

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADT LCC d/b/a ADT SECURITY SERVICES,

Respondent,

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 43,

Charging Party.

Case Nos.: 03-CA-184936
03-CA-192545

**CHARGING PARTY'S ANSWERING
BRIEF TO RESPONDENT'S EXCEPTIONS**

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INTRODUCTION

On August 4, 2017, Administrative Law Judge (“ALJ” or “Judge”) Michael A. Rosas issued a decision (“Decision” or “ALJD”) finding that the employer, Respondent ADT LLC d/b/a/ ADT Security Services (“Respondent,” “Employer,” or “ADT”), violated the Act¹ by (1) unilaterally implementing a six-day workweek for service and installation technicians at the Albany facility and service technicians at the Syracuse facility which changed the terms and conditions as set forth in the applicable collective bargaining agreements with the Charging Party, IBEW Local Union 43 (“Union” or “Local 43”), (2) refusing to bargain over changes to the terms and conditions of employment for installation technicians at the Syracuse facility, (3) unilaterally creating exceptions to the workweek policy, (4) by directly dealing with a bargaining unit member, and (5) delaying, and refusing to furnish, information necessary and relevant to the Union. The ALJ’s Decision ordered the Respondent to rescind the unlawful unilateral changes and to provide the Union with the requested information.

The Respondent filed Exceptions to the Administrative Law Judge’s Decision and a supporting brief (“Resp.’s Brief”) on September 15, 2017. This is the Union’s Answering Brief, filed pursuant to section 102.46(d) of the National Labor Relations Board’s Rules and Regulations.

¹ National Labor Relations Act (“Act”), as amended, 29 U.S.C. §§ 151-169.

STATEMENT OF FACTS

A. Background

Since 1968, the Charging Party has represented residential installers and service technicians employed by ADT as the exclusive collective bargaining representative of employees in bargaining units at the Syracuse, New York and Albany, New York locations. [Jt. Exh. 2, Art. 1, §1; Jt. Exh. 3, Art. 1, §1] Installation technicians and service technicians install, service, and maintain residential security systems throughout upstate New York.

ADT employee terms and conditions of employment are governed by a collective bargaining agreement, with each location covered by a separate agreement. The Syracuse ADT collective bargaining agreement is effective June 11, 2016 through June 10, 2019 (“Syracuse Agreement”). [Jt. Exh. 2] The Albany ADT collective bargaining agreement is effective June 11, 2015 through June 10, 2018 (“Albany Agreement”) [Jt. Exh. 3] (collectively the Syracuse Agreement and Albany Agreement are referred to herein as “Agreements”).

The Albany Agreement establishes the duration of employee workweeks as four or five consecutive days for all bargaining unit employees. Specifically, for the service technicians, Article 6, Section 1 of the Albany Agreement provides that:

- “The normal work schedule for the Service Department shall be a shift of eight and one-half hours with a thirty-minute lunch period comprising of five consecutive days, Monday through Saturday between the hours of 8:00 a.m. and 12:00 midnight.”
- “There will also be a four-day workweek comprised of ten and one half hour shifts, with a thirty-minute lunch period, between the hours of 8:00 a.m. and 12 midnight, Monday through Friday.”

The Albany Agreement explicitly contemplates the impact of increased customer needs on service technician work schedules, accommodations to satisfy customer needs, and the process

for assigning service technicians when customer needs require additional work be performed.

The Albany Agreement provides that:

- “Customer needs may periodically make it necessary for work to be performed beginning at 7:00 a.m.”
- “The Company will first seek qualified volunteers to perform such work. If there are no qualified volunteers, then the least senior qualified person will be assigned to perform the work.”
- “Advance notice of schedule changes will be given whenever possible, except in cases of emergency, such schedules shall be established one week in advance.”

The Albany Agreement also sets forth the workday for the installation technicians, which provides that:

- “The Installation Department may be scheduled for any eight-hour period between 7:00 a.m. and 5:30 p.m. in any given day between Monday and Friday.”

Like the service technicians, the Albany Agreement contemplates the impact of increased customer needs on installation technician work schedules, accommodations to satisfy customer needs, and the process for assigning installation technicians when customer needs require additional work be performed. The Albany Agreement provides that:

- “Customer needs may periodically make it necessary to add an additional shift for residential installers from Tuesday through Saturday.”
- “The Company will first seek qualified volunteers to perform such work. If there are no qualified volunteers, then the least senior person will be assigned to perform the work.”
- “Such shifts will occur between the hours of 7:00 a.m. and 12:00 midnight. Except in cases of emergency, such schedules shall be established one week in advance.”

The Albany Agreement reiterates the four or five-day workweek, providing that:

- “All time worked daily in excess of eight (8) hours in a scheduled 5 x 8 hour workweek, in excess of ten (10) hours in a 4 x 10 workweek, or weekly in excess of forty (40) hours, or on scheduled days off shall be compensated for at one and one-half (1 ½) times the employer’s regular straight time hourly rate.” [Jt. Exh. 3, Art. 6, § 3]

Like the Albany Agreement, the Syracuse Agreement establishes the duration of workweeks as four or five consecutive days for all classifications of bargaining unit employees.

