

# 20-1163-ag

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, LOCAL UNION 43,

*Petitioner,*

– v. –

NATIONAL LABOR RELATIONS BOARD,

*Respondent,*

ADT LLC,

*Intervenor.*

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ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

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## **FINAL FORM BRIEF FOR PETITIONER**

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## INTRODUCTION

This case turns on whether the collective-bargaining agreements between ADT Security Services (“ADT” or “Company”) and Local Union 43, International Brotherhood of Electrical Workers, AFL-CIO (“Local 43” or “Union”) are properly interpreted to grant the Company the right to unilaterally implement a mandatory six-day workweek for most covered technicians, while excepting certain technicians from the schedule change. As will be demonstrated in this brief, the agreements do not grant such a right. The parties’ collective-bargaining agreements contain specific provisions that directly address the Union technicians’ work hours and schedules. Those provisions provide only for either four- or five-day work schedules. To the extent that the agreements address modification of the specified work schedules, they expressly preclude the changes unilaterally made by ADT here.

The National Labor Relations Board (“NLRB” or “Board”) found, however, that the agreements authorized the Company to act unilaterally. It came to that conclusion by reading together a provision of the agreements that granted the Company the right (subject to any other express limitations in the agreement) to determine the reasonable amount of work to assign technicians, and another provision that obligated the Company to pay overtime wages for time worked in excess of forty hours in a week or on scheduled days off. But neither of those

provisions authorized the Company to unilaterally change work schedules; indeed, the overtime pay provision did not grant the Company any rights at all. And in reading these general provisions to cover the Company's unilateral actions, the Board entirely ignored the specific provisions in the agreements that directly addressed the Union technicians' work hours and schedules.

As the collective-bargaining agreements are not properly interpreted to authorize the Company's unilateral action, the Board's decision must be vacated on this point and the matter remanded for consideration of the allegations in light of a proper interpretation of the collective-bargaining agreements.

### **JURISDICTIONAL STATEMENT**

This case is before the Court on a petition to review the Decision and Order of the NLRB issued in cases 03-CA-184936 & 03-CA-192545 ("DO") [JA 237-249]. *ADT, LLC d/b/a/ ADT Security Services*, 369 NLRB No. 31 (February 27, 2020). The petitioner is Local 43. This Court has jurisdiction to review the Board's decision pursuant to Section 10(f) of the National Labor Relations Act ("NLRA" or "Act"). 29 U.S.C. § 160(f).

This case originated with unfair labor practice charges against ADT filed by Local 43. The NLRB General Counsel found merit to those charges and issued a complaint pursuant to NLRA § 10(b). 29 U.S.C. § 160(b). The Board had authority to rule on that complaint pursuant to NLRA § 10(c). 29 U.S.C. § 160(c).

As the charging party, Local 43 was aggrieved by the Board's final order dismissing the complaint insofar as it alleged ADT's unilateral change to the workweek of union-represented employees constituted an unfair labor practice.

### **STATEMENT OF THE ISSUE**

Whether the ADT/Local 43 collective-bargaining agreements grant ADT the right to unilaterally assign most covered technicians to a mandatory six-day workweek, while excepting certain technicians from the schedule change.

### **STATEMENT OF THE CASE**

1. Proceedings Before the National Labor Relations Board.

On September 6, 2016, ADT announced that the workweek of certain technicians covered by the Company's collective-bargaining agreements with Local 43 would be increased to six days. DO 5 [JA 241]. Local 43 filed unfair labor practice charges alleging, inter alia, that this unilateral change constituted a refusal to bargain in violation of NLRA § 8(a)(5). DO 6 [JA 242]. The NLRB General Counsel issued a complaint alleging that ADT's unilateral change in the workweek was an unfair labor practice. On August 4, 2017, administrative law judge Michael Rosas issued a decision recommending that the Board find that ADT had committed an unfair labor practice in violation of NLRA § 8(a)(5). DO 11 [JA 247]. On February 27, 2020, the Board (Chairman Ring and Members Kaplan and Emanuel) dismissed the complaint insofar as it alleged that ADT's

unilateral change in the workweek constituted an unfair labor practice. DO 4 [JA 240]. The Board decision is reported as *ADT, LLC d/b/a ADT Security Services*, 369 NLRB No. 31 (February 27, 2020).

