

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

ADT, LLC

Respondent

and

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCALS 46
AND 76**

Charging Party

CASE 19-CA-216379

**RESPONDENT'S REPLY BRIEF TO THE CHARGING PARTY'S AND GENERAL
COUNSEL'S ANSWERING BRIEFS TO RESPONDENT'S EXCEPTIONS**

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I. INTRODUCTION

Respondent ADT, LLC (“Respondent” or “ADT”), by its undersigned counsel and pursuant to Rule 102.46(e) of the Board’s Rules and Regulations, respectfully submits this Brief in Reply to the Charging Party’s and General Counsel’s Answering Briefs to Respondent’s Exceptions to the Decision of Administrative Law Judge (“ALJ”) John T. Giannopoulos.¹

The International Brotherhood of Electrical Workers, Locals 46 and 76’s (“Union” or Charging Party”) and General Counsel’s (“GC”) Answering Briefs attempt to confuse the analysis here through attacks on irrelevant straw men, misplaced logical steps, and emphasis on issues unrelated to ALJ’s two foundational conditional statements. If the Board finds either conditional statement invalid, then all rationale for the GC’s allegations disappears. In fact, neither statement enjoys the support of the undisputed facts or Board law. As a result, the Board should find merit in Respondent’s Exceptions and dismiss the General Counsel’s allegations.

II. THE GC DODGES THE DISPOSITIVE ISSUES BY ARGUING FOR AN ANALYTICAL APPROACH NOT IN DISPUTE.

The GC argues at length that the issue of protection controls the outcome where an employer imposes an adverse action for the same conduct alleged as Section 7 activity. (GC. 7–8). The argument flails at a straw man. Respondent agrees with this principle, and the ALJ applied it. (R. 3, 5; D.15:8–12). Why, then, does the GC insist upon tilting at windmills?

The issue of protection here is not as complicated as the Union and the GC make it appear. The ALJ’s argument for protection relied entirely on the validity of the following two propositions:

¹ References to the parties’ Briefs are identified by “R. ___” for Respondent’s Brief in Support, “U. ___” for the Union’s Answering Brief, and “GC. ___” for the GC’s Answering Brief. References to the Amended Complaint are identified by “Compl.” followed by paragraph number. References to the ALJ’s Decision are identified by “D.” followed by page number and line number.

1. If the alleged discriminatees' misconduct did not violate Washington state law, then their conduct also did not violate Respondent's No-Recording Policy (D.15:31–37; 16:42–43); and
2. If the alleged discriminatees' misconduct did not violate Respondent's No-Recording Policy, then their conduct enjoyed the protection of the Act (D.15:35–37; 16:41–44).

If the Board does not agree will *both* statements, then it must dismiss the GC's allegations.

III. THE PLAIN LANGUAGE OF RESPONDENT'S NO-RECORDING POLICY CONTRADICTS THE UNION'S AND THE GC'S ASSERTIONS REGARDING STATE LAW'S IMPACT.

The first diversionary tactic employed by the Union and the GC involves outright disengagement. Both parties continue to insist alleged discriminatees Cuff and Mansour did not technically violate state law by surreptitiously recording a meeting. (GC. 17–20; U. 10). Respondent's Exceptions 2 and 3, however, explain that *it does not matter* whether Cuff and Mansour technically violated state law. Respondent's No-Recording Policy simply does not state that an employee commits a violation only where a technical violation of state law occurs.² Instead, it explains that a consent requirement applies "in those states with laws preventing nonconsensual recording." (D.8:34–35). Washington maintains such a law. WASH. REV. CODE § 9.73.030. Thus, Respondent required Cuff and Mansour to obtain consent prior to recording other employees, *even if such a recording would not technically violate the law.*

In response, the Union and the GC provide only bald and conclusionary assertions. The Union states, "[t]hat [requirement of a technical violation] is literally how the Policy reads." (U. 9). The GC claims, "a violation of Respondent's No Recording policy is entirely predicated on a violation of State law." (GC. 21). Both parties are "literally" wrong. Neither can point to any

² Oddly, the GC suggests Respondent has not clearly articulated the work rule under which it discharged Cuff and Mansour. (G. 19). While Cuff and Mansour may have violated many rules, no party seriously questions that Respondent discharged them under its No-Recording Policy. The parties' collective briefs and the ALJ's Decision all analyze the No-Recording Policy throughout. The GC's argument in this regard thus reflects another unwarranted attempt at misdirection.

specific language in the No-Recording Policy that requires a technical violation of state law, nor does the record contain any evidence of Respondent applying such an interpretation.

