

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 18**

ADT SECURITY SERVICES, INC.

and

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS LOCAL 347

Cases 18-CA-253853  
18-CA-255233  
18-CA-259314

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS LOCAL 347's BRIEF TO THE NATIONAL LABOR RELATIONS BOARD**

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## I. INTRODUCTION

ADT Security Services, Inc. (“ADT”) and the International Brotherhood of Electrical Workers, Local No. 347 (the “Union”) have been parties to successive collective bargaining agreements dating back to 2003. The collective bargaining agreement at issue—*Agreement Between ADT Security Services, Inc. (Des Moines, IA) and International Brotherhood of Electrical Workers Local 347 AFL-CIO Installation and Service Employees*—(referred to herein as the “CBA” or “Collective Bargaining Agreement”) was effective from September 1, 2017 to August 31, 2020. *GCX 2*. ADT is a nationwide security system company that specializes in security and fire systems. The Union represents a bargaining unit at ADT’s Des Moines, Iowa branch, comprising of “all full time installers and maintenance employees . . . at [the] Des Moines, IA service facility . . . .” *GCX 2, Art. 1, § 1*.

Despite this decades-long relationship, in or about 2019, ADT simply decided to no longer cooperate with the Union and began operating its business without regard to the Collective Bargaining Agreement it signed or the National Labor Relations Act (“Act”). Specifically, ADT decided to unilaterally alter the CBA by changing the amount of money it paid bargaining unit members who were unable to work due to a short-term disability. Additionally, ADT began stonewalling the Union with respect to various grievances and associated requests for information. Rather than resolving the Union’s concerns amicably, ADT simply disregarded the duly-agreed to grievance and arbitration procedures, forcing the Union to bring unfair labor practice charges, and consequently, this action from the General Counsel followed.

As demonstrated by the evidence presented at the hearing, and as argued below, ADT violated the Act in numerous respects by: (1) refusing to respond to the Union’s requests for information; (2) frustrating the grievance process articulated in the Collective Bargaining

Agreement; and (3) unilaterally modifying the short-term disability provision of the Collective Bargaining Agreement, which constitutes a mandatory subject of bargaining.

## **II. STATEMENT OF THE CASE**

On December 27, 2019, after failing to reach an amicable resolution with ADT, the Union filed its first charge, asserting that ADT violated Sections 8(a)(5) and 8(a)(1) of the Act by failing to provide information requested by the Union. *GCX I(a)*. Then, on January 27, 2019, the Union filed a second charge, asserting that ADT violated Sections 8(a)(5) and 8(a)(1) of the Act by frustrating the grievance process outlined in the CBA. *GCX I(c)*. The Union filed a third charge on April 17, 2019, asserting violations of Section 8(a)(5) of the Act because ADT unilaterally modified a mandatory subject of bargaining by refusing to pay full short-term disability amounts to at least three (3) bargaining unit members (referred to herein as the “STD Grievants”). *GCX I(e)*. Finally, on July 9, 2019, the Union amended its third charge to allege that ADT violated Section 8(d) by unilaterally modifying the Collective Bargaining Agreement’s provisions related to short-term disability. *GCX I(g)*. A Complaint accordingly issued on June 3, 2020. It was further consolidated on July 17, 2020 and modified on the record. *GCX I(i) & I(n)*. A hearing before the Honorable Administrative Law Judge Muhl was held on September 2 and 3, 2020.

## **III. STATEMENT OF ISSUES PRESENTED**

This case presents numerous issues, all of which must be resolved in favor of the General Counsel and the Union. The first issue is whether ADT violated the Act by refusing to respond to the Union’s requests for information. Next, the second issue is whether ADT violated the Act by frustrating the grievance process outlined in the Collective Bargaining Agreement. Finally, the third issue is whether ADT violated the Act by unilaterally modifying the short-term disability

provisions of the Collective Bargaining Agreement, which constitute mandatory subject of bargaining.

#### **IV. STATEMENT OF FACTS**

In late 2019, numerous disputes arose pertaining to the bargaining unit members' wages, hours, and terms and conditions of employment. ADT allowed a supervisor—Eric Patterson—to perform bargaining unit work. Additionally, ADT unilaterally modified the CBA in a manner that shortchanged three (3) bargaining unit members of their duly-entitled short-term disability wages. As the bargaining unit representative, the Union accordingly exercised its right to issue and process grievances and requests for information, as detailed below. However, ADT failed and refused to respond to the Union.

##### **A. Eric Patterson Bargaining Unit Work Grievance**

The CBA is clear as to who may perform bargaining unit work: “Supervisory employees shall not do work in order to deprive members of the bargaining unit of jobs regularly performed by such members.” *GCX 2, Art. 8*. Despite that clear prohibition, the Union believed in or about November 2019 that Eric Patterson, an ADT supervisor, was performing bargaining unit work, in contravention of the CBA and sought to investigate. Therefore, Assistant Business Manager Scott Farnsworth filed a grievance, objecting to Patterson performing bargaining unit work. *GCX 8(b)*.

Shortly thereafter, the Union, via Mr. Farnsworth, submitted a request for information (“RFI”) with respect to the Patterson grievance, requesting materials and information pertinent to Patterson’s activities. *GCX 9(d)*. On December 2, 2019, Tim Huffman—an ADT supervisor—requested that Mr. Farnsworth clarify what provisions of the CBA were allegedly violated, despite the grievance explicitly referencing the provision. *GCX 10*. Huffman, additionally stated that ADT “would be happy to provide any relevant information.” *Id.* In response to Mr. Huffman’s

December 2, 2020 email, Mr. Farnsworth wrote to Director of Labor Relations Jim Nixdorf on December 9, 2019 and provided the provision of the CBA that was violated and described in the Patterson grievance; Nixdorf responded that he would “get back with [Mr. Farnsworth] once the information was compiled.” *GCX 14(a)-(b)*.

But, by December 16, 2019, nothing had been provided to the Union, so Mr. Farnsworth again wrote Nixdorf, and stated as such, as well as demanded that ADT produce the requested information no later than December 27, 2019. *GCX 15(a)*.

After receiving no word on the Patterson grievance, Mr. Farnsworth moved the grievance to Step 3 on December 3, 2020. *GCX 11*. Again, ADT failed to respond to the Union, so the Union, via Mr. McClitis, moved it to arbitration on December 31, 2020, and requested a response no later than January 7, 2020. *GCX 17*. After it became apparent that ADT had no intention of responding, the Union, via Mr. McClitis, filed a Demand for Arbitration with the American Arbitration Association (“AAA”) for the Patterson Grievance. *GCX 18(b)*.

All the while, no information was produced, and on January 27, 2020, the Union, via Mr. McClitis again, wrote to ADT, objecting to the lack of response with respect to its grievances and requests for information. *GCX 21*. Mr. McClitis also demanded that ADT identify the person who would conduct striking of the Patterson arbitration panel. *Id.* Nearly a week passed before Moritz responded, and requested—even though it was previously sent—the panel for the Patterson arbitration. *GCX 22(a)*. Further delaying the process, Moritz stated ADT would need at least three (3) days to prepare for the striking. *Id.*

After hearing nothing from ADT again, Mr. McClitis reached out to Moritz and requested to schedule a date to strike arbitrators for the Patterson grievance; he also advised that the Union had received nothing with respect to the request for information. *GCX 23*. To date, the Patterson

grievance has not been arbitrated, and the Union has received none of the information it requested. Collectively, over the course of four (4) months, the Union sent at least nine (9) communications to ADT regarding the grievance and information requested, and ADT failed to provide any response other than empty assurances that it would respond and scheduling a time to strike arbitrators.

