

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ADT LLC d/b/a ADT SECURITY SERVICES

and

Case 5-CA-127502

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 2, AFL-CIO

RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS

This case arises on an unfair labor practice complaint alleging that respondent ADT LLC (“ADT” or “Company”) violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide information to Office and Professional Employees International Union, Local 2, AFL-CIO (“Union”), which represents several units of Company employees involved in installation and service of residential and small business alarm systems and related products. The bargaining units at issue are based at Company facilities in Gaithersburg, Maryland, Columbia (Baltimore), Maryland, and Lanham, Maryland/Springfield, Virginia.

The hearing in the matter was held October 2, 2014. The decision of the Administrative Law Judge (“ALJD”) was issued November 12, 2014.

FACTS

The Union represents three (3) bargaining units of installation and service employees of ADT. The units are located at Gaithersburg, Maryland, at Columbia (Baltimore), Maryland, and a combined unit of employees in Lanham, Maryland, and in Springfield, Virginia. There is a collective bargaining agreement covering the employees in each of the three units. Equipment installers in each of the units are paid either an hourly wage or work on commission. Service

employees in each unit, on the other hand, are paid solely by the hour. The commissioned installers are known as High Volume Commission Installers (“HVCI”). (GCX 2-5).

In each of the three collective bargaining agreements there is provision for hourly wage rates for hourly installers and service technicians and a commission rate schedule for HVCI employees. With respect to the HVCI employees, each contract has identical language providing as follows:

HIGH VOLUME COMMISSIONED INSTALLER

High volume can best be described as a program designed to sell numerous systems with recurring revenue and such systems can normally be installed in less than one day. Such systems are designed for the low end of the residential or commercial market. The Employer reserves the right to eliminate and reinstate the High Volume Commissioned Installer program at any time and/or transfer employees between HVCI and hourly installation as business needs dictate. Employees assigned to high volume installation work will be paid a commission in accordance with Schedule “C”.

In April 2014, ADT exercised its option under the three CBAs to transfer installers from HVCI to hourly. ADT had discussed with the Union its dissatisfaction with the HVCI program and that some employees had abused the commission system and the Company was not realizing sufficient productivity from the system to justify continuing it. (Tr. 50-53, 62, 80-83).

The Union objected to the Company’s plans and wrote to the Company demanding that it bargain over the change and effects of the change and requesting information from the Company for such bargaining. The information requested included “the business justification for the change”. In view of the CBA language permitting the Company to eliminate or transfer employees from HVCI to hourly “at any time”, the Company declined to bargain and so notified the Union. The Company’s response, authored by its Director of Labor Relations, James Nixdorf, stated, in part, that “I have reviewed your request for bargaining and information. As previously discussed, the Company maintains the contract language is clear and the Union has

ceded its ability to bargain over this issue. In addition, since no right to bargain exists the union is not entitled to demand information for such bargaining.” (GCX 9).

The Union filed an unfair labor practice charge alleging that the Company violated the Act by refusing to bargain over the decision and effects of the change from HVCI to hourly and refusing to provide the information requested by the Union. (GCX 1-A). After investigation, the NLRB Regional Office ruled that the Union had waived its right to bargain and dismissed that portion of the charge. On appeal by the Union to the NLRB Office of Appeals, the Regional Office’s decision was affirmed. (See Tr. 55 (judicial notice)). The Office of Appeals stated, in pertinent part:

Contrary to the assertion in the appeal, the probative evidence obtained from the regional office’s investigation disclosed that the union clearly and unmistakably waived its right to bargain over the change in the HVCI’s compensation by the respective HVCI provisions in the respective collective bargaining agreements ... Given the contractual waivers, the probative evidence did not establish that the employer modified the HVCI’s compensation without the union’s consent. Though the appeal asserts that the employer unilaterally eliminated the HVCI classification and impermissibly changed the scope of the unit, the totality of the probative evidence indicated that the employer reclassified the HVCI to hourly installation. In addition, the employer was under no obligation to bargain over the effects of its decision as the only effect was to apply the terms and conditions of the hourly installers. The parties had already negotiated those terms and conditions which were contained in the collective bargaining agreements. Lastly, to the extent that the appeal raises a Section 8(a)(3) discrimination allegation that the employer’s decision was limited to the Union represented facilities, the union did not allege this in its underlying charge or amend the charge to include it.

Notwithstanding its own finding, affirmed on appeal, that the Union waived its right to bargain over the decision to move employees from HVCI to hourly and also waived bargaining over the effects, the Regional Office issued complaint on the refusal to provide information allegations. The complaint alleged that the Union was entitled to the requested information because the information was “necessary for, and relevant to, the union’s performance of its duties as collective bargaining representative.” (GCX 1-C). The complaint does not allege that

the information was necessary for and relevant to the bargaining that the Union demanded, although that was the expressed reason why the Union requested the information.

The Administrative Law Judge issued his decision on November 12, 2014. He found that the Company violated the Act by not providing the Union with certain requested information but that the Union's request for the "business justification for the change" from HVCI to hourly need not be provided because, said the ALJ, "the waiver language in the collective bargaining agreements is so broad that it gives Respondent a carte blanche to eliminate the HVCI program." "Thus, I find", said the Judge, "that Respondent was not obligated to give the Union any further information as to the business justification for the change." (ALJD at 3-4).

