20-1163-ag

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

PAGE PROOF REPLY BRIEF FOR PETITIONER

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Introduction

The National Labor Relations Board ("Board" or "NLRB") reads the collective-bargaining agreements ("CBAs") between ADT Security Services ("ADT" or "Company") and Local Union 43, International Brotherhood of Electrical Workers, AFL-CIO ("Union") to permit ADT to unilaterally assign service and installation technicians to mandatory six-day workweeks for an indefinite period, because a provision within the agreements' management rights clause provides ADT the "exclusive right to determine the amount of work needed," and another provision "contemplate[s] overtime outside the technicians' regular schedules." NLRB Br. 17.[1] However, as the Union explained in its Opening Brief, a provision that provides the right to determine the "amount" "of work needed" says nothing about the Company's right to determine *when* that work will be performed, and a provision that "contemplate[s]" overtime work outside the normal work schedule says nothing about whether the Company has a right to *unilaterally assign* individual technicians to a six-day workweek.

The management rights and overtime provisions simply cannot bear the interpretation the Board places on them. Indeed, according to the Board's overly-

[1] Herein, "NLRB Br." refers to the NLRB's Brief. "Pet. Br." refers to Union's Opening Brief. "ADT Brief" refers to Intervenor ADT's brief. "DO" refers to the NLRB's Decision and Order. "JX" refers to Joint Exhibit.

broad interpretation, unilateral assignment by ADT is the *only* way by which Union-employees may work overtime. *See id*. at 25. This interpretation is demonstrably overbroad, as the Board concedes that the past practice had been for technicians to work overtime on a *voluntary* basis. *See id*. at 6.

More importantly, the Board's interpretation allows these general provisions to control over specific and directly-applicable provisions related to the workweek and scheduling. Since the Board's interpretation is simply wrong, it must be reversed and the case remanded with instructions to perform the relevant analysis pursuant to a proper interpretation of the collective-bargaining agreements.

Argument

A. The Board's Claim that the Workweek Provisions Do Not Control, and Prohibit, ADT's Actions are Unpersuasive

As explained in the Union's Opening Brief, under the contract coverage analysis, the Board "will give effect to the plain meaning of relevant contractual language, applying ordinary principles of contract interpretation[,]" to "determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally." *MV Transportation, Inc.*, 368 NLRB No. 66, sl. op. 2, 11 (2019). The Board attempts to "ascertain and give effect to the parties' intent 'plainly expressed' in a collective-bargaining agreement[.]" *Id*. at 9, *quoting M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435, 135 S. Ct. 926, 933 (2015). Accordingly, the purpose

of the contract coverage analysis is to determine whether an employer's unilateral action is encompassed within the plain meaning of collectively bargained language, in order to give effect to the parties' intended bargain. In doing so, the Board will give effect to broadly written management rights, but not if those rights are otherwise limited by provisions of the CBA. *MV Transportations*, *supra*, sl. op. at 2 n. 6. Where the plain meaning of the language does not encompass the unilateral action, an employer violates § 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(5), by failing to bargain prior to implementing the unilateral change.

Board Counsel, as the Board did in its Decision and Order, points to two CBA provisions to support the holding that the Company was privileged to unilaterally and indefinitely assign Union-represented technicians to mandatory six-day workweeks, and to unilaterally exempt those technicians enrolled in higher education from the scheduling change.[2] The provisions the Board reads together as supplying this authority are, *first*, the phrase in Article 1, Section 2 that grants the Company the right "to determine the reasonable amount … of work needed"

[2] Board Counsel characterizes the change unilaterally implemented by the Company as a "temporary policy requiring [employees] to work extra hours." NLRB Br. 6. The change unilaterally implemented was neither temporary, nor did it merely require employees to work extra hours. Instead, it implemented "a mandatory six day workweek" for an indefinite term until each particular market "achieves the desired target which the manager will post locally for each market." DO 2; JX 4.

and, *second*, Article 6, Section 3, which Counsel describes as "contemplate[ing]" work in excess of 40 hours a week and on scheduled days off. NLRB Br. 17-18.[3] According to Board Counsel, the right to determine the "amount … of work needed" necessarily includes the right to determine *when* work will be performed, and, the argument runs, that conclusion is clinched by the CBAs' requirement that the Company to pay overtime for work beyond the normal work schedule. *Id*. at 21 ("It is plain that authorization to determine the amount of work encompasses and privileges assignment of extra work beyond a regular schedule, particularly in light of a provision requiring premium pay for such work, including, explicitly, on scheduled days off.").

