

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

**ADT, LLC, d/b/a ADT SECURITY SERVICES**

**and**

**Case Nos. 03-CA-230714  
03-CA-234585**

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

*Caroline Wolkoff, Esq.*, for the General Counsel.

*Jeremy Moritz, Esq.*, (*Ogletree Deakins Nash Smoak & Stewart, PC, Chicago, Illinois*)  
for the Respondent.

*Bryan Arnault, Esq.*, (*Blitman & King, Syracuse, New York*)  
for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

Arthur J. Amchan, Administrative Law Judge. This case was tried in Albany, New York on April 17, 2019. IBEW Local 43 filed the charges giving rise to this case on November 8, 2018 and January 24, 2019. The General Counsel issued a consolidated complaint in both cases on March 1, 2019.

The General Counsel alleges that, on or about October 10, 2018, Respondent by Ben Clark, Vice-President Central Operations, solicited employees' signatures for a decertification petition in violation of the Act. He alleges this solicitation also constitutes an illegal interrogation and polling of employees' union sentiments. The General Counsel further alleges that Clark provided more than ministerial assistance in assisting employees to decertify the Union.

Additionally, the General Counsel alleges that Respondent violated the Act by withdrawing recognition from the Union on November 2, 2018, refusing to sign a collective bargaining agreement, the terms of which it had agreed to on October 18, 2018, and failing to continue in effect the terms of that agreement by granting a wage increase to unit member John Brady and repudiating the dues deduction provisions of that agreement.

On the entire record,<sup>1</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and Charging Party Union, I make the following

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## FINDINGS OF FACT

### I. JURISDICTION

10 Respondent, ADT, LLC is a Delaware corporation that has its headquarters in Orem, Utah. ADT installs and services residential and commercial security systems throughout the United States, including the State of New York. Respondent derives annual revenues in excess of \$500,000 and purchases goods and materials valued in excess of \$5,000 directly from points outside of New York State. Respondent admits, and I find, that it is an employer engaged in  
15 commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Brotherhood of Electrical Workers (IBEW) Local 43, is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

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In 1968, IBEW Local 43 was certified as the exclusive bargaining representative of ADT's installers and service technicians at its facility in Albany, New York.<sup>2</sup> As of mid-2017, ADT maintained an office in Clifton, New York. In September 2017, it closed that facility. Afterwards, installers and service technicians worked out of their homes and reported to a  
25 supervisor in Orem, Utah.

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A collective bargaining agreement between the Union and ADT ran from June 11, 2015- June 10, 2018. The parties engaged in negotiations for a successor agreement. They had a preliminary meeting in May 2018 and then had 2 negotiating sessions; the first on September 7,  
30 2018; the second and last on October 18, 2018. On September 7, the Union was represented by Alan Marzullo, Local 43's Business Manager, Richard Gooden, Assistant Business Manager and John Brady, a bargaining unit member.<sup>3</sup> Respondent was represented by James Nixdorf, senior director of labor relations for ADT in North America.

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35 On October 9, 2018, Ben Clark, ADT's vice-president for central operations sent the following message by text and email to Kenneth Johnson and David Hardy, who were performing installation and service work for ADT in the Albany area, G.C Exhs. 2 and 15.<sup>4</sup>

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<sup>1</sup> Line 18 on transcript page 142 should read "objective" rather than "subjective."

Line 19, on transcript page 132 should be Arnault rather than Moritz.

<sup>2</sup> Local 43 also represents a bargaining unit in Syracuse, New York.

<sup>3</sup> As of March 2018 ADT had 6 installers working in the Albany area. John Brady and Joe Reid, who were ADT employees and union members, Dave Hardy, whose status at the time is unclear and 3 contractor employees, one of whom was Kenneth Johnson, G.C. 24. Reed's employment with ADT ended in August 2018. Brady, like Johnson, worked installing and servicing ADT equipment for a contractor, Tech Systems, prior to being placed on the ADT payroll in January 2017.

<sup>4</sup> When Johnson became an employee of ADT, as opposed to an employee of a subcontractor, is unclear. Johnson began doing installation work for ADT in January 2018. He did not

Dave, Ken,

5 We are at a point where I need to get your intentions in writing to help us move forward with the union.

10 I wanted to give these 4 in each area to at least inform you about Unions. Basically, they are casing (sic) more dues and increased hardships for you. In the past, the unions helped create correct working cultures to ensure employees were treated fairly. This is not the case today. HR is working hard to protect your rights, and ensure you have every tool and support needed to protect your employment. States have laws that companies must follow. Paying a union to do what a company must due (sic) to laws and regulations places a middle man in the works, that you must pay due (sic) to have, that is no longer needed.

