

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

**ADT, LLC D/B/A ADT SECURITY SERVICES
and**

**Cases 03-CA-230714
03-CA-234585**

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

**GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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I. Preliminary Statement

This case involves unfair labor practices committed by ADT, LLC d/b/a ADT Security Services (“Respondent” or “ADT”) to oust IBEW, Local 43 (“Union” or “IBEW”), which has represented a small unit of ADT employees in the Albany area for decades.

ADT’s effort to oust the Union began this past fall. On October 9, 2018,¹ an ADT supervisor sent a coercive email to two workers. He provided an extensive list of “cons” about unions and instructed the workers to sign a statement indicating that they did not wish to be represented by the IBEW. He told them to return the signed statement to him via overnight mail, sent them shipping labels, and contacted them at least four additional times to secure their compliance. Although ADT made a cursory attempt at neutralizing the message when confronted by the Union, the taint remained strong and ADT felt no compunction about relying on it. On November 2, just a few weeks after the workers received the coercive message, ADT relied on signatures from the two targeted workers to withdraw recognition from the Union. It then refused to execute the successor contract the parties had reached, ceased deducting and remitting union dues, and, to discourage continued union support, gave a wage increase.

The undisputed facts support the conclusion that ADT’s withdrawal of recognition from the Union was tainted and untimely—tainted because it was based on signatures secured through coercion, and untimely because it occurred after the parties had reached a successor contract. Because ADT’s withdrawal of recognition was unlawful, it cannot justify its subsequent refusal to execute the successor contract, cessation of the contractually-mandated dues deduction and remittance procedure, and unilateral grant of a wage increase above that set forth in the parties’

¹ All dates are in 2018 unless otherwise indicated.

contract. As set forth in detail below, by its conduct, ADT has violated Section 8(a)(1), 8(a)(3), 8(a)(5), and 8(d) of the National Labor Relations Act (“Act”). The General Counsel therefore asks that Your Honor grant all requested relief.

II. Statement of the Case

The hearing in this matter was held on April 17, 2019. It arose out of the March 1, 2019 Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (“Complaint”) for Cases 03-CA-230714 and 03-CA-234585.

The Complaint alleges that ADT violated Section 8(a)(1), 8(a)(3), 8(a)(5), and 8(d) of the Act. As to the Section 8(a)(1) allegations, the Complaint alleges that ADT’s VP of Central Operations Ben Clark sent employees a message through which he (i) interrogated them about their union sympathies and activities by soliciting their signatures on an anti-union petition; (ii) coercively polled them about their support for the Union; (iii) solicited that they withdraw from the Union by requesting that they sign a statement indicating that they no longer wished to be represented by the Union; and (iv) provided more than ministerial assistance to employees in helping them get rid of the Union. The Complaint further alleges that Respondent violated Section 8(a)(5) of the Act by thereafter (i) withdrawing recognition from the Union and (ii) refusing to execute a collective-bargaining agreement it had reached with the Union. The Complaint also includes allegations of contract modifications – alternatively, unilateral changes – that Respondent made following its unlawful withdrawal of recognition. Specifically, it alleges that Respondent violated Section 8(a)(5) and 8(d) of the Act by unilaterally (i) repudiating the dues deduction and remittance procedure embodied in its contract with the Union and (ii) granting a wage increase to employee John Brady above that set forth in the

agreement. Respondent's grant of a wage increase to Brady also violated Section 8(a)(3) of the Act because it was given to discourage support for the Union.

The material facts in this matter are largely undisputed. In its Answer, Respondent admitted the service, employer, commerce, and labor organization allegations of paragraphs 1 through 4 and the allegation of paragraph 8 that it withdrew recognition from the Union on or about November 2. It also appears to admit the allegations of paragraph 10(a), (b), (e), and (f) that it unilaterally ceased deducting and remitting union dues and granted a wage increase to Brady. Although ADT denies paragraphs 10(a) and (b) which set forth the alleged changes, it admits that it made the changes in answering paragraphs 10(e) and (f), explaining that it admits to making the changes but denies that it needed the Union's consent or to give the Union notice and an opportunity to bargain.

At the hearing, Respondent stipulated to other allegations. It stipulated to the allegations of paragraph 5 that Vice President of Central Operations Ben Clark and Director of Labor Relations James Nixdorf are supervisors of Respondent within the meaning of Section 2(11) and agents of Respondent within the meaning of Section 2(13) of the Act. (Tr. 14-15.) It also stipulated to the allegations of paragraph 7, which sets forth the appropriate unit, Respondent's recognition of the Union, and the Union's status as the unit's collective bargaining representative within the meaning of Section 9(a) of the Act, for the period prior to November 2, when Respondent admits it withdrew recognition. (Tr. 15-16.) Further, Respondent stipulated on the record that it had reached a complete agreement for a successor contract with the Union on October 18. (Tr. 115-16.) Finally, it stipulated to paragraphs 9(b) and 9(c) that it refused to execute the agreement at the Union's request based on its position that it had lawfully withdrawn recognition. (Tr. 129.)

Accordingly, at this stage, Respondent denies only the allegations of paragraph 6 pertaining to the alleged 8(a)(1) violations arising from the coercive message to employees from VP of Central Operations Ben Clark; the allegations of paragraph 10 that it was required to secure the Union's consent or to provide it notice and an opportunity to bargain before making the changes; and the legal conclusions of paragraphs 11 through 14 that the conduct alleged in the preceding paragraphs violated the Act and affected commerce.

As described below, the un-rebutted testimony and documentary evidence adduced at the hearing readily establish each Complaint allegation, including all that Respondent denies in whole or in part.

III. Statement of Facts

A. Background

IBEW Local 43 has represented a small unit of ADT employees in the Albany area for decades. (*See* Tr. 112-113.) In June, a collective bargaining agreement between the parties expired. (*See* Tr. 113; *see also* GC Ex. 6.) The parties initially intended to commence bargaining in May, but were unable to do so because of several outstanding information requests.² (Tr. 91-92.) The parties ultimately began bargaining on September 7, and met a second time on October 18, at which time they reached a complete agreement. (Tr. 64, 115-16.)

During the timeframe of negotiations – September 7 to October 18 – IBEW's unit of ADT employees consisted of approximately three individuals: union supporter and bargaining committee member John Brady, David Hardy, and perhaps also Kenneth Johnson. John Brady became an ADT employee in January 2017 and is a known union supporter. (Tr. 27-29.) He was involved in negotiations for the successor contract and attended the first bargaining session

² Those information requests are not at issue in this matter.

which was held on September 7. (Tr. 28-29.) The dates of David Hardy and Ken Johnson's employment are vague, (*see* Tr. 84-86, 147-49, 161-62), though ADT's position during bargaining and at the hearing was that it believed both were ADT employees at the time.³

B. VP of Central Operations Coerced Hardy and Johnson to Oust the Union

On October 9 at 5:13 p.m., Respondent's Vice President of Central Operations Ben Clark – a member of the company's upper level management⁴ – sent a highly coercive email to Hardy and Johnson with the goal of securing their signatures on a statement expressing a desire to oust the Union.

Clark sent the email from his ADT email address with his ADT signature line. (Tr. 171-72; GC Ex. 15.) He addressed it to Hardy and Johnson, stating, "We are at a point where I need to get your intentions in writing to help us move forward with the union." He then stated, "I wanted to give you these 4 in each area to at least inform you about Unions. Basically, they are casing [sic] more dues and increased hardships for you." He proceeded to make an anti-union argument and to provide a list of "Pros and cons of the union" that made his bias and preference clear. Whereas each ostensible "pro" included anti-union counterpoints, his list of "cons" included no corresponding arguments in favor of unions.

³ The record makes clear that ADT failed to clearly and timely communicate to the Union that Hardy and Johnson were unit members. Nonetheless, ADT provided some indication that Hardy was a unit member at September 7 bargaining. (*See* Tr. 84, 102, 147-49, 161-62.) ADT's position appears to be that Ken Johnson was also a unit member at that time or soon would be. (*See, e.g.*, Tr. 252 (Mr. Nixdorf testifying about Johnson as of September 7, "it was my understanding he was an ADT employee, and that they were just going through the process of getting him through background . . ."). Regardless, the totality of the testimony regarding Johnson establishes that he was hired as an ADT employee by the time bargaining commenced on September 7 but that his technical onboarding was completed at some later date.

⁴ As Brady explained, Clark was the supervisor of his supervisor's supervisor. (*See* Tr. 28.)

Clark concluded, “To ensure we are able to move forward and hire without the limitations forcing new hires to join the union, I need a written or typed letter stating the following.” He then provided the workers with specific language and explicit instructions:

‘I, Dave Hardy or Kenneth Johnson, do not want to be represented by the IBW.’

