

**OREGON EMPLOYMENT RELATIONS BOARD
STATUTORY INTEREST ARBITRATION**

AMALGAMATED TRANSIT UNION)
DIVISION 757,)
)
Union,)
)
TRI-COUNTY METROPOLITAN)
TRANSPORTATION DISTRICT)
OF OREGON,)
)
Employer.)

**INTEREST ARBITRATION
OPINION AND AWARD**

This matter involves an impasse arising from negotiations over a successor agreement to a contract that expired November 30, 2009, between the Amalgamated Transit Union Division 757 and the Tri-County Metropolitan Transportation District of Oregon. The parties are subject to interest arbitration under ORS 243.746.

The interest arbitration hearing was held before Arbitrator David Gaba on May 14-17, 2012. The parties had the opportunity to make opening statements, examine and cross-examine witnesses, introduce exhibits, and fully argue all of the issues in dispute. No transcript of the proceedings was provided; however, audio recordings of the proceedings were provided. Post-hearing briefs were filed by both parties on June 25, 2012.

Appearances

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I. INTRODUCTION

A. The Parties

The Tri-County Metropolitan Transportation District of Oregon (“TriMet” or “Employer”) provides transit services throughout an approximately 570 square mile area of Multnomah, Washington, and Clackamas counties, Oregon. TriMet is governed by a seven-member Board of Directors appointed by the Governor of Oregon; the directors represent seven geographical districts. TriMet’s transit services include 79 bus lines, a 52 mile light rail system, commuter rail service, and door-to-door paratransit for people with disabilities. The customer facilities include 625 buses, 127 light rail vehicles, 3 diesel multiple units, 268 LIFT vehicles, 1,050 bus shelters, 6,800 bus stops, 17 transit centers where buses and trains meet, 84 MAX light rail stations, and 32 park and ride lots.

The parties’ Collective Bargaining Agreement covers a bargaining unit of approximately 2,026 employees in 76 different job classifications. The vast majority of employees are employed as bus drivers, train drivers, or mechanics. The Amalgamated Transit Union Division

757 (“ATU” or “Union”) employees are prohibited from striking, and thus eligible to utilize Oregon’s statutory interest arbitration procedures which provide for contract issues at impasse to be submitted to interest arbitration pursuant to ORS 243.746.

B. The Bargaining and Procedural History

The parties arrived at their current impasse through a long and convoluted process to which the undersigned has limited knowledge. It is clear that the parties entered into a Collective Bargaining Agreement that expired on November 30, 2009. On or about October 22, 2009, the parties met to begin bargaining over a successor collective bargaining agreement. The parties met again on or about November 20, 2009, at which time the parties exchanged written proposals. The parties completed the 150 day bargaining period and, on June 7, 2010, mediation under ORS 243.712 commenced. The parties engaged in a number of mediation sessions during June and July 2010, however, it appears that no new written proposals were submitted by either party.

In a letter dated July 13, 2010, from Neil McFarlane, General Manager of TriMet, to Robert Nightingale, State Conciliation Service, TriMet filed a notification of impasse with the mediator under ORS 243.712(2)(a). Because the Union employees at TriMet are prohibited from striking, on July 21, 2010, the parties petitioned for interest arbitration and submitted their respective final offers and cost summaries. In a letter dated July 22, 2010, from Sandra Elliott of the Oregon Employment Relations Board (ERB), to Adam Collier and Anil Karia, attorneys for the parties, Ms. Elliott stated: “...you are notified that interest arbitration is initiated.” In a July 28, 2010, letter from Ms. Elliott, the parties were provided with a strike list of Oregon interest arbitrators.¹

¹ The undersigned was not listed on the strike list and was apparently appointed on an ad hoc basis by the parties.

On or about August 11, 2010, the Union filed an Unfair Labor Practice Complaint alleging that TriMet's final offer was illegal because it included new issues. In May, 2011, an "expedited" hearing was held in Salem, Oregon before the Oregon Employment Relations Board (ERB). On or about September 12, 2011, the ERB ruled in favor of the Union and ordered TriMet to submit a revised final offer excluding a number of unlawful proposals. On October 3, 2011, TriMet asked for reconsideration of the ERB's findings. On November 17, 2011, the ERB affirmed its original decision against TriMet.

Following the ERB's ruling, TriMet submitted its First Revised Final Offer on December 15, 2011. On or about December 16, 2011, the Union filed a motion to compel with the ERB requesting that TriMet be ordered to comply with the ERB's original order, and stating that TriMet's First Revised Final Offer was also illegal because it failed to comply with the Board's previous order. The ERB ruled in favor of the Union and on February 16, 2012, ordered TriMet to submit another final offer. On or about March 5, 2012, TriMet submitted its Second Revised Final Offer. On or about April 29, 2012, the Union submitted its Last Best Offer and TriMet submitted its final Last Best Offer on or about April 30, 2012.

The parties selected the undersigned as their Interest Arbitrator pursuant to the statutory procedures. As the Interest Arbitrator, I am to determine which Last Best Offer in its entirety² (either from the Union or the Employer) better meets the following statutory criteria of ORS 243.746.

² Since the passage of SB 750 in 1995, an Oregon interest arbitrator has been required to select either one side's Last Best Offer "package" in total, or to select the other. In other words, unlike many other states (and unlike Oregon before the passage of SB 750), an Arbitrator is not allowed to evaluate the parties' offers on an issue-by-issue basis. In most other jurisdictions an interest arbitrator would have the freedom to: select the better proposal(s); combine elements of two proposals; or even craft a different contract clause altogether so as to develop a total package that, in the arbitrator's view, best serves the interests of the parties and the public.

RELEVANT STATUTORY LANGUAGE

ORS 243.746 provides in relevant part:

(4) Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, unresolved mandatory subjects submitted to the arbitrator in the parties' last best offer packages shall be decided by the arbitrator. Arbitrators shall base their findings and opinions on these criteria giving first priority to paragraph (a) of this subsection and secondary priority to paragraphs (b) to (h) of this subsection as follows:

(a) The interest and welfare of the public.

(b) The reasonable financial ability of the unit of government to meet the costs of the proposed contract giving due consideration and weight to the other services, provided by, and other priorities of, the unit of government as determined by the governing body. A reasonable operating reserve against future contingencies, which does not include funds in contemplation of settlement of the labor dispute, shall not be considered as available toward a settlement.

(c) The ability of the unit of government to attract and retain qualified personnel at the wage and benefit levels provided.

(d) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance benefits, and all other direct or indirect monetary benefits received.

(e) Comparison of the overall compensation of other employees performing similar services with the same or other employees in comparable communities. As used in this paragraph, "comparable" is limited to communities of the same or nearest population range within Oregon. Notwithstanding the provisions of this paragraph, the following additional definitions of "comparable" apply in the situations described as follows:

For any city with a population of more than 325,000, "comparable" includes comparison to out-of-state cities of the same or similar size;

For counties with a population of more than 400,000, "comparable" includes comparison to out-of-state counties of the same or similar size; and

For the State of Oregon, "comparable" includes comparison to other states.

(f) The CPI-AII Cities Index, commonly known as the cost of living.

(g) The stipulation of the Parties.

(h) Such other factors, consistent with paragraphs (a) to (g) of this subsection as are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment. However, the arbitrator shall not use such other factors, if in the judgment of the arbitrator, the factors in paragraphs (a) to (g) of this subsection provide sufficient evidence for an award.

(5) Not more than 30 days after the conclusion of the hearings or such further additional periods to which the Parties may agree, the arbitrator shall select only one of the last best offer packages submitted by the parties and shall promulgate written findings along with an opinion and an order. The opinion and order shall be served on the parties and the board. Service may be personal or by registered or certified mail. The findings, opinions and order shall be based on the criteria prescribed in subsection (4) of this section.³

Although the statute directs the interest arbitrator to give priority to criterion (a), i.e. “the interest and welfare of the public,” and to give only secondary priority to criteria (b) through (h), as a general rule most arbitrators have found it impossible to apply a standard such as “the interest and welfare of the public” without considering the secondary factors. As the late Carlton Snow observed shortly after the enactment of SB 750:

In the abstract, it is impossible to find meaning in the phrase ‘the interest and welfare of the public.’ The meaning of this criterion must be found as it is applied within the context of other criteria and the facts of a given case.”⁴

LAST BEST OFFERS

The Union’s Last Best Offer dated July 21, 2010 is as follows:

Maintain the status quo as set forth in the parties’ December 1, 2003 – November 30, 2009 collective bargaining agreement under a new three year agreement commencing December 1, 2009 and expiring November 30, 2012 with the exception of Section 9-Health and Welfare Benefits, Par. 1 below.