15 Here are a few Pros and cons of the union.

Pros:

- 20 1. Unions can increase pay and benefits for workers.
- a. Both union and non-union are effected by any increase.
- 25 2. Unions set up formal procedures for disputes.
- a. Can make it easier to handle disputes. These roles are now supported by HR.
- 30 3. Unions make political organizing easier.
- a. Can make it easier to advance political causes.
- 35 4. Unions set Norms and Regulations
- a. Work to ensure standards are met like the 40 hour work week.

Cons:

- 40 1. Unions can make it harder to promote great workers.
- a. Unions tend to follow seniority. This can limit work to less experienced employees and dismiss poor work from a senior person.

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officially become an ADT employee until after ADT withdrew recognition from the Union on November 2, 2018, Tr. 252-53.

2. Unions can require dues and fees.
- 5           a. Unions force you to join and set the price you must pay.
3. Unions can make it hard to diversify the workplace.
- a. Unions have a closed culture and tend to protect member misconduct.
- 10       4. Unions can drive up the cost and cause bad relationships between labor and management.

To ensure we are able to move forward and hire without limitations forcing new hires to join the union, I need a written or typed letter stating the following.

15       “I Dave Hardy or Kenneth Johnson, do not want to be represented by the IBEW.

          “Sign and date” (handwritten signature).

20       I need your actual copy so I will sent (sic) label to overnight to me. Please get this done tomorrow.

          Thank you very much! Call if you have questions.

25       Clark provided Hardy and Johnson shipping labels to use in sending their letters back to him.

30       Ken Johnson was working with ADT employee and Local 43 member John Brady when he received this message as text on his phone. Johnson showed the message to Brady and let him take photographs of the message. Brady texted the photo to Richard Gooden, Assistant Business Manager of Local 43.

35       Clark followed-up on his email/text to Hardy and Johnson on October 10, asking them to let him know, “when you get this done!” On the morning of October 12, Clark emailed Johnson and Hardy again. He asked, “Please update me on the progress of this. This needs to be completed today, I had planned on the letters arriving today, but I have not heard back on this from either of you.” G.C. Exh. 17. There is no explanation in this record for Clark’s impatience. In the absence of such explanation, I infer his impatience was due to Respondent’s desire to withdraw recognition before or at the bargaining session scheduled for October 18.<sup>5</sup>

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<sup>5</sup> That ADT had plans to decertify the Union is indicated in an email from Logan Cornwall on which Clark was copied in January 15, 2018. Cornwall stated, “ADT is in the process of decertifying the Union in Albany.” G.C. Exh. 29. Respondent’s suggestion that Cornwall’s use of the term “decertification” referred to the closing or consolidation of the Albany office and not to decertification of the Union is not credible. Ben Clark used the same word in an inquiry to James Nixdorf on January 16 and Nixdorf used the word in replying to Clark. *Ibid.* It defies credulity that Clark and Cornwall thought decertification was the same thing as

At 7:20 p.m. on October 12, Clark texted Hardy, “Dave, I have not heard from you about the union letter. What’s the progress?” Hardy responded, “I’ll get back to U I literally get home sleep wake up and get back to it.” Clark replied, “Thank you, I get you are busy. I only ask that you keep me updated if unable to make [rest of text not included in exhibit]. Hardy wrote back,  
 5 “I don’t have a printer can I hand write it and text a picture of it?” Clark replied, “No, but you can hand write it and then mail that letter back to me. It does not have to printed very simple just says I Dave Hardy do not want to be represented by the IBEW. Sign and date and then overnight it back to me with the label you can walk in to FEDEX with that label and they can print it for  
 10 you.” G.C. Exh. 28.

At 7:27 p.m. Clark texted Johnson, “Ken, I need an update on the union I requested. Please update me on the progress. Thank you,” G.C. Exh. 27. Clark had additional telephone conversations with Johnson on October 19 and 22. There is no evidence in this record as to the  
 15 substance of these conversations apart from what size uniform Johnson required. Clark was at least 2 levels above Johnson and Hardy in the company hierarchy. Their immediate supervisor had recently been terminated, thus, they reported to Logan Cornwall, who reported to Clark.<sup>6</sup> It is very unlikely that someone at Clark’s level would call Johnson merely to discuss pants sizes.