Sign and date’ (handwritten signature)

I need your actual copy so I will sent [sic] you [sic] label to overnight to me.
Please get this done tomorrow.

Thank you very much! Call if you have questions.

Two minutes later, Clark emailed ADT’s Materials Department and requested that overnight shipping labels be sent to Hardy and Johnson, stating “I have asked them to send a physical letter to me tomorrow.” (GC Ex. 18; *see also* GC Ex. 16-17.) Materials obliged Clark’s request the following morning of October 10, and Clark promptly forwarded the labels to Hardy and Johnson, writing “Dave and Ken. Let me know when you get these sent today.” (GC Ex. 16-17; GC Ex. 18.) When he had not received the requested confirmation by that evening, he wrote them again, stating once more, “Dave, Ken, Let me know when you get this done!” (GC Ex. 16-17.)

Again, Clark received no response from either Hardy or Johnson. Rather than let the matter go, he emailed them a fourth time in less than 48 hours, writing just after 8:00 a.m. on October 12, “Hello Dave and Ken, Please update me on the progress of this letter. This needs to be completed today, and I planned on the letters arriving today, but I have not heard back on this from either of you.” (GC Ex. 17.) Again, he received no response, but again, he kept trying to secure their compliance.

On October 12 at 7:20 p.m., Clark changed tacks. Abandoning email, he texted Hardy, “Dave, I have not heard from you about the union letter. What’s the progress?” (GC Ex. 28.) Hardy deflected, “I’ll get that to u I literally get home sleep wake up and get back to it.” (GC Ex. 28.) Accepting no excuses, Clark responded, “Thank you. I get you are busy. I only ask that you keep me updated if unable to make a [cut off.]” (GC Ex. 28.) Chastised, Hardy responded, “You got it sorry about that.” (GC Ex. 28.) Hardy later texted, “I don’t have a printer can I hand write it and text a picture of it?” (GC Ex. 28.) Clark responded with specific instructions, “No but you can hand write it and then mail that letter back to me. It does not have to be printed very simple just says I gave [sic] Hardy do not want to a part or represented by the IBW. Sign and date and then overnight it back to me with that label you can walk in to FedEx with the label and they can print it for you.” (GC Ex. 28.) Hardy later told Clark that he shipped the statement on October 15. (GC Ex. 28.)

Clark likewise remained on top of Johnson about returning his signed statement. At 7:27 p.m. on October 12, just a few minutes after contacting Hardy for the fifth time, Clark contacted Johnson for the fifth time as well. As with Hardy, he abandoned email and reached out to Johnson via text message. He wrote, “Ken, I need an update on the union [sic] I requested. Please update me on the progress. Thank you.” (GC Ex. 27.) In the coming days, Clark twice requested that Johnson call him, once on October 22 and again on October 23. (GC Ex. 27.) Johnson ultimately signed the requested statement on October 23, and returned it to Clark via the overnight shipping label Clark had provided. (GC Ex. 23; Tr. 187-88.) Clark forwarded scanned copies of the signatures to Nixdorf on October 24. (GC Ex. 23; Tr. 187.)

C. Anxious and Confused Johnson Shows Message to Union Supporter Brady

If there remains any doubt about the coercive pressure of Clark's request, Johnson contemporaneously gave voice to his anxiety and confusion. On October 10, less than 24 hours after he received the email from Clark, Johnson talked about the email with his colleague, John Brady. (Tr. 32-36.) The two men were working on a residential camera installation at the time, standing at the end of the customer's driveway near the road. (Tr. 32-33.)

Brady testified that Johnson asked him if he had received an email about the Union. (Tr. 35.) When Brady said he had not, Johnson showed him his phone. Johnson said he did not understand it and asked what he should do. (Tr. 35.)

Concerned, Brady asked if he could photograph the message, and Johnson gave him permission to do so. (Tr. 36.) The resulting images create a vivid sense of the moment. (GC Ex. 2.) They show Brady's hand, stained from his installation work, holding Ken Johnson's phone with Clark's message on the screen. (GC Ex. 2; Tr. 33-34.) They show the grass at the end of the customer's driveway, and a box of materials. (GC Ex. 2; Tr. 33-34.) They create a clear sense of two colleagues puzzling over an anti-union command from upper level management, one confused, the other certain the request is "at least inappropriate." (GC Ex. 2; Tr. 35-36.)

Brady sent the images of Clark's message to the Union's Assistant Business Manager Richard Godden, (Tr. 36), who confronted ADT about the message. Godden recalled Brady contacting him about the message and expressing that it had caused "some concern, some confusion, some anxiety." (Tr. 65-66.) That same day, October 10, Godden directly spoke to Johnson about the message. Godden described Johnson as expressing that he was "[u]pset,

confused, [and] didn't understand it. Anxious.” Johnson asked Godden, “Why do I have to sign something so quickly?” (Tr. 66-67.)

D. ADT Sends Insufficient Message to Employees about Coercion

The Union's representatives, in the midst of bargaining a new contract with ADT, were shocked by the email.

On October 16, Business Manager and Financial Secretary Alan Marzullo called ADT's Director of Labor Relations and chief negotiator, James Nixdorf, about the message. He told Nixdorf that Clark's conduct was unlawful and that the message needed to be recanted. Nixdorf admitted that Clark was wrong and asked Marzullo to email him the message, which Marzullo did. (Tr. 118-19; GC Ex. 7.)

On October 18, the parties met again for bargaining. During a break, Nixdorf flipped his computer around to show Marzullo a draft email regarding Clark's message. (Tr. 156.) Marzullo said it looked good. (Tr. 156-57.) He did not know whether Nixdorf sent the email to employees, or whether it would require additional internal review or vetting. (Tr.156-58.) “Almost immediately after,” the parties reached a complete agreement. (Tr. 158.) Marzullo never received a copy of the actual email sent as Nixdorf failed to copy him or anyone else from the Union, but was satisfied that the complete agreement they had reached precluded a withdrawal of recognition.⁵ (Tr. 157-58.)

Nixdorf in fact sent the email to Hardy, Johnson, and Brady. It stated:

All—

You may have received a text message from Ben Clark in response to some questions raised regarding the IBEW. I wanted to clarify any confusion which may

⁵ Nixdorf had emailed a copy of the email to Marzullo earlier in the day on October 18. (Resp. Ex. 1.) He was not copied on or forwarded the actual email sent to employees. (Tr. 157-58; Resp. Ex. 3.)

have occurred and ensure that ADT will not retaliate in any way against any employee because of their membership in a union. ADT has a clear policy and will treat employees fairly regardless of whether they belong to a union or not. ADT will honor its obligations with the IBEW and any other union and negotiate in good faith. Make no mistake, the decision to be represented by a Union or not rests solely with employees. ADT will honor its employees decision.

As you may or may not know, there is an expired collective bargaining agreement which ADT is negotiating with the IBEW. All employees working the service territory formerly covered by the Albany office are covered by the terms and conditions of that contract; however, there are some provisions, since the contract is expired, which currently do not apply. Once the contract is renewed all provisions will apply.

If you have any further questions regarding the contract, please feel free to contact me at the number below.

Thanks,

Jim

(Resp. Ex. 3 (emphasis in original.)

The email did not copy Ben Clark; it is unclear whether Clark was even aware the message was sent or that he was bound by the vague promises it made. It also contained significant ambiguities, which demonstrate that ADT had not investigated the issue thoroughly and therefore did little to resolve employees' confusion. For example, the email purports to be about "a text message from Clark in response to questions raised about the IBEW."⁶ The documentary evidence is clear that the initial anti-union message from Clark was an email – not a text message. Likewise, Nixdorf describes the message as being in response to questions raised about the IBEW, but the evidence establishes that Clark went well beyond the scope of

⁶ Comparing this statement to Mr. Nixdorf's testimony demonstrates his lack of credibility. He attested – twice – that he had reviewed Clark's communications, yet referred to the communication as a "text message" when Respondent's own production reveals that it was an email. (Tr. 240 ("Q: Did you evaluate Mr. Clark's communication? A: Yes. . . . Q: . . . "and you reviewed what Mr. Clark sent out and how it's worded, right? A: Yes.").)

any possible employee queries. The idea that the employees requested this anti-union directive is not credible, and moreover belied by Johnson's contemporaneous expression of confusion about the message and by his and Hardy's delay in signing the statements as Clark instructed. Further, the email suggests that there was only one text message, but the evidence is clear that Clark had extensive contact with employees. He contacted each worker at least five times, four times by email, one time by text message, and possibly also by phone. Finally, Nixdorf's email is devoid of specifics about Clark's message. Very simply, it does not state that the message was wrong and that the targeted employees did not have to comply with the instructions therein. The substance of the email, therefore, was facially insufficient.

