

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

ADT LLC	§	
	§	
Employer/Petitioner	§	
	§	
and	§	Case 16-RM-123509
	§	
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 6215	§	
	§	
Union	§	

UNION’S BRIEF IN SUPPORT OF DISMISSING THE RM PETITION

Following upon the Board’s Order of April 22, 2015, granting the Union’s request for review of the Regional Director’s Decision and Direction of Election, the Communications Workers of America, the incumbent Union herein (“Union”), hereby submits this Brief in support of dismissing the RM petition at issue in this proceeding.

1.

Course of Proceedings Below

The RM petition in issue was filed on March 3, 2014. (Attachment A)¹. On March 10, 2014 the Union filed unfair labor practice charges in Case No. 16-CA-124152 alleging, among other things, that ADT had unlawfully promulgated a rule

¹ In this brief we will refer to Attachments that were appended to our Request for Review.

prohibiting employees from talking with each other and had unlawfully interrogated and polled employees about their Union sympathies. We make reference to this history only for the purpose of identifying the time line leading up to the RM hearing. The Regional Director ordered the RM petition blocked per the Board's blocking charge policy. A complaint was issued against ADT over these allegations.² The complaint was settled in front of the Administrative Law Judge. The settlement required ADT to post notices relating to the allegations of the complaint. After the 60-day compliance period, the Regional Director resumed processing the RM petition.

On January 20, 2015, the Union submitted to the Regional Director a motion to dismiss the RM petition (Att. B), arguing that the employer's basis for filing the petition was not valid under *Levitz Furniture Company, supra*. For reasons set forth in the motion to dismiss, the Union justifiably concluded that the considerations submitted by ADT to support the RM petition contained no evidence of employee non-support of the Union, but rather consisted purely of speculation or assumption that a majority of employees did not support the Union due to a reorganization of ADT's facilities. Meanwhile the Regional Director had set the RM case for a hearing on January 27, 2015. The day before the hearing the

² The complaint erroneously refers to the filing dates of the charge and first amended charge as March 10, and April 30, 2013. The Board's records will reflect the correct dates were March 10 and April 30, 2014.

Regional Director denied the motion to dismiss with no discussion of the *Levitz Furniture Company* issues. (Att. C). At the beginning of the hearing on January 27, the Union stated on the record that it continued to stand on the arguments raised in its motion to dismiss, that the RM petition was inappropriate for the reasons stated in the motion to dismiss, and that it reserved the right to pursue those arguments in the appropriate manner, time, and place. (See Att. D, Jan. 27 hearing transcript excerpt, p. 7, ll. 8-11; p. 8, ll. 5-9.) The hearing continued on February 19-20, 2015. On February 19 the Union again stated on the record that it did not relinquish its contention that the RM petition was improper under *Levitz Furniture Company*, and reserved the right to take the issue up with the Board through request for review. (See Att. E, Feb. 19 hearing transcript excerpt, p. 81, ll. 3-9). On the third day of the hearing, February 20, the parties stipulated that the petitioned-for unit was an appropriate unit. (See Att. F, Feb. 20 transcript excerpt, p. 253, ll. 3-25).

The petitioned-for unit includes all service and installation technicians at the employer's four facilities located at Carrollton, Tyler, Trinity, and Haltom City in the Dallas-Fort Worth area. (Attachment A). This is in essence the same unit as the historical, Board-certified unit, which covers "all servicemen employed by the employer at its facilities located in Dallas and Fort Worth, Texas". (Att. H, Art. 1, p. 2). It is undisputed that the extant historical unit of "all servicemen" includes the

