

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

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**CASE NO. 16-RM-123509**

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**ADT, LLC,**

**EMPLOYER,**

**AND**

**COMMUNICATION WORKERS OF AMERICA, LOCAL 6215,**

**UNION.**

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**EMPLOYER'S MOTION FOR RECONSIDERATION OF THE BOARD'S DECISION  
ON REVIEW AND ORDER**

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## **I. PRELIMINARY STATEMENT**

Pursuant to Section 102.65(e) of the NLRB's Rules and Regulations, ADT, LLC ("ADT" or "Employer"), files this Motion for Reconsideration of the Board's Decision on Review and Order, published at 365 NLRB No. 77, slip op. (May 17, 2017) ("Decision").

The Board majority erred in finding that the Employer's RM petition should be dismissed on the basis of the Board's erroneous findings that (1) Communication Workers of America, Local 6215 ("CWA" or the "Union") has never claimed to represent previously-unrepresented employees in the petitioned-for unit; and (2) the Employer has failed to adequately support its claim of good faith uncertainty with regard to the Union's continued majority status.

The findings of the Board majority are unsupported by the facts and relevant legal precedent. For all of these reasons, together and separately, the Board should reconsider and reverse its Decision, and order the Regional Director to process the RM petition, count the impounded votes, and let the appropriate unit vote on union representation.

## **II. PROCEDURAL HISTORY**

The Employer has previously summarized the factual and procedural background in this case. (*See, e.g.*, Brief of the Employer on Review, pp. 2-5.) For purposes of this Motion, a brief overview of relevant facts and recent developments follows below.

On March 3, 2014, shortly after completing a reorganization of its facilities in the Dallas/Fort Worth area, ADT filed an RM petition based on the Employer's good faith uncertainty regarding the Union's continued majority status in a combined and redistributed employee group comprising a minority of employees historically represented by the Union and a majority of previously unrepresented employees, including employees formerly employed by a competitor ("Broadview") whom ADT had acquired around May 2010. Accordingly, the

Employer's RM petition requested an election among a unit of "[a]ll install and service technicians at ADT's Carrollton, Tyler, Trinity, and Haltom City facilities in the Dallas/Fort Worth area."

Following a representation hearing conducted in January and February 2015, the Regional Director issued a Decision and Direction of Election ("D&DE") on or about March 9, 2015. In the course of the hearing, the Union moved to dismiss the petition on the basis that "the Employer has failed to provide sufficient evidence to establish a good faith uncertainty as to the Union's majority status." (D&DE, p. 2.) Noting that she had "previously determined, pursuant to Sections 11021 and 11042 of the Board's Casehandling Manual, that the Employer has met the threshold showing necessary for the processing of the Petition in this case," the Regional Director denied the Union's motion to dismiss. (*Id.*) The Regional Director then found that – as stipulated by the parties – the petitioned-for unit is an appropriate unit. (*Id.*, p. 12.) Accordingly, the Regional Director directed an election in a unit of "[a]ll installation and service technicians employed by the Employer in the Dallas/Fort Worth area at its Carrollton, Haltom City, Trinity, and Tyler facilities." (*Id.*, p. 14.)

On about March 20, 2015, and prior to the election, the Union filed a request for review of the D&DE with the Board in Washington, D.C. The election occurred as scheduled on April 8, 2015. In light of the Union's then-pending request for review before the Board, the Regional Director impounded the ballots from the vote. On April 22, 2015, the Board issued an order granting the Union's request. The parties filed their respective briefs with the Board, in support of and opposition to the Board's Order granting the Union's request for review.

Two years later, the Board issued its Decision on Review and Order on May 17, 2017. In relevant part, the Board majority found the Union has "never" sought to represent the former

Broadview employees. (Decision, p. 1.) Therefore, the Board vacated the Regional Director’s direction of an election and dismissed the RM petition on the basis of the majority’s findings that (1) the Employer failed to establish a reasonable good faith uncertainty as to the Union’s continued majority status; and (2) the Union “never” claimed to represent previously unrepresented employees in the petitioned-for unit, as required by Section 9(c)(1)(B) of the Act. (*Id.*)

### **III. ARGUMENT**

#### **A. Legal Standard**

Section 102.65(e)(1) of the Board’s Rules and Regulations provides that “[a] party to a proceeding may, because of extraordinary circumstances, [...] move after the decision or report for reconsideration.” In addition, “[a] motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion.” 29 C.F.R. § 102.65(e)(1).

#### **B. Statement of Material Errors the Board Should Reconsider**

The Board’s May 17, 2017, Decision committed the following material errors that should be reconsidered:

- The Board erroneously found the Employer failed to establish a reasonable good-faith uncertainty as to the Union’s continued majority status. (Decision, p. 3.)
- The Board erroneously found that “the Union has never sought to represent the unrepresented Broadview technicians or apply the contract to them,” and that there is “no suggestion from the Union that it wishes to represent the merged employees.” (Decision, p. 4.)

- The Board erroneously vacated the Regional Director’s Decision and Direction of Election. (Decision, p. 1.)
- The Board erroneously dismissed the pending RM petition. (Decision, p. 1.)

