

Guard Publishing Company d/b/a The Register-Guard and Eugene Newspaper Guild, CWA Local 37194. Case 36–CA–8919-1

June 20, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On June 27, 2002, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions, a supporting brief, and an answering brief to the Respondent's exceptions. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.¹

The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing new sales commissions for employees selling two types of newspaper advertisements: "Top of Mind Awareness" (TOMA) advertisements, and internet display advertisements. For the reasons stated below, we agree.

I. FACTS

A. *The Expired Collective-Bargaining Agreement*

The Union represents employees at the Respondent's newspaper. The most recent collective-bargaining agreement was effective from October 16, 1996, through April 30, 1999. The alleged unilateral changes took place after the collective-bargaining agreement had expired and while the parties were negotiating for a new agreement.

B. *New TOMA Commissions*

TOMA is an advertising contract sold by the Respondent to its customers. TOMA contracts provide that the customer's ad will appear regularly in the Respondent's newspaper for a period of several months. From 1997 through 2000, the Respondent's advertising employees sold TOMA ads periodically each year, and received commissions for doing so. The record shows no changes in TOMA commissions from 1997 through 2000.

In April 2001,² at a time when the parties' collective-bargaining agreement had expired and they were negoti-

ating a new one, the Respondent decided to re-launch its TOMA program. It kept the same basic commission structure as in past TOMA programs, *except* it added two new commissions: a \$25 signing bonus for TOMA ads sold to existing TOMA customers, and a \$10 signing bonus for TOMA ads sold by the Respondent's "media representative," a bargaining unit position created sometime after 1997. The Respondent's advertising director admitted that these two commissions were not included in past years' TOMA programs.

About April 26, the Respondent notified the Union in a memorandum that it planned to re-launch TOMA and add the \$10 commission for the media representative. The memorandum did not mention the \$25 commission for existing TOMA customers. The next day, the Union requested bargaining. About April 30, without bargaining, the Respondent held a meeting announcing the 2001 TOMA program to employees. The Respondent also distributed a memorandum to employees outlining the program, including the new \$25 and \$10 commissions.³

In May, the parties exchanged further correspondence about the TOMA program. In a memorandum to the Respondent, the Union reiterated its position that "[b]ecause the Guild and the company are currently in the process of negotiating ad commissions, the Guild believes the company has a duty to bargain any changes in the existing commission plan" The Respondent maintained that the TOMA program had been used in the past, and that the only change was the \$10 commission to the media representative.⁴

The parties stipulated that employees began selling TOMA ads under the 2001 TOMA program, and receiving commissions for those ads, in May. A witness for the Respondent testified that the Respondent has never actually paid the \$10 commission to the new media representative. However, he did not explain why, and it is clear that the \$10 commission was announced to employees as part of the 2001 TOMA program. The Respondent does not claim that it has not paid the \$25 commission for contracts sold to existing TOMA customers.

³ The judge found that the Respondent did not notify the Union of the new TOMA commissions until after employees were notified, and that the new TOMA commissions were therefore presented to the Union as a fait accompli. This is incorrect, at least as to the \$10 commission, which was proposed to the Union about 4 days before it was announced to employees. Because our analysis in this case does not depend on finding a fait accompli (see sec. II.A, below), this factual error does not affect our decision.

⁴ In its correspondence to the Union, the Respondent did not mention the new \$25 commission for sales to existing TOMA customers. As explained above, the Respondent's advertising director testified that this commission was also a new addition to the 2001 TOMA program.

¹ We shall modify the judge's conclusions of law, remedy, and recommended Order and substitute a new notice to conform to our findings and to the Board's standard remedial language.

² All dates are in 2001 unless otherwise specified.

The judge found that the Respondent violated Section 8(a)(5) by unilaterally implementing the new \$10 and \$25 TOMA commissions.

C. Internet Advertising Commission Program

Prior to May 2001, customers who bought display advertisements in the Respondent's newspaper could run the same advertisement on the Respondent's web site at no extra charge. About May 23, at a time when the parties were engaged in negotiations for a new collective-bargaining agreement, the Respondent notified the Union president that on June 3, it would begin charging advertisers a flat \$10 fee to run these internet ads. The Respondent told the Union that it wanted to pay a commission of 50 cents per ad, per week, to employees selling the internet ads.⁵ The Union replied that any changes in advertising commissions must be bargained, and requested that the Respondent contact Lance Robertson, the Union's lead negotiator. The Respondent contacted Robertson, who asked that the issue be discussed at the parties' next negotiation sessions on July 20 and 21, along with the Respondent's other proposed changes to advertising commissions. Despite the Union's request, the Respondent unilaterally implemented the 50-cent commission.⁶ The judge found that the Respondent violated Section 8(a)(5) and (1) by doing so.