E. ADT Withdraws Recognition from the Union on the Basis of Targeted Workers' Signatures, Refuses to Execute Contract

Following Nixdorf's ineffective email, Hardy and Johnson sent the signed statements to Clark via a shipping label Clark had provided. (Tr. 187-88, 207.) Hardy's was signed on October 12, and Johnson's on October 23, suspiciously following two consecutive requests from Clark that Johnson call him. (GC Ex. 23; GC Ex. 28.) Clark attested that he received the statements on the 24th,⁷ and forwarded them to Nixdorf. (GC Ex. 23.) There is no evidence that ADT informed the Union about the issue, opting instead to sit on its knowledge that the taint remained effective.

ADT did not rely on this particular set of signatures to withdraw recognition from the Union. Nixdorf attested that he did not rely on these signatures "because of the email that went out that preceded these letters being sent," referring to his email to Johnson and Hardy about Clark's message which preceded his receipt of their signatures. (Tr. 246.)

⁷ Clark had a text exchange with Johnson on October 24, when he again requests that he call him. (GC Ex. 27.) Clark also requested that Hardy call him on October 24. (GC Ex. 29.)

However, ADT had every intention of withdrawing recognition relying on tainted signatures from Hardy and Johnson. It waited nine days and secured a second set of signatures to lend the plan plausible deniability.⁸ In a text message, sent at 4:27 p.m. on November 2, Hardy sent screen shots to Clark of a signed statement that closely tracked what Clark had originally provided. He wrote, “Hi Ben, Here’s an update on the Union vote.⁹ I wrote this up. Ken and I signed it. I sent it to Jim in Boca Raton.” (Tr. 204; GC Ex. 28.) Nixdorf also received copies of the statements that day. (Resp. Ex. 7.) In the ensuing text exchange, Nixdorf corrected Hardy and Johnson’s language and had them re-submit it. (*See* Resp. Ex. 7.)

Nixdorf’s testimony suggested that these signed statements occurred organically and came as a surprise – already a stretch considering the recent taint. Documentary evidence and Clark’s testimony show that this representation is not credible. On November 1, a day before Clark and Nixdorf received the second set of signed statements, Ben Clark was already moving forward with plans to move John Brady out of a union and into a non-union position. He texted Brady about an application packet, notwithstanding that Brady had been an ADT employee since 2017. His explanation when asked about this oddity was simple:

Q: Now why would John -- this text message from November 1, 2018, telling him his -- an offer letter has been sent. Why would he be considered a new hire?”

⁸ No evidence was adduced at trial explaining how Hardy and Johnson knew that a second set of signatures would be required. Logic dictates that some additional communication must have happened between them, Clark, and/or Nixdorf about how to proceed, or they would have had no reason to doubt that their initial signed statements remained sufficient.

⁹ This statement begs the question why Hardy was providing Clark with an update. Given Clark’s track record and ADT’s conduct going forward, an inference can readily be drawn that Clark had asked for this update or that Hardy had intuited that Clark remained interested in Hardy ousting the Union.

A: Information saying that there was a vote¹⁰ -- that there would be a change in him being a union employee, from what I understood, and then being an ADT employee. So at that time, I wanted to make sure that we had everything correctly updated.

Q: Okay. So you sent this text message to make sure that everything was updated with respect to John Brady as you switched him over from the unit -- union employee to a non-union employee?

A: Correct.

Q: On November 1st, 2018?

A: Correct.

(Tr. 208-09; GC Ex. 26.)

Consistent with that plan, on November 2, ADT withdrew recognition from the Union. (GC Ex. 9; GC Ex. 10.) It did so against what ADT believed to be the clock, just hours before the Union's ratification vote. (Tr. 266-67; GC Ex. 9, 10.) Contrary to ADT's belief, however, ratification was not a pre-condition to entering the contract under any Union governing document. (Tr. 73-74, 122-23; *see also* GC Ex. 8.) Accordingly, the Union proceeded to the vote, which was in favor of the contract.¹¹ (Tr. 74.) It then sent a letter to ADT objecting to the withdrawal of recognition as untimely and tainted by Clark's conduct. (GC Ex. 11.)

¹⁰ It is not clear what vote he is referring to or the source of his information, though presumably he means the ratification vote. Certainly, the comment supports an inference of continued contact with the employees Clark had been coercing since at least October 9. Assuming Clark is referring to the ratification vote, the vote itself would have been insufficient standing alone to justify moving Brady to a non-union position. The ready inference is that Clark remained committed to leveraging Hardy to oust the Union, first by having him vote down the contract and then by securing a second set of signatures to justify withdrawal of recognition. Hardy, of course, did not show up for the ratification vote; ADT proceeded to withdraw recognition regardless.

¹¹ The Union was not surprised that the contract was ratified. At the time, John Brady was the only member and therefore the only individual eligible to vote on ratification. (Tr. 75-76.) He was a committee member, the Union had kept in close touch with him about acceptable terms, and knew beforehand that the terms actually reached were consistent with what he would approve. Although Godden attested that he attempted to get Hardy and Johnson to sign

A few days later, the Union requested that ADT execute the contract. (GC Ex. 12; Tr. 128-29.) ADT refused to do so, persisting in its unlawful course. (Tr. 129.)

F. ADT Makes Unilateral Changes to Contract Terms

After withdrawing recognition, ADT promptly moved John Brady into a non-union position. In so doing, it ceased the dues deduction and remittance procedure provided for in the collective bargaining agreement with the Union. It also granted Brady a pay raise in an amount greater than he would have been due under the successor contract. ADT did not notify and bargain with the Union prior to making these changes, and therefore of course did not receive its consent to either change.

a. ADT Unilaterally Stopped Deducting and Remitting Union Dues

Under the collective bargaining agreement between the parties, ADT was required to deduct union dues for unit employees and remit them.¹² Brady attested that dues had in fact been deducted for him in the past, and have since stopped. (Tr. 37-38.) He learned of the change in a call with an ADT representative from payroll sometime in November. (Tr. 37-38.) He objected to the change and asked to speak with Ben Clark about it. (Tr. 38.) Clark informed him that ADT was no longer affiliated with the Union and therefore would no longer be deducting and

authorization cards and vote on the contract – and even waited nearly forty-five minutes past the scheduled vote time in case they were running late – they did not show. (Tr. 74-76.)

¹² Article 3, Section of the agreement states, in relevant part:

For the period of this Agreement, upon receipt of a written, personally signed authorization from any employee subject to this Agreement, the Employer will deduct from such employee's pay. . . . The Employer will transmit to the Financial Secretary of the Union on or before the 15th day of each month, the total deductions made by the Employer, together with a list of those employees for whom such deductions have been made.

(GC Ex. 4, 6, 12.)

remitting dues. (*See* Tr. 37-38; 78-79.) The Union received no notice about the change, and therefore of course did not consent to it. (Tr. 78-79.)

b. ADT Unilaterally Granted a Pay Raise to Brady

ADT also granted a pay raise to Brady without first discussing it with the Union, let alone receiving the Union's consent. (Tr. 79-80.) The complete agreement with the parties provided for Brady to have received a raise from about \$24 an hour to \$25.22 an hour upon ratification. (Tr. 79; *see also* GC Ex. 31.) Instead, as of January 1, 2019, Brady's rate of pay is approximately \$26 an hour. (Tr. 39-41; 79-80; GC Ex. 31.)

Brady first learned of this unexpectedly generous raise from Ben Clark. (Tr. 39-41; *see also* GC Ex. 3.) Clark emailed Brady on December 19, stating:

I am very happy to hear about the increase that was approved for you this week.

I hope you have been informed of the pay changes and the direction we would like to go with David Clements.

We are ready to hire and create the correct culture and service support for the area.

Just in case you have not been informed, please call me. would love any opportunity to share good news.

Thanks for all you do!

(GC Ex. 3.) Surprised, Brady asked Clark to call him. (Tr. 40.) During the ensuing conversation, Clark explained, "[t]hat, again, going forward, we weren't affiliated with the Union, and I was being migrated to a pay scale for non-union employees." (Tr. 40.)

Indeed, days earlier, Clark and Nixdorf gave approval for the 5.7% pay raise for Brady. (GC Ex. 31.) When a Human Resources representative asked for a justification for the increase considering the raise was inconsistent with the union contract, Clark responded candidly:

Since the decision was made to go away from the union in Albany, John is being hired from union to an ADT compensation plan. If we brought him on with his experience, this would be our offered rate. The union directed his pay and we are getting it corrected with this change.

