

**McDonnell Douglas Aerospace Services Company
and International Union of Electronic, Electrical,
Salaried, Machine and Furniture Workers,
AFL-CIO. Case 32-CA-16311**

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On June 2, 1998, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief¹ and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, McDonnell Douglas Aerospace Service Company, Fallon, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Jo Ellen Marcotte, Esq., Counsel for the Acting General Counsel.

Raymond M. Deeny, Esq. and Edward J. Butler, Esq. (Sherman & Howard L.L.C.), Colorado Springs, Colorado, for the Respondent.

Tom Keane, Business Representative, of Corona, California, for the Charging Party.

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the position of the Respondent.

² Member Hurtgen agrees with the judge that the Respondent violated Sec. 8(a)(5) by withholding scheduled benefits from unit employees on April 1, 1997. In his view, once the Respondent, in December 1996, unconditionally promised to provide employees with specific benefits (regardless of whether they selected union representation), those benefits became a term and condition of employment, and part of the status quo ante. Thereafter, the burden was on the party seeking to change that term and condition to request bargaining over it. Member Hurtgen does not find that the Respondent's March 23 announcement that "these benefits will not be unilaterally provided to IUE represented employees . . . on April 1" satisfied this bargaining obligation. Rather, Member Hurtgen finds that the Respondent unlawfully presented the Union with a fait accompli. A different result might obtain, in his view, if it had been "proposed" that the benefit package not be implemented on that date.

³ The judge erroneously ordered that any backpay owed to employees be computed in the manner set forth in *F. W. Woolworth*, 90 NLRB 289 (1950). The correct backpay formula applicable in this case is set forth in *Ogle Protection Service*, 183 NLRB 682 (1970).

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried on April 13, 1998,¹ at Oakland, California. The charge was filed by International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO (Union or Charging Party), on August 26, against McDonnell Douglas Aerospace Services Company (Respondent or MDASCO). The Regional Director for Region 32, issued a complaint and notice of hearing on November 28, alleging Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) by advising employees covered by the Service Contract Act, on or about December 13, 1996, that effective April 1, they would receive enhanced fringe benefits regardless of the outcome of the forthcoming union representation election, and unilaterally determined not to implement the promised benefits on April 1.

Respondent's timely filed answer to the complaint, admits certain allegations, denies others, and denies any wrongdoing. Respondent admits at least some of the enhanced benefits are mandatory subjects of bargaining. Based on the findings and conclusions stated below, Respondent's motion to dismiss the complaint because the General Counsel failed to make a prima facie case, should be, and is hereby, denied.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following²

FINDINGS OF FACT

I. JURISDICTION

Based on the Respondent's answers to the complaint, as amended, and the parties stipulations at hearing, I find Respondent meets one of the Board's jurisdictional standards³ and the Union is a statutory labor organization.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent⁴ provides a wide variety of services pursuant to military contracts across the United States. The vast majority of those contracts involve the training of U.S. Air Force pilots. Respondent has "smaller contracts" for maintenance services on military aircraft, "and we do what's known as total training

¹ All dates are in 1997 unless otherwise indicated.

² I specifically discredit any testimony inconsistent with my findings.

³ Respondent's admitted business operations, including the provision of services valued in excess of \$50,000 to the United States Navy during the past 12 months, are sufficient to have a substantial impact on the national defense of the United States within the meaning of the Board's discretionary guidelines for asserting jurisdiction. *Castle Instant Maintenance/Maid, Inc.*, 256 NLRB 130 (1981); *Ready Mix Concrete & Materials, Inc.*, 122 NLRB 318 (1958); *Trico Disposal Service, Inc.*, 191 NLRB 104 (1971).

⁴ In December 1996, the merger of McDonnell Douglas with Boeing was announced. The merger was effected in August 1997. There was no claim Boeing or any other entity should have been made a party to these proceedings.

systems on the C-17 where we take care of the entire training system for the Air Force.”

Respondent won a contract to provide maintenance services at the Fallon, Nevada, Navy Air Station in 1995. The Union filed a petition on October 3, 1996, to represent Respondent’s maintenance and service employees at Fallon, that led the parties to agree to an election. In December 1996, the Union was in a campaign to organize Respondent’s Fallon employees. The representation election was conducted on December 18, 1996. On December 27, 1996, in Case 32-RC-4219, the Union was certified as the exclusive collective-bargaining representative of the following appropriate unit:

All full-time and regular part-time production, service, and maintenance employees employed by Respondent at the Fallon Naval Air Station, Fallon, Nevada, including Quality Assurance Representatives; excluding all office clerical employees, guards, leads, maintenance controller supervisors, and supervisors as defined in the Act.