³ At the conclusion of the hearing, the parties agreed to extend the time period for the undersigned to enter his order until August 1, 2012.

⁴ Oregon Public Employees’ Union, Local 503 and State of Oregon (OSCI Security Staff), IA-1 1-95 (Snow, 1996).

Section 9 – HEALTH AND WELFARE BENEFITS

Par. 1. Medical, Hospital, Prescription Drug, Dental, Convalescence and Optical

a. Based on the health insurance plans in effect on December 31, 2010, The District shall pay one hundred percent (100%) ninety-eight and one half percent (98.5%) of a composite rate for the medical, hospital and prescription drug, dental, convalescence and optical benefits for fulltime employees and dependents effective January 1, 2011; and shall pay ninety-seven percent (97%) effective January 1, 2012. The District shall continue to pay one hundred percent (100%) for retirees and their dependents. The benefits and specific coverage of these plans shall be the same as currently provided. Hearing aid coverage will be added to any plans not previously providing such coverage. A second dental plan will be added for full-time employees, their dependents, and retirees. Providers of these plans may be changed during the life of this Agreement only if both the District and the Association agree to do so in writing.

b. For those retired employees who left the service of the District prior to February 1, 1992, the District shall pay the full cost of providing these retirees and their dependents with medical, hospital, prescription drug, optical benefits and dental (retiree and spouse only), not including orthodonture (sic) available under the health and welfare plan in place at that time.

The estimated cost of ATU’s final offer is as follows:

		Cost in Dollars	Increase in Dollars
Current		\$176,054,436.71	
Year 1	Min. 3%	\$180,935,055.30	\$4,880,618.59
	Max. 5%	\$180,935,055.30	\$4,880,618.59
Year 2	Min. 3%	\$190,119,967.95	\$9,184,912.65
	Max. 5%	\$194,571,997.24	\$12,191,477.89
Year 3	Min. 3%	\$199,029,224.68	\$8,909,256.73
	Max. 5%	\$206,726,176.23	\$12,154,178.99

	Min. 3%	\$570,084,247.92	
Total	Max. 5%	\$582,233,228.47	

The ATU obtained these figures by calculating the cost of maintaining the status quo under the parties' December 1, 2003 - November 30, 2009 Collective Bargaining Agreement, including the status quo regarding wages (minimum 3%; maximum 5%), retirement, and health insurance. Cost savings are the result of the proposed revision in the health insurance section of its Last Best Offer due to the employee paying a portion of the health insurance costs through premium sharing.

The Employer's Second Revised Final Offer is as follows:

Pursuant to ORS 243.712 and OAR 115-40-000 and the Board's Order in ATU 757 v. TriMet, Case UP-016-11, TriMet's Second Revised Final Offer for a contract with ATU 757 is current contract language except the changes to the contract sections and paragraphs noted below. All of the specific changes are set forth in the attached pages in "track changes" format.

1. Cover Page and Article 1, Section 1, Paragraph 1
2. Article 1, Section 1, Paragraph 6
3. Article 1, Section 3, Paragraph 1
4. Article 1, Section 9, Paragraphs 1 and 2; Active Employee Health Benefits Summary (new); and Summary Plan Descriptions
5. Article 1, Section 13, Paragraph 1
6. Article 1, Section 19, Paragraphs 12 and 14
7. Pension Plan and Permanent Disability Agreement, Section I, Paragraphs 2 and 5-16
8. Pension Plan and Permanent Disability Agreement, Section II, Paragraph 3
9. Pension Plan and Permanent Disability Agreement, Section III

11. Retiree Benefits Summary

Also attached is TriMet's cost summary of the Second Revised Final Offer.⁵

While the Employer has proposed a number of relatively minor contract changes, the essential issues in dispute are health insurance and pension. The Employer's Last Best Offer includes a proposed change in the health insurance and pension benefits to both current and retired employees. There is no dispute that TriMet is dealing with financial hardship and the parties do not differ greatly on the projected costs to TriMet under their respective proposals.

II. ANALYSIS

Interest arbitration in the public sector differs from grievance arbitration in the context of a collective bargaining agreement primarily because it is driven by statutory dictates as opposed to the terms that the parties negotiated. In most cases, the statutes in question are those of the state within which the matter is being heard; therefore, the regulations that constrain the Arbitrator are specific to that specific state. Moreover, statutes are susceptible to modification and amendment thus having the potential to change over time.

Arbitrator Tim Williams authored the first interest arbitration decision involving the State of Oregon and the Oregon State Police Officers' Association in 1985. Under the statutory authority in place at that time, Arbitrator Williams provided the award on an issue by issue basis. In doing so, Arbitrator Williams was free to edit individual proposals to ensure compliance with statutory criteria.⁶

Since that time, the Public Employee Collective Bargaining Act (PECBA) has been amended by the legislature and interest arbitration is now provided on a total package basis.

⁵ The full text of TriMet's final costing analysis is omitted for the sake of brevity.

⁶ *The State of Oregon Department of State Police and Oregon State Police Officers' Association* (Williams, 2010).

Arbitrators no longer have the authority to edit the parties' proposals and must simply select one package or the other. Under this statutory scheme, each package must be viewed as a whole and the advisability of awarding the package considered in light of the criteria as set forth above. This obviously puts the Arbitrator in a position, at times, of awarding a package that has individual parts that he or she does not find to be meritorious. In such a case, the package as a whole may be viewed as better tuned to statutory criteria even though individual parts are seen as having substantial deficiencies. Awarding provisions that are seen as deficient does not always make the Arbitrator feel comfortable; and, in the instant case, the undersigned is in the uncomfortable position of choosing a Last Best Offer (LBO) in which he will award contract language that he finds personally offensive.

In the case at hand, the Arbitrator spent a considerable amount of time reviewing the exhibits provided by the parties, listening to the audio transcript that was made of the hearing, and giving full and thoughtful consideration to the parties' arguments. Both parties provided lengthy and well written briefs. Ultimately, the Arbitrator is awarding TriMet's Modified Final Offer package as he finds that it is the best total fit to the statutory criteria. He does so reluctantly as there are parts of the package which he believes are unwarranted, poor public policy, and simply unfair. The Arbitrator offers the following multi-point analysis on an issue by issue basis to explain the reasoning by which he arrived at the above conclusion.

There is concern expressed in the briefs of both parties that data being used lacks clarity and precision. The Arbitrator notes that his experience leads to the conclusion that this assessment is generic to interest arbitration in general. No matter how hard the parties try, employment data is extremely difficult to ascertain with certainty. Changes are constant; senior employees retire and junior employees are hired, new positions are created, old positions are

eliminated, employees are promoted, and work is reclassified.⁷

Further, the traditional statutory factors previously listed are not as helpful in this proceeding as they are in many other arbitrations. Specifically ORS 243.746(e) provides:

Comparison of the overall compensation of other employees performing similar services with the same or other employees in comparable communities.

As used in this paragraph, “comparable” is limited to communities of the same or nearest population range within Oregon. For the use of comparability as statutory criteria, the statute restricts comparable communities to “communities of the same or nearest population range within Oregon.”⁸ Arbitrator Lindauer clarified this requirement:

The statutory language is clear. ORS 243.746(4)(e) specifically limits the definition of ‘comparable’ to ‘communities of the same or nearest population range within Oregon.’ The legislature provided no additional criteria in the statute to qualify the term ‘comparable communities.’ Comparability is defined solely on the basis of population.⁹

For out of state comparators, the statute similarly requires a comparable city to include the same or similar population size.¹⁰ Thus, TriMet is limited to using service area population when choosing other transit agencies to act as comparators.¹¹ The above statutory factor is simply irrelevant as there are no jurisdictions in Oregon that are in any way comparable to the scope of services offered by TriMet, its service population, or the size of its budget. Simply put, it is in the interest of both parties to approach the legislature to amend the statute in a manner that would provide for statutory comparables for the arbitrator to consider.