Specifically, for the service technicians, Article 6, Section 1 of the Syracuse Agreement provides:

- “The normal work schedule for the Service Department shall be a shift of eight and one-half hours with a thirty-minute lunch period comprising of five consecutive days, Monday through Saturday between the hours of 8:00 a.m. and 12:00 midnight.”
- “There will also be a four-day workweek comprised of ten and one-half hour shifts, with a thirty-minute lunch period, between the hours of 8:00 a.m. and 12 midnight, Monday through Friday.”

The Syracuse Agreement explicitly contemplates the impact of increased customer needs, accommodations to satisfy customer needs, and the process for assigning service technicians when customer needs require additional work be performed. The Syracuse Agreement provides that:

- “Customer needs may periodically make it necessary for work to be performed beginning at 7:00 a.m.”
- “The Company will first seek qualified volunteers to perform such work. If there are no qualified volunteers then the least senior qualified person will be assigned to perform the work.”
- “Advance notice of schedule changes will be given whenever possible, except in cases of emergency, such schedules shall be established one week in advance.”

The Syracuse Agreement also sets forth the workday for the installation technicians, which provides that:

- “The Installation Department may be scheduled for any eight-hour period between 7:00 a.m. and 5:30 p.m. in any given day between Monday and Friday.”

Similarly, the Syracuse Agreement contemplates the impact of increased customer needs on installation work schedules, accommodations to satisfy customer needs, and the process for assigning installation technicians when customer needs require additional work be performed.

The Syracuse Agreement provides that:

- “Customer needs may periodically make it necessary for work to be performed on a second shift and/or Saturdays.”
- “The Company will first seek qualified volunteers to perform such work. If there are no qualified volunteers then the least senior qualified person will be assigned to perform the work.”
- “Such second shifts will occur between the hours of 7:00 a.m. and 12:00 midnight. Except in cases of emergency, such schedules shall be established one week in advance. Second shift will be defined as those shifts beginning at 12:00 noon and after.”

The Syracuse Agreement reiterates the four or five-day workweek, providing that:

- “All time worked daily in excess of eight (8) hours in a scheduled 5 x 8-hour workweek, in excess of ten (10) hours in a 4 x 10 workweek, or weekly in excess of forty (40) hours, or on scheduled days off shall be compensated for at one and one-half (1 ½) times the employer’s regular straight time hourly rate.” [Jt. Exh. 2, Art. 6, § 3]

Prior to September 2016, ADT and the Union would meet to discuss issues created by increased customer needs and backlogs. Pursuant to the Agreements, ADT would request volunteers to work extra hours to reduce the backlog. [Tr. 54:3-15] If an insufficient number of individuals volunteered, ADT would contact the Union to assist in obtaining volunteers. [Tr.

54:14-55:1] If no individuals volunteered, ADT assigned the least senior qualified person to perform the work, as required by the Agreement. [Tr. 55:2-4] For the service technicians in Albany and Syracuse, ADT could require the least senior employee to start work at 7:00 a.m. [Jt. Exhs. 2, 3] For the Albany installation technicians, ADT could change the work schedule to Tuesday through Saturday. [Jt. Exh. 3] For the Syracuse installation technicians, ADT could require the least senior employee installation technician to work on Saturday or schedule a second shift. [Jt. Exh. 2]

B. On September 7, 2016, ADT Announced a Six-Day Workweek for All Bargaining Unit Employees.

On or about September 7, 2016, Area Regional Manager Kirk emailed *all* Northeast Region employees and advised, in relevant part, that “[w]ith the integration of ADT and Protection 1[,] we have been given new customer service targets of 1.69 days on all new installations and service tickets created.” [Jt. Exhs. 1, 4; Tr. 71:18-72:6, 89:7-11, 92:12-14] As a result of this newly-imposed ADT target, ADT “will be implanting a mandatory six-day workweek in the following markets beginning on Thursday, September 22nd and will continue until each market achieves the desired target which the manager will post locally for each market.” [Jt. Exhs. 1, 4] The Albany bargaining unit would work six-days a week on a weekly basis; the Syracuse bargaining unit would work six-days a week “for the second and fourth week of every month until the target is achieved and can change to weekly if needed with no additional notice.” [Jt. Exhs. 1, 4] The six-day workweek applied to both service technicians and installation technicians. The only exception was for “those technicians that are currently attending classes and are enrolled in higher education.” [Jt. Exhs. 1, 4; Tr. 92:2-14]

That day, Union President and Assistant Business Manager Patrick Costello spoke with ADT Regional HR Manager Michael Stewart and demanded rescission of the directive, advising that it was an unlawful mid-term modification of the Agreement. [Tr. 23:21-25:24]

C. The Union Demanded Rescission of the Six-Day Workweek Directive and Requested Information Related to the Six-Day Workweek Directive.