**B. The Short-Term Disability Grievances**

The Collective Bargaining Agreement, which went into effect on September 1, 2017, states that bargaining unit members are entitled to various benefits that are duly negotiated and agreed to between their collective bargaining representative and their employer. Specifically, Article 17, Section 3 entitles bargaining unit members to short-term disability wages, should they be unable to work due to a non-workplace injury or illness. *GCX 2, Art. 17, Sec. 3*. The amount of benefits a bargaining unit member receives is dependent upon tenure:

<b>If Your Length of Service Is:</b>	<b>You Receive 100% of Pay For:</b>	<b>And Then 66% of Pay For:</b>
90 days but less than 2 years	0 weeks	25 weeks
2 years but less than 5 years	10 weeks	15 weeks
5 years but less than 10 years	15 weeks	10 weeks
10 years but less than 15 years	20 weeks	5 weeks
15 years or more	25 weeks	5 weeks

*Id.* Based on the chart in Article 17, Section 3, a bargaining unit member is entitled to 100% pay for a certain number of weeks, followed by 66% pay for a certain number of weeks, depending on his or her tenure. *Id.*

Here, three (3) bargaining unit members, Terry Muhlstein, Anthony Weibelhaus and Don Nelsen (the “STD Grievants”), filed grievances via the Union, as they are attempting to collect

their short-term disability wages, in accordance with the CBA, but ADT paid each of them merely a fraction of what they were each entitled.

1. Terry Muhlstein

Terry Muhlstein became a full-time bargaining unit employee on or about April 15, 2014. On or about April 19, 2019, Terry Muhlstein became temporarily disabled.<sup>1</sup> Accordingly, he applied for short term disability benefits in or about November 2019, pursuant to Article 17, Section 3 of the CBA. Per the Collective Bargaining Agreement, Mr. Muhlstein was entitled to fifteen (15) weeks of full pay, and then ten (10) weeks at sixty-six percent (66%) pay. Despite the clear language of Article 17, Section 3, Mr. Muhlstein did not receive his short-term disability pay for nearly eight (8) weeks, and he only received sixty percent (60%) of his pay. *GCX 5*. Accordingly, Mr. Muhlstein filed a grievance. *See id.*

However, even though multiple ADT personnel told<sup>2</sup> Mr. Muhlstein he would receive the full benefit contemplated by Article 17, Section 3, he never received the full wages due to him. Because of this, Mr. Farnsworth moved the grievance to Step 2 on November 11, 2019. *GCX 6 (a)-(d)*. That same day, Huffman responded to Mr. Farnsworth, and stated that Mr. Muhlstein's grievance had been resolved in Step 1; however, Mr. Farnsworth responded and asked whether Mr. Muhlstein had been paid the full amount provided by Article 17, Section 3, as represented to Mr. Muhlstein by ADT personnel. *GCX 7(a)*. Until that occurred, Mr. Farnsworth advised that the grievance would not be withdrawn. *Id.*

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<sup>1</sup> Mr. Muhlstein apparently became temporarily disabled shortly after he began working as an ADT bargaining unit member, though he never notified the Union of this. It was not until the hearing that the Union learned of Mr. Muhlstein's previous temporary disability.

<sup>2</sup> Indeed, Leslie Tatum testified that Mr. Muhlstein was to receive 100% of his pay because ADT reviewed the STD Policy and the CBA and determined the CBA controlled over the policy. *See also CP Ex. 88.*

Then, on November 12, 2019, Tim Huffman changed his position and stated that Mr. Muhlstein was properly paid in accordance with benefits changes announced on October 31, 2016, despite the CBA at issue going into effect *after* the brochure and spreadsheet on September 1, 2017. *GCX 7(b)*. The October 31, 2016 spreadsheet referenced by Huffman was attached to a curt email to various IBEW bargaining units, referencing vague “benefit and carrier changes,” without noting the CBA provisions it sought to alter. *Id.* Mr. Farnsworth pointed this out on November 18, 2019, and moved Mr. Muhlstein’s grievance to Step 3, as the CBA was in full force and effect at the time Muhlstein was temporarily disabled. *GCX 7(d)*.

On November 25, 2019, in an effort to process Mr. Muhlstein’s grievance, the Union via Mr. Farnsworth, issued a request for information, seeking various documents and information pertaining to ADT’s decision to unilaterally modify the CBA and only pay Mr. Muhlstein 60% of his pay. *GCX 9(a)*. On or about December 2, 2019 Huffman, in response to the request for information, stated that ADT “would be happy to provide the relevant information.” *GCX 10*. Then on December 16, 2019, still without the requested information, Mr. Farnsworth wrote to Nixdorf and demanded production of the requested information no later than December 27, 2019. *GCX 15(a)*.

ADT again failed to respond to the grievance in Step 3, so on December 6, 2019, Mr. McClitis, on behalf of the Union, moved Mr. Muhlstein’s grievance to arbitration, suggested using the same arbitrator as selected in the Nelsen termination arbitration, and asked ADT to respond no later than December 13, 2019. *GCX 13*. On December 18, 2019, after failing to reach a resolution in its previous attempts to process the grievance, the Union, via Mr. McClitis, filed a Demand for Arbitration with the AAA for the Muhlstein grievance. *GCX 16(b)*. The Union then forwarded the Demand for Arbitration to Nixdorf, but Nixdorf responded that the grievance was not subject

to arbitration pursuant to Article 10 of the CBA because the grievance “directly and/or indirectly involve[d] the interpretation of the disability plan.” *GCX 16(a)*.

On January 3, 2020, the Union received, and Mr. McClitis sent, the panel for striking arbitrators in the Muhlstein grievance to Nixdorf. *GCX 19(a)*. Mr. McClitis also requested that ADT clarify its position on arbitrability for the Muhlstein grievance. *Id.* But no response was received by the stated January 7, 2020 deadline. It wasn’t until February 2, 2020 that Moritz responded and asserted that the Short-Term Disability grievances were not arbitrable. *GCX 22(a)*.

All the while, ADT continued to stonewall the Union on its requests for information, so on January 27, 2020, Mr. McClitis wrote to Nixdorf, objecting to ADT’s lack of response to the grievances and requests for information. *GCX 21*. Mr. McClitis again asked for clarity as to ADT’s position on February 24, 2020 as the grievances did not pertain to the administration of fringe benefit plans, but rather distinct benefits provided to bargaining unit members in the collective bargaining agreement, and ADT’s counsel stated that they would answer the union’s inquiries. *GCX 23*. However, that never happened; as of March 9, 2020, the Union still had not received any information requested in its February 24, 2020 communication. *GCX 24*. To date, no information has been produced, and Mr. Muhlstein’s grievance remains unresolved. Collectively, the Union sent at least fourteen (14) communications to ADT regarding the grievance and information requested, and ADT failed, over the course of four (4) months, to provide any response other than empty assurances that it would respond and empty arguments regarding the arbitrability of Mr. Muhlstein’s grievance.

