

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges

ADT, LLC

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION NO. 364,
AFL-CIO

Cases 18-CA-264654

18-CA-266951

18-CA-270402

BRIEF TO THE ADMINISTRATIVE LAW JUDGE
ON BEHALF OF THE GENERAL COUNSEL

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTS	3
A. Background, Bargaining History, and the Move from Rockford to Janesville.....	3
B. Former Rockford Unit Employees’ Terms and Conditions Pre-Move	4
C. Former Rockford Unit Employees’ Terms and Conditions Post-Move	6
D. The Union Filed and Withdrew a Representation Petition	7
E. Respondent Announced It Would Withdraw Recognition from the Union	8
F. Post-Withdrawal Unilateral Changes.....	9
i. Method of compensation.....	9
ii. Overtime	9
iii. Paid time off.....	10
iv. Bonus eligibility.....	10
v. Performance Review System	10
G. Interrogations and Threats.....	11
III. ADVERSE INFERENCES MUST BE DRAWN BASED ON RESPONDENT’S FAILURE TO PRESENT RELEVANT WITNESSES AND DOCUMENTS	12
IV. LEGAL ARGUMENT	16
A. Respondent Withdrew Recognition from the Union in Violation of Section 8(a)(5) of the Act	16
i. <i>ADTI</i> controls the instant case	16
ii. The facts and legal findings in <i>ADTI</i>	16

TABLE OF CONTENTS

	<u>Page</u>
iii. There is a lengthy bargaining history in the instant case	18
iv. The Rockford Unit maintained its integrity and separate identity	18
v. Respondent failed to meet its burden to establish compelling circumstances.....	23
vi. Respondent cannot distinguish the instant case from <i>ADTI</i>	27
B. Respondent Unlawfully Implemented Unilateral Changes to the Former Rockford Employees’ Terms and Conditions of Employment Post-Withdrawal of Recognition in Violation of Section 8(a)(5) of the Act	28
C. Respondent Unlawfully Interrogated and Threatened Employees.....	29
D. Respondent’s Defenses Must Fail.....	32
i. The withdrawn representation petition has no bearing on the appropriateness of the already established Rockford Unit.....	32
ii. The decertification petition did not privilege Respondent to withdraw recognition from the Union.....	34
iii. The Board’s decision in <i>Johnson Controls, Inc.</i> , is inapposite	35
iv. <i>ADT II</i> does not apply to the instant case	36
V. The PROPOSED NOTICE and UNIT DESCRIPTION	38
A. Appropriate Unit Description.....	38
B. Broad Remedy in Notice is Appropriate	40
VI. CONCLUSION	42

TABLE OF CASES

	<u>Page(s)</u>
<i>Adt, LLC</i> , No. JD-51-19, 2019 WL 2501867, fn. 16 (June 17, 2019)	42
<i>ADT, LLC</i> , 363 NLRB No. 36 (2015).....	41
<i>ADT, LLC</i> , 369 NLRB No. 23 (2020).....	41
<i>Adt, LLC</i> , 369 NLRB No. 31 (2020).....	41
<i>Adt LLC d/b/a Adt Sec. Servs. & Int'l Bhd. of Elec. Workers, Loc. Union 43</i> , No. JD-31-18, 2018 WL 2263547 (May 16, 2018)	41
<i>ADT, LLC d/b/a Adt Sec. Servs. & Int'l Bhd. of Elec. Workers, Loc. Union 43</i> , No. JD-51-19, 2019 WL 2501867 (June 17, 2019)	40
<i>ADT Security Services</i> , 355 NLRB 1388 (2010), <i>enfd.</i> <i>N.L.R.B. v. ADT Sec. Servs., Inc.</i> , 689 F.3d 628 (6th Cir. 2012)	1, 2, 3, 16, 18, 19, 22, 27, 28, 36, 37, 38, 39, 40
<i>ADT Security Services</i> , 368 NLRB No. 118	36, 37, 38, 42
<i>Apex Linen Service, Inc. and International Union of Operating Engineers</i> , <i>Local 501, AFL-CIO</i> , 370 NLRB No. 75 (2021).....	40
<i>Bonnie Bourne</i> , 144 NLRB 805 (1963), <i>enfd.</i> (as modified) 332 F.2d 47, 48 (2d Cir. 1964).....	30, 31
<i>Children's Hosp. of San Francisco</i> , 312 NLRB 920 (1993), <i>enfd.</i> 87 F.3d 304 (9th Cir. 1996)	17, 27, 33
<i>Chipotle Services, LLC</i> , 363 NLRB No. 37, p. 1, fn. 1, p. 13 (2015).....	14
<i>Comar</i> , 339 NLRB 903, 904 (2003)	17, 19, 38, 39

TABLE OF CASES

	<u>Page(s)</u>
<i>Dallas Air Motive, Inc.</i> , 370 NLRB No. 3 (2020)	17
<i>Dodge of Naperville, Inc.</i> , 357 NLRB 2252, 2253 (2012), <i>enfd.</i> 796 F.3d 31 (D.C. Cir. 2015)	36
<i>Essex Valley Visiting Nurses Assn.</i> , 352 NLRB 427, 441–444 (2008), <i>reaffd.</i> 356 NLRB 146 (2010), <i>enfd.</i> 455 Fed. Appx. 5 (D.C. Cir. 2012)	15
<i>Fisher Broadcasting</i> , 324 NLRB 256 (1997)	22, 23, 38
<i>Frontier Telephone of Rochester, Inc.</i> , 344 NLRB 1270, 1272 fn. 10 (2005), <i>enfd. mem.</i> , 181 Fed. App’x 85 (2d Cir. 2006), <i>enfd. mem.</i> , 111 Fed. App’x 1 (D.C. Cir. 2004)	17, 18, 20
<i>Hickmott Foods</i> , 242 NLRB 1357, 1357 (1979).....	40
<i>Johnson Controls, Inc.</i> , 368 NLRB No. 20 (2019).....	35, 36
<i>Metro-West Ambulance Service</i> , 360 NLRB 1029, 1030 and n. 13 (2014).....	15
<i>Michael Cetta, Inc. v. Nat’l Labor Relations Bd.</i> , 805 F. App’x 2, 6 (D.C. Cir. 2019).....	13
<i>Multi-Ad Services, Inc.</i> , 331 NLRB 1226, 1227-1228 (2000), <i>enfd.</i> 255 F.3d 363 (7th Cir. 2001).....	30
<i>N.L.R.B. v. ADT Sec. Services, Inc.</i> , 689 F.3d 628 (6th Cir. 2012)	39
<i>NLRB v. Gissell Packing Co.</i> , 395 U.S. 575, 589, 618 (1969)	29
<i>Overnight Transportation Co.</i> , 322 NLRB 723 (1996)	33
<i>Pan Am. Grain Co., Inc. & Pan Am. Grain Mfg. Co., Inc. & Congreso De Uniones Industriales De Puerto Rico</i> , 346 NLRB 193 (2005).....	40
<i>Parts Depot, Inc. & Union of Needletrades</i> , 332 NLRB 670, 673-674 (2000).....	32
<i>Peat Mfg. Co.</i> , 251 NLRB 1117, 1117 (1980), <i>enfd.</i> 673 F.2d 1339 (9th Cir. 1982).....	28
<i>Phillip 66 & United Steel</i> , 369 NLRB No. 13 (2020).....	29

TABLE OF CASES

	<u>Page(s)</u>
<i>Radio Station KOMO-AM</i> , 324 NLRB 256 (1997)	17
<i>Raytheon Co.</i> , 279 NLRB 245, 246 (1986)	32
<i>Re Scepter Ingot Castings, Inc.</i> , 331 NLRB 1509 (2000), <i>enfd.</i> 280 F.3d 1053 (D.C. Cir. 2002)	28
<i>Rossmore House</i> , 269 NLRB 1176, 1178 (1984), <i>enfd.</i> 760 F.2d 1006 (9th Cir. 1985)	30, 31
<i>Sparks Restaurant</i> , 366 NLRB No. 97, slip op. at 9–10 (2018), <i>enfd.</i> 805 Fed. Appx. 2 (D.C. Cir. 2020).....	13
<i>Texas Petrochemicals Corp.</i> , 296 NLRB 1057, 1063 (1989), <i>enfd. in</i> <i>relevant part and remanded</i> , 923 F.2d 398 (5th Cir. 1991), <i>rehearing</i> <i>denied</i> 931 F.2d 892 (5th Cir. 1991).....	28
<i>Westwood Health Care Center</i> , 330 NLRB 935, 939 (2000)	30

I. INTRODUCTION

This case arises from Respondent's unlawful withdrawal of recognition from the International Brotherhood of Electrical Workers, Local Union No. 363, AFL-CIO ("Union"), which took place after Respondent ADT, LLC ("Respondent") closed its unionized Rockford, Illinois, facility and its non-unionized Madison, Wisconsin, facility, and relocated both groups of employees to a new facility in Janesville, Wisconsin. Approximately one year after the relocation, upon expiration of the collective-bargaining agreement covering the former Rockford Unit employees, Respondent withdrew recognition from the Union and implemented unilateral changes to the unit employees' terms and conditions of employment. Thereafter, Respondent interrogated unit employees about their union support and threatened them with loss of a unilaterally implemented bonus plan if Respondent was required to recognize the Union. Respondent's actions violated Section 8(a)(1) and (5) of the Act.

This is not the first time that Respondent has engaged in this type of conduct and, in fact, the controlling case in this area is *ADT Security Services*, 355 NLRB 1388 (2010), *enfd. N.L.R.B. v. ADT Sec. Servs., Inc.*, 689 F.3d 628 (6th Cir. 2012) (referred to herein as *ADT I*), where Respondent engaged in almost identical conduct to the case at bar, and the Board concluded that its withdrawal of recognition was unlawful. The Board made clear that where, as here, a unit continues to maintain its integrity and separate identity, and there is a significant history of collective bargaining, the burden is on the respondent employer to demonstrate compelling circumstances to overcome the significance of the bargaining history. *ADT I*, 355 NLRB at 1388.

