

Michigan Bell Telephone Company and Communications Workers of America, AFL-CIO. Case 7-CA-29252

February 11, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

Exceptions filed to the judge's decision in this case¹ present the question of whether, during the term of a contract, the Respondent's unilateral implementation of a substance abuse policy after bargaining to impasse with the Union violated Section 8(a)(5) and (1) of the Act.

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 only to the extent consistent with this Decision and Order.

After bargaining to impasse with the Union, the Respondent in May 1989 implemented a substance abuse policy that included discipline of employees who refused to submit to drug testing or whose test results were positive. The judge found that the Respondent's implementation of this policy violated Section 8(a)(5) and (1) and (d) of the Act.

The contract between the parties, effective from August 10, 1986, to August 12, 1989, contained no provision concerning or referring to drug testing. The contract also contained a zipper clause which provided, inter alia, that the agreement was "in final settlement of all demands and proposals made by either party during recent negotiations" and that the parties "intend[ed] thereby to finally conclude contract bargaining throughout its duration." The parties stipulated at the hearing that neither the substance abuse policy nor subject matters related to it were raised or discussed during negotiations over the 1986-1989 contract.

The judge found that the zipper clause did not constitute a clear and unmistakable waiver of the right to bargain over mandatory subjects not included in the contract or mentioned during negotiations for the contract. He further found, however, that the zipper clause could be "reasonably construed" as indicating that all bargaining, regardless of whether the subject was previously demanded or proposed, would be precluded during the term of the contract. Based on this construction of the zipper clause, the judge found that the Re-

spondent had no right to implement its substance abuse policy without the Union's consent after bargaining to impasse over it during the term of the contract. We do not agree.

The legal context in which this case arises may be summarized by the following governing principles:²

Sections 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." Generally, an employer may not unilaterally institute changes regarding these mandatory subjects before reaching a good-faith impasse in bargaining. Section 8(d) imposes an additional requirement when a collective-bargaining agreement is in effect and an employer seeks to "modif[y] . . . the terms and conditions contained in" the contract: the employer must obtain the union's consent before implementing the change. If the employment conditions the employer seeks to change are not "contained in" the contract, however, the employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change.

As the Respondent concedes, its substance abuse policy is a mandatory subject of bargaining.³ While the Respondent implemented its substance abuse policy during the term of the contract, this policy did not modify any provision of the contract. Thus, the requirement in Section 8(d) that the Union's consent be obtained does not apply. Additionally, the Respondent did not fail to bargain over the substance abuse policy. On the contrary, the Respondent bargained to impasse with the Union before implementing the policy.

Consequently, the Respondent's implementation of its substance abuse policy did not violate Section 8(a)(5) unless the Respondent, by agreeing to the zipper clause, waived its right to bargain, during the term of the contract, over mandatory subjects not addressed in the contract and not raised during bargaining.⁴ As noted above, the judge found such a waiver based on a "reasonable construction" of the zipper clause.

The test governing waiver of statutory rights, such as the right to bargain over mandatory subjects, however, is not whether the contract can be reasonably construed to effect such a waiver. Rather, as the Supreme Court stated in *Metropolitan Edison Co. v. NLRB*:⁵

¹ On January 3, 1991, Administrative Law Judge Elbert D. Gadsden issued the attached decision. The Respondent and the General Counsel each filed exceptions, supporting briefs, and answering briefs.

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

² *Milwaukee Spring Division*, 268 NLRB 601, 602 (1984), *aff'd*, 765 F.2d 175 (D.C. Cir. 1985).

³ See *Johnson-Bateman Co.*, 295 NLRB 180 (1989).

⁴ No provision of the contract other than the zipper clause is asserted to have effected such a waiver.

⁵ 460 U.S. 693, 708 (1983) (footnote omitted).

[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is “explicitly stated.” More succinctly, the waiver must be clear and unmistakable.

The clear and unmistakable waiver test applies equally to alleged waivers contained in zipper clauses as it does to those contained in other contractual provisions.⁶ Accordingly, we cannot adopt the judge’s analysis finding a waiver here.

Applying the appropriate test, we find that the zipper clause here did not waive the Respondent’s right to bargain during the contract term over mandatory subjects that were not addressed either in the contract or in bargaining over the contract. As noted above, the judge himself found that the zipper clause did not constitute a clear and unmistakable waiver of such a right.

