

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

ADT LLC D/B/A ADT SECURITY SERVICES

and

**Cases 03-CA-184936
03-CA-192545**

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 43**

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF
CROSS-EXCEPTION TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(e) of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Brief in support of Cross-Exception to the Decision of Administrative Law Judge Michael A. Rosas (ALJ), dated August 4, 2017, in the above-captioned cases. Under separate cover, General Counsel also files with the Board on this date an Answering Brief to ADT LLC d/b/a ADT Security Services (Respondent's) exceptions. It is respectfully submitted that in all respects, other than what is excepted to herein, the findings of the ALJ are appropriate, proper, and fully supported by the credible record evidence.

I. PRELIMINARY STATEMENT

The ALJ found that Respondent committed multiple unfair labor practices. Specifically, the ALJ concluded that Respondent violated Section 8(a)(1) and (5) of the Act by changing the terms and conditions of employment of the Albany Unit by imposing a six-day workweek for service and installation technicians at that location, by changing the terms and conditions of employment of the Syracuse Unit by imposing a bi-weekly six-day workweek for the service technicians in that location, and 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. (ALJD 9:14-9:18; ALJD 10:14-10:17).¹

The ALJ also found that Respondent violated Section 8(a)(1) and (5) of the Act when it 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. (ALJD 10:9-10:17). Finally, the ALJ found that Respondent violated Section 8(a)(1) and (5) of the Act when it delayed in providing information to the Union that is necessary and relevant to its role as the employee's bargaining representative. (ALJD 11:39-11:41).

In addition to the unfair labor practices found by the ALJ in this proceeding, General Counsel respectfully requests that the Board find and conclude that Respondent also violated Section 8(d) of the Act by imposing a mandatory six-day workweek both for service and installation technicians in the Albany unit, and for service technicians in the Syracuse unit, without the Union's consent. The ALJ considered the appropriate facts regarding Respondent's midterm modifications. He correctly concluded that Respondent 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 without the Union's consent (ALJD 12:8-12:13), and that Respondent 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 without the Union's consent. (ALJD 12:15-12:17).

Further, the ALJ included in his recommended Order paragraphs requiring Respondent to cease and desist from unilaterally and without the consent of the Union imposing a six-day

¹ References to the ALJ's Decision are designated (ALJD _:_) for Administrative Law Judge's Decision at page(s):line(s). References to the transcript are designated (Tr. _), references to Joint Exhibits as (J. Ex. _), references to General Counsel Exhibits as (GC Ex. _), and references to Union exhibits as (U. Ex. _).

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 (ALJD 13:6-13:10), and cease and desist from unilaterally and without the consent of the Union imposing a bi-weekly six-day workweek for the service technicians in the Syracuse unit or otherwise changing employees' terms and conditions of employment as set forth in the Syracuse collective-bargaining agreement. (ALJD 13:12-13:14). While the ALJ correctly found violations of Section 8(a)(1) and (5) of the Act, he inadvertently failed to make explicit that Respondent also violated Section 8(d) of the Act, a violation he found in his conclusions of law, remedy and order.

II. ARGUMENT

The ALJ erred by inadvertently omitting findings to support his remedy, order, and conclusions of law that Respondent violated Section 8(d) of the Act by imposing midterm modifications on the Albany service and installation employees and Syracuse service employees without the consent of the Union. (Exception 1)

a. The record evidence demonstrates that Respondent made unlawful midterm modifications to both the Albany and Syracuse collective-bargaining agreements

The General Counsel alleged, and the record evidence demonstrates, that Respondent made midterm modifications to both collective-bargaining agreements. (GC Ex. 1[n], 1[q]). As the ALJ noted, "the disputed scheduling provisions are set forth in...Article 6 in the Albany and Syracuse CBAs." (ALJD 3:27-3:28). The Albany agreement states, in pertinent part:

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 8:00a.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 8:00a.m. and 12 midnight, Monday through Friday. Customer needs may periodically make it necessary for work to be performed

beginning at 7:00a.m. The Company will first seek qualified volunteers to perform such work. If there are no qualified volunteers the least senior qualified person will be assigned to perform the work....

The Installation Department may be scheduled for any eight-hour period between 7:00a.m. and 5:30p.m. in any given day between Monday and Friday. 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 qualified person will be assigned to perform the work....

(J. Ex. 3, p. 10) (emphasis added).

The Syracuse agreement, cited by the ALJ in his Decision, states, in pertinent part:

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 8:00a.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 8:00a.m. and 12 midnight, Monday through Friday. Customer needs may periodically make it necessary for work to be performed beginning at 7:00a.m. The Company will first seek qualified volunteers to perform such work. If there are no qualified volunteers the least senior qualified person will be assigned to perform the work....