The brief will begin with a recitation of the relevant facts, including: the parties' lengthy and significant bargaining history; detailed facts showing that the former Rockford employees' terms and conditions of employment remained almost entirely the same following

the relocation to the Janesville facility and that Respondent continued to treat the former Rockford employees as a separate and distinct group from the former Madison employees; Respondent's withdrawal of recognition of the Union; the subsequent unilaterally implemented changes to the unit employees' terms and conditions of employment; and Respondent's coercive Section 8(a)(1) interrogation and threats.

The fact section will be followed by a discussion on why adverse inferences must be drawn based on Respondent's failure to present certain witness testimony and documentary evidence at the hearing. Next, there will be a legal analysis applying the controlling *ADTI* case to the facts of this case. This analysis will show that, as in *ADTI*, there existed a lengthy collective-bargaining relationship between Respondent and the Union, the former Rockford Unit employees maintained their separate identity after the relocation, and that Respondent completely failed to meet its burden of demonstrating compelling circumstances to overcome the significant bargaining history. Following an examination of the unlawful unilateral changes implemented by Respondent after its withdrawal of recognition, there will be an analysis of Respondent's unlawful interrogation of, and threats to, employees. Last, the legal analysis section will address Respondent's anticipated defenses.

The brief ends with a discussion on the Proposed Notice to Employees, which is followed by a short conclusion.

II. FACTS¹

A. **Background, Bargaining History, and the Move from Rockford to Janesville**

Respondent is a global company that installs and services residential and commercial security systems throughout the United States. (Tr. 42) This case concerns a bargaining unit originally located out of Respondent's former facility in Rockford, Illinois. (Tr. 43, 52; GCX 1(r)) The Union was certified as the collective-bargaining representative for the installers and technicians (references to "technicians" will include both service technicians and service installers) out of the Rockford, Illinois facility (herein, the "former Rockford Unit," "former Rockford technicians," or "former Rockford employees") on October 21, 1994, and the parties have been party to at least eight collective-bargaining agreements since then. (Tr. 43; GCX 2, 3-10) The most recent collective-bargaining agreement covering those workers was effective from September 1, 2017, to August 31, 2020. (Tr. 45, 58; GCX 3)

In about August of 2019, Respondent closed both its Rockford facility and an unrepresented facility in Madison, Wisconsin, and opened a new facility about halfway between the two in Janesville, Wisconsin. (GCX 1(u), GCX 11) The former Rockford employees began working out of a temporary facility in Janesville, Wisconsin, prior to moving to the permanent one. (Tr. 51-52, 77, 99) The Madison employees did not join the group at the temporary facility, but only later, during fall/early winter 2019, did both groups begin working out of the permanent facility in Janesville. (Tr. 99, 102, 184, 221, 224, 225) It is undisputed, that at the time the two groups began working out of the permanent Janesville facility, the

¹ "Tr." references are to the transcript of the unfair labor practice hearing; "GCX" references are to exhibits entered at the hearing by the General Counsel; "RX" references are to exhibits entered by Respondent; "p" references an exhibit's page number.

former Rockford employees outnumbered the Madison employees. (Tr. 103, 104, 444-445)

Prior to the move, Matt Ides, Respondent's Team Manager High Volume Install who managed the Rockford facility, assured the Rockford employees that everything would remain the same, "[t]hat we were going to stay in the Union, that everything would stay exactly the same as it is, nothing would change and [Rockford and Madison employees] would still stay separated." (Tr. 56-57, 255-56) Indeed, when asked what would change by the Union's Assistant Business Manager Larry Rowlett, Respondent's General Manager Shawn Bell replied, "Everything will stay the same. I mean, [the former Rockford Unit] would be working under that Collective Bargaining Agreement and everything would be the same other than when they went to an office location, it would be a different location. It would no longer be in Rockford." (Tr. 57) In fact, it is uncontested that the collective-bargaining agreement continued to be applied only to the former Rockford employees after the move to Janesville and that Respondent continued to apply the same terms and conditions of employment exclusively to the former Rockford employees until it unlawfully withdrew recognition from the Union almost a year later. (Tr. 57, 136-141, 231, 238, 260, 263-65)

B. Former Rockford Unit Employees' Terms and Conditions Pre-Move

Before the move, the former Rockford Unit would be dispatched from their homes directly to jobs scheduled by Respondent and were most often sent around the greater Rockford area to service and install residential security systems along with some light commercial assignments. (Tr. 118, 120, 219, 232, 240) Though there were no defined boundaries serviced by the Rockford facility, the former Rockford employees spent most of their time in Illinois and were seldom assigned to locations in Wisconsin other than to Beloit, located on its southern border and only about 16 miles from the former Rockford facility. (Tr. 118, 120-121, 241-242,

301, 307, 317) On those rare occasions that they did travel further into Wisconsin, they would go up to Madison and even further north. (Tr. 121, 242)

The former Rockford employees' schedules were assigned and communicated to the Rockford Unit by computer, which set forth their schedule for the day. (Tr. 240) The former Rockford employees would visit the Rockford facility for a regularly scheduled weekly parts pickup and to exchange and recycle equipment on Fridays and on an as-needed basis. (Tr. 112, 114-115, 233, 244) The former Rockford employees' direct supervisor, Matt Ides, managed both of the Rockford and Madison facilities and shared his time between the two locations. (Tr. 116, 220) The former Rockford employees communicated with Mr. Ides multiple times daily, either by text message or by phone for purposes of scheduling or parts issues. (Tr. 115, 116, 236-239) They worked alone for most of their time and only worked with another technician when assigned or due to the nature of the job. (Tr. 233-234) When assigned to work with another technician, the former Rockford employees worked almost exclusively with other former Rockford technicians and only on occasion worked with a technician from Madison. (Tr. 235) The former Rockford technicians all had a certification to work in Illinois; there were no certification requirements to work in Wisconsin. (Tr. 244, 245)

While working out of the Rockford facility, all the terms of the collective-bargaining agreement were applied to the Rockford Unit employees, including wages, overtime, vacation, and grievance procedure, among others. (Tr. 57, 110, 229, 230; GCX 3) The agreement's terms were not applied to the Madison technicians. (Tr. 58) Pursuant to the collective-bargaining agreement, Respondent remitted dues to the Union for each former Rockford Unit employee. (GCX 3) Respondent maintained an emergency after hours on-call list, which contained two names per week: one former Rockford technician and one Madison technician, each covering their respective territories due to the emergency nature of the calls.

(Tr. 129, 247-249) Prior to the move, the former Rockford technicians interacted with the Madison technicians infrequently when they worked together or exchanged parts in the field and when they picked up parts at the Madison facility. (Tr. 113, 225, 234-235)

C. Former Rockford Unit Employees' Terms and Conditions Post-Move

After the move to Janesville, the Rockford Unit employees' terms and conditions of employment did not materially change.² They continued to be dispatched from their homes. (Tr. 136.) Their job descriptions and pay remained the same. (Tr. 136, 256, 258) The licensing requirements for working in Illinois remained the same. (Tr. 136, 258-259) The former Rockford Unit continued to be assigned daily schedules in the same way. (Tr. 136, 256) The type and percentage of work that was residential versus commercial remained the same. (Tr. 137, 259) Apart from going to the Janesville facility weekly for parts pick up, the former Rockford technicians' geographic service area continued to be the same as before, with the general Rockford area being the predominant area that they serviced. (Tr. 137, 259-260)

The former Rockford technicians also continued to report directly to the same supervisor, Matt Ides, with only a slight decrease in face-to-face contact, due to Ides now working out of the Janesville facility and the former Rockford technicians continuing to work primarily out of the Rockford area. As one former Rockford technician explained, "it wasn't easy for [supervisor Ides] to just jump in the car and bring me a part." (Tr. 137-138, 260) Just as before the move to Janesville, the former Rockford technicians continued to be scheduled to pick up parts at the new Janesville facility on Fridays. (Tr. 138) Madison technicians were scheduled to pick up parts on

² The Rockford Unit employees first moved to a temporary facility located in Janesville, Wisconsin, prior to moving to the permanent facility. (Tr. 221) For purposes of this Memorandum, General Counsel collectively refers to the temporary and permanent Janesville locations as the Janesville location, unless otherwise stated.

Tuesdays. (Tr. 139) They continued to earn the same overtime rate as set forth in the collective-bargaining agreement. (*Id.*) The same on-call system remained in place and the on-call list continued to list two names for each week: one former Rockford technician and one Madison technician, each servicing their respective areas. (Tr. 139, 147-148, 263-264; GCX 30)³ The former Rockford technicians also continued to earn the same on-call rate as set forth in the collective-bargaining agreement. (Tr. 264) Interactions with Madison technicians in the field also largely remained the same. (Tr. 140-141, 265, 306-307) However, the former Rockford technicians testified they may randomly see a Madison technician a little more frequently if they happen to be in the Janesville facility to pick up a part at the same time. (Tr. 140-141, 265, 306-307) After moving to Janesville, the former Rockford technicians and Madison technicians had about two in-person training sessions at the new facility;⁴ the first session took place during the end of 2019 and the second session occurred in January 2020. (Tr. 143-145)

D. The Union Filed and Withdrew a Representation Petition

On May 8, 2020, the Union filed a representation petition to create a new bargaining unit in Janesville consisting of both the former Rockford Unit and the other technicians now working out of the Janesville facility. The representation petition was withdrawn by the Union one week later. No stipulated election agreement was reached, unit determinations were not made, and no election was held. (Tr. 20, 305, 395; GCX 12, 13)

³ GCX 30 was inadvertently marked with a GCX 29 stamp in the administrative hearing record.