On September 19, 2016, Mr. Costello wrote to Mr. Stewart and advised that “the Union demands that ADT immediately rescind the six-day workweek directive set to take effect on Thursday, September 22, 2016.” [Jt. Exh. 5] In addition, the Union also requested information in connection with ADT’s six-day workweek directive. The Union requested information related to: (1) the customer service targets for installation and service tickets, including internal and external communications; (2) ADT’s purported need to change to a six-day workweek and/or recommendations on how to implement the directive, including internal and external communications; (3) any documents discussing the application of the collective bargaining agreements to the six-day workweek, establishing weekly and biweekly six-day workweeks; (4) the exception for “those technicians that are currently attending classes and are enrolled in higher education”; (5) the manner in which ADT will calculate how and whether each market will achieve the desired customer service target; and (6) how the manager will post locally the desired target at each location, including the frequency of the posting, location of the posting, and general operation of the posting. [Jt. Exh. 5] The Union requested an answer by October 7, 2016.

On Thursday, September 22, 2016, ADT’s six-day workweek directive went into effect. [Tr. 89-90] On Saturday, September 24, 2016, bargaining unit members were ordered to, and did, report for the sixth consecutive day of work. [Tr. 89-90]

On September 22, 2016, the Union filed an unfair labor practice charge alleging an unlawful mid-term modification, among other allegations. [GC Exh. 1(a)]

D. ADT Directly Dealt with Employee Michael Sopok to Exempt Mr. Sopok From the Six-Day Workweek.

Following announcement of the six-day workweek, bargaining unit member Michael Sopok spoke with ADT Install Team Manager Peter Bernard concerning the workweek, advising that the schedule would jeopardize his custody arrangement. [Tr. 72-73] Mr. Bernard told Mr. Sopok to put his concerns in writing. [Tr. 73:17-21] On September 20, 2016, Mr. Sopok complied with Mr. Bernard's request and submitted a written request to be excluded from the six-day work schedule. [GC Exh. 16; Tr. 73-20-21] After receipt of Mr. Sopok's letter, Mr. Bernard advised that the letter was insufficient and Mr. Bernard requested additional information from Mr. Sopok concerning the exemption from ADT's directive. [Tr. 75:16-76:11] On or about September 23, 2016, Sopok again complied and submitted a notarized letter from his daughter's mother concerning the impact of a six-day workweek of their custody arrangement. [GC Exh. 17; Tr. 76:9-77:19] Following receipt of the notarized letter, Mr. Bernard advised Mr. Sopok that he did not have to work the six-day workweek. [Tr. 77:22-78:1]

E. ADT Delayed, and Refused to Provide, Relevant Requested Information to the Union.

On October 6, 2016, Mr. Stewart responded to the Union and advised that it was working on the information request and targeted October 14th as the date it would respond. [Jt. Exh. 6] That same day, the Union requested that ADT provide the information currently in its possession and provide the remaining information by October 14th. [Jt. Exh. 6] ADT did not partially respond to the request. [Tr. 26:20-25]

On October 13, 2016, Mr. Stewart responded to the Union and advised that ADT intended to continue the six-day workweek until the backlog was sufficiently reduced. [Jt. Exh. 7(a)] In that same communication, ADT provided two Microsoft Excel spreadsheets concerning backlog numbers. [Jt. Exhs. 7(b), 7(c)] ADT also generally objected to the September 19, 2016 request as vague, ambiguous, and irrelevant, but did not identify which requests were vague, ambiguous, or irrelevant. [Jt. Exh. 7(a)]

On or about October 26, 2016, the Union sent two follow up information requests to ADT, dated October 24, 2016 -- one concerning the customer service targets and one concerning the six-day workweek. [Jt. Exhs. 8, 9] The requests renewed the September 22, 2016 information request, described the relevance of each request, clarified each request, and demanded production of the information by October 31, 2016.

On October 31, 2016, Mr. Stewart responded to the Union and advised that he was “consulting with our legal team regarding the issues you raised. I will update you on my progress later this week.” [Jt. Exh. 10] Mr. Stewart did not update the Union on the progress later that week. [Tr. 28:18-22]

On November 18, 2016, the Union again wrote ADT and advised that the information requests dated September 19, 2016 and October 24, 2016 remained outstanding and demanded a response by November 22, 2016. [Jt. Exh. 11] The Union also provided copies of the October 24, 2016 information requests. [Jt. Exhs. 12, 13] The Company did not respond by November 22, 2016. [Tr. 29-30]

On November 29, 2016, the Union filed an amended unfair labor practice charge to include an allegation that ADT failed to furnish relevant requested information. [GC Exh. 1(c)]

On December 15, 2016, Mr. Costello again contacted Mr. Stewart and requested all responses to the Union's information requests. [Jt. Exh. 14]

