

20-1163

United States Court of Appeals
for the
Second Circuit

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL UNION 43,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

ADT LLC,

Intervenor.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR INTERVENOR
ADT LLC

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CORPORATE DISCLOSURE STATEMENT

Intervenor ADT LLC, by its counsel, and pursuant to Fed. R. App. P. 26.1 submits that ADT is a limited liability company wholly owned by ADT U.S. Holdings Inc. and that there is no publicly held corporation that owns ten percent or more of ADT's stock.

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STATEMENT OF THE ISSUES

Whether the Board erred in finding ADT's implementation of a temporary six-day workweek at its Albany and Syracuse, New York locations was not a violation of Section 8(a)(5) and (1) of the Act under the sound arguable basis or the contract coverage standard.

STATEMENT OF THE CASE

I. THE PARTIES

ADT is a corporation providing electronic security systems and services throughout the country, including Albany and Syracuse, New York. The International Brotherhood of Electrical Workers, Local 43 ("Local 43") is the collective bargaining representative for all full-time and regular part-time "residential and small business installers, residential and small business high volume commissioned installers, residential and small business service technicians" employed by ADT at its Albany and Syracuse, New York locations. (Jt. Exs. 2–3).¹ This case

¹ Pursuant to the Court's July 9, 2020 Order, the appendix is deferred in accordance with Fed. R. App. P. 30(c). Accordingly, references to the Board's Decision and Order are designated as (DO ____). References to the ALJ's Decision are designated as (ALJD ____). References to the transcript of proceedings are designated as (Tr. ____). References to the General Counsel Exhibits are designated as (GC Ex. ____). References to Joint Exhibits are designated as (Jt. Ex. ____).

involves service technicians at ADT's Albany and Syracuse, New York locations.

II. RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENTS

At the time of this case, the collective bargaining agreement covering the Albany unit was effective from June 11, 2015 through June 10, 2018 (the "Albany Agreement") and the collective bargaining agreement covering the Syracuse unit was effective from June 11, 2016, through June 10, 2019 (the "Syracuse Agreement") (collectively, "the Agreements").

Article 1, Section 2 of the Agreements established ADT's exclusive right to manage the operations of its business and the direction of its workforce, stating in pertinent part:

The operation of the Employer's business and the direction of the working force including, but not limited to, the making and the enforcement of reasonable rules and regulations relating to the operation of the Employer's business, the establishment or [sic] reporting time, the right to hire, transfer, lay off, promote, demote, and discharge for cause, assign or discipline employees, to relieve employees from duties because of lack of work or other legitimate reasons, ***to plan, direct and control operations, to determine the reasonable amount and quality of work needed, to introduce new or improved methods, to change existing business practices*** and to transfer employees from one location or classification to another is vested exclusively in the

Employer, subject, however to the provisions of this agreement.

(Jt. Ex. 3, p. 3–4; Jt. Ex. 2, p. 3) (Emphasis added).

Article 6, Section 1 of the Albany Agreement states, in pertinent part:

The *normal* work schedule for the Service Department shall be a shift of eight and one-half hours with a thirty-minute lunch period comprising of five consecutive days, Monday through Saturday between the hours of 8:00 a.m., and 12:00 midnight. There will also be a four-day workweek comprised of ten and one half hour shifts, with a thirty-minute lunch period, between the hours of 8:00 a.m. and 12 midnight, Monday through Friday. Customer needs may periodically make it necessary for work to be performed beginning at 7:00 a.m. The Company will first seek qualified volunteers to perform such work, if there are no qualified volunteers then the least senior qualified person will be assigned to perform the work. ... Advance notice of schedule changes will be given whenever possible, except in cases of emergency, such schedules shall he established one week in advance.

The Installation Department may be scheduled for any eight-hour period between 7:00 a.m. and 5:30 p.m. in any given day between Monday and Friday. Customer needs may periodically make it necessary to add an additional shift for residential installers from Tuesday through Saturday. The Company will first seek qualified volunteers to perform such work. If there are no qualified volunteers then the least senior qualified person will be assigned to perform the work.

(Jt. Ex. 3, p. 10) (Emphasis added).