⁷ *The State of Oregon Department of State Police and Oregon State Police Officers’ Association* (Williams, 2010).

⁸ ORS 243.746(4)(e).

⁹ *International Association of Firefighters, Local 696, and the City of Astoria, IA-14-00* (Lindauer, 2000).

¹⁰ ORS 243.746(4)(e)(A).

¹¹ It is important to note that this criterion was developed before transit workers were strike prohibited. While the statute refers to comparable “cities” and their “population,” the comparison should be to comparable transit agencies and their service area population for purposes of this analysis.

The statutory criterion also requires the Arbitrator to give first consideration to the interest and welfare of the public. It is the Arbitrator's conclusion that the interest and welfare of the public is best served by an award that has the least chance of increasing employee turnover, decreasing employee morale, increasing fares, discontinuing free rail zones, reconfiguring routes, or reducing services. Of course, these goals are mutually incompatible.

The statute also specifies that the Arbitrator is to give full consideration to the "reasonable financial ability of the unit of government to meet the costs of the proposed contract giving due consideration and weight to the other services, provided by, and other priorities of the unit of government as determined by the governing body." This is what is commonly referred to as "ability to pay."

A. Ability to Pay

At the outset of the hearing, it became clear that TriMet would argue they had an "inability to pay." As the leading treatise in the field makes clear:

In the public sector, with the necessity of continuing to provide adequate public service as a given, 'going out of business' is not an option, and an employer's *inability* to pay can be the decisive factor in a wage award notwithstanding that comparable employers in the area have agreed to higher wage scales...¹²

However, economic distress for public employers is not a new issue and commentators have been writing learned papers on the subject since the 1950s.¹³ In the instant case, there is no question that TriMet is experiencing a very difficult economic environment. Some would argue that the ability of the Employer to pay is irrelevant and that market wages should be paid

¹² Elkouri & Elkouri, *How Arbitration Works*, (6th ed., 2003).

¹³ See, *The Arbitration of Wages*, University of California Press, Berkeley and Los Angeles (1954). "Nowhere in the public sector is the problem of interest arbitration more critical than in the major urban areas of the nation. Municipal governments are highly dependent, vulnerable public agencies. Their options for making concessions in collective bargaining are at best limited, and are often nullified by social and economic forces which command markets, resources, and political power extending far beyond the city limits."

regardless.¹⁴ Others would argue that TriMet has adequate reserves to pay the Union employees this year, so that it would be acceptable to deplete the Employer's reserve fund.¹⁵

This arbitrator does not ascribe to either of the above theories; however, the fact remains that the Employer has been well-managed and continues to have reasonable financial reserves. TriMet states that "The total difference in cost between the two proposals over the proposed three year term of the agreement is slightly more than \$12 million, due almost entirely to the parties' divergent health insurance proposals." TriMet admits that the "financial difficulties stem not only from both the unsustainable wage and benefit package found in the collective bargaining agreement, but from the effects of the recession." TriMet argues that it has almost "no ability to increase its revenues to offset the rising labor costs" and that it has already increased revenue by increasing fares.

It is also axiomatic in interest arbitrations that the Employer has the burden of proof of establishing its "inability to pay." Further, "the alleged inability to pay must be more than speculative."¹⁶ An unwillingness to pay is not enough to satisfy the statute; the statute requires showing an inability to pay.¹⁷ Looking at TriMet's approved 2012-2013 budget one sees that "TriMet's FY13 Contingency is \$20 million..."¹⁸ Using reserves, TriMet could pay the Union's proposal if they chose to do so; however, the inevitable result would be substantial service cuts and/or fare increases. TriMet, while suffering from severe financial problems, still has the technical ability to pay an adverse award.

¹⁴ See, *City of Quincy*, 81 LA 352 (1982). "The price of labor must be viewed like any other commodity which needs to be purchased. If a new truck is needed, the City does not plead poverty and ask to buy the truck for 25% of its established price. It can shop various dealers and makes of truck to get the best possible buy. But in the end the City either pays the asked price or gets along without a new truck."

¹⁵ See, *Northwest Kans. Educational Service Center*, 113 LA 47 (1999). "Consequently, if the Union's salary proposal is implemented, the district's reserves for next year might decrease, but no over spending will result."

¹⁶ Elkouri & Elkouri, *How Arbitration Works*, (6th ed., 2003).

¹⁷ *Bend Firefighter's Association and City of Bend*, IA-09-95 (Snow, 1996).

¹⁸ Employer Exhibit 72, page 11.

B. THE INDIVIDUAL PROPOSALS

1. Pension

TriMet argues that its “proposed changes to the pension benefits will have little effect on the current employees and retirees.” The preceding is simply factually incorrect. TriMet proposed to adjust the pension benefit based on the CPI with a minimum increase of 0% and maximum increase of 7% per year. For employees who retire after the decision in the instant case, “their pension benefit will be adjusted based on 90% of the CPI (up to a maximum of 7%).” TriMet has also proposed that new employees will be eligible for a defined contribution plan rather than a defined benefit plan.

Here, the Employer is seeking to take away two longstanding benefits without granting the Union anything in return. As a general rule, “the interest and welfare of the public is dispositive where a party seeks to take away a previously negotiated benefit without appropriate justification.”¹⁹ Arbitrator Harris reasoned that if a party trying to change the status quo has not provided an appropriate justification or a corresponding quid pro quo, then it is not in the interest and welfare of the public to choose that party’s Last Best Offer. Choosing a Last Best Offer that “seeks to override the status quo . . . without offering a quid pro quo . . . would be antithetical to harmonious labor relations and would violate traditional principles of collective bargaining.”²⁰

In the instant case, the Employer offers two separate proposals. The first proposal will remove the Union retirees’ possibility of receiving pension benefits that increase faster than inflation. The current pension benefit for existing employees and retirees adjusts each year based on the wage adjustment of bargaining unit employees (which in the expired contract was based on the CPI) with a minimum increase of 3% and a maximum increase of 5%. Under

¹⁹ *Lincoln County v. Lincoln County Sheriff’s Deputies Association*, IA-19-03 (Harris, 2005).

²⁰ *Id.*

TriMet's Last Best Offer, "... the pension benefit will continue to adjust annually in accordance with the CPI, but the minimum increase will be 0% and the maximum increase will be 7%. For current employees who retire after the Arbitrator's decision, their pension benefit will be adjusted based on 90% of the CPI (up to a maximum of 7%)." In short, in times of low inflation, TriMet employees have been receiving pension increases greater than the rate of inflation. This proposal would change that approach while at the same time raising the cap of inflation adjustments to 7%.

Stated another way, TriMet's Last Best Offer limits the retirement pay increases to 90% of the CPI for the previous year, not to exceed 7%. This proposed change takes away the 3% floor from both current and future retirees. At hearing, both parties called experts who testified about the legality of taking away such "vested" or "accrued" benefits for TriMet retirees and current employees whose benefits have vested. While the legality of this proposal is unclear, TriMet's LBO, if awarded, will result in litigation. Given the nature of this issue, litigation is likely to continue up to the Oregon Supreme Court, encompassing multiple years and costing taxpayers hundreds of thousands of dollars.

In enacting the Public Employees Collective Bargaining Act, the Oregon Legislature expressed that "unresolved disputes in the public service are injurious to the public, the governmental agencies, and public employees." ORS 243.656(2). While this arbitrator believes that the Employer will prevail, there are good arguments that could be made on both sides of this argument. At the end of the day, arbitrators place the burden of proof on the party seeking to change the terms of the current bargaining agreement.²¹ The status quo consists of "the existing terms and conditions of the Agreement" and "absent persuasive evidence to justify some

²¹ See, *City of Tigard and Tigard Police Officers' Association*, IA-08-02 (Levak, 2002).

significant change, the proposal that most nearly continues the existing terms and conditions of the agreement is preferred.”²²

As this arbitrator has previously held, where a party in an interest arbitration seeks to change the status quo, it must do so by satisfying a “compelling need” test. The party that seeks to modify or change the status quo bears the burden of proving that:

- a. a “compelling need” for change exists;
- b. that the party’s proposal addresses that “compelling need”; and,
- c. that the party proposing to change the status quo has the burden to justify taking away a benefit that was previously obtained through negotiated settlement.²³

TriMet has shown no compelling need for this proposal other than the economic cost and, standing alone, it would not be awarded (however, the cost would be included in the total compensation analysis set forth below).

