

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

ADT, LLC	§	
	§	Cases 16-CA-144548
Respondent,	§	16-CA-168863
	§	16-CA-172713
and	§	16-CA-179506
	§	16-CA-189805
COMMUNICATIONS WORKERS OF	§	16-CA-187497
AMERICA, AFL-CIO,	§	16-CA-191963
	§	16-CA-199947
Charging Party.	§	16-CA-200961
	§	16-CA-209070
	§	16-CA-209995
	§	

**CHARGING PARTY COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO'S
ANSWERING BRIEF TO RESPONDENT ADT, LLC'S EXCEPTIONS**

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**CHARGING PARTY COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO'S
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TO THE HONORABLE NATIONAL LABOR RELATIONS BOARD:

COMES NOW Charging Party Communications Workers of America, AFL-CIO (“Charging Party” or “the Union” or “CWA”) and, pursuant to Section 102.46(b) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “the Board”), 29 C.F.R. § 102.46(b), and files this answering brief to exceptions filed by Respondent ADT, LLC (“Respondent” or “ADT”) to the November 16, 2018 decision (“the Decision”) of Administrative Law Judge Robert Ringler (“ALJ”), which sustained multiple allegations in ADT violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act (“NLRA” or “the Act”) by unlawfully withdrawing recognition, unlawfully excluding new hires for the unit, terminating Art Whittington, failing to respond to requests for information relevant to CWA’s representational duties, committing unlawful unilateral changes, and making threats and coercive

statements to employees. In support of CWA's position that the Decision should be affirmed and adopted by the NLRB, CWA would respectfully show the Board the following:

I. Introduction and Summary of Case

a. The history of the bargaining unit

CWA and ADT have been parties to a collective bargaining agreement ("CBA") dating back to 1978. The CBA's recognition article establishes CWA as the bargaining representative of the following bargaining unit:

The Employer hereby recognizes the Union as the exclusive bargaining representative with respect to rates of pay, wages, hours and other conditions of employment for the employees in the bargaining unit for whom the Union was certified by the National Labor Relations Board on November 20, 1978 in Case Number 16-RC-7820, including all servicemen employed by the Employer at its facilities located in Dallas and Fort Worth, Texas; excluding operators, office clerical employees, salesmen, confidential employees, alarm service investigators, supervisors, relief service supervisors and guards as defined in the Act. (General Counsel Exhibit ("GC") 4, p. 2, Article 1, Section 1; see also GC 5).

ADT technicians in the unit install and service security products for residential and small business customers. The bargaining history was uninterrupted for over 37 years.

(Transcript page ("Tr.") 785, lines ("Ins.") 4-9). In 2015, the parties entered negotiations for a successor agreement after the 2011-14 CBA had been renewed for one year pursuant to its evergreen provision. While these negotiations were proceeding, ADT committed several unfair labor practices ("ULP" or "ULPs") that are at issues in this case, including failing to provide information relevant to the Union's representational duties, unlawful unilateral changes in working conditions, unlawful threats to bargaining unit employees, and the unlawful termination of Union steward and bargaining committee member Art Whittington.

The most egregious of the ULPs at issue in this case, however, concern ADT's unlawful efforts to change the scope of the unit. In 2010, ADT acquired Broadview, a competitor in the security industry whose employees performed similar installation and repair work as bargaining unit employees. Broadview employees were separated from the bargaining unit until 2014. At that time, ADT comingled the Broadview employees and the unit. ADT then filed a RM petition with the NLRB that was ultimately dismissed. *ADT, LLC*, 365 NLRB No. 77 (2017).

ADT also in 2014 ceased applying the terms of the CBA to newly hired ADT technicians who performed security system installation and repair work identical to that performed by bargaining unit employees. On May 31, 2017, ADT withdrew recognition from CWA in the wake of the Board's dismissal of the RM petition. (Respondent Exhibit ("R") 11). Contemporaneous with the withdrawal of recognition, ADT committed numerous other unfair labor practices that are at issue in this case that range from additional unlawful unilateral changes to additional instances where ADT failed to provide information relevant to CWA's representational duties.

b. The ALJ's Decision

The ALJ sustained the allegations against ADT in their entirety. The ALJ held that, as pled in the complaint, supervisors Derek Roberts and Andy Shedd violated Section 8(a)(1) of the Act, respectively, by Roberts telling unit employees that they should leave if they did not like ADT's assignment policy and Shedd telling employees they should resign if they do not like ADT's sick leave policy. (Decision at 12 (citing *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177, slip op. at 1 (2018); *McDaniel Food, Inc.*, 322 NLRB 956 (1997))). The ALJ also concluded that supervisor Rob Raymond unlawfully told employees they would not be receiving raises

because of the CBA. (Decision at 12, citing *Invista*, 346 NLRB 1269, 1270 (2006); *Earthgrain Baking Cos.*, 339 NLRB 24, 28 (2003)).

Further, the ALJ held that ADT violated Section 8(a)(3) of the Act under the Board's framework established in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), by terminating Art Whittington. (Decision at 13-14). The ALJ also held that ADT violated Section 8(a)(5) of the Act by excluding newly hired technicians who perform security system installation and repair work from the unit (Decision at 15-16) because "when an established bargaining unit expressly encompasses employees in a specific classification, new employees hired into that classification are included in the unit." (Decision at 15, quoting *Gourmet Award Foods*, 336 NLRB 872, 873 (2001)). The ALJ also held that ADT's May 31, 2017 withdrawal of recognition violated Section 8(a)(5) because ADT's contention that CWA represented a minority of the technicians was wrong because it was premised on ADT's exclusion of new hires from the bargaining unit. (Decision at 17-18). The ALJ then proceeded to hold that the Broadview employees were an accretion to the bargaining unit, which included employees historically in the unit plus the new hires that ADT had unlawfully excluded. (*Id.* at 18-19).

The ALJ also held that ADT's unilateral changes to paid leave, bereavement leave, sales compensation system, grievance procedure, cessation of dues deduction, and pay periods that occurred post-withdrawal of recognition violated Section 8(a)(5). (*Id.* at 20). The ALJ also ruled that ADT violated the Act by failing to respond to CWA's (1) October and December 2014 requests for information about new hires (*Id.* at 20-21); (2) October 29, 2015 requests concerning grievances over out-of-classification work, overtime, and work hours (*Id.* at 21); (3) the October

30, 2015 request on the discipline of Brian Sauser, the January 8, 2016 request for information on Chad Short's discipline, and fully respond to the July 2016 requests for information about Whittington's termination (Id.); (4) the March 23, 2017 request over subcontracting (Id.); and (5) the March 24, 2017 request for information about new hires so as to assess the appropriate remedy in an arbitration decision. (Id.).

To remedy these violations of the Act, the ALJ ordered Whittington to be reinstated and made whole for losses resulting from his unlawful termination. (Id. at 23, 25). The ALJ also ordered ADT to recognize and bargain with CWA as the representative of the bargaining unit of technicians pursuant to an affirmative bargaining order and make the employees unlawfully excluded from the unit whole for any losses they suffered. (Id. at 23-24, 26). The ALJ further ordered the unlawful unilateral changes to be rescinded at the Union's request and respond to the outstanding information requests. (Id. at 24). Finally, the ALJ ordered ADT to cease and desist from informing employees they should resign and threatening employees that they will not receive raises because of the Union or the CBA. (Id. at 25).