job classifications of both service technicians and installation technicians. (See Att. H, Art. 6, Sec. 1(a), p. 5 [“The work week for installation shall be ...”] and Sec. 1(b) [“The work week for service shall be ...”]). See also Art. 15, p. 11; Art. 16, p. 12 and Schedules A and B, pp. 19-20, Att. H. The employer’s written submission in support of the RM petition represented that the four facilities listed in its petitioned-for unit description are considered ADT’s Dallas-Fort Worth locations. Trinity and Haltom City are in Fort Worth, Texas (Attachment J-2, pages 1 and 2 of letter). The municipality of Carrollton is a suburb of Dallas, Texas (see Ex. E-4 in the RM hearing record, approximately 10th and 11th pages, “Tech Assignments” and “Tech Assignments”); before the February 2014 facilities consolidation, a previous Carrollton facility was recognized as within the scope of the Dallas-Fort Worth bargaining unit. (Att. D, p. 22, ll. 8-10 and p. 23, ll. 13-24; see also Att. J-2, second page of March 3, 2014 letter: “With respect to the [previously existing] Carrollton facility and one of the Fort Worth facilities, the Union had represented the technicians in those locations in a single bargaining unit.”) The Tyler, Texas facility is treated as a satellite of the DFW facilities. (Att. J-2, March 3, 2014 letter, second page: “Along with the new satellite office in Tyler, one pre-existing and three new locations now comprise ADT’s DFW operation.”)

The Union did not enter into an election agreement. The Union stated on the record that its stipulation to the appropriateness of the unit – essentially the same unit as already extant - was without prejudice to its right to file this request for review. (Att. F, p. 255, l. 25, p. 256, ll. 1-12). The hearing officer stated that the Union had renewed its motion to dismiss and stated that she was referring the motion to the Regional Director. (Att. F, p. 254, ll. 20-25). In the Regional Director’s decision and direction of election issued on March 9, 2015, the Regional Director referred to the fact that the Union contended the petition should be dismissed because there is an insufficient basis for the employer to question the Union’s majority status; then the Regional Director held that ADT had met the threshold showing for entertaining the RM petition, again without discussion of the legal issues. (See excerpt from decision and direction of election, Att. G, pp. 2, 3.)

The Union has never claimed that the former Broadview employees constituted an accretion to the historical bargaining unit. The Union has never claimed that it represents the former Broadview employees. In the email correspondence that the employer submitted with its RM petition (“Attachment A” to employer’s March 3, 2014 letter, contained within Attachment J-2 hereto), the employer’s James Nixdorf memorialized to Union representative Bonnie Mathias that she said “no” to whether the Union was trying to represent the “integrated” workforce, but only that the Union “had ‘bargained-for’ employees”. In pending

unfair labor practice Case 16-CA-144548, currently under investigation by Region 16, the Union alleges that the employer violated the Act by refusing to recognize as within the bargaining unit newly hired employees, hired several months after the February 2014 transactions, who were never affiliated with Broadview. Indeed the Union agreed in its 2011 agreement with the employer, to which the employer also agreed, that the only way the former Broadview employees could come into the bargaining unit would be if a majority of them voted for Union representation in a special private secret ballot election to be conducted only among the former Broadview employees. (As to which the Union is currently suing the employer in a Section 301 action for enforcement thereof.) See Attachments I, J, and J-1.

2.

The Collective Bargaining Agreement and History

The current collective bargaining agreement (“CBA”) went into effect on May 29, 2011. (See Att. H, Union Exhibit 2 in RM hearing, cover page and Article 27, p. 18). The unit was initially certified by the Board in 1978 and has enjoyed an unbroken collective bargaining history since that time. (Att. D, pp. 9-10; Att. H, Article 1, p. 2). Pursuant to Article 27, the CBA automatically renewed from May 28, 2014 for another year unless prior notice in writing was given by either party to the other of its termination or any changes desired 60 days prior to May 28, 2014. There is no evidence that either party gave the other notice of

termination or of any changes desired 60 days before May 28, 2014. The Union hereby requests the Board to take administrative notice of the affidavits presented to the Board by the Union in pending unfair labor practice Case 16-CA-144548, containing competent evidence that no such notice was given by either party and accordingly that the CBA automatically renewed for another term to May 28, 2015, if the Board finds such issue relevant to its treatment of this Request for Review.