On December 16, 2016, Mr. Stewart provided a three page "Talking Points" memorandum in response to the Union's requests. [Jt. Exh. 15] It is unclear when the Talking Points document was drafted, which locations it applied to, or other background information. Mr. Stewart advised that ADT has "now provided you the information in our possession that is responsive to your request." [Jt. Exh. 15]

F. General Counsel's Complaint

On April 21, 2017, the General Counsel issued an Order Consolidating Cases, consolidated Complaint and Notice of Hearing ("Complaint"). The Complaint, as amended, alleges Respondent:

- (1) violated Section 8(a)(5) and (d) of the Act when it failed to abide by the terms of the parties' collective bargaining agreement when Respondent implemented a mandatory six-day workweek for service and installation technicians in its Albany facility;
- (2) violated Section 8(a)(5) and (d) of the Act when it failed to abide by the terms of the parties' collective bargaining agreement when Respondent implemented a mandatory bi-weekly six-day workweek for service technicians in its Syracuse facility;
- (3) violated Section 8(a)(5) of the Act when it implemented a bi-weekly six-day workweek for installation technicians at its Syracuse facility;
- (4) violated Section 8(a)(5) of the Act by direct dealing with an employee to create exceptions to the six-day workweek at the Albany facility; and
- (5) violated Section 8(a)(5) of the Act by delaying, and failing to furnish, relevant information requested by the Union.

G. ALJ Decision

On August 4, 2017, ALJ Rosas issued the Decision. The ALJ concluded the Respondent engaged in the exact conduct alleged in the Complaint, finding:

3. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally and without the consent of the Union when it:
 - (a) Changed the terms and conditions of employment in the Albany unit by imposing a six-day workweek for service and installation technicians in that location.
 - (b) Changed the terms and conditions of employment in the Syracuse unit by imposing a bi-weekly six-day workweek for the service technicians in that location.
 - (c) Refused to bargain with the Union by making changes to employees' terms and conditions of employment by unilaterally imposing a bi-weekly six-day workweek for the installation technicians in the Syracuse Unit without first giving the Union notice and an opportunity to bargain.
 - (d) Unilaterally created exceptions to the workweek policy for the Albany Unit. And engaged in direct dealing with employees regarding mandatory terms and conditions of employment.
 - (e) Delayed in providing information to the Union necessary and relevant to its role as the employees' bargaining representative.

[ALJD 12:8-28] Further, the Decision ordered Respondent to cease and desist from:

- (1) Unilaterally and without the consent of the Union imposing a six-day workweek for service and installation technicians in the Albany Unit, or otherwise changing employees' terms and conditions of employment as set forth in the Albany collective-bargaining agreement.
- (2) Unilaterally and without the consent of the Union imposing a bi-weekly six-day workweek for service technicians in the Syracuse Unit, or otherwise changing employees' terms and conditions of

employment as set forth in the Syracuse collective-bargaining agreement.

- (3) Refusing to bargain with the Union by making changes to employees' terms and conditions of employment by unilaterally imposing a bi-weekly six-day workweek for the installation technicians in the Syracuse Unit without first giving the Union notice and an opportunity to bargain.
- (4) Unilaterally creating exceptions to the workweek policy for the Albany Unit.
- (5) Engaging in direct dealing with employees regarding mandatory terms and conditions of employment.
- (6) Delaying in providing information to the Union that is necessary and relevant to its role as the employees' bargaining representative.
- (7) Refusing to provide information to the Union that is necessary and relevant to its role as the employees' bargaining representative.

[ALJD 13:1-24]

Finally, the Decision ordered Respondent to rescind the unlawful unilateral changes to the workweek for the Albany and Syracuse units and provide the Union with the requested information. [ALJD 13:30-33].

ARGUMENT

POINT I

THE ALJ PROPERLY CONSIDERED AND CORRECTLY CONCLUDED RESPONDENT FAILED TO ABIDE BY THE TERMS OF THE AGREEMENTS

The ALJ's Decision, without explicitly naming "sound arguable basis" or Section 8(d), considered the Respondent's contract interpretation claim and found the Respondent's interpretation implausible. Accordingly, the ALJ rejected Respondent's contract interpretation argument and issued an Order and Remedy consistent with a Section 8(d) violation, finding the Respondent violated Section 8(a)(5) and (1) within the meaning of Section 8(d).²

An administrative law judge is not required to articulate and address each and every contention of the parties or potential legal concept alleged. Where an administrative law judge has evaluated the employer's explanation for its actions and concluded the reasons advanced by the employer were unsupported, the Board is not required to reiterate and recast the administrative law judge's finding and conclusions in order to achieve "formulaic consistency." *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981) ("We shall not, therefore, in any future cases in which we adopt an administrative law judge's finding of a pretext discharge point to any failure to make a specific reference to *Wright Line*."). The administrative law judge's finding itself necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon. *Id.*