2. Relevant Facts.

ADT installs and services residential and commercial security systems. DO 1 [JA 237]. For decades, the Company and Union have been parties to labor agreements covering bargaining units of service and installation technicians at the Company's facilities in Albany, New York and Syracuse, New York. *Ibid.* The relevant collective-bargaining agreement for the Albany bargaining unit was effective June 11, 2015 through June 10, 2018 ("Albany Agreement"). JX 3 [JA 152-177].<sup>1</sup> The relevant collective-bargaining agreement for the Syracuse bargaining unit was effective June 11, 2016 through June 10, 2019 ("Syracuse Agreement"). JX 2 [JA 132-151] (the Syracuse Agreement and Albany Agreement are collectively referred to herein as "Agreements").

A. Relevant Contractual Provisions.

Article 1 of the Agreements grants the Company the right to "determine the reasonable amount... of work needed[.]" JX 2, p. 3 [JA 134]; JX 3, p. 3 [JA 154]. This right is "subject, however to the [remaining] provisions of th[e A]greement[s]." JX 2, p. 3 [JA 134]; JX 3, p. 4 [JA 155].

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<sup>1</sup> Herein, "JX" refers to Joint Exhibit. "Tr." refers to Transcript.

Article 6 of the Agreements defines “Hours of Work and Overtime.” JX 2, p. 7 [JA 138]; JX 3, p. 10 [JA 161]. Section 1 of that Article provides the regular workweek hours, which “shall be forty (40) hours” for all bargaining unit employees. *Ibid.*

Article 6, Section 1 also sets the following regular work schedule for bargaining unit technicians.

- For *service technicians* at both facilities, the “normal work schedule” “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.” JX 2, p. 7 [JA 138]; JX 3, p. 10 [JA 161] (emphasis added). Article 6, Section 1 also provides these service technicians an alternative “*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.” *Ibid* (emphasis added).
- *Installation technicians* at both facilities “may be scheduled for any eight-hour period between 7:00 a.m. and 5:30 p.m. in any given period between Monday and Friday.” JX 2, p. 7 [JA 138]; JX 3, p. 10 [JA 161].

The Agreements provide for specific departures from these schedules due to customer needs, and a specific process for determining which technicians would be assigned to these schedule departures.

- For *service technicians* at both facilities, “[c]ustomer needs may periodically make it necessary for work to be performed beginning at 7:00 a.m.” JX 2, p. 7 [JA 138]; JX 3, p. 10 [JA 161].
- For *Albany installation technicians*, “[c]ustomer needs may periodically make it necessary to add an additional shift for residential installers from Tuesday through Saturday.” JX 3, p. 10 [JA 161].
- For *Syracuse installation technicians*, “[c]ustomer needs may periodically make it necessary for work to be performed on a second shift and/or Saturdays.” JX 2, p. 7 [JA 138].<sup>2</sup>

Under both Agreements, in order to implement these departures from the service and installation technicians’ regular work schedules, the Company is required to “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.” JX 2, p. 7 [JA 138]; JX 3, p. 10 [JA 161].

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<sup>2</sup> The Syracuse Agreement defines second shift “as those shifts beginning at 12:00 noon and after.” JX 2, p. 10 [JA 141].

In practice, whenever ADT had difficulty finding enough volunteers to perform work outside of the regular work schedule, the Company enlisted the Union's help in finding volunteers. Tr. 54-55 [JA 20]. As a result, ADT nearly always got the volunteers it needed. *Ibid.*

Article 6, Section 3 of the Agreements sets the compensatory rate for hours worked in excess of the regular workweek. This provision establishes that “[a]ll 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 (1-1/2) times the employee's regular straight time hourly rate.” JX 2, p. 7 [JA 138]; JX 3, p. 10 [JA 161].

B. The Company's Unilaterally Implemented Six-Day Workweek.

In 2016, the Apollo Group purchased ADT and merged it with Protection One, another Apollo Group security subsidiary. DO 2 [JA 238]. Protection One maintained a policy of responding to 75 percent of service calls within 24 hours, which surpassed ADT's standard; Apollo Group decided to apply this policy nationwide to all ADT facilities. *Ibid.* Accordingly, ADT set a new customer service target of 1.69 days on all new installations and services tickets created. DO 7 [JA 243].