Article 6, Section 1 of the Syracuse Agreement states, in pertinent part:

The *normal* work schedule for the Service Department shall be a shift of eight and one-half hours with a thirty minute

lunch period comprising of five consecutive days, Monday through Saturday between the hours of 8:00 a.m. and 12:00 midnight. There will also be a four-day workweek comprised of ten and one half hour shifts, with a thirty-minute lunch period, between the hours of 8:00 a.m. and 12 midnight, Monday through Friday. Customer needs may periodically make it necessary for work to be performed beginning at 7:00 a.m. The Company will first seek qualified volunteers to perform such work. If there are no qualified volunteers then the least senior qualified person will be assigned to perform the work.... Advance notice of schedule changes will be given whenever possible, except in cases of emergency, such schedules shall be established one week in advance.

The Installation Department may be scheduled for any eight-hour period between 7:00 a.m. and 5:30 p.m. in any given day between Monday and Friday. Customer needs may periodically make it necessary for work, to be performed on a second shift and/or Saturdays. The Company will first seek qualified volunteers to perform such work. If there are no qualified volunteers then the least senior qualified person will be assigned to perform the work. Such second shifts will occur between the hours of 7:00 a.m. and 12:00 midnight except in cases of emergency, such schedules shall be established one week in advance. Second shift will be defined as those shifts beginning at 12:00 noon and after.

(Jt. Ex. 2, p. 7) (Emphasis added).

Article 6, Section 3 of the Agreements states, in pertinent part:

All time worked daily in excess of eight (8) hours in a scheduled 5 x 8 hour workweek, in excess of ten (10) hours in a 4 x 10 hour workweek, or weekly in excess of forty (40) hours, or on scheduled days off shall be compensated for at one and one-half (1 ½) times the employee's regular straight time hourly rate.

(Jt. Ex. 3, p. 10; Jt. Ex. 2, p. 7) (Emphasis added).

III. IMPLEMENTATION OF THE SIX-DAY WORKWEEK

In 2016, Apollo Group Management acquired ADT and subsequently merged ADT with Protection 1, another security service subsidiary of Apollo Group Management. (Tr. 111; Jt. Ex. 7). As part of the integration of ADT and Protection 1, ADT adopted Protection 1's "In Standard," which targeted responses to at least 75% of customer service calls within 24 hours. (Tr. 112, 117; Jt. Exs. 1, 7). After reviewing the Agreements and determining there was no language in the Agreements prohibiting ADT from assigning overtime work on a Saturday, the sixth day, ADT moved forward with the implementation of a six-day work schedule. (Tr. 109–130, 117).

Accordingly, on September 6, 2016, the Area General Manager, Michael Kirk, sent an e mail to a group of ADT managers informing them of the new customer service targets on all new installation and service tickets. (Jt. Ex. 1). The September 6 e-mail further explained that in order to reach these targets, ADT would implement a six-day workweek in certain markets, including Albany, New York, beginning on September 22, 2016 and until the new targets were met. (Tr. 34; Jt. Ex. 1). In other

markets, including Syracuse, New York, ADT would implement a bi-weekly six-day workweek beginning on September 22, 2016 and until the new target rates were met. (Jt. Ex. 1). Whether a location operated under a six-day workweek every week of the month or every two weeks of the month was contingent on the degree of backlog at each location. (Jt. Ex. 7). ADT provided one exception to the six-day workweek for technicians who were attending classes and enrolled in higher education pursuant to ADT's tuition reimbursement program. (Jt. Ex. 1; Tr. 121).

An e-mail announcement was distributed to all technicians in Albany and Syracuse regarding ADT's new target rates and related changes to the workweek. (Jt. Ex. 1). Immediately after, on September 7, 2016, through an e-mail from ADT's Regional HR Manager, Michael Stewart, to Pat Costello and Al Marzullo of the Union, ADT informed Local 43 of the same. (Tr. 23; Jt. Ex. 4). Thereafter, ADT updated Local 43 on the status of the backlog at the Albany and Syracuse locations. (Jt. Ex. 7). ADT informed Local 43 that as of October 11, 2016 the Albany location had a backlog of 93 tickets and would continue to work a six-day workweek until the backlog was reduced by 69 tickets. (Jt. Ex. 7). ADT further reported that the Syracuse location had achieved its target

numbers and would return to the 5-day workweek on or about October 22, 2016. (Jt. Ex. 7). The Albany location resumed a five-day workweek after about two to three months. (Tr. 36–38).