The bargaining unit certified by the Board in 1978 and adopted in the contractual recognition article included “all servicemen employed by the employer at its facilities located in Dallas and Fort Worth, Texas”. (Att. H, Art. 1, p. 2). The unit employees include installation technicians and service technicians. (See Att. H, Art. 6, Sec. 1(a), p. 5 [“The work week for installation shall be ...”] and Sec. 1(b) [“The work week for service shall be ...”]). See also Art. 15, p. 11; Art. 16, p. 12 and Schedules A and B, pp. 19-20, Att. H.

3.

The Purported Objective Considerations

After the RM hearings before the Regional Director in this case, ADT knowingly and consciously waived any claim of confidentiality to the “objective considerations” it had presented to the Regional Director in support of the RM

petition, by openly providing that submission to the Union in the course of pending federal Section 301 litigation between the parties.

Attachment I hereto is a copy of a breach of contract complaint filed by the Union against ADT in the U.S. District Court for the Northern District of Texas in Civil Action No. 3:14-CV-04205-D, in which the Union claims that ADT is in breach of a collectively bargained neutrality agreement made between the parties in 2011 and providing the Union an opportunity at a time of its choosing to call for a private non-Board secret ballot election for self-determination by the former employees of a previously separate company named Broadview. (See Attachments J and J-1 hereto). ADT filed a motion to dismiss the complaint, which is currently pending before the Court. ADT attached as Ex. C to its motion to dismiss its March 3, 2014 submission to the Regional Director setting forth the purported objective considerations for its alleged reasonable uncertainty as to the Union's continued majority status. (See Atts. J and J-2). The Union's receipt of this document as part of ADT's publicly filed motion to dismiss in Civil Action No. 3-14-CV-04205-D confirmed the Union's justifiable supposition, just as ADT had informed the Union in an email of February 5, 2014 (see ADT's Attachment A to the March 3, 2014 letter, Att. J-2 hereto), that the submission was based solely on a headcount of employees newly integrated into the recognized scope of the bargaining unit and contained zero objective evidence that any of the newly integrated employees did

not support the Union. This evidence was not available to the Union until after the close of the RM hearing. (Att. J).

4.

Why the RM Petition Is Clearly Inappropriate under Established Board Precedent

As seen above, the scope of the recognized bargaining unit applies to the employer's facilities in Dallas and Fort Worth, Texas. In May 2010, ADT acquired a company referred to as Broadview (see Att. E, p 141, ll. 23-25), whose employees were not represented by a union. As of the May 2010 acquisition the former employees of Broadview became ADT employees. (Att. E, p. 142, ll. 1-5). The former Broadview employees were kept in separate facilities from the historical bargaining unit employees for nearly four years. Nearly four years after ADT's acquisition of Broadview, on or about February 3, 2014, ADT closed all of the former Broadview facilities and one of the former bargaining unit facilities (the previous bargaining unit Carrollton facility), relocated the majority of the bargaining unit employees to the three new facilities in Carrollton, Trinity, and Tyler, and reassigned the former Broadview employees into a combination of the three new facilities and the Haltom City facility, which had been a bargaining unit facility and remained to continue as one of the four DFW facilities. (See Attachment J-2 and Attachment E, hearing transcript excerpt, pp. 21-25).

The employer characterized the transactions as “integration” (Attachment J-2), but in fact the transactions were overwhelmingly a relocation of the bargaining unit within the sense of Board precedent. The bargaining unit was previously employed in two facilities, one at Carrollton – a different Carrollton facility than the new post-relocation facility – and the one at Haltom City. The February 2014 transaction relocated 45 of the bargaining unit employees to the three new facilities at Carrollton, Trinity, and Tyler.³ At the continuing Haltom City facility there were 13 bargaining unit employees.⁴ Thus 78% of the bargaining unit employees were relocated to new facilities.