## 2. Anthony Weibelhaus and Don Nelsen

In or about December 1998, Anthony Weibelhaus became a full-time bargaining unit employee. On or about October 20, 2019, Mr. Weibelhaus became temporarily disabled, and he

subsequently applied for short-term disability on or about October 30, 2019. Given his tenure, Mr. Weibelhaus was entitled to twenty-five (25) weeks at 100% pay, and then five (5) weeks at sixty-six (66%) pay, per the Collective Bargaining Agreement. However, Mr. Weibelhaus was paid merely a fraction of what the CBA called for, as he only received sixty percent (60%) of his pay. He also did not receive his short-term disability wages in a timely manner, as they were not paid until December 20, 2019, nearly two (2) months after his disability began. Then, while investigating Mr. Muhlstein and Mr. Weibelhaus's short-term disability grievances, the Union learned that ADT also shorted Don Nelsen when he was unable to work due to an injury or illness.

Accordingly, on November 19, 2019, Mr. Farnsworth filed Mr. Weibelhaus's and Mr. Nelsen's grievances. *GCX 8(c)-(d)*. After receiving no response from ADT, Mr. Farnsworth moved the Weibelhaus and Nelsen grievances to Step 2 on November 25, 2019. *GCX 8(a)*.

That same day, Mr. Farnsworth issued two requests for information, seeking various documents and information pertaining to the decision to only pay Mr. Weibelhaus and Mr. Nelsen sixty percent (60%) of their pay in contravention of the CBA. *GCX 9(b)-(c)*. On December 2, Huffman responded to the Union and assured that ADT "would be happy to provide any relevant information." *GCX 10*. Despite the fact that the information was clearly relevant to the Union's duties to represent the bargaining unit, ADT refused to produce any information. The next day, on December 3, 2019, Mr. Farnsworth issued another request for information that sought documents pertaining to Mr. Nelsen's grievance, such as Mr. Nelsen's paystubs, in order to "allow [the Union] to effectively represent the bargaining unit." *GCX 12*.

Then, also on December 3, 2019, after no response from ADT, Mr. Farnsworth moved Mr. Weibelhaus's and Mr. Nelsen's grievances to Step 3. *GCX 11*. Again after no response, the Union moved the grievances to arbitration on December 31, 2019, and the grievances were amended to

reflect that Mr. Weibelhaus and Mr. Nelsen were only paid sixty percent (60%), rather than sixty-six percent (66%), of their pay, due to ADT unilaterally altering the CBA. *GCX 17*. Given that ADT contended that Mr. Muhlstein's short-term disability grievance was not arbitrable, the Union also requested ADT provide clarification on whether these two grievances would be arbitrable. *Id.*

On January 3, 2020, Mr. McClitis renewed the Union's request that Nixdorf clarify its stance on arbitrating the short-term disability grievances. *GCX 19(a)*. ADT was radio silent. So, on January 27, 2020, Mr. McClitis wrote to Nixdorf, objecting to the lack of response to its grievances and RFIs. *GCX 21*. Mr. McClitis requested ADT's position with respect to the short-term disability grievances, as well because ADT refused to strike a panel for the Muhlstein arbitration. *Id.* Nearly a week later, Moritz responded, stating that the short-term disability grievances were not arbitrable. *GCX 22(a)*.

On February 24, 2020, Mr. McClitis wrote to Moritz regarding ADT's position on the arbitrability of the short-term disability grievances, and Moritz stated ADT would answer the union's inquiries. *GCX 23*. Mr. McClitis also stated the Union was still waiting for responses to its requests for information, including the request for information pertaining to Mr. Weibelhaus's and Mr. Nelsen's grievances. *Id.* But, again, hearing nothing, Mr. McClitis was forced to follow-up on March 9, 2020. *GCX 24*. To date, no information has been produced, and Mr. Weibelhaus's grievance remains unresolved. Collectively, the Union sent at least thirteen (13) communications to ADT regarding the grievance and information requested, and ADT failed to provide any response other than empty assurances that it would respond and empty arguments regarding the arbitrability of the grievances over the course of four (4) months.

## V. ARGUMENT

Overall, the hearing evidence abundantly demonstrated that ADT repeatedly violated the Act by: (1) refusing to properly respond to the Union’s requests for information; (2) frustrating the duly-agreed to grievance procedures; and (3) unilaterally modifying a mandatory subject of bargaining—and a term of the CBA—by refusing to pay the STD Grievants. Accordingly, an order must issue that rectifies these violations to the fullest extent of the law.

### A. ADT Violated the Act by Refusing to Respond to the Union’s Requests for Information.

ADT plainly violated the Act through its near blanket refusal to respond to the Union’s requests for information.

#### 1. Applicable Law and Applicable Requests

“Section 8(a)(5) of the Act imposes on an employer ‘the duty to bargain collectively’ which includes a duty to supply a union with requested information that will enable it to ‘negotiate effectively and perform its duties as bargaining representative.’” *Hamilton Park Health Care Ctr.*, 365 NLRB No. 117 (2017) (quoting *New York & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011)). With respect to Section 8(a)(5), the employer must provide the union with the information it needs to properly perform its duties as the collective bargaining representative. *Ohio Power Co.*, 216 NLRB No. 177, 991 (1975). “This duty extends beyond the period of contract negotiations and applies to labor-management relations during the term of a collective-bargaining agreement.” *Ohio Power Co.*, 216 NLRB No. 177, 991 (1975).

“The required showing is subject to a liberal, ‘discovery-type standard’ and is not an exceptionally heavy one.” *YP Adver. & Publ’g*, 366 NLRB No. 89 (2018). Thus, “Section 8(a)(5) requires an employer to furnish the union representing its employees with information that is relevant to the union in the performance of its collective bargaining duties including . . . its

grievance-processing duties.” *YP Adver. & Publ’g*, 366 NLRB No. 89 (2018). Essentially, a union is entitled to any information that is even potentially relevant to processing its grievances. *Grand Rapids Press*, 331 NLRB No. 43, 299 (2000).

Indeed, where a request for information pertains to “information concerning names, addresses, telephone numbers, as well as wages, hours worked, and other terms and conditions of employment of unit employees,” the request is presumptively relevant. *Bryant & Stratton Bus. Inst.*, 323 NLRB at 410. Stated differently, where the request pertains to employees in the bargaining unit, such information is presumptively relevant. *El Du Pont De Nemours & Co.*, 366 NLRB No. 178. Consequently, employers must produce presumptively relevant information. *See Bryant & Stratton Bus. Inst.*, 323 NLRB at 410.

Here, the Union issued five (5) requests for information. *GCXs 9(a)-(d) & 12*. These requests were all presumptively relevant; four (4) pertained to short-term disability wages (*GCXs 9(a)-(c) & 12*), and one (1) pertained to a supervisor performing bargaining unit work (*GCX 9(d)*). Obviously, this information all pertained to the bargaining unit. Information pertaining to the STD Grievants’ short-term disability pay indisputably pertains to their wages such that the information requested is presumptively relevant. Finally, information pertaining to the bargaining unit clearly allows the Union to evaluate the grievances with respect to the bargaining unit such that the information is presumptively relevant. Even under the liberal discovery standard used to evaluate requests for information, it is readily apparent that the information requests pertained to presumptively relevant subjects, and ADT was required by the Act to provide the information in a timely manner.