The Union's strained slippery slope hypothetical provides the only attempt by either party to support their interpretations. (U. 9–10). That hypothetical, regarding an employee's off-duty attendance at a global warming conference, bears little resemblance to the property and business interests implicated by surreptitious recordings of a security provider's office meetings.

The language of Respondent's No-Recording Policy speaks for itself. The Union and the GC fail to engage with that language beyond conclusionary statements because no support for such analysis exists. As a result, the first conditional statement necessary to the finding of a violation fails. The breakdown of that logic provides an independently sufficient basis for dismissal.

IV. The Issue of Protection Does Not Solely Depend upon Violation or Compliance with Respondent's No Recording Policy.

The GC concedes, “[i]n each case where the Board has made that determination [that recordings were either protected or did not disqualify an employee from reinstatement], it has noted that the employer did not have a work rule prohibiting the disputed employee's conduct[.]” (GC. 16). This concession reveals two important considerations: (1) the GC acknowledges the Board has never found an employee's recording protected where it also violated a lawful rule against recordings; and (2) the GC, like the ALJ, relies on the proposition that employee conduct enjoys protection *unless* a lawful rule expressly forbids it.

The Board, in a case *quoted by the GC* (at GC 17) has directly rejected the latter principle. *Roadway Express*, 271 NLRB 1238, 1239 (1984) (“The presence or absence of a specific company rule is a factor in deciding whether an employee's conduct is protected by the Act, *but it is not the controlling factor*”) (emphasis added). Even more importantly, though, the ALJ's, GC's, and

Union’s rule-dependent approaches to the issue of protection not only contradict Board law, but also fail to engage in the fundamental balancing of interests required by the Act.

A. The Union and the GC Focus on a “Loss” of Protection, But Cuff and Mansour Never Engaged in Protected Activities in the First Place.

The Union and the GC, like the ALJ approach the issue of protection from the perspective of whether Cuff and Mansour *lost* the Act’s protection. (U. 8; GC. 15–19; D.13:28–15:10). In doing so, they draw analogies to employee outbursts under *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). (*Id.*). Their focus is misplaced. Instead, the Board should focus on whether Cuff and Mansour ever enjoyed the Act’s protection *in the first place*. That determination invokes a balancing of interests the Union and the GC appear unwilling to consider.

B. The Issue of Protection Requires a Balancing of Interests.

The Union and the GC accuse Respondent of arguing that a violation of its policies permits it to disregard Section 7 rights. (U. 11; GC 17). To the contrary, Respondent asserts that the Board’s inquiry requires a comparison of Section 7 interests to its legitimate property and business interests. That inquiry demonstrates a balance of interests very similar to the Board’s analysis in *The Boeing Company*, 365 NLRB No. 154 (2017) (“*Boeing*”). Consequently, the Act’s protection did not extend to Cuff and Mansour, and Respondent lawfully applied its concededly lawful rule.

1. The Section 7 Interests at Stake Here are Comparatively Slight.

The Union and the GC, despite their failures to balance interests explicitly, provided overviews of the Section 7 interests at stake through their arguments in favor of concert or Union activities. The GC, for example, asserts Cuff and Mansour engaged in Section 7 activities for two reasons: (1) the nature of the recorded meetings – and their captive audience status – confer “*de facto*” Section 7 status, or at least “infers a concerted objective[;]” and (2) the recordings ultimately made their way to the Union. (GC 9–13).

The GC’s first such argument (which lacks any citation to Board or other law) appears to draw heavily on the Board’s doctrine of “inherently concerted” activities. *Hoodview Vending Co.*, 362 NLRB 690 (2015). The Board has found “inherently concerted” employee conduct regarding certain “vital condition[s] of employment.” *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 n. 10 (2004). Such “vital” conditions include pay (*Trayco of S.C., Inc.*, 297 NLRB 630-634-34 (1990) *enf. denied mem.* 927 F.2d 597 (4th Cir. 1991)), work schedules (*Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995)), and job security (*Component Bar Products, Inc.*, 364 NLRB No. 140, slip op. at *1, n. 1).³

The Board, though, has never found the ability to surreptitiously record captive audience meetings a “vital” condition of employment justifying application of the “inherently concerted” doctrine. To the contrary, the *Boeing* Board ***explicitly found the Section 7 interests in such recordings “comparatively slight.”*** 365 NLRB No. 154, slip op. at *19. Moreover, the Board in *Alstate Maintenance*, 367 NLRB No. 68, slip op. at *7 (2019) confirmed that the context of a meeting does not automatically establish (or “infer,” in the GC’s terminology) protection.