October 12, David Hardy signed a statement that he did not want to be represented by the IBEW.<sup>7</sup> Ken Johnson signed an identical statement on October 23. These statements were sent to Ben Clark with the shipping labels he provided. Clark transmitted those statement to James Nixdorf on October 24.  
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On October 16, 2018, Local 43 Business Manager Alan Marzullo sent an email to Labor Relations Director Nixdorf. Referring to Ben Clark’s October 9 text message to Ken Johnson and Dave Hardy, Marzullo stated:  
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30 If ADT is unwilling to disavow these statements, I will be filing a ULP charge with the NLRB to address this matter.

ADT must immediately send a letter to Dave Hardy and Kenneth Johnson retracting the Clark communications, indicating the Union is the designated bargaining representative for the bargaining unit, and advising it will not, in any way, interfere with the employees’ ability to join or be represented by the Union. If a letter is not sent by  
 35 close of business on Friday, October 19, the Union will file a ULP charge on Monday morning.

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the physical closing of the Albany office. Moreover, the opening of Clark’s October 9 message, “We are at a point where I need to get your intentions in writing to help us move forward with the union,” suggests a pre-existing plan to get rid of the Union in Albany.

<sup>6</sup> In April 2019, John Brady reported to Anthony Ferra, who reported to Cornwall, who reported to Ben Clark.

<sup>7</sup> However, on October 23, Clark reported to Nixdorf that Hardy was avoiding returning the Union’s calls because he did not know if he was staying in New York or if he wanted to join the Union, G.C. Exh. 32.

Marzullo and Nixdorf also discussed the Clark text by telephone on October 16.

*Events of October 18, 2018*

5 At the parties' second and last bargaining session, October 18, 2018, ADT, represented by James Nixdorf, and the Union, represented by Business Manager Marzullo and Assistant Business Manager Gooden, reached agreement on a successor collective bargaining agreement effective retroactively from June 11, 2018-June 10, 2021.<sup>8</sup> In accordance with its past practice the Union proposed to submit the contract to a ratification vote by its members.<sup>9</sup>

10 During this meeting James Nixdorf's computer failed and he borrowed Marzullo's computer. He drafted a letter on Marzullo's computer to send to Ken Johnson, Dave Hardy and John Brady about the October 9 text/email Johnson and Hardy received from Ben Clark. Nixdorf then sent the following email to Marzullo and Gooden.

15 As we discussed yesterday, I appreciate your offer to resolve this issue without going through the ULP process. I know Ben had been asked questions regarding the union and the text was he thought an efficient way to respond. Below is the e-mail I plan to send out. I[s] there anything else you think I should add?

20 You may have received a text message from Ben Clark in response to some questions raised regarding the IBEW.<sup>10</sup> I wanted to clarify any confusion which may have occurred and ensure that 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.

25 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;

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<sup>8</sup> Respondent submits that, "no rational employer would embark upon these schemes [to withdraw recognition] only to fully undermine the alleged effort by reaching a final tentative agreement after only two or three bargaining sessions, R. brief at 3. While this would appear to be correct in the abstract, other evidence, such as Ben Clark's impatience in getting responses from Hardy and Johnson, indicates the contrary. It is well within the realm of possibility that Respondent expected the desired responses from Hardy and Johnson before the October 18 meeting. Also, Respondent had no way of knowing that Johnson would show the October 9 message to Brady and that the Union would find out about it.

<sup>9</sup> The Union's by-laws do not require ratification. Local 43 could have signed the CBA on October 18. In 2009, the agreement reached between Local 43 and ADT was rejected in the ratification vote. Afterwards, ADT and the Union returned to bargaining table.

<sup>10</sup> There is no credible evidence that Clark's email/texts were made in response to any inquiry by Hardy and/or Johnson. In fact, John Brady's account of his conversation with Johnson on October 9 or 10, establishes that Johnson had no idea why he was receiving this message from Clark, Tr. 35. I do not credit Ben Clark's testimony on this point at Tr. 172. There is no evidence that either Hardy or Johnson had been contacted by the Union prior to October 9.

however, there are some provisions, since the contract is expired, which currently do not apply. Once the contract is renewed all provisions will apply.