2. ADT refused to adequately respond to the Union’s requests.

When responding to a request for information, “[w]hat is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow.” *In re West Penn Power Co.*, 339 NLRB No. 77, 587 (2003) (quoting *Good Life Beverage Co.*, 312 NLRB 1060, 1062 n.9 (1993)). “Generally, an employer has to either provide the information or explain its reasons for noncompliance.” *YP Adver. & Publ’g*, 366 NLRB No. 89 (2018). Indeed, where an employer refuses to provide information, it violates Section 8(a)(5) of the Act. *Grand Rapids Press*, 331 NLRB No. 43, 299 (2000).

Despite this clear obligation, and despite their assurances, ADT provided the Union practically nothing.<sup>3</sup> While Nixdorf admitted during the hearing that ADT has an obligation to respond to the Union’s requests and despite repeated assurances that ADT would produce the information requested, ADT never conferred with the Union about any issues with the requests. It simply ignored the requests,<sup>4</sup> in violation of the Act and at the detriment of the Union’s representational duties. It is also telling that Nixdorf refused to answer if ADT had a directive instructing supervisors and employees not to respond to the Union’s requests. Such a “non-answer” strongly suggests that ADT engaged in a strategy to starve the Union of information. ADT’s failure to simply respond to the Union consequently constitutes a violation of Section 8(a)(5) that must be remedied.

3. ADT’s defenses for failing to produce the requested information are laughable.

ADT asserted various, poorly-timed defenses at the hearing to justify its failures, but all of the stated defenses lack merit. In order to raise a valid objection to a request for information, the

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<sup>3</sup> To the extent ADT argues it partially responded to the Nelsen short-term disability grievance, this is factually incorrect. ADT relies on an exchange that predates the short-term disability grievance, in which ADT provided the Union an incomplete personnel file in response to Mr. Nelsen’s termination grievance. *CP Ex. 98*. Thus, this misleading argument should be rejected, as it is clear that ADT never responded to the requests at issue in this matter.

<sup>4</sup> The only materials ADT ever provided in response to the Union’s requests was an incomplete list of ADT employees.

Act requires that an employer raise, at the time of the request, any objections with complying with the request. *See Gruma Corp.*, 345 NLRB 788, 789 (2005). But in this instance, ADT *never* raised its concerns with the Union, and therefore, the defenses it belatedly raised at the hearing must fail. Even if, *arguendo*, the defenses raised at the hearing were considered, they also fail based on the factual circumstances and clear Board precedent.

a. *First Objection: Holiday Season*

First, ADT seems to suggest that since the requests for information were issued around the Thanksgiving and Christmas holidays, they should simply be excused from complying. This argument is ludicrous. The Board has stated that “[i]f an employer has a legitimate claim that a request for information is unduly burdensome or overbroad, it must articulate those concerns to the union and make a timely offer to cooperate with the union to reach a mutually acceptable accommodation.” *YP Adver. & Publ’g*, 366 NLRB No. 89 (2018). Indeed, Christmas holidays are no exception; the Board has previously found that where a company’s delay in responding to a request for information was—in part—due to the Christmas holiday, the employer failed to provide a legitimate explanation for a delay in responding to a request for information, such that the company violated the Act. *See Conn. Inst. For the Blind, Inc.*, 360 NLRB No. 55, 401 (2014).

Here, ADT is a massive company, with branches across the country. To suggest that five (5) requests for information were unduly burdensome because they were issued within the six (6) weeks comprising the holiday season is simply nonsensical. This is also not a case where a union was quick to file charges. Instead, the Union continually pushed back deadlines to respond in an effort to avoid filing charges, with no success. *See GCX 15(a)*. Accordingly, it cannot be said that the fact that the RFIs were issued around the holidays constitutes a justifiable excuse for ADT’s

noncompliance and quite frankly, its complete lack of a response to the information requests. This defense must fail.

b. *Second Objection: Pre-Arbitration Discovery*

Next, ADT attempts to characterize the requests for information as impermissible pre-arbitration discovery, but clear Board precedent refutes this ill-timed objection. “It has been held numerous times that the duty to supply information extends to a request for material to prepare a grievance for arbitration.” *Chesapeake & Potomac Tele. Co.*, 259 NLRB No. 30, 227 (1981). While prearbitration discovery is not permitted in terms of collecting information pertaining to litigation strategy and preparation, the Board has routinely found that “substantive information pertaining to the issues at arbitration . . . must be produced.” *Hamilton Park Health Care Ctr.*, 365 NLRB No. 117 (2017) (holding that the union’s request for information was relevant to the issues before the arbitrator, that the request for information did not seek information about the parties’ presentation of its case, and that the parties were in the preliminary stages of arbitration, such that the company was required to produce the requested information). Indeed, “[t]he existence or utilization of a grievance-arbitration clause does not relieve an employer of its duty to furnish a union with information needed to perform its statutory functions.” *Sinclair Refining Co.*, 145 NLRB No. 68, 733 (1961). Thus, “[t]he union is entitled to the information in order to determine whether it should exercise its representative function in the pending matter, that is, whether the information will warrant further processing of the grievance or bargaining about the disputed matter.” *Ohio Power Co.*, 216 NLRB No. 177, 991 (1975).

Here, all of the requests for information were issued prior to any mention of arbitration. Thus, it is nonsensical that the requests could remotely constitute impermissible pre-arbitration discovery. Even so, the contents of the requests demonstrate they sought substantive information,

rather than information related to arbitration strategy. For instance, the short-term disability requests simply pertain to documents addressing the amount of money the STD Grievants received, documents pertaining to processing and paying the STD Grievants' short-term disability wages, and other related materials. *GCXs 9(a)-(c) & 12*. These materials are clearly substantive, as they pertain to the actual facts of the grievance, and therefore, do not constitute pre-arbitration discovery. Similarly, the request pertaining to Mr. Patterson performing bargaining unit work sought materials related to jobs he had completed, which constitute substantive materials and not pre-arbitration discovery.

This is simply another one of ADT's attempts to evade its obligations under the Act. This conduct cannot be condoned. ADT's untimely objection that the RFIs constituted pre-arbitration discovery is simply meritless and must be rejected.

*c. Third Objection: Multiple Requests*

Finally, ADT seems to suggest that the number of requests submitted by the Union allows it to simply not respond. This suggestion cannot be farther from the truth. The Board has held that "[t]he fact that a union may ask an employer for a large volume of information does not, by itself, render that request 'overbroad' so as to relieve the employer from the duty to provide that information where, as here, the information is relevant and necessary to the union's performance of its bargaining duties." *Pulaski Constr. Co.*, 345 NLRB No. 66, 937 (2005). Additionally, it is the employer's obligation to timely raise an objection that the requests are unduly burdensome and substantiate the objection. *Id.* (holding that the employer failed to substantiate its undue burden defense because it did not show the time, expense, or resources it would need to expend to comply with the request).

Here, the Union submitted five (5) requests over several weeks. At no time did ADT respond to the Union that the number of requests was burdensome. At no time did ADT request additional time to comply with the requests for information; indeed, the Union continually extended response deadlines.<sup>5</sup> *See GCX 15(a)*. Despite Jim Nixdorf testifying that the Union has a right to request information from ADT, Nixdorf and ADT simply ignored the RFIs in violation of the Act. Thus, their ill-timed objection at the hearing cannot stand, and an order should issue, directing ADT to disclose the requested information immediately.

