apprenticeship program orientation of that program. The orientation will include a meeting with a supervisor to cover job requirements and expectations, working conditions, and an interview with a journey level worker. Any employee after entering a program and who leaves that program for any reason prior to attaining journey level status, shall forfeit their right to enter another program for one year or the length of time served in that program, whichever is lesser.”