II. Arguments and Authorities

As a preliminary matter, CWA urges the Board to sustain and adopt the findings of the ALJ recounted above. Accordingly, the Board should reject the exceptions raised by ADT. In response to these objections, as argued below, CWA would show that the ALJ correctly found that ADT unlawfully withdrew recognition; the ALJ's decision to accrete the Broadview employees into a unit of ADT technicians including new hires was appropriate or, in the alternative, the Board should hold that the appropriate unit in this case is limited to the historical unit employees and the new hires. Further, the ALJ correctly found Whittington's termination to

violate Section 8(a)(3) of the Act. The Board should also overrule the exceptions filed by ADT as to Raymond's unlawful statement that there would be no raises because of the Union. The Board should also overrule ADT's exceptions to the rulings that ADT unlawfully failed to respond to the Union's information requests and ADT made unlawful unilateral changes.

a. *The unlawful withdrawal of recognition*

The ALJ held that ADT unlawfully withdrew recognition on May 31, 2017 in violation of Section 8(a)(5) of the Act because CWA had not lost majority support. (Decision at 17-18). ADT in its answering brief rejects this proposition. (ADT's Brief in Support of Exceptions ("Brief") at 24-30). ADT did not, however, have objective evidence that CWA lost majority support in May 2017 when it withdrew recognition. As such, the ALJ's Decision on this issue should be sustained.

The critical defect of ADT's reasoning in its exceptions is that ADT refuses to acknowledge what decisions by the Board make clear: new hires are part of the bargaining unit. *Gourmet Award Foods*, 336 NLRB at 873; *Levitz Furniture Company*, 353 NLRB 717, 728, n. 60 (2001). The new hires in this unit were only excluded because of the malfeasance of ADT, which perniciously classified them as new hires into the Broadview group; an employer that no longer existed as it had been bought by ADT. As the Board noted in *Levitz Furniture*, an employer cannot gain an advantage that results from its own malfeasance of excluding new hires from the unit. *Levitz Furniture*, 353 NLRB at 729, n. 63 (citing *Henry Bierce*, 328 NLRB 646, 647 (1999)). Contrary to the bald assertion of ADT, CWA never agreed to exclude Broadview new hires from the unit when it agreed to the private, self-determination election for Broadview employees because that election agreement never contemplated such a thing as Broadview new

hires. (Charging Party Exhibit (“CP”) 3). As such, the default status of new hires under Board law is that they are new hires into the bargaining unit.

Under *Levitz Furniture*, ADT must “prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition.” *Levitz Furniture* at 725. The implication of this holding in this case is that ADT must prove that as of May 2017, not 2014 or any time prior, that CWA had lost majority support in the unit. The evidence in this case establishes that as of May 2017 CWA had not lost majority support.¹

ADT’s arguments to the contrary are premised on its adding the new hires to the Broadview unit so as to argue that the non-represented employees outnumbered the represented employees. This fallacy is not defensible under Board law.

ADT also argues the Board should look to the alleged number of employees in the Broadview and Union groups in 2014 to find ADT had good faith doubt three years later in 2017 to withdraw recognition. The number of employees in these groups in 2014 is irrelevant to the facts in 2017 when ADT did withdraw recognition. There was no objective basis in 2017 to withdraw recognition regardless of what the facts might have been in 2014. ADT spares no breath or turn of phrase in its Brief to lament and attempt to re-litigate the 2014 RM petition, but none of its pleas and posturing change the fact that the RM petition was dismissed because ADT could not meet the criteria for filing a RM petition. *ADT, LLC*, 365 No. 77, slip op. at 5-6 (2017). Whatever opportunity to withdraw recognition in 2014 was passed on by ADT when it unsuccessfully pursued a RM petition. Its decision to withdraw recognition in 2017 must stand

¹ Per Respondent Exhibit R 8, as of May 2017 there were approximately 31 legacy Union employees, 53 new hires, and 35 legacy Broadview employees. Per R 9, as of May 2017 there were approximately 19 legacy Union employees, 30 new hires, and 20 legacy Broadview employees. Based on either exhibit, the legacy Union and new hires outnumbered the legacy Broadview employees.

on the facts in 2017 and it cannot because the facts of 2017 established CWA had not lost majority support at the time ADT withdrew recognition.

ADT has no ground to stand to support its claim that CWA lost majority support other than its self-serving decision to designate new hires as Broadview employees, a decision that cannot stand under *Levitz Furniture*'s construction of the standard to withdraw recognition. In *Levitz Furniture*, the NLRB held "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees." *Levitz Furniture*, 353 NLRB at 717.

In this case, all ADT has is its flawed accounting that for its own benefit designated new hires as Broadview employees rather than, as the law required, bargaining unit employees. As the ALJ noted, ADT could not in 2017 rely on a decertification petition filed in 2015 because that petition was stale. (Decision, p. 18, n. 48). This holding is consistent with Board law that a stale decertification petition is not evidence of a loss of majority support. *Ferri Supermarkets, Inc.*, 330 NLRB 1119, 1120 (2000) (holding "Under these circumstances, the Respondent could not reasonably rely on the August 1996 petition given to the predecessor, the April 1997 petition filed with the Board, or the ensuing checkoff revocations as objective considerations justifying a refusal to recognize the Union.'). *Rock-Tenn Co.*, 315 NLRB 670, 672 (1994) (holding "We also find that at the time the Respondent withdrew recognition on December 18, 1991, the May petition was stale and thus did not accurately indicate the employees' true sentiments regarding the Union.').

Further, as also recognized by the ALJ, any value the petition would otherwise have is tainted by ADT's numerous ULPs, most significantly the exclusion of new hires from the unit as

discussed below. (Decision at 18, n. 48, citing *Hearst Corp.*, 281 NLRB 764 (1986), *enfd.*, 837 F.2d 1088 (5th Cir. 1988)). This conclusion is consistent with recent Board decisions finding an employer's conduct to taint a petition as evidence of a loss of support. *CoServ Electric*, 366 NLRB No. 103, slip op. at 2, 11 (2018) (citing *Master Slack Corp.*, 271 NLRB 78, 84 (1984)). The lack of any objective basis for ADT withdrawing recognition wholly defeats its exceptions to the ALJ's findings on this issue and the ALJ's Decision should be sustained on this issue.

b. The appropriate unit in this case

As to the question of what unit ADT must recognize, CWA asserts that the ALJ's accretion analysis should be upheld for the reasons advanced by the ALJ in his Decision. In the alternative², as argued below, the Board should order ADT to recognize a unit of employees composed of legacy Union employees and new hires.

1. The ALJ's accretion analysis should be sustained

The ALJ determined that ADT's withdrawal of recognition raised the question of "what Unit it must now recognize." (Decision at 18). In answering this question, the ALJ determined that the Broadview employees should be accreted to the bargaining unit, which the ALJ had previously defined as consisting of the legacy Union employees and new hires. (*Id.* at 19). The bargaining unit, defined as including the new hires, outnumbers the Broadview employees.³ As recounted by the ALJ, and even noted by ADT in its brief (Brief at 26, 28), all the employees at

² Federal Rule of Civil Procedure 8(d)(3) recognizes that a party may raise inconsistent claims or defenses in a case. The Board has stated that the Federal Rules of Civil Procedure, while not binding on the NLRB, provide "useful guidance." *Brink's, Inc.*, 281 NLRB 468, 468 (1986) (holding application of FRCP 26 to be appropriate in the context of resolving subpoena issues). CWA asserts that it is appropriate for it to assert the ALJ's accretion is correct and that, in the alternative, the unit of legacy Union and new hires that it has previously advocated is appropriate should the Board decline to adopt the ALJ's accretion analysis.

³ See *supra*, footnote 1.

issue in this case share a significant community of interest. (Decision at 19). For the reasons advanced by the ALJ, this determination should be upheld by the Board.

It should be noted in discussing the ALJ's accretion analysis that this configuration of a wall-to-wall unit, as noted by the ALJ, is the very unit that ADT has sought in this litigation dating back to 2014. (Id., n. 49). ADT's previous support for a wall-to-wall unit was premised, however, on its pernicious reasoning that the Broadview employees outnumbered the legacy Union employees because ADT was adding the new hires to the Broadview headcount. As noted above, ADT's reasoning on that point is inconsistent with and not supported by Board law.