⁴ Former Rockford employees and the Madison employees also met virtually once-weekly, along with all other facilities under General Manager Gary Talma's management, including those in Milwaukee, Minnesota, and possibly Iowa. (Tr. 143)

E. Respondent Announced It Would Withdraw Recognition from the Union

During the spring of 2020, Respondent received a decertification petition signed solely by former Madison and other newly hired employees seeking to decertify the Union that had never represented them. (Tr. 150, 432, 443-444; GCX 14) Purportedly based on this petition, Respondent notified the Union of its intention to withdraw recognition upon the expiration of the current collective-bargaining agreement by letter on June 22, 2020. (Tr. 58-59, 430-432; GCX 15)

On July 6, 2020, the Union responded to Respondent's notice, by letter, disputing Respondent's assertion that a majority of employees from the former Rockford bargaining unit sought to decertify the Union. The letter stated, in part, "To our knowledge, ADT has never applied the terms of the Local 364 agreement to any other employees who may be working in the Janesville location. The Rockford bargaining unit members who were transferred to Janesville continue to want [the Union] to represent them, and none have signed any such petition, as claimed by ADT. To the extent such a petition was signed by employees outside of the Rockford bargaining unit, [the Union] has never asserted that they are bound by or covered by [sic] Rockford collective bargaining agreement." (Tr. 62; GCX 16)

The administrative record clearly demonstrates that not a single former Rockford Unit employee signed the petition. (Tr. 153; GCX 14) Indeed, Respondent's own Director of Labor Relations James Nixdorf testified that Respondent never considered the non-former Rockford employees to be part of the bargaining unit. (Tr. 58, 444) Respondent never replied to the Union's July 6, 2020, letter in response to Respondent's notice to withdraw recognition, nor did it reply to any of the seven subsequent requests to bargain made by the Union. (Tr. 64-66; GCX 17-23)

Respondent carried out its stated intentions and ultimately withdrew recognition from the Union on August 31, 2020. (Tr. 58)

F. Post-Withdrawal Unilateral Changes

Following Respondent's unlawful withdrawal of recognition, it made unilateral changes to the former Rockford Unit's terms and conditions of employment, including changing the method of compensation, overtime and paid time off, implementing a bonus system that had been previously offered only to the non-represented employees and instituting a new performance review system. (Tr. 160-167, 176-179, 271; GCX 1(u))⁵

i. Method of compensation.

Prior to the withdrawal of recognition, the former Rockford Unit employees were paid according to the longevity-based wage scale set forth in the collective-bargaining agreement's Schedule "A." (GCX 3, p 22) After withdrawal, and during about September 2020, Respondent increased wages for the former Rockford Unit employees between \$.12 and \$.71 per hour, averaging about \$.57 per hour increase among the five former Rockford Unit technicians: David Anderson, Gabriel Files, Jon Frazier, Scott Joswick and Sissum. (GCX 33, p 3-4) Respondent also made increases dependent on employees meeting certain criteria and training. (Tr. 164-165, 269, 271)

ii. Overtime.

Prior to the withdrawal of recognition, Article 14 of the collective-bargaining

⁵ Respondent denied making any unilateral changes in its first Answer to the Consolidated Complaint yet admitted making them in the district court proceeding seeking injunctive relief for the unlawful withdrawal of recognition and unilateral changes. (GCX 1(i), GCX 31) During the instant hearing, after being confronted with its response to the district court proceeding, Respondent amended its answer to substantially admit having made the alleged unilateral changes. (GCX 1(u))

agreement set forth the overtime structure, whereby former Rockford employees would earn the overtime rate after working 8 hours each day, regardless of how many hours were worked that week. (Tr. 165, GCX 3, p 11-12) After the withdrawal of recognition, Respondent changed the overtime policy so that employees need to work 41 hours in a week to get one hour of overtime. (Tr. 165 – 166, 269, 271) Holidays and other paid time off are also no longer included in the calculation for overtime. (*Id.*)

iii. Paid time off.

Prior to the withdrawal of recognition, the former Rockford Unit employees earned separate vacation time and sick time, which were set forth in Articles 12 and 19 of the collective-bargaining agreement, respectively. (Tr. 160; GCX 3) Since the withdrawal of recognition, Respondent no longer offers the former Rockford employees separate vacation and sick time, but instead gives them one lump-sum category of paid time off. (Tr. 167-168, 271) Paid time off is now dependent on the hours worked each week. (*Id.*) The former Rockford employees can also now sell their paid time off back to Respondent and roll over up to 40 hours of paid time into the next year. (Tr. 160, 166-167, 269, 271)

iv. Bonus eligibility.

Prior to the withdrawal of recognition, the former Rockford Unit employees were not eligible to earn bonuses. (Tr. 160) Upon withdrawal of recognition, Respondent implemented a new performance-based bonus plan. (Tr. 164-165, 273; GCX 34) Under the new bonus structure, the former Rockford employees earn hundreds of dollars per month. (Tr. 165, 271, 274-275)

v. Performance Review System.

Since approximately mid-2020, the former Rockford employees were tasked with notifying customers about a survey program called Medallia. (Tr. 176-177) Whereas prior to the

withdrawal of recognition, the customer responses had no effect on compensation, after the withdrawal, the responses are factored into employees' performance reviews and, ultimately, their compensation. (Tr. 176-178, 282-283)

G. Interrogations and Threats

Former Rockford technicians Anderson and Sissum testified they were threatened and interrogated by Team Manager High Volume Install Matt Ides on separate occasions from October through December 2020. (Tr. 172-175, 273-282, 296-297) Respondent did not present Ides to testify at trial.

Anderson testified that, beginning around the end of September 2020, he had received a bonus of between \$200 and \$410 every two weeks under the newly implemented performance-based bonus plan. (Tr. 273-275) During a phone conversation with Team Manager High Volume Install Ides in early October 2020, Ides congratulated Anderson, stating that he had received the highest bonus out of the office and was doing well overall. (Tr. 275-276) Ides immediately followed his congratulatory statement regarding the bonus by stating, "You are aware that if you guys go back to the Union that this will go away, that you will not be part of the bonus program, the TFE program." (Tr. 277, 296 - 297) Ides then elaborated, ". . . ADT would not do both. That, you know, if you are part of the Union, you can't have the bonus program." (Tr. 277) Anderson replied to Ides, that if they were part of the Union everything would be up to negotiation. (Tr. 277) Ides simply repeated, "ADT would not do both." (Tr. 278) At some point during this same conversation, Ides asked Anderson, ". . . why I wanted to be in the Union." (*Id.*) Anderson, demonstrating his frank openness and sincerity at the hearing stated, "I kind of was being a smart-aleck about it and I said, why don't you guys want the Union?" (*Id.*) Ides did not answer. (*Id.*)

Former Rockford technician Anderson testified about another conversation with Ides, which took place during about the middle of November 2020. (Tr. 278-279) Anderson approached Ides to notify him that he was going to receive a subpoena for the instant proceedings and that he needed to be blocked for the schedule for the day. (Tr. 280-281) After a moment or two, Ides replied, “You know, if you guys go back to the Union, that the TFE bonus program will go away.” (Tr. 281) Anderson again asked why they couldn’t continue the program, to which Ides replied, “ADT is very firm on this. They will not do both.” (*Id.*) Though other technicians were present and facing each other, “they weren’t exactly part of the conversation. We were all there for different things.” Anderson also testified that he didn’t know when, but one of the other former Rockford technicians, Sissum, walked away from the conversation at some point. (Tr. 279, 282)

Former Rockford technician Sissum testified that on about December 9, 2020, he had a telephone conversation with Ides regarding the performance-based bonus plan. (Tr. 172-173) Sissum asked Ides during this call, “would it still be the same thing, you know, could we still be able to work with [the bonus plan], you know, if we were able to go back to negotiating it.” (Tr. 173) Ides responded, “I don’t think you can. I think it’s going to be – I think it will go away if you go into that.” (Tr. 173-174) Sissum then said that it didn’t make sense that it couldn’t be negotiated, to which Ides said, “I think it’s only designed for the non-Union people as an incentive” and “if we went back to negotiating, the TFE plan would go away.” (Tr. 174-175)

**III. ADVERSE INFERENCES MUST BE DRAWN BASED ON
RESPONDENT’S FAILURE TO PRESENT RELEVANT WITNESSES
AND DOCUMENTS**

Counsel for the General Counsel respectfully requests that Your Honor draw adverse inferences based on Respondent’s failure to produce relevant subpoenaed documents and to call

material witnesses during the hearing in this matter. Recently, in *Sparks Restaurant*, 366 NLRB No. 97, slip op. at 9–10 (2018), *enfd.* 805 Fed. Appx. 2 (D.C. Cir. 2020), the Board adopted an administrative law judge’s decision drawing an adverse inference against the respondent employer for failing to call its manager to testify and produce tip records. The allegations at issue were, *inter alia*, whether the respondent unlawfully failed and refused to reinstate striking employees after their unconditional offer to return to work and unlawfully discharged them. The judge found it appropriate to infer that had the manager who signed offers offering “seasonal” employment to the replacement workers testified, his testimony would not have supported a finding that the “seasonal” employees’ understanding regarding their status was consistent with that of a legitimate permanent replacement. In addition, the judge drew an adverse inference based on the respondent’s failure to present tip records that would have reflected the precise date the strike replacements began working; these records would have substantiated the respondent’s claim that the striking employees were permanently replaced prior to their unconditional offer to return to work.⁶

Here, under the rubric set forth in *ADTI*, it is Respondent’s burden to demonstrate compelling circumstances sufficient to overcome the parties’ lengthy collective-bargaining history. Yet, Respondent inexplicably failed to present witnesses and evidence that would support its claim that the former Rockford employees and the former Madison employees share an overwhelming community of interest and that the former Rockford employee’s geographic area changed after the relocation to Janesville.

As described in more detail in subsection IV(A)(v), Respondent failed to call its current

⁶ In the enforcement action, the court determined that the administrative law judge was mistaken that the tip records had not been provided pursuant to subpoena but found that mistake to be harmless error. *Michael Cetta, Inc. v. Nat'l Labor Relations Bd.*, 805 F. App'x 2, 6 (D.C. Cir. 2019).