2. The New Defined Contribution Benefit Plan

TriMet also proposed that “new employees hired after the Arbitrator’s decision will be eligible for a defined contribution plan rather than a defined benefit plan. The defined contribution plan would have the same elements as TriMet’s defined contribution plan for non-union employees. Under the plan, TriMet annually would contribute 8% of the employee’s base wages and the employee also could contribute up to 15% if he/she desired.”

TriMet argues that it has “demonstrated a compelling need for its retirement proposals. As discussed in detail above, the union defined benefit plan is significantly underfunded – only 55.9% as of July 1, 2011. The total unfunded amount is \$228,554,000.” The foregoing is simply

²² *Id.*

²³ *Gladstone Police Association and City of Gladstone, IA-10-00 (Gaba, 2001).*

irrelevant. Why is the TriMet pension underfunded? Has the Employer consistently chosen to underfund its plan? I don't know. Did TriMet lose a substantial portion of its pension assets through foolish investments? I don't know. Has the Employer consciously chosen to make foolish assumptions as to investment returns? I don't know. In short, there may be good or bad reasons for the plan to be underfunded and TriMet has simply provided no evidence for the change other than to state that "the plan is underfunded." This is simply TriMet's attempt at a tautology which results in simple sophistry.

TriMet's defined benefit plan is, of course, one in which the benefit upon retirement is determined by a set formula rather than depending on investment returns. 26 U.S.C. § 414(j) specifies a defined benefit plan to be any pension plan that is not a defined contribution plan (see below), while a defined contribution plan is any plan with individual accounts. A traditional pension plan that *defines a benefit* for an employee upon that employee's retirement is a defined benefit plan.

A traditional form of a defined benefit plan is the final salary plan, under which the pension paid is equal to the number of years worked, multiplied by the member's salary at retirement, multiplied by a factor known as the accrual rate. The final accrued amount is available as a monthly pension or a lump sum, but usually paid monthly.

The benefit in a defined benefit pension plan is determined by a formula that can incorporate the employee's pay, years of employment, age at retirement, and other factors. Uniquely, TriMet's plan is very egalitarian and is based on a simple years of service calculation that does not allow "spiking" or other abusive practices common with some defined benefit plans.

Also, inflation during an employee's retirement affects the purchasing power of the pension; the higher the inflation rate, the lower the purchasing power of a fixed annual pension. This effect can be mitigated by providing annual increases to the pension at the rate of inflation as the TriMet plan does. As noted above, TriMet seems unique in providing for a cost of living adjustment that can be more than the rate of inflation. This method is advantageous for the employee since it stabilizes the purchasing power of pensions.

If a pension plan allows for early retirement, payments are often reduced to recognize that the retirees will receive the payouts for longer periods of time. Under the ERISA rules,²⁴ any reduction factor less than or equal to the actuarial early retirement reduction factor is acceptable.²⁵ Many defined benefit plans such as TriMet's include early retirement provisions to encourage employees to retire early, before the attainment of normal retirement age. Employers would rather hire younger employees at lower wages. Some of those provisions come in the form of additional temporary or supplemental benefits, which are payable to a certain age, usually before attaining normal retirement age.²⁶ Most importantly, many of the Union-represented positions at TriMet are physically and mentally demanding and many employees will be incapable of performing their duties at age sixty-five. The undersigned questions his ability to drive a thirty ton bus during rush hour in downtown Portland even though he's not yet sixty years old.

Critically, defined benefit plans may be either funded or unfunded. In an unfunded defined benefit pension plan, no assets are set aside and the benefits are paid for by the employer

²⁴ It should be noted that as a public employer, TriMet is not subject to ERISA.

²⁵ Early Retirement Provisions in Defined Benefit Pension Plans. *Ann C. Foster*, <http://www.bls.gov/opub/cwc/archive/winter1996art3>.

²⁶ Qualified Domestic Relations Order Handbook *By Gary A. Shulman*, pp.199-200, Published by: Aspen Publishers Online, 1999 ISBN 0735506655, ISBN 9780735506657.

or other pension sponsor as and when they are paid. This method of financing is known as pay-as-you-go. The social security system is “unfunded,” having benefits paid directly out of current taxes and social security contributions. In a funded plan such as TriMet’s, contributions from the employer and plan members are invested in a fund towards meeting the benefits. The future returns on the investments, and the future benefits to be paid, are not known in advance, so there is no guarantee that a given level of contributions will be enough to meet the benefits. The contributions to be paid are regularly reviewed in a valuation of the plan’s assets and liabilities, carried out by an actuary to ensure that the pension fund will meet future payment obligations. This means that in a defined benefit pension plan, investment risks and investment rewards are typically assumed by the sponsor/employer (TriMet) and not by the individual. If a plan is not well-funded, the plan sponsor may not have the financial resources to continue funding the plan.

The open-ended nature of these risks to the Employer is the reason given by many employers for switching from defined benefit to defined contribution plans over recent years. The risks to the employer can sometimes be mitigated by discretionary elements in the benefit structure, for instance in the rate of increase granted on accrued pensions, both before and after retirement.

Defined benefit plans are sometimes criticized as being paternalistic as they enable employers and unions to make decisions about the type of benefits, family structures, and lifestyles of their employees. However, in most circumstances they are typically more valuable than defined contribution plans for most employees (mainly because the employer tends to pay higher contributions than under defined contribution plans).

The “cost” of a defined benefit plan is not easily calculated, and requires an actuary. However, even with the best of tools, the cost of a defined benefit plan will always be an

estimate based on economic and financial assumptions. These assumptions include the average retirement age and lifespan of the employees, the returns to be earned by the pension plan's investments, and any additional taxes or levies (such as those required by the Pension Benefit Guaranty Corporation in the private sector). Simply put, under a defined benefit plan, the benefit is relatively secure but the contribution is uncertain even when estimated by an actuary.

In a defined contribution plan, contributions are paid into an individual account for each member. The contributions are invested, for example in the stock market, and the returns on the investment (which may be positive or negative) are credited to the individual's account. On retirement, the member's account is used to provide retirement benefits, sometimes through the purchase of an annuity, which then provides regular income. Money contributed can either be from employee salary deferral or from employer contributions. This is what TriMet proposes for the ATU.

In the proposed defined contribution plan, investment risks and investment rewards are assumed by each individual/employee/retiree and not by TriMet. In addition, participants do not necessarily purchase annuities with their savings upon retirement and bear the risk of outliving their assets. The "cost" of a defined contribution plan is readily calculated, but the benefit from a defined contribution plan depends upon the account balance at the time an employee is looking to use the assets. So, for defined contribution plans, the contribution is known but the benefit is unknown (until calculated). Also, despite the fact that the participant in a defined contribution plan typically has control over investment decisions, the plan sponsor retains a significant degree of fiduciary responsibility over the investment of plan assets, including the selection of investment options and administrative providers.

In the instant case, there is no question that all defined benefit plans are different. Some defined benefit plans may be “good” and some may be “bad.” Some plans may be actuarially sound while others may not. TriMet’s Last Best Offer proposes that all new employees hired after the date of the arbitrator’s decision shall be made participants in a defined contribution plan, while all current TriMet employees will remain on a defined benefit plan. As noted above, defined contribution plans are less favorable for employees because they place all of the risk of investment gains and losses on the employee and guarantee nothing at the time of retirement. In contrast, under defined benefit plans, the risk of investment losses and gains remains with the employer and employees are guaranteed a set amount at retirement. TriMet’s proposed change to a defined contribution plan places substantial risks on employees and is not in the interest and welfare of the public.

