

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NEXSTAR BROADCASTING, INC.
d/b/a KOIN-TV

and

Case Nos. 19-CA-219985
19-CA-219987

NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES & TECHNICIANS, THE BROADCASTING
AND CABLE TELEVISION WORKERS SECTOR OF THE
COMMUNICATION WORKERS OF AMERICA, LOCAL 51,
AFL-CIO

J. Dwight Tom, Esq.,
for the General Counsel,
Charles W. Pautsch, Esq.,
for the Respondent.
Anne I. Yen, Esq.,
for the Charging Party

DECISION

STATEMENT OF THE CASE

Robert A. Giannasi, Administrative Law Judge. This case was submitted to me upon a joint motion and stipulation of facts pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. Based on charges filed by the Charging Party Union (hereafter the Union), which is the bargaining representative of a group of Respondent's employees, the General Counsel issued the consolidated complaint in this case. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by implementing a new requirement for employees to complete a motor vehicle/driving history background on their anniversary date; and changing how it formerly posted employees' work schedules. Respondent filed an answer denying the essential allegations in the complaint. The parties filed briefs in support of their positions.¹

¹ The stipulation includes attached exhibits, which together with the stipulation itself, constitute the entire record in this case.

Based on the stipulation and the stipulated record, as well as the briefs of the parties, I make the following

FINDINGS OF FACT

5

I. JURISDICTION

Respondent is a corporation with an office and place of business in Portland, Oregon, where it operates a television station. I find, as Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find, as Respondent further admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

10

II. ALLEGED UNFAIR LABOR PRACTICES

15

The Facts

On about January 17, 2017, Respondent purchased the business of LIN Television Corporation, a Media General Company, d/b/a KOIN-TV (Media General KOIN-TV), and, since then, has continued the business of that entity in basically unchanged form and employed a majority of that entity's previous employees. Respondent is thus a successor of Media General KOIN-TV in the following appropriate bargaining units represented by the Union:

20

The first, as certified by the National Labor Relations Board, consists of all regular full-time and regular part-time engineers and production employees, but excluding chief engineer, office clericals, professionals, guards and supervisors as defined in the Act, and all other employees of KOIN-TV.

25

The second, as voluntarily recognized by the parties, consists of all regular full-time and part-time news, creative services employees, and web producers, but excluding news producers, IT employees, on-air talent (a/k/a "performer"), office clericals, professionals, guards and supervisors as defined in the Act and all other employees of KOIN-TV.

30

At all material times until January 17, 2017, the Union had been the exclusive bargaining representative in the above units and recognized as such by Media General KOIN-TV as embodied by successive bargaining agreements, the most recent of which was in effect from July 29, 2015 to August 18, 2017, with a short extension to September 8, 2017. That agreement has expired and there is no evidence that the agreement or any of its terms was to continue beyond the expiration of the agreement.

35

40

At all material times, Respondent and the Union were either preparing to engage or actually engaged in bargaining for a new agreement. Indeed, the parties were apparently bargaining even before the existing agreement expired. During a bargaining session in June 2017, Respondent proposed eliminating "any advance schedule posting," which the Union rejected. The existing practice was that that work schedules

45

would be posted four months in advance. That practice had been in effect in the applicable units since 1993 in order to better manage work and vacation schedules.

5 According to the stipulation (p. 9, No. 39), in February 2018, while bargaining was ongoing for a successor bargaining agreement, Respondent “changed” how it posted work schedules. It posted the work schedules about two weeks in advance instead of continuing its past practice of posting about four months in advance. Respondent did not provide the Union with advance notice or the opportunity to bargain regarding the change in the posting of work schedules.

10 Also, in accordance with the stipulation (p. 6, No. 20), in September of 2017, Respondent implemented a “new requirement” that employees complete a motor vehicle/driving history background check on their anniversary date. Prior to such implementation, the unit employees were neither asked nor required to complete a motor vehicle/driving history background check unless they were involved in a motor vehicle accident on the job. Prior to the implementation of this change, which was described as “a requirement of employment,” Respondent did not provide the Union with advance notice or the opportunity to bargain about the matter.²

20 Statement of Issues

The parties agree that the legal issues to be resolved in this matter are as follows: Whether Respondent has violated Section 8(a)(5) and (1) of the Act by (1) Implementing a new requirement for employees to complete a motor vehicle/driving history background check on their anniversary date, without first having provided the Union with notice and an opportunity to bargain over the matter; and (2) Implementing a change by posting employees’ work schedules about two weeks in advance of the workweek, rather than continuing its past practice of such posting about four months in advance, without providing the Union with advance notice or opportunity to bargain over the matter.

