

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADT LLC, A WHOLLY-OWNED SUBSIDIARY OF ADT
CORPORATION D/B/A ADT SECURITY SERVICES

and

Case 05-CA-127502

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

**COUNSEL FOR THE GENERAL COUNSEL'S
REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS**

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, counsel for the General Counsel files this Reply Brief in Support of Its Exceptions.

I. INTRODUCTION

ADT fails to refute the arguments made in counsel for the General Counsel's Brief in Support of its Exceptions in a number of ways. First, ADT fails to address the argument that the requested business justification was relevant to the parties' current and future bargaining, which is not only a sufficient basis to entitle the Union to the information but is also the basis upon which the ALJ relied to find the Union entitled to the other requested information at issue in this case. Second, ADT's argument that the Union has no right to "second guess" ADT's "pure business judgment" misses the mark because the Union requested the information not to second guess ADT but instead to ensure that ADT's decision to shut down the HVCI program was in fact a pure business judgment as required by the plain language of the CBAs, which the Union has a right to enforce. Finally, ADT's reliance on the Office of Appeals' non-controlling opinion fails because the decision does not address the allegations in this case and is not inconsistent with the Union's entitlement to the requested information.

II. ARGUMENT

A. ADT Failed to Address the Information's Relevance to the Parties' Collective Bargaining Obligation

ADT replied to only one of the two arguments that counsel for the General Counsel made in its initial brief with respect to why the Union is entitled to ADT's business justification.

Counsel for the General Counsel explained that ADT's business justification for changing the installers' pay rates was relevant to: (1) the parties' current and future collective bargaining over new CBAs for the Springfield/Lanham and Columbia units; and (2) the Union's role of policing the parties' current CBAs by ensuring that business needs dictated the change. (Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge, hereinafter "GC Brief," at 1, 13-16). While both grounds apply to this case, either is sufficient to entitle the Union to ADT's business justification. (*See id.* at 9-12). In its reply, however, ADT failed to address the first basis of relevance for the requested information and instead addressed only the second. (*See* Respondent's Answering Brief to General Counsel's Exceptions, hereinafter "ADT Brief," at 4-6). ADT thus failed to address the Union's entitlement to the requested information based on the parties' collective bargaining.

As previously explained, the parties' collective bargaining is an independent basis of relevance for the requested information. (*See* GC Brief at 15-16). Board law is clear that even where a union waives its right to bargain over a subject, it is still entitled to information regarding the waived subject if that information is also relevant to the parties' collective bargaining over a contract. *See Galaxy Towers Condo. Ass'n*, 361 NLRB No. 36, slip op. at 1 n.4 (2014). This case is similar to *Galaxy Towers*, where the union alleged that the employer failed to bargain over its decision to subcontract unit work and failed to provide the union with information it requested regarding the subcontracting. *Id.* at 12. There, the Board found the

union waived its right to bargain over the decision to subcontract, but was still entitled to the information regarding subcontracting because it “was relevant and necessary for other reasons,” such as the union’s “duty to bargain over the terms of a new agreement” for unit members. *Id.* at 1 n.4. The Board rejected the argument that the union had waived its right to the information by waiving its bargaining rights over the decision, finding instead that “circumstances surrounding the [u]nion’s request,” such as the parties’ “ongoing negotiations over nonwaived bargaining subjects, reasonably put the [employer] on notice of a relevant purpose for requesting the information.” *Id.* As such, the Board found the employer was obligated to provide the information regarding the waived subject, and violated Section 8(a)(5) and (1) when it failed to do so. *Id.*

Similarly here, at the time of the request, the parties had reopened bargaining on one CBA, for the Columbia unit, and had plans to bargain another CBA, for the Springfield/Lanham unit, in the next year. (Tr. 20:15-21:13, 22:14-23:4, 36:5-37:8). ADT’s business justification for changing (and as a result, decreasing) half of the unit employees’ pay rates was clearly relevant to such bargaining because it would help the Union bargain new pay rates or a restoration of the HVCI program by addressing the issues that led to the change in the first place. Indeed, the parties had discussed some of ADT’s issues with the HVCI program in previous bargaining sessions, indicating they found the topic relevant to their collective bargaining. (Tr. 62:1-63:1).¹ The caselaw and bargaining history thus show that ADT’s business justification was relevant to the parties’ collective bargaining and therefore should have been provided, and ADT fails to argue otherwise.

¹ As explained in counsel for the General Counsel’s initial brief, the parties’ previous discussions during bargaining did not satisfy ADT’s obligation to provide the requested information. (GC Brief at 20-22). Additionally, ADT has not argued that such conversations satisfied its obligations.

Notably, the basis of relevance ADT failed to address is the same basis the ALJ relied on to find the Union to be entitled to the other information requested. Specifically, the ALJ found that the Union was entitled to other requested information in spite of the waiver, due to the information's relevance to the parties' bargaining of the Columbia and Springfield/Lanham contracts. (ALJD at 4:30-37). Counsel for the General Counsel explained in its initial brief how that conclusion should also apply to the Union's request for ADT's business justification, which was just as relevant to the parties' collective bargaining as the other requested information. (GC Brief at 16-18). The ALJ was thus inconsistent in finding the Union entitled to one request but not the other, when both requests were equally relevant to the parties' collective bargaining. (Id.) ADT failed to reply, however, and explain why the ALJ's inconsistent findings should be maintained.