The operative language of the zipper clause states:

This Agreement is agreed upon in final settlement of all demands and proposals made by either party during recent negotiations, and the parties intend *thereby* to finally conclude contract bargaining throughout its duration. [Emphasis added.]

We find that this language is ambiguous in that the term “thereby” may refer to the preceding language regarding “all demands and proposals made . . . during recent negotiations.” So construed, the clause waives bargaining only with respect to those demands and proposals that the parties made during contract negotiations. Further, the presence of the word “contract” in the phrase “finally conclude contract bargaining” may imply that it is only as to contract matters—not matters outside the contract—that the parties had concluded bargaining. Although it may not be clear that the foregoing is the correct interpretation of the parties’ intent, neither is it clear that the interpretation given this language by the judge is correct.⁷ Thus, we cannot conclude that the zipper clause clearly and unmistakably waived the parties’ rights to bargain over mandatory subjects not mentioned in the contract or in the negotiations preceding the contract.⁸

⁶ *Angelus Block Co.*, 250 NLRB 868, 877 (1980) (zipper clause must meet standard of any other form of waiver); see also *Asbestos Workers Local 27 (Master Insulators)*, 269 NLRB 719, 721 (1984) (waiver of employer’s statutory right).

⁷ The zipper clause’s second sentence, indicating only that the contract “may be amended at any time by mutual consent,” merely reiterates a principle embodied in Sec. 8(d) of the Act and provides no additional insight into the parties’ intent concerning the scope of the zipper clause regarding matters not raised in the contract or in contract negotiations.

⁸ The zipper clause here is in marked contrast to the one in *GTE Automatic Electric*, 261 NLRB 1491 (1982), which was found to have clearly and unequivocally waived the union’s right there to request bargaining concerning a new benefit during the contract term. The clause there stated that for the life of the contract the parties voluntarily and unqualifiedly waive[d] the right . . . to bargain col-

Accordingly, as the Respondent’s substance abuse policy did not modify the parties’ contract and was implemented after bargaining to impasse, and as the zipper clause did not clearly and unmistakably waive the parties’ rights to bargain over mandatory subjects of bargaining not mentioned in the contract or in negotiations over the contract, we conclude that the Respondent’s postimpasse implementation of its substance abuse policy did not violate Section 8(a)(5) and (1) of the Act.

Contrary to our dissenting colleague, we believe that our result is wholly consistent with legal principles governing zipper clauses. In general, a zipper clause is an agreement by the parties to preclude further bargaining during the term of the contract. If the zipper clause contains clear and unmistakable language to that effect, the result will be that neither party can force the other party to bargain, during the term of the contract, about matters encompassed by the clause. That is, the zipper clause will “shield,” from a refusal to bargain charge, the party to whom such a bargaining demand is made.⁹ Similarly, under such a clause, neither party can unilaterally institute, during the term of the contract, a proposal concerning a matter encompassed by the clause. That is, the zipper clause cannot be used as a “sword” to accomplish a change from the status quo.¹⁰

However, where, as here, the purported zipper clause does not contain clear and unmistakable language, there is no waiver of the right to bargain. Thus, each party has the right, and the opposing party has the duty, to bargain about subjects not covered by the contract and not discussed in contract negotiations. Similarly, because these subjects are “open” for negotiations, a party can implement its proposals after bargaining to a good-faith impasse.

Our dissenting colleague fears that, under these principles, an employer could refrain from raising a subject during negotiations for a contract and then raise the subject during the contract term, i.e., at a time when, according to the dissent, the union is less likely to strike.

The simple answer to our colleague is that the evidence in this case does not establish that the Respond-

lectively with respect to any subject or matter referred to, or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered by this Agreement even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement [emphasis added].

Similarly, the zipper clause here lacks the clarity of the one in *Jones Dairy Farm*, 295 NLRB 113 (1989), which stated that “negotiation on matters not covered by this Agreement is to be deferred until expiration of this Agreement.” That language was found to have waived the employer’s right during the contract term to implement a condition of employment not covered by the contract.

⁹ *GTE*, supra.