But as the Union explained in its Opening Brief, the authorities granted the Company in the CBAs' management rights clauses are "subject . . . to the provisions of th[e] agreement." JX 2, p. 3; JX 3, p. 4. The provisions of the agreements include Article 6, Section 1, which, in contrast to the general provisions relied on by the Board, provide specific and directly-applicable

[3] ADT argues that additional provisions in the management rights clause support its right to implement the mandatory six-day workweeks. ADT Br. 2, 16, 23. The Board did not rely on any of these provisions, and this Court cannot affirm its Decision and Order based on those provisions. *Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397, 94 S. Ct. 2315, 2326 (1974) ("an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself[,]'" *quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169, 83 S. Ct. 239, 246 (1962)).

provisions regarding the technicians' workweek and the Company's right to change that workweek. Indeed, as the Union showed in its Opening Brief, these provisions actually *prohibited* ADT's scheduling of technicians not enrolled in higher education to mandatory six-day workweeks. *See* Pet. Br. 15-18.

Briefly, the provisions of Article 6, Section 1 set the scope of technicians' normal, four- or five-day workweek, and provide ADT a limited right to add hours outside the technicians' regular shifts. JX 2, p. 7; JX 3, p. 10. For Albany and Syracuse service technicians, ADT is permitted to add an hour at the shifts' beginning, requiring these technicians to begin work at 7:00AM. *Ibid*. For Albany installation technicians, the Company is authorized to "periodically" "add an additional shift for residential installers from Tuesday through Saturday." JX 3, p. 10. For Syracuse installation technicians, the Company is authorized to "periodically" require "work to be performed on a second shift and/or Saturday." JX 2, p. 7. For all technicians, the Company must first seek volunteers for these additional workhours, and *if* it obtains insufficient volunteers, it may assign technicians in reverse seniority order. JX 2, p. 7; JX 3, p. 10.[4] These provisions are the only relevant provisions in the contracts that address the workweek, and the

[4] Clearly, then, ADT is wrong when it claims that Article 6, Section 1 only requires advanced notice prior to unilaterally implementing the limited modifications to the normal workweek allowed by that section. ADT Br. 16, 23.

Company's right to deviate from the normal workhours.[5] It is clear that these provisions do not provide the Company a right to unilaterally assign technicians not enrolled in higher education to mandatory six-day workweeks, while exempting those enrolled in higher education, and without first seeking volunteers prior to assigning in reverse seniority order. [6]

Board Counsel denies that these directly-applicable provisions have any relevance to the analysis of whether the contracts cover ADT's unilateral scheduling of mandatory six-day workweeks for select technicians, instead arguing that these provisions simply set technicians' normal workweek, and that the management rights and overtime provisions address the assignment of workhours outside the normal workweek. *See* NLRB Br. 22-23. Board Counsel's arguments do not square with the clear language of Article 6, Section 1.

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[5] Of course, the Company may always seek volunteers for any overtime work, including on a sixth day. Indeed, that had been the past practice. DO 6, Union Opening Br. 6, NLRB Br. 6.

[6] ADT misleadingly claims that Article 6, Section 1 explicitly permits the Company to assign Saturday work. ADT Br. 17, 24. That section says nothing about assigning Saturday work to service technicians, only to installation technicians. And as explained, the provisions require the Company to first seek volunteers prior to "periodically" assigning technicians in reverse seniority order to work outside the normal workweek. Nothing about these provisions says the Company may indefinitely schedule technicians to a six-day workweek that includes Saturday, and unilaterally exempting technician enrolled in higher education from that scheduling change.

First, this interpretation was concocted by Board Counsel, as the Board itself did not rely on it in the Decision & Order. Such a post-hoc rationale is impermissible. *Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397, 94 S. Ct. 2315, 2326 (1974) ("an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself[,]'" *quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169, 83 S. Ct. 239, 246 (1962)). The Board discusses Article 6, Section 1 in its contract coverage analysis only to support its interpretation that the Company was empowered to schedule work on a sixth weekday, by pointing to the language regarding the Company's right to schedule installation technicians on Saturdays. DO 3 n. 9.

