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528 Cottage St NE, Suite 400
 Salem, Oregon 97301-3807
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**STATE OF OREGON
 EMPLOYMENT RELATIONS BOARD**

**UNFAIR LABOR PRACTICE
 COMPLAINT
 Public Employment**

For Board Use Only

Case No. _____

Date Filed _____

<p>COMPLAINANT Name, address, and phone number</p> <p>Amalgamated Transit Union Division 757 c/o Michael J. Tedesco Julie Falender Tedesco Law Group 3021 NE Broadway Portland, OR 97232 866-697-6015</p>	<p>COMPLAINANT'S REPRESENTATIVE Name, address, and phone number, if applicable</p> <p>Michael J. Tedesco Julie Falender Tedesco Law Group 3021 NE Broadway Portland, OR 97232 866-697-6015</p>
<p>RESPONDENT Name, address, and phone number</p> <p>Tri-County Metropolitan Transportation District of Oregon c/o Adam S. Collier Bullard Smith Jernstedt Wilson 1000 SW Broadway, Ste 1900 Portland, OR 97205 503-248-1134</p>	<p>RESPONDENT'S REPRESENTATIVE Name, address, and phone number, if applicable</p> <p>Adam S. Collier Bullard Smith Jernstedt Wilson 1000 SW Broadway, Ste 1900 Portland, OR 97205 503-248-1134</p>

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

1.

Complainant Amalgamated Transit Union Division 757 ("ATU") is a labor organization as defined in ORS 243.650(13). ATU is the exclusive representative of certain employees of Respondent Tri-County Metropolitan Transportation District of Oregon. ATU is a strike-prohibited unit under ORS 243.738.

2.

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

3.

ATU and TriMet were parties to a collective bargaining agreement effective December 1, 2003 through November 30, 2009 (the "Agreement"). The Agreement is attached hereto as Attachment A.

4.

The parties bargained for over 150 days and, on June 7, 2010, commenced mediation under ORS 243.712. The parties participated in a number of mediation sessions during June and July 2010.

5.

On or about July 14, 2010, TriMet filed a declaration of impasse with the mediator under ORS 243.712(2)(a).

6.

On or about July 21, 2010, because ATU 757 employees are strike prohibited, the parties petitioned for interest arbitration and submitted their respective final offers and cost summaries.

7.

On or about August 10, 2010, ATU filed an Unfair Labor Practice Complaint alleging that TriMet's final offer was illegal because it included new issues. An expedited hearing was held in Salem, Oregon before the Oregon Employment Relations Board ("ERB") in May, 2011.

8.

On or about September 12, 2011, ERB ruled in favor of ATU. ERB ordered TriMet to submit a revised final offer excluding a number of unlawful proposals. Rather than accept ERB's finding, TriMet asked for reconsideration on October 3, 2011. On November 17, 2011, ERB affirmed its original decision against TriMet.

9.

On or about December 15, 2011, following ERB's ruling, TriMet submitted a first revised final offer. The following day, on December 16, 2011, ATU filed a motion with ERB to compel compliance with ERB's order, asserting that TriMet's First Revised Final Offer was also illegal because it failed to comply with the Board's previous order. ERB ruled in favor of ATU and on February 16, 2012, required TriMet to submit yet another final offer. Specifically, the Board ordered that TriMet must include in its final offer the language from the expired contract concerning wages. On March 5, 2012, TriMet submitted its Second Revised Final Offer.

10.

On or about April 29, 2012 ATU and TriMet submitted their Last Best Offers ("LBOs".)

11.

From May 14-17, 2012 the parties proceeded to interest arbitration before Arbitrator David Gaba.

Count 1

12.

TriMet's LBO included a proposal that would impose new health insurance plans onto ATU's members retroactively back to December 1, 2009. TriMet provided no information or details in its LBO to explain how it would implement its retroactive health insurance proposal. See TriMet's LBO at Attachment B. For instance, TriMet provided no details or explanation as to whether or, how, TriMet intended to collect money that it might claim was owed from bargaining unit members through retroactive application of health insurance plans.

13.

ATU, in its opening statement, raised the issue that TriMet's insurance proposal was too vague to be implemented, as TriMet never provided information regarding the proposed methodology for retroactively applying a lesser health insurance plan onto ATU's members. ATU further questioned the legality of such a retroactive application of health insurance.

14.

On May 16, 2012--the last of three days of TriMet's case in chief, late in the afternoon, through a witness--TriMet finally explained its methodology for collecting the money that it claimed would be "owed" to TriMet if the health insurance plans were retroactively applied. This witness, who was not even a TriMet employee, indicated that, TriMet would calculate the difference in monthly premiums between what TriMet paid under the current health plans and the amount TriMet would have paid if its LBO insurance plans had been in place. If TriMet paid more in monthly premiums than it would have paid for a LBO plan, then each ATU member would owe the difference in monthly premium costs going back to December 1, 2009. The witness estimated that some bargaining unit employees could owe over \$7,000.

15.