**B. ADT Further Violated the Act by Frustrating the Grievance Process.**

In addition to violating the Act by refusing to respond to the Union's requests for information, ADT's refused to engage in the grievance process in violation of the Act. Their stonewalling tactics with respect to requests for information further frustrated the grievance process in violation of the Act.

1. Applicable Law and Applicable Grievances.

Section 8(a)(5) of the Act mandates that employers must bargain collectively in good faith with the representative chosen by a majority of its employees. *Riverside Cement Co.*, 305 NLRB 815, 818 (1991). This obligation includes the duty to meet and confer over grievances concerning the terms and conditions of employment. *Storall Mfg. Co.*, 275 NLRB 220 (1985). Section 8(d) further obligates an employer to meet with the collective bargaining representative to discuss its grievances and to do so in a sincere effort to resolve them. *Hoffman Air & Filtration Sys.*, 316

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<sup>5</sup> Notably, the Union is not necessarily in control of the timing of grievances as they are often in response to ADT actions. Here, the Union learned of potential violations of the Act and responded in due course. ADT has not at any point suggested the grievances were frivolous or harassing --- instead, ADT made a conscious choice to ignore the Union's information requests and be subject to the Complaints in this matter.

NLRB 353, 356 (1995), *enfd.* 786 F.2d 1169 (8th Cir. 1986). This obligation is broad enough to include individual grievances. *Id.*

Thus, conduct that frustrates the intended operation of the grievance procedure violates the obligation set forth under Section 8(d) of the Act. *See In re Contract Carriers Corp.*, 339 NLRB 851, 852 (2008); *see also Riverside Cement Co.*, 305 NLRB 815, 820 (1991) (finding that employer's refusal to meet and discuss the grievance was part of an unlawful strategy to avoid its obligation to bargain with the Union).

2. ADT refused to provide requested information, in order to prevent the Union from processing its grievances.

ADT failed to timely provide information connected to the grievances in an effort to further frustrate the grievance process. Employers violate the Act by failing to respond to request in a manner that frustrates the processing of grievances. *See Nat'l Broad. Co., Inc.*, 352 NLRB No. 15, 100 (2008) (holding that "one of the functions of arbitration procedures, is to permit the union the opportunity to evaluate the merits of the grievance, at whatever stage, and perhaps withdraw it if necessary, once it received the information."); *see also YP Adver. & Publ'g*, 366 NLRB No. 89 (2018) ("Section 8(a)(5) requires an employer to furnish the union representing its employees with information that is relevant to the union in the performance of its collective bargaining duties including . . . its grievance-processing duties.") Where an employer "obstructed the [grievance] process by failing to produce the written information requested by the Union and necessary for it to prepare to argue the merits of the grievance," the employer was found to have frustrated the grievance process in violation of the Act. *Majestic Towers, Inc.*, 353 NLRB No. 29, 313-14 (2008).

Here, particularly with respect to the short-term disability wage grievances, ADT has unreasonably delayed—or outright refused to—provide information to the Union in an effort to

frustrate the grievance process. By failing to provide the requested information, ADT hamstrung the Union, such that it was unable to effectively evaluate whether its grievances were meritorious. It is nonsensical that the short-term disability grievances could be arbitrated without any information provided, as ADT inserted the issue of documents into these grievances; Nixdorf continually referenced the Short-Term Disability Policies related to both the merits of the grievance *and* its arbitrability, but at the same time, refused to submit them to the Union so that it could evaluate the merits of the grievances and arbitrability. *GCX 16(a)*. ADT simply cannot have it both ways.

3. ADT unreasonably delayed the grievances.

It is clear that ADT engaged in a strategy to ignore the Union's grievances so as to frustrate the ability to engage in the collective bargaining process. Here, the CBA expressly states that "[i]n the event that an agreement cannot be reached between the Union and the Employer, with respect to a grievance involving and limited to the interpretation and application of any specific provision of this Agreement, it may be submitted at the request of either party, to arbitration . . . ." *GCX 2, Art. 4, Section 1*. ADT simply refused to engage with the Union on several occasions, forcing the Union to escalate the grievances. *See GCX 8(a)*. For instance, with respect to the short-term disability grievances, ADT failed to respond to Step 1 of the grievance procedure, and once it did, ADT only responded with curt and vague defenses.<sup>6</sup>

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<sup>6</sup> Despite the Union moving for arbitration with respect to Article 17, Section 3, ADT has continually relied upon Article 4, Section 2, in attempt to evade arbitration and frustrate the grievance process. The clear language in Section 2 does not remotely indicate that Article 17, Section 3 is exempted from arbitration, which demonstrates this empty offer to arbitrate the arbitrability of the short-term disability grievances cannot cure ADT of its misdeeds. Indeed, this offer is just an extension of ADT's strategy to frustrate the grievance process in order to weaken the bargaining strength of the Union. Such dubious tactics should not be rewarded.

Thus, it is clear that ADT has frustrated the grievance and arbitration process in violation of the Act, and an Order should issue, mandating that ADT turn over the requested information and properly process the grievances in accordance with the CBA.

**C. ADT Violated Sections 8(d) and 8(a)(5) and (1) by Unilaterally Altering the STD Grievants' Short-Term Disability Wages.**

An employer violates Section 8(d) and 8(a)(5) by altering any term of a collective bargaining agreement governing a mandatory subject of bargaining without obtaining the consent of the union. *St. Vincent Hosp.*, 320 NLRB 42 (1995) (employees must receive union consent to change contract terms). Here, ADT violated both Sections 8(d) and 8(a)(5) by failing and refusing to pay the STD Grievants in accordance with Article 17, Section 3 of the CBA.

1. ADT Violated Section 8(d) by Unilaterally Modifying the Collective Bargaining Agreement.

The evidence clearly demonstrates that ADT violated Section 8(d) of the Act because their unilateral alteration of Article 17, Section 3 was wholly irrational and not rooted in a sound arguable basis.

a. *ADT Violated Article 17, Section 3 of the Collective Bargaining Agreement.*

It is axiomatic that “parties are entitled to the benefit of their bargain based on the language they agreed to include in their contract.” *MV Transp., Inc.*, 368 NLRB No. 66 (2019). Accordingly, “Section 8(d) preserves the status quo as to subjects covered by the [collective bargaining] agreement.” *Jones Dairy Farm*, 295 NLRB No. 20, 115 (1989). The Board has held that “Section 8(d) makes clear that one party may not change the terms and conditions of employment set forth in a collective-bargaining agreement during the term of the contract without the consent of the other party.” *Transp. Servs. of St. John, Inc.*, 369 NLRB No. 15 (2020). Thus, the Board has consistently found an employer’s mid-term modification of a fixed term contract to

be unlawful. *See Hosp. San Carlos Borromeo*, 355 NLRB 153 (2010) (finding employer did not have a sound arguable basis for its interpretation that the contract did not require it pay the full amount of a Christmas bonus owed to employees).

It has long been recognized that temporary disability programs constitute mandatory subject of bargaining. *Jones Dairy Farm*, 295 NLRB No. 20, 115 (1989). Previously, the Board has noted that benefits—such as health, pension, and sickness and accident benefits—constituted mandatory subjects of bargaining. *Whitesell Corp.*, 357 NLRB No. 92, 1182 (2011). Importantly, the Board noted that unilateral changes in wages, pay structure, and eligibility for disability benefits constitutes a “straight-forward violation[] of duties prescribed by Section 8(d) of the Act. . . .” *Spectrum Health-Kent Cnty. Campus*, 353 NLRB 996, 1005 (2009).