All of the former Broadview employees in the Dallas-Fort Worth area were reassigned/relocated into the two new facilities at Carrollton and Trinity and the pre-existing facility at Haltom City;⁵ the former Broadview facilities in the Dallas-Fort Worth area, where these employees had worked from the time of ADT’s May 2010 acquisition of Broadview until their February 2014 reassignments, were all closed. (Attachment E, hearing transcript excerpt, pp. 21-25, and Attachment J-2).

³ See the chart presented by the employer on the second page of its March 3, 2014 letter: after the “integration” there were 25 bargaining unit employees at the new Carrollton facility, 6 bargaining unit employees at the new Tyler facility, and 14 bargaining unit employees at the new Trinity facility.

⁴ See fn. 2 above.

⁵ The new Tyler satellite facility was comprised entirely of 6 relocated bargaining unit employees. See the employer’s chart referenced in fn. 2 above.

No bargaining unit employees and no former Broadview employees were assigned into any facility previously affiliated with Broadview.

Of the 87 employees placed into the new Carrollton, Trinity, and Tyler facilities, 45 or 52% were historical bargaining unit employees and 41 or 48% were previously unrepresented employees. See the employer's chart referred to in footnote 2, *supra*. Of the 41 employees placed into the Haltom City facility, 13 were historical bargaining unit employees and 28 were former Broadview unrepresented employees. Of the 128 employees placed into the four facilities, 58 or 45% were historical bargaining unit employees. 68% (87 total) of the total 128 employees were placed into the three new facilities.

The employer refuses to apply the CBA to employees hired into these four facilities since February 2014 (Att. D, p. 34, ll. 1-4), but does apply the CBA to the pre-existing bargaining unit employees who are located at these four facilities (Att. E, p. 85, ll. 6-12). During the hearing, the Union's attorney attempted to ask an ADT management official on cross-examination why ADT has not applied the CBA to employees hired since the consolidation, but the hearing officer sustained the employer's objection to the question. (Att. E, p. 144, ll. 1-14 and p. 145, ll. 9-25). In pending unfair labor practice Case 16-CA-144548, the Union claims that ADT's refusal to apply the CBA to installation and service technicians hired into these four facilities since in or about August 2014 constitutes an unlawful

withdrawal of recognition of the Union with respect to such newly hired employees. (See Att. K hereto and, if necessary, the Board's investigative record in Case 16-CA-144548).

As seen in Att. J-2, ADT's asserted basis for the RM petition is purely and solely an assumption that the former Broadview installation and service technicians consolidated into four facilities that indisputably fall within the geographic scope of the certified and recognized bargaining unit do not support the Union merely because they were not represented by a union in their previous workplaces. In *Levitz Furniture Company*, 333 NLRB 717 (2001), the Board squarely held that the reasonable uncertainty necessary to support an RM petition must be based on "evidence that is objective and that reliably indicates employee opposition to incumbent unions—i.e. evidence that is not merely speculative". *Levitz Furniture Company, supra* at 729. Here, in stark contrast, ADT presented zero objective evidence of employee opposition to the incumbent Union, but solely speculation that all former Broadview employees newly added to the recognized bargaining unit scope did not support the Union merely because they were not union-represented in their previous workplaces.

Levitz Furniture Company lists illustrative examples of the types of evidence that will be held to support an RM petition, such as the contradiction presented by evidence of an employee petition showing majority non-support of the union at the

same time as evidence indicating majority support for the union, *Levitz Furniture Company, supra* at 727-28; or “antiunion petitions signed by unit employees”, “firsthand statements by employees concerning personal opposition to an incumbent union”, “statements of personal dissatisfaction with the union”, “dissatis[faction] with the representation [an employee is] getting from the union”, and “[an] employee told the employer that he felt the employees did not want a union and that if a vote was taken, the union would lose”, *Levitz Furniture Company, supra*, at 728.