¹⁰ *Ibid.*

ent resorted to such a stratagem. Moreover, even if an employer did so, a zipper clause containing clear and unmistakable language would preclude the employer from raising or implementing the new subject during the term of the contract.

Finally, our colleague's approach would permit a party to refuse to bargain about unforeseen problems that arise during the term of the contract. Absent clear and unmistakable waiver language in the contract, we believe that the Act should encourage the parties to bargain in good faith concerning such matters. Further, it is only after good-faith bargaining to impasse or to an agreement that a party can institute the desired change.

ORDER

The complaint is dismissed.

MEMBER DEVANEY, dissenting.

By permitting the Respondent to implement its substance abuse policy during the term of the contract without the Union's consent, my colleagues encourage the use of the contractual zipper clause as a "sword" rather than a "shield," providing employers an incentive to withhold from contract negotiations their planned changes in terms or conditions of employment.

During the term of the parties' contract, the Respondent unilaterally implemented a substance abuse policy that required discipline of employees who refused to submit to drug tests or whose drug test results were positive. Although my colleagues admit, as they must, that the Respondent's substance abuse policy is a mandatory subject of bargaining,¹ they nevertheless find that the Respondent's unilateral implementation of this policy was permissible under the contract's zipper clause. It is well settled that a zipper clause being wielded as a "sword" which would allow unilateral changes stands on different footing than a clause which is a "shield" to preserve current employment terms.² Indeed, as the Board has stated, "the normal function of such [zipper] clauses is to maintain the status quo, not to facilitate unilateral changes."³ In allowing themselves to be sidetracked by the Respondent's "clear and unmistakable waiver" argument, a red her-

ring in this case, my colleagues overlook this paramount principle.

Under my colleagues' interpretation of the zipper clause, by failing to raise the substance abuse policy during contract negotiations, the Respondent was privileged to raise and unilaterally implement it during the contract term; however, if the Respondent had raised the substance abuse policy in contract negotiations, it would have been precluded from implementing it unilaterally during the contract term.⁴ Thus, my colleagues' finding that the Respondent's actions here were lawful has the effect of encouraging employers not to raise in contract negotiations any changes in employment terms they intend to make in the future that do not modify the contract. By waiting instead to raise a noneconomic matter, such as a substance abuse policy, until the contract term has commenced, an employer secures a significant tactical advantage, as a union is unlikely to strike solely over a matter that does not change wages or benefits. Thus, during the contract term, an employer may unilaterally implement such an employment condition with impunity, free from fear that a strike may result. My colleagues' dismissal of the complaint here encourages employers to refrain from raising intended changes during contract bargaining, a result that flies in the face of the Act's purpose of "encouraging the practice and procedure of collective bargaining."⁵ Accordingly, I dissent.

⁴There is no evidence concerning whether the Respondent had made plans to implement a substance control policy at the time the contract at issue here was being negotiated. It is noteworthy, however, that the Respondent unilaterally implemented this policy just 3 months short of contract expiration, rather than deferring this matter until negotiations over a new contract.

⁵Sec. 1 of the Act.

Ellen B. Rosenthal, Esq., for the General Counsel.
Albert Calille, Esq., of Detroit, Michigan, for the Respondent.
Kevin Conlon, District Counsel, of Itasca, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. Upon a charge of unfair labor practice conduct filed on May 9, 1989, by Communications Workers of America, AFL-CIO (the Union or Charging Party) against Michigan Bell Telephone Company (the Respondent), the Regional Director for Region 7, on behalf of the General Counsel, issued a complaint against the Respondent on November 20, 1989.

In substance, the complaint alleges that on or about May 15, 1989, the Respondent implemented and since that date has enforced a substance abuse policy without the consent of the Union; and that by doing so, Respondent has failed and refused to bargain with the Union in good faith, in violation of Section 8(a)(1) and (5) and (d) of the Act.

¹See *Johnson-Bateman Co.*, 295 NLRB 180 (1989).

²See *GTE Automatic Electric*, 261 NLRB 1491 (1982). While finding that the zipper clause in *GTE* privileged the employer to reject the union's midterm bargaining demand, the Board there emphasized that it was permitting the employer to invoke the zipper clause solely as a shield, that the employer sought only to maintain the status quo regarding terms and conditions of employment, that the employer had not made unilateral changes affecting unit employees, and that finding the employer's conduct lawful accorded stability to the parties' collective-bargaining relationship. None of these rationales apply in the present case.