Here, with respect to the STD Grievants, ADT refused to comply with the provisions of the Collective Bargaining Agreement, and instead paid the STD Grievants merely a fraction of their base pay. Short-term disability wages described in the CBA constitute wages, such that they are a mandatory subject of bargaining under Section 8(d) of the Act. Thus, ADT had a legal obligation to refrain from altering the benefits during the life of the CBA.

Per Article 17, Section 3, each bargaining unit member, while temporarily disabled, is entitled to at least a certain number of weeks of full pay, and then a certain amount of weeks at sixty-six percent (66%) pay, depending on his or her tenure. *GCX 2, Art. 17, Sec. 3*. But ADT failed to honor this obligation; rather than paying the short-term disability wages based on the criteria outlined in the CBA, ADT simply ignored this provision. ADT tried to unilaterally substitute a fringe benefit plan for terms that the bargaining unit duly negotiated and agreed to. ADT accordingly only paid the STD Grievants sixty percent (60%) of the wages due to them under Article 17, Section 3 of the CBA, and for many—if not all—of the STD Grievants, ADT failed to

pay these wages in the timeframe contemplated by the CBA. ADT never notified, let alone bargained with, the Union about these changes. Thus, ADT unilaterally altered this mandatory subject of bargaining in violation of Section 8(d).

b. *ADT's Actions Were Not Rooted in a Sound Arguable Basis.*

Even more, the CBA's language provides no sound arguable basis for ADT's actions. In cases of this type, the Board may not find a violation if "an employer has a 'sound arguable basis' for its interpretation of a contract and is not 'motivated by animus or . . . acting in bad faith.'" *NCR Corp.*, 271 NLRB 1212, 1213 (1984) (quoting *Vickers, Inc.*, 153 NLRB 561, 570 (1965)). ADT's mid-term modification of Article 17, Section 3 was plainly not rooted in a sound arguable basis because: (1) the factual timeline shows that the CBA invalidated any prior benefit changes; and (2) standard, well-established canons of construction demonstrate that ADT's position regarding its unilateral authority is wholly illogical.

i. *The Factual Timeline Demonstrates that ADT's Argument is Illogical.*

First, ADT's argument ignores the clear timeline of the facts, highlighting the absurdity of its position. Specifically, the brochure and spreadsheet on which ADT relies in an attempt to demonstrate a sound arguable basis occurred *prior* to the CBA's ratification. During the course of the bargaining relationship, ADT sent only a brochure and a spreadsheet with purported "changes," separated by several years, and the changes were buried in documents. One came in 2013, and simply provided a benefits brochure; it said nothing about what—if anything—changed. *R. Ex. 6*. Then, ADT only provided a spreadsheet to the Union of "benefit and carrier changes" on October 31, 2016; this spreadsheet did not even include the policy or plan, or state what provisions of the CBA were impacted. *GCX 7(b)*. Importantly, Jim Nixdorf admitted during the

testimony that ADT has never since provided the Union with any other alterations to fringe benefit plans.<sup>7</sup>

Then, ADT—nearly a year after the last benefits change notification—ratified the Collective Bargaining Agreement with the Union, which went into effect on September 1, 2017. The CBA contained Article 17, Section 3, which would obviously override any previous changes. Stated differently, it is clear that the Collective Bargaining Agreement would supersede any prior unilateral change, and ADT could not logically rely on those unilateral changes to shortchange the STD Grievants. To argue that the CBA—which provided for STD benefits pursuant to Article 17—was somehow invalidated *before* it was even signed by materials predating the CBA is ludicrous. This further demonstrates that ADT could not unilaterally alter the STD Grievants' wages.

ii. *Well-Established Canons of Construction Demonstrate ADT Lacked a Sound Arguable Basis for its Unilateral Actions.*

When assessing whether a party's contract interpretation has a sound arguable basis, the Board applies traditional principles of contract interpretation. *Conoco, Inc.*, 318 NLRB 60, 62 (1995). Reviewing the Collective Bargaining Agreement as a whole demonstrates that the plain language of the agreement clearly does *not* grant ADT unilateral authority to modify short-term disability wages, and that ADT's interpretation of the CBA would render provisions impermissibly superfluous. As such, it is apparent ADT lacked a sound arguable basis for its mid-term modification of the Collective Bargaining Agreement.

ADT attempts to create a sound arguable basis for its unlawful actions by arguing that Article 10 invalidates the short-term disability provisions found in Article 17, but such an argument

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<sup>7</sup> Indeed, ADT introduced into evidence multiple other short-term disability policies from various years that were never mentioned to the Union. Thus, it is clear that these policies are irrelevant. *See R. Ex. 5.*

is clearly illogical.<sup>8</sup> The parties' actual intent, as reflected by the underlying contractual language, is paramount and is determined by reviewing the plain language of the agreement. *Mining Specialists*, 314 NLRB 268, 269 (1994). Article 10 states

The Employer hereby agrees that provisions of the plans covering employee's pensions (401k), disability benefits and death benefits, as amended, subject to all limitations and qualifications therein contained, are hereby incorporated in and made part of this collective bargaining Agreement [*sic*]. The Employer agrees to offer benefits listed above comparable to the majority of ADT employees.

*GCX 2, Art. 10*. Importantly, Article 10 only says ADT will "offer comparable" benefits in accordance with the company's plans. *Id.* Nothing even suggests ADT possesses unilateral authority. Because someone is offered a fringe benefit plan does not mean that they have accepted the plan to the rejection of all other benefits. Thus, it is clear that the simple offer of benefits under a fringe benefit plan cannot invalidate a duly-negotiated, expressly stated, and provided right under the Collective Bargaining Agreement.

Additionally, the policies presented by the Company during the hearing state that the policy "does not apply to team members covered by a collective bargaining agreement unless the collective bargaining agreement provides for coverage under th[e] STD Policy." *See R. Ex. 5, 2015 Policy*. As Article 10 simply "offers" benefits, this clearly demonstrates the policies referenced in Article 10 cannot invalidate Article 17, Section 3. But, ADT tries to selectively incorporate the disability policies into the CBA by alleging that the percentages contemplated in the policies apply to bargaining unit members, but they refuse to recognize that these express provisions in the short-term disability policies clearly indicate that the Collective Bargaining

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<sup>8</sup> This attenuated argument is based on one-sided testimony regarding a dated "quid pro quo" appearing nowhere in the CBA. It must be disregarded, per Article 1, Section 3 of the CBA: "This Agreement is a complete agreement between the parties covering wages and conditions of employment and will supersede all prior agreements and understandings, oral or written, expressed or implied." *GCX 2*.