In order to meet this new customer service target, on September 6, 2016, ADT announced that it was “implementing a mandatory 6-day work-week” for employees at nine Company offices in New York and Pennsylvania, of which only the Albany and Syracuse offices were unionized. DO 7 [JA 243]. The change went into effect on September 22, 2016. *Ibid.* At four offices, including Albany, the change applied to all workweeks. *Ibid.* At the other five, including Syracuse, the six-day workweek requirement applied to only the second and fourth weeks of every month, although that could be changed at any time to apply to all workweeks. *Ibid.* At the time of the announcement, the Company stated that the mandatory six-day workweek would be in place “until further notice.” Tr. 51, 84 [JA 19, 27]. ADT’s announcement excepted employees who were enrolled in higher education through the Company’s reimbursement benefit program from the mandatory six-day workweek.<sup>3</sup> DO 7 [JA 243]. The Company later made another exception for one employee due to his childcare situation. DO 8-9 [JA 244-45].

Upon receipt of the Company’s announcement, the Union immediately objected to the implementation of the mandatory six-day workweek, and demanded that the Company rescind the change. DO 2, 8 [JA 238, 244]. The Company moved forward with implementation of the mandatory six-day workweek on

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<sup>3</sup> The Company apparently excepted these technicians because it had pre-paid the reimbursement benefit. Tr. 96 [JA 30].

September 22, 2016, and it continued in effect for Albany technicians until December 2016 or January 2017, and for Syracuse technicians for about one month. *Ibid.* The Company assigned technicians not only backlogged work for their mandatory sixth day, but booked new work for those days. Tr. 100, 108 [JA 31, 33]. Normally, the employees with the least amount of seniority can be expected to receive such assignments. Due to absences and unilaterally-determined exceptions, however, the Company assigned only the highest seniority technician in the Albany bargaining unit to work the additional sixth day each week. DO 8 [JA 244]; Tr. 90-91 [JA 29], 95-96 [JA 30].

C. The NLRB's Decision and Order.

The Board held that ADT “did not violate Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally implementing a 6-day workweek for service and installation technicians at both the Albany and Syracuse facilities.” DO 1 [JA 237]. According to the Board, ADT’s implementation of a six-day workweek for Albany and Syracuse technicians who were not enrolled in higher education “was within the compass or scope of language in the Agreements granting the [Company] the right to take that action unilaterally.” DO 3 [JA 239]. The Board reached this conclusion by simply “[r]ead[ing] together” the phrase from Article 1, Section 2 that allows ADT “to determine the reasonable amount... of work needed” with Article 6, section 3, which specified how overtime work

would be compensated, including for hours worked “in excess of forty (40) hours” and for “scheduled days off.” *Ibid.* According to the Board, these two provisions “covered” the Company’s decision to implement the six-day workweek. *Ibid.*

Though it determined that the Company did not violate the Act by unilaterally implementing the six-day workweek for technicians not enrolled in higher education, the Board upheld the ALJ’s determination that the Company violated the Act by bargaining directly with an employee (as opposed to the Union) a separate exception that permitted him not to work on Saturdays due to his childcare situation. DO 1 [JA 237], 8-9 [JA 244-45].

### **SUMMARY OF ARGUMENT**

The issue in this case is whether ADT refused to bargain in violation of NLRA § 8(a)(5) by unilaterally implementing an indefinite six-day workweek for Union-represented technicians working out of the Company’s Albany and Syracuse facilities. The Board found that ADT did not violate NLRA § 8(a)(5) solely on the ground that the Agreements granted the Company authority to unilaterally add a day to the technicians’ workweek. The Board’s finding in this regard was based on a patent misreading of the Agreements.

The Agreements each contain provisions that specifically address the technicians’ regular work schedules and how those schedules may be altered due to customer needs. For service technicians, the provisions allow ADT to begin the

workday as early as 7:00 a.m., but do not allow the Company to add a day to the workweek. For installation technicians, the Company may periodically add a day. But with respect to both groups, ADT must first seek volunteers before assigning the additional work by seniority.

The Board ignored these provisions in finding that ADT had authority to unilaterally alter the technicians' work schedules. Instead, the Board focused on a part of the management rights clause and a provision defining the rate of overtime pay. But the management rights clause was expressly limited by the other provisions of the Agreements. And the overtime pay provision did not involve any grant of authority to the Company.

When the Board finally did turn to the relevant provisions governing work schedules, it ignored altogether the fact that they did not authorize ADT to add a day to the service technicians' workweek. And, the Board attempted to forgive the Company's failure to first seek volunteers by asserting, falsely, that all technicians were needed, such that the issue of volunteers was moot. In fact, ADT *did not* assign extra work to all technicians. The Company unilaterally decided to exempt certain technicians from the six-day workweek. And at one of the unionized locations, the Company scheduled the sixth day only every other week.