II. ANALYSIS

For the reasons stated below, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing the new \$10 and \$25 TOMA commissions. We further agree that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing the new internet advertising commission program.

A. Unilateral Changes During Negotiations for New Collective-Bargaining Agreement

1. New TOMA commissions

Although the Respondent had run its TOMA program in prior years, the Respondent's advertising director admitted that the \$10 and \$25 commissions were not included in past TOMA programs, but were first introduced in 2001. These new TOMA commissions represented a change in employees' wages, and therefore were

⁵ The judge found that the Respondent notified employees of the 50-cent commission before notifying the Union. He therefore found that the commission was presented as a *fait accompli*. Although that is not clear from the record, it does not affect our decision. Again, our analysis does not depend on finding a *fait accompli*. See sec. II.A, below.

⁶ The exact date on which the commission was implemented is unclear. An employee who sold advertisements under the commission program testified that it took effect about June 2001. A memorandum from the Respondent suggests that the commission may not have taken effect until early July.

a mandatory subject of bargaining.⁷ Where, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes in terms and conditions of employment "extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole." *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); see also *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enfd.* 15 F.3d 1087 (9th Cir. 1994).

The Board has recognized two limited exceptions to this rule: "when economic exigencies compel prompt action," and when a union, "in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining." *Bottom Line*, *supra* at 374 (quoting *M&M Contractors*, 262 NLRB 1472 (1982), review denied 707 F.2d 516 (9th Cir. 1983)); see also *RBE*, *supra* at 81. The Respondent does not argue that economic exigencies required it to implement the new commissions, and the evidence does not show that the Union engaged in delay tactics. The Union verbally requested bargaining on April 27, the day after it received notice of the proposed new TOMA commission. The Respondent, however, announced the new commissions to employees about April 30, only 3 days later. Employees began selling TOMA ads and receiving commissions in May. During this time period, the Union continued to participate in negotiations with the Respondent for a new collective-bargaining agreement, including negotiation sessions on May 22 and 23. Under these circumstances, the evidence does not establish that the Union insisted on continually avoiding or delaying bargaining. Contrast *Serramonte Oldsmobile*, 318 NLRB 80, 100-101 (1995), *enf. granted in part, denied in part* on other grounds 86 F.3d 227 (D.C. Cir. 1996) (union's entire course of conduct showed a strategy to obstruct negotiations; among other things, union

⁷ A unilateral change in a mandatory subject of bargaining is unlawful only if it is "material, substantial, and significant." *Flambeau Air-mold Corp.*, 334 NLRB 165 (2001), modified on other grounds 337 NLRB 1025 (2002) (quoting *Alamo Cement Co.*, 281 NLRB 737, 738 (1986)). The new TOMA commissions meet this standard. The record shows that the sale of TOMA ads in 2001 was an important aspect of sales representatives' duties. According to one of its flyers, the Respondent held a "Special TOMA Sales Meeting" to announce the "new and improved" 2001 TOMA package to employees. The Respondent also required employees to make at least one TOMA sales call per week, and to document their TOMA sales calls and future TOMA prospects to management each week. Although the new commission amounts were arguably small (\$10 and \$25), employees had the opportunity to earn those amounts many times over by selling TOMA ads to multiple customers.

avoided bargaining for more than 3 months, took a “spurious” and “sham” position that respondent had failed to serve timely notice of its intent to open negotiations, and failed to communicate with unit employees about what they desired from bargaining); *M&M Contractors*, supra at 1472 (delay tactics found where union refused for 7 months to give respondent a date on which it would meet to bargain).

Therefore, we find that the Respondent violated Section 8(a)(5) and (1) by implementing the new TOMA commissions during negotiations for a new agreement, before the parties had reached overall impasse on the entire agreement.

