

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**T-MOBILE USA, INC.**

**And**

**COMMUNICATION WORKERS OF  
AMERICA, AFL-CIO**

**Case Nos.**

**01-CA-123183**

**01-CA-129976**

**01-CA-140752**

**And**

**COMMUNICATION WORKERS OF  
AMERICA, LOCAL 1298, AFL-CIO**

*Rick Concepcion Esq.*, for  
the General Counsel.

*Mark Theodore, Esq. and Irina  
Constantin, Esq.*, for the  
Respondent.

*Thomas W. Meiklejohn Esq.*, and  
*Nicole M. Rothgeb Esq.*,  
for the Charging Party.

**Decision**

**Statement of the Case**

Raymond P. Green, Administrative Law Judge. I heard this case in Hartford, Connecticut on May 8, 2015. The charges and amended charges were filed on February 25, March 14, April 29, June 3, and October 29, 2014. Based on those charges, Region 1 of the National Labor Relations Board issued a Consolidated Complaint on October 31, 2014. This alleged as follows:

1. That since August 2, 2011, the Respondent has recognized the Communications Workers of America (the National Union) and Local 1298 as the representatives of certain employees in Connecticut.

2. That the most recent collective-bargaining agreement was effective from July 31, 2012 through May 31, 2014.

3. That since January 16, 2014, and prior to the contract's expiration, the Respondent issued an Employee Handbook applicable to the bargaining unit employees that states:

(a) Employment at TMUS is "at will" which means that it is not for any specific duration and that an employee or the Company may terminate the

employment relationship at any time, for any reason, with our without notice. No one except the President or Chief Executive Officer of TMUS has the authority to change any employee's at will employment status, to make any agreement that an employee will be employed by TMUS for any set period of time, or to make any other promises or commitments that are contrary to this policy of at will employment. For any such agreement, promise or commitment to be binding on the Company, and to be valid and enforceable against it, that agreement, promise of commitment must be part of a written contract signed by an employee and the President or Chief Executive Officer of TMUS and, if applicable, have the approval of the Compensation Committee...

4. That since January 16, 2014, the Respondent, by issuing and maintaining the at-will policy described above, informed bargaining unit employees that the selection of a bargaining representative was futile.

5. That since January 16, 2014, the Respondent, by maintaining the "at will" policy has failed to continue in effect the terms of the expired contract.<sup>1</sup>

6. That since May 29, 2014, the Respondent has unilaterally changed the notice requirements for the use of paid time off, thereby modifying article XVIII of the agreement.

7. That the foregoing changes were made during the term of the collective-bargaining agreement and were made without the consent of the Union, it therefore is contended that the Respondent violated Section 8(d) and 8(a)(5) of the Act.

8. That since October 8, 2014, the Respondent has refused to meet with the Union to negotiate a successor collective-bargaining agreement.

Among other things, the Respondent asserts that it did not modify the collective-bargaining agreement and that its notice to 40,000 nonunit employees regarding their status as "at will" employees, cannot be construed as changing the status of the employees covered by the union contract. The Respondent also asserts that it has not withdrawn recognition and has continued to notify and offer to bargain with the Union regarding any changes in working conditions. Its position is that it has merely suspended bargaining until a question of representation is resolved via an election.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

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<sup>1</sup> The complaint asserted that the revised handbook provisions also modified the company's policy regarding absenteeism in that they provided that an employee may be deemed to have abandoned his employment if absent for 3 or more days without notice. However, this contention is not mentioned in either the General Counsel's or the Charging Party's Brief. I therefore deem that this allegation has been abandoned.

## Findings and Conclusions

### I. JURISDICTION

5           It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I also find that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES

10           The Respondent is a phone service provider that employs about 40,000 employees throughout the United States. Most of these employees are not represented by any labor organization.

15           Pursuant to an election held in 2011, the Respondent recognized the CWA and its affiliated Local 1298 as the exclusive collective-bargaining representative in a unit consisting of:

20           All full-time and regular part-time field technicians switch technicians and material handlers employed by T-Mobile USA in the State of Connecticut, but excluding all other employees, contractors and supervisors and guards as defined in the Act.

25           For the calendar year 2014, there were 20 bargaining unit employees, including about six former employees of Metro-PCS who were added to the bargaining unit in December 2013.

30           The parties stipulated that David Karpinski held the position of Market Manager, Connecticut, for T-Mobile's Engineering and Operations in the State of Connecticut. They also stipulated that in that capacity, Karpinski has been a supervisor within the meaning of Section 2(11) of the Act and an agent within 2(13) of the Act.