Counsel for the General Counsel has filed exceptions to the ALJ's finding that Respondent did not violate the Act by not providing "any further information as to the business justification for the change." (ALJD at 4). The propriety of this finding is the only issue before the Board in this appeal, Respondent having elected not to file exceptions to the ALJ's findings that are adverse to Respondent.

ARGUMENT

Board law holds that where a union waives its right to bargain over a change to a term or condition of employment, the union is no longer entitled to information requested for that bargaining. E.g., Kennametal, Inc., 358 NLRB No. 68 (2012), sl.op. at 3, and cases cited.

Here, the Union's one and only request for information -- the request upon which Counsel for the General Counsel's entire case against the Company rests -- came in a letter from the Union to the Company declaring and demanding that the Company must bargain over decision and effects of the change from HVCI to hourly. (GCX 8). The information sought was ostensibly to aid the Union in such bargaining; indeed, the Union's letter expressly cautioned

that the Union may “need more information as [bargaining] proceed[s] forward.” In direct and immediate response to these demands, the Company wrote that due to the HVCI language in the parties’ contracts, the Union had waived its rights to bargain over these issues and that “since no right to bargain exists[,], the union is not entitled to demand information for such bargaining.” (GCX 9). As recited above, the Board’s General Counsel, through the Office of Appeals, subsequently ruled that, in fact and law, the Union’s right to bargain over the decision and effects of the HVCI change had indeed been waived, just as the Company asserted.

The ALJ found that notwithstanding the Union’s waiver, the Company was required to give the Union certain information it requested and violated the Act by not doing so. However, the ALJ agreed with the Company that, as to the Union’s request for the “business justification for the change,” such information need not be provided given the breadth of the waiver language and in light of information the Company had previously given to the Union regarding the Company’s business issues with the HVCI pay system. Accordingly, the ALJ found that “further information as to the business justification for the change” need not be provided. This finding is clearly correct and should be affirmed by the Board.

General Counsel’s argument in this appeal is that the ALJ erred in finding that the “business justification for the change” need not be provided to the Union due to the breadth of the contract waiver. General Counsel’s theory is that under the contracts between the Company and Union, the Company was “only permitted to change the HVCI installers’ pay as business needs dictated” (GC brief in support of exceptions, at p. 13). Thus, General Counsel posits that “if ADT’s claim that business needs dictated the change was wrong or false, then the change would have breached the CBAs and the Union...could have filed a grievance over ADT’s failure to comply with the “as business needs dictate” requirement (GC Brief at 14). On this basis the

General Counsel contends that the Union was entitled to the “business justification” information it requested.

Putting aside General Counsel’s conjecture that ADT’s claims of business needs could be proven “false”, which no one asserts and for which there is neither evidence nor allegation, the General Counsel’s claim that information must be provided to the Union because ADT’s business judgment could be found “wrong” in a grievance proceeding, resulting in reversal of the Company’s actions, is nothing short of preposterous. There is no standard in the contract for determining whether a pure business judgment made by the employer is “wrong.” The contract language which the Union here agreed to plainly means that ADT may eliminate the HVCI program for any reason or combination of reasons which, in the Company’s judgment, is in accordance with the Company’s assessment of “business needs”. The contractual language does not give the Union an enforceable right to second guess the Company’s business judgment, as the General Counsel would have it. Rather, obviously and necessarily, it is solely the Company, and not the Union or employees that operates and manages the corporate enterprise and makes such business decisions. If the General Counsel’s argument here had any validity, the General Counsel’s own Office of Appeals would never have concluded in the first instance that the Union plainly and unmistakably waived its right to require bargaining over the decision to transfer employees from HVCI to hourly.¹ The General Counsel’s contention before the Board that the ALJ erred in so interpreting the contracts must accordingly be rejected.

¹ Moreover, the Union did not ask the Company merely to specify its “business needs” under the contract (which in any event the Company had already done), but asked the Company for the “business justification” for the change. As the ALJ so succinctly stated, and in complete agreement with the determination of the Office of Appeals, “the waiver language in the collective bargaining agreements is so broad that it gives Respondent a carte blanche to eliminate the HVCI program. Thus, I find that Respondent was not obligated to give the Union any further information as to the business justification for the change.” There is no basis in law or fact to disturb this finding.

CONCLUSION

The decision of the Administrative Law Judge in favor of Respondent on the issue raised by General Counsel's exceptions should be affirmed and the exceptions denied.

Respectfully submitted,



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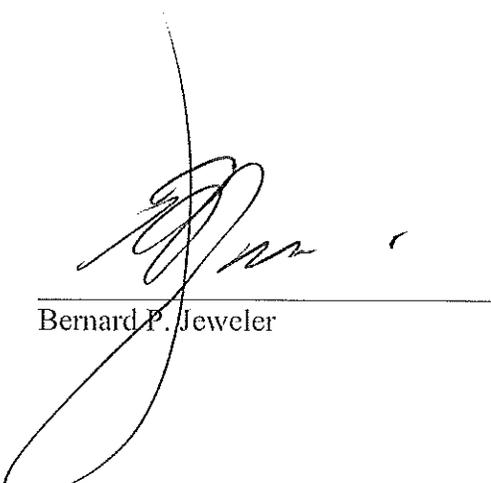
OFFICE AND PROFESSIONAL EMPLOYEES
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CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent's Answering Brief to General Counsel's
Exceptions was sent this day by electronic mail to the following:

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Dated: December 30, 2014