In closing, while CWA has previously maintained its preference to represent the Broadview employees as the result of their own expression of self-determination, and to that end negotiated with ADT for an election agreement, which ADT declined to follow in 2014 when CWA sought an election. CWA has also previously acknowledged for purposes of the RM election that the community of interest was sufficient to support finding one unit. *ADT*, 365 NLRB, slip op. at 2. The decision by the ALJ resulted, however, from CWA being forced to seek redress through the NLRB for the unlawful acts of ADT, in particular the withdrawal of recognition and the exclusion of new hires from the unit. Had ADT followed the law and respected the scope of the bargaining unit, there would be no accretion. ADT, however, has spared no effort to decimate the bargaining unit, and as a result the lawful recourse CWA took in response to the unlawful acts of Respondent, the Broadview employees were accreted to the bargaining unit by the ALJ. Given the community of interests between the groups, CWA prays the Board adopt and uphold the ALJ's holding that the minority Broadview unit is an accretion to the majority bargaining unit of legacy Union and new hire employees.

2. In the alternative, a unit of legacy Union and new hire employees is appropriate

In the alternative, CWA would show the Board that an appropriate bargaining unit in this case exists that is less than the conventional wall-to-wall unit arrived at by the ALJ. This unit is composed of the legacy Union and new hire employees who, as argued above, are part of the historical unit under Board law.

The Board has recognized that a historical bargaining unit can remain despite a change in the circumstances of the unit. The viability of such units turns on the question of “whether the existing unit remains appropriate in light of changed circumstances.” *Dodge of Naperville, Inc.*, 357 NLRB 2252, 2253 (2012). While the Board looks to the community of interests in many such cases, it “gives significant weight to the parties’ history of bargaining. Specifically, our case law holds that ‘compelling circumstances’ are required to overcome the significance of bargaining history.’” *Dodge of Naperville*, 357 NLRB at 2253 (quoting *ADT Security Services*, 355 NLRB 1388, 1388 (2010); see also *Radio Station KOMO-AM*, 324 NLRB 256, 262-263 (1997) (citing *Armco, Inc. v. NLRB*, 832 F.2d 357, 363 (6th Cir. 1987); *NLRB v. ADT Security Services, Inc.*, 689 F. 3d 628, 634 (6th Cir. 2012) (holding “ADT is required to establish that compelling circumstances overcome the almost twenty-nine year bargaining history between the parties.”)).

In this case, the bargaining history dated from November 20, 1978, the date of certification (GC 4, p. 2, Art. 1, Mutual Recognition of Rights, Sec. 1; GC 5), to May 31, 2017, the date of withdrawal; an approximate 38 ½ year bargaining relationship that Respondent stipulated was uninterrupted until the May 31, 2017 withdrawal of recognition at issue in this case. (Tr. 785, lns. 4-9).

Bargaining history alone will not suffice to find a historic unit combined with a non-union group to still be an appropriate unit. *Dodge of Naperville* at 2253. In some cases, the loss of the historic unit's distinct identity presents sufficiently compelling circumstances to overcome bargaining history. *Id.* (citing *Serramonte Oldsmobile*, 318 NLRB 80, 104 (1995)). In *Dodge of Naperville*, the Board found an absence of compelling circumstances to overcome the unit's history because the unit only lost its distinct qualities because of the unlawful unilateral changes committed by the employer. In this case, the unique characteristics of the unit that resulted from the terms of the CBA remained in place until the withdrawal of recognition on May 31, 2017, when ADT ceased applying the terms of the labor agreement to the legacy Union employees. (Tr. 790, ln. 24-Tr. 791, ln. 2). The legacy Union employees never lost their distinct identity from the Broadview employees until after ADT withdrew recognition and as a result of other ULPs. As to the new hires, as discussed above, ADT unlawfully failed to treat them as unit employees and ADT's exclusion of these employees from the unit is an independent ULP, as argued below.

Legacy Union employees continued to enjoy the benefits of the CBA after the integration with Broadview employees inherited by ADT through its acquisition. The Broadview and unit employees thus existed in stable, parallel worlds coexisting and working side by side from 2014 until the May 31, 2017 withdrawal of recognition.

During that three year period, the Broadview employees were not subject to just cause for discipline and discharge as the unit employees were per the CBA, but the unit employees were. (Tr. 791, lns. 6-11). The Broadview employees did not have a grievance process that culminated in arbitration. (*Id.*, lns. 14-18). The CBA provided distinct terms for bereavement leave of five

days for unit employees that Broadview employees did not have. (Tr. 792, Ins. 5-11). Unit employees also began overtime after working eight hours a day whereas Broadview employees only began to accrue overtime after working forty hours in a week. (Tr. 792, Ins. 2-4; Tr. 792, ln. 22-Tr. 793, ln. 125). Broadview employees are not paid under the terms of the high volume commission plan included in the CBA. (Tr. 793, Ins. 2-8). Unit employees receive pay raises based on their respective years of service under the progression outlined in the CBA that is not based on merit, but Broadview employees only receive an annual wage increase based on merit. (Tr. 793, ln. 11-Tr. 794, ln. 8).

These conditions of employment mandated by the CBA were terms unique to unit employees that rendered them identifiable as a distinct group despite the integration with the former Broadview employees. In this regard, the present case is identical to an earlier case involving the same employer. In *ADT Sec. Servs.*, 355 NLRB 1388 (2010), the Board confronted a situation the employer closed its Kalamazoo, Michigan facility and were relocated to a Wyoming, Michigan facility, and the employer subsequently withdrew recognition claiming the old unit no longer existed. Despite being comingled with the Wyoming employees, the Kalamazoo group retained its distinct character:

Even after the closure of the Kalamazoo facility, the employees in the unit continued to perform the same work in the same distinct geographical area under largely unchanged terms and conditions of employment. Contrary to the Respondent's contentions, the record does not establish that the Kalamazoo servicemen were "absorbed" or "integrated" into a unit including all the servicemen who work out of the Wyoming facility. To the contrary, some of the most fundamental terms of employment that distinguished the Kalamazoo servicemen from the Wyoming servicemen --including the location of their work, their rate of pay, and their separate, dual "on call" list--not only remained intact following the closure of the Kalamazoo facility, but continued to separate them from the Wyoming servicemen. *ADT*, 355 NLRB at 1388 (emphasis added).

The analytical approach of the Kalamazoo *ADT* case dispels ADT's efforts in this case to obfuscate the reality of a discernable legacy Union group of employees from 2014 through 2017. Both groups did the same work, but the unit employees retained their distinct terms of employment as required by the CBA, including wages, overtime, and bereavement leave. The two groups reported to the same offices, but the unit employees were still the unit employees.

The maintenance of the distinct conditions of work of the unit from 2014 until the 2017 withdrawal leads inescapably to the conclusion that ADT cannot muster compelling facts to overcome more than 38 ½ years of bargaining history. The new were unlawfully deprived of the benefits of representation and the CBA by ADT's unlawful decision, as argued below, to classify new hires as non-bargaining unit employees despite settled Board law, recounted above, requiring new hires be included in the unit. Given that new hires should have always been included in the bargaining unit, it is appropriate for the Board to order in the alternative that ADT recognize CWA as the representative of bargaining unit consisting of legacy Union employees and new hires.

c. The unlawful exclusion of new hires from the bargaining unit

The ALJ held that ADT violated Section 8(a)(5) of the Act when it placed new hires outside the bargaining unit and treated them as Broadview rather than legacy Union employees. (Decision at 14-16). This holding should be adopted by the Board and ADT's exceptions on this issued should be denied for the reasons advanced by the ALJ

Additionally, in support of the ALJ's decision, CWA would show that Article I of the CBA, Mutual Recognition of Rights, Section 1 describes the bargaining unit as follows

The Employer hereby recognizes the Union as the exclusive bargaining representative with respect to rates of pay, wages, hours and other conditions of

employment for the employees in the bargaining unit for whom the Union was certified by the National Labor Relations Board on November 20, 1978 in Case Number 16~RC-7820, including all servicemen employed by the Employer at its facilities located in Dallas and Fort Worth, Texas; excluding operators, office clerical employees, salesmen, confidential employees, alarm service investigators, supervisors, relief service supervisors and guards as defined in the Act. (GC 4, p. 2, Art. 1, Sec. 1).