B. Events of December 13, 1996

Only one witness, Eric Benjamin, testified about the December 13, 1996 mandatory meeting Respondent held for about 80 of its employees at Fallon, 5 days before the election. Benjamin is a current employee of Respondent and works as a senior aircraft mechanic. He also served on the union negotiating committee. I credit his testimony based on his open and straightforward demeanor. He also demonstrated clear recall of the event. Benjamin was informed by his supervisor, Roland Easler, that he had to attend the December 13, 1996 meeting. The second speaker at the meeting was Mike Sartor, site manager. The first speaker awarded plaques to exceptional employees. Sartor is no longer employed by Respondent, but all times here pertinent, he is an admitted agent of Respondent.

Sartor informed the employees “he had just gotten confirmation that the new benefits package was approved by St. Louis.⁵ He just got it off the fax machine.” Respondent distributed a memorandum entitled “Enhanced Benefits Package” to the attending employees. The package was for all of MDASCO’s employees, not just those working at Fallon. Attached to Sartor’s memorandum⁶ was a memo from Frank Kimball, identified as “MDASCO’s General Manager.” Kimball’s memo provided: “I am please [sic] to announce that after months of effort and study, we are now prepared to announce the enhancements to our fringe benefit program. The changes as outlined below will go into effect during the month of March in 1997.”

Benjamin recalled an employee, Ken Cox, asked:

[W]ith the upcoming union vote, how would—would the new benefits package go into effect regardless of the outcome of the vote whether we voted for the union. His [Sartor’s] response was that it would go into effect even if we vote for the union.⁷

Respondent described the benefits it announced as providing each employee an additional \$2.56 per hour worked. The em-

ployee could elect to take the cash or contribute the money to a health and welfare benefits plan. The employees who chose to contribute the \$2.56 per hour to the plan were also entitled to participate in other benefits, including life insurance, sick pay, an investment plan, a retirement income plan, tuition reimbursement, jury duty pay, bereavement pay, and military differential pay.

The Charging Party, in a distribution to unit members in December 1996, critiques some of the “Enhanced Benefits Package.” This missive informed the employees at least some of the benefits would be studied by the Union’s benefits experts.⁸ David Bouse, Respondent’s manager of human resources, obtained a copy of this flyer. This material was circulated prior to the representation election and cannot, by content or nature, be construed a waiver or operate as an estoppel. On March 21, Ed Warshauer, the Union’s representative involved in the organizing campaign and lead negotiator, wrote Respondent a letter explaining the Union’s position concerning the announced “Enhanced Benefits Package.”⁹ The letter advised:

... regarding MDASCO’s plans to implement a new “enhanced” benefit program effective April 1, 1997, to groups not covered under collective-bargaining agreements.

After consultation with the employees affected, as well as our legal counsel, it is the union’s view that the employees at NAS Fallon should be offered these “enhanced” benefits. We believe that it would be an unfair labor practice to deny them the new benefit package at this time.

The Union does not endorse the new plan, nor does it waive its rights to bargain over these benefits when we begin contract negotiations.

Please advise if there are any questions or suggestions whatsoever.

Respondent, by Bouse, manager, human resources, replied to this letter on March 23, stating:

It’s [sic] the company’s view that these benefits will not be unilaterally provided to IUE represented employees at NAS Fallon on 01 April 1997. Such benefits are proper subject for discussion and may be addressed during upcoming contract negotiations.

⁸ The circular also mentioned:

The union does not discount everything that the company has proposed in their “benefit enhancement” package. These items need to be discussed calmly, in collective bargaining, with full disclosure and the democratic involvement of your elected negotiating committee. Without a union, the company makes all labor relations decisions. With the IUE, you have a say. With the IUE, you will elect your own negotiating committee. you will have the support, resources, and expertise of a national labor union. And you will vote on your wages, benefits, and working conditions in a legally binding contract.

⁹ Warshauer explained:

What prompted me to write the letter was that as a result of meetings that we’d had with employees we became aware that the company did not plan to implement the benefits package that had been announced prior to the union vote back in December of ‘96, and so we wanted to make our position clear in advance of the implementation. We understood that they planned to implement that enhanced benefit package on April 1. We wanted to make our position clear in advance of that what we thought their obligation was in that regard.