An employer violates Section 8(a)(5) and Section 8(d) of the Act when during the term of the Act when during the term of a collective-bargaining agreement it modifies any provision

² While the Judge may have inadvertently failed to cite Section 8(d), the only way to read the Decision is that the ALJ rejected the notion that there was even a sound arguable basis for the Respondent's defense.

governing a mandatory subject of bargaining. *Daycon Products Co., Inc.*, 357 NLRB 508 (2011), reaffirmed 360 NLRB No. 54 (2014). In *Bath Iron Works, Corp.*, 345 NLRB 499 (2005), the Board succinctly explained the difference between a unilateral change violation of Section 8(a)(5) and a modification of the collective bargaining agreement in violation of Section 8(a)(5) and (1) within the meaning of Section 8(d). The Board held that the two theories of violation were fundamentally different in terms of principle, possible defenses, and remedy:

In terms of principle, the "unilateral change" case does not require the General Counsel to show the existence of a contract provision; he need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining*. The allegation is a *failure to bargain*. In the "contract modification" case, the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere to the contract. In terms of defenses, a defense to a unilateral change can be that the union has waived its right to bargain. A defense to the contract modification can be that the union has consented to the change. In terms of remedy, a remedy for a unilateral change is to bargain; the remedy for a contract modification is to honor the contract.

345 NLRB at 501 (italics in original). The Board further explained that in the analysis of an 8(d) violation, the "only issue presented is whether the Respondent modified the contract within the meaning of Section 8(d). Phrased differently, the issue here [in analyzing an 8(d) allegation] is whether the contract forbade the conduct. In the unilateral change cases, the issue is whether the contract privileges the conduct." *Id.* at 502.

Contrary to the Employer's contentions in support of its Exception No. 1 [Resp.'s Brief, pp. 10-15], there is absolutely no language in the Agreements that provide Respondent the right to implement a six-day workweek for the Albany service technicians, the Albany installation technicians, and the Syracuse service technicians. The Employer's midterm change

in the contract was based on an unsupported and unreasonable interpretation of the contract and therefore no discussion of the sound arguable basis need occur. Rather, as the Judge found, it is plain that the Employer unlawfully modified the Agreements and no reasonable interpretation may be found in the plain language of the Agreements [ALJD pp. 8-13].

It is undisputed that the Union did not consent to Respondent's modification of the Agreements or agree the conduct was allowed by the Agreements.³ Further, there can be no dispute that the sound arguable basis issue was fully and fairly litigated at the hearing and briefed before the ALJ. There was evidence adduced at the hearing establishing that Respondent's interpretation was patently unreasonable and lacked a sound arguable basis. Relying on the evidence produced at hearing, the reasons stated in the Charging Party's Brief to the ALJ, and General Counsel's Brief to the ALJ, the ALJ rejected the Respondent's sound arguable basis argument out of hand.

Moreover, throughout the Decision, the Judge correctly found that Respondent modified the Agreements' provisions governing the duration of the workweek. In addressing the six-day workweek allegations, the ALJ explicitly references the Respondent's claim⁴ that

³ Respondent's references to the testimony of Union Assistant Business Manager and President Patrick Costello in its Brief are misplaced and misrepresented. [Resp.'s Brief p. 15] As the Complaint alleges, there are four groups of employees implicated by the Respondent's conduct – service technicians in Albany, service technicians in Syracuse, installation technicians in Albany, and installation technicians in Syracuse. The testimony referenced in Respondent's brief related only to the Syracuse bargaining unit. Further, Mr. Costello's testimony that Article 6 permits the scheduling of work on a scheduled day off, the sixth day, related to the Syracuse installation technicians. [Jt. Exhs.2-3; Tr. 34-38] The Complaint does not allege a Section 8(d) violation with respect to the Syracuse installation technicians and the Decision does not refer to a departure from the collective bargaining agreement with respect to the Syracuse installation technicians. [ALJD 12]. At no point during the testimony of Mr. Costello did the Employer reference the Albany contract -- Respondent's questioning failed to consider the different language in the Syracuse Agreement and Albany Agreement or distinguish between the Syracuse service technicians and Syracuse installation technicians. [Jt. Exhs. 2-3].

⁴ The contract interpretation claim is a defense and Respondent failed to satisfy its burden of proof. See *Knollwood Country Club*, 365 NLRB No. 22, slip op. at 2 (2017).