Analysis

35 It is well settled that an employer who makes substantial and material changes to existing terms and conditions of employment without giving notice to the union that represents its employees and giving it an opportunity to bargain over the matter violates Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962). That principle, which essentially outlaws unilateral changes, applies as well after the expiration of a bargaining agreement and during negotiations for a new agreement that have not been completed. *Litton Financial Planning Division v. NLRB*, 501 U.S. 190, 198 (1991). Under *Katz*, existing terms and conditions continue in effect not because they may be

² The stipulation states that implementation of the change was “[o]n a date better known to Respondent in about September 2017.” On September 17, 2017, Respondent sent the first of a series of emails notifying some employees of the change as their anniversary dates were nearing. Stipulation pp. 6-7, No. 23. This was clearly after the expiration of the collective bargaining agreement and the Respondent does not assert otherwise.

embedded in the expired contract, but under the Act's requirement that the employer must maintain the status quo for mandatory subjects of bargaining. *E.I. Du Pont De Nemours*, 364 NLRB No. 113, slip op. 4 (2016), discussing at length the Supreme Court's decision in *Litton Financial*, supra. It is also settled that the status quo is defined by past practices. "An employer's past practices, even if not required by a collective bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of unit employees' employment, which cannot be altered without offering their collective bargaining representative notice and opportunity to bargain over the proposed change." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007), citing applicable authorities. A past practice is one that occurs "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." Ibid.

The stipulated facts make clear that Respondent's changes to its motor vehicle/driving record requirements and to its work schedule posting procedure were contrary to existing past practices on those subjects. They were admittedly made without prior notice to the Union and without giving it an opportunity to bargain over the changes. Respondent does not dispute that the changes here were substantial and material conditions of employment and thus bargainable issues. Accordingly, the violations are established, at least as an initial matter.

Except for two technical defenses that will be discussed later, Respondent's substantive defense in this case is a jumble of three different points (R. Br. 6): (1) the Union waived any right to bargain over the changes; (2) the changes were not unilateral because they were "consistent" with the expired bargaining agreement; and (3) the expired agreement covered the changes under the so-called "contract coverage" standard or theory. None of those defenses, either separately or in combination, can avail Respondent here.

As Respondent recognizes (R. Br. 11), it has the burden of proving the Union waived its right to bargain over the changes in this case, namely that the Union "knowingly and voluntarily" relinquished its bargaining rights. Such a waiver is not easily proven for it must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 702 (1983).

The stipulated facts in this case do not show or establish a clear and unmistakable waiver based on the expired agreement or any other conduct of the Union. As mentioned above, the touchstone of a *Katz* violation is a change in the status quo, as reflected in past practice, especially after the expiration of a contract. Thus, Respondent's reliance for a Union waiver on specific expired contract terms is completely without merit. Nor does the stipulation provide any support for a waiver by conduct other than those expired terms.

Indeed, the contract terms do not trump the contrary established past practices set forth in the stipulation. The rather general travel provision of the expired contract cited by Respondent (R. Br. 10) says nothing about background checks, although it does provide that employees who are ticketed for a "moving violation" when on

company business “must pay the fine for such ticket.” Exhibit G, p. 11. It is conceded that the existing past practice was that employees who drive as part of their jobs were required to submit vehicle or driving reports only when they were involved in accidents on the job. It is also conceded that Respondent’s change required employees to submit
5 an annual vehicle or driving report, whether or not an accident was involved. This clearly shows a significant unilateral change.

Respondent’s reference (R. Br. 10) to the expired contract provision on work schedule posting likewise does not refute the stipulated change. The applicable contract language is not clear.³ But what is clear from the stipulation, despite what the contract provision states, is that the established past practice was that the work schedule was posted 4 weeks in advance and that practice had been in effect for decades. But, in February 2018, Respondent started posting schedules two weeks in advance. Thus, there is no doubt that, here again, there was a significant unilateral change. Indeed,
15 Respondent recognized that posting work schedules or changing them was a bargaining issue. In bargaining negotiations, Respondent submitted a proposal to eliminate any advance posting of work schedules, and the Union rejected it.