IV. PROCEDURAL HISTORY BEFORE THE NLRB

The initial charge filed by Local 43 in Case 03-CA-184936, dated September 26, 2016, alleged ADT abnegated the provisions of its labor agreement regarding the duration of the workweek by implementing a six-day workweek in violation of Sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (the “Act”). (GC Ex. 1(a); GC Ex. 1(p), ¶ I(a)). A first, second and third amended charge in Case 03-CA-184936 were filed by Local 43 alleging ADT violated the Act by abnegating the provisions of its labor agreement regarding the duration of the workweek by implementing a six-day workweek, unilaterally changing terms and conditions of employment regarding the duration of the workweek by unilaterally implementing a six-day workweek and by not providing information requested by the Union. (GC Exs. 1(c)–1(h)).

Local 43's unfair labor practice charge in Case 03-CA-192545 alleged ADT communicated directly with bargaining unit members in violation of Sections 8(a)(1) and 8(a)(5) of the Act. (GC Ex. 1(i)).

In an order dated April 21, 2017, Region 03 consolidated Case 03-CA-184936 with Case 03-CA-192545. (GC Ex. 1(n)). A hearing was held on June 13, 2017 before Administrative Law Judge Michael A. Rosas. (Tr. 1). ALJ Rosas issued a decision dated August 4, 2017 finding, among other things, that ADT violated Section 8(a)(5) and (1) of the Act when it implemented a six-day workweek at its Albany and Syracuse locations. (ALJD 8–11). ADT filed exceptions, a supporting brief, and a reply brief. Local 43 filed an answering brief. The General Counsel filed an answering brief, cross-exceptions, and a reply brief.

On February 27, 2020, the Board issued a Decision and Order finding, contrary to ALJ Rosas, that ADT did not violate Section 8(a)(5) and (1) of the Act by unilaterally implementing a six-day workweek for service and installation technicians at the Albany and Syracuse facilities. (DO 1). The Board found, specifically, that ADT's "implementation of a 6-day workweek for technicians at both the Albany and Syracuse facilities was within the compass or scope of language in the Agreements granting

the Respondent the right to take that action unilaterally.” (DO 3). The Board also found that ADT did not violate Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d) by modifying its collective-bargaining agreements with Local 43 when it implemented the six-day workweek. The Board found ADT “had a sound arguable basis for interpreting the Agreements as giving it the right to implement a 6-day workweek for Albany service and installation technicians and Syracuse service technicians.” (DO 4). Local 43 filed a Petition for Review before this Court on April 6, 2020.

SUMMARY OF THE ARGUMENT

ADT’s rational business decision to implement a temporary six-day workweek for technicians at its Albany and Syracuse locations was permissible under the sound arguable basis standard and the contract coverage standard. In the underlying case, General Counsel alleged ADT violated Section 8(a)(5) and (1) of the Act under two theories, (1) a contract modification theory and (2) a unilateral change theory. The Board summarily dismissed both theories, finding, first, that ADT presented a reasonable interpretation of the relevant contractual language and, thus, had not violated the Act under the contract

modification theory and, second, that ADT's implementation of a six-day workweek was covered by Articles 6 and 1 of the Agreements and was, therefore, not a unilateral change in violation of the Act.²

This Court should affirm the Board's Decision and Order pursuant to the sound arguable basis and contract coverage standard. The Court owes great deference to the Board's determination under the sound arguable basis standard. The implementation of a temporary six-day workweek was a decision based on ADT's reasonable interpretation of the Agreements. There is no dispute that the six-day workweek was a legitimate business decision based on a need to meet customer retention rates and reduce the backlogs identified through the integration of ADT with Protection 1. Based on its reasonable interpretation of the Agreements, ADT determined that Articles 1 and 6 of the labor agreements permits ADT to extend the workweek to Saturdays and to assign such work as overtime work to all bargaining unit members at the same time — seeking volunteers in an all-hands-on-deck situation was

² Notably, in its appeal brief, Local 43 glosses over the mutual exclusivity of these two theories. As the Board noted, however, “[b]ecause the remedies are mutually exclusive, an alleged unlawful employer decision cannot be *both* a unilateral change *and* a contract modification.” (DO 3).

simply unnecessary given the language in the Agreements. The Board agreed, finding ADT “had a sound arguable basis for interpreting the Agreements as giving it the right to implement a six-day workweek for Albany service and installation technicians and Syracuse service technicians.” Pursuant to the “sound arguable basis” standard, the Board found “Articles 1 and 6 of the Agreements, read together, granted the Respondent the right to modify technicians’ regular work schedules by requiring them to work a 6-day workweek.” (DO 4).