2. New internet advertising commission program

For the same reasons, we also agree with the judge that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing the internet advertising commission program. Like the new TOMA commissions, this program was a change in employees’ wages, and therefore was a mandatory subject of bargaining.⁸ Because the parties were engaged in negotiations for a new agreement, the Respondent had an obligation to refrain from implementing unilateral changes to terms and conditions of employment, absent overall impasse. *RBE*, supra at 81; *Bottom Line*, supra at 374. As with TOMA, the Respondent does not argue that economic exigencies required it to implement the commissions, and the evidence does not show that the Union engaged in tactics designed to delay bargaining. Consistent with *RBE* and *Bottom Line*, the Union simply requested that the new internet ad commission be discussed during the parties’ next contract negotiation session, along with other changes the Respondent had proposed to advertising commissions.

B. Respondent’s Defenses

The Respondent raises several defenses, which it claims permitted it to implement the new TOMA commissions and the new internet advertising commission program without bargaining. Specifically, the Respondent contends that the new commissions were a continuation of past practice and therefore did not change the status quo, that the dispute is solely a matter of contract interpretation, and that the allegations are time barred by

⁸ Like the new TOMA commissions, we find that the internet advertising commission program was a “material, substantial, and significant” change. *Flambeau*, supra at 165. An employee testified that he sold ads under the program and that his wages increased as a result. Although the new commission amount was small (50 cents per ad per week), employees had the opportunity to earn many times that amount by selling multiple ads.

Section 10(b). We reject each of these defenses for the reasons stated below.

1. Past practice

a. TOMA

The Respondent argues that the new TOMA commissions were a continuation of its past practice, did not change the status quo, and therefore did not violate Section 8(a)(5) and (1). We disagree.

First, the Respondent argues that TOMA has been an ongoing program since 1997. It is undisputed, however, that the \$10 and \$25 commissions discussed above were not included in the 1997–2000 TOMA programs, but were first introduced when the TOMA program was re-launched in 2001.

Second, the Respondent argues that since launching TOMA in 1997, it has made several changes to the TOMA program without objection from the Union. Those changes, however, were not changes to commissions or other terms and conditions of employment, but changes in the size and duration of the TOMA advertisements offered by the Respondent to its customers. Therefore, the changes do not establish a past practice of unilaterally implementing new advertising sales commissions.

Third, the Respondent argues that it has a past practice of unilaterally implementing other types of advertising sales incentive programs, without objection from the Union. However, in contrast to the new TOMA commissions at issue here, all but one of the Respondent’s past incentive programs were implemented while the collective-bargaining agreement was still in effect.⁹ The Respondent contends that it was permitted to implement those programs under a provision of the agreement that stated: “In the sole discretion of the Publisher, wages in excess of the established wage may be paid.” A contractual reservation of managerial discretion, like the provision relied on by the Respondent, does not survive expiration of the contract that contains it, absent evidence that the parties intended it to survive. See *Ironton Publications*, 321 NLRB 1048 (1996); *Blue Circle Cement Co.*, 319 NLRB 954 (1995), enf. granted in part, denied in part on other grounds 106 F.3d 413 (10th Cir. 1997). There is no such evidence here. Therefore, the contractual provision under which the Respondent implemented

⁹ The one advertising sales incentive program implemented after the contract expired was a “web directory” ad program implemented in March 2000. That program is discussed below.

The Respondent also introduced evidence that in January 2000, it paid a special bonus to one employee for her work on an experimental project. However, the Respondent made clear that this was a one-time bonus. It was not an advertising sales commission program like those at issue here.

its past commission programs expired in 1999, when the collective-bargaining agreement expired. Under these circumstances, the Respondent's past commission programs, implemented under a contractual provision that has since expired, do not establish a past practice allowing the Respondent to implement the new 2001 TOMA commissions at issue here.

The Respondent did implement a "web directory" advertising sales incentive program in March 2000, after the collective-bargaining agreement expired. The Respondent gave the Union notice of its intent to implement this program, and the Union did not request bargaining. However, a union's acquiescence in previous unilateral changes generally does not constitute a waiver of the right to bargain over such changes in the future. See *Johnson-Bateman Co.*, 295 NLRB 180, 188 (1989); *Owens-Corning Fiberglass Corp.*, 282 NLRB 609 (1987). Therefore, the Union's acquiescence on this one occasion does not constitute a waiver of its right to bargain over the new TOMA commissions at issue here. Nor does this one instance establish a past practice of unilaterally implementing advertising sales incentive programs after the contract expired. Accordingly, we reject the Respondent's argument that the new TOMA commissions were a continuation of past practice and did not change the status quo.

b. Internet ad commission program

The internet advertising commission program was unquestionably a new program, introduced for the first time in May 2001. Nevertheless, the Respondent argues that it had unilaterally implemented other types of advertising sales incentive programs in the past, and that the internet ad commission program was therefore a continuation of past practice and did not change the status quo. To establish a past practice, the Respondent relies on the same advertising incentive programs discussed above with respect to TOMA. For the same reasons stated above, we reject the Respondent's argument that the internet ad commission program was a continuation of past practice.