This Court owes the Board no deference with respect to interpreting the collective-bargaining agreements. As the Board's decision rests on a patent

misreading of the Agreements, that decision should be vacated and the case should be remanded for consideration under a proper understanding of the relevant contract terms.

## ARGUMENT

Section 8(a)(5) of the National Labor Relations Act makes it an “unfair labor practice for an employer... to refuse to bargain collectively with the representative of its employees.” 29 U.S.C. § 158(a)(5). An employer violates this Section “when it discontinues an established policy, resulting in ‘chang[es] [to its] employees’ wages, hours, and other terms and conditions of employment,’ ‘without [first] notifying and bargaining with the [employees’] collective bargaining representative.’” *HealthBridge Mgmt., LLC v. NLRB*, 902 F.3d 37, 46 (2d Cir. 2018) (alteration in original), *quoting Local Union No. 36, Int’l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 706 F.3d 73, 81 (2d Cir. 2013); *see also NLRB v. United Technologies Corp.*, 884 F.2d 1569, 1574-75 (2d Cir. 1989) (“It is axiomatic that an employer violates its duty to bargain under § 8(a)(5) of the Act by changing employees’ terms and conditions of employment without notifying and bargaining with the collective bargaining representative of its employees.”).

“It is well established that an employer does not violate the Act if the collective-bargaining agreement... grant[s] the employer the right to take certain actions unilaterally (i.e., without further bargaining with the union).” *MV*

*Transportation, Inc.*, 368 NLRB No. 66, sl. op. 1 (2019). In its recent *MV Transportation* decision, the Board abandoned its long-standing “clear and unmistakable waiver” standard for determining whether a collective-bargaining agreement grants an employer that right. *Ibid.* Instead, when an “employer defends against an 8(a)(5) unilateral-change allegation by asserting that contractual language privileged it to make the disputed change without further bargaining[.]” the Board “will assess the merits of this defense” under the so-called “contract coverage” standard. *Id.* at 11.

Under this standard, “the Board will conduct a limited review and ‘examine the plain language of the collective-bargaining agreement to determine whether action taken by the employer was within the compass or scope of contract language granting the employer the right to act unilaterally.’” *ABF Freight Sys., Inc.*, 369 NLRB No. 107, sl. op. 3 (2020), *quoting MV Transportation, supra*, sl. op. at 2, 11.<sup>4</sup> “Under contract coverage, the Board will ascertain and give effect to the parties’ intent ‘plainly expressed’ in a collective-bargaining agreement[.]” *MV Transportation, supra*, sl. op. at 9, *quoting M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435, 135 S. Ct. 926, 933 (2015). In doing so, the Board “will give

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<sup>4</sup> The Board’s review must be limited as it is only authorized to interpret collective-bargaining agreements to the extent necessary to determine whether an unfair labor practice has occurred. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 428 (1967).

effect to the plain meaning of relevant contractual language, applying ordinary principles of contract interpretation[,]” and “not require that the agreement specifically mention, refer to or address the employer decision at issue.” *MV Transportation, supra*, sl. op. at 11. The Board will interpret broadly worded management rights provisions to provide broad rights to an employer, but only to the extent “that no other provision of the agreement limits the employer’s right of action.” *Id.* at 2 n. 6.<sup>5</sup>

A. Judicial Review of the Board’s Contract Interpretation is De Novo.

As the Board’s contract coverage standard ultimately turns on the proper interpretation of the relevant collective-bargaining agreement, judicial review is de novo. *HealthBridge*, 902 F.3d at 47 (“We decide de novo whether a matter is ‘covered’ by the contract”). Thus, the judiciary does not “defer to the Board’s interpretation of a contract such as a CBA because the interpretation of contracts falls under the special, if not unique, competence of courts.” *Local Union No. 36*, 706 F.3d at 82; *see also Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v.*

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<sup>5</sup> Where an employer fails to carry its burden under the contract coverage standard, it may still assert a defense that the union waived its right to bargain over the unilateral change. In that situation, “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, supra*, sl. op. at 12.

*NLRB*, 501 U.S. 190, 202–03 (1991) (“Arbitrators and courts are [ ] the principal sources of contract interpretation[,]” and courts “would risk the development of conflicting principles were [they] to defer to the Board in its interpretation of the contract.” (internal quotation marks and citations omitted)).<sup>6</sup>

B. The Agreements Do Not Grant ADT the Right to Unilaterally Implement Mandatory Six-Day Workweeks for Technicians Not Enrolled in Higher Education.