Team Manager High Volume Install, Ides, who directly supervised the former Rockford employees and the former Madison employees both prior to and after the relocation to Janesville and is arguably most familiar with their terms and conditions of employment, including geographic territories. Based on Respondent's failure to present Ides to testify, an adverse inference should be drawn that had he testified, his testimony would not have supported Respondent's claims of shared community of interest or changed geographic territory. In addition, an adverse inference should certainly be drawn based on Respondent's failure to call Team Manager High Volume Install Ides to refute the various Section 8(a)(1) allegations he is alleged to have committed. *See Chipotle Services, LLC*, 363 NLRB No. 37, p. 1, fn. 1, p. 13 (2015) (an adverse inference is particularly warranted where the uncalled witness is an agent of the party in question).

Also described in further detail in subsection IV(A)(v) is Respondent's failure to present dispatch logs or other documents, which appear to be in Respondent's possession based on Director of Labor Relations Nixdorf's testimony, that showed each customer's address and would have resolved the question of what the former Rockford employees' geographic territory was prior to the relocation to Janesville, and whether that territory changed after the relocation. (Tr. 364, 376, 384) Such documents would have also resolved the question of the frequency in which the former Rockford employees and Madison employees worked in each other's territories. An adverse inference should be drawn that had Respondent entered these documents into evidence, they would not have supported Respondent's claim of changed geographic territory.

The basis for an adverse inference is strengthened by the fact that the documents in question were arguably encompassed by Subpoena No. B-1-1AWTZ3L, issued by the General

Counsel to Respondent on November 12, 2020, but which were not produced to Counsel for the General Counsel. (GCX 27) The subpoena sought, inter alia: (a) Documents, including but not limited to dispatch logs, reflecting the number of service calls or assignments performed by all Rockford employees in the Madison territory for the period beginning May 1, 2019, to the subpoena return date; and (b) Documents, including but not limited to dispatch logs, reflecting the number of service calls or assignments performed by all Madison employees in the Rockford territory for the period beginning May 1, 2019, to the subpoena return date. The subpoena request arguably encompassed the dispatch logs with customer addresses.⁷ (Tr. 364, 376, 384) *See Metro-West Ambulance Service*, 360 NLRB 1029, 1030 and n. 13 (2014) (respondent's unexplained failure, in an Section 8(a)(3) discrimination case, to produce subpoenaed accident reports over the previous 3 1/2 years warranted an adverse inference that they would not have supported respondent's position that it treated the discriminatee the same as other similarly situated employees); *Essex Valley Visiting Nurses Assn.*, 352 NLRB 427, 441–444 (2008), *reaffd.* 356 NLRB 146 (2010), *enfd.* 455 Fed. Appx. 5 (D.C. Cir. 2012) (respondent's failure to produce subpoenaed documents warranted an adverse inference supporting the General Counsel's allegation of single-employer status).

⁷ The documents that Respondent produced pursuant to the subpoena reflected only general areas (including a central area consisting of Minnesota, Iowa, Wisconsin and Illinois) and districts, such as a district that encompassed at least Minnesota, for customer locations. (Tr. 371 – 373) It is inconceivable that Respondent does not have records reflecting customer addresses given that the technicians *go to* the customers' locations to perform repair and service work.

IV. LEGAL ARGUMENT

A. **Respondent Withdrew Recognition from the Union in Violation of Section 8(a)(5) of the Act**

i. ***ADT I* controls the instant case**

As noted above, the legal rubric to be applied to the facts in the instant case are set forth in the Board's decision in *ADT I*, 355 NLRB 1388 (2010), *enfd. N.L.R.B. v. ADT Sec. Servs., Inc.*, 689 F.3d 628, 632 (6th Cir. 2012). That case involved Respondent's unlawful withdrawal of recognition from a different union that represented another unit of employees that had also been relocated to another facility. *Id.* The issue in *ADT I*, and in the instant case, is whether a represented unit with a long bargaining history, after being transferred to a new facility with other unrepresented workers, continued to maintain its integrity and separate identity. When, as in *ADT I* and also here, the unit maintains its integrity and there is a significant history of collective bargaining, the burden is on Respondent to demonstrate *compelling circumstances* to overcome the significance of this bargaining history. *Id.*

ii. **The facts and legal findings in *ADT I***

In *ADT I*, the union represented employees at Respondent's Kalamazoo, Michigan facility for 29 years. *Id.* Respondent closed the Kalamazoo facility and transferred the 14 represented employees to its Wyoming, Michigan, location, out of which 27 non-represented service employees also worked. Respondent withdrew recognition from the Union as of the date of the consolidation. *Id.* at 1393. After their transfer to the Wyoming facility, Respondent continued to pay the Kalamazoo employees their contractual wage rate, which was more than the rate paid to the Wyoming employees. *Id.* at 1394. The Kalamazoo employees reported to Wyoming and no longer operated under separate supervision. *Id.* at 1393. They continued to perform the same work (the installation and service of security systems) in the same distinct

geographical area (the Kalamazoo service territory), under largely unchanged terms and conditions of employment, including separate on-call lists (to handle emergencies on nights and weekends) for commercial and residential service. *Id.* at 1388, 1393 and 1394. Both before and after the transfer to Wyoming, the Kalamazoo unit employees were dispatched from home and performed work in the field, reporting originally to the Kalamazoo facility only to turn in their timesheets and pick up supplies, and later, after closing, reporting to the Wyoming facility only once a week to replenish their parts supply. *Id.*

Finding that Respondent unlawfully withdrew recognition from the union, the Board noted that when evaluating whether an existing unit remains appropriate in light of changed circumstances, the Board gives *significant weight* to the parties' history of bargaining: "Specifically, our caselaw holds that '*compelling circumstances*' are required to overcome the significance of bargaining history." *Id.* at 1388 (*emphasis added*) (quoting *Radio Station KOMO-AM*, 324 NLRB 256 (1997)). *See also Dallas Air Motive, Inc.*, 370 NLRB No. 3 (2020) (noting it was the respondent's burden to show that the represented bargaining unit was no longer an appropriate unit for bargaining after being combined with a similar group of employees at a new facility because it did not have an identity distinct from the combined group of employees); *Children's Hosp. of San Francisco*, 312 NLRB 920 (1993), *enfd.* 87 F.3d 304 (9th Cir. 1996) (finding that the administrative law judge's reliance on bargaining history in finding a unit of registered nurses to be appropriate was not erroneous). The Board found that the historical unit of Kalamazoo servicemen maintained its integrity following the closure of the Kalamazoo facility and remained an appropriate unit with which Respondent was obligated to bargain. *Id.* at 1389, citing *Comar, Inc.*, 339 NLRB 903, at 903 fn. 2, *See Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1272 fn. 10 (2005), *enfd. mem.*, 181 Fed. App'x 85 (2d Cir.

2006), *enfd. mem.*, 111 Fed. App'x 1 (D.C. Cir. 2004).

Respondent was not privileged to withdraw recognition from the Union as the collective-bargaining representative of the Kalamazoo unit because the bargaining unit maintained its integrity and Respondent could not establish that the Kalamazoo unit employees were “absorbed” or “integrated” into a unit including all the servicemen who worked out of the Wyoming facility. Some of the most fundamental terms of employment that distinguished the Kalamazoo servicemen from the Wyoming servicemen included the: (1) location of their work; (2) their rate of pay; and (3) their separate, dual “on call list.” The Board noted that these factors remained intact following the closure of the Kalamazoo facility and continued to separate them from the Wyoming servicemen. (*Id.* at 1388). In addition, the Board noted that the closing of the Kalamazoo facility was of less significance than it would have been had the employees actually performed work at the facility; instead, after the closing, the Kalamazoo employees continued to perform work in the field and reported to the Wyoming facility only once a week to replenish their parts supply. Given the separate identity of the Kalamazoo bargaining unit, Respondent was unable to demonstrate compelling circumstances sufficient to overcome the parties’ lengthy bargaining history. *Id.*

iii. There is a lengthy bargaining history in the instant case

As in *ADTI*, Respondent and the Union have a lengthy collective-bargaining history. Here, the collective-bargaining relationship spanned over 26 years. The Union was certified as the representative of the bargaining unit in 1994, and the parties subsequently entered into at least eight collective-bargaining agreements, including the most recent agreement that expired on August 31, 2020. (GCX 2 – 10)

iv. The Rockford Unit maintained its integrity and separate identity

Like the Kalamazoo unit, the Rockford Unit maintained its integrity and separate

identity after the relocation to Janesville and prior to the unlawful withdrawal of recognition on about September 1, 2020.⁸ The Board in *ADTI* noted that the Kalamazoo unit employees “continued to perform the same work in the same distinct geographical area under largely unchanged terms and conditions of employment.” *ADTI*, 355 NLRB at 1388. This continuity in work and terms and conditions of employment is also present in the instant case.

After the relocation to Janesville and prior to the unlawful withdrawal of recognition, the former Rockford employees continued to perform the same installation and service work in the de facto defined Rockford territory under largely unchanged terms and conditions of employment, including those set forth in the still-applied collective-bargaining agreement. (Tr. 57, 136 – 141, 257 – 265)

Post-relocation and prior to the withdrawal of recognition, Respondent continued to apply the collective-bargaining agreement in its entirety to the former Rockford Unit. (Tr. 57 – 58, 110, 230 – 231) Their contractual terms and conditions of employment, including but not limited to wages, overtime, and on-call rates remained the same. (Tr. 109 – 110, 140, 256, 263) The terms of the collective-bargaining agreement were not applied to the non-represented former Madison employees. (Tr. 58) Accordingly, given the breadth of the contractual terms, their continued application to the former Rockford Unit is a key factor indicating these employees maintained their own separate identity.