(GC Ex. 31.) Brady received the raise around January 1, 2019. (Tr. 39.) The Union received no notice from ADT and therefore did not consent to the raise. (Tr. 79-80.)

IV. Argument

A. Clark's Email to Hardy and Johnson Violated Section 8(a)(1) of the Act

The Complaint alleges that Ben Clark's October 9 email to David Hardy and Ken Johnson violates Section 8(a)(1) of the Act in four ways. Through the email, Clark (i) unlawfully interrogated the men; (ii) polled them about their union sympathies; (iii) coerced them by soliciting that they withdraw from the Union; and (iv) provided them with more than ministerial aid in ousting the Union.

a. Clark Unlawfully Interrogated Hardy and Johnson

Section 8(a)(1) of the Act prohibits employers from activity which, based on a totality of the circumstances, tends to restrain, coerce or interfere with employee rights. *Rossmore House*, 269 NLRB 1176, 1177 (1984). Thus, a supervisor's interrogation of an employee will fall within the ambit of Section 8(a)(1) when, through words or context, the supervisor creates an element of coercion or interference. *Id.*

Some factors which may be considered in analyzing whether an alleged interrogation violates the Act are the questioner's identity, including their position of authority; the method of interrogation; the background of the questioning, including the context of unfair labor practices; the nature of the information sought; and whether the employee is an open union supporter. *Id.* at n.20 (citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964)); *Scheid Electric*, 355 NLRB 160, 160 (2010). The Board also considers whether the employees responded truthfully, as evasive

responses may tend to indicate a tendency of the questioning to intimidate or coerce. *Westwood Health Care Ctr.*, 330 NLRB 935, 939 (2000). “These and other relevant factors are not to be mechanically applied in each case. Rather, they represent some area of inquiry that may be considered.” *Rossmore House*, 269 NLRB at 1177. Further, the test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Servs., Inc.*, 331 NLRB 1226, 1227-28 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001).

The Board views employer interrogations of employees’ union views as especially suspect. As the Board has explained:

[A]n employee is entitled to keep from his employer his views so that the employee may exercise a full and free choice on whether to select the Union or not, uninfluenced by the employer’s knowledge or suspicions about those views and the possible reaction toward the employee that his views may stimulate in the employer. That the interrogation might be courteous and low keyed instead of boisterous, rude, and profane does not alter the case.

Sea Breeze Health Care Ctr., Inc., 331 NLRB 1131, 1132 (2000) (citations and quotation marks omitted).

Considering the totality of the circumstances as the Board directs, Clark’s October 9 email to Hardy and Johnson constitutes a straightforward coercive interrogation in violation of Section 8(a)(1) of the Act. The email was directed to two individuals whose support for the Union was not known. Indeed, the evidence established that Respondent had only recently notified the Union that the two men were in the unit, and Respondent offered no evidence at the hearing that either had expressed views prior to October 9. Yet Clark, a high-ranking member of ADT’s management, explicitly requested that they sign statements that they did not wish to be represented by IBEW. Moreover, Clark riddled his request with anti-union commentary, making

his preference clear.¹³ By making the request in writing and requiring a response in writing, the targeted workers could not avoid providing a clear response without fear of repercussion.

Indeed, when Hardy and Johnson did not immediately respond to his request, Clark followed-up at least four additional times, in writing, to secure the signatures, and rebuked them when he did not receive a timely response.

Such a direct, written, persistent command from an upper level manager of new unit members harboring unknown views represents a clear violation of the Act under the totality of the circumstances.¹⁴ Clark's anti-union words and persistence in securing a response would have the natural tendency "to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained," which is clearly not a legitimate purpose under Section 8(a)(1) of the Act." *Sea Breeze Health Care Ctr., Inc.*, 331 NLRB at 1132 (quoting *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 904 (9th Cir. 1953)). ADT therefore violated Section 8(a)(1) of the Act by coercively interrogating Hardy and Johnson.

b. Clark Unlawfully Polled Employees

The Board has long-held that polling employees about their union support is inherently coercive, and the Board allows it only under very limited circumstances and in a very limited manner. "[A]ny attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights." *Struknes Constr.*

¹³ See *Readyjet, Inc.*, 365 NLRB No. 120 (Aug. 16, 2017) (finding supervisor's "anecdotal story about his own negative experience with the Union was intended and is the equivalent of discouraging employees from supporting the Union" and therefore tended to coerce them into not supporting the Union); *Ass'n of Cmty. Organizations for Reform Now*, 338 NLRB 866, 870 (2003) (finding that supervisors' questions to employees "as to why they needed a union, and what its benefits would be are coercive interrogation and violate the Act.").

¹⁴ See, e.g., *Central Mgmt. Co.* 314 NLRB 763, 767 (1994) (finding unlawful interrogation where supervisors on several occasions solicited employees to sign petition to oust union).

Co., 165 NLRB 1062, 1062 (1967). “Thus, where the employer elects to resort to the polling method of ascertaining his employees’ union sympathies, such poll is presumed to be violative of the Act and the burden is upon the employer to establish that he has observed all of such required safeguards. . . . In simple language an employer who resorts to the poll must come to it with clean hands.” *Heck’s, Inc.*, 174 NLRB 951, 951 (1969).

The Board therefore requires certain safeguards to ensure that a poll does not coerce employees. *Id.*; *see also Vista Del Sol Health Servs.*, 363 NLRB No. 135 (2016). As an initial matter, a poll of employees will be unlawful if it seeks to create, rather than confirm, a good-faith doubt as to the union’s majority support among employees. *See Wisconsin Porcelain Co.*, 349 NLRB 151, 151 (2007) (“[A]n employer may poll its employees concerning their support for the incumbent union only if the employer has a good-faith doubt, based on objective considerations, as to the Union’s majority status.”) (citing *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359 (1998)); *see also Miron & Sons, Inc.*, 358 NLRB 647, 647 (2012).

Beyond that threshold issue, an employer’s polling of employees may still violate Section 8(a)(1) of the Act unless the employer can show: (1) the purpose of the poll is to determine the truth of a union’s claim of majority; (2) this purpose is communicated to the employees; (3) assurances against reprisal are given; (4) the employees are polled by secret ballot; and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. *Struknes*, 165 NLRB at 1063; *see also Johnnies Poultry*, 146 NLRB 770, 775 (1964); *HTH Corp.*, 356 NLRB 1397, 1398 (2011), *enfd.* 693 F.3d 1051 (9th Cir. 2012). Further, the Board held that where there is an incumbent union, advance notice of the poll is a required element. *Grenada Stamping & Assembly, Inc.*, 351 NLRB 1152, 1152 (2007); *Texas*

Petrochemicals Corp., 296 NLRB 1057, 1061 (1989). The burden is on the employer to establish that all required safeguards are satisfied. *See Struknes*, 165 NLRB at 1063.

In this case, Clark's email to Hardy and Johnson was a clear attempt to poll the unit about support for the Union. At the time of the poll, Clark understood the unit to consist of three men: Johnson, Hardy, and Brady. Brady was a well-known union supporter; he served as a member of the Union's bargaining committee and as the union steward.¹⁵ In contrast, Johnson's and Hardy's views about the Union were unknown. Respondent presented no evidence that either individual had expressed an opinion about the Union previously, and certainly no evidence that either had initiated a petition to remove the Union of his own accord. The purpose of Clark's email, therefore, was to poll these two individuals.

ADT cannot satisfy its burden of demonstrating that Clark's poll was lawful, however. As an initial matter, ADT provided no evidence to demonstrate that Clark conducted the poll to confirm – rather than create – a good-faith doubt as to the union's majority support among employees. The record is devoid of testimony or documentary evidence suggesting any basis for a good faith doubt of the union's majority support prior to October 9. Considering the October 9 email's coercive commentary and directive to sign, the conclusion is inevitable that Clark sought to establish doubt as to the Union's majority status, not confirm the true level of support for the Union within the unit.

¹⁵ In fact, in internal communications from March, Clark identified Brady as being a "Union" employee, whereas Hardy was referred to as "ADT employee," although both were performing the same work in the same role at the time. (*See* GC Ex. 24; *see also* Tr. 208-10.) Indeed, Hardy referred to as an ADT employee in this email between Clark and Nixdorf is tantamount to an admission that he was an ADT employee at least as early as March given that other workers are referred to as "ADT subs" in the same email. (GC Ex. 24.)