The provisions within Article 6 of the Agreements, entitled “Hours of Work and Overtime[,]” control the technicians’ hours of work and schedules. Jt. Ex. 2, p. 7 [JA 138]; Jt. Ex. 3, p. 10 [JA 161]. Section 1 of that Article contains the only relevant contractual provisions addressing the technicians’ work schedules.<sup>7</sup> A review of the provisions of this Section shows that they do not grant ADT the right to unilaterally implement a mandatory six-day workweek schedule; in fact, these provisions *prohibit* that action.

For all *service technicians*, Article 6, Section 1 provides that the “normal work schedule” “shall be a shift” of eight paid hours “comprising of five consecutive days[.]” JX 2, p. 7 [JA 138]; JX 3, p. 10 [JA 161]. Alternatively,

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<sup>6</sup> The Board has “recognize[d] that the courts will not defer to the Board’s contract interpretations under the contract coverage standard[.]” *MV Transportation, supra*, sl. op. at 7 n. 18.

<sup>7</sup> Article 6, Section 2 provides for an occasional 12:00 noon to 8:30 p.m. shift for trouble and maintenance requirements. JX 2, p. 7 [JA 138]; JX 3, p. 10 [JA 161]. That provision is not relevant to the instant dispute.

service technicians may be assigned to a “four-day workweek” composed of ten paid hours. *Ibid.* These provisions in no way allow ADT to assign service technicians to a “mandatory 6-day work-week.” DO 7 [JA 243].

Article 6, Section 1 does provide ADT with the right to adjust the service technicians’ work schedule in response to customer needs. The Section states, “Customer needs may periodically make it necessary for work to be performed beginning at 7:00 a.m.” JX 2, p. 7 [JA 138]; JX 3, p. 10 [JA 161]. In other words, ADT is authorized to change service technicians’ work schedules to accommodate customer needs in one way only – by starting their shifts one hour earlier than the regular schedules provided for in the Section. *Ibid.*

That same Section also specifies the process ADT must follow in assigning service technicians a 7:00 a.m. start time. The Company “will first seek qualified volunteers[.]” JX 2, p. 7 [JA 138]; JX 3, p. 10 [JA 161]. If there are no volunteers, “then the least senior qualified person will be assigned to perform the work.” *Ibid.*

It is clear that these provisions do not authorize ADT to change the service technicians’ regular workweek to a mandatory six-day workweek. Nor do they authorize ADT to unilaterally determine who will be assigned to the schedule changes. That is exactly what the Company did when it excepted those service technicians who were enrolled in higher education from the mandatory six-day

workweek and assigned the altered workweek to only the remaining service technicians.

Similarly for *installation technicians*, Article 6, Section 1 provides for shifts of “any eight-hour period[,]” within certain hours, “between Monday and Friday.” JX 2, p. 7 [JA 138]; JX 3, p. 10 [JA 161]. Just as with service technicians, nothing in this provision authorizes the Company to add an additional sixth day to the workweek.

Article 6, Section 1 of each Agreement also provides ADT the right to adjust the installation technicians’ work schedule in response to customer needs. The Albany Agreement authorizes the Company to “periodically” “add an additional shift for residential installers from Tuesday through Saturday.” JX 3, p. 10 [JA 161]. The Syracuse Agreement authorizes the Company to “periodically” require “work to be performed on a second shift and/or Saturday.” JX 2, p. 7 [JA 138]. The language in these Agreements does not authorize implementation of a mandatory six-day workweek that will continue “until further notice.” Tr. 51, 84 [JA 19, 27].

Both Agreements also specify how installation technicians are to be assigned to these schedule changes driven by customer needs. As with service technicians, “[t]he Company will first seek qualified volunteers[;]” if there are no volunteers, “then the least senior qualified person will be assigned to perform the work.” JX 2,

p. 7 [JA 138]; JX 3, p. 10 [JA 161]. Again, as with the service technicians, neither Agreement authorizes the Company to unilaterally determine who will be assigned to the schedule changes, which the Company did when it excepted those installation technicians who were enrolled in higher education from the mandatory six-day workweek.