In addition to being distinguished by the application of contractual wages and terms to

⁸ The post-withdrawal unilateral changes to Unit employees’ terms and conditions of employment are unfair labor practices and do not factor into an analysis of whether the Rockford Unit maintained its integrity and separate identity prior to the unlawful withdrawal of recognition. *See Comar*, 339 NLRB at 911 (noting that unlawful changes do not establish that the unit lost its separate identity because “[t]o hold otherwise would allow [r]espondent to benefit from its own unlawful conduct”).

the former Rockford Unit employees, the two groups were further distinguished by the location of their work. The former Rockford employees worked in the same geographic area both before and after the relocation to Janesville, primarily in Rockford and the surrounding area. (Tr. 137, 259) Former Rockford employee Sissum continues to spend the majority of his working time in Rockford and the surrounding area. The remainder of the time, he may be sent to Iowa, or Beloit, Wisconsin, a town on the border of Illinois and Wisconsin. Sissum described the amount of time he works in Wisconsin as minimal, mostly in Beloit but sometimes in Madison or further north. (Tr. 120 – 121) Former Rockford employee Anderson also continues to spend most of his working time in Rockford and its surrounding area. He works in Beloit, but otherwise does not often work in Wisconsin. (Tr. 240 – 242)

The separation of the former Rockford employees and the former Madison employees by geographic area is evident in the on-call list, which existed in the same format both prior to and after the relocation to Janesville. (Tr. 263-264) A former Rockford employee and a former Madison employee are assigned to be “on-call” and respond to emergency calls for each week of the year. (Tr. 147 – 148, 247) The former Rockford employees are able to switch their assignments with other former Rockford employees. (Tr. 128 – 129) As Sissum explained, it would not be feasible to have the former Rockford employees switch on-call assignments with a Madison employee because the response time for a former Rockford employee to go deep into Wisconsin on an emergency call would be too great. (Tr. 129 – 130)

Respondent may point to the interchange between the former Rockford employees and the former Madison employees while on the job and their shared supervisor as evidence of an integrated unit. However, interaction between the two groups of employees and shared supervision are not changed circumstances in this case and do not demonstrate any degree of integration. *See Frontier Telephone of Rochester, Inc.*, 344 NLRB at 1272 fn. 10 (noting that a

finding of employee interaction cannot substitute for a finding of employee interchange). Prior to the relocation to Janesville, the former Rockford employees and the former Madison employees attended trainings together and, albeit infrequently, encountered each other while out in the field for work. (Tr. 113, 130 – 131, 225, 235) Their interaction may have slightly increased due to their reporting to the same Janesville office but there is no evidence of any demonstrable change in interaction between the two groups.⁹ (Tr. 140, 143 – 144, 261, 306 - 307) That there has only be a negligible increase in interaction is to be expected given that each group of employees performs their work in the field and is scheduled to come to the facility once weekly, on different days, to pick up parts.¹⁰ (Tr. 83 – 84, 138 - 139, 219, 256, 259 - 260, 262)

The former Rockford employees and the former Madison employees have historically shared the same supervisor and their continued common supervision serves as further evidence of the continuity of the former Rockford employees' working conditions. Even if the common supervision arose after the transfer to Janesville, it would not weigh in favor of a finding that

⁹ Respondent intimated in its related District Court filing that General Counsel was using the Covid-19 pandemic to detract from the integration of the Rockford and Madison groups. To the extent Respondent raises such a false and inflammatory aspersion in these proceedings, we quickly address it here: The uncontroverted record evidence establishes that the former Rockford and Madison groups had only two in-person training sessions at the new facility. This is a fact established by record evidence that cannot be ignored. One witness, employee and shop steward Sissum, testified that there were no other instances in which the two groups had face-to-face interaction, explaining that the building had been closed since the virus began. (Tr. 145) Respondent cannot extrapolate from this isolated statement that increased in-person interaction stalled solely because of the pandemic, especially as the Janesville consolidation occurred *at least half a year* before the start of the pandemic, giving Respondent ample time to bring the two groups of employees together on a more frequent or regular basis. Respondent did not present any witnesses to testify that the lack of integration was caused by the Covid-19 pandemic nor did it present any documentary evidence in this regard. Its belated and unfounded attempts to fashion an explanation for the lack of integration between the former Rockford employees and the former Madison employees, post-consolidation, are meritless and must be disregarded.

¹⁰ The on-line meetings are attended by all facilities under General Manager Gary Talma's management, including those in Milwaukee, Minnesota and possibly Iowa, thus detracting from any argument that these meetings establish any sort of integration between the former Rockford employees and the former Madison employees. (Tr. 143)

the two groups constituted a single integrated unit. As the Board noted in *ADTI*, “because the servicemen at issue in this case work out of their homes, have no onsite supervision, and in fact, do not even see their supervisors on a daily basis, we do not accord the absence of separate supervision here the weight it bears in other cases.” *ADTI*, 355 NLRB at 1389, fn. 2.

Nor should any weight be given to the unutilized shared spaces in the Janesville facility or the common office staff. In *Fisher Broadcasting*, 324 NLRB 256 (1997), the Board upheld the administrative law judge’s determination that the respondent unlawfully failed to recognize and bargain with the union because of the alleged integration of the represented unit employees with the employees of two other radio stations purchased by the respondent. The administrative law judge noted that “the employees of the three radio stations share some common areas, such as a newsroom and lunch area, have contacts with each other in said areas, and, except for terms and conditions of employment specific to the most recent collective-bargaining agreement between Respondent and AFTRA, are subject to the same labor relations policies; that there is one general manager, one operations manager, one chief engineer, one human resources manager, and one general sales manager for the three radio stations; and that the three radio stations have centralized administrative functions.” However, the judge noted that although the employees of the various stations had brief daily contacts in the lunchroom, the hallways and the newsroom, the unit employees’ work time was spent in their own radio station areas, working with unit or other employees of the respondent and not with employees of the other two radio stations. Ultimately, the administrative law judge concluded that the “most compelling factor” warranting a finding that the already-represented employees remained a separate appropriate unit after the consolidation of the three radio stations was the long history of collective-bargaining for the unit.

In the instant case, Respondent has failed to demonstrate any significant interaction between the service employees and the shared office staff. (Tr. 184 – 186, 302 – 304) That a

common lunch space is available to both groups of employees is also without consequence, especially as the former Rockford employees and the former Madison employees do not report to the Janesville office for their weekly parts pick-up on the same day of the week. (Tr. 138 - 139, 260, 262) Furthermore, both Sissum and Anderson testified that they did not use this space. (Tr. 193, 308) The former Rockford employees and the former Madison employees have even less interaction than the unit employees in *Fisher Broadcasting* had with the unrepresented employees.

In sum, with the Respondent and Union's lengthy bargaining history, the continued application of collective-bargaining agreement to the former Rockford Unit after the relocation to Janesville, and the former Rockford employees' continued dispatch from home to work in the field performing the same job functions in the same geographic area with no significant increase in interaction with the former Madison employees, the former Rockford Unit maintained its separate identity and integrity.

v. Respondent failed to meet its burden to establish compelling circumstances

Despite being given a full opportunity at the hearing to present witnesses and documentary evidence to demonstrate that compelling circumstances existed to overcome the parties' significant bargaining history, Respondent failed to meet its burden. Respondent argues that the former Rockford employees and former Madison employees shared an overwhelming community of interest because they share the same or similar wage rates and perform the same work out of the same facility under the same supervision and according to the same work pools. (Tr. 389 – 390) There is no dispute that the two groups of employees share the same supervision

(as they always have) and perform the same type of work out of the Janesville facility.¹¹

However, Respondent failed to call any witnesses with direct knowledge of the employees' terms and conditions of employment, including their wage rates or work areas. Despite it being Respondent's burden to demonstrate compelling circumstances, Respondent failed to call a single employee to testify regarding the geographic area in which they work. As such, Respondent is unable to prove that the two groups of employees constituted a single integrated unit at any point in time.

Respondent called only two witnesses: Union organizer Brad Williams and Director of Labor Relations James Nixdorf. Williams offered no testimony regarding the employees' terms and conditions of employment. (Tr. 390 – 402) Nixdorf, based out of Boca Raton, Florida, who is responsible for administering collective-bargaining agreements for approximately 30 bargaining units across the United States, gave only general testimony regarding employee work areas and later admitted to having no independent knowledge of where each technician in the instant case spent their work time (one of the fundamental factors at issue in this case as set forth in *ADT I*). (Tr. 346, 423 and 441; GCX 15 (letterhead showing Boca Raton, Florida address)) An excerpt from Nixdorf's testimony is below:

Counsel for General Counsel: **There was some testimony on direct about where the technicians work. You don't have any independent knowledge of where each technician spends their work time, do you?**

Nixdorf: **No.** (Tr. 441)

¹¹ Common work duties are also not changed circumstances in the instant case. The two groups of employees have historically performed the same type of work. (Tr. 81, 209, 424 - 425)

He also offered only vague testimony regarding the former Madison employees' wages, one of the most significant terms and conditions of employment. (Tr. 426)

Significantly, Respondent failed to call the former Rockford employees' and former Madison employees' direct supervisor, Team Manager High Volume Install Ides. (Tr. 98, 219 – 220) Ides supervises the former Rockford employees and former Madison employees, as he did prior to the relocation to Janesville. Ides sees the employees weekly at their parts pick-up and communicates with at least the former Rockford employees daily. (Tr. 98, 114 – 116, 137, 220, 236 – 238, 259 – 260) He is arguably in the best position to testify regarding the terms and conditions of employment of these two groups, yet Respondent inexplicably failed to call him to the stand.