In similar vein, the Board in *Levitz Furniture Company* illustrates the types of evidence that will not support an RM petition, such as: “newly hired employees’ failure to join the union”, “some employees’ failure to authorize dues checkoff”, and “employee turnover”. *Id.*

The Board decisively held in *Levitz Furniture Company* that turnover among employees in the bargaining unit will not support an RM petition; but instead, new employees are presumed to support the union in the same proportion as pre-existing bargaining unit employees. *Levitz Furniture Company, supra* at 728 n. 60. In February 2014, nearly four years after its acquisition of Broadview, ADT reassigned former employees of Broadview who performed the same work as the pre-existing bargaining unit employees to facilities clearly within the geographic scope of the bargaining unit and where bargaining unit employees also worked.

This “reorganization” did not occur due to the acquisition of Broadview in 2010, but to decisions made nearly four years later. As seen above, the employer has stipulated that all these employees share a community of interest. At that time the Union enjoyed a conclusive presumption of majority status. *Auciello Iron Works v. NLRB*, 517 US 781, 786 (1996); *Young Women’s Christian Association of Western Massachusetts*, 459 NLRB No. 78 (2007); *Levitz Furniture Company, supra* at 730, n. 70. Thus it should have been presumed that a majority of the former Broadview employees supported the Union because a majority of the pre-existing unit employees conclusively supported the Union. In any event, ADT’s speculation that 100% of the former Broadview employees did not support the Union merely because they were not union-represented in their previous workplaces clearly is not supportable as a basis for an RM petition under the established Board precedent of *Levitz Furniture Company*.

The following passage from *Levitz Furniture Company* is instructive:

We reject, however, the argument that, absent serious unremedied unfair labor practices, there should be no showing necessary to obtain RM elections. Such a rule would enable even an employer who had no doubt whatsoever of his employees’ support for an incumbent union to force the union to prove its majority repeatedly as often as once a year. It would have the anomalous effect of allowing employers to obtain elections when the employees themselves could not, because of an insufficient showing of interest. It is well to bear in mind, that after all, it is the *employees’* Section 7 right to choose their bargaining representatives that is at issue here. Strictly speaking, employers’ only statutory interest is in insuring that they do not violate Section 8(a)(2) by recognizing minority unions.

Levitz Furniture Company, supra at 728.

In this case ADT had no reasonable ground to claim the risk of an 8(a)(2) complaint for recognizing the Union as the representative of the former Broadview employees upon their integration with bargaining unit employees in facilities within the scope of a geographically defined bargaining unit. *Levitz Furniture Company* discredits any such concern, holding in affirmation of prior caselaw that “... an employer violates Section 8(a)(2) only by continuing to recognize a union that it knows has actually lost majority support, not one whose majority status is merely in doubt”. *Levitz Furniture Company, supra* at 724. In the case at hand the employer clearly was not faced with a situation in which it knew that the Union had actually lost majority support; as seen above ADT had no more than speculation or ill-founded assumption that the former Broadview employees did not support the Union, with no objective evidence of non-support. Such speculation or assumption, as seen above, does not rise to the level of reasonable uncertainty to support an RM petition, much less constituting knowledge of actual loss of majority support. ADT’s claim of risk of violating 8(a)(2) is exceptionally hollow.

The assertion by Union official Bonnie Mathias that the Union “had bargained for employees” in the consolidated facilities in February 2014 in nowise

created objective considerations supporting an RM petition. ADT had no objective evidence contradicting Ms. Mathias' claim that there were bargained-for employees in the newly integrated facilities. Again, ADT had no more than speculation about non-support of the Union among the former Broadview employees. Ms. Mathias' statement did not present ADT with contradictory evidence because ADT had no evidence contradicting her statement. ("Under the standard we adopt today, employers who are faced with such contradictory evidence will be able to obtain elections." *Levitz Furniture Company, supra* at 728, emphasis added.)