Standing alone, I would accept the Union’s proposal on this subject and enter an Award in their favor as TriMet is not attempting to reduce their costs so much as they are attempting to transfer investment risks from TriMet to the unionized employees. TriMet has shown no compelling need for this proposal and, standing alone, it would not be awarded.

C. Joint Labor Relations Committee/Payment of the Union to Attend Grievance Meetings

Under the expired Collective Bargaining Agreement, TriMet is required to pay for a Union representative to represent a grievant at all three steps of the grievance process. TriMet alleges that it “has been forced to pay for the Union to advance meritless grievances against TriMet.” The Union argues that this is “an attempt to retaliate against the ATU for the number of grievances it files.”

TriMet’s Last Best Offer also proposed that the Union be responsible for payment of its own officers to attend and participate in Joint Labor Relations Committee meetings. Given the

poor state of labor management relations at TriMet, it should be no surprise that the committee has not been meeting and that this proposal has no cost.

While the cost of these proposals is minimal, the proposal to not pay for the Joint Labor Relations Committee meetings appears to be motivated by anger or spite rather than by any legitimate need on the part of the Employer. TriMet is a transit agency and its employees work odd shifts with a focus on morning and evening rush hour. Payments to Union officers for work of this nature makes perfect sense for an employer of this type.

Additionally, given the odd shifts worked by Union members, one might have great difficulty in scheduling grievance meetings during an employee's off hours. Again, the party that seeks to modify or change the status quo bears the burden of proving that:

- a. a "compelling need" for change exists;
- b. that the party's proposal addresses that "compelling need"; and,
- c. that the party proposing to change the status quo has the burden to justify taking away a benefit that was previously obtained through negotiated settlement.²⁷

TriMet has shown no compelling need for these proposals and, standing alone, they would not be awarded.

D. Child Care/Elder Care Assistance Program; Benefits Coordinator; Transit Exchange Program

TriMet's proposal to "cap its annual contribution to the Child Care/Elder Care Assistance Program at \$55,000; to cap its monthly contribution to the Benefits Coordinator position at \$1,500; and to eliminate its monthly contribution to the Transit Exchange Program" is a simple attempt to reduce its expenses. The Union argues that TriMet has not proven a "compelling need

²⁷ *Gladstone Police Association and City of Gladstone*, IA-10-00 (Gaba, 2001).

nor offered a justification for changing a contract term that was previously obtained through negotiated settlement.”

Overall, it is the opinion of the Arbitrator, that TriMet’s total package results in less financial demand on the agencies’ available money and does so with little or no harm to the employees. However, these reductions in benefits must be considered in the context of total compensation as set forth below. TriMet would show a compelling need for these proposals and, standing alone, they would be awarded if they were justified by a total compensation analysis.

E. Seniority

TriMet states that its purpose for the seniority proposal is to “prevent long-time management employees from bumping back into a bargaining unit position for one day and then retiring in order to get better retiree benefits such as fully paid health insurance benefits.” TriMet’s proposal prohibits “an employee promoted to a non-union position from retaining their seniority for more than five years from the date of the promotion.” The Union argues that TriMet’s Last Best Offer proposal for seniority involves management employees, not Union, and that it “should fix this issue through management contracts, not by forcing it into its contract with ATU.”

Although only a handful of management employees have chosen to game²⁸ the TriMet Retiree Health Plan by bumping back into a bargaining unit position for one day before retiring, this proposal will help TriMet (to some small degree) address its huge unfunded Retiree Health Plan liability. Significantly, TriMet’s proposal will have no effect on current bargaining unit employees. Employees are not forced to promote out of the bargaining unit and they will continue to have the option of whether to accept a promotion. More importantly, the huge

²⁸ “Game” is not a term that this arbitrator uses lightly, however, that is exactly what TriMet management employees are doing when they bid back into Union jobs on their last day of work.

financial cost of TriMet's Retiree Health Plan is included in the calculation of total compensation set forth below. One could very well argue that this proposal benefits the members of the bargaining unit as they will not be burdened by total compensation costs that arise by management employees abusing a benefit that was designed for Union members.

TriMet has demonstrated a compelling need for its seniority proposal which would prevent an employee promoted to a non-union position from retaining their seniority for more than five years from the date of promotion out of the bargaining unit.

F. Health Insurance

The "Elephant in the room" is an English metaphorical idiom for an obvious truth that is being ignored or goes unaddressed.²⁹ The idiomatic expression also applies to an obvious problem or risk no one wants to discuss. It is based on the idea that an elephant in a room would be impossible to overlook; thus, people in the room who pretend the elephant is not there have chosen to avoid dealing with the looming big issue. In the instant case, the TriMet - ATU health plan is not just an elephant but a two headed Siamese twin elephant that has been ignored for well over a decade.³⁰ One head of the elephant is the current health plan for active ATU members while the larger and more problematic head is the same health plan as it is applied to TriMet retirees. The financial impact of this benefit dwarfs all of the other proposals and affects total compensation to a degree that effectively controls the outcome of this Award. The two issues are discussed separately below.

1. The Health Plan for Active Employees

Under the expired Collective Bargaining Agreement, TriMet offered two health insurance plans to its bargaining unit employees and retirees: a Regence PPO plan and a Kaiser HMO plan.

²⁹ *Cambridge Academic Content Dictionary*, p. 298. Cambridge University Press. (2009).

³⁰ I apologize to the reader for the mixed- or more accurately, mangled- metaphor.

The current Regence plan is one of the most generous health insurance plans the undersigned has seen in the past two decades and costs more than \$30,000 per year for individuals with full family insurance coverage. Under status quo provisions of the expired Collective Bargaining Agreement, TriMet pays 100% of the monthly premium and the employees/retirees pay virtually nothing except for a \$5 co-pay for office visits and prescriptions.

In many respects, neither party bears responsibility for the costs of this plan. When first negotiated in the early 1990s, this plan was generous but not exceptional. However, as times changed, this plan remained the same with the result that neither party in this proceeding could identify a comparable plan. The long length of the prior six year contract and the length of time between its expiration and this hearing have exacerbated an already difficult situation. The current plan is shockingly expensive and drives the “total compensation” analysis for this bargaining unit to a degree that essentially controls the outcome of this Award.

Even the Union agrees that “it is undisputed that we are all involved in extremely difficult economic times,” and made a well thought out proposal to reduce benefits for its members through premium share for the current health plan. The fact that the Union has agreed to contribute 1.5% of the cost of health care for calendar year 2011 and 3% of the cost of health care for calendar year 2012 indicates their recognition that the health plan has become prohibitively expensive.

The main problem with the Union’s proposal is that it focuses on “premium share” as a method to reduce the cost to the Employer of this plan. While premium share does reduce the Employer’s costs, it does nothing to address the usage of the plan that could be reduced through co-pays, co-insurance, or other plan design elements.

TriMet has proposed to change the Regence plan design to a 90/10 co-insurance plan retroactive to Dec. 1, 2009, which is the same plan that was available for TriMet's non-union employees and retirees at that time (on January 1, 2012, TriMet's plan for non-union employees was changed to an 80/20 plan). Under its Last Best Offer, TriMet's proposed plan design changes would reduce premium costs by approximately 15%, while TriMet would continue to pay 100% of the monthly premium cost. The proposed plan is still very generous and compares favorably to other plans maintained by Oregon public sector employers.³¹

TriMet's proposal includes no changes to the Kaiser plan design. TriMet will continue to pay 100% of the monthly premium cost for the Kaiser plan for both employees and retirees. Forty-two percent (42%) of TriMet's union employees are currently enrolled in the Kaiser plan. Moreover, an open enrollment period will occur immediately following the issuance of this Award, which will allow individuals to switch from the Regence plan to the Kaiser plan (or vice versa).

The Union has many arguments as to why the Employer's proposal should not be adopted and all of the Union's arguments have merit. First, TriMet's Last Best Offer proposes that on a retroactive basis (from December 1, 2009), all Union members will move to new health insurance plans. The undersigned finds this proposal to be both harsh and unfair to employees who made health care decisions based on what their current plan provided. If this were a close case, the Employer's action in seeking to implement a retroactive proposal would result in the Employer's proposal being rejected out of hand. Further, a proposal of this nature raises serious legal concerns and may very well violate Oregon law depending on how it is implemented.