Any attempts by Respondent to rely on its cross-examination of the former Rockford employee witnesses to establish that there was a change in the geographic area in which they worked post-relocation to Janesville must fail. Former Rockford employee Sissum credibly testified on direct examination that while working at the Rockford facility, he spent the majority of his working time in Rockford and its surrounding areas, and a minimal amount of time working in Wisconsin, and that these working areas did not change after the relocation to Janesville. (Tr. 120, 137) On cross-examination, he consistently testified that while working out of the Rockford facility, he spent only a small percentage of his typical work week in Wisconsin. (Tr. 209) His testimony that he now goes to Wisconsin every week hardly establishes a changed geographic work area, as it is undisputed that the former Rockford employees now report to the Janesville, Wisconsin facility every Friday for their scheduled parts pick-up. (Tr. 138, 209) Former Rockford employee Anderson's testimony on cross-examination that he was unaware of any geographic distinction between where the former Rockford employees and the former Madison employees worked is undercut by his more detailed testimony on direct examination

that he works mainly in Illinois, in Rockford or within 20 miles thereof, and that other than the border of Illinois and Wisconsin, he does not work in Wisconsin often and only on an as-needed basis. (Tr. 240 – 242, 308)

Respondent failed to compensate for its lack of relevant testimony through the presentation of compelling documentary evidence. For instance, the weight of Respondent's case at the administrative hearing appeared to be that the former Rockford employees' geographic coverage changed after the relocation to Janesville. Director of Labor Relations Nixdorf, who admitted to having no independent knowledge of where each technician worked, offered only general testimony regarding the former Rockford employees' coverage area. (Tr. 422 - 423, 441) Although Respondent possessed dispatch logs or other documents that showed each customer's address and could have easily resolved the question of what geographic area the service employees worked in, Respondent failed to introduce these records into evidence. (Tr. 364, 376, 381) Respondent identified a document that included information from its Oracle HR system that reflects wage rates for both former Rockford employees and former Madison employees working at the Janesville facility. (Tr. 425; GCX 33) However, Respondent offered no context for this document, including how the former Madison employees' wages were determined, i.e. by seniority, performance or any other criteria, or how the former Madison employees' job titles, skills, training and experience compared to that of the former Rockford employees. Regardless, any similarity between wages does not detract from the fact that the wage rates for the former Madison employees were determined by Respondent whereas the wage rates received by the former Rockford Unit employees, both prior to and after the relocation to Janesville, were collectively-bargained and contractually derived.

As the record testimony does not establish that the former Rockford employees were absorbed or integrated into a unit including all the employees who work out of the Janesville

facility, Respondent cannot establish compelling circumstances to overcome the parties' lengthy 26-year collective-bargaining relationship. *See Children's Hosp. of San Francisco*, 312 NLRB at 929 (adopting the administrative law judge's decision and order in which he noted that respondent had not demonstrated "compelling" reason to overcome the significance of bargaining history by, inter alia, failing to support its assertions about employee interchange with records or specific evidence).

vi. Respondent cannot distinguish the instant case from *ADT I*

The facts in *ADT I* closely parallel the facts in the instant case. *ADT I*, 355 NLRB at 1388. In both cases, Respondent withdrew recognition from the union after a lengthy bargaining relationship and where the unit employees maintained separate and distinct identity from the non-unionized group of employees. Respondent attempts to distinguish the facts in the instant case from those in *ADT I* by arguing that the collective-bargaining agreement in *ADT I* contained a work jurisdiction clause, which defined the unit as serving the Kalamazoo territory, and a notification clause, which required that the Union be notified of anyone else working in that territory. (Tr. 389 – 390, 424)

The collective-bargaining agreement in the instant case does not contain a work jurisdiction clause or a notification clause. (GCX 3) However, the absence of these clauses does not take the instant case out of the legal rubric set forth in *ADT I*. *ADT I*, 355 NLRB at 1388. The Board's analysis focused on the fact that the Kalamazoo unit employees "continued to perform the same work in the same distinct geographical area under largely unchanged terms and conditions of employment." *Id.* That the distinct geographic work area for the former Rockford Unit employees is defined de facto by practice, and not contractually, and that the Union was not notified of others working in the Rockford territory, are not material differences. The Board's

legal analysis in *ADT I* is appropriately applied in the instant case.

B. Respondent Unlawfully Implemented Unilateral Changes to the Former Rockford Employees' Terms and Conditions of Employment Post-Withdrawal of Recognition in Violation of Section 8(a)(5) of the Act

It is well-established that an employer's implementation of unilateral changes after an improper withdrawal of recognition are unlawful. *In Re Scepter Ingot Castings, Inc.*, 331 NLRB 1509 (2000), *enfd.* 280 F.3d 1053 (D.C. Cir. 2002) (finding the employer's unilateral changes implemented after unlawful withdrawal of recognition violated Section 8(a)(5)); *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1063 (1989), *enfd. in relevant part and remanded*, 923 F.2d 398 (5th Cir. 1991), *rehearing denied* 931 F.2d 892 (5th Cir. 1991) (finding that after unlawfully withdrawing recognition from the union, the respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, without notice to or consultation with the union, converting all bargaining unit employees from hourly to salaried compensation and restructuring their insurance premiums); *Peat Mfg. Co.*, 251 NLRB 1117, 1117 (1980), *enfd.* 673 F.2d 1339 (9th Cir. 1982) (finding that the respondent violated Section 8(a)(5) and (1) of the Act by unilaterally granting benefits to unit employees after unlawfully withdrawing recognition from the union).

It appears from Respondent's Amended Answer, that it substantially admitted making the unilateral changes, including changing the method of compensation, overtime and paid time off, implementing a bonus system that had been previously offered only to the non-represented employees, and instituting a new performance review system.¹² (GCX 1(u))

As the evidence establishes that Respondent unlawfully withdrew recognition from the

¹² Respondent's Amended Answer admits making changes between September 1, 2020, and the issuance of the Complaint for *certain* former Rockford Unit employees. Counsel for General Counsel is unaware of evidence that any individual former Rockford employees are not included in such admitted changes. In addition, Respondent did not contest General Counsel's Petition for Preliminary Relief under Section 10(j) with respect to these allegations.

Union, it follows that the unilateral changes to the former Rockford employees' terms and conditions of employment, to which Respondent essentially admits, are also unlawful. General Counsel has established that Respondent made changes to compensation (i.e. wage raises and eligibility for bonuses), overtime, paid time off, and the performance review system for the former Rockford employees. (*See* section II(F)) General Counsel's evidence on these allegations has not been refuted or challenged during the hearing by presentation of any contrary evidence.

C. Respondent Unlawfully Interrogated and Threatened Employees

Respondent violated Section 8(a)(1) by interrogating and threatening employees. An employer's predictions of loss of benefits because of unionization are either unlawful threats under Section 8(a)(1) of the Act or protected by 8(c) of the Act. *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 589, 618 (1969). To be protected by Section 8(c), the prediction must be "carefully phrased on the basis of objective fact to convey the employer's belief as to demonstrably probable consequences beyond his control." *Id.* However, statements not cloaked by such objective fact are not protected by Section 8(c) and, rather, are coercive threats in violation of Section 8(a)(1). *Id.* When assessing statements alleged to be unlawful, the Board "view[s] employer statements from the standpoint of employees over who the employer has a measure of economic power," because it "take[s] into account the economic dependence of the employees on their employers, and the necessary tendency for the [employee], because of that relationship, to pick up intended implications of the [employer] that might be more readily dismissed by a more disinterested ear." (internal citations omitted). *Phillip 66 & United Steel*, 369 NLRB No. 13 (2020).

In this case, Team Manager High Volume Install Ides clearly threatened the loss of the performance-based bonus plan on three occasions by stating it will go away if the Union comes

back, if the parties go back to negotiating, and further, that Respondent was “very firm” on this. Respondent did not call Ides to testify to contradict or contextualize General Counsel witnesses’ testimony. Nor did Respondent offer *any* objective fact by which Ides relied upon for making such unlawful predictions (e.g., “You know, if you guys go back to the Union, that the TFE bonus program will go away.” (Tr. 281)) It is clear from the undisputed testimony that the employees received hundreds of dollars bi-weekly pursuant to the new bonus system, further highlighting the economic dependence the employees upon Respondent. Such statements are clearly coercive under Section 8(a)(1) of the Act.

Respondent also violated Section 8(a)(1) of the Act when Ides asked why employee Anderson wanted to be in the Union during the same coercive conversation in which he threatened loss of the new bonus system if the Union came back. (Tr. 278) In evaluating whether the questioning at issue constitutes an unlawful coercive interrogation, the questioning must be considered under all the circumstances and there are no particular factors “to be mechanically applied in each case.” *Rossmore House*, 269 NLRB 1176, 1178 (1984), *enfd.* 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1227-1228 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001). Factors to be considered include: 1) the background, i.e., is there a history of employer hostility and discrimination?; 2) the nature of the information sought, e.g. did the interrogation appear to be seeking information on which to base taking action against individual employees?; 3) the identity of the questioner, i.e. how high was he in the-company hierarchy?; 4) place and method of interrogation, e.g. was employee called from work to the boss's office and was there an atmosphere of “unnatural formality?”; and 5) the truthfulness of the employee's reply. *Bonnie*

Bourne, 144 NLRB 805 (1963), *enfd.* (as modified) 332 F.2d 47, 48 (2d Cir. 1964); *Rossmore House*, 269 NLRB at 1178, fn 20.

In the instant case, the October 2020 interrogation of employee Anderson occurred during a period of time when unfair labor practice charges were pending against the Employer, including an allegation that the Employer unlawfully withdrew recognition from the Union. Team Manager High Volume Install Ides was Anderson's direct supervisor and appears to be sole manager on site daily at the Janesville facility out of which Anderson works. The interrogation took place during a telephone call from Ides to Anderson, in which Ides congratulated Anderson on being the top earner in a bonus program that was unlawfully applied to unit employees after the Employer withdrew recognition from the Union. Anderson and Ides regularly communicated by telephone during Anderson's workday and the nature of this call was not unusual. In reply to Ides' questioning why Anderson wanted a union, Anderson didn't answer directly. Rather, Anderson answered with his own question (i.e., "why don't you guys want the Union?"), suggesting Anderson was likely uncomfortable with the coercive turn in which Ides steered the conversation.

Although Ides' questioning did not appear to be seeking information on which to base taking action against individual employees, and the conversation did not take place during an atmosphere of "unnatural formality," it came immediately after the unlawful threat that if employees went back to the Union (presumably pursuant to the then-upcoming unfair labor practice hearing), the bonus program would go away. Further, the questioning took place after Respondent's unlawful withdrawal of recognition, rendering Anderson without protection from the Union. Questioning an employee about his support for the union immediately after making an unlawful threat substantiates the coercive nature of the questioning and reflects that the threat

and questioning are inextricably linked. *Parts Depot, Inc. & Union of Needletrades*, 332 NLRB 670, 673-674 (2000). (Board finds otherwise lawful interrogations unlawful when accompanied by threats or other violations of Section 8(a)(1) as there can be no question as to the coercive effect of the inquiry). Moreover, there is no evidence in the record suggesting Anderson to be an open Union supporter or management having knowledge of any such support other than membership in the Union prior to the withdrawal of recognition. *See Raytheon Co.*, 279 NLRB 245, 246 (1986) (The Board held, inter alia, the fact employees being questioned were not known to be open, active union supporters, at the time of the conversation, to weigh in favor of finding such interrogation in violation of Section 8(a)(1) of the Act).