³*Murphy Oil USA*, 286 NLRB 1039 (1987).

On December 15, 1989, the Respondent filed an answer denying that it has engaged in unfair labor practice conduct as set forth in the complaint.

The hearing in the above matter was held before me in Detroit, Michigan, on July 12, 1990. Briefs have been received from counsel for the General Counsel and counsel for the Respondent, respectively, which have been carefully considered.

On the entire record in this case, including my observation of the demeanor of the witnesses, and my consideration of the briefs filed by respective counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation organized under, and existing by virtue of, the laws of the State of Michigan.

At all times material, Respondent has maintained its principal office and place of business at 444 Michigan Avenue, Detroit, Michigan, the only facility involved, where it is engaged in furnishing telephone communications service.

During the year ending December 31, 1988, a representative period, Respondent in the course and conduct of its business operations derived gross revenues in excess of \$500,000, and purchased and caused to be transported and delivered at its several Michigan facilities, wires, telephones and other goods and materials valued in excess of \$100,000, of which goods and materials valued in excess of \$50,000 were transported and delivered to its several Detroit facilities directly from locations outside the State of Michigan.

The complaint alleges, the answer admits, and I find that at all times material, Respondent was an Employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the parties stipulated, and I find that the Union, Communications Workers of America, AFL-CIO is, and has been at all times material, a labor organization within of the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE CONDUCT INVOLVED

At all times material, the Union, by virtue of Section 9(a) of the Act, has been the exclusive representative of the Respondent's employees for purposes of collective-bargaining.

A. Background Facts

Respondent operates its Detroit, Michigan business of providing telephone communications service with its unionized servicing employees pursuant to an effective collective-bargaining agreement. The agreement (contract) contains a provision which essentially states that the agreement was a settlement of all demands and proposals made during negotiations; and that negotiations were concluded for the duration of the agreement, although the agreement could be amended by mutual consent of the parties.

Before expiration of the contract, the Respondent desired to implement a policy which it concedes is a mandatory subject of bargaining. On or about May 15, 1989, the Respondent implemented and enforced the policy on the premise that the aforescribed provision in the contract did not preclude

it from implementing the policy, and if in fact it did, it was no longer binding on Respondent because Respondent and the Union had bargained to impasse on the policy; and that by bargaining to impasse on the subject policy, the Union waived any right it might have had not to bargain during the term of the contract.

B. The Contract Provision in Dispute

The Respondent and the Union were parties to a collective-bargaining (Contract) which by its terms was effective from August 10, 1986, until August 12, 1989. Article 55.3, page 126 of the contract provided:

This agreement is agreed upon in final settlement of all demands and proposals made by either party during recent negotiations, and the parties intend thereby to finally conclude contract bargaining throughout its duration. However, this agreement may be amended at any time by mutual consent of the company and the union.

At the hearing the parties stipulated that in May 1989, the Respondent implemented and has since enforced a substance abuse policy without the consent of the Union, which policy includes testing as well as disciplinary penalty for refusal to submit to drug testing on request, and also for positive test results.

The parties also stipulated that the Respondent and the Union bargained to impasse on the implementation of the above substance abuse policy; and that the subject policy had not been raised or discussed during the negotiations for the current (1986) contract (Jt. Exh. 1).

The uncontroverted evidence of record shows that after the Respondent and the Union bargained to impasse, the Respondent implemented and has since enforced the above described substance abuse policy effective May 1, 1989, without even obtaining the consent of the Union. Neither party presented any witnesses but relied solely on the above stipulations and documentary evidence of record.

Arguments

Counsel for the General Counsel contends that in accordance with article 55.3 of the contract, the Union did not consent to implementation of the substance abuse policy; and that although the Union bargained to impasse with Respondent about the implementation of the subject policy, the Union was not required to bargain with Respondent and it has not consented to, or agreed with implementation of the policy by the Respondent.