Second, nothing in the Company's communications regarding the implementation of the six-day workweek indicates that it believed it was exercising a purported authority to assign overtime work on a sixth workday outside the normal workweek. Its initial announcement indicated that it was "impl[eme]nting a mandatory six day workweek"; the email forwarding this announcement to Union representatives also referenced "a 6 day work week[.]" JX 4. In response, the Union argued to the Company that Article 6 only allowed for four- or five-day workweeks, and not a six-day workweek. JX 5. The Company's reply made no reference to overtime, but instead stated that, based on certain backlogs, it "determined which locations needed to temporarily implement 6 day work weeks

weekly, and which needed to temporarily implement 6 day work weeks bi-weekly." JX 7, *see also ibid* (referring to targets needed to be reached to return to "normal work weeks," and also describing the "new 6 day work week").[7]

Third, and most important, as the Union explained in its Opening Brief, the Board's interpretation would render Article 6, Section 1 superfluous. The Board interprets the right to determine the "amount … of work needed" together with the requirement to pay overtime wages for certain workhours to privilege the Company to schedule any individual technician to an unlimited workweek – including scheduling technicians to seven-day workweeks. But, if that were so, the Company could structure technicians' workdays and workweeks however it pleased, as long it was willing to pay overtime wages for those hours specified within Article 6, Section 3. Article 6, Section 1's provisions detailing the normal workweek and schedule, and the limited deviations from those normal workweeks and schedules, would be rendered void. For example, there would be no need for contractual language that allowed the Company to add an hour to service technicians' workdays by starting their shifts at 7:00am, if the management rights

[7] Thus, ADT's claim that it "determined" that it was permitted to "assign [the sixth workday per week] as overtime work to all bargaining unit members at the same time" has no basis in the record. ADT Br. 10.

and overtime provisions allowed the Company to begin the workday at 6:00am.[8] And the Company could circumvent the need to first seek volunteers prior to assigning the additional work to the least senior technician by doing what it did here, assigning every technician the additional work other than those it unilaterally exempts. The Board's interpretation therefore runs afoul of the canon that all terms should be given effect and thus an interpretation that renders a provision superfluous is to be avoided. *Kelly v. Honeywell International, Inc.*, 933 F.3d 173, 183 (2d Cir. 2019).

In a classic "rubber-glue" argument, Board Counsel claims that it is actually the Union's interpretation that renders CBA provisions superfluous, namely the management rights and overtime provisions. NLRB Br. 26. But this argument is simply wrong. *First*, the management rights clause is explicitly limited by the

[8] Board Counsel interprets the language related to starting service technician workdays at 7:00am to not add an hour to these technicians' workday, but to simply shift their eight-hour workday an hour earlier. NLRB Br. 25. This interpretation is wrong. *First*, Counsel's interpretation is not one provided by the Board itself in the Decision and Order. *See Texaco, Inc.*, *supra*. *Second*, this interpretation is inconsistent with the Board's interpretation of the deviation language applied to installation technicians, which the Board interprets to add "an extra shift on a 6th day," rather than to shift their normal workweek to include Saturday. DO 3 n. 9. *Third*, Counsel's interpretation makes nonsense of the requirement that the Company first seek volunteers before assigning the least senior technician to the 7:00am start time. Such safeguards are bargained to both offer employees with greater seniority an opportunity for additional hours of work, while also protecting senior employees from mandatory assignment of undesirable hours, such as having to work a prolonged shift, rather than having to begin and end a regular eight-hour shift an hour earlier.

other provisions of the contract; specific contract provisions are not limited by the general terms of the management rights clause. *Second*, even assuming the right to determine the "amount … of work needed" coupled with the requirement to pay overtime wages for certain workhours says anything about the Company's ability to unilaterally schedule extra hours beyond the normal workweek, the Company retains that right under the Union's interpretation. The Company maintains its ability to determine that the amount of work needed requires service technicians to work an extra hour a day from 7:00am to 8:00am, and for installation technicians to work Saturdays, as long as it first seeks volunteers prior to assigning via reverse seniority and pay overtime wages for that time.