D. Respondent's Defenses Must Fail

Respondent's defense to the allegation that it unlawfully withdrew recognition from the Union rests largely on a May 8, 2020, representation petition that the Union filed with the Board. The petition sought to represent a unit consisting of all service employees working out of the Janesville facility and was promptly withdrawn. Respondent appears to argue that the filing of this petition demonstrated the Union's belief that there existed an integrated unit of former Rockford employees and former Madison employees. By asserting the existence of such an expanded unit, Respondent then relies on a decertification petition signed by only the non-unionized former Madison employees to show that a majority of the former Rockford Unit no longer wished to be represented by the Union and Respondent properly withdrew recognition from the Union. (Tr. 67 – 69, 152 – 153; GCX 14, 24 – 25) This defense must fail.

i. The withdrawn representation petition has no bearing on the appropriateness of the already established Rockford Unit

The May 8, 2020, representation petition filed by the Union sought to represent a unit consisting of all service employees working out of the Janesville facility. (GCX 12) On May 15,

2020, the Region issued an order approving the Union's request to withdraw the petition. (GCX 13) As the parties did not reach a stipulated election agreement and no election was held, no determination was made by the Board on the appropriateness of the petitioned-for unit. (Tr. 20)

The Union's brief, and since abandoned, pursuit of a unit that included both the former Rockford employees and the former Madison employees is a red herring and has no bearing on the appropriateness of the already well-established Rockford Unit. Section 9(b) of the Act grants the Board authority to determine "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b). It is well-established that the Board need only find *an* appropriate unit, not the *most* appropriate unit, and more than one appropriate unit may exist among the same group of employees. *Overnight Transportation Co.*, 322 NLRB 723 (1996) ("The plain language of the Act clearly indicates that the same employees of an employer may be grouped together for purposes of collective bargaining in more than one appropriate unit...it is well-settled that there is more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining."); *Children's Hosp. of San Francisco*, 312 NLRB at 928 ("At the outset, in this regard, it must be noted that Section 9(a) of the Act requires that, in order to be designated as a group of employees' exclusive representative for purposes of collective bargaining, a labor organization must be selected, as such, by a majority of the employees in an appropriate unit and that "there is nothing in the [Act] which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be "appropriate."...Also, "the fact that one unit is appropriate does not necessarily mean that all other units are inappropriate.") (citations omitted).

As the Board noted in *ADT I*:

Even absent the 29 year-old bargaining relationship, were the Union now to petition to represent the service employees assigned to southwestern Michigan, the question would not be whether the unit sought was the most appropriate unit, i.e., whether the unit of all servicemen operating out of the Wyoming facility is more appropriate, but merely

whether it was an appropriate unit. *ADTI*, 355 NLRB at 1388.

It is not incongruent for the Union to have petitioned to represent a unit consisting of all service employees out of the Janesville facility while at the same time having maintained the appropriateness of the well-established former Rockford Unit.

ii. The decertification petition did not privilege Respondent to withdraw recognition from the Union

The record is clear that no former Rockford Unit employees' signatures appear on the decertification petition that Respondent argues demonstrates the Union's loss of majority support in the Rockford Unit. (Tr. 67 – 69, 152 – 153) In order to rely on this defective petition to justify its withdrawal of recognition from the Union, Respondent attempts to improperly expand the former Rockford Unit to include the former Madison employees. As there is no evidence that Respondent recognized the Union as the collective-bargaining representative of the former Madison employees at any time, nor that the former Rockford employees and former Madison employees were integrated into a single unit as described above in subsection IV(A)(iv), Respondent's ruse must fail.

The evidence is clear that Respondent never considered the Union to be the collective-bargaining representative of the former Madison employees nor did it consider the former Madison employees to be part of the Rockford Unit. At the time the former Madison employees joined the former Rockford Unit employees at the Janesville facility the former Rockford employees outnumbered the former Madison employees and were the majority. (Tr. 103 – 104, 444 – 445)

Respondent never applied the collective-bargaining agreement to the former Madison employees, nor did it notify the Union of any new hires into the bargaining unit or remit dues to the Union on behalf of any new employees or former Madison employees. (Tr. 58, 444)

Furthermore, there is no evidence that the Union claimed to represent the former Madison employees at any time before or after the relocation to Janesville.

Respondent's Director of Labor Relations, Nixdorf, admitted on cross-examination that Respondent did not consider all the service employees at the Janesville facility to be represented by the Union. He further admitted that Respondent's actions with respect to the Union demonstrated it did not believe the Union represented all the service employees at the Janesville facility. (Tr. 443 – 444) Respondent's reliance on the decertification petition signed only by non-Unit employees to withdraw recognition from the Union was self-serving, disingenuous and unlawful.

iii. The Board's decision in *Johnson Controls, Inc.*, is inapposite

Respondent ADT will likely argue that the Board's decision in *Johnson Controls, Inc.*, 368 NLRB No. 20 (2019), required the Union to file a petition to re-establish its majority status after receiving the notification of the anticipated withdrawal of recognition. This would be a baseless argument, as *Johnson Controls* is inapposite to the instant case.¹³

Johnson Controls addresses the situation where employees provide an employer with evidence that at least 50% of bargaining unit employees no longer wish to be represented by the union and the union reacquires majority status after the employer's anticipated withdrawal of recognition. The Board held that proof of an incumbent union's actual loss of majority support, if received by an employer within 90 days prior to contract expiration, conclusively rebuts the union's presumptive majority status when the contract expires. However, the union may attempt to reestablish that status by filing a petition for a Board election within 45 days from the date the

¹³ The Board in *Johnson Controls*, however, unequivocally provides a union with the option of filing an unfair labor practice charge alleging that "the number of valid signatures on the disaffection petition fails to establish loss of majority status." *Id.*, slip op. at 9. This is exactly the route the Union took in the instant case.

employer gives notice of an anticipatory withdrawal of recognition. *Id.*

Johnson Controls did not consider the issue at hand in the instant case, which is whether a specific bargaining unit is still a valid unit after a facility relocation. Here, the issue is whether Respondent improperly expanded the bargaining unit so that it could rely on non-Unit employees' signatures on the decertification petition in order to unlawfully withdraw recognition from the Union. None of the former Rockford Unit employees signed the petition. Respondent withdrew recognition from the Union when it did not have valid evidence that at least 50% of the established former Rockford Unit no longer wished to be represented by the Union. Anticipatory withdrawal law under *Johnson Controls* is immaterial here because the purported evidence of loss of support did not come from the existing bargaining unit.¹⁴

In short, as shown above, the former Rockford Unit maintained its integrity after the facility relocation to Janesville; Respondent has failed to meet its burden of demonstrating compelling circumstances overcoming the parties' significant bargaining history and its defenses are without merit.

iv. *ADT II* does not apply to the instant case

Respondent may argue that *ADT Security Services*, 368 NLRB No. 118 (2019) (referred to herein as *ADT II*) is applicable to the instant case. However, *ADT II* is both factually and legally distinguishable from the instant case. *ADT II* involved Respondent's consolidation with a competitor in the same greater metropolitan area that resulted in significant integration between

¹⁴ Nor does *Dodge of Naperville, Inc.*, 357 NLRB 2252, 2253 (2012), *enfd.* 796 F.3d 31 (D.C. Cir. 2015) as Respondent may argue, apply to the instant case. *Dodge of Naperville* concerned a failure to engage in effects bargaining before a unit merger, which is not at issue here. Even so, the Board in that case cited to the "compelling circumstances" test set forth in *ADT I*, while cautioning that bargaining history alone is insufficient to establish an appropriate unit.

the non-unionized employees of the former competitor and Respondent's unit employees. The Board concluded that Respondent was not obligated to recognize and bargain with the representative of the unit employees, noting that at all times after the consolidation, the unit and non-unit employees were fully integrated, and the non-unit employees outnumbered the unit employees. *Id.* at page 2-3.

ADT II is factually distinguishable from the instant case, in which the former Rockford Unit employees have retained their identity as a separate group at all material times after the consolidation, including by the continued application of the collective-bargaining agreement, the terms of which were not applied to the non-unit former Madison employees. (Tr. 58) While the former Rockford employees and former Madison employees now report to one centralized office, the former Rockford employees continue to work in their geographically distinct and distant service area, with no demonstrable increase in interaction with the former Madison employees. (Tr. 137, 140, 143 – 144, 259, 261, 306 - 307) Furthermore, there is no dispute that at the time of the consolidation in Janesville, the former Rockford Unit employees outnumbered the non-unit former Madison employees. (Tr. 103 – 104, 444 – 445)

In addition, *ADT II* is legally distinguishable from the instant case. In *ADT II*, the Board found that the administrative law judge had erroneously approached an accretion issue, i.e. finding that the majority non-unit employees should be accreted into the minority unit, a situation that is not present in the instant case. It should be noted that even if Respondent were able to establish that at some point in time the balance shifted and the former non-unit Madison employees outnumbered the former Rockford employees, this would not affect the application of *ADT I* to the instant case. In *ADT I*, the Board found the historical bargaining unit remained an appropriate unit for bargaining even though non-unit servicemen outnumbered the unit

employees. *ADT I*, 355 NLRB at 1393. *See also Fisher Broadcasting*, 324 NLRB at 257 (finding that respondent unlawfully refused to recognize and bargain with the union because of the alleged integration of unit employees with employees of two other radio stations purchased by the respondent even though the non-unit employees outnumbered the unit employees).