5 Marzullo approved the text on October 18 and never suggested that ADT say anything else to the three employees about the Clark text. Nixdorf then emailed a letter to Hardy, Johnson and Brady, R. Exh. 3; on October 18, which is identical to the last 2 paragraphs of the draft shown to Marzullo, Tr. 239.<sup>11</sup> The Union also did not file an unfair labor practice charge about the Clark text message prior to November 8, 2018, Tr. 136-142.

10 The ratification vote was originally scheduled for October 25. Nixdorf asked the Union to delay it pending the completion of paperwork to put Ken Johnson on its payroll. The vote was rescheduled for November 2, 2018.

*Ben Clark's November 1, 2018 text message to John Brady*

15 On the morning of November 1, 2018, Ben Clark sent the following text to John Brady.

20 Good morning John. This is Ben from ADT. I have been informed your offer letter has been sent. Please check your email and complete the packet as soon as possible. Call with any questions! Very excited to get you working.

G.C. Exh. 26.

25 Clark explained that the purpose of this text was to switch Brady from a union employee to a non-union employee, Tr. 208-09.

This text indicates that Respondent planned to withdraw recognition from the Union before it received the communications from Dave Hardy and Ken Johnson on November 2, on which it now relies.<sup>12</sup>

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<sup>11</sup> Nixdorf's letter to the employees concluded, "If you have any further questions regarding the contract, please feel free to contact me at the number below."

<sup>12</sup> Respondent characterizes Clark's emails as an inadvertent product of his lack of experience with regard to union matters. It defies credulity to believe that a manager of Clark's rank would transmit a message such as the October 9 message without checking with someone more knowledgeable. Indeed, the record shows that Clark knew who to call and had discussed union matters regarding Albany with Nixdorf previously. On January 16, 2018 he sent the following inquiry to Nixdorf.

Jim,

Can you give us an update on the Union Status in Albany? We have a tech coming off leave from an injury over a year ago. Last we talked the union was in the process of decertifying and I would like some direction on what to do with this tech.

Nixdorf responded

Sorry about the delay. I'm in the middle of a union decertification campaign in Seattle (90 employees). I will give you a call tomorrow to discuss.

G.C. Exh. 29.

*Events of November 2, 2018*

5 John Brady invited David Hardy and Kenneth Johnson to the ratification vote scheduled for November 2. Union Assistant Business Manager Richard Gooden spoke to David Hardy on November 2. During that conversation Hardy told Gooden that he and Ken Johnson would vote against ratification. Gooden responded that unless Hardy and Johnson joined the Union, they would not be allowed to vote.

10 While waiting for a flight at the Lexington, Kentucky airport on the afternoon of November 2, 2018, ADT Labor Relations Director James Nixdorf received a telephone call from David Hardy.<sup>13</sup> Hardy told Nixdorf that he had received a call from union assistant business manager Richard Gooden who informed him that there would be a vote on whether to ratify the collective bargaining agreement that evening. According to Nixdorf, Hardy told him neither he nor Ken Johnson wanted anything to do with the Union.<sup>14</sup> Nixdorf told Hardy that if that was the case he could sign a petition to that effect and have Johnson sign it as well. Tr. 256.<sup>15</sup>

20 At 2:35 p.m. on November 2, Hardy sent Nixdorf a statement signed by himself and Johnson stating that they “choose not to be members of the international brotherhood of electrical workers.” Nixdorf texted back to Hardy that the statement, “needs to say not represented by...,” R. Exh. 7.<sup>16</sup>

25 At 2:46 p.m. Eastern Time, Nixdorf informed Business Manager Marzullo that Respondent had objective evidence that the Union no longer represented a majority of unit employees in Albany and that Respondent was withdrawing recognition from the Union, G.C. Exh. 9. After Respondent withdrew recognition, Hardy followed up at 2:51 with a revised statement stating that he and Johnson no longer wished to be represented by the Union, G.C. Exh. 10, pg. 2.

30 The same evening the Union held its ratification meeting. Although John Brady invited Johnson and Hardy to the meeting, neither showed up. After waiting until 5:42, Brady, the only union member, voted to ratify the tentative agreement reached on October 18.