As set forth below, the Board should reconsider and reverse its erroneous Decision, and direct the Regional Director to resume processing the RM petition and count the impounded ballots.

**C. The Board Should Reconsider Its Finding That the Employer Has Not Demonstrated a Reasonable Good Faith Uncertainty Regarding the Union’s Majority Status**

It was an error for the Board majority to vacate the Regional Director’s direction of an election and order that the RM petition be dismissed on the basis of a finding that the Employer has not demonstrated a reasonable good faith uncertainty as to the Union’s majority status. (Decision, p. 4.)

The majority held that the RM petition should be dismissed because the Employer did not provide “evidence that unit employees were dissatisfied with the Union,” but “instead relied solely on the reorganization of its operations to support its claim of good-faith uncertainty as to the Union’s continued majority status.” (Decision, p. 4.) The Board’s conclusion in this regard fails to follow applicable NLRB precedent.

Dissenting, Chairman Miscimarra aptly found that “evidence that the former unit employees have been consolidated into a numerically larger unrepresented group of employees, rendering the two groups of employees indistinguishable, raises a question concerning representation that can only be resolved through an election in the new, consolidated unit.” (Decision, dissent at pp. 8-9.) As Chairman Miscimarra pointed out, the Board has found that where an employer consolidated a group of historically union-represented employees with a

larger group of unrepresented employees, the historical unit was “no longer appropriate” and “the continuing representative status of the Union can be resolved only by means of an election among” the new group of combined employees. *Renaissance Center Partnership*, 239 NLRB 1247 (1979). In reinstating the employer’s RM petition, the Board in *Renaissance Center* did not require any showing that the Union had lost majority support in the historical unit. Instead, the Board relied on its findings that the represented and unrepresented employee groups had been combined with the result that they were “now indistinguishable” from one another, and the number of previously unrepresented employees was greater than the number of historically-represented employees. *Id.* at 1247-48.

The same is true in this case, and the same result should follow: the Board should direct the Regional Director to resume processing of the RM petition and count the impounded ballots.

**D. The Board Should Reconsider Its Holding That the Union Has “Never” Made a Demand for Recognition as the Representative of Employees Other Than Those Whom It Has Historically Represented**

The Board majority committed clear error by its finding that the Union has never sought “to represent the unrepresented employees” in the combined facilities “as part of an existing unit,” but only “continues to demand recognition as the representative of its historic members.” (Board, p. 5.) The record evidence and related ULP case assertions by the Union thoroughly refutes the Board’s findings in this regard.

In reaching its conclusion that the Union has not sought recognition as the representative of the former Broadview employees, the Board majority appears to rely on the Union’s bare representation that, “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.” (Union’s Brief in Support of Dismissing the RM Petition [hereinafter, “Union’s Brief ISO Dismissal”], p. 5.)

The majority’s erroneous finding that the Union has only sought to represent those employees whom it has “historically” represented fails to consider record evidence establishing that – as Chairman Miscimarra correctly found in his dissent – “the Union has taken measures that can only be understood as a claim for recognition in the consolidated unit of technicians.” (Decision, dissent at p. 6.) For example, the Union has a pending unfair labor practice charge in which the Union broadly asserts a claim for recognition as the representative of “newly hired” employees within the Employer’s integrated operations. (*See* NLRB Case 16-CA-144548.) In the Third Consolidated Complaint, the Counsel for General Counsel asserts the following in support of the Union’s unfair labor practice charges:

**13.**

The following employees of Respondent (the "Unit") constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All install and service technicians at ADT's Carrollton, Tyler, Trinity and Haltom City facilities in the Dallas/Fort Worth area.

**Excluded:** All other employees, including sales employees, clerical employees, guards and supervisors as defined by the Act.

**14.**

Since about May 29, 2011, and at all material times, the Union has been recognized by Respondent as the exclusive collective-bargaining representative of the Unit. This recognition has been embodied in a collective-bargaining agreement which is effective by its terms from May 29, 2011 through May 28, 2014.

The Union’s allegations in the related unfair labor practice proceeding can only be understood as a claim to represent a combined unit of historically-represented employees and new employees

who indisputably have *not* been part of the historical unit. Just as critical, the Board majority did not address the fact that notwithstanding the Union's apparent disclaimer of interest (*see* Union's Brief ISO Dismissal, p. 5), the Union has *also* asserted:

- The Employer's RM petition is not based on "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.*" (Union's Brief ISO Dismissal, p. 12.) (Emphasis added.)
- When former Broadview employees were integrated with Union employees around February 2014, "...*the Union enjoyed a conclusive presumption of majority status. 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.*" (Union's Brief ISO Dismissal, p. 14.)
- "*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.*" (Union's Brief ISO Dismissal, p. 15.)

Contrary to the Board majority's findings and conclusions, the basis for the Union's opposition to the Employer's RM petition is not an assertion that the Union does not seek to represent the former Broadview employees, but an explicit claim that upon integration, the Union had majority status as the representative of *the combined employee group*, including "the former Broadview employees."