Respondent admits in its answer to paragraph 13 of the complaint that the subject substance abuse policy relates to wages, hours, and other terms and conditions of employees in the unit, and that it is a mandatory subject of bargaining for purposes of collective bargaining. However, Respondent argues that the contract does not provide a zipper clause; that article 55.3 of the contract does not constitute a zipper clause against midterm bargaining on matters not discussed during negotiations; and that if article 55.3 does constitute such a zipper clause, the Union has waived any contractually reserved right not to bargain during the term of the contract by bargaining to impasse on the substance abuse policy.

Both parties here agree that the subject substances abuse policy was not a term or condition of employment in the cur-

rent contract (G.C. Exh. 1), or that any reference is made to such policy in the current agreement.

With respect to a provision against midterm bargaining in an effective collective-bargaining contract, the General Counsel properly argues that Section 8(d) of the Act, preserves the status quo as to mandatory subjects of bargaining during the term of an agreement. Under this Section of the Act (8(d)) neither party under such circumstances may compel the other party to bargain during the term of the contract over any change *in a term or condition of employment established by the contract*, except by mutual consent of the parties. *Jones Dairy Farm*, 295 NLRB 113 (1989).

Analysis and Conclusions

It is particularly noted that the language of article 55.3 does not expressly refer to “demands and proposals” which were not made or referred to during the negotiations between the parties. However, the additional language of 55.3: “and the parties intend thereby to finally conclude contract bargaining throughout its duration,” literally and logically implies that the parties intended that bargaining on any subject during the term of the contract would be precluded. If this interpretation is correct, or reasonable, counsel for the General Counsel appears to be supported in her position that if the parties bargain on demands and proposals made during the term of the contract, no changes may be made in any terms or conditions of employment as established by the contract. The one exception is that such changes may be made by mutual consent or agreement of the parties. This is so because the zipper clause language of 55.3 was apparently intended to preserve the status quo of the contract with respect to any demands or proposals made during the term of the contract. *Suffolk Child Development Center*, 277 NLRB 1345, 1350 (1985).

The General Counsel further argues that the Board has upheld a zipper clause which prevents changes in a collective-bargaining agreement on subjects which are not covered by the agreement. This includes changes not within the knowledge or contemplation of the parties, *GTE Automatic Electric*, 261 NLRB 1491 (1982). Correspondingly, terms and conditions of employment which are not covered by a collective-bargaining agreement are placed on the same footing as such terms and conditions in a contract under Section 8(d) of the Act. *Jones Dairy Farm*, supra.

As the Board stated in *GTE Automatic Electric*, supra, 1491-1492:

by permitting Respondent to invoke the zipper clause as a shield against the Unions’ midterm demand for bargaining over a new benefit, and by giving literal effect to the parties’ waiver of their bargaining rights, industrial peace and collective-bargaining stability will be promoted.

A distinguishing feature noted in the *GTE* case is that the Respondent there, relying on a clear and unmistakable waiver of midterm bargaining in the zipper clause, refused the Unions’ request to bargain midterm on a matter not covered in the contract (pension plan). In construing the zipper clause of the contract, the Board held that by allowing the Respondent to defensively invoke the zipper clause as a shield against the Unions’ midterm demand for bargaining over a new ben-

efit, it was giving literal effect to the parties waiver of their bargaining rights, and thereby promoting industrial peace and collective-bargaining stability. However, since the Respondent’s exercise of his right to refuse to bargain under the zipper clause resulted in a discriminatory application of the pension plan among the represented and unrepresented employees, the Respondent’s conduct was found to be violative of Section 8(a)(1) and (5) and (d) of the Act.

In the instant case, not only was there not a clear and unmistakable waiver of bargaining rights by the parties on matters not included in the contract, or demands and proposals mentioned during negotiations, but the Respondent and the Union voluntarily bargained on the substance abuse policy to impasse. So it is clear that the *GTE* case is distinguishable from the facts in the instant case.

Additionally, although the Union here is invoking the zipper clause as a defense to the Respondent’s demand for midterm bargaining and its unilateral implementation of the substance abuse policy, it is again noted that the zipper clause (55.3) does not constitute a clear and unmistakable waiver by the parties not to engage in midterm bargaining on mandatory subjects of bargaining, not included or referred to in the contract or mentioned in negotiations for the contract.