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<sup>13</sup> At page 13 of its brief, Respondent states, “There is no evidence that Clark, Nixdorf, or any other Company official communicated with employees regarding union related issues between October 18, 2018 and November 2, 2018.” To the contrary there is a strong indication that Clark spoke to Hardy about the Union on or about October 23, G.C. Exh. 32.

<sup>14</sup> Neither Hardy nor Johnson testified in this proceeding.

<sup>15</sup> As the General Counsel points out in its brief at footnote 8, page 12, there is no evidence explaining how Hardy and Johnson knew that their October 12 and 23 signatures were not sufficient and that additional signatures were required to decertify the Union. I infer this was communicated to them by Respondent at some point not reflected in this record.

<sup>16</sup> I do not credit Nixdorf’s testimony at Tr. 258 that Hardy had already explained what he wanted to do. This is somewhat inconsistent with Respondent’s representation that neither Nixdorf nor Clark had any union-related discussions with Hardy between October 18 and November 2. If Nixdorf was referring to Hardy’s October 12 statement, that was tainted by Clark’s unlawful solicitation. If he is referring to his November 2 conversation with Hardy, Nixdorf’s testimony at Tr. 255-56 belies the notion that Hardy came up with the idea that he didn’t want union representation without prompting from Nixdorf.

On November 7, 2018, the Union demanded that Respondent sign the collective bargaining agreement agreed to on October 18. Respondent refused to do so on the grounds that the Union no longer represented its Albany employees. Respondent ceased deducting and remitting union dues and granted John Brady a wage increase in accordance with its policies for unrepresented employees.

#### *Issues*

*Was Respondent entitled to rely on the November 2, 2018 statements from David Hardy and Ken Johnson in withdrawing recognition from the Union?*

*Did Respondent sufficiently disavow the text/email messages sent to Hardy and Johnson on October 9, 2018?*

*Did the Union waive its right to object to withdrawal due to failure to object to Nixdorf's email to Hardy and Johnson on October 18, 2018, or demand changes or additions to that email?*

*Did Respondent, by Ben Clark, illegally interrogate employees and/or poll them about their union sympathies?*

#### **ANALYSIS**

*Respondent, by Ben Clark, illegally solicited messages from employees stating that they did not wish to be represented by the Union and illegally interrogated and polled employees.*

An employer violates Section 8(a)(1) by “actively soliciting, encouraging, promoting or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify a bargaining representative. In determining whether an employer’s assistance is unlawful, the appropriate inquiry is whether an employer’s assistance constitutes more than ministerial aid. In making that inquiry, the Board considers the circumstances to determine whether “the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned,” *Mickey’s Linen & Towel Supply*, 349 NLRB 790, 791 (2007); *Sociedad Espanola de Auxilo Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 459 (2004).

There is no question that Respondent, by Ben Clark, violated Section 8(a)(1) by soliciting letters from David Hardy and Kenneth Johnson disavowing representation by the Union. Moreover, he violated the Act by monitoring their response to his solicitation. By doing so, he put Hardy and Johnson in the position of risking his displeasure if they did not follow through and submit letters rejecting representation by the Union, *Bay Area Mack*, 293 NLRB 125, 133-34 (1989). His messages also constituted an illegal interrogation and polling as to their attitude towards the Union.<sup>17</sup>

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<sup>17</sup> The Board’s standards for evaluating alleged interrogations are set forth in *Rossmore House*, 296 NLRB 1176 (1976) enf. 760 F. 2d 1006 (9<sup>th</sup> Cir. 1985); and *Kellwood Co.*, 299 NLRB 1026

*Respondent did not sufficiently disavow Ben Clark's October 9 text/email prior to withdrawing recognition from the Union?*

5           In order to relieve itself of liability for unlawful conduct by repudiating the conduct, such repudiation must be timely, unambiguous and specific in nature to the coercive conduct . It also must be adequately publicized and there must be no proscribed conduct by the employer after the publication. The disavowal should also give assurances to employees that in the future the employer will not interfere with the exercise of their Section 7 rights, *Passavant Memorial Area Hospital*, 237 NLRB 138, 139 (1978).