Thus, the “plainly expressed” terms of Article 6, Section 1 establish four- or five-day workweeks for all bargaining unit technicians; a six-day workweek is entirely contrary to the contractual language. Further, under these “plainly expressed” terms, ADT cannot change the work schedules established by Article 6, Section 1, except pursuant to the terms specified in that Section. And, the Board admits that ADT did not follow Article 6, Section 1’s strictures for assigning technicians to the unilaterally changed work schedules. DO 3 n. 9, 4 [JA 239, 240].

Accordingly, not only do the Agreements not authorize the Company’s unilateral action at issue, but they actually foreclose that action. By not offering to bargain prior to making the unilateral change, the Company violated § 8(a)(5) of the Act. *HealthBridge*, 902 F.3d at 47, 48 (employer’s unilateral change violated §

8(a)(5) because the employer made the change “without attempting to bargain” “changes to the contractual arrangement.”)<sup>8</sup>

C. The Board’s Interpretation Does Not Give Effect to the Plain Meaning of the Relevant Provisions of the Agreements.

The Board found 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 [Company] the right to take that action unilaterally.” DO 3 [JA 239]. Yet, its contract coverage analysis completely ignored the work schedule provisions in Article 6, Section 1. Instead, the Board relied upon language in “Article 6, section 3 of the Agreements provid[ing] for payment of overtime wages for work performed ‘weekly in excess of forty (40) hours, or on scheduled days off,’” and language in “Article 1, section 2 of the Agreements vest[ing] the [Company] the exclusive right ‘to determine the reasonable *amount*... of work needed.’” *Ibid.* (emphasis added). According to the Board’s interpretation, these provisions authorized the Company to implement the

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<sup>8</sup> Since ADT did not attempt to engage in bargaining prior to changing the length of the workweek, this Court does not need to address the issue of whether the Company violated NLRA § 8(a)(5) by unilaterally acting in the face of Local 43’s insistence that NLRA § 8(d) freed it from any obligation to bargain over a midterm change to Article 6. As 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.

mandatory six-day workweek for most technicians, and to choose not to assign the modified work schedule to certain technicians enrolled in higher education.

The Board's analysis of the Agreements between ADT and Local 43 demonstrates why it is a good thing that courts do not "defer to the Board's interpretation of a contract such as a CBA[.]" *Local Union No. 36*, 706 F.3d at 82. By no stretch of the imagination does ADT's "implementation of a 6-day workweek" for most technicians, while choosing to not assign those technicians enrolled in higher education to the modified workweek, come "within the compass or scope of contractual language granting the [Company] the right to act unilaterally." DO 3 [JA 239] (quotation marks omitted).

As noted, in reviewing Article 6 of the Agreements, the Board skipped over the directly-applicable work schedule provisions of Section 1, and instead looked to the provision in Section 3 that required ADT to pay overtime wages for work performed "weekly in excess of forty (40) hours, or on scheduled days off." DO 3 [JA 239]. The Board interpreted this provision to grant the Company the right to unilaterally "require its technicians to work in excess of 40 hours a week or on scheduled days off[.]" *Ibid.* But Article 6, Section 3 does *not* grant the Company the right to take *any* action unilaterally. That Section simply guarantees that "[a]ll 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.” JX 2, p. 7 [JA 138]; JX 3, p. 10 [JA 161]. In other words, instead of granting the Company a right to act unilaterally, this provision solely obligates ADT to pay employees for overtime work at one and one-half times their normal rate, with no exceptions.

Article 1, Section 2 does give ADT authority “to determine the reasonable amount and quality of work needed[.]” JX 2, p. 3 [JA 134]; JX 3, p. 3 [JA 154]. But that authority says nothing about when such reasonable amount of work may be scheduled.<sup>9</sup> And because that authority is “subject . . . to the provisions of th[e] agreement[.]” JX 2, p. 3 [JA 134]; JX 3, p. 4 [JA 155], one must look to the “Hours

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<sup>9</sup> Conspicuously absent from Article 1, Section 2’s list of management rights is the commonly included right to determine schedules and work hours. *See, e.g., MV Transportation, supra*, sl. op. 15 (management rights provision in that case provided “the right... to decide and assign all schedules, work hours, work shifts”); *The Academy of Magical Arts, Inc.*, 365 NLRB No. 101 (2017) (employer did not violate bargaining obligation by shortening length of unit-employee shifts and creating new shifts where agreement authorized employer “to schedule and change working hours, shifts and days offs”); *United Technologies Corp.*, 300 NLRB 902, 902 (1990) (employer did not violate Section 8(a)(5) by unilaterally changing length of a particular shift because contract gave employer the right “to determine... shift schedules and hours of work”). The Board has recognized the distinction between the management rights to determine employees’ schedules and to determine the amount of their work. *Control Services, Inc.*, 303 NLRB 481, 483-485 n. 20 (1991) (employer’s contractual right “to schedule hours of employment... [or] to relieve employees of duties because of lack of work” did not authorize employer’s unilateral reduction in number of hours to be worked by unit employees).