Third, the Company may continue its past practice and engage the Union to find volunteers for the additional amount of work needed, and pay overtime wages for that time. *Fourth*, the Company maintains rights consistent with the plain meaning of the "amount … of work needed," such as determining how much work technicians would be expected to perform during their normal work shifts, or deciding to hire additional technicians to perform a greater amount of work or to layoff technicians due to lack of work (*see* JX 2, p. 12; JX 3, p. 17). *Finally*, the overtime provision would continue to guarantee technicians' overtime wages for certain hours worked, even where the Company would not be required to pay overtime under the Fair Labor Standards Act (such as for hours beyond eight in a

day, or for scheduled days off, regardless of whether technicians reached the statutory threshold of 40-hours worked in a week).

It is clear then that, not only was the Company not privileged to make the unilateral schedule change, but, under a proper interpretation of the CBAs, the Company was actually prohibited from making that change. In an attempt to avoid this conclusion, the Board makes the strawman argument that a claim that the contract forbids an action is a different theory of a statutory violation – a contract modification claim – that the Union does not raise before this Court. NLRB Br. 27-28 ("while the question in a unilateral-change case is whether the contract *privileged* the employer's action, the issue of whether a contract *forbade* employer action is typically the crux of a mid-term-contract-modification allegation") (emphasis in original)). This argument makes little sense, and is easily dismissed. Obviously, contract language that forbids a unilateral action also does not privilege that action. This Circuit has previously so held. *See HealthBridge Mgt., LLC v. NLRB*, 902 F.3d 37, 47 (2d Cir. 2018) (contractual language that "cover[ed] the disputed issues" prohibited the employer's unilateral change, resulting in § 8(a)(5) violation for failing to bargain prior to the change).

By not offering to bargain prior to making the unilateral scheduling change, the Company violated § 8(a)(5) of the NLRA. The Court should remand this case

for consideration of the § 8(a)(5) allegations in light of a proper interpretation of the collective-bargaining agreements.[9]

B. There is No Reason that the Plain Meaning of the CBAs' Management Rights Clause and Overtime Provision Would Control in a Contract Coverage Analysis Over the Directly-Applicable Workweek Provisions

As discussed, Board Counsel relies on the Company's right to determine the "amount … of work needed" and the overtime provision that "contemplate[s]" work in excess of 40 hours a week and on scheduled days off to find that the contract covered ADT's unilateral scheduling of technicians to six-day workweeks, and exempting technicians enrolled in higher education from that sixth workday. NLRB Br. 21 ("It is plain that authorization to determine the amount of work encompasses and privileges assignment of extra work beyond a regular schedule, particularly in light of a provision requiring premium pay for such work, including, explicitly, on scheduled days off."). The Board improperly reads these provisions to be more directly applicable to ADT's scheduling change than the workweek

[9] As explained in the Union's Opening Brief, because the Board's holding that the Company did not violate § 8(a)(5) turns on its flawed contract interpretation, upon remand, the Board may address any potential unfair labor practices that flow from a proper interpretation of the Agreements. This includes whether the Company violated NLRA § 8(a)(5) by unilaterally acting in the face of the Union's insistence that NLRA § 8(d) freed it from any obligation to bargain over a midterm change to Article 6.

provisions in Article 6, Section 1. The plain meaning of these general provisions does not provide any basis for such an interpretation.

Nothing about the plain meaning of the phrase "amount … of work needed" encompasses the right to schedule that work to be performed. The standard definition of "amount" is "the total number or quantity." https://www.merriam-webster.com/dictionary/amount. That the Company had the right to determine the total quantity of work needed does not plainly encompass the right to unilaterally change the workweek by scheduling each technician to perform that work on a sixth workday each week, and to further exempt technicians enrolled in higher education from the sixth workday. Similarly, that the overtime provisions of the CBAs "contemplate" payment of increased wages for work performed on a sixth workday – without any enabling language even suggesting that the Company has a right to unilaterally assign that overtime – does not bolster the Board's unacceptably broad reading of the management rights clause.

Board Counsel seeks to support the Board's analysis by pointing to other cases in which the Board or courts have found an employer action covered by general contract language. But, unlike here, those cases each involve language whose plain meaning would encompass the contested action. Thus, in *Conoco Inc. v. NLRB*, 91 F.3d 1523 (D.C. Cir. 1996), the D.C. Circuit held that a collective-bargaining agreement covered an employer's decision to rearrange its divisions,

and thereby rearrange the employee groupings that aligned with those divisions, where a management rights clause included the rights to

> (a) determine the organization of the divisions, including types of operation; (b) discontinue processes or operations, or their performance by certain employees; and (c) transfer within or without the Company any work, technology, equipment, or process.