Additionally, while the Court reviews *de novo* the Board’s interpretation of the collective bargaining agreement, when interpreting contractual language, the mutual intent must be drawn from the language alone and unambiguous language must be given its plain meaning. That is precisely what the Board did in this case. The Board’s analysis was shaped by the plain meaning of the relevant contractual language through which it found that language in Articles 6 and 1 of the Agreements covered the implementation of a six-day workweek for technicians at both the Albany and Syracuse facilities. For these reasons and those more thoroughly explained below, this Court should affirm the

February 27, 2020 Decision and Order of the Board, thereby dismissing the allegations that ADT violated Section 8(a)(5) and (1) of the Act.

ARGUMENT

I. THE BOARD CORRECTLY APPLIED THE SOUND ARGUABLE BASIS STANDARD

In accordance with decades of Board precedent, the Board found that ADT implemented a temporary six-day workweek at its Albany and Syracuse locations based on its reasonable interpretation of the Agreements and, therefore, had not violated Section 8(a)(5) and (1) of the Act in doing so. The Board will not find an employer in violation of the Act where the employer acted according to its sound arguable basis in the contract. Compare *NLRB v. Katz*, 369 U.S. 736, 743 (1962) and *e.g. Phelps Dodge Magnet Wire Corp.*, 346 NLRB 949, 952 (2006). The Board's findings under the sound arguable basis standard are due great deference by this Court.

A. DEFERENCE IS DUE TO THE BOARD'S FINDINGS

It is well established that "the Board has 'the primary responsibility of marking out the scope ... of the statutory duty to bargain,' and 'great deference' is due to the Board because determining whether a party has violated this statutory duty is 'particularly within' the Board's expertise

.... Reviewing courts may not ‘displace the Board’s choice between two fairly conflicting views,’ even if the court ‘would justifiably have made a different choice’ in the first instance. *Pac. Mar. Ass’n v. NLRB*, 967 F.3d 878, 884 (D.C. Cir. 2020) (internal citations omitted). Accordingly, the Second Circuit will not “displace the Board’s choice between two fairly conflicting views, even though [we] would justifiably have made a different choice had the matter been before [us] *de novo*.” *Local 917, Intern. Broth. Of Teamsters v. NLRB*, 577 F.3d 70, 76–77 (2d Cir. 2009) (internal citation omitted); *see also Cibao Meat Products, Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008) (“[T]he NLRB’s answer to the particular question of whether an employer’s conduct constitutes a [violation] is ‘entitled to considerable deference.’”) (quoting *Ford Motor v. NLRB*, 441 U.S. 488, 495, 99 S.Ct. 1842, 60 L.Ed.2d 420 (1979)).

B. ADT ACTED ON ITS REASONABLE INTERPRETATION OF THE AGREEMENTS

Board precedent dictates that Sections 8(a)(5) and (1) of the Act are not implicated where the employer acted on “its reasonable interpretation of the parties’ contract.” *See NCR Corp.*, 271 NLRB 1212, 1213 (1984); *see also Westinghouse Elec. Corp.*, 313 NLRB 452, 452 (1993) (dismissing an 8(a)(5) allegation “[w]here . . . the dispute is solely one of

contract interpretation, and there is no evidence of animus, bad faith, or intent to undermine the union”) (quoting *Atwood & Merrill Co.*, 289 NLRB 794, 795 (1988)); *Pac. Mar. Ass’n v. Nat’l Labor Relations Bd.*, 967 F.3d 878, 885 (D.C. Cir. 2020) (“The Board has recognized that an employer has not violated Section 8(a)(5) by modifying terms and conditions of employment under a CBA where the employer has a ‘sound arguable basis’ for its interpretation of a contract and it is not motivated by animus or bad faith.”) (citing *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005)). The Board has long taken the position that it will not enter into a dispute “to serve the function of [an] arbitrator” when the employer’s “plausible interpretation” of a collective bargaining agreement differs from the charging party. *NCR Corp.*, 271 NLRB at 1213.