TriMet's witness further testified that TriMet intended to take money "owed" from ATU bargaining unit members back through deductions from the money owed by TriMet for the retroactive cost of living wage adjustments TriMet is required to pay to ATU members pursuant to the Board's compliance orders in UP-016-11.

16.

ORS 243.746(3) states that: "Not less than 14 calendar days prior to the date of the hearing, each party shall submit to the other party a written last best offer package on all

unresolved mandatory subjects, and neither party may change the last best offer package unless pursuant to stipulation of the parties or as otherwise provided in this subsection.”

17.

TriMet substantively changed its health insurance proposal in its LBO by amending it at the interest arbitration hearing by adding a collection methodology for the implementation of its retroactive health insurance proposal. This methodology had not been included in TriMet’s LBO filed on April 30, 2012.

18.

TriMet bargained in bad faith in violation of ORS 243.6721(e) by violating ORS 243.746(3) when TriMet amended its LBO health insurance proposal at the interest arbitration hearing.

Count 2

19.

TriMet’s LBO also included a proposal to place all new TriMet employees, hired after the date of the interest arbitration decision, into a defined contribution plan. Specifically, TriMet’s LBO proposed: “Active employees who are hired by TriMet on or after the first day of the month following the date of the Arbitrator’s decision, shall only be eligible for and become a participant in a Defined Contribution Plan, which shall have the same elements as that currently offered to all TriMet non-union employees.” See LBO at Attachment B. The LBO included no details of the plan “elements” that would or would not be implemented if TriMet’s LBO was awarded. For instance, among other things, the language in the LBO provided no explanation of the level of contribution required to participate in the plan or whether the contribution is an employer contribution, an employee contribution or a combination of the two.

20.

At the interest arbitration hearing, TriMet introduced Employer Exhibit 68, the summary plan description for the defined contribution plan for non-union employees. See TriMet Arbitration Exhibit 68 at Attachment C. TriMet offered the oral testimony of Beth deHamel that it was “TriMet’s intent” that the union and non-union employees would have the same plan. TriMet also offered the testimony of Neil McFarlane who testified that the defined contribution plan for ATU members would be the same as the plan for non-union employees. Specifically, McFarlane testified that TriMet would contribute 8% of an employee’s salary to the plan and that the plan would be managed by ICMA and allow self-directed investments.

21.

ATU re-alleges paragraph 16 above.

22.

TriMet substantively changed its pension proposal at the interest arbitration hearing by introducing evidence that explained the “elements” of the Defined Contribution Plan that had been alluded to in TriMet’s LBO but not previously been shared with ATU and which was not included as part of TriMet’s LBO

23.

TriMet bargained in bad faith in violation of ORS 243.6721(e) by violating ORS 243.746(3) when TriMet amended its LBO pension proposal at the interest arbitration hearing.

Count 3

24.

ATU re-alleges paragraphs 1-11 and 14-15 above.

25.

As described above, TriMet's methodology for recouping the value of retroactive health insurance premiums involves deducting the premiums from the retroactive wage adjustments ordered by the ERB in UP 16-11. *Amalgamated Transit Union, Division 757 v. TriMet*, UP-16-11. Deducting money from ATU member's paychecks in this way violates Oregon's wage and hour laws.

26.

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;
- (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.

27.

By presenting a proposal that violates Oregon wage and hour law, TriMet has presented a proposal that is illegal and therefore a prohibited subject of bargaining. TriMet violated ORS 243.672(1)(e) by proposing an illegal and therefore prohibited proposal at interest arbitration.

Count 4

28.

ATU re-alleges paragraphs 1-11 above.

29.

TriMet's LBO proposal for grievances and arbitrations proposed discontinuing the practice of allowing ATU bargaining unit members to participate in steps of the grievance procedure while in a paid status. This was the practice in the parties' expired contract.

30.

At the interest arbitration hearing, TriMet's Neil McFarlane testified that the rationale underlying TriMet's proposal to discontinue paying ATU bargaining unit members to attend grievance step hearings and meetings was "to place seriousness on the process" due to the grievance rich environment between the parties. TriMet later called Evelyn Minor-Lawrence, Director of workforce development at TriMet, who testified that the number of grievances filed over the last five years against TriMet by ATU was excessive and that this proposal was designed to limit ATU and its bargaining unit members use of the grievance process. The testimony reflected that TriMet's rationale for changing the status quo was directly related to its belief that ATU files too many grievances and their desire to silence ATU and its bargaining unit members for their engaging in protected activities. Based on this justification, the purpose of TriMet's proposal on grievances is to retaliate against bargaining unit members for the number of grievances they file.

31.

By offering a LBO proposal that retaliates against ATU members for filing grievances, TriMet has interfered with, restrained or coerced ATU members in or because of the exercise of rights guaranteed in ORS 243.662, in violation of ORS 243.672(1)(a).

Count 5

32.