The Installation Department may be scheduled for any eight-hour period between 7:00a.m. and 5:30p.m. in any given day between Monday and Friday. Customer needs may periodically make it necessary for work to be performed on a second shift and/or Saturdays.² 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....

(J. Ex. 2, p. 6; ALJD 3:27-4:13) (emphasis added).

² Because of the language stating that customer needs may periodically require Saturday work, the General Counsel did not allege in the Complaint that Respondent's implementation of the six-day workweek was a midterm modification with regard to the Syracuse installation department; merely that it was a unilateral change.

Sometime in 2016, Respondent determined that in order to meet new customer service targets, it should increase the number of days per week employees worked. (J. Ex. 1). Despite the language in the Albany and Syracuse CBAs explicitly stating that the workweek shall consist of four or five days, Respondent decided to implement a mandatory six-day workweek at its Albany facility, and a bi-weekly six-day workweek at its Syracuse facility. Respondent implemented the mandatory six-day workweek at the Albany and Syracuse facilities on about September 22, 2016. (J. Ex. 1, Tr. 34). Prior to the implementation of the six-day workweek, employees worked four or five days per week, as allowed in the collective-bargaining agreements. (J. Ex. 2, p. 6, J. Ex. 3, p. 10; Tr. 22-23, 71, 88).

Although the collective-bargaining agreements were in effect and explicitly state that the workday should comprise of four or five days for Albany employees and Syracuse service employees, Respondent implemented the change to a mandatory six-day workweek without the Union's consent. Indeed, as soon as the Union became aware of Respondent's plan to impose a mandatory six-day workweek, union president Patrick Costello called regional human resources manager Michael Stewart and demanded that Respondent rescind the change. Stewart told Costello that Respondent would be unlikely to rescind the change. (Tr. 25; ALJD 6:16-6:19). Later, Costello sent Stewart an information request that included a demand to rescind the change and bargain. (J. Ex. 5; ALJD 6:38-6:43). Respondent did not rescind the change. Instead, Respondent continued to impose the mandatory six-day workweek until about October 2016 for the Syracuse facility, and about December 2016 for the Albany facility. (J. Ex. 7A; Tr. 91).

b. The ALJ correctly concluded that Respondent changed terms and conditions of employment by instituting the six-day workweek without the consent of the Union, and provided the proper remedy

The ALJ properly concluded in his recommended Conclusions of Law that Respondent violated Section 8(a)(1) and (5) of the Act when it changed terms and conditions of employment by instituting the mandatory six-day workweek for Albany employees and Syracuse service employees without the Union's consent. Respondent changed the number of days employees were required to work, a mandatory subject of bargaining, without the Union's consent. This conduct violated Section 8(d) of the Act and, in turn, constituted a violation of Section 8(a)(1) and (5) of the Act.

“It has been consistently held that an employer acts in derogation of its bargaining obligation under Section 8(d), and thereby violates Section 8(a)(5) and (1) of the Act when, during the effective period of the contract and without the consent of the union, it modifies...employment conditions that are mandatory bargaining subjects.” *Safelite Glass*, 283 NLRB 929, 939 (1987) citing *Chemical Workers Local 10 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183-188 (1971). In this case, it is undisputed that Respondent implemented the mandatory six-day workweek during the term of both the Albany and Syracuse collective-bargaining agreements. It is also undisputed that Respondent did so without the Union's consent, and, in fact, in the face of the Union's vocal opposition to the plan. The ALJ noted that “[i]tems falling within the language of Section 8(d) are mandatory subjects of bargaining.” (ALJD 8:25-8:26). Additionally, the ALJ also correctly found that the number of days per week employees are required to work is a mandatory subject of bargaining. (ALJD 9:14-9:16).

Because the question of whether an employer unlawfully modified a collective-bargaining agreement may depend on the interpretation of the contract language, “the Board may

be called on to decide the threshold issue regarding the meaning of a particular provision of the agreement,” and “is empowered to interpret provisions of a collective-bargaining agreement if necessary to the adjudication of the alleged unfair labor practice.” *Id.*, citing *NLRB v. Strong*, 631 F.2d 669, 675 (10th Cir. 1980); *C&C Plywood Company*, 385 U.S. 421, 428 (1967); *Northeast Oklahoma City Mfg. Co. v. NLRB*, 631 F.2d 669 (10th Cir. 1980); *Buck Brown Contracting Co.*, 272 NLRB 951 (1984). The ALJ considered the language of the collective-bargaining agreements and correctly held that Respondent unlawfully altered employee work schedules of employees in the Albany unit and Syracuse service employees without the Union’s consent. (ALJD 3:27-4:12, 12:11-12:17).