Agreement prevails in the event of inconsistencies.<sup>9</sup> Indeed, ADT's staff indicated that Article 10 does not invalidate Article 17. Leslie Tatum testified that ADT would pay Mr. Muhlstein 100% because the CBA's STD provisions overrode the STD Policy. Emails between Mr. Muhlstein and Ms. Tatum further indicate that ADT supervisors also knew the CBA overrode the STD Policy. *CP Ex. 88.*

Next, the drafting history of the Collective Bargaining Agreement and the plain language of the version of Article 10 at issue also demonstrates that ADT did not have unilateral authority to change Article 17, Section 3, so ADT surely lacked a sound arguable basis for its mid-term contract modifications. The 2006-2008 CBA explicitly states ADT's right to alter fringe benefits under Article 10. *R. Ex. 2, Art. 10.* In that version of the CBA, Article 10 states

The Employer hereby agrees that the provision of the plans covering employee's pensions, disability benefits and death benefits, as amended, subject to all limitations and qualifications therein contained, are hereby incorporated in and made part of this collective bargaining Agreement [*sic*]. *The Employer shall not, during the term of this Agreement, terminate this plan. The Employer, however, reserves the right to alter or modify the plan.*

*Id.* (emphasis added). However, under the 2017-2020 CBA that was in effect at the time of the grievances, no such sentence exists. Instead, the CBA now reads,

The Employer hereby agrees that the provisions of the plans, covering employee's pensions (401k), disability benefits and death benefits, as amended, subject to all limitations and qualifications therein contained, are hereby incorporated in and made part of this collective bargaining Agreement [*sic*]. The employer agrees to offer benefits listed above comparable to the majority of ADT employees.

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<sup>9</sup> Indeed, the rejected GCX 4, which is the 2006 version of the ADT employee handbook, states "Who is covered by this Handbook? It applies to all team members in the United States. However, if you are covered by a collective bargaining agreement, any specific provision contained in that agreement will supersede the corresponding provision contained in this Handbook." Leslie Tatum, during her testimony, stated that ADT's STD Policies were part of the handbook, and further stated that the current handbook contained similar—if not identical—language to the quoted statement in GCX 4. Accordingly, it was error to exclude this evidence from the record, as it is clearly relevant.

*GCX 2, Art. 10*. This conspicuous deletion can only mean that the parties intended to revoke ADT's unilateral rights. *Cf. Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020) (holding that amendments to statutes evince a substantive change). So it is evident that the current CBA's plain language provided no right to alter or modify the STD Grievants' wages unilaterally. Thus, it is even more apparent that ADT's assertion that Article 10 allows it to unilaterally alter Article 17 is not based in sound logic.

Similarly, ADT's interpretation of Article 10 impermissibly renders Article 17 superfluous, further highlighting that ADT lacked a sound arguable basis for its mid-term modification of the short-term disability wages provision in the CBA. The Supreme Court has held that, even in the context of collective bargaining agreements, contracts "should be interpreted in such a fashion as to preserve, rather than destroy, [their] validity." *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 81 (1998). Stated differently, "the law abhors an interpretation that results in the language of a contract having no meaning at all . . . ." *NTN Bower Corp.*, 356 NLRB No. 141, 1141 (2011) (quoting *In re Hill*, 981 F.2d 1474, 1487 (5th Cir. 1993)). Indeed, the Board has stated that it is a "well-established principle that no part of a contract's language should be construed in such a way as to be superfluous." *CVS Albany, LLC*, 364 NLRB No. 21 (2016).

Nixdorf testified that Article 17 was inoperative after the alleged addition of unilateral rights in Article 10. However, such a position would render provisions of the CBA wholly meaningless. This cannot be the case; indeed, Nixdorf admitted that he had not fully reviewed the contract and did not even realize that Article 17 existed. Even more, Nixdorf mentioned that the short-term disability wages chart was removed from the CBA for the Atlanta bargaining unit so as to avoid conflicts with Article 10, but failed to bargain over its removal in the Des Moines CBA. Such a statement clearly contradicts the idea that Article 10 simply overrides Article 17. Nixdorf,

a licensed attorney, with more than a decade of experience negotiating collective bargaining agreements, surely recognizes that all sections of a contract—including collective bargaining agreements—must have meaning. This is simply further proof that ADT’s position defies logic such that it cannot justify their unlawful conduct under the Act.

Finally, the Management Rights Clause does not permit unilateral modifications of the short-term disability wages clause. The clause reads

The Union and the Company agree that the provisions of this Agreement are limited to hours, wages and other working conditions of the employees covered, and the provisions shall not be construed or interpreted to restrain the Company from the full and absolute operation, control and management of its business. *Except as specifically limited by this Agreement, the Company retains the exclusive right to manage the facility, to direct, control and schedule its operations and the work force; and to make any and all decisions affecting the business, whether or not specifically mentioned herein.* Such prerogatives, authority and functions shall include but are not limited to the sole and exclusive right to: hire, promote, demote, layoff, assign, transfer, suspend, discharge or discipline; select and determine the number of its employees including the number assigned to any particular work and to increase or decrease that number; direct and schedule the work force; to determine or change the starting time, quitting time or the number of hours to be worked; to assign work and duties to the employees in the work force or to subcontract; to organize, discontinue, enlarge, reduce or revise a function or department; determine the location and type of operation; determine the methods, procedures, materials, equipment and operations to be utilized or to discontinue their performance by employees of the Company; establish, increase or decrease the number of work shifts and their starting and/or ending times, determine and schedule over time; transfer, relocate, or close any or all of the operations of the business to any location or discontinue such operations; promulgate, post and enforce rules and regulations, policies, and procedures, including but not limited to attendance control and drug and alcohol testing; select supervisory employees; establish, determine content of, and conduct training programs; discontinue any department or branch; introduce new and improved methods or revisions of operation; establish, change, combine, revise or abolish job classifications and descriptions, and set standards of performance of the employees.

And in all respects carry out in addition, the ordinary and customary functions of management, except as specifically altered or modified by the terms of this Agreement.

*GCX 2, Art. 7.* Short-term disability wages constitute wages and terms and conditions of employment; therefore, they are explicitly exempted from and not within the scope of the management rights clause. Consequently, ADT lacked authority to unilaterally alter the terms of the STD Benefits. Even though the management rights clause is expansive, the items listed demonstrate that the short-term disability wages are outside the scope of the clause. Common canons of construction indicate that when a list of items is included, items dissimilar to the items listed fall outside the scope of the list. *Lytton Rancheria of Cal.*, 361 NLRB 1350, 1361 (2014) (noting that under the principle of *ejusdem generis*, “where general words follow words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as apply to only persons or things of the same kind or class as those specifically mentioned.”) Short-term disability wages are not remotely similar to the items articulated in ADT’s management rights clause. This demonstrates that the drafters of the CBA did not intend to include short-term disability wages within the scope of management rights.

Accordingly, it is apparent that ADT lacked any sound arguable basis to unilaterally modify the collective bargaining agreement. Accordingly, an order must issue, remedying ADT’s egregious conduct.

2. ADT Violated Section 8(a)(5) by Unilaterally Changing a Mandatory Subject of Bargaining.

In addition to violating Section 8(d) via a mid-term unilateral contract modification, ADT violated Sections 8(a)(5) and 8(a)(1) by unilaterally changing a mandatory subject of bargaining.

a. *ADT Unilaterally Altered the STD Grievants’ Wages.*

It is well-known that “[u]nilateral changes [in violation of Section 8(d)] are a per se breach of the Section 8(a)(5) duty to bargain, without regard to the employer’s subjective bad faith. *Covanta Energy Corp.*, 356 NLRB No. 98, 719 (2011). So, “an employer violates Section 8(a)(5) and (1) of the Act if it makes a unilateral change in a term or condition of employment involving a mandatory subject of bargaining without first bargaining to an impasse.” *Finch, Pruyn & Co., Inc.*, 349 NLRB No. 28, 277 (2007); *see also Transp. Servs. of St. John, Inc.*, 369 NLRB No. 15 (2020). Consequently, an employer violates Sections 8(a)(1) and 8(a)(5) of the Act by unilaterally changing the wages, hours, and other terms and conditions of employment of bargaining unit employees without first providing their collective-bargaining representatives with notice and a meaningful opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736.; *Waxie Sanitary Supply*, 337 NLRB 303 (2001); *Bryant & Stratton Bus. Ins.*, 321 NLRB 1007 (1996); *Mercy Hosp. of Buffalo*, 311 NLRB 869 (1993).

