Nexstar Broadcasting, Inc. d/b/a KOIN-TV *and* National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL–CIO.[1] Cases 19−CA−219985 and 19−CA−219987

April 21, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On February 27, 2019, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The Charging Party filed cross-exceptions and a supporting brief, to which the Respondent filed an answering brief.

The National Labor Relations 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.[2]

The principal issue in this case is whether the "contract coverage" standard applies to unilateral changes made after a collective-bargaining agreement has expired, where the expired agreement did not provide that the employer would retain a relevant right of unilateral action post-expiration. For the reasons explained below, we conclude that it does not.

I. FACTS

The National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL–CIO (the Union or NABET-CWA) represents two bargaining units of employees at KOIN-TV, a CBS-affiliated television station in Portland, Oregon. One unit is comprised of engineers and production employees, and the other of creative service employees and web producers. On July 29, 2015, the Union and LIN Television Corporation, a Media General Company, doing business as KOIN-TV (LIN Television), executed a collective-bargaining agreement covering both units, effective from that date to July 28, 2017.

The agreement contained three provisions relevant to this proceeding. The first, article 1, addressed management rights and provided as follows:

> NABET-CWA recognizes the exclusive right and responsibility of the Company to direct the working force and to direct the operations of the Company. The Company's rights shall include, but not be limited to, those necessary to maintain order and efficiently manage the Company, and to discharge, suspend, or discipline Employees for just cause and to establish working rules and to control station operations, provided, however, that the exercise of such rights does not violate the terms and provisions of this Agreement.

The second, article 8.1, addressed hours of work and provided as follows:

> The "normal work week" shall be defined as commencing at 12:00 a.m. Monday and ending at 11:59 p.m. on Sunday. All work schedules, continuing hours of work and days off will be prepared and posted two (2) weeks in advance of the commencement of the workweek. The Employer will post work schedules as soon as they are known to the Employer.

The third, article 10.1, addressed travel and provided as follows:

> Automobile travel by Employees shall be covered by the Vehicle Use Policy in the Company's Employee Guidebook. It is understood that under no circumstances shall an Employee be required to use their car under this Article.
>
> Employees who are ticketed for a moving violation for which they are responsible while driving on Company business must pay the fine for such ticket, whether the moving violation occurred while driving a Company-owned vehicle or their own vehicle.

Around January 17, 2017, the Respondent purchased LIN Television. It hired as a majority of its workforce employees formerly employed by LIN Television and

[1] We have corrected the caption in the judge's decision.

[2] We shall amend the judge's conclusions of law to add that the Respondent's unfair labor practices affect commerce. We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

The Union requests various extraordinary remedies, including notice reading, an extended notice-posting period, and an apology, among others. We deny these requests because the Board's traditional remedies are sufficient to effectuate the policies of the Act. The Union also requests that the notice be distributed via email, mail, and posting on the Respondent's intranet and public website. In accordance with *J. Picini Flooring*, 356 NLRB 11 (2010), we shall require the Respondent to distribute the notice through various electronic means if it customarily communicates with its employees by such means. These means of distributing the notice are sufficient, and we deny the Union's request for additional means.

continued to operate the business in essentially unchanged form. At some point thereafter, the Respondent and the Union agreed to extend the collective-bargaining agreement to September 8, 2017, at which time the agreement expired.[3]

The parties stipulated that they were engaged in or were preparing to engage in bargaining for a successor collective-bargaining agreement at all material times. That bargaining appears to have begun as early as June 2017, when the Respondent proposed to eliminate any requirements regarding the advance posting of employee work schedules. The Union rejected the proposal, and there is no evidence the parties subsequently reached agreement on the issue.

After the parties' extended agreement expired, the Respondent made two changes. On or about September 21, 2017, it implemented a new requirement that employees complete a motor vehicle/driving history background check (hereinafter referred to as a "driver-background check") annually on their anniversary dates. Previously, employees completed driver-background checks only if they were involved in a vehicular accident on the job. In February 2018, the Respondent began posting employees' work schedules 2 weeks in advance. Previously, the Respondent had posted schedules 4 months in advance, a practice the parties stipulated had been followed since 1993 at the latest. The Respondent stipulated that it did not provide the Union with notice or an opportunity to bargain over either change.

II. THE JUDGE'S DECISION

The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing the annual driver-background check and changing when it posted work schedules. On two grounds, the judge rejected the Respondent's argument that the changes were lawful under the contract coverage standard: first, that standard was not extant law, and second, even if it were, contract coverage would not apply to the changes at issue because they were made after the collective-bargaining agreement expired. The judge also found the Respondent did not establish that the Union clearly and unmistakably waived its right to bargain over the changes. Finally, the judge rejected the Respondent's arguments that the changes were lawful because they were consistent with the expired agreement or, alternatively, that they should be deferred to arbitration.[4]

III. ANALYSIS

A. Collective-Bargaining Agreement Provisions Do Not Survive the Expiration of the Agreement, Absent Explicit Contractual Language to the Contrary.