This provision of the CBA establishes the scope of the unit. In 2011, the parties agreed that the inherited Broadview employees were not part of the unit (CP 3), but at no time did CWA agree to remove new hires from the unit. New hires are presumed to support the Union in a ratio comparative to that of existing bargaining unit employees. *Levitz Furniture*, 333 NLRB at 728, n. 60. ADT's removal of those employees from the unit was an unlawful unilateral act that violated the scope of the agreement.

ADT's unilateral removal new hires beginning in 2014 prior to expiration of the CBA and continuing through expiration in 2015 through the 2017 withdrawal of recognition reduced the scope of the bargaining unit and violated the recognition clause of the CBA. (GC 4, p.2, Art. 1, Sec. 1). This section of the CBA, as between the parties, which recognized the Union as representing all technicians in Dallas and Fort Worth. The scope of a unit cannot be unilaterally changed. *Antelope Valley Press*, 311 NLRB 459, 461 (1993) ("A proposal to change the actual unit description clause would raise questions regarding the union's right to represent those employees. The employer consequently may not insist on such a proposal."); *Boise Cascade Corp.*, 283 NLRB 462, 467 (1987) (citing *Bozzuto's, Inc.*, 277 NLRB No. 100 (1985); *Douds v. Longshoremen*, 241 F.2d 278 (2nd Cir. 1957); *Young & Hay Transp. Co.*, 214 NLRB 252 (1974), *enfd.* 522 F.2d 562 (8th Cir. 1975)).

ADT, however, unilaterally changed the scope of the unit when it excluded new hires from the unit beginning in 2014. This exclusion of new hires led to what ADT glibly referenced in its brief as a “shattered, non-existent bargaining unit.” (Brief at 15). This rhetorical turn of phrase begs the question of who shattered the unit; the answer is ADT by excluding new hires from the unit despite the fact, as recounted above, the legacy Union employees remained a distinct group within ADT until it unlawfully withdrew recognition on May 31, 2017. ADT was in no way privileged to do so under Board law and, to the contrary violated one of the tenants of *Levitz Furniture* by excluding new hires from the unit in order to undermine support for the Union. *Levitz Furniture*, 353 NLRB at 729, n. 63 (citing *Henry Bierce*, 328 NLRB at 647). ADT’s unilateral removal and exclusion of new hires from the bargaining unit violated Sections 8(a)(1) and 8(a)(5) of the Act and the ALJ’s holding on this issue should be sustained.

d. The legacy Union bargaining unit was never extinguished

It should be noted in concluding the discussion of the 8(a)(5) allegations concerning the withdrawal of recognition, the appropriate unit, and exclusion of new hires that legacy Union employee bargaining unit was not extinguished as a result of the 2014 consolidation. As previously recounted, the legacy Union employees never lost their distinct identity from the Broadview employees until after ADT withdrew recognition and ADT undertook unilateral changes, discussed below, in an effort to make mask the legacy Union employees as indistinguishable from the Broadview employees. Prior to May 2017, however, the legacy employees were readily identifiable and new hires could have easily been placed into the bargaining unit.

The primary distinctive feature of legacy Union employees is that they continued to enjoy the benefits of the CBA after the integration with Broadview employees in 2014. During the three year period from the integration to the unlawful withdrawal of recognition, the legacy Union employees were protected by the just cause standard for discipline and Broadview employees were not. (Tr. 791, Ins. 6-11). The Broadview employees did not have a grievance process that culminated in arbitration, whereas the CBA provided such dispute resolution procedures. (Id., Ins. 14-18). The CBA provided distinct terms for bereavement leave of five days for unit employees that Broadview employees did not have. (Tr. 792, Ins. 5-11). Unit employees also began overtime after working eight hours a day whereas Broadview employees only began to accrue overtime after working forty hours in a week. (Tr. 792, Ins. 2-4; Tr. 792, ln. 22-Tr. 793, ln. 125). Broadview employees are not paid under the terms of the high volume commission plan included in the CBA. (Tr. 793, Ins. 2-8). Unit employees receive pay raises based on their respective years of service under the progression outlined in the CBA that is not based on merit, but Broadview employees only receive an annual wage increase based on merit. (Tr. 793, ln. 11-Tr. 794, ln. 8). These conditions of employment established by the CBA were not lost as a result of the consolidation; they were only lost when ADT withdrew recognition and began to deliberately change them, as recounted below, after its unlawful withdrawal of recognition. ADT's assertion to the contrary, that the unit was shattered or extinguished, should therefore be rejected.

e. The unlawful termination of Art Whittington

The ALJ held that Whittington's termination violated Section 8(a)(3) (Decision 13-14) and this holding should be adopted and sustained by the Board and ADT's exceptions to the

contrary should be declined. Additionally, consistent with the ALJ's reasoning, CWA would show the following in support of the ALJ's holding that Whittington's termination violated Section 8(a)(3) of the Act.

1. The legal framework under *Wright Line*

The Board analyzes an employer's motive for discipline or discharge under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir.1981), *cert. denied* 455 U.S. 989 (1982); see also *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395 (1983) (noting with approval the Board's approach adopted in *Wright Line*). Under *Wright Line*, the General Counsel carries the burden of persuading by a preponderance of the evidence that employee protected conduct was a motivating factor, in whole or in part, for the employer's adverse employment action. Proof of unlawful motivation can be established by direct evidence or inferred from circumstantial evidence based on the whole of the record. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

Under the dual motive analysis of *Wright Line*, an employer violates Section 8(a)(3) if the evidence shows that the employee's union activity was a motivating factor in the employer's decision to discipline or discharge. *T. Steele Constr., Inc.*, 348 NLRB 1173, 1183 (2006); *Willamette Indus.*, 341 NLRB 560, 562 (2004). The respondent's unlawful motivation can be established by showing union activity by the employee, employer knowledge of that activity, and antiunion animus by the employer. *T. Steele*, 348 NLRB at 1183; *Willamette Indus.*, 341 NLRB at 562; *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999).

To support an inference of unlawful motivation, the Board looks at factors such as "inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity." *Robert Orr/Sysco*, 343 NLRB at 1184.

Once a discriminatory motive under *Wright Line* has been established, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *T. Steele* at 1183; *Senior Citizens*, 330 NLRB at 1105. Under this dual motive framework, an employer's burden is not met by showing that a legitimate reason factored into its decision; rather, the employer must show that the legitimate reason would have resulted in the same action even in the absence of the employee's union and protected activities. *T. Steele* at 1183; *Monroe Mfg.*, 323 NLRB 24, 27 (1997).

Under *Wright Line*, it need not be proven that the unlawful union animus was the sole reason animating a disciplinary decision; only that anti-union animus was a motivating factor. *Wright Line*, 251 NLRB at 1089. Accordingly, it need not be proven that the improper motive was the sole motive of Respondent in disciplining Whittington, but only that the improper motive contributed to the discipline. *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 137 (2d Cir. 1990).

A component of this burden-shifting analysis includes assessing whether an employer's proffered reason for discipline is a pretext. An employer's alleged reason for discipline is a pretext, and the resulting termination a violation of the Act under Section 8(a)(3), when the proffered reason for discipline does not in fact exist or was not in actuality the reason for an

employer's actions. *Rood Trucking Co.*, 342 NLRB 895, 897-98 (2004); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *La Gloria Oil*, 337 NLRB at 1124. The Board has held that when an employer's proffered lawful reason does not exist or was not relied on by an employer, this alleged reason is deemed a pretext, the dual motive analysis is unnecessary, and the discipline imposed is unlawful because "If no legitimate business justification for the discharge exists, there is no dual motive, only pretext." *La Gloria Oil*, 337 NLRB at 1124 (citing *Talwanda Springs, Inc.*, 280 NLRB 1353, 1355 (1986)). In *La Gloria Oil*, the employer claimed it fired union supporters because of their driving violations, yet it had never done so in the past. *La Gloria Oil* at 1124. Also, the employer had only disciplined one other employee and did not permit the discriminatees the opportunity to explain their conduct. *Id.*

2. The facts of Whittington's discharge

Whittington was a Union steward and a member of the bargaining committee; Whittington filed grievances and prior to his discharge was a grievant. (Tr. 452, Ins. 6-8; Tr. 752, In. 15-20; GC 9). Whittington also filed charges with the NLRB, as Respondent noted on Whittington's termination document. (GC 32, p. 1).