“the issue is not a unilateral change, but rather a dispute between the Respondent and the Union over an interpretation of the contract.” [ALJD 8:14-16]. In analyzing the direct dealing allegation, the ALJ states that the request “stemmed from a unilateral and unexpected change made by the Respondent that ***deviated substantially from the bargaining agreement*** that unit members reasonably relied upon.” [ALJD 10:1-4 (emphasis supplied)]. In addressing the failure to timely furnish relevant requested information, the ALJ states that the unlawful change to the employees’ work schedules “hampered the Union’s ability to enforce the contract.” [ALJD 11:26-28]

The ALJ’s Order and Remedy also demonstrate a Section 8(d) finding. The Order explicitly states that the unilateral changes departed from the terms “as set forth in the Albany collective-bargaining agreement” and “as set forth in the Syracuse collective-bargaining agreement.” [ALJD 13:1-13]. Finally, the ALJ’s remedy is for Respondent to rescind the unlawful unilateral changes; the ALJ does not order bargaining as a remedy. *See WETM-TV*, 363 NLRB No. 32, slip op. at 1, fn. 3 (2015) (deleting portion of order requiring employer to bargain, as an 8(d) remedy is for the employer “to apply the terms of the existing collective-bargaining agreement”).

Therefore, at all times, the ALJ’s decision sounds in Section 8(d), even if not explicitly stated. However, the Board does not require that the ALJ adhere to a formulistic statement in order to find the violation. *See Limestone Apparel Corp.*, 255 NLRB at 722 (failure to cite *Wright Line* does not undermine finding of pretext). What is clear is that the ALJ explicitly found the Employer failed to adhere to the Agreements, and ordered the Respondent to rescind the unlawful changes. The ALJ was fully aware of Respondent’s sound arguable basis defense and

rejected it. *See Knollwood Country Club*, 365 NLRB No. 22, slip op. at 2 (“We also agree with the judge . . . [the conduct] violated Section 8(a)(5) and (1) of the Act by modifying, without the Union’s consent, article 8 of the parties’ collective bargaining agreement. . .”).

Accordingly, Respondent’s first exception is without merit and must be rejected.

POINT II

THE ALJ CORRECTLY FOUND THAT RESPONDENT VIOLATED ITS BARGAINING OBLIGATIONS

A. The Judge Correctly Found Respondent Violated Section 8(a)(5) and (1) by Implementing the Six-Day Workweek on September 22, 2016.

Despite its clear obligation to do so, Respondent also failed to bargain in good faith with the Union over the six-day workweek and exceptions to the workweek policy.⁵ It is well established that an employer may not unilaterally change terms and conditions of employment during the course of a collective-bargaining relationship on matters that are mandatory subjects of bargaining without first bargaining with the union. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Mandatory subjects of bargaining, as delineated in Section 9(a) and Section 8(d), include hours of employment. In general, good faith bargaining requires timely notice and a meaningful opportunity to bargain regarding a proposed change. *See Brimar Corp.*, 334 NLRB 1035, 1035 (2010).

In this case, during the period of an effective contract, the Employer implemented a six-day workweek requirement, which included biweekly implementation in Syracuse and weekly implementation in Albany. It is undisputed that Respondent failed to bargain with the Union over the unilateral change to a six-day workweek, the effects of that decision, or any exceptions

⁵ This is an independent violation of Section 8(a)(5) and (1) as a unilateral change in employees’ terms and conditions of employment.

to the six-day workweek. Because there never was bargaining, much less an impasse in bargaining, the Employer's unilateral action violated section 8(a)(5) and (1).

Further, the Judge correctly found that the addition of a sixth workday was a material, substantial, and significant change affecting the terms and conditions of employment. Respondent argues that the temporary nature of the change did not rise to the level of material, substantial, or a significant change. That contention is belied by well-established law. There can be no dispute that the duration of the workweek is a mandatory subject of bargaining. *See Katz*, 369 U.S. at 742-743. The Board has previously found that the abolition of a fifteen minute break was a material, substantial and significant change, *Rangaire Co.*, 309 NLRB 1043 (1992), and that an employer's single unilateral refusal to adhere to a past practice of a paid extra half hour for lunch on Christmas Eve violated Section 8(a)(5). *Litton Systems*, 300 NLRB 324, 331 fn. 34 (1990), *enfd.* 949 F.2d 249, 251-252 (8th Cir. 1991).

Respondent's attempts to frame an additional day of work as "overtime" is without support in the record or law. The change involved the scheduling of an additional workday. At no point in the September 7th e-mail did Respondent reference overtime. [Jt. Exh. 1]. It is clear that the additional workday is a material, substantial, and significant change. *See id.*

Moreover, Respondent's emphasis on the economic necessity and legitimate business purpose for the change only further supports the material, substantial, and significant nature of the change. *See Rangaire Co.*, 309 NLRB at 1043 ("[T]he Respondent's own witness has effectively acknowledged the substantiality of the 15-minute Thanksgiving break by claiming the economic necessity of eliminating it").

Accordingly, Respondent's second exception is without merit and must be rejected.

B. The Judge Correctly Found Respondent Engaged in Unlawful Direct Dealing.

The Judge extensively reasoned that Respondent engaged in direct dealing in violation of the Act by bypassing the Union to create an exemption for Mr. Sopok. And, as the Supreme Court has stated, a union's status as exclusive bargaining representative exacts a "negative duty" to "treat with no other." *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944). In *El Paso Electric Co.*, 355 NLRB 544, 545 (2010), the Board restated the established criteria for finding that an employer has engaged in unlawful direct dealing. Those criteria are as follows: (1) that the [employer] was communicating with Union-represented employees; (2) the discussion was for the purpose of establishing or changes wages, hours and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union.