The Union and the General Counsel also assert Section 7 interests related to the fact that the alleged discriminatees’ recordings ultimately reached the Union. In support, they rely upon the same inapposite cases utilized by the ALJ. First, they cite *Commerce Concrete Co., Inc.*, 197 NLRB 658 (1972), where a Trial Examiner merely inferred knowledge of union activities because the employer’s representatives saw the employees with the union at a representation case hearing. *Id.* at 659; (U 5; GC 10). Neither party, nor the Judge, has explained how this case about knowledge helps demonstrate any noteworthy Section 7 interests.

³ In *North West Rural Electric Cooperative*, 366 NLRB No. 132, slip op. at *1, n. 1 (2018), the Board refused to pass on the issue of whether safety constitutes an “inherently concerted” activity, and Member Emanuel expressed his view that the Board should reconsider the “inherently concerted” doctrine. Respondent agrees with Member Emanuel’s view.

Second, and again like the ALJ, the Union and the GC cite to *Great Dane Trailers*, 293 NLRB 384, 392 (1989), where the employer unlawfully surveilled an employee taking notes at a meeting. There, the Board itself did not discuss the “notes” allegation. That ALJ’s analysis of the allegation, though, explains:

[The employer] argued that if [its supervisors] watched employees taking notes at a meeting attended by all [of its] supervisory and hourly personnel [then the supervisors] were doing nothing more than lawfully observing open activity which occurred during working time on an employer’s premises. I would agree if [the employer’s] management personnel had confined themselves to employees taking notes. When [a supervisor] followed [an employee] on February 19 and when he attempted to read the notes . . . he went beyond an observation of open activity.

Id. at 391-92.

Illuminating though this allegation of *Great Dane* may be for surveillance cases, it sheds no light on the Section 7 interests implicated by surreptitious workplace recordings.

Thus, neither the Union, GC, nor ALJ have explained how Cuff and Mansour’s Section 7 interests in surreptitious recordings amount to anything more than comparatively slight interests. To the contrary, the Board must find the recordings implicated only “peripheral” Section 7 interests, as decided in *Boeing*. 365 NLRB No. 154, slip op. at *15 (see also *Flagstaff Medical Center*, 357 NLRB 659 (2011)).

2. Respondent’s Property Rights and Legitimate Business Interests Heavily Outweigh Any Section 7 Interests in Surreptitious Recordings.

The Union and the GC similarly fail to articulate cognizable reasons for their attacks on Respondent’s property and business interests. They assert no significant interests existed because no customers attended the recorded meetings, and because these particular meetings did not pertain to security issues. (U 9, 16; GC 13–14, 18). This argument, however, assumes Respondent’s interest in maintaining security fluctuates depending on the content of individual meetings.

Respondent's No-Recording Policy makes no distinctions between meeting content or any other particular workplace events. Indeed, such distinctions would not comport with Respondent's overall need for secure operations. As a security company, Respondent constantly handles sensitive security information. That reality does not wax and wane based on the content of meetings. One need not employ much imagination to conceive of an ill-intentioned individual recording sensitive information at Respondent's offices, including passcodes, technician repair and installation schedules, and technical system details. Even absent nefarious motives by the recorder, misplaced or digitally unsecure recordings could reach the wrong hands. Such concerns provide more than sufficient justification for Respondent to refuse to tolerate surreptitious in-office records. These represent common sense concerns. The failures of the Union and the GC to acknowledge those interests – regarding a company in the security business – strain credulity.

Instead, the GC baldly states there is, “no business justification that can justify Respondent's invasion of its employees' § 7 rights in light of the Act and its policy[.]” (GC 14). Its argument not only fails to diminish Respondent's legitimate interests, but even appears to disavow the Board's balancing test responsibilities. The Union, for its part, cites *G4s Secure Solutions, Inc.*, 364 NLRB No. 92, slip op. at *4 (2016). There, in the Union's words, “the employer argued its broad social media policy was justified by the nature of its business as a security provider.” (U. 15). The Board there, however, addressed only the employer's contention that its interests related to online disclosure of customer information. 364 NLRB No. 92, slip op. at *4. *G4s Secure Solutions'* examination of a social media policy in that context bears virtually no relationship to a No-Recording Policy that protects ADT's building security operations.

After noting that Boeing's no-camera rule “is an integral component of [its] security protocols,” the Board observed, “many of the reasons why Boeing restricts the use of camera-

enabled devices on its property provide a sobering reminder that we live in a dangerous world[.]” 365 NLRB No. 154, slip op. at **18–19. The Board could just as well have described ADT. In fact, while Boeing exists to manufacture aircrafts, ADT exists for the very purpose of protecting customers from that dangerous world. Thus, its strong interests in prohibiting surreptitious workplace recordings far outweigh the comparatively slight impact on Section 7 interests.