ADT also cannot meet its burden that Clark respected any of the necessary safeguards in conducting this poll. Clark's intention was, ostensibly, to use the statements requested of Hardy and Johnson as evidence that the Union had lost majority support. However, his email does not clearly state this intention. Moreover, considering the coercive, anti-union commentary throughout the message, it is impossible to interpret what he writes as aiming "to determine the truth of a union's claim of majority support." Certainly, Clark did not communicate that he wanted Johnson's and Hardy's true views; rather, he instructed them to sign a pre-written statement expressing the specific view that they did not wish to be represented by the IBEW. He provided no assurances of reprisal should the employees opt not to sign the statement or to express a view different from the one Clark set forth. To the contrary, the employees could readily assume Clark would hold against them any failure to comply with his directive given his anti-union commentary and persistence in securing their signatures. Likewise, the employees knew their responses would be directly traceable to them because the poll was not conducted by secret ballot; Clark addressed each employee by name and requested that they sign statements to be returned to his attention. His request was, therefore, also an interrogation of the employees' union views, as discussed previously, and a solicitation to withdraw from the union, as discussed below. Thus, it was not free of other unfair labor practices and served to create a coercive atmosphere. Given that the Union was provided no prior notice of the poll, the record is clear that ADT failed to satisfy a single required safeguard in conducting this poll.

Accordingly, ADT has failed to satisfy its burden of demonstrating that its poll was conducted lawfully. Clark's October 9 email therefore violates Section 8(a)(1) of the Act because it was an unlawful poll.

c. Clark Solicited Hardy and Johnson to Withdraw from the Union

An employer's solicitation of employees to abandon a union is a classic violation of Section 8(a)(1) of the Act. *See, e.g., Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944); *Bennington Iron Works*, 267 NLRB 1285, 1286 (1983) ("It is a settled principle that the Act proscribes an employer or its agents from soliciting employee support for an antiunion petition."). While it is not unlawful for an employer to correctly inform employees of their legal rights to resign from the union and revoke union-checkoff authorizations, an employer may not initiate, stimulate, and induce employees to withdraw their support for their union. *See Kentucky Fried Chicken*, 341 NLRB 69, 69 (2004) (affirming ALJ's conclusion that respondent violated Section 8(a)(1) because "employees hearing the Respondent's speeches would reasonably believe they were being asked to provide evidence, which the Respondent currently lacked, to support an employer-initiated decertification effort before the anticipated agreement on a new contract could bar such an effort.")

As in *Kentucky Fried Chicken*, the evidence here supports the conclusion that Clark originated an effort to oust the Union and solicited signatures from employees to that end. There is no evidence that the employees had filed or were planning to file a decertification petition. *See id.* There is likewise no evidence that any employee had asked about the procedure for withdrawing from the Union or that anyone had requested information or a meeting for that purpose. *See id.* Likewise, there is no evidence that employees needed or wanted help in deciding whether they wanted to be represented by the Union. *See id.* The record reflects, at most, that the targeted workers had asked Clark a few questions about the Union. Clark attested, "They had called and asked what – why am I being called by the Union; what is the Union? What's happening? That's what sparked [the October 9] email." (Tr. 172.) Such basic inquiries

certainly did not invite the anti-union diatribe that Clark provided. Indeed, contemporaneous evidence belies the possibility that the employees' queries veered into a request for help ousting the Union. John Brady credibly testified that he had a conversation with Johnson in which Johnson was confused and anxious about Clark's request. (Tr. 35-36.) Rich Godden also spoke to Johnson during the relevant period and corroborated Brady's account, attesting that Johnson expressed anxiety and confusion about Clark's email. (Tr. 65-67.)

The evidence therefore demonstrates that Clark, on his own accord, decided to tell Hardy and Johnson that unions are unnecessary and that they ought to oust theirs. His email states, "We are at a point where I need to get your intentions in writing to help us move forward with the union." This language makes clear that Clark is the person deciding what needed to be done and the proper timing. He goes on to provide his reasons why unions are unnecessary and directions for signing and returning his pre-written statement. Then, when faced with delay and possible reluctance, Clark contacted each worker at least four additional times – three more times by email, once by text message, and likely also by phone – to secure their signatures. The record is therefore clear that Clark, a high-ranking member of ADT's management team, initiated a campaign to have employees withdraw their support from the Union, directed employees to sign an anti-union petition that he authored, and ensured compliance with his directive. The Board has routinely found that such conduct amounts to solicitation of employees to withdraw from a union.¹⁶ Accordingly, Respondent violated Section 8(a)(1) of the Act, as alleged.

¹⁶ See, e.g., *Florida Wire & Cable*, 333 NLRB 378, 381 (2001) (affirming ALJ conclusion that employer solicited employees to resign from union where employer gave employees advice on how to resign, displayed sample resignation letters, and mailed sample letters to employees to be returned by certified mail); *Erickson's Sentry of Bend*, 273 NLRB 63, 64 (1984) (finding employer conduct impaired employee free choice in violation of the Act, where store manager, upon request of an employee, provided language for a petition to resign from the union, which the employee copied, signed and gave to the manager in the manager's office; and, the manager

d. Clark Provided More than Ministerial Aid

Under well-settled Board precedent, employers may give employees information about how to resign from a union “as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation.”

Manhattan Eye, Ear & Throat Hosp., 280 NLRB. 113, 114 (1986) (quoting *R. L. White Co.*, 262 NLRB 575, 576 (1982)). It is, therefore, unlawful for an employer to lend more than ministerial aid to employees seeking to oust a union, and any such aid must occur in a “situational context free of coercive conduct.” *See, e.g., D & H Mfg. Co.*, 239 NLRB 393, 403 (1978) (citing *KONO-TV-Mission Telecasting Corp.*, 163 NLRB 1005, 1006 (1974)); *Craftool Mfg. Co.*, 229 NLRB 634, 637-38 (1977).

Clark provided well more than “ministerial aid” in initiating and advancing an effort to oust the Union. The language of his email makes clear that he is in the driver’s seat of the effort, framing the argument, identifying the goal, directing the language, setting the timeframe, and facilitating the return of statements via overnight mail to his attention via labels he provided. Even assuming Clark’s message originated from employee questions, his orchestration of the employee statements went well beyond permissible limits. *See, e.g., Craftool Mfg.*, 229 NLRB at 636-37 (adopting ALJ decision finding well more than ministerial aid where high-level member of management suggested circulating decertification petition to employees who expressed some dissatisfaction with the union, suggested the language for the petition, directed employees to return the petitions to him, and failed to fully inform employees of their legal

discussed with the employee which other employees the manager might approach about resigning from the union, calling those employees’ to his office; thereby, gave the appearance the employer favored the petition, and, encouraged the employees to sign the petition).

rights); *Narricot Indus.*, 353 NLRB 775, 776 (2009) (finding an employer provided more than permissible “ministerial aid” where an employee asked his HR director ‘how to oust the union’ and the director prepared a petition for the inquiring employee as well as two other employees, telling them the number of signatures needed and directing them to return the petitions to him daily); *D & H Mfg.*, 239 NLRB at 403 (affirming ALJ decision stating that employers “violate the law . . . when they subsequently involve themselves personally in furthering” employee proposal to remove union).

Indeed, Clark went well beyond initiating the signing of anti-union statements; he dedicated himself to ensuring the targeted employees signed the statements, even when faced with delay and reluctance. After his initial anti-union email, he contacted Hardy and Johnson on at least four additional occasions – via email, text, and possibly by phone as well – to obtain their compliance with his directives and timeframe. By this conduct, too, Clark provided more than ministerial assistance. *See, e.g., Manhattan Hosp.*, 280 NLRB at 115 (finding more than “ministerial assistance” provided where individual acting on behalf of management solicited resignations from a union, evidenced continuing interest in whether employees would resign, and offered assistance in resigning). This conduct, combined with the anti-union commentary throughout Clark’s email, created a highly coercive environment that well exceeded any aid permitted by law. *See D & H Mfg. Co.*, 239 NLRB at 403 (citations omitted).

Thus, by Clark’s conduct, ADT violated Section 8(a)(1) of the Act by providing more than ministerial aid to employees in resigning from the Union, as alleged.

B. ADT's Withdrawal of Recognition Violated Section 8(a)(5) of the Act

On November 2, ADT withdrew recognition from the Union. This withdrawal of recognition was tainted by the unfair labor practices, described above, and was moreover untimely because it occurred after ADT had agreed to a successor contract.

a. ADT's Withdrawal of Recognition was Tainted

“When an employer withdraws recognition from an incumbent majority representative, it violates Section 8(a)(5) unless it meets its burden to show that the union has actually lost its majority status.” *SFO Good-Nite Inn, LLC*, 352 NLRB 268, 270 (2008) (citing *Levitz Furniture Co.*, 333 NLRB 717, 725 (2001)). This burden is not met when an employer relies on evidence tainted by its unfair labor practices. *Medo Photo Supply*, 321 U.S. at 687 (citations omitted) (holding that an employer cannot incite defections of employees from a union and then rely on those defections to withdraw recognition); *Narricot Indus.*, 353 NLRB at 776; *SFO Good-Nite Inn*, 352 NLRB at 270-71.