When “an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract **as he construes it**,” the Board will not enter the dispute to serve the function of arbitrator in determining which party’s interpretation is correct.

Id. (Emphasis added) (quoting *Vickers, Inc.*, 153 NLRB 561, 570 (1965)).

The key issue is whether the employer’s interpretation —“as [he/she] construes it” — is plausible. In conducting this analysis, an

employer need not be correct. For example, in *Atwood & Morrill Co.*, the ALJ found a violation of the Act where the employer “had at least a colorable contract defense,” but “found a violation ‘resting simply upon the more appropriate interpretation’ of the contract.” 289 NLRB 794, 795 (1988). The Board dismissed the allegation and explained that it “will not seek to determine which of two equally plausible contract interpretations is correct.” *Id.* Likewise, in *Phelps Dodge Magnet Wire Corporation*, the Board dismissed a complaint regarding an alleged violation of Section 8(a)(5) because “even though the Respondent’s construction of article 16.5 may have been erroneous, its interpretation had a sound arguable basis.” 346 NLRB 949, 952 (2006); *see also Monmouth Care Center*, 354 NLRB 11, 87 (2009) (adopting ALJ’s determination that “as long as Respondents have a ‘sound arguable basis’ for its interpretation of the contract, no violation will be found”).

ADT’s decision to temporarily extend work schedules to include overtime on Saturdays within facilities with large backlogs was done in accordance with its reasonable interpretation of what was permissible under the Agreements. (Tr. 112). Local 43’s objection to ADT’s interpretation of the Agreements does not give rise to an unfair labor

practice under Section 8(a)(5) or (1) much less a basis to challenge the Board's findings on the plausibility of ADT's interpretation of such Agreements. *NCR Corp.*, 271 NLRB at 1213; *see also Atwood & Morrill Co.*, 289 NLRB 794, 795 (declining to determine "which of two equally plausible contract interpretations is correct"); *Monmouth Care Center*, 354 NLRB 11, 87 (2009) (adopting ALJ's determination that "as long as Respondents have a 'sound arguable basis' for its interpretation of the contract, no violation will be found").

Pursuant to the Management Rights Provision in Article 1 of the Agreements, and subject to other provisions of the Agreements, ADT was vested with the authority, among other things, to assign and direct work, control operations, determine reasonable amount and quality of work needed, and change existing business practices. (Jt. Ex. 2, 3). Article 6, moreover, permits ADT to modify employee work schedules (as long as ADT provided advance notice of the change) and allows ADT to assign work at premium pay on scheduled days off, thus allowing the assignment of overtime on a sixth day of work. (Jt. Ex. 2, 3).

In fact, the language in both Agreements expressly contemplates work on Saturdays. (Tr. 112). Although there is language in Article 6

indicating ADT would seek volunteers to perform overtime work, it also permits ADT to assign bargaining unit members according to seniority with no limitation on how many employees could be assigned at any given time. (Jt. Ex. 3, p. 10; Jt. Ex. 2, p. 7; Tr. 61, 65, 105, 121–22). That is, all employees can be assigned to overtime work on Saturdays. And, in fact, this is what ADT did. While Local 43 is hung up on the concept of the expanded workweek, what this really constitutes is a need for all bargaining unit employees to perform weekly overtime. The contract explicitly permits ADT to require that all available employees report to work on their day off, if business needs require it. Indeed, the term “normal work schedule” contemplates exceptions to the work schedules to perform weekly overtime.

Local 43’s own hearing testimony furthered ADT’s interpretation of the labor agreements. At the hearing, Local 43’s Assistant Business Manager and President, Patrick Costello, testified that Article 6 of the Agreements permits ADT to assign work on a scheduled day off, the sixth day. (Tr. 34–38). He acknowledged that the Agreements place no limit on the number of employees ADT could assign to overtime work. (Tr. 61, 65). Costello further testified that he had no reason to believe ADT

implemented a six-day workweek for any other reason than the legitimate business needs it relayed to Local 43. (Tr. 39–40).