Counsel for the General Counsel further argues that zipper clause language in the instant case is clear and unambiguous, that the parties intended there would be no midterm bargaining on any mandatory subject of bargaining, whether or not the subject was raised in negotiations. However, while I do not find such specificity and clarity of expression in article 55.3 as was set forth in the zipper clause in *GTE*, supra, “that there would be no bargaining on any mandatory subject of bargaining throughout the duration of the contract,” it would appear that the language of 55.3 is sufficient to support the General Counsel’s conclusion.

Perhaps more precisely in point is the case of *Martin Marietta Energy Systems*, 283 NLRB 173 (1987), cited by the General Counsel. There, the contract between the employer and the Union contained the following provision:

Article XV, Section 1. It is hereby agreed that this contract contains the complete agreement between the parties or their successors, and *no additions, waivers, deletions, changes or amendments*, shall be made during the life of this contract except by mutual consent, in writing of the parties.

It is obvious that the language in the *Martin Marietta* case is specific and explicit that no changes or additions in the terms or working conditions can be made in any manner, except by mutual consent of the parties in writing.

While the language in the instant case (55.3) is not as explicit as the language in the zipper clause in *Martin Marietta*, the parties nevertheless specifically agreed that their agreement was “a final settlement of all demands and proposals made by either party during negotiations,” and by which agreement, they intended that contract bargaining would end bargaining during the term of the agreement. The latter language may be reasonably construed that the parties intended that all bargaining, whether or not the subject was previously demanded or proposed, would nonetheless conclude bargaining during the term of the contract. The language of 55.3 goes further, by adding, the agreement “may be amended at

any time by mutual consent” of the company and the Union. The latter sentence, beginning with “However,” conveys the understanding that the agreement may be amended midterm only by the mutual consent of the parties.

In view of the foregoing language analysis, interpretation, and cited legal authority, I give reasonable and literal effect to the language of the zipper clause (55.3) that “the parties intended to finally conclude all contract bargaining throughout its duration,” and that no bargaining should take place during the term of the contract. This is especially true since the contract’s zipper clause provides that the contract can be amended only on the consent of both parties. *Martin Marietta Energy Systems*, supra.

Since the language of article 55.3 of the contract described above makes it clear that the agreement was the finality of all demands and proposals made by either party during recent negotiations, unless amended by mutual consent of the parties, it is clearly a zipper clause. As such, either party may clearly refuse to bargain about any demands and proposals made during the term of the contract. Although the parties may voluntarily choose to bargain, they are not required to do so. However, if the parties do bargain during the term, no changes may be made in the contract terms without the mutual consent of the parties because mutual consent is required by the last sentence in article 55.3. *Suffolk Child Development Center*, supra.

In the instant case, the Respondent and the Union bargained to impasse over the substance abuse policy but there was no mutual consent by the parties to implement the policy. Under such circumstances, Respondent could not legally add to or change the terms of the contract (G.C. Exh. 1) by unilaterally implementing and enforcing the substance abuse policy (which was neither demanded nor proposed during negotiation). *Jones Dairy Farm*, supra; *Suffolk Child Development Center*, supra.

Midterm Contract Modification

Even Section 8(d) of the Act does not impose a midterm bargaining obligation on parties if either party makes or receives a proposal or demand, in the absence of a contract reopener provision. *Speedrack, Inc.*, 293 NLRB 1054 (1989). The contract in the instant case does not provide for a reopener during the term of the agreement. In fact, it (55.3) precludes bargaining on any subject during the term of the contract, although the contract may be amended by mutual consent of Respondent and the Union, *Hydrologics, Inc.*, 293 NLRB 1060 (1989).

Speedrack, Inc., supra, cited by counsel for the General Counsel, is distinguishable from the facts before me because the subject of the unilateral change there, was wage rates “in an existing collective-bargaining agreement,” made without the consent of the union. However, there, unlike in the instant case, the change was made pursuant to the contract’s wage reopener after the parties had bargained to impasse. Here, the change or addition (a substance abuse policy) was not a subject in the existing collective-bargaining agreement, and the agreement does not contain a reopener provision. Consequently, Section 8(d) of the Act as applied in *Speedrack, Inc.*, supra, addresses unilateral changes of provisions or subjects contained within an existing contract or zipper clause thereof.

The last sentence of Section 8(d) of the Act provides:

That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collective shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification complies with subsections (1), (2), (3) and (4).