15           Nixdorf's letter to unit employees falls short of the Board's requirements in *Passavant*. Most notably it does not address that fact that Ben Clark blatantly violated the Act by soliciting decertification letters from employees and by interrogating and polling them. Moreover, Nixdorf's letter addresses only "a text message from Ben Clark." It does not address the follow-up messages Clark sent the employees of October 10 and 12. Respondent's failure to specifically disavow Clark's wrongdoing is fatal to its attempt to negate its coercive effect, *Rivers Casino*, 356 NLRB 1151, 1152-53 (2011); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993) enfd. 48 F.3d 1360 (4<sup>th</sup> Cir. 1994); *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1422-23 fn. 9 (2010). Nixdorf's desire to clarify "confusion" doesn't repudiate anything and thus fails to adequately disavow Clark's conduct, *Powellton Coal Co.*, 354 NLRB 419, 419 fn. 2, 422, incorporated by reference *Powellton Coal Co.*, 355 NLRB 407 (2010)

25           Further, the letter does not give any assurances that Respondent will not engage in such solicitation/interrogation in the future. Specific repudiation of Clark's text/email and follow-up messages is necessary to cure his violation of the Act. Particularly in this case where 2 of the unit employees were new to ADT [indeed Kenneth Johnson was not yet an ADT employee] several messages from a high-level manager expressing his desire that employees disavow representation is highly coercive. If there was any doubt in employees' minds as to how important decertification was to Clark and ADT, he dispelled such doubt with his follow-up messages on October 10 and 12 [of which the Union was not aware]. The delay by Hardy and particularly by Johnson in responding to Clark's entreaties is a strong indication that they were in fact coerced.

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(1990). Whether interrogation violates the Act depends on several factors: the background of the interrogation, e.g., the hostility of the Respondent towards unionization; the nature of the information sought, i.e., whether the interrogator appears to be seeking a basis to retaliate against the employee; the identity of the questioner, i.e., his or her place in the company hierarchy; the place and method of interrogation, the truthfulness of the interrogated employee's reply and whether or not the employee questioned was an open and active union supporter. These factors are not to be applied mechanically, *Camaco Lorain Mfg. Plant*, 356 NLRB 1182 (2011). Applying these factors, I find Clark's inquiry to be illegal based his position in the company, the obvious hostility expressed towards unionization and the fact that there is no evidence that Hardy or Johnson had expressed an opinion about unionization beforehand. As an employee not yet on the ADT payroll, Johnson was likely to very susceptible to coercion. I also find that Respondent illegally polled employees as to their union sympathies. Respondent did not observe the safeguards required, *Struksnes Construction Co.*, 165 NLRB 1062 (1967).

Finally, Respondent, by James Nixdorf, violated the Act on November 2, 2018, as discussed below, in rendering more than ministerial assistance to the decertification effort. This proscribed conduct also negates any attempt by Respondent to claim that it effectively disavowed the misconduct by Ben Clark.

*The Union did not waive its right to object to the withdrawal of recognition by tacitly giving its approval to Nixdorf's October 18, 2018 email.*

The Union's tacit approval of Nixdorf's October 18 email to unit employees did not waive its right to object to Respondent's withdrawal of recognition. This is so because its approval was not given with full knowledge of the extent of Clark's coercion of unit employees. There is no evidence that the Union was aware of Clark's highly coercive follow-up messages to Ken Johnson and David Hardy on October 10 and October 12. Even if the Union could be deemed to have waived its right to object to withdrawal in other circumstances, its lack of awareness of the extent of Clark's coercion negates any basis for finding a waiver in this instance. Waiver applies only where a party has acted with full knowledge of the facts, *Roadway Express*, 355 NLRB 197, 203 fn. 25 (2010) (dictum) citing *Middlesex Mutual Insurance Co. v. Levine*, 675 F. 2d 1197, 1204 (11<sup>th</sup> Cir. 1982).

*James Nixdorf also violated the Act by providing more than ministerial assistance to Hardy and Johnson on November 2, 2018.*

In *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985) the Board set forth the standard to be applied with regard to what conduct constitutes sufficient ministerial assistance to invalidate a decertification petition. The Board stated:

...it is unlawful for an employer to initiate a decertification petition, solicit signatures for the petition or lend more than minimal support and approval to the securing of signatures and the filing of the petition. In addition, while an employer does not violate the Act by rendering what has been termed "ministerial aid," its actions must occur in a situational context free of coercive conduct. In short, the essential inquiry is whether "the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned, *KONO-TV-Mission Telecasting*, 163 NLRB 1005, 1006 (1967).