Whittington as an employee of Respondent was a technician assigned to drive an ADT vehicle to customer locations to provide service to ADT customers. He was required under the CBA to take a lunch between 11:00 a.m. and 2:00 p.m. (GC 4, p. 5, Art. 6, Sections 1(a) and 1(b)). Employees could take an hour or half-hour for lunch and were required to record that time on their laptop. (Tr. 465, In. 3-Tr. 466, In. 2). Whittington would often go to his home for lunch (Tr. 472, In. 24-Tr. 473, In. 12). Whittington explicitly understood that employees could go home for lunch. (Tr. 473, Ins. 11-12). Whittington went home for lunch because of his diabetes, a

condition that he told management about. (Tr. 473, Ins. 22-23; Tr. 474, Ins. 9-21; Tr. 475, Ins. 1-13). Whittington could not test his blood while at work and had to go home to test his blood. (Tr. 477, Ins. 9-17).

Whittington's supervisor, Derek Roberts, first noticed the alleged discrepancies in Whittington's time reporting on June 10, 2016. (Tr. 624-25). Roberts waited six days until June 16th, however, to contact human resources representative Carolyn Vassey about these discrepancies. (Tr. 631, Ins. 4-12; R 2, p. 1). In the email, Roberts stated that in addition to the incident on June 10th, he had also discovered incidents on June 8th and 14th. (R 2, p. 1). Vassey instructed Roberts to get "more daily details and outline specifically the day, and the inaccurate times for each day." (R 3). She also stated that "Typically for time card falsification it is termination. You will need very good details." (Id.). It is noteworthy that Roberts did not question Whittington about his conduct at this time because of the instructions he received from Vassey. (Tr. 106, Ins. 18-24).

Technicians are not provided a route to follow to get to their jobs. (Tr. 88, Ins. 16-25). Roberts used Google Maps in the course of his investigation of Whittington to check the trip time that Whittington could have taken. (Tr. 642, Ins. 19-22). Whittington, however, could not have used such an application because ADT does not issue its employees smart phones. (Tr. 86, In. 22-25). ADT thus does not require or recommend technicians take a certain route; they must determine for themselves how they will get to their jobs. Technicians also lacked the means to check for the best route and therefore must use their best judgment.

Roberts concluded that Whittington was taking a longer lunch than he was recording because he was adding the drive time between the two jobs that bracketed Whittington's lunch to

the time Whittington took for lunch. (R 4). This conclusion is demonstrated by reviewing the days Whittington went home for lunch that were studied by Roberts. (Id.). Roberts, however, did not bring these issues to Whittington's attention and at no point did the Company inform Whittington that his conduct deviated from or violated Company policies.

The decision to treat Whittington's case special and not counsel him about his conduct but instead observe him is a departure from other instances of time recording violations and not being at work during scheduled times. Demarcus Allen was issued a final written warning on January 12, 2016 for leaving the job at 1:06 p.m. on January 7, 2016 to return home despite the fact that his shift ended at 4:30 p.m. (GC 37). This final warning was issued after Allen had been previously counseled about the same conduct in November 2015. (Id.). Glen Rodriguez received a written warning for a late start time on January 1, 2016. (GC 39(a)). This issue had previously been discussed with Rodriguez by management. (Id.). Rodriguez was terminated on April 4, 2016 for not being on the job. (R 16, p. 16). Miguel Monsivais received a warning on November 24, 2015 for a late start time, an issue that had previously been discussed with him. (GC 39(b)). Petrick Mills received a warning on December 8, 2015 for not being onsite or being in route to the job. (GC 39(c)). Mills' discipline is similar to Whittington's discipline in that Mills was disciplined on December 8th for multiple infractions on October 31, November 14, 23, and 28, 2015 for not being onsite or being out-of-route. (Id.). Unlike Whittington, Mills was warned about his conduct and provided a chance to improve; Mills was not terminated.

Milton Davenport also received a warning on December 1, 2015 for a late start time. (GC 39(d)). An instance after Whittington's termination on May 10, 2017 involving Rob Casteel resulted in a final warning for Casteel as the result of three instances where he "did not document

his time accurately to reflect his actual work schedule and thus approved false time knowingly during pay periods.” (GC 39(e)). In another instance after Whittington’s termination, Jesus Hernandez received a written warning on September 30, 2016 for discrepancies on his time ticket entries. (GC 39(g)). Chad Short received a “Verbal Written Warning” for time reporting infractions. Even Respondent’s purported comparators show that they received notice that their conduct did not meet ADT’s expectations. Blaine Hancock was fired on March 2, 2015 for time card inaccuracies, but was previously warned about that conduct on February 18, 2015. (R 16, pp. 1, 10).

Roberts’ investigation was completed on June 30, 2016 when he, Vassey, and managers Andy Shedd and Ken Arcenau had a meeting with Whittington and the Union concerning the time reporting issues Roberts observed. At this point, Robert’s investigation covered the entire month of June 2016 and the meeting was 20 days after Roberts’ first discovery and two weeks after he contacted Vassey. Roberts questioned Whittington about his long drive times and Whittington responded by saying they could have been caused by a number of factors, but he could not recall any specific reasons because of the passage of time. (Tr. 471, Ins. 14-19). Whittington admitted that he may have gone home on those days to test his blood sugar. (Tr. 474, Ins. 16-21). Whittington would have been better able to answer these questions if he had been questioned about them in closer proximity to their occurrence.

Vassey stated during the June 30th meeting that lunch begins after completing the last job scheduled during the morning and the Union disputed that position as being inconsistent with past practice and the terms of the CBA. (Tr. 240-42; 480-81). It should be noted that Labor Relations Director James Nixdorf testified that drive times to the next job during which an

employee takes lunch are permitted because the employee is still in the service of the Company. (Tr. 697, Ins. 7-17). Nixdorf did assert that when detours are taken between the jobs, lunch starts when the employee deviates from the route. (Tr. 697, In. 18-Tr. 698, In. 2). This framework, however, is problematic because employees are not order to take a specific route to a customer locations. Roberts only had estimated drive times and routes for purposes of his investigation because he looked them up, such information is not available to technicians like Whittington in the field. Despite these ambiguous policies, Whittington was suspended at the close of the June 30th meeting.

Whittington grieved his suspension and was ultimately informed of his termination at the close of the second step grievance meeting on or about July 18, 2016, at which time Whittington was presented with his termination notice. Nixdorf is the final decision-maker for terminations of bargained-for employees. (Tr. 740, Ins. 15-20). Nixdorf testified that he made the decision to terminate Whittington in June 2016. (Tr. 744, Ins. 16-23). Nixdorf asserted that Whittington was fired because he engaged in a pattern of intentional conduct rather than a “one-off” or mistake. (Tr. 742, Ins. 10-12). Critical here is the fact that a pattern arguably only existed because ADT did not intervene on or about June 10th when Roberts first “discovered” these alleged discrepancies. The pattern and course of conduct Nixdorf pointed to as a justification for Whittington’s discharge was the result of ADT’s strategy of lay in wait.

3. Whittington’s termination is unlawful under the dual motive analysis

Wright Line requires that a discriminatee engage in protected activity and the employer be aware of this activity. Whittington satisfies these thresholds because ADT sat across the table from him when the parties bargained and received grievances from Whittington. As to the

question of animus, that prong of *Wright Line* is satisfied based on direct evidence.

Whittington's termination notice referencing the fact that Whittington had previously filed NLRB charges. This statement, in the document's corrective action section, demonstrates ADT's hostility to concerted action by mocking it in the course of processing Whittington's termination.