Under this section the terms “termination” or “modification” appear to refer to the language or terms and conditions of employment in an existing contract, and not to subjects not mentioned within the contract, such as “the substance abuse policy” in the instant case.

Respondent’s argument that by bargaining to impasse on Respondent’s implementation of the policy, the Union waived its right in the zipper clause against midterm bargaining, is unfounded, and certainly not supported by any appropriately cited legal authority. *American Telephone & Telegraph Co.*, 250 NLRB 47 (1980), cited by Respondent, is distinguishable from the instant case, as the General Counsel argues, because unlike here, the contract there, was silent on the matter of midterm bargaining.

Consequently, even though the parties bargained gratuitously to impasse on the substance abuse policy, they were not required to do so. In fact, they did so in spite of the express language of the zipper clause that “there would be no midterm bargaining.” However, as previously construed, the language of the zipper clause (55.3) does not end there. It further provides that the contract may be amended by mutual consent of the parties. In the face of such language, it can not be reasonably found that the Union waived its right not to bargain by gratuitously bargaining to impasse with Respondent. At no time did the Union give its consent to the substance abuse policy and the Respondent was without authority to implement the policy without the consent of the Union to do so.

Respondent appears to be equating the parties’ zipper clause language, “finally conclude contract bargaining throughout the duration of the contract,” with the relinquishment of a collective-bargaining right under the provisions of a collective-bargaining agreement. I do not read Respondent’s “waiver interpretation” of the zipper clause into the parties 55.3 zipper clause. It is clear by the zipper clause language of 55.3 that neither party was waiving any right to bargain on mandatory subjects of bargaining. Instead, both parties were agreeing not to bargain on any bargainable subjects during the term of the contract. They were not relinquishing the right to bargain on any mandatory subject of bargaining. Such a waiver, of course must be made in clear and unmistakable language. The language of the zipper clause here does not address the subject of waiver, not to mention clear and unmistakable language.

Although the Union bargained to impasse with Respondent about the substance abuse policy, its bargaining conduct, in the face of the language of article 55.3, is insufficient to constitute a clear and unmistakable waiver of its right not to bargain midterm under 55.3.

Respondent further argues that the zipper clause (55.3) by its language is limited to only “demands and proposals” made by either party during contract negotiations. Respondent might be correct if the zipper clause ended at that juncture, but it does not. It continues by stating “the parties in-

tend to finally conclude contract bargaining throughout” duration of the contract. It is obvious that the parties were trying to avoid any bargaining whatsoever during the term of the contract and preserve the status quo of each party until expiration of the contract. Again, to assure preserving the status quo, the parties added the last sentence of the zipper clause, that the “agreement may be amended at anytime by mutual consent of the parties.” It is therefore clear that any amendment of the contract during its term had to have the consent of both parties. Since the Union never consented to the drug abuse policy, Respondent could not amend the contract by implementing the substance abuse policy, which it concedes is a mandatory subject of bargaining.

I find that other arguments and cases cited by Respondent do not support its position and are not applicable to the facts in the instant case.

Based on the foregoing uncontroverted evidence, cited legal authority, and reasons, I find that Respondent implemented and enforced the substance abuse policy in spite of the language of article 55.3 precluding any bargaining change in the collective-bargaining agreement with the Union; and that Respondent’s unilateral implementation of the substance abuse policy constitutes a failure and refusal to bargain with the Union as the exclusive collective-bargaining

representative of the employees, in violation of Section 8(a)(1) and (5) and (d) of the Act.

IV. THE REMEDY

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

Having found that Respondent implemented and enforced a substance abuse policy without the consent of the Union, Respondent has violated the zipper clause of the collective-bargaining agreement and thereby, has failed and refused to bargain in good faith with the duly authorized collective-bargaining representative (the Union) of its employees, in violation of Section 8(a)(1) and (5) and (d) of the Act.

CONCLUSION OF LAW

By unilaterally implementing and enforcing the substance abuse policy without the consent of the Union, the Respondent has failed and refused to bargain in good faith with the Union, and has restrained and coerced employees in the exercise of their rights guaranteed by Section 7, in violation of Section 8(a)(1) and (5) and (d) of the Act.

[Recommended Order omitted from publication.]