of Work and Overtime” provisions of Article 6 to determine when technicians may be scheduled to perform the reasonable amount of work needed by ADT. JX 2, p. 7 [JA 138]; JX 3, p. 10 [JA 161]. As already demonstrated, the provisions of Section 1 of that Article directly address scheduling, and those provisions *prohibit*, rather than authorize, the Company’s implementation of a mandatory six-day workweek.

The only reference in the Board’s contract coverage analysis to the provisions of Article 6, Section 1 is in a footnote that only addresses installation technicians. *See* DO 3 n. 9 [JA 239].<sup>10</sup> There, the Board claimed that the language regarding the potential changes to work schedules due to customer needs for installation technicians supports its interpretation of the Agreements, because both suggest the Company may add an extra shift on a sixth day. *Ibid.* However, the Board then acknowledged in the footnote that the Agreements require the Company to first seek volunteers for that extra work, and if none, to assign it to the least senior technician. *Ibid.* But the Board provides no explanation for why the Company would be relieved of its obligation to assign the extra work pursuant to these provisions.

In a different section of its Decision and Order, the Board claims that the Company was in an “all hands on deck” situation, and seeking volunteers would

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<sup>10</sup> The Board never considers the application of Article 6, Section 1 for the service technicians.

have been merely a “formality” when it was assigning the sixth day to “all of the technicians.” DO 4 [JA 240]. That claim is demonstrably false. The Company did not assign the sixth day of work to all of the technicians. It unilaterally decided not to assign technicians enrolled in higher education to work a sixth day. *See, e.g.*, DO 8 [JA 244], Tr. 90-91, 95-96 [JA 29, 30] (due to exceptions and absences, the most senior technician in the Albany bargaining unit was the only technician required to work the six-day workweek). It further excepted one technician due to his child custody arrangement. DO 8-9 [JA 244-45]. And it was hardly an “all hands on deck” situation for Syracuse technicians, as they were only required to work the six-day workweek every other week.

In addition to being false, the Board’s claim should have no bearing in a contract coverage analysis. The Board’s determination amounts to a finding of futility on the part of the Company to adhere to the specific terms of Article 6, Section 1.<sup>11</sup> But futility is a defense to an allegation of a contract breach. *See*

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<sup>11</sup> The Board has also indicated that the generalized application of particular language will not authorize a unilateral change. *See MV Transportation, supra*, sl. op. at 11 n. 27 (“Based on the foregoing precedent, we note that it is at least arguable, if not likely, that a violation would have been found in *C & C Plywood* even if the Board had applied a contract coverage analysis. *See C & C Plywood Corp.*, 148 NLRB 414, 416-417 (1964) (wage clause granting employer “the right to pay a premium rate to ‘reward any particular employee for some special fitness, skill, aptitude, or the like’” did not authorize the employer to unilaterally change the compensation of a group of employees from an hourly wage to production-based pay) (emphasis added), *enf. denied*, 351 F.2d 224 (9th Cir. 1965), *reversed*, 385 U.S. 421, 87 S. Ct. 559, 17 L. Ed. 2d 486 (1967).”).

*Restatement (Second) of Contracts* §§ 261-271. The question before the Board under the contract coverage standard is not whether the employer breached the contract. It is whether the employer’s action was “within the compass or scope of contractual language granting the employer the right to act unilaterally[,]” to be determined by giving effect to the “plain meaning” of relevant contract language. DO 3 [JA 239]. Clearly, the Company’s unilateral determination to assign a mandatory six-day workweek to all technicians not enrolled in higher education was outside the plain meaning of Article 6, Section 1.

The Board’s interpretation of the Agreements fails to “give effect to the plain meaning of the relevant contractual language[,]” as required under its contract coverage standard. Such an interpretation cannot stand.