To the extent that Respondent relies on the management rights clause or the zipper clause in the expired agreement to support a waiver of bargaining rights (R. Br. 12-13, 15), that reliance is completely misplaced. It is settled law that management rights clauses do not survive the expiration of a bargaining agreement in the absence of a contrary intent, which is not present here. *Du Pont*, supra, 364 NLRB No. 113, slip op. 5, and cases there cited. The same applies to Respondent’s contention about the zipper clause since zipper clauses are creatures of contract and the zipper clause in this case is inextricably tied to the expired agreement itself. Thus, the clause would not apply because the agreement itself had expired before the unilateral changes were implemented.
20

Respondent’s lengthy discussion in its brief of the “contract coverage” theory of waiver, which appears to be a variation of its assertion that the admitted changes were “consistent” with the expired contract, is unavailing. First of all, that theory is not recognized Board law, as Respondent clearly acknowledges (R. Br. 6-10). See *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-815 (2007), which reaffirms the clear and unmistakable standard for waiver of bargaining rights and rejects the contract coverage theory. Nor, in any event, would the contract coverage theory apply to permit Respondent’s unilateral changes in this case. The contract that contained whatever coverage Respondent relies upon had expired before the changes took place. The changes are thus bargainable not because of any application or nonapplication of
30 contract coverage, but because they affected existing terms and conditions of employment as established by past practices that amounted to the status quo.
40

³ The applicable contract provision is found at p. 8 of Exhibit G. Although the first sentence of the provision states that work schedules would be posted 2 weeks in advance, the next sentence states that they would be posted “as soon as they are known to the Employer,” indicating that they could be posted earlier.

Respondent's other defenses also lack merit. For example, Respondent asserts (R. Br. 17-19) that the unilateral changes should be deferred to the grievance-arbitration clause of the expired agreement that is set forth at p. 6 of Exhibit G to the stipulation. But there are problems with that assertion. Even assuming that deferral might
5 otherwise apply to the clear violations here, there was never a contract grievance filed over the changes. Indeed, there could be none. That is because the unilateral changes in this case were changes to established past practices, not changes to the expired contract. Moreover, it is well settled that arbitration clauses do not survive the
10 expiration of a bargaining agreement, at least in the circumstances presented here where the changes took place after the expiration of the agreement. *Litton Financial*, supra, 501 U.S. at 200-201, 204-206. See also *W.H. Froh, Inc.*, 310 NLRB 384, 386 (1993); and *Buck Creek Coal*, 310 NLRB 1240 n. 1 (1993). Respondent apparently recognizes the point because it cites *Litton Financial* for the same proposition, while erroneously asserting that the non-existent grievances in this case arose under the
15 expired agreement (R. Br. 18).

Respondent also asserts that the complaint allegation about the change in the motor vehicle/driving history background check requirement is time-barred under
20 Section 10(b) of the Act and should be dismissed because a charge with the Board was not filed on the issue within 6 months of implementation of the change. Respondent's position is based on its claim (R. Br. 5) that a representative of Respondent sent emails to some employees about the change as they were nearing their anniversary dates and that the Union thereby had "constructive notice" of the alleged change. It is clear that Respondent has the burden of proving that a charging party had actual or constructive
25 notice of a violation more than 6 months prior to the filing of a charge. See *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995).

The Respondent had not met its burden here. According to the stipulation, none of the employees who received email notifications was a representative of the Union
30 and Respondent offers nothing further to show why the Union should reasonably have known that there was a change in Respondent's policy on background checks. No representative of the Union was notified of the change until a unit employee who received an email about the new requirement several days before notified a representative of the Union on February 8, 2018. The Union thereafter demanded that
35 Respondent rescind its new requirement, but the Respondent refused to do so. The Union filed its first charge on the matter on May 9, 2018, well within 6 months of the time when the Union learned of the change. Here the Union acted as soon as it was notified and pressed its bargaining rights even before it filed its charge with the Board. Thus, I reject Respondent's assertion that the charge was untimely filed.
40

Nothing in Respondent's defenses overcomes the established violations in this case. Accordingly, I find that Respondent's unilateral changes violated Section 8(a)(5)
45 and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally
 5 implementing changes to its motor vehicle/driving history reporting requirements and its
 work schedule posting procedure without notifying the Union in advance and affording it
 the opportunity to bargain over such changes.