First of all, Nixdorf's message to Hardy was more than "ministerial aid." Whether employees are expressing a desire not to be represented, as opposed to disavowing union membership goes to the heart of their communication to their employer. The Board has held for over 40 years that there is no necessary correlation between membership and the number of union supporters since no one could know how many employees who favor union bargaining do

not become or remain members, *Terrell Machine Co.*, 173 NLRB 1480, 1481 (1973). A statement that explicitly refers only to union membership is insufficient to support the conclusion that employees do not wish to be represented by the Union, *Anderson Lumber Co.*, 360 NLRB 538 (2014), *enfd. sub nom. Pacific Coast Supply, LLC v. NLRB*, 801 F. 3d 321, 331-34 (D.C. Cir. 2015).<sup>18</sup>

In *Eastern States Optical* the Board found that the employer did not render unlawful assistance in the preparation of the certification petition. However, even assuming that Nixdorf's assistance on November 2 was ministerial, the instant case is distinguishable in that the initiative for a decertification letter came from Respondent's vice-president for central operations; not from unit employees. In *Eastern States Optical* employees called Respondent's attorney after they decided to seek decertification. In this case, there is no evidence that either Hardy or Johnson was thinking of decertification until Clark lobbied them for a decertification letter. Also, in *Eastern States Optical*, it was unclear whether Respondent's attorney did anything more than review what the employees had written and told them, "that sounds alright to me." In the instant case the language of the employees' letter was not merely reviewed by Clark and then by Nixdorf. It was Clark and then Nixdorf that dictated the content of the letters.

The employees' failure to respond to Clark's requests and his follow-up of his initial texts is also evidence that their decertification letters were not free and uncoerced acts. Moreover, on October 9 and 10, Clark specifically asked the employees for a statement that they do not wish to be represented by the Union. In spite of this, on November 2, Hardy and Johnson submitted a letter stating only that they did not want to be union members. This leaves open the possibility and maybe the likelihood that this is what they wanted until prompted or pressured by Nixdorf.

Finally, Respondent did not sufficiently disavow Clark's conduct in its letter to employees. Thus, Nixdorf's prompting as to what they must write did not occur in an atmosphere free of coercion. In conclusion, Nixdorf's assistance in advising Hardy and Johnson that their statements had to say that they didn't want to be represented by the Union, rather than not merely be members, violated the Act.

## CONCLUSION OF LAW

1. Respondent by Ben Clark violated Section 8(a)(1) by:
  - a. Soliciting employees to disavow representation by the Union on October 9, 2018.
  - b. Following up with unit employees on October 10 and 12 as to whether they had submitted the disavowals he had requested on October 9.
  - c. Coercively interrogating employees as to their union sympathies.

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<sup>18</sup> Also see, *Highland Regional Medical Center*, 347 NLRB 1404, 1406 (2006); *DeNite Sign Co.*, 356 NLRB 975 (2011). In this vein, when David Hardy told union business representative Richard Gooden that he was not into the union thing, that could mean merely that he was not interested in being a member, as opposed to not wanting the Union to represent him.

d. Illegally polling employees.

2. Respondent did not adequately disavow Clark's conduct in its October 18 message to unit employees. Thus, it was not entitled to rely on the employees' letters of November 2 in withdrawing recognition from the Union.

3. Respondent, by James Nixdorf, violated Section 8(a)(1) of the Act in telling unit employees that they must submit a statement that they no longer wished union representation as opposed to not wanting to be members of the Union.<sup>19</sup>

4. Respondent violated Sections 8(a)(5) and (1) by :

a. Withdrawing recognition of the Union on November 2, 2018.

b. Refusing to sign the collective bargaining agreement agreed to by Respondent and the Union on October 18, 2018.

c. Failing to abide by the terms of the agreement signed on October 18, 2018 by:

1. Ceasing to deduct and remit dues as required by the Agreement.

2. Granting a wage increase to John Brady.

### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent must make unit employees whole for any loss of earnings and other benefits suffered by its failure to execute and abide by the collective bargaining agreement, calculated in the manner set forth in *Ogle Protection Services*, 183 NLRB 682 (1970). It must also make the Union whole for any dues that it failed to deduct and transmit under the contract agreed to on October 18, 2018. Interest shall be computed in accordance with *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall also reimburse unit employees for any expenses ensuing from failure to make required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, fn. 2 (1980), with interest as computed above.