⁵ The site of Respondent’s corporate headquarters.

⁶ Sartor’s memo references Kimball’s missive as highlighting “the new benefits package that has been approved by McDonnell Douglas Corporation and will be effective as of March 1997.” Respondent admitted implementing the benefits for its other employees on April 1, with some changes at the various sites.

⁷ This testimony is not refuted.

We remain available to negotiate this contract at your earliest convenience, which we understand to be approximately 01 May 1997.

Respondent did not implement the “Enhanced Benefit Package” for its represented Fallon employees on April 1, but did implement the benefits with some changes, that were not fully detailed on the record, at its other facilities. Either prior to, or after this letter exchange, Warshauer had a telephone conversation with Ken Heinger, who was in-house legal counsel for Respondent, and Bouse. Heinger told Warshauer Respondent believed it was “in a dilemma because they couldn’t unilaterally just implement benefits without giving [the Union] an opportunity to bargain about that.” Warshauer could not recall if the conversation included a statement by him that the Union did not consider the implementation of the “Enhanced Benefits Package” to be an unfair labor practice and Respondent should proceed with the implementation. Warshauer believed his letter accomplished the communication of that opinion to Respondent.

C. Contract Negotiations

The first negotiating session occurred May 7.¹⁰ The Union did not lodge any further protests concerning Respondent’s failure to implement the “Enhanced Benefits Package” for the employees it represents until the first negotiating session.¹¹ The Union made an oral presentation to Respondent during the first negotiating session, including reasserting its claim Respondent should have implemented the “Enhanced Benefits Package” for unit members on April 1.¹² The Union made this assertion during several of the negotiating sessions, according to Warshauer’s unrefuted testimony. Moreover, Warshauer appeared open and answered questions in a direct and convincing manner, therefore, his testimony is credited.

¹⁰ The failure to meet earlier was not shown to be due to lack of good faith or a refusal to bargain.

¹¹ Specifically, Warshauer testified:
the union made a verbal presentation of our bargaining position on the key—on many of the key points that affected the bargaining, and one of the points that I made as the lead spokesperson was that the union’s position was that the company should have implemented the benefits package on April 1. We’ve maintained that position. We never wavered from that position, and we felt that they had committed an unfair labor practice by not implementing that package on April the 1st.
The Respondent answered “That we would have to agree to disagree on that point, and that—but that the company understood the union’s position.” According to Warshauer,

... at least 2 or 3 other occasions during the bargaining process where, as an aside in the bargaining process, the union maintained its position, and I maintained the union’s position that the company should have implemented the entire benefits package as of April the 1st and that we still maintained our position that they had committed an unfair labor practice by, in effect, putting us in a hole in the bargaining—to bargain for something that we should have already had.
The parties continued to negotiate with the understanding this was a legal dispute and they agreed to disagree.

¹² Bobby Greene, a labor specialist for Respondent who participated in the negotiations for a collective-bargaining agreement, admits the Union raised the issue of benefits either May 7 or 8. Greene informed the Union that Respondent “considered benefits being a mandatory subject for bargaining and that we would be discussing such things as bargaining progressed.”

After a series of negotiating sessions, the Union presented Respondent with its 39th proposal dated August 5. The first paragraph of this proposal provided:

The parties have agreed that the Company will implement effective September 29, 1997, the group insurance, optical insurance, [dental] insurance, life insurance, paid sick days, tuition reimbursement, retirement plan, and savings plan, and other benefits as described in the Company’s proposal dated August 5, 1997. The Company will advise the Union of any change in the companies which currently administer these plan benefits.

The Union’s proposal also included references to the retirement income plan, including methods of computing benefits and vesting of benefits, the health plans, and the statement, “The parties have agreed that to the extent practical, benefits as described in the Company’s proposal dated—shall be made retroactive to April 1, 1997.” Respondent’s counsel indicated it construed this proposal to reflect the agreement of the Union that these benefits be implemented on September 29. I find this argument unpersuasive. The Union indicated it was just its manner of making proposals, and also contemplated the parties being able to agree to make the benefits retroactive to April 1, if practical. Supporting this position is the fact this proposal included benefits that were not part of the December 16, “Enhanced Benefits Package.”