It was based on this record that the Board found ADT “had a sound arguable basis for interpreting the Agreements as giving it the right to implement a 6-day workweek for Albany service and installation technicians and Syracuse service technicians.” (DO 4). In doing so, the Board noted that “no party claims that [ADT] implemented a 6-day workweek for anything other than legitimate business reasons—i.e., that it was motivated by animus or acting in bad faith.” *Id.* And that “its interpretation of the relevant contract language was certainly reasonable” where “Articles 1 and 6 of the Agreements, read together, granted [ADT] the right to modify technicians’ regular work schedules by requiring them to work a 6-day workweek.” *Id.* The Board found ADT’s interpretation of the Agreements reasonable and much deference is due to that determination.

II. THE BOARD CORRECTLY APPLIED THE CONTRACT COVERAGE STANDARD

Furthermore, while ADT does not dispute that pursuant to *Katz* and its progeny an employer cannot make unilateral changes to terms and conditions of employment without first providing the union notice

and an opportunity to bargain, Board law provides that where the plain language of the relevant contractual provisions covers the scope of the issue the employer is not in violation of the labor agreement. And while the Court reviews the Board's contract interpretation *de novo*, it is pursuant to the contract coverage standard established by the Board — to which this Court owes deference — that it reviews the Board's contractual interpretation. A *de novo* review of the Board's interpretation of the Agreements pursuant to the contract coverage standard set forth in *MV Transportation* reaches the same conclusion. ADT's temporary implementation of a six-day workweek “was within the compass or scope of language in the Agreements granting [ADT] the right to take that action unilaterally.” (DO 3).

A. THE COURT'S REVIEW OF THE BOARD'S CONTRACT INTERPRETATION

The Supreme Court recognizes “the authority of the Board and the law of contract are overlapping, concurrent regimes,” and that “the Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts.” *NLRB v. Strong*, 393 U.S. 357, 360–61, 89 S.Ct. 541, 21 L.Ed.2d 546 (1969). This Court reviews *de novo* the Board's interpretation of the

collective bargaining agreement while deferring to the Board's contract coverage standard. *See Local Union 36, Intern. Broth. Of Elec. Workers, AFL-CIO v. NLRB*, 706 F.3d 73, 81-85 (2d. Cir. 2013) (applying two-step analysis wherein the Court reviews the contract *de novo* while giving deference to the standard applied in the labor context).

B. THE BOARD'S INTERPRETATION OF THE AGREEMENTS IS CONSISTENT WITH THE PLAIN MEANING OF THE RELEVANT LANGUAGE

In *MV Transportation*, the Board announced that it would abandon the heightened "clear and unmistakable waiver" standard and instead apply the "contract coverage" standard to determine whether an employer's defense that contractual language privileged it to make a disputed unilateral change without further bargaining with a union has merit. *MV Transportation, Inc.*, 368 NLRB No. 66 (2019). Under the contract coverage standard, employers do not have a continuing duty to bargain over an issue during the term of a CBA if the contract language can be said to "cover" the change in dispute. "Contract coverage, in contrast, holds the parties to the deal they have struck." *See Huber Specialty Hydrates, LLC*, 369 NLRB No. 32 at *4 (2020).

In applying this standard, the Board majority in *MV Transportation* declared:

[T]he ***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 contract language that grants the employer the right to act unilaterally.

The *MV Transportation* Board further stated that:

In applying this standard, the Board will be cognizant of the fact that “a collective bargaining agreement establishes principles to govern a myriad of fact patterns,” and that “bargaining parties [cannot] anticipate every hypothetical grievance and . . . address it in their contract.” . . . Accordingly, we will not require that the agreement specifically mention, refer to or address the employer decision at issue. . . . Where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5).

MV Transportation, Inc., 368 NLRB No. 66 (2019) (Emphasis added); see *ADT LLC*, 369 NLRB No. 31 (2020) (discussing *MV Transportation*).

Further, “if the contract coverage standard is not met, the Board will continue to apply its traditional waiver analysis to determine whether some combination of contractual language, bargaining history, and past practice establishes that the union waived its right to bargain regarding a challenged unilateral change.” *MV Transportation*, 368 NLRB at 12.

The NLRB continues to apply the “contract coverage” standard in *MV Transportation*. See *Huber Specialty Hydrates, LLC*, 369 NLRB No.