B. The Union Has a Right to Enforce the Terms of the CBAs

ADT's argument that the Union does not have a right to enforce the terms of the waiver fails. ADT argues that the "as business needs dictate" language is unenforceable because "[t]here is no standard in determining whether a pure business judgment made by the employer is 'wrong'" and the contract "does not give the Union an enforceable right to second guess the Company's business judgment." (ADT Brief at 6). This argument misses the issue, which is not whether the Union can second-guess ADT's business judgment, but whether ADT's decision to shut down the HVCI program at the Union-represented facilities *was in fact a business judgment*. That is why the waiver applies only "as business needs dictate"—there must in fact be business needs that dictate the change to the HVCI program. The Union *is* entitled—indeed, is

obligated—to ensure that ADT complies with the terms of the waiver by ensuring that ADT has a business justification for shutting down the HVCI program.² (*See* GC Brief at 13-15).

The evidence shows that the Union requested ADT’s business justification for just that reason—to ensure that ADT’s decision was in fact a pure business judgment. The Union requested the information because it “wanted to know why this was happening,” whether it be a “monetary consideration,” a “customer need” or some other “business need.” (Tr. 36:5-21). The Union’s representative, George Kapanoske, was concerned that the Union’s units were being targeted for non-business reasons because when the parties had discussed installer programs in the past, ADT had raised only issues that applied to its facilities across the country and that were based on a nationwide audit. (Tr. 51:16-23, 62:1-63:1). At the time of the Union’s information request, however, ADT had shut down the HVCI programs at only five facilities, four of which the Union represented. (Tr. 63:25-64:4). Moreover, Kapanoske knew there were non-Union facilities in the same area as the Union-represented facilities where ADT was not unilaterally eliminating the HVCI programs. (Tr. 39:3-8, 63:25-64:4). The evidence thus indicated that ADT’s decision to selectively close the Union-represented facilities, after the parties had previously discussed only general nationwide issues common to all HVCI programs, was based on something other than “a pure business judgment” and thus violated the plain terms of the CBA’s waiver, which is why the Union requested ADT’s business justification.

C. The Office of Appeals’ Opinion Does Not Support ADT’s Argument

ADT argues that if the Union were entitled to ADT’s business justification to ensure ADT’s compliance with the parties’ CBAs, the Office of Appeals “would never have concluded in the first instance that the Union plainly and unmistakably waived its right to require

² As stated in counsel for the General Counsel’s initial brief, the CBAs allow the parties to file grievances over potential noncompliance with the terms of the CBAs. (GC Brief at 14 n.8). ADT does not appear to argue otherwise.

bargaining over the decision to transfer employees from HVCI to hourly.” (ADT Brief at 6). As a threshold matter, the Office of Appeals’ opinion is irrelevant to this case, because it does not cover the information requests at issue here. The Office of Appeals decided only whether to affirm the Regional Director’s decision not to issue a complaint that ADT unlawfully eliminated the HVCI program unilaterally based on the conclusion that the Union waived the right to bargain over ADT’s decision to change the way installers were paid. It neither considered nor decided whether the Union was entitled to the information it requested with respect to the change.

Even if the Office of Appeals’ finding that the Union waived its right to bargain over ADT’s change to the HVCI’s compensation were relevant, it is consistent with the finding that the Union is entitled to information regarding that change to ensure that ADT complies with the terms of the waiver. As stated at the outset of our initial brief, counsel for the General Counsel does not dispute that the Union waived its right to bargain over ADT’s decision to change the HVCI compensation, and that the Union is not entitled to the information for purposes of bargaining over that change as a result. (GC Brief at 1). The issue of whether ADT complied with the clear limits to the waiver, however, by making the change only “as business needs dictate” is a separate issue, and the Union *is* entitled to the information to determine that.

Regardless of its merits, ADT’s reliance on the Office of Appeals’ opinion suffers from the same omission as the rest of its brief—it addresses only whether the requested information is relevant to the Union’s role in policing the contract by enforcing the “as business needs dictate” limit. Yet, as discussed above in Subsection A, the Union is also entitled to that information based on its relevance to the parties’ bargaining over new CBAs for the Springfield/Lanham and Columbia units. That bargaining provides a completely independent basis upon which the Union

is entitled to the information, even if the Office of Appeals' decision precluded the information's relevance to the Union's assessment of whether business needs dictated the change.

III. CONCLUSION

For the foregoing reasons, counsel for the General Counsel requests that the Board grant the General Counsel's exceptions, find that ADT has violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with ADT's business justification for the change to employees' pay rates, and order the appropriate remedy, including ordering ADT to provide the Union with its business justification and include a statement to that effect in its notice posting.

Respectfully submitted,

/s/ Clark Brinker

Clark C. Brinker

Sean R. Marshall

Counsels for the General Counsel

National Labor Relations Board, Region 5

Bank of America Center, Tower II

100 S. Charles St., Suite 600

Baltimore, MD 21201

Telephone: 410.962.2915

Fax: 410.962.2198

clark.brinker@nlrb.gov

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CERTIFICATE OF SERVICE

I hereby certify that this Counsel for the General Counsel's Reply Brief in Support of Its Exceptions was electronically filed on January 13, 2015, and, on that same day, copies were electronically served on the following individuals by e-mail:

Bernard P. Jeweler
Ogletree Deakins
1909 K St., N.W., Ste. 1000
Washington, DC 20006
Bernard.Jeweler@ogletreedeakins.com

James F. Wallington
Baptiste & Wilder, P.C.
1150 Connecticut Ave., N.W., Ste. 315
Washington, DC 20036
jwallington@bapwild.com

/s/ Clark Brinker

Clark C. Brinker

Counsel for the General Counsel

National Labor Relations Board, Region 5