After the judge issued his decision, the Board adopted the contract coverage standard in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), and decided to apply that standard retroactively to all pending cases, id., slip op. at 2. Under the contract coverage standard, the Board will "examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally." Id. In conducting that inquiry, the Board will apply "ordinary principles of contract interpretation." Id. "Where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5)." Id., slip op. at 11.

Whether the contract coverage standard applies to changes made after a collective-bargaining agreement expires is an issue of first impression for the Board. For the reasons discussed below, we hold that provisions in an expired collective-bargaining agreement do not cover post-expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration. Because that exception is not established here, we find that the expired agreement does not cover the changes at issue.[5]

[3] The parties presented this case to the judge for decision based on a joint stipulation of facts. The parties stipulated that following its purchase of LIN Television, the Respondent became a successor employer to both units represented by the Union. While the stipulation does not specifically indicate that the Respondent adopted the 2015–2017 collective-bargaining agreement between LIN Television and the Union, a finding that it did is consistent with other provisions of the stipulation and the positions of the parties. Thus, the parties stipulated that the 2015–2017 agreement was in effect from July 29, 2015, to August 18, 2017, and was extended to September 8, 2017. That extension occurred after the Respondent purchased LIN Television. The fact that the Respondent agreed to extend the contract necessarily implies that the Respondent adopted it. In addition, the Respondent asserts in its brief in support of exceptions that it assumed the agreement, the judge did not find otherwise, and the General Counsel does not claim otherwise.

[4] The Respondent does not except to the judge's findings that both changes in this case were made after the parties' collective-bargaining agreement expired, were contrary to established past practice, were made without prior notice to the Union and without giving it an opportunity to bargain, and were substantial and material.

[5] The Respondent also argues that the Union waived its right to bargain over the changes, that the matter should be deferred to arbitration, and that the judge should have applied the sound arguable basis standard because the dispute is one of contract interpretation. We agree with the judge, for the reasons he stated, that the Union did not clearly and unmistakably waive its statutory right to bargain over the changes. We also agree with the judge that deferral to grievance arbitration is inappropriate because the changes were made after the parties' agreement expired. See *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991). We do not rely, however, on his rationale that "[e]ven assuming that deferral might otherwise apply to the clear violations here, there was never a contract

The provisions of a collective-bargaining agreement are enforceable in federal court, see Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (vesting federal district courts with jurisdiction of "[s]uits for violation of contracts between an employer and a labor organization"), and courts (along with arbitrators) are "the principal sources of contract interpretation," *NLRB v. Strong*, 393 U.S. 357, 360–361 (1969). As the Supreme Court has recognized, however, the Board has authority to interpret collective-bargaining agreements when doing so is necessary to decide an unfair labor practice case. See *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967); *NLRB v. Strong*, supra at 361.

Collective-bargaining agreements are interpreted "according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435 (2015). One such principle is that "'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" Id. at 441–442 (quoting *Litton*, 501 U.S. at 207). Thus, "an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied." *Litton*, 501 U.S. at 206. Although the parties may agree that a particular provision survives the contract's expiration, any such agreement must be stated "in explicit terms." Id. at 207; accord *Tackett*, 574 U.S. at 442.

After a collective-bargaining agreement expires, different principles govern the obligations of parties to a bargaining relationship. In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that an employer violates Section 8(a)(5) of the Act if, without first bargaining to impasse, it unilaterally changes a term or condition of employment constituting a mandatory subject of bargaining. Id. at 743. *Katz* involved parties that were bargaining for an initial collective-bargaining agreement, but the Court subsequently made clear that the rule of *Katz* also applies after an agreement has expired while the parties are bargaining for a successor agreement. See *Litton*, 501 U.S. at 198.[6] Thus, after a labor contract expires, an employer has a duty to maintain the status quo. Although the status quo is ascertained by looking to the substantive terms of the expired contract, see, e.g., *PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3 (2019), the *obligation* to maintain the status quo arises out of the Act, not the parties' contract. After a contract expires, "terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law." *Litton*, 501 U.S. at 206.[7]