2. Contract interpretation

With respect to both TOMA and the internet ad commission program, the Respondent argues that the only dispute in this case is over interpretation of the contract provision that states: "In the sole discretion of the Publisher, wages in excess of the established wage may be paid." The Respondent relies on Board decisions stating that where a dispute is solely one of contract interpretation, the Board "will not seek to determine which of two equally plausible contract interpretations is correct," and will not find a Section 8(a)(5) violation if the employer has a "sound arguable basis for ascribing a particular

meaning to his contract and his action is in accordance with the terms of the contract as he construes it." *Crest Litho*, 308 NLRB 108, 110 (1992) (quoting *Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988), and *Vickers, Inc.*, 153 NLRB 561, 570 (1965)).

We find these decisions inapplicable. Unlike the present case, they did not involve interpretation of a contractual reservation of managerial discretion that had expired by the time of the alleged 8(a)(5) violation. Here, the alleged unlawful unilateral changes took place in 2001. However, the contract provision relied on by the Respondent expired in 1999, when the collective-bargaining agreement expired. See *Ironton*, supra at 1048; *Blue Circle*, supra at 954. Therefore, the Respondent cannot defend its unilateral changes on the basis that they were made in accordance with a plausible interpretation of that provision.

3. Section 10(b)

Finally, the Respondent argues that the allegations in this case are barred by Section 10(b).¹⁰ The Respondent contends that the 10(b) period for both TOMA and the internet ad allegations should run from 1997, when the Respondent first began using its TOMA program and implementing other advertising sales incentive programs.

We disagree. The alleged violations in this case are the unilateral implementation of new TOMA commissions and the unilateral implementation of a new internet advertising commission program, both of which occurred in 2001. The 10(b) period commenced only when the Union had clear and unequivocal notice of those violations. *Leach Corp.*, 312 NLRB 990, 991 (1993), *enfd.* 54 F.3d 802 (D.C. Cir. 1995). With respect to the new TOMA commissions, the earliest date on which the Union can be charged with knowledge of a violation is April 30, when the Respondent announced the new commissions to employees. Knowledge that the Respondent had unilaterally implemented the internet ad commission program came even later, in June or early July. Therefore, the charge filed and served on October 26 is timely as to both the TOMA and internet ad commission allegations.

For all the foregoing reasons, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing the new \$10 and \$25 TOMA commissions and the internet ad commission program during negotiations for a collective-bargaining agree-

¹⁰ Sec. 10(b) provides in relevant part that "no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made"

ment, in the absence of overall impasse on the entire agreement.¹¹

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 3:

“3. By unilaterally implementing changes in terms and conditions of employment during negotiations for a collective-bargaining agreement in the absence of overall impasse on the entire agreement, the Respondent violated Section 8(a)(5) and (1) of the Act.”

AMENDED REMEDY

In addition to the remedy provided for in the judge’s decision, we shall order the Respondent, on request of the Union, to bargain collectively and in good faith with the Union concerning terms and conditions of employment of unit employees and, if an understanding is reached, to embody it in a signed agreement. Further, we shall order the Respondent, if requested to do so by the Union, to rescind the unlawful unilateral changes, and to reinstate the terms and conditions of employment in these areas that existed before those changes. To the extent that the unlawful unilateral changes implemented by the Respondent have improved the terms and conditions of employment of unit employees, the Order set forth below shall not be construed as requiring the Respondent to rescind such improvements unless requested to do so by the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Guard Publishing Company d/b/a The Register-Guard, Eugene, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Eugene Newspaper Guild, CWA, Local 37194, as the exclusive bargaining representative for the appropriate unit of employees described in the parties’ 1996–1999 collective-bargaining agreement, by unilaterally implementing changes in terms and conditions of employment during negotiations for a collective-bargaining agreement in the absence of overall impasse on the entire agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

¹¹ Chairman Battista notes that the Respondent does not contend that there was an impasse in bargaining, either overall or on a major subject or on the particular subject of the internet commission program. Thus, he agrees that the unilateral implementation of that commission program was unlawful.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain collectively and in good faith with the Union as the exclusive representative of all the employees in the appropriate unit described above concerning terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

(b) If requested by the Union, rescind the unlawfully implemented internet advertising commission program and new TOMA commissions, and reinstate the terms and conditions of employment in these areas that existed before the Respondent’s unlawful unilateral changes.