Respondent failed to establish the Union’s proposal accurately reflected an agreement they reached in prior negotiations, or was more than a proposal. In fact, Respondent admitted in its brief it was only a proposal. There is no persuasive evidence the Union specifically waived its claim the “Enhanced Benefit Package” was vested at the time it was announced and should have been implemented on April 1. That the parties disagreed about the impact of the representation election on the unit employees’ entitlement to the benefits did not foreclose negotiations in general or specifically on matters relating to benefits encompassed in the “Enhanced Benefit Package.”

The evidence clearly establishes there was no clear and knowledgeable waiver on its agreement concerning the propriety of Respondent’s position concerning the “Enhanced Benefits Package.” The parties had negotiations about credits for vesting of pension benefits, and on August 5, the Company had a pension specialist discuss this issue with the negotiators. At about this time, Respondent and the Union agreed to use the services of the Federal Mediation and Conciliation Service. The Union did not mention the dispute concerning the “Enhanced Benefits Package” to the mediator. Such a failure does not constitute a waiver by the Union and Respondent agreed the issue was a legal matter that would not be resolved through negotiations.

In sum, I find Respondent has failed to establish the negotiations during this session resulted in any agreements or resolutions of the dispute or waiver by the Union concerning the employees entitlement to the “Enhanced Benefits Package” effective April 1, or when they should have been implemented. The contrary is indicated by the fact Respondent made a final proposal to the Union on August 11, that was rejected by the bargaining unit on or about August 20, 1997. This conclusion is supported by the testimony of Greene that both Respondent and the Union submitted written proposals for consideration during this negotiating session. Greene also admitted the Respondent’s proposal on this date had some differences from the “Enhanced

Benefit Package” announced the preceding December. This final offer was not shown to propose the imposition of the “Enhanced Benefit Package” effective April 1. Warshauer had told the employees there was more for them to get from Respondent. The benefits were not specifically mentioned in this statement, but his statement does not clearly waive any rights.

Negotiations resumed and the parties discussed vesting of the pension plan. Respondent presented another final offer on September 7. This offer was accepted. After about 31 negotiating sessions, a collective-bargaining agreement was ratified on September 9. The agreement made some of the “Enhanced Benefits Package” effective retroactive to April 1, for the employees who were on the payroll on or after September 29. Other of the “enhanced benefits” were effective for those employed on September 29, and some were not effective until September 29, including, according to Warshauer, the announced tuition reimbursement program, a savings program with matching contributions by Respondent, improved formula for computation of sick days, improved medical insurance benefits, and the jury duty differential pay. Warshauer’s uncontroverted testimony is credited.

Greene testified he did not know at the time Respondent made the September 7 final offer that certain employees were excluded from the retroactive application provisions. According to Green, the Union never attempted to bargain to get these excluded employees included in the coverage. I do not credit this testimony based on demeanor. Greene did not appear to be testifying in an open and straightforward manner. Moreover, the Union’s August 5 proposal contained reference to making all the benefits retroactive to April 1, albeit, as far as practical. Another reason for not crediting Greene is Bouse’s admission that Respondent and the union negotiators “discussed at length” vesting and retroactivity, “[t]here were a great many discussions on the benefit service time” Respondent was concerned about when the collective-bargaining agreement would be ratified because timely ratification would afford it the opportunity to seek a new wage determination from the Department of Labor to recoup any increases in costs.

The collective-bargaining agreement entered into by the Union and Respondent was effective September 9, 1997. According to this agreement, health care expense benefits became effective for the unit employees on September 29, not April 1. Similarly, the life and accidental death and dismemberment insurance and disability provisions had an effective date of September 29. The hourly life insurance benefit also became effective September 29, as did the prescription drug plan, and the tuition reimbursement plan.

Subsequent to reaching an agreement, Warshauer had a conversation with Bouse which Warshauer initiated concerning a member of the unit who was preparing to resign right after the collective-bargaining agreement had been ratified. Bouse “thought it would be important for him to contact employees who were—who had announced resignation to explain to them what benefits they may have coming to them.” Respondent offered to similarly inform any other unit members who indicated they intended to resign that if they remained until after September 29, it could materially affect the vesting of their retirement plan. Bouse believed three employees resigned and left Respondent’s payroll between the time the collective-bargaining agreement was ratified on September 29. Bouse admitted other employees, with whom Respondent’s representatives did not speak to about the impact of their resignations on

their retirement benefits, resigned between April 1, and the ratification of the collective-bargaining agreement, and thus did not have any “enhanced benefits” vest.