Indirect evidence is also present in this case as well. Whittington's termination arose in the context of a multi-year campaign by Respondent to rid itself of the Union. As argued below, ADT, prior to Whittington's termination, made several threats, committed unilateral changes, and refused to respond to information requests. Respondent also unlawfully removed new hires from the bargaining unit. Additionally, the reference to Board charges on Whittington's termination document can also be taken as evidence of animus because it suggests that past concerted activity by Whittington was impermissibly present in ADT's thinking as it decided to terminate Whittington. *U-Haul*, 347 NLRB 375, 377 (2006) (recognizing the Section 7 right of employees to seek redress through the Board). ADT's reference to the NLRB charges on the termination document is all the more striking because ADT could offer no reason why it was listed on the document because Board charges are not corrective action under any common understanding of that term. Instead, the only conclusion that can be drawn from its presence on the document is that ADT targeted Whittington as a Union advocate, demonstrating not only animus but also an unlawful motive.

The Board has also found an unlawful motive for termination when an employer, as ADT did in this case, does not promptly discipline an employee. *Robert Orr/Sysco*, 343 NLRB at 1184 (finding an employer taking two additional weeks before discharging employees supported

finding an unlawful motive behind the terminations). In this case, ADT took 20 days from its discovery of these alleged infractions to discipline Whittington. Further indirect evidence of animus exists when an employer responds to alleged impropriety, as ADT did here, by seeking documentation to support a discharge. *Waste Stream Mgmt., Inc.*, 315 NLRB 1088, 1097 (1994). Such conduct is evidenced in this case by the email correspondence between Vassey and Roberts and cemented by Jonah Serie's email of July 12, 2016 where he notes they need to have their evidence "in line" so as to proceed with terminating Whittington. (GC 37, p. 3).

An unlawful motive for a termination also exists where an employee is allowed "more rope in the obvious hope that he would hang himself," rather than a warning "when his conduct was first discovered (or second discovered or third discovered)." *Business Prod. Div. of Kidde, Inc.*, 294 NLRB 840, 850-51 (1989). Here, Roberts did not confront Whittington about the first alleged infractions or the first three infractions; he waited until he observed the entire month of June 2016 to take any action, and that was to discipline and subsequently terminate Whittington. Had corrective action been applied, as was the case for numerous comparators, Whittington would have been afforded an opportunity to change his behavior or at least be on notice that such conduct not acceptable to ADT. Instead, Roberts and Vassey laid in wait on behalf of ADT to spring a trap on Whittington. This secretive nature of ADT's undertaking to build a case against Whittington supports finding an unlawful motive animating Whittington's termination. This theory is confirmed Nixdorf's testimony that the decision to terminate Whittington was made in June 2016. (Tr. 744, Ins. 16-23). Nixdorf further testified that the decision to terminate was made after the suspension, (Tr. 745, Ins. 17-20), but that short timeframe between the

suspension and decision to discharge further supports the conclusion that ADT sought to railroad Whittington.

As noted above, several employees received notice and a warning for time discrepancies before being terminated. The pattern of conduct that Nixdorf fixated on was the product of ADT's own doing and the result of its desire build a case against Whittington. Unlike other employees, Whittington was never provided the opportunity to correct his conduct. Further, while time discrepancies were the proffered reason for the termination, the largest component of these "discrepancies" were ADT's second-guessing the routes Whittington took to jobs. No other employee was fired for such conduct. In fact, the record is devoid of other instances where ADT criticized an employee's selection of routes. To whatever extent optimal routes are a work rule, its discriminatory enforcement can be the foundation for an unfair labor practice under Section 8(a)(3). *NLRB v. Thermon Heat Tracing Servs.*, 143 F.3d 181, 186-87 (5th Cir. 1998). Such was the case in the termination of Whittington.

The United States Court of Appeals for the Fifth Circuit has noted that employment action based on ostensibly legitimate work rules can violate the Act if the rule asserted by the employer is "more honored in the breach than in the observance." *NLRB v. Turner Tool & Joint Rebuilders Corp.*, 670 F.2d 637, 639 (5th Cir. 1982). This principle applies to Whittington's termination because ADT offered no evidence of a policy on optimal selection of routes, failed to provide employees with a recommended route to take, and no other employee was disciplined because ADT disputed his selection of routes. *Thermon Heat* further addressed the unlawful, selective, and discriminatory enforcement of work rules. In that case, an employer applied a safety rule that prohibited employees from going to parts of the jobsite where they were not

assigned to work in order to further the union's organizing campaign. The court noted that the lack of application of the rule to non-union employees and the inability of the employer to explain specifically how the rule was applied led the court to conclude that the application was discriminatory in nature and the employer had not met his burden under *Wright Line*. *Thermon Heat*, 143 F.3d at 187.

In this case, "more honored in the breach than in the observance" perfectly captures ADT's reasoning to support Whittington's termination. ADT never explained to Whittington the routes he should take. When it disputed his choice of routes, ADT laid in wait rather than bringing the issue to Whittington's attention and allowing him to correct his conduct or challenge ADT's position through the grievance process over a less severe form of discipline. ADT wanted to get rid of Whittington, and seized the opportunity presented by these so-called time infractions. Further, denying Whittington the warnings that comparators received treated him differently than other employees, and this discrimination contributed to Whittington's termination. ADT has no lawful justification for terminating Whittington and its decision to terminate violated Sections 8(a)(1) and 8(a)(3). Whittington should be reinstated to his prior position and made whole for his losses.

4. Alternate theories of Whittington's termination

ADT's termination of Whittington can also be found under Section 8(a)(1) and 8(a)(4). While these theories were not raised in the complaint, their absence from the complaint does not bar finding such violations. The Board has recognized latitude to go beyond the language of the complaint so as to "find and remedy a violation even in absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been

fully litigated.” *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). An issue is fully litigated if the responding party would not have altered the presentation of its case so as to address the issue. *Pergament*, 296 NLRB at 335.

The reference to prior NLRB charges on the termination document without any explanation establishes that such activity was the motive. In cases where it is undisputed that as an employee’s protected, concerted activity was the basis for discipline, evidence of motive is not required for purposes of establishing a violation of Section 8(a)(1). *Phoenix Transit Systems*, 337 NLRB 510, 510 (2002). Use of the Board’s processes is protected under Section 7. *U-Haul*, 347 NLRB at 377. ADT could not explain the reference to NLRB charges on the termination document. Therefore, the presence of the statement demonstrates that it was concerted activity that led to the termination. Whittington’s discharge thus violated Section 8(a)(1). As with the remedy under 8(a)(3), Whittington should be reinstated to his prior position and made whole for his losses to remedy this violation of Section 8(a)(1).

Whittington’s termination also violated Section 8(a)(4). Section 8(a)(4) protects the right of an employee to participate in Board investigations. *Caterpillar, Inc.*, 322 NLRB 674 (1996) (discharge for assisting union in Board proceeding violates Section 8(a)(4)); *Yenkin-Majestic Paint Corp.*, 321 NLRB 387 (1996) (written reprimand to employee for leaving work without permission, where employee left work because he was under subpoena to attend hearing in federal district court on general counsel’s action seeking injunctive relief against employer’s alleged unfair labor practices violates Section 8(a)(4)); *Vasaturo Bros., Inc.*, 321 NLRB 328 (1996) (transfer to undesirable shift because employee served as union’s election observer, violates 8(a)(4)); *Nat’l Surface Cleaning v. NLRB*, 54 F.3d 35 (1st Cir. 1995) (discharge because

of employer's belief that employees would provide corroborative testimony before Board violated the Act); *Pillsbury Chem. & Oil Co.*, 317 NLRB 261 (1995) (discharge for furnishing affidavits to Board unlawful); *Sportsman's Service Center*, 317 NLRB 195 (1995) (discharge for calling the Board unlawful); *Vokas Provision Co.*, 271 NLRB 1010 (1985) (discharge of employees for leaving work early to attend a Board hearing without being served with subpoenas violated Section 8(a)(4) since subpoenas were waiting for the employees at the Board's regional office).