As a result, the Board should find Cuff and Mansour’s surreptitious recordings unprotected. Furthermore, the ALJ’s erroneous reliance on the premise that compliance with the No-Recording Policy equates to protection under the Act provides a second independently sufficient basis to dismiss the GC’s allegations.

V. **THE UNION AND THE GC MISCONCEIVE OF THE GOVERNMENT’S ROLE IN RESPONDENT’S MANAGEMENT OF ITS BUSINESS.**

Additionally, a common thread in the Union, GC, and ALJ’s arguments, and in particular the GC’s Answering Brief, requires particular note. Both with regard to Respondent’s interpretation of its own policy, and its evaluation of its own business interests, the GC advocates unacceptable government encroachment into private prerogatives.

For example, the GC argues that lawful management of its own No-Recording Policy required Respondent, “to research and find precedent contrary to how Washington has interpreted the statute on recordings and specifically defines a ‘private’ conversation.” (GC 19) (*see also* GC 20–21, 23). **The Act imposes no such obligation** for an employer to take these affirmative steps to apply its own policies. This philosophy disconcertingly threatens a “super human resources” approach. The GC essentially asks the Board to tell employers, “if you do not apply your policies in a manner we deem consistent with their terms, then we will find the underlying employee activities protected and any discipline imposed unlawful.” Such policing of employers’ adherence

to the strict terms of their policies departs completely from the Board's more limited role in enforcing the Act. The Board should not adopt such an overbroad view of its authority.⁴

VI. THE UNION AND THE GC ATTEMPT TO FURTHER MISDIRECT ATTENTION FROM THE TWO FLAWED CONDITIONAL STATEMENTS THROUGH FOCUS ON IRRELEVANT ISSUES.

The Union and the GC attempt to complete their misdirection through emphasis on a number of issues completely unrelated to the ALJ's two flawed conditional statements. For example, the GC repeatedly refers to Respondent as "selectively and discriminatorily" enforcing the No-Recording Policy. (GC 1, 7). The Complaint also contains similar language. Compl. Para. 5(b), 8. The record, however, provides no evidence of disparate treatment whatsoever.

The Union and the GC also continue to focus on another employee discharged for recording violations in New York, arguing that the ALJ properly addressed that issue for credibility purposes, even though the facts are otherwise not in dispute. (R. 2; U. 3-4; GC. 21-24). Credibility determinations are not necessary when the essential facts of a case or allegation are not in dispute. *Georgia Auto Pawn*, 365 NLRB No. 26, slip op. at *9, n. 8 (2017).

Other irrelevant or misplaced issues include: (1) the GC's emphasis on another employee's possession of mace, which it does not (and cannot credibly) argue as a comparable situation, but instead only categorizes as "interesting" or "bizarre" (GC 5, 21-22); the GC's argument regarding employee awareness of the No-Recording Policy, despite specific ALJ findings that Respondent trained Mansour on it, and that Cuff possessed access to it (and did access it) online (GC 6; D.9:9-16); another employees' promotion long after the events at issue (U 14; GC 18-19); and the

⁴ The GC criticizes Respondent because it does not believe Director of Labor Relations Nixdorf performed sufficient legal research on Washington state law, and because he is an attorney. (GC 20). Initially, as the ALJ noted, "[w]hile he is an attorney, Nixdorf's role as labor relations director is considered nonlegal." (D.2:27-28). Moreover, the GC's argument improperly suggests the Board should hold employers whose decision-makers include attorneys to a stricter standard.

Union's stunning contention that Board non-acquiescence to Court of Appeals decisions under *Iowa Beef Packers*, 144 NLRB 615, 616 (1963) no longer applies (U. 13). All of these misstatements of fact and law serve only to distract from the real issue: the failure of the ALJ's two foundational conditional statements, and the resulting lack of Section 7 protection.

VII. CONCLUSION

For these and all of the reasons discussed in Respondent's prior brief, the Board should grant Respondent's Exceptions and dismiss the Amended Complaint with prejudice.

Dated: September 17, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 17th day of September 2019, the foregoing, **RESPONDENT'S REPLY BRIEF TO THE CHARGING PARTY'S AND GENERAL COUNSEL'S ANSWERING BRIEFS TO RESPONDENT'S EXCEPTIONS**, was filed via electronic filing with:

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