Clark's unfair labor practices, described above, categorically tainted ADT's withdrawal of recognition. He interrogated workers about their views of the union, polled them about their union support, solicited them to sign statements that they did not wish to be represented by the Union, and provided more than ministerial aid in obtaining those signatures. ADT then relied on signatures from the two targeted employees to withdraw recognition from the Union.¹⁷ The

¹⁷ Nixdorf appeared to suggest in his testimony that the signatures relied upon were proper because they were not the initial set Hardy and Johnson returned to Clark on or about October 23. Nixdorf indicated that he did nothing with those signatures, but felt it appropriate to rely on a second set provided to him on November 2. Hardy and Johnson provided the second set of signatures merely two weeks after Clark coerced them and solicited their withdrawal of support from the Union. In the interim, as described below, Respondent failed to adequately repudiate its conduct under *Passavant*. If the email Nixdorf sent on October 18 did not cure the taint, the taint did not evaporate of its own accord because a few more days had passed.

Board has routinely held that an anti-union petition procured in this manner precludes a withdrawal of recognition.¹⁸ See, e.g., *Hearst Corp.*, 281 NLRB 764, 764 (1986), *affd. mem.* 837 F.2d 1088 (5th Cir. 1988); see also *Texaco Inc.*, 264 NLRB 1132, 1132-33 (1982) (finding antiunion petition invalid where the employer unlawfully assisted in its circulation and encouraged employees to sign); *Tyson Foods*, 311 NLRB 552, 556 (1993) (affirming ALJ decision stating, “Where an employer aids or supports employees in withdrawing from a union or otherwise manifesting their disaffection with an incumbent representative, the Board has held that the evidence of withdrawal or disaffection thus procured by the employer cannot serve as the requisite objective basis upon which a lawful withdrawal of recognition must be predicated.”); *Am. Linen Supply Co.*, 297 NLRB 137, 137-38 (1989); *Erickson’s Sentry of Bend*, 273 NLRB 63, 64 (1984) (finding employer conduct impaired employees’ free choice in violation of the Act, where store manager, upon request of an employee, provided language for a petition to resign from the union, which the employee copied, signed and gave to the manager in the manager’s

¹⁸ Respondent’s cultivation of employee disaffection from the Union began well before Clark’s October 9 email. ADT failed to notify the Union of unit member David Hardy for well over a year after he commenced his employment in Albany. (Tr. 45, 83-85, 90, 102-03; GC Ex. 7, 22.) ADT also had a clear practice of delineating between newer employees they kept from the Union and older employees who were Union supporters, such as John Brady. (Ex. 24.) The Board has held that an employer may not withdraw recognition from a union based on loss of majority support where the employer had cultivated the loss of support by failing to notify the union of new members, “made a wholly self-serving division of the bargaining unit between more senior ‘union employees’ and newer ‘nonunion’ employees,” and thereby deprived new unit members of their benefits under the collective bargaining agreement with the Union. See *Henry Bierce Co.*, 328 NLRB 646, 650 (1999) (“Respondent’s violation of its own contractual obligations to notify the Union of job openings and new hires undermines rather than fortifies its position. The Union was entitled to rely on the Respondent to fulfill its contractual commitments and notify the Union about job openings and new hires. Indeed, the statutory objective of industrial peace would scarcely be attainable unless unions and employers could exercise a degree of prudent reliance on their contractual partners to abide by their word. The Respondent defaulted on its obligation to do so and its recitation of the extent to which it failed to keep its word, largely by depriving its own employees of benefits accruing to them under the Agreement, does not, and cannot, put it in a more favorable position than it would be had it abided by the contract.”)

office); *Florida Wire & Cable*, 333 NLRB 378, 381 (2001) (affirming ALJ decision finding that employer unlawfully solicited employees to resign from union where employer gave employees advice on how to resign, displayed sample resignation letters at a meeting with employees, and, mailed sample letters to employees).

Accordingly, ADT cannot satisfy its burden of demonstrating, by objective evidence, that its withdrawal of recognition from the Union was lawful. It therefore violated Section 8(a)(5) of the Act, as alleged.

b. ADT Did Not Cure the Taint Under Passavant

ADT may argue that it cured Clark's unfair labor practices such that its withdrawal of recognition is proper. It will likely rely on Nixdorf's October 18 email to the unit members addressing "a text message from Ben Clark . . . to clarify any confusion which may have occurred." (See Resp. Ex. 1.) Nixdorf's email does not address any specifics about Clark's message or conduct. It is, therefore, insufficient to cure Clark's unfair labor practices.

When an employer engages in this type of misconduct, the Board "presumes that the employer's unlawful meddling tainted any resulting expression of employee disaffection, without specific proof of causation, and precludes the employer from relying on that expressed disaffection to overcome the union's continuing presumption of majority support." *SFO Good-Nite Inn*, 357 NLRB 79, 80 (2011) (citations omitted). Accordingly, in *Passavant Memorial Area Hospital*, the Board set forth criteria that an employer must satisfy to cure past unfair labor practices. 237 NLRB 138, 138 (1978). To avail itself of this defense, an employer bears the burden of showing that it repudiated the conduct. *Id.* The repudiation, in turn, must be (1) timely, (2) unambiguous, (3) specific to the coercive conduct, and (4) free from other prescribed illegal conduct. *Id.* Furthermore, there must be adequate publication of the

repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maint. Corp.*, 228 NLRB 326, 340 (1977). Finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. *See Fashion Fair, Inc.*, 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965).

ADT's email about Clark's message does not satisfy the *Passavant* criteria. As a baseline matter, Nixdorf did not disavow Clark's conduct in his October 18 email. He states that he seeks to "clarify . . . confusion," but admits no wrongdoing. *See, e.g., Intermet Stevensville*, 350 NLRB 1349, 1350 n.6, 1383 (2007) (adopting ALJ decision finding no effective repudiation in part because employer "did not admit any wrongdoing, it simply informed employees that it was clarifying its policy"). Moreover, the email does not satisfy the remaining *Passavant* standards because it is highly ambiguous and not specific to the coercive conduct. For example, Nixdorf states that employees may have received a "text message" from Clark. As the evidence at trial shows, Clark's message was actually an email. (*Compare* Resp. Ex. 1 with GC Ex. 15.) Moreover, Nixdorf's email references only a single contact. The evidence at trial made clear that Clark contacted Hardy and Johnson numerous times – four times via email, once via text message, and possibly also by phone to secure their compliance with his directive.¹⁹ (GC Exs.

¹⁹ Although Marzullo saw the email before Nixdorf sent it and said he believed it looked fine, he had no way of knowing about these inaccuracies. Marzullo never saw the actual message from Clark; only the photographs Brady took of Clark's message. He therefore could not know that Clark had emailed the men, not texted them. Further, Marzullo was unaware of Clark's four or more additional contacts with Hardy and Johnson until the hearing, when the documentation was produced. Nixdorf, in contrast, was in the position to investigate the extent and details of the unfair labor practices. In the same vein, it bears repeating that Respondent – not the Union – bears the burden of ensuring a disavowal of unfair labor practices satisfies the *Passavant* standard.

15-18, 27-28.) Such ambiguities preclude Nixdorf's message from diffusing the unlawful conduct.

Similarly, Nixdorf's email is insufficiently specific to the coercive conduct. It does not address the anti-union rhetoric; the unlawful interrogation of employees; the solicitation of employees' signatures on an anti-union petition; the coercive polling of employees to the exclusion of the Union; the solicitation of employees to withdraw from the Union by requesting that they no longer wish to be represented by the Union; or Clark's provision of more than ministerial assistance to achieving that end. The email therefore fails the specificity requirement of the *Passavant* test. See, e.g., *Pope Maint. Corp.*, 228 NLRB at 341 (adopting ALJ decision finding "disavowals" insufficient where they failed to mention coercive solicitation of employees to sign withdrawals of their authorization cards among other specific unfair labor practices).

Finally, Nixdorf's email was not free from other proscribed conduct. Just two weeks after sending the email, ADT withdrew recognition from the Union on the basis of the targeted employees' signatures and after it had already reached a successor agreement with the Union. Such proscribed conduct makes plain that the ostensible cure cannot stand under *Passavant*. This remains true even if the Union was satisfied with ADT's communication to the employees at the time – notably, without knowing that ADT would withdraw recognition and refuse to execute the contract on the fruits of Clark's conduct just a few weeks later.