After negotiations were finalized and the collective-bargaining agreement ratified, Warshauer spoke with one or more of Respondent’s representatives. During the discussion Bouse asked Warshauer, “What was gonna happen with the union’s unfair labor practice charge?” Warshauer replied: “That it was probably going to go away, and I was hopeful that it would go away because I thought there was enough good faith that we would be able to resolve those issues.” There is no persuasive showing the Union, as part of the collective-bargaining agreement negotiations committed to withdrawal of the unfair labor practice charge or otherwise is bound to withdraw the charge or waive the employees right to the “Enhanced Benefits Package.”

D. Service Contract Act

At the time Respondent commenced operations at Fallon, they were governed by the Service Contract Act (SCA). According to Bouse, on government contracts covered by the SCA where there is no collective-bargaining agreement, the service contract is accompanied by a contract called an area wage determination that sets the floor for wages and a computation of an average wage that must be paid. Most of Respondent’s contracts under the SCA provide for health and welfare benefits. Respondent inferred but failed to prove, it was restricted in what it could negotiate because it had to acquire a conformance or exception from the Department of Labor to increase benefits. The unit employees had not received a wage increase in the 4 to 5 years prior to the union representation election. Respondent had been unsuccessful in persuading the Department of Labor to raise the area wage determination. Such failure was not shown to have barred Respondent from implementing the promised “Enhanced Benefits Package.” On the contrary, Respondent admitted under the SCA there was no ceiling to the wages and benefits it could pay its employees.

I find Respondent has failed to convincingly establish the Service Contract Act, precluded it from implementing the “Enhanced Benefit Package” on April 1. Respondent never claimed it would not have implemented this package if the Union lost the representation election. That the costs of the benefits may or may not be susceptible to recoupment after negotiations with the Department of Labor did not act as a legal bar and was not shown to be a practical bar. Respondent did not point to any provision of the SCA which prevented implementation of the “Enhanced Benefits Package.” Bouse admitted the Service Contract Act did not preclude Respondent from increasing wages and benefits. Respondent did not need to get the approval of the Department of Labor to implement the benefits.

III. ANALYSIS AND CONCLUSIONS

At the time, Respondent unconditionally promised to implement the “Enhanced Benefits Package” the employees were not represented by the Union. No objections were filed to the Board’s certification of the Union. As noted in *Holland American Wafer Co.*, 260 NLRB 267, 270 (1982):

The violative unilateral changes may include either the denial of a benefit which, because of practice or promise, has become a term or condition of employment (see *Liberty Telephone & Communications, Inc.*, and *Century Telephone Enterprises, Inc.*, 204 NLRB 317 (1973), and

cases cited therein) or the grant of a benefit which is not a term or condition of employment because it involves the exercise of discretion. See, e.g., *Allis Chalmers Corporation*, 237 NLRB 290 (1978). See also *Mercury Industries, Inc.*, 242 NLRB 90 (1979).

The General Counsel contends Respondent, by this promise, created a vested right to the “Enhanced Benefits Package” and thus, Respondent’s decision, reached without bargaining, to not implement the package on April 1 at Fallon, constitutes an unlawful unilateral change in working conditions in violation of Section 8(a)(1) and (5) of the Act. Respondent argues the election of the Union as the unit members collective-bargaining representative created an obligation on the part of Respondent to bargain with the Union concerning the units terms and conditions of employment, including these benefits.

The Respondent claims it notified the Union of its intent to withhold implementation of the “Enhanced Benefits Package” and the Union waived its right to bargain over the unilateral change. I find this argument is unpersuasive. The Union protested the change and requested bargaining over the matter. Under the circumstances of this case, I find the Union has not waived any rights to bargain over the matter. The Union argued against Respondent’s course of action stating it believed withholding the benefits constituted an unfair labor practice and expressed the Union’s willingness to bargain over benefits in general. The Union raised the matter at the first and subsequent negotiating sessions. Respondent and the Union agreed their dispute involved a legal question and they disagreed on the answer, which effectively foreclosed bargaining on Respondent’s decision to make the unilateral change in terms and conditions of employment. Moreover, Respondent’s actions presented a *fait accompli*. Respondent never agreed to bargain over its decision, only over benefits. *R.R.R. Restaurant*, 314 NLRB 1267 (1994). Respondent failed to delay the unilateral change despite the Unions bargaining request and presented its decision as a *fait accompli*. *Mercy Hospital of Buffalo*, 311 NLRB 869 (1993).