The Judge properly found that Respondent (1) communicated directly with an employee represented by the Union, Michael Sopok, (2) for the purpose of modifying Mr. Sopok's work schedule, a mandatory subject of bargaining, and (3) such communication occurred without the Union's knowledge. Each element is satisfied to find ADT engaged in unlawful direct dealing. Respondent does not offer any legal support for its contention that direct dealing only occurs where there is a threat of reprisal or an offer or promise of a benefit. It is undisputed that Respondent offered an exception to Mr. Sopok that was not otherwise made available to the rest of the bargaining unit. Respondent offered more favorable working conditions that were not available to the rest of the bargaining unit and was made to the exclusion of the Union.

Accordingly, Respondent's third and fourth exceptions are without merit and must be rejected.

C. The Judge Correctly Found Respondent Failed to Timely and Adequately Furnish Requested Information.

The Complaint alleges that Respondent unreasonably delayed in furnishing, and failed to furnish, the Union with information that it requested which was necessary for, and relevant to, the Union's performance of its duties as bargaining representative. See Compl. ¶ XI. It is well established that a union is statutorily entitled to information relevant to assessing its representational rights. *Mercywood Health Building*, 287 NLRB 1114, 1124 (1988); *Compact Video Services*, 319 NLRB 131, 143-44 (1995). Indeed, part of an employer's statutory duty to bargain collectively in good faith under the Act is the obligation to provide the union, upon request, with information sufficient to permit intelligent bargaining. See *Levingston Shipbuilding Co.*, 244 NLRB 119, 121 (1979), *enforced*, 617 F.2d 294 (5th Cir. 1980).

The Judge properly found that from September 19, 2016 to December 16, 2016, Respondent unreasonably delayed furnishing the Union with information that it requested which was necessary for, and relevant to, the Union's performance of its duties as bargaining representative. Additionally, Respondent's response, when it did respond, was insufficient by failing to provide available, relevant, and specifically requested documents.

When a request for relevant information is received, an employer's obligation is to provide it or set forth adequate reasons why it is unable to do so. *Kroger Co.*, 226 NLRB 512, 513-14 (1976). Where an employer believes an information request is vague, the onus to request clarification rests with the employer. See *Keauhou Beach Hotel*, 298 NLRB 702, 702 (1990). The employer must request clarification or comply with the request by furnishing appropriate information based on a reasonable interpretation of the request. *Id.* at 703. An

employer may not simply refuse to comply with a request it considers overly broad and/or onerous. *Id.*

The employer also has the obligation to respond in a reasonable period of time. *Bundy Corp.*, 292 NLRB 671, 679 (1989); *DePalma Printing Co.*, 204 NLRB 31, 33 (1973). The employer must furnish “as promptly as practical any information properly requested.” *Electrical Energy Services, Inc.*, 288 NLRB 925, 932 (1988). An employer commits an unfair labor practice when it unreasonably delays in providing the Union with requested relevant information. *See Bundy Corp.*, 292 NLRB 671 (delay of two-and-a-half months unreasonable where Union needed information to engage in bargaining). *See also B&B Trucking*, 345 NLRB 1 (2005) (employer violated the Act by delaying provision of information for five weeks). Whether information is provided in a timely fashion depends on the existing circumstances in each case, but the Board has held that a delay as short as four (4) weeks can be unlawful. *Postal Service*, 308 NLRB 547, 550 (1992).

An employer also has the duty to provide an accurate and complete response to a Union’s request for relevant information. *Reigel Electric & Central Electric Services*, 341 NLRB 198, 202 (2004); *Association of D.C. Liquor Wholesalers*, 300 NLRB 224 (1990). When incomplete information is supplied, the employer does not meet its duty. *Id.* Even where the employer asserts that an underlying decision is not subject to mandatory decision bargaining, relevant requested information still must be provided to the Union. *See North Star Steel Co.*, 347 NLRB 1364, 1368 (2006); *Kennametal, Inc.*, 358 NLRB 553, 555 (2012). *See also Champion Int’l Corp.*, 339 NLRB 671, 692, n.31 (2003) (that same information might have been requested for decision bargaining purposes does not defeat the right to the information for effects

bargaining). Furthermore, the employer has the obligation to make a reasonable effort to secure the requested information and, if unavailable, to explain or document the reasons for the asserted unavailability. *Rochester Acoustical Corp.*, 298 NLRB 558, 563 (1990). The burden is on the employer to show that information does not exist. *House of Good Samaritan*, 319 NLRB 392 (1995).