Further, to the extent the Union acquiesced to ADT's repudiation of Clark's conduct, the deferral to this non-Board settlement is inappropriate under *Independent Stave*, 287 NLRB 740, 742-43 (1987). The company cynically relied on the signatures of two coerced employees to withdraw recognition a mere two weeks after they received a coercive email and has provided no evidence that either targeted worker demonstrated any interest in ousting the Union prior to being subject to Clark's coercion. ADT, therefore, did not truly disavow the message – a breach of the settlement and evidence that they defrauded the Union into entering it.

ADT has therefore failed to satisfy its stringent burden under *Passavant* that it adequately repudiated Clark’s unlawful conduct. Accordingly, ADT’s withdrawal of recognition was tainted despite Nixdorf’s October 18 email.

c. ADT’s Withdrawal of Recognition from the Union was Untimely

ADT’s withdrawal of recognition from the Union was untimely and therefore violated Section 8(a)(5) of the Act. In general, a union is entitled to a presumption of majority support during the term of a CBA, up to three years. *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). Thus, an employer may not decline to bargain with, or withdraw recognition from, the union during the contract period. This rule applies “[o]nce final agreement on the substantive terms” of a collective bargaining agreement has been reached, “regardless of the status of any written instrument incorporating that agreement,” and even if the employer “has lawful grounds for believing that [the union] has subsequently lost its majority status,” which might otherwise permit a withdrawal of recognition.²⁰ *North Bros. Ford*, 220 NLRB 1021, 1022 (1975).

For example, in *Utility Tree Service*, the Board rejected an employer’s defense that it was justified in refusing to execute a collective bargaining agreement when the union actually lost its majority status two days after the parties reached agreement. 215 NLRB 806, 807 (1974); *see also Young Women’s Christian Ass’n*, 349 NLRB 762, 763-64 (2007). In that vein, the Board

²⁰ This standard has not been overturned, despite recent changes to Board law in the context of employee-initiated RM petitions. *See Silvan Indus.*, 367 NLRB No. 28 (2018) (holding that employer may file an RM petition when it receives petition from employees seeking to decertify the union after an agreement has been reached, but before it is in effect) (“We also recognize that the RM petition here was filed at a time when the Employer could not have lawfully withdrawn recognition. However, the Employer did not withdraw recognition. Rather, it engaged in good-faith bargaining as required by the Act, and when it received the employee petition opposing continued union representation, the Employer filed an appropriate petition with the Board. Thus, the standard for determining whether an employer could lawfully withdraw recognition does not govern this case.”).

reasons that an employer may not “sit” on its doubt while a contract offer is outstanding.

Auciello Iron Works, Inc., 317 NLRB 364, 370 (1995). As the Board explained:

If we were to permit Respondent to “sit” on that doubt and to raise it after the offer is accepted, we would effectively permit an employer to unilaterally control a vital part of the collective-bargaining process. An employer with such a doubt would then not only be able to act on it and nullify the offer, but also it could wait until the offer is accepted and then vitiate the contract. If the Board’s policies were to permit an employer to retain complete control over when to act on its purported doubt, control that can even invalidate after the fact a union’s prior, appropriate, and good-faith bargaining acts, the demonstration of that doubt, with its profound legal and practical consequences, becomes amenable to post-hoc reasoning and self-serving interpretations.

Id. That reasoning is readily applicable to this case. The parties stipulated that ADT and the Union reached a complete agreement for a successor contract on October 18 and that ADT did not withdraw recognition until November 2, hours before the contract was ratified. Under extant Board law, ADT’s withdrawal of recognition at that late-date was necessarily untimely, occurring after it had reached a complete agreement with the Union. To hold otherwise would grant ADT the unilateral authority to sit on the fruit of its earlier coercive conduct and rely upon it when it deems the moment most opportune.

ADT’s apparent position that it was entitled to withdraw recognition up until the contract was ratified is meritless. The Board has repeatedly held that a union does not lose its authority to make agreements with an employer when it puts a proposal to its members for ratification. Such votes are “purely advisory” unless the union clearly surrenders its “exclusive domain and control” over contract acceptance. *Longshoremen ILA Local 1575*, 332 NLRB 1336 (2000); *see also N. Country Motors, Ltd.*, 146 NLRB 671, 673-74 (1964); *see also Sacramento Union*, 296 NLRB 477, 479 (1989); *New Process Steel, LP*, 353 NLRB 111, 114 (2008) (holding that employer violated Section 8(a)(5) by repudiating the contract based on the ratification

procedure). Moreover, the Board “distinguishes between a union’s expressions of intent to seek employee ratification, which the union can modify or ignore at will, and an actual bilateral agreement with an employer to make ratification a condition precedent to the formation of a binding contract.” *New Process Steel*, 353 NLRB at 114; *C&W Lektra Bat Co.*, 209 NLRB 1038, 1038-39 (1974) (stating that the Board is “unwilling to distort words of intention into terms of agreement, particularly where the subject is unrelated to wages and terms and conditions of employment.”) (quotations omitted).

Here, the testimony is uncontroverted that ratification was not a precondition to reaching an agreement. Although the Union expressed its intention to put the contract to a membership vote and in fact successfully obtained ratification of the contract on November 2, the vote was purely voluntary and, indeed, largely ceremonial as the sole union member at the time was a member of the bargaining committee and had already voiced satisfaction with the terms of the new contract. The record is clear that the Union does not require a contract to be ratified in its bylaws, constitution, or any other governing document. Likewise, it did not enter a formal, bilateral agreement with the employer that would have made reaching a contract contingent on this vote. There were, for example, no ground rules governing this or any other contract negotiation between Respondent and the Union. The Union, therefore, “did not surrender its exclusive domain and control” over contract acceptance. ADT’s cynical²¹ argument to the contrary, therefore, fails.

²¹ ADT’s bad faith in advancing this argument is especially clear considering its request to delay the ratification vote, which the Union accepted to permit a possible new member to vote, and its race to withdraw recognition mere hours before that vote was scheduled. (GC Ex. 5.)

C. ADT Violated Section 8(a)(5) by Refusing to Execute the Contract

The obligation to bargain in good faith requires that a party execute an agreement at the request of the other party once agreement on the terms has been reached. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 526 (1941). An employer’s “refusal to honor, with his signature, the agreement which he has made with a labor organization discredits the organization, impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining.” *Id.* Once an agreement is reached, a party’s refusal to execute the agreement is a violation of the Act. See *TTS Terminals, Inc.*, 351 NLRB 1098, 1101 (2007) (citations omitted).

Respondent stipulated that the parties reached a complete agreement on October 18. (Tr. 115-16.) The record further reflects that the Union requested execution of that contract on November 7, and that Respondent has failed and refused to execute that agreement by the November 9 deadline set by the Union. (GC Ex. 12; Tr. 128-29.) Respondent contends that it has not violated the Act through this conduct because it lawfully withdrew recognition from the Union. This position is without merit. Respondent’s withdrawal of recognition from the Union was tainted by its unfair labor practices and untimely because it occurred after the parties had reached a complete agreement. *See supra.*

Consequently, Respondent has no lawful basis for refusing to execute the agreement it reached with the Union, and its failure to do so violates Section 8(a)(5) of the Act.

D. ADT Violated the Act by Repudiating the Dues Deduction and Remittance Procedure and Granting a Wage Increase to Discourage Union Support

Section 8(d) of the Act states that, when a collective-bargaining agreement is in existence, “the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period,

if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.” When an employer’s breach of contract is so flagrant as to amount to either a repudiation of the contract or a unilateral modification of it, the Board will find a violation of Section 8(a)(5) and 8(d) of the Act. *See Independent Stave Co.*, 233 NLRB 1202 (1977). This principle applies when an employer unilaterally modifies terms to a complete agreement it has unlawfully refused to execute. *See Am. Floor Servs., Inc.*, 269 NLRB No. 45 (1984) (“By refusing to execute a written contract embodying agreed-upon terms and conditions of employment, and by making unilateral changes in the contractual terms, including but not limited to the method of determining wage rates . . . , the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 8(d).”).

The facts in this case are not in dispute. Respondent stipulated that it reached a complete agreement with the Union on October 18. (Tr. 115-16.) As in the expired agreement, the successor contract included a provision requiring the deduction and remittance of dues to the Union. (*See* GC Ex. 12.) The new contract also, of course, set forth wage rates, including a wage increase to take effect upon ratification. (*See* GC Ex. 4, 12.) In addition, Respondent admitted²² in its Answer that it ceased deducting and remitting dues and that it granted a pay increase to John Brady. Respondent maintains that it could make these changes without consulting the Union because it lawfully withdrew recognition. (GC Ex. 1(r).)