Thus, Respondent made a unilateral change during the course of a collective-bargaining relationship of matters that are mandatory subjects of bargaining, in violation of the Act. For the reasons stated below, I find the employees had a vested right to the “enhanced benefits.” *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991), held “[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.” There is no claim the parties bargained to impasse prior to the unilateral change, indeed, there was no bargaining prior to the unilateral change. *Public Service Co. of Colorado*, 312 NLRB 459 (1993).

I find Respondent has failed to demonstrate any of the circumstances the Court in *NLRB v. Katz*, 369 U.S. 736 (1962), and its progeny justified unilateral employer action.¹³ Thus,

¹³ The Court in *Katz*, *id.* at 747, explained:

Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified.

The Court also determined it was unnecessary to demonstrate subjective bad faith on the part of the employer to establish a violation of the Act because the conduct was viewed as so harmful to the collective-

acknowledgement of the Union’s win in the election did not alter Respondent’s obligation to refrain from unilaterally changing unit members’ terms and conditions of employment until good-faith bargaining resulted in an impasse. *White Oak Coal Co.*, 295 NLRB 567 (1989). In fact, the Respondent recognized its obligation to bargain prior to implementing the unilateral change when Bouse indicated in his letter the matter would be the subject of bargaining in May. A unilateral change violates the Act even if the employer has a mistaken good-faith belief an impasse had been reached or the union had not been negotiating in good faith. *Columbia Portland Cement Co.*, 294 NLRB 410 (1989); *Saunders House*, 265 NLRB 1632 (1982), *enf. denied* 719 F.2d 683 (3rd Cir. 1983); *cert. denied sub nom. Hospital & Health Care Employees District 1199C v. Saunders House*, 466 U.S. 958 (1984); *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983), *cert. denied* 466 U.S. 937 (1984).¹⁴

In sum, I conclude there is no persuasive evidence the Union, by either action or inaction waived or relinquished any rights concerning Respondent’s unilateral change in terms and conditions which are mandatory subjects of bargaining. The Union protested Respondent’s announced unilateral action in a timely manner. There is no clear and unmistakable waiver demonstrated on this record. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 fn. 12 (1983). The Union clearly did not acquiesce to Respondent’s announced and implemented unilateral change in terms and conditions of employment. Thus, the evidence falls far short of establishing a clear and unmistakable waiver by the Union. The Union both protested the unilateral action and sought to bring it to the bargaining table.

Respondent argues the promised benefits were not vested. I disagree. There is no question there was a specific promise to implement the “Enhanced Benefit Package” unconditionally at a time certain and specifically regardless of the outcome of the representation election. It is clear the promised “enhanced benefits” relate to wages, hours, and other terms and conditions of employment of the unit members, and are mandatory subjects of bargaining. As the Board held in *Liberty Telephone*, *supra*, 204 NLRB 317:

... logic and relevant authority decree that the definition of “condition of employment” includes not only what the employer has already granted, but also what he “proposes to grant.”¹³ The terms and conditions of employment in a labor contract are fixed not by rigid formulas or stipulations but by the relationship between the employer and the employees. It is the normal foreseeable expectations arising out of the relationship, including the expected weekly wage, the usual promotion policy, anticipated wage increases, customary bonuses and vacations, and *other announced or expected benefits*,

bargaining process. *Dailey News of Los Angeles*, 315 NLRB 1236 (1994). As found herein, this reasoning applies to cases where benefits have vested, not just where there is a long history of wage increases, but where there is a clearly promised benefit which thereby became vested.

¹⁴ I also find Respondent’s reliance on *McCulloch Corp.*, 132 NLRB 201 (1961), unpersuasive. In *McCulloch*, there was not a promise to implement the change in benefits regardless of the outcome of a representation election, therefore, the benefit may not have been considered as vested. Moreover, there was a finding the company had a good-faith doubt the union represented a majority of the unit at the end of the certification year. I find the decision in *Holland American Wafer Co.*, 260 NLRB 267 (1982), discussed in greater detail herein, to be more on point and applicable to the facts in the instant case.

which constitute the terms and conditions of employment. Hence in determining whether a particular matter or program is a term and condition of employment which is subject to collective bargaining, the Board and courts have properly considered whether the program is a reasonable expectancy of the employment relationship, i.e., whether the program in fact acted as an inducement to employees to accept or continue employment. [Emphasis added.]