Id. at 1528.

Similarly, in *NLRB v. U.S. Postal Serv.*, 8 F.3d 832 (D.C. Cir. 1993), the court held a collective-bargaining agreement covered an employer's decision to implement certain service reductions (such as, closing post offices on some Saturdays and reducing window hours, *id*. at 834), and the resultant changes to employee work schedules, where the management rights clause included the "exclusive right" to "[t]ransfer and assign employees[,]" "[t]o determine the methods, means and personnel by which [its] operations are to be conducted[,]" and "[t]o maintain the efficiency of the operations entrusted to it." *Id*. at 838. *See also Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 935-37 (7th Cir. 1992) (employer was privileged to implement a drug and alcohol policy that the Court found to be "a regulation relating to employee conduct" where management rights clause provided "the exclusive right … to establish and enforce reasonable rules and regulations relating … to employee conduct"); *MV Transportation*, *supra*, sl. op. at 17 (employer was privileged to implement a safety policy that included disciplinary consequences where two separate provisions provided employer with

right "to issue, amend and revise policies, rules and regulations[,]" and management rights clause further provided employer "sole[ ] and exclusive[ ]" right to "discipline and discharge for just cause[,]" and "to adopt and enforce reasonable work rules"); *Huber Specialty Hydrates, LLC*, 369 NLRB No. 32, sl. op. 1, 3 (2020) (employer was privileged to implement attendance policy where management rights clause provided it "the right to adopt reasonable rules and policies").

In contrast to these cases, as shown above, the plain meaning of the right to determine the "amount … of work needed" does not encompass the right to schedule technicians to work a mandatory six-day workweek, and also exempt certain technicians from that assignment because they were enrolled in higher education. Similarly, unlike any of the provisions the courts or the Board relied on in each of the cases above, the Board here mines a right to unilateral action out of a provision – the overtime provision – that includes no affirmative right to act unilaterally at all.[10] Finally, and dispositively, unlike here, none of the contracts in

[10] Board Counsel appears to acknowledge that the overtime provision grants no affirmative right to ADT to act unilaterally, as it repeatedly describes the provision as "contemplating" work on days off. *See* NLRB Br. 12, 17, 19, 20. The fact that the provision views work outside the normal workweek as likely to occur in no way grants ADT the unilateral right to assign individual technicians to that work. It simply requires ADT to pay time-and-a-half wages for that work. This should also be read in conjunction with Article 6, Section 1, which identifies the limited circumstances in which an individual can be assigned to work outside of the normal scheduled workweek. In regards to unilateral action by ADT, it is only

those cases contained directly-applicable specific language that trumped the general language relied upon by the Board or the courts.[11]

That the Board's interpretation of the management rights and overtime provisions is overly broad is easily demonstrated by Board Counsel's claim that the unilateral assignment of overtime work is the *only* means for technicians to earn overtime pay. In disputing that provisions within Article 6, Section 1 prohibit the Company from unilaterally adding a sixth day to a service technician's workweek, Board Counsel claims that the Union's "interpretation would make service technicians ineligible for any overtime." NLRB Br. 25 (this claim is based on Board Counsel's mistaken interpretation that Article 6, Section 1 does not allow ADT to unilaterally add hours outside the service technicians' normal workweek, *see supra* note 8). However, Board Counsel also acknowledges that the past practice for overtime work had been for ADT to "let[ ] the Union know the amount of extra hours required, which the Union satisfied by offering the overtime to technicians on a *voluntary basis*, by seniority." *Id*. at 6 (emphasis added).

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in these limited circumstances explicitly identified in Article 6, Section 1 that the overtime language for "scheduled days off" would apply. As discussed, technicians may also volunteer for overtime work on their scheduled days off.

[11] For instance, in *USPS*, it appears that the only directly-applicable language outside the management rights provisions was a requirement that positions subject to new schedules would be re-posted so that employees could re-bid on the newly scheduled position. *USPS*, 8 F.3d at 835 n. 1. That provision was not at issue in the case. *Ibid*.