³¹ This plan design change would also apply to retirees, whose health care benefit is defined by the plan maintained for active employees and is addressed below.

Also, TriMet's Last Best Offer proposal lacks the details normally provided when implementing a new health plan. The Last Best Offer provided no details or explanation for how TriMet intended to collect the money they would be owed from bargaining unit members through retroactive application of these plans. TriMet also did not provide an explanation for how the retroactivity would be applied during bargaining or in the months preceding the interest arbitration.

The vagueness of the Employer's proposal was foolish and severely prejudiced TriMet's chances of prevailing in this matter. A fundamental question considered by arbitrators in assessing Last Best Offers is whether there is "sufficient specificity in the proposed language to prevent misinterpretation or misapplications of the language."³² This is a question of primary importance because "it is not in the interest and welfare of the public to select a Last Best Offer that raises more questions than it answers."³³ No testimony was presented to address a number of likely scenarios regarding the retroactivity of health insurance plans. For instance, how will TriMet recoup money from ATU employees who no longer work for TriMet? If there are no wage checks to deduct from, how will TriMet collect the money? Will TriMet subject people to collection agencies? How will that impact credit scores? What happens if an ATU member's wage check is insufficient to cover the amount owed to TriMet? Will TriMet deduct the additional money from members' paychecks? Will the money be taken all at once, or in smaller increments over an undefined period of time?

Further, in granting TriMet's proposal, the undersigned realizes that he is presenting the Union with yet another invitation to litigate as TriMet's health insurance proposal may have been unlawfully amended at the hearing and TriMet may have presented substantive amendments to

³² *City of Medford v. IAFF Local 1431*, IA-21-05 (Skratek, 2008).

³³ *Id.*

its health insurance proposal. These amendments may have included a new methodology for implementing TriMet's Last Best Offer health insurance proposal that may not have previously been provided to ATU and that may have materially changed TriMet's Last Best Offer. While the undersigned has only made factual findings as to the statutory requirements of ORS 243.746, it is possible that a fact-finder could find that TriMet amended its Last Best Offer at the hearing.³⁴

The undersigned is also aware that TriMet's new methodology for recouping the value of health insurance premiums from ATU members could violate Oregon's wage and hour law. Ms. Johnson testified that TriMet proposes to deduct the value of the premiums from the retroactive wages that ATU members will be receiving based on Oregon Employment Relations Board's Order in UP-16-11. Deducting the value of the premiums from wages could very well be unlawful. Under ORS 652.610(3), an employer may only deduct wages under the following circumstances:

- (a) The employer is required to do so by law;
- (b) The deductions are authorized in writing by the employee, are for the employee's benefit and are recorded in the employer's books;
- (c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer and that the deduction is recorded in the employer's books;
- (d) The deduction is authorized by a collective bargaining agreement to which the employer is a party;

³⁴ In *Baker County v. Baker County Law Enforcement Association*, IA-08-06 (Hayduke, 2006), Arbitrator Hayduke stated that "[a]rbitrators operating under ORS 243.746 have . . . made clear that the statute prohibits the parties from making substantive amendments of proposals at hearing." He goes on to note that "an arbitrator's award in favor of a 'corrected' or 'clarified' LBO will carry a cloud of uncertainty and the distinct possibility of further dispute and litigation . . . An award including terms that lack clarity and finality does not best serve the interests and welfare of the public." *Id.*

- (e) The deduction is authorized under ORS 18.736; or
- (f) The deduction is made from the payment of wages upon termination of employment and is authorized pursuant to a written agreement between the employee and employer for the repayment of a loan made to the employee by the employer.

Simply put, TriMet may be subject to additional litigation by my acceptance of its proposal. ORS 652.615 creates a private cause of action for violations of ORS 652.610(3) for actual damages. If TriMet implements the methodology they discussed at the hearing, ATU members may have a cause of action under ORS 652.615 and yet more litigation will inevitably follow.

While it is somewhat unclear, it is possible that TriMet's proposal also violates the Oregon Employment Relations Board's Order in UP-16-11. In February 2012, after more than a year of litigation over TriMet's final offers, the Employment Relations Board issued a compliance order directing TriMet that its position on wages had to be status quo due to TriMet's bad faith bargaining. By amending their Last Best Offer to use the retroactive cost of living adjustments ("COLA") to recoup health insurance premium costs, TriMet could be seeking to avoid having to pay the retroactive wage adjustments. In doing so, TriMet could be seen as violating the Employment Relations Board's Order because its proposal amends its final offer on wages. At the end of the day, the Union has what seems to this arbitrator to be many valid arguments; however, they are arguments that will eventually have to be resolved by the Oregon Employment Relations Board and the courts.

TriMet has shown no compelling need for this proposal other than the economic cost and, standing alone, it would not be awarded, but the cost would be included in the total compensation analysis set forth below. If Retiree Medical were not an issue in this matter, TriMet's Last Best Offer would be rejected.

2. Retiree Medical

Under the expired Collective Bargaining Agreement, TriMet is required to provide retirees with a 100% employer paid health insurance benefit that is the same as the benefit that active employees receive. This benefit includes spouses and dependents, along with the Medicare risk plan for retirees over 65 and their spouses. Currently, TriMet has over 1,200 covered retirees. Over 50% of TriMet's general fund budget currently goes toward personal services and retiree benefits. The Union does not dispute that they have a generous health insurance plan.

TriMet argues that "the current Regence plan is one of the most generous health insurance plans ... and costs more than \$30,000 per year for individuals with full family insurance coverage." TriMet currently pays 100% of the monthly premium and the employees/retirees pay only a \$5 co-pay for office visits and prescriptions; there are no annual deductibles and no co-insurance. The cost of the current plan is \$2,580.75 per month for employees with full family coverage and \$2,807.85 per month for retirees with full family coverage.

TriMet offers two health insurance plans for current employees and pre-age 65 retirees: Regence Plan Medical/Prescription Drug and Kaiser Plan. TriMet's Last Best Offer to the Union stated:

- Regence Plan Medical (58% of employees participate in this plan)
- No employee contribution for insurance premium (Due to ERB's ruling, TriMet must retain the status quo on premium contributions)
- \$5 office visit replaced with 10% coinsurance (no co-insurance for preventive care)
- Annual deductible: \$150 individual/\$450 family (deductible waived for preventive care)
- Out of pocket maximum: \$1,500 individual/\$4,500 family
- Regence Plan Prescription Drug:

\$5/20% Generic; \$15/20% Preferred; 50% Non-Preferred Prescription
Drugs
Out of pocket maximum: \$1,000 individual/\$3,000 family
Kaiser Plan: No changes to plan. No employee contribution, no deductible,
\$5 co-pay, \$5 for prescription drugs (42% of employees participate in this
plan)³⁵

TriMet's Last Best Offer would create a significant savings. The monthly premium would be \$2,201.95 for employees with family coverage and \$2,357.60 for retirees with family coverage. In comparison to TriMet's Last Best Offer, the Union's Last Best Offer would cost approximately \$12 million more during the new contract. Essentially all of the cost savings of TriMet's Last Best Offer would come from reduced health insurance costs.

TriMet's retiree medical benefits appear to be the most generous offered by any public employer in the northwest, which explains in part why TriMet is faced with an \$816 million unfunded liability due primarily to its unfunded retiree medical costs. Many public employers do not contribute anything towards health insurance for retirees. Of those that do contribute, the amounts are significantly less than TriMet provides for its retirees. Unfunded liability as a percent of payroll is far higher at TriMet than other local public agencies that provide employer paid retiree medical benefits. A simple comparison shows:

- Lane Transit District (39%);
- Salem Cherriots (41%);
- Portland Public Schools (54%);
- Multnomah County (57%);
- TriMet (592%).

³⁵ TriMet v. ATU Arbitration Slide Deck, p. 29.

Clearly, the unfunded liability that TriMet is accruing is unsustainable. The Union did not present evidence of any jurisdictions in Oregon or even in the Western United States that have a benefit even remotely as expensive as the TriMet Retiree Medical Plan.