The Board's decision in *Nott Company*, 345 NLRB 396 (2005) does not support the employer's position. In *Nott Company* the employer purchased another company, immediately closed the purchased company's facilities, and immediately brought the purchased company's employees into Nott Company's extant facility. Thus the Board held that the relocation doctrine of *Harte & Company*, 278 NLRB 947 (1986), did not apply because the bargaining unit employees were not relocated. The Board in *Nott Company* did not overrule *Harte & Company*, but simply found that on the facts before it the transaction that had taken place was not relocation – in fact no bargaining unit employees were relocated.

Under the rule of *Harte & Company*, if bargaining unit employees are relocated and after the relocation the bargaining unit employees comprise at least 40% of the workforce in the new facility in comparison with previously unrepresented employees, this is considered a substantial continuity and the Union's recognition continues and cannot be questioned by the employer. In *Nott Company*, the Board in distinguishing the facts before it from a relocation emphasizes that, "the instant case involves the entrepreneurial decision to buy a company, retain the employees, and consolidate them at the prior location." 345 NLRB at 401. In contrast, ADT's February 2014 transactions were not proximately related to its purchase of Broadview, and the employees were not consolidated into pre-existing ADT locations – with the exception of a minority of the workforce placed in Haltom City.

In a case heavily relied upon by the Board in *Nott Company*, *Central Soya Company*, 281 NLRB 1308 (1986), the facts were also different. The employer purchased a competitor and placed both the former competitor's employees and the bargaining unit employees into the former competitor's facility. As in *Nott Company*, the transactions were part and parcel of the entrepreneurial acquisition of the other company – not years later as in the instant case. And in the instant case, ADT placed no bargaining unit employees into the purchased competitor's facilities, as they were in *Central Soya*. All the former Broadview facilities were

closed and the only pre-existing facility remaining open, Haltom City, was not a former Broadview facility.

The Board continues to adhere to the *Harte & Company* rule, as recently recognized and reaffirmed in *Gaylord Chemical Company*, 358 NLRB No. 63, 2012 NLRB LEXIS 422, *12 (2012). Here, where 45% of the workforce resulting from employer-mandated relocations and reassignments occurring years after an acquisition of another company were extant bargaining unit employees, and where the employer presented zero evidence of employee non-support of the Union; and where 78% (45 out of 58) of the bargaining unit employees were relocated to completely new facilities where they constituted a 52% majority; the substantial percentage policy of *Harte & Co.* and *Gaylord Chemical Company* should apply so as to defeat any attempted reliance on *Nott Company* or its progeny.

Furthermore, to the extent *Nott Company* may be deemed applicable, it should be overruled with respect to facts similar to the facts of the instant case, as inconsistent with *Levitz Furniture Company*, the impact of which was apparently not briefed or argued in *Nott Company*.

Conclusion

We respectfully urge the National Labor Relations Board to dismiss the RM petition as clearly insupportable under established Board precedent.

Respectfully submitted,

/s/ David Van Os
David Van Os
Texas Bar No. 20450700
Email: dvo@vanoslaw.com
DAVID VAN OS & ASSOCIATES, P.C.
8705 Shoal Creek Blvd., Suite 116
Austin, TX 78757
Tel. 512-452-8683
Fax 512-452-8684
COUNSEL FOR COMMUNICATIONS
WORKERS OF AMERICA, AFL-CIO

CERTIFICATE OF SERVICE

This is to certify service of the above and foregoing Request for Review by electronic means to the below indicated counsel of record for ADT on the 6th day of May 2015, and to Martha Kinard, Regional Director, as indicated below.

Jeremy C. Moritz, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
155 N. Wacker Drive
Suite 4300
Chicago, Illinois 60606
jeremy.moritz@ogletreedeakins.com

Martha E. Kinard, Regional Director
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102

/s/ David Van Os
David Van Os