35           It also was stipulated that Christopher Cozza and Christopher Cocola have been union stewards for Local 1298 and have been designated as contact persons for bargaining unit employees by the local union.

40           The Board certified the union on August 2, 2011. Bargaining commenced in the fall of 2011, and concluded in the summer of 2012. A collective-bargaining agreement was reached in July 2012, and that contract ran from July 31, 2012 through May 31, 2014. This contract was executed by William Henderson and Paul Bouchard on behalf of the Unions and by Mark Appel, who is the Respondent's area director.<sup>2</sup> A number of provisions of that contract are relevant to the issues in this case.

45           The contract contains a broad management rights clause, which among other things, states that management has the right "to suspend, discipline, discharge, demote

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<sup>2</sup> The parties stipulated that Mark Appel was neither the president of the company, the chief executive officer, nor a member of the company's executive office. There is however, no doubt that Mr. Appel had authority to execute this contract on behalf of the employer and the Respondent does not contend otherwise. At no time after the contract's execution, has the Respondent asserted that the contract was invalid or inoperative because it was executed by a person without authority.

or take any other disciplinary action for just cause” The management rights clause also states: “The foregoing management rights are expressly reserved to be decided by the company on a unilateral basis and shall not be subject to any dispute resolution procedure.”

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At Article XVIII there is a clause that provides that employees are eligible to participate in various company benefits, including paid time off. It also states that: “During the term of this Agreement, the Employer shall have the right, in its sole discretion, to alter or eliminate entirely these benefits currently offered, provided such revisions match those of employees outside the bargaining unit.” At paragraph 2, the contract states that the “Company will give notice to the Union of any such changes,” and that the “Company’s right to alter or eliminate these benefits shall not be subject to Article XII – Grievance and Arbitration.”

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In addition, the contract contains a seniority clause that affects layoffs and recalls. It states inter alia, that “if skill and ability are equal, in the Employer’s opinion, then seniority shall prevail. The Employer shall not make decisions on the skill and ability in a capricious or arbitrary manner.”

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Finally, the contract contains a grievance/arbitration clause at Article XII. Coupled with that part of the management rights clause that allows disciplinary actions vis a vis employees based on “just cause,” the contract therefore permits an arbitrator in a grievance proceeding to conclude, for example, that the discharge of an employee was not for just cause and therefore that the employee would be entitled to reinstatement and backpay.

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It should also be noted that although the Company, pursuant to Article XVIII (described above), has the right to alter or modify various benefits during the life of the collective-bargaining agreement, there is a limitation of that right by virtue of the Company’s obligation to notify the Union of such changes.

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The contract described above expired on May 31, 2014, and no new contract has been negotiated. Although the General Counsel is asserting that certain limited provisions of the contract have been unilaterally changed, the evidence is that for the most part, the terms and conditions of employment as they existed prior to the contract’s expiration, have remained in effect.

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In August 2012, and subsequently in August 2013, the Company revised its nationwide employee handbook. This was accomplished by posting the changes on its company-wide website that was available to its 40,000 employees. Needless to say, the changes were made available to the 20 employees who were covered by the collective-bargaining agreement in Bloomfield, Connecticut. These postings contained language to the effect that employment with the Respondent was on an “at will” basis. As far as I know, there was no discussion between the Union and the Respondent, during the term of the contract, as to what effect, if any, these handbook “at will” provisions would have on the “just cause” provision contained in the collective-bargaining agreement.

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On or about January 16, 2014, the Respondent again posted a newly revised handbook covering its employees on a nationwide basis. However, as to its California and Puerto Rico employees, the posting indicated that they would be covered by slightly different provisions.

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Neither the notices posted on January 16 and 20, nor the handbook itself, state that certain provisions would not apply to employees covered by a collective-bargaining agreement.

5 This newly revised handbook included the provision that employment was considered to be on an “at will” basis. Further, employees were notified that when new employees were hired, they would be required to sign a statement acknowledging their “at will” status. Neither the handbook nor the notices state that this “at will” status would be applicable only to nonunion employees. On the other hand, there is nothing in the handbook or the notices that states that the Bloomfield employees’ contract would not be honored including the grievance/arbitration provisions which permit the Unions to contest whether a discharge or other adverse action was taken without “just cause.”

10 No employee at the Bloomfield facility covered by the collective-bargaining agreement has been required to sign any statement acknowledging that his or her employment is on an “at will” basis.