D. The Board’s Interpretation is Inconsistent with Ordinary Principles of Contract Interpretation.

“[I]t is a fundamental rule of contract construction that ‘specific terms and exact terms are given greater weight than general language.’” *Aramony v. United Way of Amer.*, 254 F.3d 403, 413 (2d Cir. 2001), *quoting Restatement (Second) of Contracts* § 203(c). Similarly, it is a “well-settled principle” of contract interpretation that the interpreter “must avoid an interpretation of an agreement that renders one of its provisions superfluous.” *Kelly v. Honeywell Int’l, Inc.*, 933 F.3d 173, 183 (2d Cir. 2019) (quotation marks and citation omitted); *also Restatement (Second) of Contracts* § 203(a) (“an interpretation which gives a reasonable,

lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect”). The Board’s interpretation is contrary to both of these ordinary principles of interpretation.

The Board interpreted general language that authorized ADT “to determine the reasonable amount... of work needed[,]” and that obligated ADT to pay time and a half compensation for work performed “weekly in excess of forty (40) hours, or on scheduled days off[,]” to cover the Company’s unilateral implementation of a six-day workweek, due to customer needs, for technicians not enrolled in higher education. The Board gave no weight to the provisions of Article 6, Section 1, which specifically address work schedules and changes to those schedules due to customer needs. That Section sets technicians’ workweeks as either four or five days, and allows for certain schedule changes due to customer needs only if volunteers are sought prior to assigning the additional work time to the least senior qualified technician. By giving more weight to the general language instead of the specific language addressed directly to the Company’s action, the Board failed to adhere to ordinary principles of contract interpretation.

The Board’s interpretation also renders the provisions of Article 6, Section 1 superfluous. According to this interpretation, because ADT is authorized to determine the amount of work needed from its technicians, it is authorized to assign that work to be performed according to any schedule, as long as ADT pays

time and half compensation when required. The Company may then ignore Article 6, Section 1's four- and five-day work schedules, and the allowable departures from those work schedules due to customer needs, described in that Section. It can also choose to ignore Article 6, Section 1's requirement that the Company seek volunteers before assigning the least senior technician to the changed work schedule by doing what it did in the instant case – assign the work to all technicians whom the Company chooses not to exempt from the assignment.

That this interpretation rendered the provisions of Article 6, Section 1 superfluous is demonstrated by the following: 1) that the Company treated its union technicians exactly the same as its non-union technicians, notwithstanding that the provisions of Article 6, Section 1 applicable to the Union technicians set specific work schedules, allow only for specific departures from those work schedules due to customer needs, and establish a specific process for assigning technicians to those changed work schedules; 2) that the Company treated the Union service technicians and installation technicians exactly the same, notwithstanding that Article 6, Section 1 only allow for the Company to change the service technicians' schedules by one hour rather than adding an additional day of work; and 3) that the Company did not act consistent with its prior performance under the Agreements, where it sought volunteers for the changed work schedules

with help from the Union. By rendering provisions superfluous, the Board again failed to adhere to ordinary principles of contract interpretation.

E. The Board's Interpretation Allowing for the Company's Unilaterally Created Exception to the Mandatory Six-Day Workweek is Inconsistent with the Provisions of the Agreement and with its Own Decision and Order.

The Board held that the contract covered ADT's unilateral implementation of a mandatory six-day workweek for technicians not enrolled in higher education. Thus, under the Board's interpretation, the Agreements authorized the Company to change the technicians' regular work schedules to a six-day workweek, and to create exceptions to those six-day workweeks. But nothing in Article 6, Section 1, or anywhere else in the Agreements, permits ADT to pick and choose which technicians will be assigned to the modified work schedules. The Company may only assign the modified work schedules to either volunteers or the least senior technician. The Board's interpretation grants the Company a right that is contrary to the plain language of the Agreements.

The Board's interpretation is also inconsistent within its own Decision and Order. While interpreting the Agreements such that the Company's unilateral exception for technicians enrolled in higher education did not violate the Act, the Board also determined that the Company did violate the Act when it bargained an additional exception directly with a technician, as opposed to bargaining with the Union. DO 1 [JA 237]. This unfair labor practice finding is at odds with its

interpretation that the Agreements authorized the Company to exempt employees from the work schedule change without bargaining. Such tortured decision-making underscores the Board's faulty contract interpretation.

### CONCLUSION

The decision of the National Labor Relations Board should be vacated and the case remanded for consideration of the NLRA § 8(a)(5) allegations in light of a proper interpretation of the collective-bargaining agreements.

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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 6,520 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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