Accordingly, the Board's interpretation that the right to determine the amount of work needed, together with the requirement to pay overtime wages for certain workhours, grants ADT the exclusive and sole authority to award overtime through unilateral assignment is contradicted by its own factual findings.

In response to the Union's arguments highlighting these weaknesses in the Board's interpretation, Board Counsel argues that the contract coverage analysis does not require that the contract language specifically address the unilateral action. NLRB Br. 21.[12] Fair enough, but that does not mean that the Board may imbue contractual language with whatever meaning it pleases, and ignore specific language that addresses the issue. Language must be given its plain meaning, through application of ordinary principles of contract interpretation, in an effort to determine the parties' intent. *See HealthBridge Mgt.*, 902 F.3d at 47 (court read "employee" "to have its ordinary meaning" rather than meaning that excluded part-time or per-diem employees).

As the Union pointed out in its Opening Brief, nowhere in the CBAs does the Company retain the commonly bargained right to "assign all schedules, work

[12] Indeed, Board Counsel lays *ad hominen* accusations that the Union harbors a secret agenda – "to shift the contract-coverage standard back towards the prior, clear-and-unmistakable-waiver standard." NLRB Br. 21. There is no basis for that line of attack. The Union's only agenda – which is transparent – is to hold the Board accountable for fairly applying the contract coverage standard it adopted in *MV Transportation*.

hours [and] shifts." *MV Transportation*, *supra*, sl. op. at 15; *see also, e.g.*, *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 837 (6th Cir. 2000) (management rights clause included right to "direct, control, and schedule its operations work force"); *Local 65-G, Graphic Communications Conf. of the Int'l Broth. of Teamsters v. NLRB*, 572 F.3d 342, 345 (7th Cir. 2009) (management rights clause included right "to establish and change work schedules").[13] This is not to say that this exact language must appear for an employer to retain the authority to schedule employees to hours outside their normal workweek. However, it illustrates how untenable the Board's interpretation is, as it interprets the right to determine the "amount … of work needed" together with a provision that requires overtime wages for certain workhours to encompass the same right as the a provision granting the right to "assign all schedules, work hours [and] shifts." The CBAs' "literal language" simply "does not embrace[ ]" such a right. *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 315 (D.C. Cir. 2003) (finding that contract language did not cover employer action where that action was "not embraced by the literal language of the management rights clause"). Reading the provisions to do so would not effectuate

[13] Board Counsel inappositely dismisses additional examples of this collectively-bargained right cited in the Union's Opening Brief, arguing that those cases applied the clear-and-unmistakable-waiver standard. NLRB Br. 22 n. 6. The point is that express terms establishing the employer's the right to schedule the workforce are commonly bargained, which these cases illustrate. The applicable legal standard is wholly beside the point.

the parties' intent, particularly where collective-bargaining agreements regularly use different words to express that intent and where – as here – specific provisions directly address the issue.

It is clear, then, that the general management rights provision to determine the "amount … of work needed" and the overtime provision that requires payment for enhanced wages for certain workhours do not trump the directly-applicable provisions regarding workweeks and scheduling of workhours in Article 6, Section 1. As these are the only provisions the Board relied on to determine that the Company's actions were covered by the contract language, the Court must remand the case to the Board to analyze the matter pursuant to a proper interpretation of the CBAs.

C. The Board's Argument that the Company Did Not Have to First Seek Volunteers Prior to Assigning Additional Workhours in Reverse Seniority Order is Meritless

Board Counsel's arguments that the Company was relieved of the need to first seek volunteers prior to assigning technicians to a six-day workweek according to reverse seniority, are unconvincing. Counsel, as the Board did in its Decision and Order, argues that the Company was in an "all hands on deck" situation that rendered seeking volunteers a formality. NLRB Br. 29.[14]

[14] In the course of responding to the Union's argument that Article 6, Section 1 prohibited the Company's unilateral implementation of the six-day workweek, while exempting technicians enrolled in higher education and without first seeking

Initially, Board Counsel offers no response to the Union's argument in its Opening Brief that the "all hands on deck" explanation amounts to a futility defense to a contract violation claim, which has no relevance to the contract coverage analysis. Under the contract coverage analysis, the Board determines whether the plain meaning of a contract's language covers or encompasses the unilateral action taken. Clearly, the language in the CBAs does not cover ADT's unilaterally imposing a six-day workweek without first seeking volunteers prior to assigning technicians in reverse seniority order, and then exempting those technicians enrolled in higher education from those extra hours.