Even if one were to apply the *ADT II* rubric to the facts of the instant case, Respondent would not be able to meet the high threshold of demonstrating that the former Rockford employees and the former Madison employees are fully integrated and that the former Rockford employees lost their distinct identity as a group.

V. The PROPOSED NOTICE and UNIT DESCRIPTION

A. Appropriate Unit Description

The original NLRB certification describes the Rockford Unit as consisting of “[a]ll full-time and regular part-time installers, technicians and service personnel employed by the Employer at its 510 LaFayette Avenue, Rockford, Illinois facility.” (GCX 2) Counsel for the General Counsel’s Proposed Notice to Employees, Appendix A, modifies this unit description and requests that Respondent cease withdrawing recognition from and refusing to recognize and bargain with the Union in a unit consisting of “[a]ll full-time and regular part-time installers, technicians, and service personnel employed by the Employer at its Janesville, Wisconsin facility, who are regularly assigned to work in the service territory of the Employer’s former Rockford, Illinois facility.” The Proposed Notice is guided by the modified unit description crafted by the Board in *ADT I* and affirmed by the Sixth Circuit.

It is well-within the Board’s authority to fashion remedies for unfair labor practices, including, if necessary, the modification of the collective-bargaining unit description. *See e.g. In re Comar*, 339 NLRB 903, 904 (2003) (requiring employer to continue to bargain with

representative of relocated employees and describing the unit in terms of those “performing the work that was formerly done” at the previous plant). The Sixth Circuit enforcement of *ADT I* upholds the Board’s authority in this regard. *N.L.R.B. v. ADT Sec. Services, Inc.*, 689 F.3d 628 (6th Cir. 2012). In *ADT I*, the Kalamazoo unit was defined as “[a]ll full-time and part-time servicemen employed by the Employer at its Kalamazoo, Michigan facility (unit exclusions omitted).” In its Order remedying Respondent’s unlawful withdrawal of recognition, the Board redefined the bargaining unit as “[a]ll full-time and regular part-time servicemen regularly assigned to work in the Kalamazoo service territory (unit exclusions omitted).” *ADT I*, 355 NLRB at 1389.

In response to the NLRB seeking enforcement of the Board’s Order in *ADT I*, Respondent argued that the modification of the unit description was beyond the Board’s power. The Sixth Circuit, however, disagreed and noted that the Board’s modification of the unit description “merely reflects the reality that those employees are no longer employed at the Kalamazoo facility” and that modification was within the Board’s power and discretion and appropriately flowed from the record evidence regarding the distinctions Respondent used to assign work, including geographic area, and pay to its employees. 689 F.3d at 635, also citing to *Comar*, 339 NLRB at 904.

Similarly, here, the modified unit description in General Counsel Proposed Notice reflects the reality that the unit employees are no longer employed at the Rockford facility but continue to work under the same processes and in the same Rockford service area. The modification is reasoned and appropriate and comports with the manner in which Respondent has been functioning since closing the Rockford facility and relocating the facility to Janesville. The modified unit description does not create a new or unworkable jurisdiction so much as it

memorializes the jurisdiction that already exists in practice, and has existed for well over a year, since the relocation in August 2020, as testified to by employees Sissum and Anderson.

B. Broad Remedy in Notice is Appropriate

In the Proposed Notice in Appendix A, Counsel for the General Counsel seeks a broad remedy that Respondent “will not in any manner restrain or coerce you in the exercise of your rights under Section 7 of the Act.” The Board finds such a broad remedial order appropriate, “when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.” *Pan Am. Grain Co., Inc. & Pan Am. Grain Mfg. Co., Inc. & Congreso De Uniones Industriales De Puerto Rico*, 346 NLRB 193 (2005), citing *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). Recently, in *Apex Linen Service, Inc. and International Union of Operating Engineers, Local 501, AFL-CIO*, 370 NLRB No. 75 (2021), the Board expanded the administrative law judge’s narrow cease and desist order where, during the prior three years, the “[r]espondent has been found to have committed unfair labor practices, including numerous violations. . .” of the Act and thus finding the respondent’s violations “indicate both a proclivity to violate the Act and a ‘general disregard for the employees’ fundamental statutory rights’ sufficient to warrant a broad order.” *Id.*, citing *Hickmott Foods*, supra.

In this case, Counsel for the General Counsel bases this request for a broad remedy on Respondent’s recidivist conduct in: 1) *ADT I*, 355 NLRB 1388; 2) *ADT, LLC d/b/a Adt Sec. Servs. & Int’l Bhd. of Elec. Workers, Loc. Union 43*, No. JD-51-19, 2019 WL 2501867 (June 17, 2019), which was adopted by the Board in No. S 03-CA-230714, 03-C, 2019 WL 3451539, at *1 (DCNET July 29, 2019), where the administrative law judge found, inter alia, that Respondent solicited employees to decertify the union representing its employees, interrogated employees

about their attitude towards the union, unlawfully withdrew recognition from the union, failed and refused to bargain with the union, and refused to sign and abide by a collective-bargaining agreement to which it had agreed; 3) *ADT, LLC*, 363 NLRB No. 36 (2015), where the Board, reversing the administrative law judge, found Respondent failed to provide relevant and necessary information about the Respondent's "business justification" for transferring unit employees from one compensation program to another; 4) *Adt, LLC*, 369 NLRB No. 31 (2020), where the Board adopted the administrative law judge's finding Respondent unlawfully bypassed the union and dealt directly with employees regarding mandatory scheduling; 5) *ADT, LLC*, 369 NLRB No. 23 (2020), where the Board adopted the administrative law judge's finding Respondent violated the Act when it fired two employees because they engaged in protected union activity during the captive audience meetings and did not lose the protection of the Act; 6) *Adt LLC d/b/a Adt Sec. Servs. & Int'l Bhd. of Elec. Workers, Loc. Union 43*, No. JD-31-18, 2018 WL 2263547 (May 16, 2018), which was adopted by the Board in No. 03-CA-202122, 2018 WL 3091018, at *1 (DCNET June 21, 2018), where the administrative law judge found that Respondent failed to engage in effects bargaining with the union concerning the effects of its decision to close its facility at Clifton Park, New York, failed and refused to furnish the union, in a timely manner, with necessary and relevant information in order to perform its duties as the bargaining representative, and failed and refused to provide the union, in a timely manner, with information that certain requested information did not exist.

Based on Respondent's eleven-year record of egregiously violating the Act, Counsel for the General Counsel submits it has demonstrated Respondent's proclivity to violate the Act *and* a "general disregard for the employees' fundamental statutory rights" and, therefore, requests such extraordinary relief.

VI. CONCLUSION

Counsel for the General Counsel submits that Respondent violated the Act by: (1) unlawfully withdrawing recognition from the Union; (2) implementing unilateral changes to the Rockford Unit's terms and conditions of employment, including changes to the method of compensation, overtime, paid time off and bonus eligibility, and the implementation of a performance review system; (3) interrogating employees about their Union support; and (4) threatening employees with loss of the unilaterally implemented bonus plan if Respondent was required to recognize the Union again. The General Counsel's witnesses testified truthfully and should be credited.¹⁵ It is respectfully requested that the Administrative Law Judge find the violations described above and order the appropriate remedies, including the Proposed Notice attached as Appendix A.

Dated: March 12, 2021.

Respectfully submitted,

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¹⁵ Note that the administrative law judge in *Adt, LLC*, No. JD-51-19, 2019 WL 2501867, fn. 16 (June 17, 2019) declined to credit a portion of Director of Labor Relations Nixdorf's testimony, noting that it was inconsistent with Respondent's representations on the matter in question; Respondent did not file exceptions to this decision. Note also, that the Board upheld the credibility determination by the administrative law judge in *Adt, LLC*, 368 NLRB No. 118, *6 (2019), who found that "Nixdorf appeared less than credible. He seemed to be more concerned with advocating ADT's labor relations stance than providing a candid account."

APPENDIX A

Proposed Notice to Employees

As you may know, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 364, AFL-CIO (UNION) filed charges with the National Labor Relations Board against ADT, LLC (RESPONDENT) alleging that we violated the National Labor Relations Act. As a result of these charges, we have been ordered to post this notice by the National Labor Relations Board.

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT withdraw recognition from and fail and refuse to bargain with International Brotherhood of Electrical Workers, Local Union No. 364, AFL-CIO (Union) as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All full-time and regular part-time installers, technicians and service personnel employed by the Employer at its Janesville, Wisconsin facility, who are regularly assigned to work in the service territory of the Employer's former Rockford, Illinois facility; but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act, and all other employees.

WE WILL NOT unilaterally, without notice to or bargaining with the Union, make changes in wages, hours and working conditions without bargaining to agreement with the Union or reaching an overall good faith impasse, including by changing the method of compensation, overtime and paid time off, implementing a bonus system that was previously only offered to unrepresented employees, and instituting a new performance review system.

WE WILL NOT ask you about your Union support.

WE WILL NOT threaten you that we will take away the bonus system that we unilaterally implemented if we are required to recognize the Union again.

WE WILL rescind our withdrawal of recognition from the Union, and **WE WILL** extend recognition to the Union as the collective-bargaining representative of our former Rockford employees, and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the foregoing appropriate unit.

WE WILL, only if requested by the Union, reinstate the terms for the expired collective-bargaining agreement without retracting any benefit conferred.

WE WILL, only if requested by the Union, rescind the unilateral changes made to compensation, overtime, paid time off, and to the new performance review system.

WE WILL, only if requested by the Union, rescind the bonus system that we unilaterally implemented.

WE WILL make you whole for the wages and for the benefits that were lost or decreased because of the changes in terms and conditions of employment that we made without bargaining with the Union, plus interest.

WE WILL NOT in any manner restrain or coerce you in the exercise of your rights under Section 7 of the Act.

ADT, LLC

(Employer)

Dated: _____

By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at <https://www.federalrelay.us/tty> (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

310 W. Wisconsin Avenue, Suite 450W
Milwaukee, WI 53202

Telephone: (414) 297-3861

Hours of Operation: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Centralized Compliance Unit at complianceunit@nlrb.gov.