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<sup>19</sup> The complaint does not allege this violation by Nixdorf. However, it is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter and has been fully litigated. The evidence supporting a violation by Nixdorf was tried by consent in that it was introduced by Respondent, R. Exh. 7; Tr. 257-59, *Pergament United Sales*, 290 NLRB 333, 334 (1989) enfd. 920 F. 2d 130 (2d Cir. 1990); *Kankakee County Training Center for the Disabled*, 366 NLRB No. 181 (slip opinion at 3) (2018).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>20</sup>

### ORDER

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

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1. Cease and desist from

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- a. Soliciting employees to decertify the International Brotherhood of Electrical Workers (IBEW) Local Union 43.
- b. Interrogating employees about their attitude towards IBEW Local 43 or any other union.
- c. Polling employees about their union sympathies.
- d. Withdrawing recognition from International Brotherhood of Electrical Workers Local Union 43 and failing to recognize and bargain with the Union as the exclusive collective bargaining representative of the employees in the bargaining unit.
- e. Changing wages, benefits or other terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.
- f. Refusing to sign and abide by the collective bargaining agreement to which it agreed on October 18, 2018.
- g. In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act.

- a. Execute the collective bargaining agreement reached between the parties on October 18, 2018.
- b. On request of the Union, adhere to any or all of the terms and conditions set forth in the collective-bargaining agreement agreed to on October 18, 2018.
- c. Make unit employees whole, as set forth the remedy section herein, with interest, for any loss of earnings or other benefits they may have suffered

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<sup>20</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

because of Respondent’s refusal to sign and adhere to the collective bargaining agreement agreed to on October 18, 2018.

- 5 d. On request by the Union, rescind any changes in its unit employees' terms and conditions of employment that were unilaterally implemented since November 2, 2018.
- 10 e. Make the Union whole for any dues that it failed to deduct and transmit under the terms of the 2018-2021 collective bargaining agreement.
- 15 f. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- 20 g. Within 14 days after service by the Region, the Respondent shall duplicate and mail, at its own expense, a copy of the notice the attached notice marked “Appendix.”<sup>21</sup>to all current employees and former employees employed by the Respondent at any time since October 9, 2018.
- 25 h. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. June 17, 2019

*Arthur J. Amchan*

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Arthur J. Amchan  
Administrative Law Judge

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21 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

**APPENDIX**

**NOTICE TO EMPLOYEES**

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives 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** solicit or ask you to provide us with a statement that you do not wish to be represented by the International Brotherhood of Electrical Workers, Local Union 43 or any other union.

**WE WILL NOT** in any way ask you to divulge your attitude towards the International Brotherhood of Electrical Workers, Local Union 43 or any other union, either by interrogation or by polling.

**WE WILL NOT** withdraw recognition from the International Brotherhood of Electrical Workers, Local Union 43.

**WE WILL NOT** refuse to sign or refuse to abide by the collective bargaining agreement with the International Brotherhood of Electrical Workers, Local Union 43 that we agreed to on October 18, 2018 which is effective from June 11, 2018 to June 1, 2021.

**WE WILL NOT** unilaterally make any changes to your wages, benefits and other terms and conditions of employment.

**WE WILL NOT** in any like or related manner restrain or coerce you in the exercise of the rights guaranteed to you by Section 7 of the National Labor Relations Act.

**WE WILL** execute and abide by the collective bargaining agreement we reached with the International Brotherhood of Electrical Workers, Local Union 43 on October 18, 2018.

**WE WILL** on request of the International Brotherhood of Electrical Workers, Local Union 43 rescind any changes in the terms and conditions of bargaining unit employees that conflict with the collective bargaining agreement reached on October 18, 2018.

**WE WILL** make bargaining unit employees whole, with interest compounded daily, for the loss of any earnings and benefits they may have suffered by our failure to sign and abide by the collective bargaining agreement reached with the International Brotherhood of Electrical Workers, Local Union 43 on October 18, 2018.

**WE WILL** compensate in full International Brotherhood of Electrical Workers Local Union 43 for any dues that we failed to deduct and transmit as required by our 2018-2021 collective bargaining agreement with it.

**ADT, LLC, d/b/a ADT SECURITY SERVICES**

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

Niagara Center Building., 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2465  
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/03-CA-230714](http://www.nlrb.gov/case/03-CA-230714) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.