Further, as the Union explained in its Opening Brief, ADT was not in an "all hands on deck" situation. *First*, the Company unilaterally exempted technicians enrolled in higher education. Board Counsel argues that this exemption was authorized by the CBAs because these technicians' scheduling conflict meant they were not "qualified" volunteers, as required under Article 6, Section 1. NLRB Br. 29-30 and n. 10. Board Counsel invents this interpretation of "qualified"; it is nowhere in the Board's Decision and Order. *See Texaco, Inc.*, *supra*. Nor is it consistent with the plain meaning of the word "qualified," which typically refers to

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volunteers, Board counsel at various points wrongly asserts that one aspect or another of that argument is precluded by the Union's failure to raise the points before the Board. NLRB Br. 29, 30 and 31. There is no question, however, that the Union did argue that Article 6, Section 1 controlled.

an employee's skill level. QUALIFIED, Black's Law Dictionary (11th ed. 2019) ("Possessing the necessary qualifications; capable or competent."). As the Board's interpretation of "qualified" cannot stand on its own, Board Counsel inserts an additional caveat, requiring "qualified, available technicians." NLRB Br. 29 ("ADT, consistent with the Agreements and past practice, required no more than was necessary to meet customer needs: extra work by all qualified, available technicians.").[15] *Second*, the Company unilaterally exempted a technician with a childcare conflict. If it indeed was an all hands on deck situation, such an exception would not be allowed. *Third*, the Company required Syracuse technicians to work only every other Saturday, which hardly indicates an "all hands on deck" moment.

[15] The only relevant use of "available" in the CBAs is found in Article 6, Section 6, which provides that "[i]n order to assure continuity of service and production standards, it is agreed that a supervisor may perform installation and maintenance work when there is an insufficient number of Alarm Technicians available and when such work will not result in the layoff of any Alarm Technicians." Additionally, if technicians are considered unavailable because of a scheduling conflict caused by their taking advantage of a Company-provided benefit, the exemption should have extended to any technicians who, through use of the Company-provided health insurance plan, had a conflicting medical appointment. Board Counsel's interpretation highlights how the Board's Decision and Order improperly allows the Company's to unilaterally schedule six-day workweeks for technicians of its choosing.

D. The Board's Argument that the Reasoning for its Direct Dealing Finding Does Not Conflict With its Contractual Interpretation is Unconvincing

Board Counsel argues that there is no conflict between the Board's finding that ADT violated the NLRA by directly bargaining an exemption to the mandatory six-day workweek with an employee who had a childcare conflict and its contract interpretation that ADT had no duty to bargain over its implementation of the six-day workweek and its exemption for those technicians enrolled in higher education. According to Counsel, "ADT's contractual right to temporarily implement a six-day workweek did not encompass the separate (and unlawful) act of bypassing the Union to negotiate an exemption from that blanket implementation directly with one represented employee." NLRB Br. 31.

The Union is at a total loss in understanding Board Counsel's argument. According to the Board, ADT had no duty to bargain over the implementation of the six-day workweek because the contract authorized it to do so. According to that interpretation, the contractual authorization also encompassed the unilateral right to exempt any technician who was enrolled in higher education from the six-day workweek. Yet Board Counsel suggests that, even though ADT may unilaterally exempt technicians enrolled in higher education, it could not directly deal with an individual employee to exempt that employee from the mandatory six-day workweek. If the Company had no duty to bargain with the Union over one

exemption, it makes no sense to find that it violated the NLRA by not bargaining with the Union over a second exemption. Board Counsel suggests that the *ad hoc* nature of the childcare exemption, or that it came after the initial implementation, differentiates it from the higher education exemption. NLRB Br. 31. But again, if the Company had no duty at all to bargain with the Union over the implementation of and exemptions from the mandatory six-day workweek, then it makes no sense to fault it for dealing directly with an employee to bargain another exemption, regardless of when it did so.

Board Counsel's twisted logic supports the Union's argument. The Board's inconsistent findings show that its contract interpretation is faulty, and must not stand.

Conclusion

The Board provides no reasons to deny the Union's petition for review. The Court should remand this matter to the Board to determine the allegations pursuant to a proper interpretation of the CBAs.

Dated: December 11, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,694 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2) 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

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