³ *Armstrong Cork Company v. NLRB*, 211 F.2d 843, 847 (5th Cir.); *United Aircraft Corporation, Hamilton Standard Division (Boron Filament Plant)*, 199 NLRB No. 68.

It is uncontroverted the promise to implement the “Enhanced Benefit Package” was not contingent upon a certain result in the Union election or any other event. On the contrary, the promise was specifically that the “Enhanced Benefit Package” would be implemented regardless of the outcome of the election.¹⁵ The nature and amount of the benefits were also contained in the announcement.¹⁶ As the Board found in *Baker Brush Co.*, 233 NLRB 561, 562 (1977):

We find that the discretionary increase promised for implementation on or about January 1 was, by reason of that promise, an existing condition of employment which Respondent—had the Union been certified—would have been legally obligated to continue and could not alter without consulting the Union. *Liberty Telephone & Communications Inc.*, and *Century Telephone Enterprises, Inc.*, 204 NLRB 317 (1973).⁵

⁵ See also *Armstrong Cork Company v. NLRB*, supra, 211 F.2d 843 (5th Cir. 1954).¹⁷

I conclude the announced “Enhanced Benefits Package” was an explicit promise which became a term and condition of employment at the time it was announced. As the Supreme Court held in *May Department Stores Co. v. NLRB*, 326 U.S. 376 (1945), the mere announcement of a wage increase constituted a change in the existing terms and conditions of employment. The Court also noted the involvement of the War Labor Board in that case did not alter this finding or act in mitigation. The fact the unit employees worked under the Service Contract Act, similarly, does not alter this conclusion; even more so in this case where Respondent admits the Labor Department does not set a ceiling on wages and benefits under the Service Contract Act. Respondent failed to show the representation of its employees by a Union prevented implementation of the “Enhanced Benefit Package” under the SCA or any other law.

¹⁵ There is no claim the announcement of the “enhanced benefit” package was unlawfully motivated.

¹⁶ That Respondent altered in some manner, which was not detailed on the record the benefits it implemented on April 1 at different facilities and for different employees does not demonstrate on this record, that promised benefits were to amorphous to be considered terms and conditions of employment. Respondent announced the benefits would be implemented without contingencies. There was no evidence the facilities that received the benefits on April 1, were all represented or, that any was represented by a collective-bargaining representative received the same announcement on or about December 13, and did not bargain with and agree to, or waive such right, prior to Respondent implementing any of the subsequent changes to the “Enhanced Benefits Package.”

¹⁷ Cf. *United Aircraft Corp.*, 199 NLRB 658 (1972), enfd. in part *NLRB v. United Aircraft Corp.*, 490 F.2d 1105 (2d Cir. 1973).

Concomitantly, there was no showing the SCA or any other law constituted a legitimate and substantial business justification for Respondent’s unilateral action. Thus, there was no contingency attached to the announcement. The withholding of the announced benefits from the unit employees discouraged them and denied them their reasonably expected benefits, an expectation which resulted from Respondent’s prior announcement. The question of obtaining any quid pro quo from the Union for these benefits does not obtain in this case, for these benefits had been vested prior to the Union becoming the employees’ representative. The withholding of these promised benefits after the representation election thereby unilaterally changed their terms and conditions of employment. *Liberty Telephone*, supra.

Respondent referred to the dilemma it faced resulting from the Board’s decisions in this area. Any difficulty was created by Respondent announcing it would implement the announced benefits regardless of the outcome of the election and then unilaterally choosing not to implement the benefits on April 1, and bargain with the Union prior to withholding the benefits. It was Respondent who made the choices and acts or refuses to act at its own risk. *O’Conner Chevrolet-Buick-GMC Co.*, 209 NLRB 701 (1974), enfd. 512 F.2d 684 (8th Cir. 1975). In general, during a representation campaign an employer must proceed as he would have done had the Union not been on the scene. *Gates Rubber Co.*, 182 NLRB 95 (1970).

The Union did not protest the implementation of the “Enhanced Benefits Package.” *Smith & Smith Aircraft, Co.*, 264 NLRB 516 (1982). The court in *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970), determined:

At first glance it might appear that the employer is caught between the proverbial “devil and the deep blue sea.” It is an unfair labor practice to grant a wage increase during the campaign and bargaining periods, but at the same time it may be an unfair labor practice to refuse to grant an increase during this same period. Indeed, the employer in this case has made just this sort of an argument, claiming that it could not grant the pressroom employees their normal progression raises since to do so would have been an unfair labor practice. We find little merit in such arguments. The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.