Therefore, it was an error for the Board to find that the Union's belated, unsupported assertion that it has "never" claimed to represent former Broadview employees is sufficient to outweigh the Union's actions and arguments to the contrary, including its efforts to force the Employer to apply the collective bargaining agreement to new hires at the reorganized facilities, and the Union's repeated, extensive and explicit arguments that former Broadview employees should have been considered to have joined the bargaining unit as a result of the February 2014 integration.<sup>1</sup>

Moreover, to the extent the Board majority finds the Union has made a demand for recognition in a bargaining unit of only those employees whom the Union has "historically" represented, such a subset of the combined group of technicians is not an appropriate unit. Therefore, the Employer has no obligation to recognize or bargain with the Union in response to such a demand.<sup>2</sup> See, e.g., *Abbott-Northwestern Hospital*, 274 NLRB 1063, 1064 (1985) (lawful withdrawal of recognition where the employer consolidated a group of represented employees with a larger group of unrepresented employees and the Board found the historically represented unit was no longer an appropriate unit).

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<sup>1</sup> The Employer further asks the Board to take judicial notice of two related actions brought by the Union, Civil Action No. 3:14-CV-04205-D in the U.S. District Court for the Northern District of Texas, and AAA Arbitration Case No. 01-15-0004-4149. In the federal court case, the Union continues its attempts to gain representation rights over the former Broadview employees. In the arbitration, the Union clearly attempts to assert representational rights over new hires. One must ask oneself, what more does an adjudicatory body need than the record facts in the case, especially when those facts are supported by the Union's actions outside this proceeding.

<sup>2</sup> While the Employer would have preferred that the readily obvious question concerning representation involved herein be properly and promptly resolved by the affected employees through a democratic secret ballot election, that path has been presently foreclosed. Moreover, since the Board and the Union now have expressly found or acknowledged that the latter claims alleged representational rights only in a plainly inappropriate unit, the Employer, today, has advised the Union it will not bargain in such a patently inappropriate unit; and, to the extent necessary, has thus withdrawn any recognition.

**E. The Board Should Reconsider Its Decision to Vacate the Direction of Election and Dismiss the RM Petition**

As explained above, the Regional Director correctly found that the standard for processing an RM petition under Section 9(c)(1)(B) has been satisfied and an election should be held in the petitioned-for unit to resolve the question concerning representation that has arisen as a result of the integration of the Employer's operations in the Dallas/Fort Worth area. The Board should reconsider its holding to the contrary because the Board's findings are unsupported by the record evidence and are inconsistent with relevant NLRB precedent and the purposes of the Act.

In reaching the result set forth in its Decision, the Board majority has inexplicably ignored the Union's numerous claims for recognition as the representative of employees other than those whom the Union has historically represented. The majority's Decision also inexplicably fails to consider evidence of the Union's demands that ADT must apply the collective bargaining agreement to "new hires" who have joined the Employer post-integration, notwithstanding the lack of any reasoned basis for a finding that such "new hires" should be considered a part of the subset of integrated employees comprising the historical unit that the Board erroneously concludes is the sole focus of the Union's recognition efforts. (*See* Union's Brief ISO Dismissal, pp. 11-12 and Att. K thereto; *see also* the NLRB's investigative record in related Case 16-CA-144548.)

The potential impact on employers, employees and unions in future cases demands careful inquiry into the ramifications that will follow the Board's decision to dismiss the petition and not count the votes in this matter. In a good faith effort to defer to the Board's preference for secret ballot elections, the Employer twice chose to refrain from unilaterally withdrawing recognition from the Union – before the filing of the RM petition in the first instance, and before the filing of the RD petition in related Case 16-RD-152333, when the employee-petitioner

presented ADT with a petition signed by a majority of unit employees, stating that those employees no longer wanted Union representation and wanted ADT to withdraw recognition. The Decision denies employees the right to determine whether they wish to be represented by the Union, in contravention of the purposes of the Act. And, as Chairman Miscimarra notes, the majority's Decision means that after years of fruitless waiting for the Board's representational processes to address the question concerning representation that resulted from the February 2014 reorganization, the parties – including the affected employees – can now anticipate continued litigation and delay as they attempt to resolve this critical representational issue through other proceedings, including the Employer's withdrawal of recognition from the Union as the purported representative of a nonexistent, inappropriate "bargaining unit."

#### IV. CONCLUSION

For the foregoing reasons, ADT respectfully requests that the Board reconsider and reverse its Decision, and remand this case to the Regional Director for Region 16 with an order to resume processing the RM petition, including opening the ballot boxes, counting the ballots, and taking appropriate action thereafter.

Dated this the 31st day of May 2017.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,  
SMOAK & STEWART, P.C.



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James H. Fowles, III

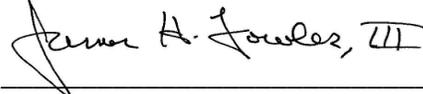
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**CERTIFICATE OF SERVICE**

This is to certify service of the above and foregoing **EMPLOYER'S MOTION FOR RECONSIDERATION OF THE BOARD'S DECISION ON REVIEW AND ORDER** by electronic mail to the below indicated counsel of record for the Union and by electronic filing to the Regional Director for Region 16 on this the 31st day of May 2017.

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