Consistent with the foregoing principles, the parties' expired collective-bargaining agreement cannot provide a defense for the Respondent's allegedly unlawful unilateral actions. The contact coverage standard is based on "ordinary principles of contract interpretation," *MV Transportation*, 368 NLRB No. 66, slip op. at 2, which, as shown, include the principle that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement," *Tackett*, 574 U.S. at 441–442 (internal quotation marks omitted). We find that this principle applies with equal force to contractual *rights*, including provisions granting the employer the right to act unilaterally. This conclusion is consistent with the underlying rationale for the contract coverage standard. As the Board explained in *MV Transportation*, that standard respects the agreement reached by the parties as expressed in the plain language of the contract, including "the limits—or absence of limits—upon which the parties themselves have agreed." 368 NLRB No. 66, slip op. at 10. The Board emphasized that contract coverage would ensure that "*the parties* are firmly in control of negotiating the parameters of unilateral employer action, as they should be." Id. (emphasis in original). Duration is an important limit to any contractual right or obligation, as the Supreme Court clearly held in *Litton* and *Tackett*, and our holding today respects the right of parties to set that limit by declining to extend contractual rights of unilateral action beyond the contract's agreed-upon expiration date absent an explicit agreement to do so.[8]

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grievance filed over the changes." See, e.g., *Caritas Good Samaritan Medical Center*, 340 NLRB 61, 63 fn. 5 (2003) ("[T]he filing of a grievance is not a prerequisite to deferral."). We also find the sound arguable basis standard inapplicable because it applies only where the issue is whether the employer modified an *existing* collective-bargaining agreement—not where, as here, the issue is whether the Respondent unilaterally changed employment terms constituting mandatory subjects of bargaining *after* the expiration of the agreement. See *Bath Iron Works*, 345 NLRB 499, 501 (2005), affd. sub nom. *Bath Marine Draftsmen Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

[6] The *Katz* doctrine is subject to certain limited exceptions, none of which is relevant here. See *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

[7] As the Board recently reiterated, however, some contractual terms are *not* "imposed by law" post-expiration, including management-rights clauses granting the employer a right to act unilaterally. See *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center*, 368 NLRB No. 139, slip op. at 2 (2019).

[8] In *MV Transportation,* the Board also explained that the contract coverage standard was necessary to avoid undermining parties' collective-bargaining agreements and to promote "contractual repose." Id., slip op. at 5–6. It was also necessary to support "the Congressional policy of encouraging the use of grievance arbitration to resolve contractual disputes" and to discourage the forum-shopping that results when unions bypass arbitration procedures to file unilateral change allegations with

Further, the provisions of the parties' expired collective-bargaining agreement, set forth above, do not contain language extending the rights of unilateral action to post-expiration conduct or otherwise beyond the term of the contract. Indeed, they do not mention post-expiration conduct at all. Accordingly, they cannot cover the Respondent's unilateral changes to driver-background checks or advance posting of work schedules. Instead, under *Katz*, the Union has a *statutory* claim to continuance of the status quo with respect to those practices.

B. The Unilateral Changes Altered the Status Quo.

The Respondent alternatively contends that even if the expired contract did not cover its unilateral actions, those actions were consistent with the status quo as defined by the terms of the expired agreement and thus did not constitute unilateral changes. We disagree.

The evidence shows that the Respondent's practice regarding posting of work schedules was to post the schedules 4 months in advance. This uninterrupted past practice, which started in 1993 or earlier, was continued by the Respondent after it succeeded LIN Television as the employer of the unit employees in January 2017, and maintained thereafter for 13 months until February 2018. Indeed, the Respondent maintained the practice for 5 months after the parties' agreement expired, which contradicts the Respondent's suggestion that it made no change but rather maintained the status quo of the expired contract. The status quo at the time of the change was therefore to post schedules 4 months in advance.[9]

For the driver-background checks, the evidence is similarly clear that the status quo did not include annual checks. The parties stipulated that the past practice through the date the contract expired was that such checks were required only when an employee was involved in an automobile accident on the job, and the expired contract did not address driver-background checks.[10] The status quo at the time of the change was therefore to require driver-background checks not annually but only when on-the-job driving accidents occurred.

Accordingly, for all of the reasons stated above, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its schedule-posting practices and driver-background check requirements.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 2: "The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act."

ORDER

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

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees by changing schedule-posting practices and implementing a new requirement that employees complete a motor vehicle/driving history background check on their anniversary dates without first notifying the Union and giving it an opportunity to bargain.

(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.

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the Board. Id., slip op. at 7. These justifications, while perfectly valid during the term of an agreement, do not justify the standard's application after the agreement's expiration, when there is no "contractual repose" to protect and the arbitration procedure is generally not available. See *Litton*, 501 U.S. at 206–207 (no obligation to arbitrate disputes that arise after contract expires absent explicit provision to the contrary).