Analogously, I have found Respondent’s unconditional promise to implement the “Enhanced Benefits Package,” by its nature, became an existing condition of employment which Respondent unilaterally withheld because the Union won the election. Thereby, Respondent has failed to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act. This is a violation despite the fact that the Respondent may have believed it could not grant any (increase in benefits) because the Union won the representation election. *Dorn’s Transportation Co.*, 168 NLRB 457 (1967).

To find otherwise would permit an employer to box unions in on future bargaining positions by unconditionally promising benefits shortly before an election and then refusing to implement them on the stated date because the union won the election. Respondent knew the Union won the election when it determined not to implement the promised benefits on April 1.

Allis-Chalmers Corp., 234 NLRB 350 (1978); *enfd.* in part *NLRB v. Allis Chalmers Corp.*, 601 F.2d 870 (1979); *Laney & Duke Storage Warehouse Co.*, 151 NLRB 248 (1965). Even if I conclude Respondent lacked antiunion motivation, such unilateral action is still a violation of the Act. *Chatham Mfg. Co.*, 172 NLRB 1948 (1968).

CONCLUSIONS OF LAW

1. McDonnell Douglas Aerospace Services Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since December 27, 1996, the Union has been, and is now, the exclusive collective-bargaining representative of Respondent's employees in the following unit, which is appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production, service and maintenance employees employed by Respondent at the Fallon Navel Air Station, Fallon, Nevada, including Quality Assurance Representatives; excluding all office clerical employees, guards, Leads, Maintenance Controller Supervisors, and supervisors as defined in the Act.

4. By unilaterally changing the terms and conditions of employment of the employees in the appropriate unit described above by delaying or withholding the scheduled "Enhanced Benefits Package," because the employees selected the Union as their collective bargaining representative, thereby failing to bargain with the Union in good faith, Respondent has violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I recommend it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

As I have found, Respondent has illegally withheld benefits to which bargaining unit employees were entitled and would have received but for Respondent's unilateral conduct in violation of Section 8(a)(5) and (1) of the Act, I recommend that each of the affected employees be made whole for Respondent's failure to give effect to the promised "Enhanced Benefits Package," on April 1, 1997. The amount shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); plus interest as computed in *New Horizons For the Retarded*, 283 NLRB 1173 (1987). Respondent is to bargain in good faith with the Union regarding these benefits.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

ORDER

The Respondent, McDonnell Douglas Aerospace Services Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally delaying or withholding the granting of scheduled benefits because the employees had selected the Union as their collective-bargaining representative of its employees in the following appropriate unit, thereby failing and refusing to bargain with the Union in good faith:

All full-time and regular part-time production, service and maintenance employees employed by Respondent at the Fallon Navel Air Station, Fallon, Nevada, including Quality Assurance Representatives; excluding all office clerical employees, guards, Leads, Maintenance Controller Supervisors, and supervisors as defined in the Act.

(b) In any other 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) Make whole the employees in the appropriate unit for any monetary losses they may have suffered by reason of Respondent's unilateral withholding of the "Enhanced Benefits Package" which the employees would have received in the manner set forth above in the remedy section of this decision and, on request, bargain collectively with International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO as exclusive representative of the employees in the appropriate bargaining unit, described above, and, if an understanding is reached, embody that understanding in a signed contract.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(c) Within 14 days after service by the Regional Director, post at its Fallon, Nevada office copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since April 1, 1997.

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

¹⁸ In the event 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.

¹⁹ 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."

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 the National Labor Relations Act and we have been ordered to post this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To bargain as a group through representatives of their own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT fail to bargain with the Union in good faith by unilaterally delaying or withholding the implementation of scheduled benefits because the employees had selected the Union as their collective-bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time production, service and maintenance employees employed by us at the Fallon Naval Air Station, Fallon, Nevada, including Quality Assurance Representatives; excluding all office clerical employees, guards, leads, maintenance controller supervisors, and supervisors as defined in the Act.

WE WILL make whole, the employees in the above appropriate unit for any losses they may have suffered by reason of out unilateral withholding of the "Enhanced Benefits Package" which they should have received on April 1, 1997, and, on request of the Union, bargain collectively regarding the "Enhanced Benefits Package" as it may affect bargaining unit employees, with the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of rights guaranteed you by Section 7 of the Act.

MCDONNELL DOUGLAS AEROSPACE SERVICES COMPANY