15 The General Counsel also contends that prior to the expiration of the contract, (May 31, 2014), the Respondent modified the contract by failing to notify the Union regarding a change it made to the employees’ paid time-off benefits. In this regard, the alleged change to the collective-bargaining agreement is not the change in the actual time-off benefits, but rather the failure to give notice to the Union before making the change. The General Counsel concedes that pursuant to Article XVIII, the Respondent had the right to make the change, provided (a) that the change offered unit employees the same benefit given to employees outside the bargaining unit and (b) that the Company gave notice to the Union of the change. My reading of this provision is that it only requires notice and does not require bargaining about a benefit change.

20 Under the old policy, effective during the term of the contract, employees were required to provide 1 day of advance notice for 1 day of paid time off; 72 hours of notice for 2 paid days off; and 5 days of notice for 3 or more days of paid time off.

25 On May 29, 2014, Karpinski notified unit employees that they would be required to provide 2 weeks of notice if they were asking for 4 or more days of paid time off. This change was announced 2 days before the contract’s expiration.

30 Although shop stewards, as unit employees, were aware of the May 29 notice, which they forwarded to the Union, no official notice was given by the Respondent directly to the CWA or to the local Union.

35 On March 28, 2014, one of the employees filed a decertification petition in 1–RD–12542 seeking an election to determine if a majority of the employees in the unit wished to be represented by the Union. That petition was supported by a showing of interest, which means that at least 30 percent of the bargaining unit employees signed something to indicate that they no longer wished to be represented. The decertification petition has not been dismissed, but its processing has been blocked by this unfair labor practice case.

40 At some time later, the Respondent received a petition to remove the Union as the representative of the employees. This was signed by a majority of the employees in the bargaining unit.

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Notwithstanding the filing of the RD petition and the receipt of the employee petition, the Respondent has not withdrawn recognition from the Union. And in fact, it continued to bargain for a period of time and continues to deal with the Union with respect to various grievances and other matters.

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On October 8, 2014, Mark Theodore, the Respondent's attorney sent the following letter to Patrick O'Neil, which in effect, suspended contract negotiations.

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This letter is to inform you that T-Mobile has received from the employees in the Connecticut Area market, objective evidence of a loss of majority support of bargaining unit employees, a majority of whom no longer wish to be represented by the CWA. Under NLRB case law the Company would be privileged to withdraw recognition at any time after the expiration of the parties' agreement.... The collective bargaining agreement expired on May 31, 2014.

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The Company always has maintained that an election is the best course of action when it comes to deciding questions concerning union representation and twice has been willing to proceed to such an election in this bargaining unit. As you are aware, employees in the bargaining unit filed a timely certification petition several months ago. Unfortunately, their efforts to seek a simple election have been blocked by the CWA's unfair labor practice charges.

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Given the CWA's lack of majority status, the Company is going to suspend bargaining while the question concerning representation is sorted out.

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If the election on the employee petition is held, and should the Union prevail, bargaining will resume. In this period of suspension, the Company will abide by the terms of the expired collective bargaining agreement, as well as any other interim bargaining obligations that may arise.

By letter dated October 15 2014, O'Neil wrote to Theodore as follows:

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I have one question about your letter. You state that the Company will abide by the terms of the expired collective bargaining agreement. Does this include the just clause provision of the contract? Is the Company prepared to arbitrate any disputes that arise concerning discipline, despite the suspension of negotiations?

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On October 27 2014, Theodore replied:

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In your letter, you asked what suspension of bargaining for a successor contract means. It is simple: T-Mobile will abide by the law just as it always has done. This means that certain provisions of the parties' expired contract will remain unchanged by force of law: other provisions do not survive contract expiration....

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Although Theodore might be accused of being a bit coy, it would be clear to any experienced labor relations practitioner that in accordance with present law, an arbitration

clause, unlike most other provisions of a collective-bargaining agreement, does not continue after the contract's expiration.

### III. ANALYSIS

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Among other things, Section 8(d) provides that when a contract is made, the duty to bargain "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract" The purpose of this provision, (enacted to modify the decision in *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 342 (1939)), was to insure a degree of stability once the parties to a collective-bargaining relationship have established a contract for a fixed term. (A bargain made is a bargain to be kept). To allow either party to require the other to bargain about an issue that has been set for a fixed period of time, would, in a sense, make the agreement somewhat illusory and insert a degree of instability into the relationship between the parties. (There is, however, nothing unlawful if both parties to a collective-bargaining agreement voluntarily and mutually agree to a mid-term modification).