As discussed below, a Total Compensation model for the members of this bargaining unit is driven by health care costs. For example, a comparison of west coast peers (Dallas, Denver, Eugene, Oakland, Sacramento, Salt Lake City, San Diego, San Francisco, San Jose, Santa Anna, and Seattle; hereinafter the “west coast eleven”) shows a TriMet bus driver with fifteen years of experience to be paid 3.2% more than his/her comparators based solely on base wages. Factoring in that Eugene is not a true comparator, it would appear that an average TriMet driver is paid approximately at his/her peer average. Yes, Salt Lake City drivers are paid considerably less, while Seattle drivers are paid considerably more in base wages. However, as noted below, “base wages” are irrelevant to this proceeding. It is the cost of benefits that are driving TriMet’s net hourly compensation per driver. As it appears that TriMet has by far the highest employee health plan costs of the west coast eleven, it is not surprising that this results in TriMet having a higher net total cost per hour for a fifteen year driver than San Francisco or Seattle.

III. APPLICATION OF THE STATUTORY CRITERIA

A. Interest and Welfare of the Public

ORS 243.746(4) dictates that the “interest and welfare of the public” be given primary consideration when deciding which final package to award. Only where the interest and welfare of the public is not an issue standing alone, do arbitrators reference the so-called secondary factors found in ORS 243.746(4)(b)-(h).

With regard to the essential issue in this hearing, health insurance, or more specifically retiree health insurance, TriMet’s Last Best Offer best promotes the interest and welfare of the

public. ORS 243.746(4)(a) provides that such consideration shall be given “first priority” by the arbitrator. Although most arbitrators have found it necessary to consider the “other factors” in ORS 243.746(4) to determine the interest and welfare of the public, this is one of the exceptional cases where that is not required.³⁶ While the Employer’s Last Best Offer is riddled with legal questions and other infirmities, the alternatives to their proposal are severe. If TriMet were a political subdivision that provided panoply of municipal services, this decision might well be different. Unfortunately, transit services are all that TriMet provides and there are no libraries, parks, pools, or zoos to close. The Union and Employer are engaged in a zero sum game in which any increase in total compensation for the bargaining unit members will inevitably result in decreased transit service to the public.³⁷

This is also not a case where a public employer has refused to raise taxes in order to keep wages low. Eighty-five percent (85%) of TriMet’s revenues come from three sources (payroll taxes 50%, federal grants 15%, and fares 20%). Clearly, payroll taxes make up the largest source of TriMet’s funding. Employers pay a tax of .7018% of their employees’ gross wages to TriMet. Self-employed individuals pay the same percent of their net income from self-employment to fund TriMet’s transit services. Currently, the payroll tax rate is increasing at a rate of 1/100th of a percent per year to 2014’s rate of .7218% to pay for transit services and employee compensation that is controlled by this Award. In short, Tri-Met is raising taxes on a consistent basis.

³⁶ See, *Oregon State Police Officers’ Association and State of Oregon*, IA-15-03 (2004), in which Arbitrator Norman Brand stated: “In my view, this is the rare case in which the interest and welfare of the public may be discernible from the context of the dispute.” Arbitrator Brand noted that several factors supported the fact that the State’s last best offer was in the interest and welfare of the public including overwhelming evidence that the employer was experiencing a fiscal crisis; bargaining unit employees still would receive a fair compensation and benefits package; and the employer’s last best offer would avoid the need for further service cuts.

³⁷ It should be noted that in this case, the parties have chosen to enter a less than zero sum game by retaining the most preeminent attorneys on both the union and management side to represent them in what must be an expensive endeavor.

Further, TriMet has taken extraordinary steps to reduce expenditures that have not directly affected the ATU membership. These steps include:

- In 2003, TriMet moved its non-union employees and retirees to the Regence 90/10 health plan, which required them to pay an annual deductible, 10% co-insurance, and premium cost sharing to cover dependents.
- In 2003, TriMet closed its defined benefit pension plan to new non-union employees, and opened a defined contribution plan for those employees in which TriMet contributes 8% of the employee's salary (the same as TriMet has proposed for future union employees in its Last Best Offer).
- In 2009, TriMet changed its policy to state that new non-union employees with 10 years of service are no longer eligible for retiree health insurance benefits unless they pay the full cost.
- TriMet has reduced its overall staffing by 10% since 2001, and many employees have had their hours reduced. TriMet laid off a number of non-union employees in 2009 and 2012.
- Since 2009, a wage freeze has been in effect for non-union employees.
- In 2012, TriMet's non-union employees and retirees in the PPO health plan were required to contribute more toward health insurance including a \$300/\$900 annual deductible, 20% co-insurance, and a 6% premium contribution. In addition, the co-pays for non-union employees and retirees in the HMO health plan were increased to \$10.
- TriMet has regularly increased fares. Between 2000 and 2012, all fares have increased anywhere from 23% to 72% above the rate of inflation. In September 2012, TriMet is eliminating its downtown fareless rail service and significantly increasing adult fares.
- Beginning January 1, 2005, TriMet began to use the authority granted to it by the 2003 Oregon Legislature to increase the payroll tax by .01% per year over ten years. This is the most the law allows.
- TriMet has deferred replacing buses and equipment, and the average age of its bus fleet is now twice that of the national average.
- TriMet has reduced cost growth associated with its ADA paratransit service in a variety of ways including reducing service boundaries and increasing fares.

At the hearing, TriMet presented substantial evidence of the serious financial situation it has found itself in which has necessitated more than \$60 million in budget cuts. By late 2011, it became clear that TriMet was facing another \$12 to \$17 million budget shortfall with respect to fiscal year 2012-13. TriMet ultimately took a number of actions to balance the budget including raising fares, discontinuing the free rail zones, reconfiguring routes, and reducing trips. The Unionized employees were immune from reductions due to the masterly legal work of Mr. Tedesco. While the ATU-represented employees did not face the wage freezes or reduction in benefits faced by many other Oregon public employees, TriMet had to take other steps to address the budget shortfall. The monetary impact of the Employer's efforts to reduce its budget included:

Increase fares	\$ 6,000,000
Eliminate Free Rail Zone	\$ 2,700,000
Reduce service	\$ 1,100,000
Reduce Streetcar funding	\$ 300,000
Redefine LIFT boundaries	\$ 400,000
Increase advertising revenue	\$ 300,000
Internal reductions	\$ 1,200,000
Total	\$12,000,000

If the Union's Last Best Offer is awarded, TriMet will be faced with an additional \$5 million in expenses which it will need to address in its 2012-13 budget. Simply put, additional service cuts or fare increases will have to occur if the Union's Last Best Offer is accepted.³⁸ Driving a bus is a tough, physically and mentally demanding job that deserves good pay, and it is in the "interest and welfare of the public" that high quality employees be hired to maintain and

³⁸ If TriMet's Last Best Offer is awarded, the Employer will save \$5 million this year in health insurance costs. Consequently, TriMet made the decision not to implement the additional \$5 million in cuts in advance of this arbitration Award.

drive equipment that can be extremely dangerous. I wish it were possible to choose the Union's Last Best Offer; however, where there is not an issue of recruitment or retention (as discussed below in detail), one must look to the service reductions that must inevitably occur if the Union's proposal is awarded.

Clearly, reducing service and increasing fares for buses and trains does not promote the interest and welfare of the public. TriMet has already elected to reduce service in September 2009, December 2009, June 2010, and September 2010. TriMet has eliminated 13% of bus service hours since 2009; 10% of rail service on its three pre-existing lines (Blue, Red and Yellow); and its originally planned service level on the Green line was cut by approximately 33%. In short, 65 of 82 bus lines have had a reduction in weekly vehicle hours and all four rail lines are operating under reduced service levels. In September 2012, TriMet's bus service will be reduced yet again with service reconfigured on 14 lines and reduced on 11 lines.