(c) Within 14 days after service by the Region, post at its facility in Eugene, Oregon, copies of the attached notice marked “Appendix.”¹² Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 26, 2001.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively with Eugene Newspaper Guild, CWA, Local 37194, as the exclusive bargaining representative for the appropriate unit of employees described in the parties' 1996–1999 collective-bargaining agreement, by unilaterally implementing changes in terms and conditions of employment during negotiations for a collective-bargaining agreement in the absence of overall impasse on the entire agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

WE WILL, on request, bargain collectively and in good faith with the Union as the exclusive representative of all the employees in the appropriate unit described above concerning terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

WE WILL, if requested by the Union, rescind the unlawfully implemented internet advertising commission program and new TOMA commissions, and reinstate the terms and conditions of employment in these areas that existed before our unlawful unilateral changes.

GUARD PUBLISHING COMPANY D/B/A THE REGISTER-GUARD

Adam D. Morrison and Irene Botero, for the General Counsel.
L. Michael Zinser, of Nashville, Tennessee, for Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Eugene, Oregon, on April 30, 2002. On October 26, 2001, Eugene Newspaper Guild, CWA Local 37194 (the Union) filed the charge in Case 36–CA–8919 alleging that Guard Publishing Company d/b/a The Register-Guard (Respondent) committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). On January 30, 2002, the Regional Director for Region 19 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(1) and (5) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses and having con-

sidered the posthearing briefs of the parties, I make the following.¹

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is an Oregon corporation with an office and place of business in Eugene, Oregon, where it is engaged in the business of publishing newspapers. During the 12 months prior to issuance of the complaint, Respondent had gross sales of goods and services in excess of \$200,000. In the same time period, Respondent held membership in or subscribed to interstate news services, published nationally syndicated features, and advertised nationally sold products. Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

The Union has represented employees at Respondent's newspaper since 1946. The most recent collective-bargaining agreement between the Union and Respondent was effective by its terms from October 1996 to April 30, 1999. The parties have been bargaining for a successor agreement since February 1999, including bargaining sessions in March, April, and May 2001, the times material herein.

The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by implementing changes in an advertising incentive commission program named top of the mind awareness (TOMA) and, by implementing a new commission for advertising space sold on Respondent's internet website. The answer denied the commission of any unfair labor practices. Respondent alleges that it maintained the status quo and did not change its TOMA program. Further, Respondent maintains that under the status quo it is entitled to pay the unit employees' sales commissions in excess of the bargaining contract rate.

B. *Facts*

In 1997, Respondent instituted its top of the mind awareness program (TOMA). A TOMA contract is a frequency contract, typically 4-column inches, 1 column by 4 inches, or 2 columns by 2 inches. A TOMA advertisement is usually printed three times in a week. TOMA contracts were originally for 52-week or 26-week periods. Salespersons represented by the Union receive commissions under this program, pursuant to the collective-bargaining agreement. There were some modifications to

¹ The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

the TOMA program between 1997 and 2001. For example, in 1999, the TOMA program sold contracts for 13-week periods.

In April 2001, Respondent decided to “relaunch” its TOMA program. On April 26, 2001, Respondent sent the Union a notice that it was launching a new TOMA program and adding a \$10 signing bonus to the new media representative’s commission plan. The new media representative was a new position and was not previously covered by the TOMA commission program. In addition, the 2001 TOMA program provided for a commission for the selling of contracts to existing TOMA customers. The commission for sales to existing TOMA customers had not existed in the TOMA program from 1997–2000.

Upon receipt of the notice of the new TOMA program, Suzi Prozanski, then president of the Union, called Cynthia Walden, Respondent’s director of human relations. Prozanski asked that Respondent not implement the TOMA program and that Respondent bargain about the matter. Walden stated that Respondent was maintaining the status quo and had a right to implement the program. Walden stated that Respondent was not making any change but that TOMA was a continuing program. She stated that the only change was the new media representative because that position had not existed when TOMA was first instituted. Walden set up a meeting so that supervisors in the sales department could explain to Prozanski that no change was being made. However, even after that meeting, Prozanski maintained that Respondent was implementing changes to a commission program and was obligated to bargain with the Union. On May 22, Prozanski wrote Walden requesting that Respondent refrain from unilateral implementation of the TOMA program until the parties bargained over the matter.