32 (2020) (finding that the employer was allowed to unilaterally change the attendance policy subject to a post-decision input period); *see also ExxonMobil Research & Engineering Company, Inc.*, 370 NLRB No. 23 (2020) (applying *MV Transportation* in finding that an employer's unilateral change to the evaluation procedures was not a violation of the Act). In *Huber Specialty*, the Board determined that the "[r]espondent's changes to the attendance policy were clearly covered by the management-rights clause in the parties' agreement [where] [t]he plain wording of that provision gave the Respondent the right to adopt 'reasonable rules and policies,' subject to the Union's rights to a 7-day 'input' period prior to implementation and to challenge the reasonableness of the changes through the contractual grievance-arbitration procedure." *Huber Specialty Hydrates, LLC*, 369 NLRB at *4 ("The changes the Respondent made to its attendance policy were plainly within the compass or scope of contractual management-rights language granting the Respondent the right to act unilaterally."). The Board reached a similar conclusion in this matter after examining the language in Articles 1 and 6 of the Agreements. Applying ordinary principles of contract interpretation, the Board found:

Article 6, section 3 of the Agreements provided for payment of overtime wages for work performed “weekly in excess of forty (40) hours, or on scheduled days off.” Article 1, section 2 of the Agreements vested in the Respondent the exclusive right “to determine the reasonable amount . . . of work needed.” Read together, these provisions authorized the Respondent to determine the amount of work it needed the technicians to perform and to require its technicians to work in excess of 40 hours a week or on scheduled days off to accomplish that work.

On remand, the Board would reach the same conclusion. Indeed, as noted above *supra* Section I.B., ADT was vested with the authority, among other things, to assign and direct work, control operations, determine reasonable amount and quality of work needed, and change existing business practices. (Jt. Ex. 2, 3). Article 6, moreover, permits ADT to modify employee work schedules (as long as ADT provides advance notice of the change) and allows ADT to assign work at premium pay on scheduled days off, thus allowing the assignment of a sixth day of work. (Jt. Ex. 2, 3). There is no language in the Agreements that limits ADT’s authority to implement a temporary six-day workweek.

Contrary to Local 43’s assertions, there is no language in Article 6 limiting ADT’s right to assign overtime on an additional work day. Indeed, Sections 1 and 3 of Article 6 permits ADT to modify employee work schedules (as long as ADT provides advance notice of the change)

and allows ADT to assign work at premium pay on scheduled days off, thus allowing the assignment of a sixth day of work. (Jt. Ex. 2, 3). In fact, the language in both labor agreements on overtime pay expressly contemplates work on Saturdays. (Tr. 112). Furthermore, although there is language in Article 6 stating the Respondent will seek volunteers to perform overtime work, it does not prohibit but, rather, permits the Respondent to assign bargaining unit members according to seniority with no limitation on how many employees can be assigned at a time. (Jt. Ex. 3, p. 10; Jt. Ex. 2, p. 7; Tr. 61, 65, 105, 121–22). Local 43 admitted as much in the underlying proceedings. Local 43's witness testified that the Agreements place no limit on the number of employees ADT could assign to overtime work. (Tr. 61, 65). Yet, Local 43 is now asking this Court to read into the Agreements obligations that simply do not exist. Nowhere in the Agreements does there exist language prohibiting ADT from assigning overtime on a Saturday. ADT's legitimate business decision was, thus, within the scope of what the clear and unambiguous language in the Agreements permitted.

CONCLUSION

Accordingly, this Court should decline the Appellant's request to vacate and remand the February 27, 2020 Decision and Order of the National Labor Relations Board. For the foregoing reasons, Intervenor ADT LLC requests that this Court affirm the February 27, 2020 Decision and Order of the Board, dismissing the allegations that ADT violated Section 8(a)(5) and (1) of the National Labor Relations Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(C), I certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 5,257 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared using Century Schoolbook 14-point font, a proportionately spaced typeface.

Dated this 13th day of November 2020.

s/ Norma Manjarrez

CERTIFICATE OF SERVICE

I certify that on this 13th day of November 2020, I caused this BRIEF FOR INTERVENOR ADT LLC to be filed electronically with the Clerk of the Court using the CM/ECF System, and with the required six copies via federal express to:

United States Court of Appeals for the Second Circuit
Clerk of the Court, Catherine O'Hagan Wolfe
40 Foley Square
New York, NY 10007

I further certify that this document was served on all parties or their counsel of record through the Court's CM/ECF system.

s/ Norma Manjarrez