The Board evaluates midterm modifications under the “sound arguable basis” standard, not the “clear and unmistakable waiver” standard used in unilateral change cases. See *American Electric Power*, 362 NLRB No. 92 (2015); *Bath Iron Works*, 345 NLRB 499 (2005). The Board will not find an employer had a sound arguable basis for its interpretation of a collective-bargaining agreement where that interpretation is implausible. *Lenawee Stamping Corporation*, 365 NLRB No. 97, slip op. at 7 (June 14, 2017), citing *Hospital San Carlos Borromeo*, 355 NLRB 153 (2010) (finding respondent did not have a sound arguable basis for its contract interpretation as such interpretation was implausible). Respondent has no sound arguable basis for its implementation of the six-day workweek. It argues that it did not believe implementing a six-day workweek conflicted with the language of the collective-bargaining agreements. This explanation is implausible since the contracts both explicitly state the number of days allowed in a given work week – four or five. Moreover, though Respondent argues that it has the unfettered right to assign overtime work, both contracts explicitly set forth provisions for assigning overtime work. While Respondent abided by those provisions in the past when a backlog

necessitated that employees work overtime, it chose not to do so in this instance. (Tr. 49-51). Notably, employee and steward David Madsen testified that the sixth day of work was not scheduled the same way overtime had been prior to the implementation of the six-day workweek. Instead, it became a regular day of work, just like Monday through Friday. (Tr. 100).

Nor can Respondent show that the Union consented to the midterm modifications, making any other defense meritless. “Unless a union consents to the midterm modification, employer defenses, such as that the midterm modification was made in good faith or out of economic necessity, will not bar an 8(a)(5) finding.” *Safelite Glass*, supra at 939.

Here, the ALJ was correct in concluding that Respondent, without the consent of the Union, changed the terms and conditions of employment for service and installation employees in the Albany unit and changed the terms and conditions of employment for service employees in the Syracuse unit by imposing a six-day workweek on those employees. The ALJ also provided in his recommended Order the correct remedy for such a violation – that Respondent cease and desist from imposing the six-day workweek on those employees without the Union’s consent. (ALJD 12:8-12:17, 13:6-13:14).

c. The ALJ’s failure to explicitly find a violation of Section 8(d) is an inadvertent error which the Board should correct by explicitly finding that Respondent violated Section 8(d) of the Act

The ALJ’s failure to make a finding of a violation of Section 8(d) of the Act is an inadvertent error. The factual issue of whether Respondent violated Section 8(d) of the Act was fully addressed at the June 13, 2017 administrative hearing, and the record evidence demonstrated that Respondent violated Section 8(d) of the Act. Further, the parties addressed the issue in their briefs. The ALJ considered the relevant facts, and came to the conclusion of law that Respondent, by implementing the six-day workweek for Albany unit employees and Syracuse

service employees *without the Union's consent*, had violated Section 8(a)(1) and (5) of the Act. (emphasis added). The ALJ's recommended Order would also require Respondent to cease and desist from unilaterally *and without the consent of the Union* imposing a six-day workweek for service and installation technicians in Albany, and service technicians in Syracuse. (emphasis added). Notably, these portions of the ALJ's conclusions of law and recommended Order are different than those dealing with Respondent's unilateral change to terms and conditions of employment for Syracuse installation employees. This is because the General Counsel did not allege an 8(d) violation on behalf of the Syracuse installation employees, for reasons noted above in footnote 2. The language the ALJ used addressed Respondent's violation of Section 8(d) and 8(a)(1) and (5) of the Act.

The ALJ was presented with the relevant facts and tailored his conclusions of law and recommended Order to provide remedies for a Section 8(d) violation. Accordingly, the Board should correct the ALJ's inadvertent omission by making an explicit finding that Respondent violated Section 8(d) of the Act.

III. CONCLUSION

For all the reasons set forth above, General Counsel respectfully requests that the Board grant the General Counsel's Cross-Exception to the Decision of the Administrative Law Judge and find that Respondent violated Section 8(d) of the Act, as discussed above. General Counsel further requests that the Board issue an order otherwise affirming and adopting the Decision and Recommendations of the ALJ.

DATED at Albany, New York, this 13th day of October, 2017.

Respectfully submitted,

/s/ Alicia E. Pender

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