Tens of thousands of citizens in the Portland metropolitan area rely on TriMet for transportation each day. Cutting service leads to a further reduction in riders as some trips simply become too inconvenient or difficult to make. Reduced ridership results in loss of passenger fares which results in a need to either cut service further or raise fares. Similarly, raising fares reduces ridership which causes the need to either raise fares even higher or to cut service.³⁹ It is a vicious downward spiral until such time as TriMet receives increased revenue from payroll taxes.

³⁹ It should be noted that cutting service and raising fares most affects low-income citizens in the Portland metropolitan area. Many of these people simply do not own a car or cannot afford to put gas in their car. Approximately 16% of TriMet's riders take the bus/light rail because they cannot drive, do not know how to drive, and/or do not own a car. Reducing service and/or increasing fares would greatly impact their lives as well as possibly their standard of living.

B. Ability to Pay

ORS 243.746 (b) provides in relevant part that one factor to consider is:

The reasonable financial ability of the unit of government to meet the costs of the proposed contract giving due consideration and weight to the other services, provided by, and other priorities of, the unit of government as determined by the governing body. A reasonable operating reserve against future contingencies, which does not include funds in contemplation of settlement of the labor dispute, shall not be considered as available toward a settlement.

As discussed above in detail, TriMet currently has an ability to pay an adverse Award. Given that TriMet provides only transit services, much of this factor does not apply as the Employer has no other missions (priorities) other than transit services.

C. Ability to Recruit and Retain Employees

ORS 243.746(4)(c) refers to “[t]he ability of the unit of government to attract and retain qualified personnel at the wage and benefit levels provided.” If TriMet was in a situation where they could not attract or retain qualified employees, it would be in the “interest and welfare of the public” to accept the Union’s proposal.

However, in 2008, TriMet attracted 1,371 applicants for 53 part-time bus operator positions; in 2010, 604 applicants for 30 part-time bus operator positions; and in 2011, 2,365 applicants for 83 bus operator positions.⁴⁰ Even though TriMet trains its drivers internally and does not require prior driving experience, approximately 30% of its applicants are experienced bus drivers.

Similarly, TriMet attracted numerous qualified applicants for its service worker positions. In 2008, 1,135 individuals applied for 34 job vacancies. In 2010, TriMet had 1,389 applicants for 38 job vacancies. In 2011, TriMet had 1,100 applicants for 26 job vacancies. There were no

⁴⁰ There were no positions available in 2009 due to implementation of service reductions.

service worker positions available in 2009. TriMet is not experiencing a shortage of applicants for either its operator or service worker positions.

The evidence at the hearing also established that TriMet does not have a problem retaining bargaining unit employees.⁴¹ TriMet's turnover rate for bargaining unit positions has been less than 3% during each of the past four years which would seem to be accounted primarily for separations from employment due to retirement or injury. In short, the current wages for the ATU bargaining unit are sufficient to attract a highly skilled work force.

D. Comparison of Overall Compensation

ORS 243.746(4)(d) directs arbitrators to consider “[t]he overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance, benefits, and all other direct or indirect monetary benefits received.”

The Union argues that “by including healthcare and pension costs in their analysis of overall compensation, TriMet inappropriately exceeded the scope of the statutory criteria.” The Union is simply wrong and misreads the statute that clearly references both “insurance” and the more generic “benefits” that insurance is a subset of. The Union and its very capable counsel know that absent the “insurance” proposals in TriMet’s Last Best Offer, the Union would easily prevail in this matter. However, the statute and prior decisions clearly require the use of a “total compensation” analysis in assessing the parties’ proposals.⁴²

⁴¹ See, e.g., *State of Oregon Corrections and AOCE*, IA-18-01 (2002) (evidence of 51.8% turnover during the past five years in the bargaining unit, in and of itself, was not evidence of a retention problem).

⁴² See, *State of Oregon, Oregon Military Department v. Portland Air National Guard, International Association of Fire Fighters, Local 1660*, IA-03-10 (Boedecker, 2011).

Both parties realize that the current insurance plan for employees and retirees needs to be addressed and both have competing rationales as to where the reductions should come from. However, in determining the appropriate level of any one element of compensation, it is appropriate to base remuneration and make comparisons based on “total compensation.”

When most employees hear the term “compensation”, they typically only think of the money they receive in their paycheck each payday. However, “total compensation” or “net hourly compensation” goes beyond base wages; it is the complete pay package for any group of employees. This amount includes all forms of money, benefits, services, and other “perks” employees are eligible for at TriMet. Total compensation can be defined as all of the resources available to employees, which are used by the employer to attract, motivate, and retain employees. At TriMet, the members of the ATU enjoy a total compensation package that far exceeds the value of their base salary alone, and which includes both direct and indirect compensation for services performed. Wages are a form of direct remuneration, while fringe benefits such as health insurance and pension contributions are a form of indirect remuneration. Using a total compensation methodology, it is axiomatic that the cost of the entire benefit package is considered in conjunction with the parties’ insurance and pension proposals.

In determining which proposals to recommend, the arbitrator looks at the total compensation of the union members and the total aggregate value of the changes proposed rather than addressing each financial proposal individually. In this case, there is no question that the hourly wages of the bargaining unit members are not clearly excessive. However, it is the cost of the insurance plan, in particular, Retiree Medical that are resulting in the employees having a “total compensation” package that exceeds that given to other transit workers in the Western United States.

E. The Cost of Living

ORS 243.746(4)(f) states: “[t]he CPI-All Cities Index, commonly known as the cost of living” should be considered. The Union argues that “wages are not in dispute due to ERB’s Compliance Order from February 16, 2012 and, therefore, any evidence relating to CPI should be disregarded by the arbitrator.” In reaching this decision, the arbitrator took into account the cost of living in other jurisdictions that this bargaining unit was compared to. However, any adjustment due to cost of living was factored into the overall compensation provided for in ORS 243.746(4)(d).

F. Other Factors

ORS 243.746(4)(h) directs arbitrators to consider such other factors, consistent with paragraphs (a) to (g) of this subsection as are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment. However, the arbitrator shall not use such other factors, if in the judgment of the arbitrator the factors in paragraphs (a) to (g) of this subsection provide sufficient evidence for an award.

Because transit workers did not become eligible for interest arbitration until 2007, ORS 243.746 (which was enacted in 1995) does not specifically address whether a large transit district such as TriMet should be compared with smaller transit districts in Oregon or similarly-sized transit districts outside of Oregon. However, given the fact that the legislature made exceptions for large cities and counties in Oregon to be compared with out-of-state cities and counties of a similar size, it seems likely that the legislature would expect a large transit district like TriMet to be compared to transit districts outside of Oregon that serve a population similar in size to the Portland metropolitan area.

While this factor did not enter into my Award, the other factor I would have utilized if other factors had not been determinative is an objective set of comparables. Specifically, I would have utilized transit districts of a similar size in the Western United States, specifically the “west coast eleven” with the exception of Eugene. In determining similar size, I would have looked primarily at ridership rather than service population. Only through looking at objective information regarding comparable jurisdictions can the parties avoid the potential of yet another interest arbitration. While the Western United States comparables proposed by the Employer seem to make sense (with the exception of Eugene), the subject was not fully developed at the hearing. I am also mindful of the advice of Arbitrator Gaunt who stated:

The selection of comparable jurisdictions is a process fraught with imprecision. As one of my colleagues has accurately observed: “The interest arbitrator faces the problem of making ‘apples to apples’ comparisons on the basis of imperfect choices and sometimes incomplete data.”⁴³

⁴³ *Whitman County*, WA PERC Case No. 17193-I-03-0396 (2004).

INTEREST ARBITRATION AWARD

After careful consideration of all oral and written arguments and evidence with the provisions of ORS 243.746 in mind, and for the reasons described in the foregoing Opinion, it is awarded that:

1. I find the Employer's Last Best Offer better meets the statutory criteria than the Last Best Offer of the Union; therefore,
2. I award the Employer's Last Best Offer and order that it be adopted; and
3. Per the requirements of ORS 243.746(6), the Arbitrator assigns his fees one-half to each Party.

This interest arbitration award is respectfully submitted, under the authority of ORS 243.742 and in compliance with ORS 243.746.

/s/ David Gaba

David Gaba, Interest Arbitrator
July 12, 2012
Seattle, Washington