The Board applies the elements established in *Wright Line* to determine if conduct violates Section 8(a)(4). *Intermet Stevensville*, 350 NLRB 1270, 1324 (2007); *Verizon*, 350 NLRB 542 (2007); *American gardens Management Co.*, 338 NLRB 644, 645 (2002); *Taylor & Gaskin, Inc.*, 277 N.L.R.B. 563, fn. 2 (1985). Incorporating all of the above arguments concerning Section 8(a)(3), it is apparent that Whittington's termination violated Section 8(a)(4). In regards to the application of *Wright Line* in 8(a)(4) charges, the Board has noted that its

[A]pproach to this provision 'has been a liberal one in order to fully effectuate the section's remedial purpose.' *General Services*, 229 NLRB 940, 941 (1977), relying on *NLRB v. Scrivener*, 405 U.S. 117, 124 (1972). Such an approach is consistent with the Court's acknowledgement that the initiation of a Board proceeding effectuates public policy and, therefore, through Section 8(a)(4), 'Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board.' *Metro Networks*, 336 NLRB 63, 66 (2001) (quoting *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967)).

The presence on the termination document of a reference to Whittington having filed NLRB charges suggests this was the actual motive for his discharge. ADT's failure to explain the statement supports the inference that it was made to mock Whittington's concerted activity that are protected under the Act. Whittington's termination thus violated Section 8(a)(4).

Whittington should be reinstated and made whole for his losses that resulted from this violation of Section 8(a)(4).

f. The unlawful unilateral changes, unlawful threats and coercion

An employer cannot unilaterally implement changes concerning mandatory subjects of bargaining without providing notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962). Under *Katz*, “an employer’s unilateral change in conditions of employment under negotiation is similarly a violation of § 8 (a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8 (a)(5) much as does a flat refusal.” *Katz*, 369 U.S. at 743. Many of the unilateral changes at issue were made to terms of the CBA, which though expired, continued in effect until a successor agreement was reached. “The *Katz* doctrine has been extended to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed.” *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988)); see also *Air Convey Indus.*, 292 NLRB 25, 25-26 (1988) (holding “It is well established that Section 8(a)(5) and (1) of the Act prohibits an employer who is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union.”).

1. ADT’s unlawful threats

In this case, ADT made several unlawful threats and coercive statements as found by the ALJ. (Decision at 12). ADT did not file exceptions to two of these statements, a December 15, 2015 statement by Derek Roberts that employees should leave if they are not happy assignments and a May 20, 2016 statement by Andy Shedd that employees should quit if they did like the

changes to the sick leave policy. The holdings and findings of the ALJ as to these two Section 8(a)(1) violations should therefore be adopted by the NLRB pursuant to NLRB Rule 102.46(a)(1)(ii).

The ALJ also found that Rob Raymond unlawfully told employees in August 2017 they would not be receiving a raise because of the Union contract. (Decision at 12). This holding should be adopted by the NLRB. ADT filed exceptions to this finding. (Brief at 21-23). The Decision's holding was premised on the credibility findings of the ALJ based on the demeanor of the respective witnesses (Decision at 11), and a challenge to these findings cannot serve as the basis for overturning the ALJ's Decision. *Standard Dry Wall Prods.*, 91 NLRB 544, 545 (1950).

ADT argues in its exceptions that the ALJ erred because there would be no reason for ADT to raise the CBA in August 2017 because it had withdrawn recognition in May of 2017. This point does not carry the day because the argument is factually deficient because ADT did not call Raymond to testify. Two witnesses testified that the incident occurred and the ALJ credited their testimony while finding that the testimony of an ADT manager, who was not the person to whom the unlawful statement was attributed, was deficient. If ADT wished to establish that the allegation is so absurd that it could not have occurred, it should have called Raymond to the stand. This failure, as noted by the ALJ, permitted the drawing of an adverse inference because ADT did not call Raymond to rebut the allegation. (Decision at 11, citing *Douglas Aircraft Co.*, 308 NLRB 1217 (1992)). As such, ADT is implicitly excepting to the drawing of the adverse inference in regards to this allegation. Such an exception is without merit because the adverse inference rule is well established and ADT was aware that not calling Raymond could result in an adverse inference being drawn. *Douglas Aircraft*, 308 NLRB at

1217, n. 1. The decision of the ALJ as to this Section 8(a)(1) allegation should be adopted and ADT's exceptions on this point overruled.

2. Unilateral changes prior to the unlawful withdrawal of recognition

The ALJ held that ADT violated Section 8(a)(5) of the Act by unilaterally changing in May 2016 the sick leave policy from one where employees could leave with one hour's notice to one that required a doctor's note and changed the lunch policy from one where it began at an employee's lunch stop to one where it began once an employee left his assignment before lunch. (Decision at 16-17). The decision of the ALJ should be adopted and exceptions filed by ADT on these issues overruled.

Sick leave policies are mandatory subjects of bargaining that cannot be unilaterally altered. *Alcoa, Inc.*, 352 NLRB 1222, 1223 (2008); *Foundation of California State University*, 255 NLRB 202, n. 3 (1981) (change requiring a doctor's note is a mandatory subject of bargaining). Changes impacting employee lunch periods are also mandatory subjects of bargaining. *Nat'l Grinding Wheel Co.*, 75 NLRB 905, 906 (1948).

ADT argues in its Brief that its imposition of the doctor's note requirement was a reasonable interpretation and enforcement of the sick leave policy. (Brief at 37-38). This argument is without merit. Established past practices related to mandatory subjects of bargaining cannot be unilaterally changed. *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 205 (2011). As such, ADT's decision to more strictly police sick leave could not be unilaterally implemented because it violated the party's past practice of not requiring a doctor's note. Additionally, to the extent ADT relies on a theory of waiver, its arguments are flawed because there is no evidence that the Union waived its right to bargain over changes to the past practice

as to how the sick leave policy was interpreted and enforced and the existence of a management's rights clause cannot be read as waiving the Union's right to bargain over changes to past practices. *Burns Int'l Servs.*, 324 NLRB 485 (1997). Finally, ADT cannot rely on the CBA's management's rights clause, which expired in 2015, to justify a unilateral change in 2016 because such clauses do not survive expiration of the labor agreement. *Kendall College of Art*, 288 NLRB 1205, 1212 (1988). Accordingly, ADT's exceptions on this issue should be denied.

As to the change in lunch time, ADT claims no such change occurred. (Brief at 38). In finding that such a change did occur, the ALJ credited the testimony of bargaining unit employees Paul Linder and Shawn Bieker that the change in lunch breaks had occurred. (Decision at 12; see also Tr. 117-19; 130; 143-44; 171-74). He discredited the testimony of Nixdorf on this matter. (Decision at 12). This credibility determination cannot be challenged under *Standard Dry Wall* and ADT's exceptions on this issue should be denied.

3. Unilateral changes after the unlawful withdrawal of recognition

The ALJ held that ADT violated Section 8(a)(5) of the Act when it made unilateral changes to paid leave, bereavement leave, imposed a sales compensation system, changed the grievance procedure, ceased deduction dues, and changed pay periods after it unlawfully withdrew recognition. (Decision at 20). The ALJ's holding is premised on the proposition that unilateral changes following an unlawful withdrawal of recognition "are similarly unlawful." (Id., citing *Turtle Bay Resorts*, 353 NLRB 1242, 1275 (2009); *Northwest Graphics, Inc.*, 342 NLRB 1288, 1288 (2004)). Additionally, the ALJ noted under *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015), dues deduction, like any other mandatory subject of bargaining, survives

expiration of a labor agreement and cannot be unilaterally changed following expiration of the labor contract.