Here, in addition to altering a duly-executed portion of the collective bargaining agreement, ADT violated Section 8(a)(5) by unilaterally changing wages in the form of short-term disability wages. Wages are obviously a mandatory subject of bargaining. It has long been recognized that temporary disability programs constitute mandatory subject of bargaining. *Jones Dairy Farm*, 295 NLRB No. 20, 115 (1989). Previously, the Board has noted that benefits—such as health, pension, and sickness and accident benefits—constituted mandatory subjects of bargaining. *Whitesell Corp.*, 357 NLRB No. 92, 1182 (2011). Thus, the short term disability wages articulated in Section 17 of the CBA constitute mandatory subjects of bargaining.

But, as shown, ADT failed to adhere to the terms of the Collective Bargaining Agreement. Rather than paying the short term disability wages based on the criteria outlined in the Collective Bargaining Agreement, ADT simply paid each Bargaining Unit Member at issue a mere fraction

of his base pay. ADT never notified, let alone bargained with, the Union about these changes. Thus, ADT unilaterally changed this mandatory subject of bargaining in violation of Section 8(a)(5).

b. *ADT was not Engaged in a Past Practice.*

Importantly, the evidence is clear that ADT was not engaged in a past practice. “Section 8(a)(5) prohibits employers from making a *change* in mandatory bargaining subjects unless the change is preceded by notice to the union and the opportunity for bargaining regarding the planned change.” *Raytheon Network Centric Sys.*, 365 NLRB No. 161 (2017). “[A]ctions constitute a ‘change’ only if they materially differ from what has occurred in the past.” *Id.* The change must be “a material, substantial, and a significant one and must have a real impact on, or be a significant detriment to, the employees or their working conditions.” *Waxie*, 337 NLRB at 303 (internal quotations omitted). So, “when determining whether an employer’s action constitutes a ‘change’ and thus triggers the obligation to provide the union notice and the opportunity for bargaining, the only relevant factual question is whether the employer’s action is similar in kind and degree to what the employer did in the past.” *Raytheon Network Centric Sys.*, 365 NLRB No. 161 (2017).

Here, ADT’s impermissible unilateral alteration of the short-term disability clause materially, substantially, and significantly altered the terms and conditions of employment for the STD Grievants. ADT only paid each STD Grievant a fraction of their base pay. But, per Article 17, Section 3, each Bargaining Unit Member was entitled to one hundred percent (100%) of pay for at least fifteen (15) weeks, followed by sixty-six percent (66%) of their pay. Such a significant discrepancy (topping forty percent (40%)) in earning capacity certainly creates significant challenges. The large difference between the amount of their expected benefits and what they actually received created hardships that materially impacted the STD Grievants. Such an

egregious disregard for the Collective Bargaining Agreement indicates ADT's changes were substantial and therefore violated the Act.

But, ADT suggested it simply followed its past practice of awarding STD benefits based on its policies, but this argument is significantly flawed.

The instances on which ADT relies in an attempt to demonstrate a past practice occurred *prior* to the CBA's ratification. During the course of the bargaining relationship, ADT sent only a brochure and a spreadsheet containing various fringe benefit changes, and those changes were buried in the documents. One came in 2013, and simply provided a benefits brochure; it said nothing about what—if anything—changed. *R. Ex. 6*. Additionally, even though additional policies were issued in subsequent years, ADT only provided a spreadsheet to the Union of potential benefit changes on October 31, 2016. *GCX 7(b)*. This spreadsheet never indicated what constituted a change, let alone what provision(s) of the CBA were impacted, and it omitted the policy and the plan. *Id.* Importantly, Jim Nixdorf admitted during the testimony that ADT has never since provided the Union with any information about alterations to fringe benefit plans. ADT—nearly a year after the last benefits change notification—then ratified the Collective Bargaining Agreement with the Union, which went into effect on September 1, 2017. The CBA contained Article 17, Section 3, which obviously overrode any previous changes. It is nonsensical to think that a change predating the enactment of the CBA can somehow prospectively invalidate a duly executed express provision. Accordingly, ADT's sporadic practice is starkly different from the facts in *Raytheon*, where the company regularly provided notice and explanation of changes to healthcare benefits. Thus, the fact that the CBA's execution interrupts the chain of sporadic past practices demonstrates that *Raytheon* is inapplicable.

c. *ADT's Actions were not Within the Compass or Scope of its Management Rights.*

Moreover, nothing suggests that unilateral changes of Article 17, Section 3 were in the compass or scope of ADT's management rights. The Board, in 2019, adopted the contract coverage standard for considering allegations of an improper unilateral action. *MV Transp., Inc.*, 368 NLRB No. 66 (2019). Under the contract coverage standard,

the Board will first review the plain language of the parties' collective-bargaining agreement, applying ordinary principles of contract interpretation, and then, if it is determined that the disputed act does *not* come within the compass or scope of a contract provision that grants the employer the right to act unilaterally, the analysis is one of waiver.

*Id.* In doing so, "the Board will give effect to the plain meaning of the relevant contractual language, applying ordinary principles of contract interpretation; and the Board will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of the contract language that grants the employer the right to act unilaterally." *Id.*

Here, altering short-term disability wages was not within the compass or scope of ADT's management rights as established by the CBA. As discussed above, the plain language of Article 10 does not grant right to unilaterally alter short term disability benefits. Likewise, as previously mentioned, the management rights clause does not provide authority to unilaterally alter short-term disability wages. Accordingly, it is clear that altering short-term disability wages was not within the compass or scope of ADT's management rights.<sup>10</sup>

Thus, it is evident that ADT's actions did not constitute a permissible past practice or an action within the compass or scope of its management rights such that it violated the Act. An order must issue awarding the STD Grievants the entirety of the wages under Article 17, Section 3.

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<sup>10</sup> To the extent ADT argues that the Union waived its right to bargain over the short-term disability wages, such an argument is clearly baseless. The short-term disability wages have continually appeared in all CBAs between ADT and the Union. *See, e.g., CP Ex. 99; CP Ex. 100; R. Ex. 2; and GCX 2.* Thus, there is no clear and unmistakable waiver. Even more, upon learning of ADT's shortchanging tactics, the Union diligently filed grievances and pursued information requests in order to police the grievances. Accordingly, no waiver occurred.

## VI. CONCLUSION

For the foregoing reasons, an order should issue in favor of the Union and General Counsel. Specifically, ADT must be ordered to: (1) bargain in good faith by providing the requested information immediately; (2) bargain in good faith by properly processing the Union's grievances; and (3) making the STD grievants whole by fully compensating them their short-term disability wages; and (4) all other relief the Board deems just and proper.

Dated: October 23, 2020

Respectfully Submitted,

**BLAKE & UHLIG, P.A.**

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 23rd day of October, 2020, a true and correct copy of the above was e-filed with the Region and served by e-filing and/or electronic mail upon the following persons:

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