We acknowledge that the United States Court of Appeals for the District of Columbia Circuit has applied contract coverage in assessing the lawfulness of a postcontract expiration unilateral change. See *Wilkes-Barre Hospital Co. v. NLRB*, 857 F.3d 364, 376–377 (D.C. Cir. 2017); see also *Tramont Mfg., LLC v. NLRB,* 890 F.3d 1114, 1120 (D.C. Cir. 2018) (characterizing *Wilkes-Barre* as having applied the "contract-coverage standard to the terms of a collective-bargaining agreement that had expired but that continued to define the status quo between the parties") (alterations and internal quotation marks omitted). However, the court did not address the analytically prior question of whether the contract coverage standard should be *applicable* postexpiration absent express language extending a contractual right of unilateral action beyond the contract's term, and there is no indication in the court's decision that the parties presented that question for the court to decide. Moreover, the court found that the expired contract did *not* cover the post-expiration change at issue, so the outcome was the same as it would have been had the court deemed the standard inapplicable.

[9] Moreover, the practice was consistent with the hours-of-work provision cited by the Respondent in art. 8 of the expired collective-bargaining agreement. We recognize that art. 8 included language that provided for schedule posting 2 weeks in advance. However, art. 8 also required that schedules be posted "as soon as they are known to the Employer." That the Respondent posted work schedules 4 months in advance from January 2017 to February 2018 demonstrates that schedules were known to the Respondent that far in advance during that time, and there is no evidence or contention that the change in schedule posting was based on changed circumstances that affected the Respondent's ability to schedule work 4 months out. But even if there were such a change, this would not affect our determination that posting schedules 4 months in advance was the status quo or alter the Respondent's bargaining obligations under *Katz* and *Bottom Line Enterprises*.

[10] The Respondent relies on the automobile travel provision in art. 10.1 set forth above. That sec. covers three topics: (1) whether employees must use their personal vehicles for company travel, (2) moving violations, and (3) the terms contained in the Respondent's Vehicle Use Policy. The first two topics do not address background checks; the Vehicle Use Policy is not in the record. Therefore, so far as the record shows, art. 10.1 does not address driver-background checks. The Respondent also cites the management-rights clause of the expired contract for both changes, but that clause expired with the agreement, and there is no evidence of similar changes under the clause that could have become part of the status quo. See *Holiday Inn of Victorville*, 284 NLRB 916, 916–917 (1987).

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

(a) Rescind the change in the terms and conditions of employment for its unit employees that was unilaterally implemented on or around September 21, 2017, when it implemented a new requirement that employees complete a motor vehicle/driving history background check on their anniversary dates.

(b) Rescind the change in the terms and conditions of employment for its unit employees that was unilaterally implemented in February 2018, when it changed its schedule-posting practices by posting schedules 2 weeks in advance rather than 4 months in advance.

(c) Before implementing any further changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining units:

> 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.
>
> 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.

(d) Within 14 days after service by the Region, post at its Portland, Oregon facility copies of the attached notice marked "Appendix."[11] 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. If 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 September 21, 2017.

(e) 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 the Respondent has taken to comply.

Dated, Washington, D.C. April 21, 2020

_____
John F. Ring, Chairman

_____
Marvin E. Kaplan, Member

_____
William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

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 change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

[11] 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."

WE WILL rescind the change in the terms and conditions of employment for our unit employees that was unilaterally implemented around September 21, 2017, when we implemented a new requirement that employees complete a motor vehicle/driving history background check on their anniversary dates.

WE WILL rescind the change in the terms and conditions of employment for our unit employees that was unilaterally implemented in February 2018, when we changed our schedule-posting practices by posting schedules 2 weeks in advance rather than 4 months in advance.

WE WILL, before implementing any further changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> 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.
>
> 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.

NEXSTAR BROADCASTING, INC. D/B/A KOIN-TV

The Board's decision can be found at http://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.

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

FINDINGS OF FACT

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.

II. ALLEGED UNFAIR LABOR PRACTICES

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:

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 part-time news, creative services employees, and web producers, but excluding news producers, IT employees, on-air talent (a/k/a "performer"), office clericals,

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

professionals, guards and supervisors as defined in the Act and all other employees of KOIN-TV.

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.

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 would be posted 4 months in advance. That practice had been in effect in the applicable units since 1993 in order to better manage work and vacation schedules.

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 2 weeks in advance instead of continuing its past practice of posting about 4 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.

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]

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 2 weeks in advance of the workweek, rather than continuing its past practice of such posting about 4 months in advance, without providing the Union with advance notice or opportunity to bargain over the matter.

Analysis

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 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).

[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.

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 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 2 weeks in advance. Thus, there is no doubt that, here again, there was a significant unilateral change. Indeed, 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.

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 contract coverage, but because they affected existing terms and conditions of employment as established by past practices that amounted to the status quo.

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 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 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 fn. 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 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 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 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 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 Respondent rescind its new requirement, but the

[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 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.

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) and (1) of the Act.

Conclusions of Law

1. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes it 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 the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I 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]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

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

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 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 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.

(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 4 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.

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

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

[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.

[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."

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 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 4 months of visibility, without first notifying and bargaining, upon request, with the Union.

WE WILL post your schedules at least 4 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

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.