As the Judge found, Respondent failed to provide the requested information in a timely manner and also failed to provide all the requested information. By letters dated September 19, 2016, October 24, 2016, November 18, 2016, and December 15, 2016, the Union requested certain information from Respondent that it needed in connection with the six-day workweek and newly imposed customer service targets. [Jt. Exhs. 5, 8, 9, 11, 12, 13, 14] The Union also filed an unfair labor practice charge concerning the requested information on November 29, which still failed to elicit a response from the Company until December 16, 2016. [GC Exh. 1(c); Jt. Exh. 15] The Union's information requests dated October 24, 2016 very clearly explain why the Union requested that information and why it was relevant to its demand for bargaining. *See KIRO*, 311 NLRB 745, 746 (1993) (“[T]he determination of relevance ‘depends on the factual circumstances of each particular case.’”).

The only information that Respondent initially provided in response to the Union's September 19 letter were some bare assertions (in the body of Respondent's e-mail) about the extended workweek [Jt. Exh. 7a], and some backlog data [Jt. Exhs. 7b, 7c]. Crucially, this information did not satisfy all of the Union's request and arrived well after Respondent had already implemented the six-day workweek. Moreover, in refusing to provide any additional information, Respondent made bare assertions of ambiguity and relevance in the response, but

failed to advise which requests it believes to be vague, ambiguous, or lack relevance.

Respondent was obligated to notify the Union of its objections to each request and where clarification was necessary. *Hospital Episcopal San Lucas*, 319 NLRB 54, 57 (1995); *Martin Marietta Energy Systems*, 316 NLRB 868 (1993). Despite that failure, the Union again requested relevant information in requests dated October 24th, including a clarification, an explanation of the relevance, and the information the Union believes remains outstanding. [Jt. Exhs. 8, 9] Respondent did not provide any further information to the Union until after the Union filed an unfair labor practice charge alleging the failure to provide information. And even that information did not come easily, as the Union had to again request Respondent produce additional information.

There can be no question that the Union's September 19 and October 24 letters sought information relating to the six-day workweek, including all internal and external correspondence on the issue. Despite that request, it was not until the hearing on June 13, 2017, that Respondent furnished internal correspondence concerning the roll-out of the six-day workweek. [Jt. Exh. 1] This is despite the Union explicitly referencing this document in its information requests dated October 24, 2016 as an example of documents ADT failed to furnish. [Jt. Exhs. 8, 9 ("For example, on or about September 7, 2016, Michael Kirk sent an e-mail to bargaining unit employees . . . but a full copy of that e-mail and its recipients was not provided to the Union on October 13th.")] Employee witnesses Madsen and Sopok both also testified the September 7, 2016 e-mail was sent to all employees, but a full copy of the e-mail, including the recipients, was never produced. [Tr. 71:18-72:6; 89:7-18; 92:12-14] The Union was entitled to this information to determine when the six-day workweek decision was made,

when it was communicated to the employees, how it was communicated to the employees, and who communicated the decision to the employees.

At the hearing, Respondent simply failed to offer any testimony on the information request allegation, explain any potential reason for the delay, explain why the requested information was not furnished, or offer any information related to the Union's requests. [Tr. 119:10-12] Respondent appears to argue, by way of its December 16, 2016 letter, that it was not obligated to provide any additional requested information because Respondent purportedly provided all relevant information. [Jt. Exh. 15] This defense is not supported by the evidence or Board law.

In sum, Respondent's failure to provide the requested information prevented the Union from engaging in meaningful bargaining concerning the six-day workweek, the newly imposed customer service targets, and the impact of the same on unit employees. *See Peterbilt Motors Co.*, 357 NLRB 47, 49 (2011). Absent the requested information, the Union could not effectively represent the bargaining unit members, including on key issues such as the duration of the six-day workweeks. *Comar, Inc.*, 349 NLRB 342, 355 (2007) (finding it "hard to imagine how the Union could bargain intelligently" about issues without requested information). Under the circumstances, Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) by failing to furnish, and unreasonably delaying furnishing, information relevant to the Union's responsibilities as the representative of the bargaining unit employees.

Accordingly, Respondent's fifth and sixth exceptions are without merit and must be rejected.

CONCLUSION

For the foregoing reasons and authorities, as well as those stated in the Answering Brief of the General Counsel, the Charging Party respectfully submits that the Judge's Decision sets forth wholly correct findings of fact, conclusions of law, and an appropriate order and remedy. The Respondent's Exceptions should be rejected in their entirety.

Dated: October 12, 2017

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADT LCC d/b/a ADT SECURITY SERVICES,

Respondent,

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 43,

Charging Party.

Case Nos.: 03-CA-184936
03-CA-192545

CERTIFICATE OF SERVICE

Bryan T. Arnault, attorney for the charging party in the above captioned matter, certifies that on this date a copy of the within Charging Party's Answering Brief to Respondent's Exceptions was electronically filed with the e-filing system and served by electronic mail upon Respondent's attorneys and upon Counsel for the General Counsel at the addresses stated below:

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