On May 23, Walden sent Prozanski a memorandum announcing that Respondent was making available internet advertisements to its print advertisers. Under this program print advertisers could have their display advertisements on Respondent’s internet web page. The memorandum also announced the commission to the salespersons for such advertising. The next day, Prozanski sent Walden an e-mail demanding that Respondent bargain over this change in advertising commissions. Walden took the position that Respondent was permitted to pay more than the contract rate and that Respondent could implement this program. Walden wrote Lance Robertson, then the Union’s chief negotiator, and offered to meet and discuss this new incentive program. On June 19, 2001, Robertson responded that the matter was a mandatory subject of bargaining and was suitable for negotiation at the bargaining table. At no time during negotiations, did the Union make a formal proposal regarding the TOMA program or internet advertising commissions.

III. ANALYSIS

It is well settled that unilateral action by an employer without prior discussion with the union amounts to a refusal to negotiate about the effected conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). Moreover, a showing of subjective bad faith on the employer’s part is unnecessary to establish a violation. *NLRB v. Katz*, 369 U.S. at 747. The Board looks to whether a change has been implemented in conditions of employment. It simply determines whether a change in any term

and condition of employment has been effectuated, without first bargaining to impasse or agreement and condemns the conduct if it has. *Daily News of Los Angeles*, 315 NLRB 1236 (1994), remanded 979 F.2d 1571 (D.C. Cir. 1992), decision supplemented 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (1996), cert. denied 519 U.S. 1090 (1997). It makes no difference whether or not the unilateral changes increased or decreased the employees’ wages or benefits. *Daily News of Los Angeles*, id.

The Board held in *Bottom Line Enterprises*, 302 NLRB 373 (1991), that when, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. The Board in *Bottom Line* recognized two limited exceptions to that general rule; when a union engages in tactics designed to delay bargaining and “when economic exigencies compel prompt action.” See *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995). See also *Visiting Nurses Services of Western Massachusetts*, 325 NLRB 1125, 1130 (1998), enfd. 177 F.3d 52 (1st Cir. 1999) cert. denied 528 U.S. 1074 (2000); *Pleasantview Nursing Home*, 335 NLRB 961 (2001).

I find that Respondent had an established TOMA program. However there were two changes in that program, a signing bonus for the new media representative and a commission for sales to existing TOMA customers. Respondent was obligated to bargain over such matters. On May 23, 2001, the Respondent notified the employees of the changes in its TOMA plan. Respondent did not notify the Union of the changes until after the employees were notified. The parties did not engage in bargaining over these changes. Respondent could not institute changes in sales commissions without first bargaining to impasse with the Union. See *RBE Electronics*, supra. Under *RBE Electronics*, the defense of waiver does not apply where negotiations are in progress. Id at 81–82.

In any event, the facts do not support Respondent’s allegation that the Union waived its right to bargain over the changes in the TOMA program. It was Respondent’s failure to notify the Union of the prospective changes, rather than a union waiver or inaction, which led to the unilateral action. The employees and the Union were presented with a fait accompli. See *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994).

Similarly, the internet advertising commissions were a change from past practice. The Union never had the opportunity to bargain about this commission rate. Rather, Respondent unilaterally determined the commission it would pay for internet advertising. Again, the Union was not notified of this change until the employees were notified of the new commission. Respondent could not institute changes in sales commissions without first bargaining to impasse with the Union. See *RBE Electronics*, supra. Under *RBE Electronics*, the defense of waiver does not apply where negotiations are in progress. Id. at 81–82.

Respondent’s argument that the expired contract allowed it to unilaterally increase wages is not persuasive. The Board has held that such a waiver does not extend beyond the expiration

of the contract unless the contract provides for it to outlive the contract. *Blue Circle Cement Co.*, 319 NLRB 954 (1995); *Holiday Inn of Victorville*, 284 NLRB 916, 916-917 (1987).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By announcing and implementing changes in its TOMA commission incentive program and its internet commission incentive program for bargaining unit employees, Respondent violated Section 8(a)(1) and (5) of the Act.

4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

[Recommended Order omitted from publication.]