ADT filed exceptions to this finding and argued its May 2017 withdrawal of recognition was lawful. (Brief at 38). ADT's assertion is in error for the reasons advanced by the ALJ (Decision at 17-19) and argued above in this brief; ADT's withdrawal of recognition was unlawful and it was therefore not privileged to make any unilateral changes after May 2017. The decision of the ALJ on this issue should be adopted and ADT's exceptions denied.

g. The unlawful refusals by ADT to respond to requests for information

The ALJ ruled that ADT violated Section 8(a)(5) of the Act by failing to respond to CWA's (1) October and December 2014 requests for information about new hires (Id. at 20-21); (2) October 29, 2015 requests concerning grievances over out-of-classification work, overtime, and work hours (Id. at 21); (3) the October 30, 2015 request on the discipline of Brian Sauser, the January 8, 2016 request for information on Chad Short's discipline, and fully respond to the July 2016 requests for information about Whittington's termination (Id.); (4) the March 23, 2017 request over subcontracting (Id.); and the (5) March 24, 2017 request for information about new hires so as to assess the appropriate remedy in an arbitration decision. (Id.). These holdings by ALJ should be adopted by the Board

ADT did not file exceptions to the decision concerning the October 29, 2015 information requests and the Board should therefore adopt that holding pursuant to NLRB Rule 102.46(a)(1)(ii). As to the remaining requests for information, which ADT did file exceptions to, those exceptions should be denied and ALJ's decision adopted for the reasons argued below.

An employer has a duty under Sections 8(a)(5) and 8(d) to provide a union with relevant information that it needs to perform its function as the representative of unit employees. The relevancy of information is determined using a liberal standard analogous to that found in civil discovery. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438 (1967). The Board has consistently upheld the right of a union to obtain information that it needs to bargain intelligently and “to service and police the contract.” *Viewlex, Inc.*, 204 NLRB 1080, 1080 (1973). The right to information includes, as the ALJ noted, the right to both information it needs for bargaining and information relevant to the processing of grievances. (Decision at 20, citing *Postal Service*, 337 NLRB 820, 822 (2002)).

1. The requests for information on new hires

As the ALJ held, the Union was entitled to information about the new hires. A union is entitled to a roster of unit employees. *Southern Nev. Home Builders Ass'n*, 274 NLRB 350 (1985). Information concerning bargaining unit employees is presumptively relevant. *Kentile Floors, Inc.*, 242 NLRB 755 (1979) (wage information); *Polymers, Inc.*, 319 NLRB 26 (1995) (names, mailing address, job classification, and earnings); *A. S. Abell Co.*, 230 NLRB 1112 (1977) (training); *Minnesota Mining and Mfg. Co.*, 261 NLRB 27 (1982) (safety and health); *Cowles Communications, Inc.*, 172 NLRB 1909 (1968) (dates of birth, dates of hire, and experience rating). Requests for information do not have to be in writing. *Hospitality Care Center*, 307 NLRB 1131 (1992).

Whittington orally requested information about the new hires. (Tr. 495, ln. 25 – Tr. 496, ln. 19). On or about December 16, 2014, the Union, through CWA Staff Representative Kevin Kimber, again orally requested a list of new hires, including their service date. (GC 8, p. 1).

Kimber reduced this request to writing on or about December 19, 2014 and again requested a list of new hires, including their service date. (Tr. 28, Ins. 16-19; GC 7). Nixdorf responded to this request by asking about its relevance (GC 8, p. 1). Kimber responded to this email by stating because he needed to know who was in the unit in order to adequately represent those persons and enforce the CBA. (CP 1). Thus, contrary to the arguments raised by ADT in its Brief (Brief at 35). Kimber did respond to ADT's question about the relevancy of the request. Kimber never received a response to his oral request (GC 8, p. 1) or his written request. (Tr. 32, Ins. 21-23). ADT's failure to respond to these requests concerning new hires violated Sections 8(a)(1) and 8(a)(5) of the Act.

2. The requests over the discipline of Chad Short, Brian Sauser, and Art Whittington

The ALJ held that ADT violated Section 8(a)(5) of the Act when it did not provide responses to requests concerning the discipline of Brian Sauser, Chad Short, and Art Whittington. These findings should be sustained and ADT's objections to these holdings should be overruled.

Unions are entitled to information that relates to pending grievances and employees discipline. *Postal Service*, 337 NLRB at 822; *Viewlex*, 204 NLRB at 1080. Miller submitted on October 30, 2015 an information request concerning the suspension and termination grievances of bargaining unit employee Brian Sauser. (GC 19). Miller never received a response to this request. (Tr. 393, ln. 22-Tr. 394, ln. 6). ADT's failure to respond to these requests, which likewise pertained to CWA's enforcement of the labor contract through the grievance process, violated Sections 8(a)(1) and 8(a)(5) of the Act.

CWA Chief Steward Ken Stephens submitted on January 8, 2016 a request for information on bargaining unit employee Chad Short concerning Short's personnel files and medical records. (GC 22). ADT did not respond to this request. (Tr. 347, Ins. 7-9). This request sought relevant information concerning the Company's records on a bargaining unit employee and ADT's failure to respond to this request violated Sections 8(a)(1) and 8(a)(5).

On July 15, 2016, Miller submitted a request for information to ADT concerning Whittington's termination. (GC 23, pp. 1-2). Miller received a partial response by email to the request on July 22, 2016. (R 14, p. 1). Miller responded by email on July 27th that the information from ADT satisfied some of the requests, but items 8, 9, 10, and 12-16 remained outstanding and Miller expected a response to these items. (Id., pp. 3-4). ADT never provided a response to the outstanding requests. (Tr. 381).

Miller also sent an email on July 27, 2016 to request information concerning the Company's global positioning system (GPS), which was relevant to Whittington's discharge. (GC 24). ADT never responded to this request. (Tr. 383, Ins. 13-15). These requests concern grievances seeking to enforce the just cause provision of the CBA and CWA's efforts to police the agreement, including the termination of Whittington. ADT's failure to respond to these requests violated Sections 8(a)(1) and 8(a)(5) of the Act.

ADT rests its defense as to these information requests on the proposition that it produced several hundred pages of documents. (Brief at 36). This production, based on the record in this case, could only be the partial response that Miller indicated was inadequate. ADT may also have produced these documents in response to other requests, but the volume of production does not privilege its refusal to respond to other requests and specifically the requests at issue in this

allegation. It is immaterial how many pages ADT produced to CWA if the response remained incomplete and other requests were wholly ignored. This argument should be rejected and the exceptions on this issue denied.

3. The requests for information about subcontracting and compliance with the arbitration award

The ALJ held ADT violated the Act by not responding to information requests concerning subcontractors and information necessary to secure compliance with an arbitration award. (Decision at 21). ADT's exceptions as to these requests should be denied and the ALJ's holdings sustained.

On March 23, 2017, prior to the Company withdrawing recognition in May 2017, Miller submitted a request for information on contractors. (GC 24). This request was made while the parties were still negotiating a successor agreement. (Tr. 699, lns. 12-19). Miller never received a response to this request. (Tr. 395, ln. 20-Tr. 396, ln. 9). This request relates not only to policing the agreement but also to negotiations over a successor contract and ADT's failure to respond to it violated Sections 8(a)(1) and 8(a)(5).

Lastly, Miller submitted a request for information on March 24, 2017 seeking information relevant to complying with an arbitration award concerning new hires issued by Arbitrator Ruben Armendariz on March 12, 2017. (GC 26; GC 31). ADT did not respond to this request. (Tr. 397, lns. 5-8). This request, like other requests in this case, concerned policing the labor agreement and ADT's failure to respond to it violated Sections 8(a)(1) and 8(a)(5).

ADT's exceptions to both of these requests rests on the proposition that responding to these requests is excused by the proximity of these March 2017 requests to the May 2017 withdrawal of recognition. (Brief at 36). This argument is not tenable because, as discussed

above, ADT's withdrawal of recognition was unlawful. Further, withdrawal of recognition has never been held to apply retroactively so as to excuse conduct that occurred prior to the withdrawal. As such, these exceptions should be rejected and the ALJ's holdings sustained.

III. Conclusion & Prayer

Charging Party Communications Workers of America, AFL-CIO prays the findings of the ALJ in the November 16, 2018 decision be sustained and the exceptions to it filed by Respondent ADT, LCC be overruled and denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This section is to certify service of the above and foregoing instrument has been forwarded electronically to the parties below on April 4, 2019 as follows:

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