The parties' 2003-2009 Collective Bargaining Agreement provided that existing retirees had their retirement pay cost-of living ("COLA") increases tied to any general wage

adjustment increase. Attachment A, Pension Plan and Permanent Disability Agreement, Sec. 1, Par. 5(c). The contract's general wage adjustment COLA increase included a 3% floor and 5% ceiling. Attachment A, Operations Division. Thus, the COLA increases for existing retirees had the same 3% floor and 5% ceiling. TriMet's LBO changed this provision and proposed that retirees' COLA would be based on the increase in the U.S. Urban Wage Earners Clerical Workers Consumer Price Index, not to exceed 7% per year. Attachment B, TriMet's LBO, Pension Plan and Permanent Disability Agreement, Section 1, Par. 5(c). Thus, TriMet's LBO removed the 3% floor so that in a given year, a retiree could receive no COLA increase.

33.

For existing retirees, who have already vested their retirement under the terms of the contract, the elimination of the 3% floor takes away a benefit that the retirees have already earned pursuant to the parties' collective bargaining agreement.

34.

By eliminating the 3% floor for retiree pay increases for those bargaining unit members whose benefits have vested under the contract, TriMet breached the 2003-2009 collective bargaining agreement, in violation of ORS 243.672(1)(g).

Count 6

35.

ATU re-alleges counts 1-11, 25-26 above.

36.

On or about July 12, 2012, Arbitrator David Gaba awarded TriMet's Last Best Offer. See Interest Arbitration Award at Attachment D.

37.

Shortly after TriMet learned of Arbitrator Gaba's decision, TriMet began implementing the provisions of its LBO. TriMet has taken steps to implement both the health insurance and pension provisions of its LBO.

38.

TriMet's LBO is unenforceable because it contains provisions that are illegal and therefore include prohibited subjects of bargaining. By implementing an unenforceable collective bargaining agreement, TriMet has bargained in bad faith in violation of ORS 243.672(1)(e).

Counts 7 and 8

39.

The parties' collective bargaining agreement provides that TriMet will deposit funds into ATU's Recreation Trust Fund. The provision dictates what amount TriMet will deposit into the Fund for each year of the collective bargaining agreement. See Attachment A, Article 1, Section 19, Par. 4.

40.

Following the expiration of the parties' collective bargaining agreement, TriMet continued to honor the status quo and deposited funds into ATU's Recreation Trust Fund in 2009, 2010 and 2011.

41.

The parties' collective bargaining agreement provides that TriMet will pay ATU every year for ATU to operate and administer an Employee Assistance Program. The provision dictates what amount TriMet will pay ATU for the Employee Assistance Program for each year of the collective bargaining agreement. See Attachment A, Article 1, Section 9, Par. 3.

42.

Following the expiration of the parties' collective bargaining agreement, TriMet continued to honor the status quo and paid ATU to operate and administer the Employee Assistance Program in 2009, 2010 and 2011.

43.

TriMet's LBO does not include any provisions or changes reflecting TriMet's intent to discontinue making payments to the Recreation Trust Fund or the Employee Assistance Program. Also, TriMet never proposed discontinuing payments to either of these funds during bargaining.

44.

On or about August 1, 2012, ATU President Bruce Hansen received a letter from Randy Stedman, TriMet's Executive Director of Labor Relations and Human Resources. In his letter, Mr. Stedman advises ATU that TriMet was discontinuing its payments to the Recreation Trust Fund and the Employee Assistance Program. Stedman stated that "TriMet's commitment to continue making payments ended with Arbitrator Gaba's contract award to TriMet." See Attachment E.

45.

TriMet unilaterally altered the status quo by discontinuing its payment to ATU's Recreation Trust Fund in violation ORS 243.672(1)(e).

46.

TriMet unilaterally altered the status quo by discontinuing its payment to ATU's Employee Assistance Program in violation ORS 243.672(1)(e).

47.

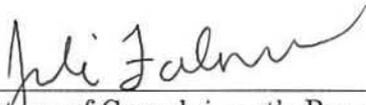
TriMet maintains e-mail addresses for all ATU members, and routinely uses its e-mail system to communicate with ATU members about job-related matters. Communication

through the e-mail system about the results of this proceeding would be more effective than any other type of communication.

WHEREFORE, ATU requests that the Board order as follows:

- A. That TriMet cease and desist its unlawful actions;
- B. That TriMet bargain in good faith with ATU;
- C. That TriMet return to the status quo before it submitted its last best offer;
- D. That TriMet submit a last best offer that does not contain unlawful provisions;
- E. That the matter be remanded to Arbitrator Gaba with instructions to issue an interest arbitration award consistent with the Board's order.
- F. That TriMet make whole all ATU members who lose monetary and/or health insurance benefits as a result of TriMet's unlawful acts;
- G. That TriMet post notices of its unlawful actions. This requirement for posting should include e-mail notification to all ATU members through TriMet's e-mail system;
- H. That TriMet pay ATU's reasonable representation costs pursuant to OAR 115-035-0055; and,
- I. Any additional relief that the Board deems just and equitable.

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

By: 
Signature of Complainant's Representative

Julie Falender
Attorney for Complainant

8/8/12
Date