2. The above violations constitute unfair labor practices within the meaning of
 10 the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I
 15 shall order it to cease and desist therefrom and to take certain affirmative actions
 designed to effectuate the policies of the Act. Requesting the traditional remedy for the
 violations found in this case, the General Counsel submitted a proposed order requiring
 a restoration of the pre-existing past practices as well as a proposed notice posting. I
 shall issue the order and notice essentially as proposed by the General Counsel.⁴

20 On these findings of fact and conclusions of law and on the entire record, I issue
 the following recommended⁵

ORDER

25 Respondent, Nexstar Broadcasting, Inc. d/b/a KOIN-TV., its officers, agents,
 successors, and assigns, shall:

30 1. Cease and desist from:

(a) Failing and refusing to bargain in good faith with the Union by making
 unilateral changes to the terms and conditions of employment, including
 those involving schedule posting and annual Motor Vehicle Records
 check, for Respondent's bargaining unit employees in the following two
 35 bargaining units at Respondent's Portland, Oregon location:

The first, as certified by the National Labor Relations Board, consists
 of all regular full-time and regular part-time engineers and production
 employees, but excluding chief engineer, office clericals,
 professionals, guards and supervisors as defined in the Act, and all
 40 other employees of KOIN-TV.

⁴ The Union's brief (U. Br. 14-16) asks for a number of additional remedies, mostly with respect to
 the notice to employees, including a reading of the notice. I do not find that the violations in this case
 warrant anything more than the traditional remedy that the General Counsel seeks.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the
 findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted
 by the Board and all objections to them shall be deemed waived for all purposes.

The second, as voluntarily recognized by the parties, consists of all regular full-time and regular part-time news, creative services employees, and web producers, but excluding news producers, IT employees, on-air talent (aka "performer"), office clericals, professionals, guards and supervisors as defined in the Act and all other employees of KOIN-TV.

(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.

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

(a) Restore the past practice of posting Units' employees work schedules on Schedule Base with at least four months of visibility.

(b) Restore the Units' employees requirements regarding Motor Vehicle Records check to as it was prior to September 2017.

(c) Within 14 days after service by Region 19, post at its Portland, Oregon facility copies of the attached notice marked "Appendix."⁶ 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 facilities 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 September 21, 2017.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply with the terms of this Order.

⁶ 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."

Dated, Washington, D.C. February 27, 2019

5



10

Robert A. Giannasi
Robert A. Giannasi
Administrative Law Judge

APPENDIX

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose a representative 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 do anything to prevent you from exercising the above rights.

National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL- CIO ("Union"), is the representative of the following two bargaining units at our Portland, Oregon location:

The first, as certified by the National Labor Relations Board, consists of all regular full-time and regular part-time engineers and production employees, but excluding chief engineer, office clericals, professionals, guards and supervisors as defined in the Act, and all other employees of KOIN-TV.

The second, as voluntarily recognized by the parties, consists of all regular full-time and regular part-time news, creative services employees, and web producers, but excluding news producers, IT employees, on-air talent (aka "performer"), office clericals, professionals, guards and supervisors as defined in the Act and all other employees of KOIN-TV.

WE WILL NOT refuse to bargain with the Union as your exclusive collective bargaining representative.

WE WILL NOT change our past practice of posting your work schedule on Schedule Base, with at least four months of visibility, without first notifying and bargaining, upon request, with the Union.

WE WILL post your schedules at least four months in advance on Schedule Base.

WE WILL NOT require you to complete an annual Motor Vehicle Records check as a condition of employment without first notifying and bargaining, upon request, with the Union.

WE WILL rescind our requirement that you complete an annual Motor Vehicle Records check as a condition of employment and restore our policy that only required a Motor Vehicle Records check after an on the job vehicle accident.

WE WILL NOT, in any like or related manner, interfere with your rights under Section 7 of the Act.

NEXSTAR BROADCASTING, INC. d/b/a
KOIN-TV

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-219985 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6340.