To the contrary, Respondent was obligated to obtain the Union’s consent to these changes because its withdrawal of recognition was tainted and untimely. *See supra*. The record is clear

²² To the extent Respondent’s Answer on these points is ambiguous, the record also establishes the relevant facts. Testimony at the hearing established that dues deductions were halted, remittances ceased, and that the Union was not consulted beforehand. (Tr. 37-41, 78-80.) Testimony and record evidence also demonstrate that Brady was granted a pay increase, and that the Union was not consulted about it. (Tr. 37-41, 78-80.)

that Respondent did not secure the requisite consent.²³ (Tr. 78-79; *see also* GC Ex. 1(r).) There is, therefore, no dispute that Respondent unilaterally repudiated the contractual dues deduction and remittance procedure and unilaterally granted wage increases. Because Respondent's withdrawal of recognition from the Union and refusal to execute the complete agreement were unlawful, these changes, made without the Union's consent, violate Section 8(d) and 8(a)(5) of the Act, as alleged.

In addition, Respondent's unilateral grant of a wage increase to Brady violates Section 8(a)(3) of the Act. The testimony and record evidence are clear that Brady was entitled to a pay raise to \$25.22 an hour upon ratification of the contract. (Tr. 79; GC Ex. 31.) The contract was ratified on November 2, but Respondent did not grant Brady the pay raise he was due at that time. Rather, Respondent granted a larger-than-promised pay raise effective January 1, 2019. (Tr. 39-41; *see also* GC Ex. 3.)

The connection between Brady's union status and the raise is plain. Coming on the heels of Respondent's unlawful withdrawal of recognition from the Union, a ready inference can be made that the raise was intended to discourage union support. Moreover, in contemporaneous correspondence about the wage increase, Respondent made explicit the connection between the raise and Brady's newfound non-union status. In informing Brady of the raise, Clark wrote, "[w]e are ready to hire and create the correct culture and service support for the area," language that echoes a statement to Hardy and Johnson in the October 9 anti-union email. (GC Ex. 3; GC Ex. 15 ("To ensure we are able to move forward and hire without the limitations forcing new hires to join the union . . .").) In addition, Clark wrote internally by way of explanation for the

²³ In the alternative, Respondent also did not provide the Union with notice or an opportunity to bargain. (*See* Tr. 78-79; *see also* GC Ex. 1(r).)

change, “Since the decision was made to go away from the union in Albany, John is being hired from union to an ADT compensation plan. . . . The union directed his pay and we are getting it corrected with this change.” (GC Ex. 31.) The link between Brady’s new non-union status and the raise was, therefore, explicit. The timing supports the conclusion that the raise was meant to discourage union support. Conditioning a pay raise on non-union status is a plain violation of Section 8(a)(3) of the Act. *See, e.g., Flying Foods Grp., Inc.*, 345 NLRB 101, 104 (2005). ADT therefore violated Section 8(a)(3) by granting this raise to Brady, in addition to Section 8(d) and 8(a)(5).

V. Conclusion

The General Counsel respectfully submits that Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union sympathies; polling employees about their support for the Union; soliciting employees to sign a statement that they no longer wish to be represented by the Union; and providing more than ministerial assistance to employees in helping them get rid of the Union. The General Counsel further submits that Respondent has violated Section 8(a)(5) of the Act by withdrawing recognition from the Union and refusing to execute the contract it reached with the Union upon request; Section 8(a)(5) and 8(d) of the Act by making contract modifications without the Union’s consent; and 8(a)(3) of the Act because one of those modifications – a wage increase – was granted to discourage support for the Union. The General Counsel respectfully requests that Your Honor issue a decision and recommended order granting the relief sought herein and any other relief deemed appropriate.

VI. Proposed Conclusions of Law

1. Respondent violated Section 8(a)(1) of the Act by the following conduct:
 - a. Interrogating its employees about their union sympathies and activities by soliciting their signatures on an anti-union petition;
 - b. Coercively polling employees about their support for the Union;
 - c. Soliciting employees to withdraw from the Union by requesting that employees sign a statement indicating that they no longer wished to be represented by the Union; and
 - d. Providing more than ministerial assistance to employees in helping them get rid of the Union.
2. Respondent violated Section 8(a)(1) and (5) of the Act by the following conduct:
 - a. Withdrawing recognition from the Union and
 - b. Failing and refusing to execute an agreement reached with the Union at the Union's request.
3. Respondent violated Section 8(d) of the Act by engaging in the following conduct:
 - a. Repudiating the dues deduction and remittance procedure embodied in its contract with the Union and
 - b. Modifying the wage rate embodied in that contract for employee John Brady.
4. Respondent violated Section 8(a)(1) and (3) of the Act by granting the wage increase to employee John Brady to discourage membership in a labor organization.
5. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

VII. Proposed Order

Respondent, ADT LLC d/b/a ADT Security Services, by its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - a. Coercively interrogating employees concerning their Union support;
 - b. Coercively polling employees concerning their support for the Union;
 - c. Soliciting employees to withdraw from the Union;
 - d. Providing more than ministerial assistance to employees in helping them get rid of the Union;
 - e. Refusing to recognize the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All full-time and regular part-time employees originally described in the certification dated November 20, 1968 (Case Number 03-RC-4533) classified by the Employer as residential and small business installers, residential and small business high volume commissioned installers, residential and small business service technicians, employed by the Respondent at its facility in Albany, NY; but excluding all alarm service investigators, relief supervisors, all office clerical employees and professional employees, guards and supervisors, as defined in the Act; and excluding all commercial installers and commercial service unless the employees are employed by the Employer and are located at, or are directly supervised by the Employer's supervisors located at its Albany, NY facility.

- f. Failing and refusing to execute the collective bargaining agreement that the Union submitted for signature;
- g. Unilaterally and without the consent of the Union repudiating the dues deduction and remittance procedure embodied in its collective bargaining agreement with the Union;
- h. Unilaterally and without the consent of the Union granting a wage increase to bargaining unit employees; and
- i. Granting a wage increase to discourage support for the Union.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:
 - a. Recognize the Union as the exclusive collective-bargaining representative of the Albany Unit;
 - b. Make employees whole for any losses associated with our refusal to recognize the Union;
 - c. Execute the collective-bargaining agreement covering employees in the Albany Unit that were submitted to us for signature; and
 - d. Abide by the terms of the collective-bargaining agreement with the Union by honoring the dues deduction and remittance procedure embodied in that agreement and, upon request by the Union, rescind the changes we made to the wage rates.
 - e. Within 14 days after service by the Region, mail at its own expense to employees in the Albany Unit copies of the attached notice marked "Appendix."
 - f. Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

VIII. Proposed Notice to Employees:

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

International Brotherhood of Electrical Workers Local 43 (the Union) is the employees' representative in dealing with us regarding wages, hours and other working conditions of the employees in the following appropriate unit (the Albany unit):

All full-time and regular part-time employees originally described in the certification dated November 20, 1968 (Case Number 03-RC-4533) classified by the Employer as residential and small business installers, residential and small business high volume commissioned installers, residential and small business service technicians, employed by the Respondent at its facility in Albany, NY; but excluding all alarm service investigators, relief supervisors, all office clerical employees and professional employees, guards and supervisors, as defined in the Act; and excluding all commercial installers and commercial service unless the employees are employed by the Employer and are located at, or are directly supervised by the Employer's supervisors located at its Albany, NY facility.

WE WILL NOT solicit you to resign from the Union.

WE WILL NOT interrogate you concerning your support for the Union.

WE WILL NOT coercively poll you concerning your support for the Union.

WE WILL NOT provide more than ministerial assistance to employees in helping them get rid of the Union.

WE WILL NOT withdraw recognition from the Union as your exclusive collective-bargaining representative.

WE WILL NOT fail and refuse to execute the collective bargaining agreement that the Union submitted to us for our signature on November 7, 2018.

WE WILL NOT unilaterally and without the consent of your Union fail to honor the terms of the collective bargaining agreement reached with your Union.

WE WILL NOT implement wage increases to discourage support for the Union.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL recognize the Union as the exclusive collective-bargaining representative of the Albany Unit and **WE WILL** make employees whole for any losses associated with our refusal to recognize the Union.

WE WILL execute the collective-bargaining agreement covering employees in the Albany Unit that were submitted to us for signature on about November 7, 2018.

WE WILL, at the request of the Union, rescind any unilateral modifications to terms of the collective-bargaining agreement reached with the Union.

DATED at Albany, New York, this 12th day of June, 2019.

/s/ Caroline V. Wolkoff
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