Pursuant to Section 8(a)(5), the Act also imposes a duty to bargain when an employer chooses to make a change in an existing term and condition of employment where that change is not covered by terms and conditions of a collective-bargaining agreement. This obligation exists during the term of an existing contract and, in most respects, after the contract expires, so long as a union remains the legally recognized bargaining representative. The duty to bargain in such cases involves the obligation to give notice to a union about the desired change and a reasonable opportunity to bargain about the change. However, the duty to bargain attaches only to changes that materially affect terms and conditions of employment.

It is the contention of the General Counsel and the Charging Party that by issuing a new employee handbook in January 2014, the Respondent effectively modified the existing collective-bargaining agreement by telling the bargaining unit employees that they were "at will" employees and that they could, in effect, be terminated with or without just cause.

The Respondent asserts that this claim is incorrect and that a handbook written for and issued to 40,000 employees, was never intended to modify, nor could it legally modify, the terms of the existing collective-bargaining agreement. It notes that there is no evidence to suggest that the Company by any of its agents or representatives, ever directly told, claimed, or suggested to the Union, or to the employees, that the grievance/arbitration or the "just cause" provisions of the contract had been changed, modified or superseded by the handbook provisions. And if the Company had chosen to take that position, there were plenty of opportunities to do so when union representatives met with the Company to discuss a variety of matters after the handbook was issued.

I don't think that the issuance of an employee handbook that included a statement reiterating a long standing company assertion that it considers its employees to be "at will" employees, can reasonably be construed as an attempt to modify the "just cause" provisions of the collective-bargaining agreement, which in this case, covers 20 out of about 40,000 employees. There is no evidence of any communication by the Company to the Union or to the employees, that the revised handbook was somehow meant to nullify any of the terms of the collective-bargaining agreement. In my opinion, this assertion is a creative but incorrect interpretation of a document that was clearly not intended to modify, alter or change the existing contract.

Based on the above, I conclude that by issuing the handbook with the statement about “at will” employment, the Respondent has not violated Sections 8(a)(5) and 8(d) of the Act. I also conclude that the Respondent has not notified employees that bargaining would be futile.

On May 29, 2014, the Company notified the bargaining unit employees that there were some changes in the amount of notice time that would be required if they wanted to take 4 or more days of paid time off. Basically, they were required to give 5 more days of notice than had previously been required. (Two weeks instead of 5 days).

The General Counsel and the Charging Party do not contend that the Company could not make the change in the paid time off policy. Rather, they contend that the Respondent modified the existing contract by failing to give notice of the change.

As described above, the contract allows the Company, in its sole discretion, to change existing benefits, including paid time off, provided that the change is the same as given to nonbargaining unit employees; and provided that it gives notice of the change to the Unions. The contract does not require the Company to maintain the existing benefit until such time as the parties have either reached an impasse or reached an agreement on the change. Indeed, it does not require bargaining at all.

In my opinion, this was a change in a contractual provision and it did occur a couple of days before the contract expired. So technically, this could be considered a modification of the existing contract. Nevertheless, it is also my opinion, that this change, which related only to the contractual notice procedure, was not sufficiently material so as to justify a finding that the Respondent violated the Act. In short, I conclude that this alleged violation was de minimus.

Finally, the complaint alleges that the Respondent has unlawfully suspended negotiations for a contract in violation of Section 8(a)(5) of the Act.

In this regard, the facts show that on October 8, 2014, the Company, by its counsel, wrote a letter to the unions suspending negotiations until such time as an election determined that the union still represented a majority of the unit employees. The Company did not withdraw recognition from the unions and since October 8, it has continued to deal with the unions on a variety of matters affecting the terms and conditions of the employees, including grievances.

The Respondent’s defense is based on the fact that an employee filed a decertification petition and that it also received a petition from more than 50 percent of the unit employees indicating their desire to not be represented by the Unions.

In *Levitz Furniture Company of the Pacific*, 333 NLRB 717 (2001), the Board held that an employer could not legally withdraw recognition from an incumbent union based only on its “good faith” belief that the union no longer represented a majority of the bargaining unit employees. However, the Board did hold that by “demonstrating good-faith reasonable uncertainty (rather than disbelief) as to unions’ continuing majority status, an employer could file an RM petition.” (Thereby permitting the Board to hold a secret ballot election). The Board also held that an employer could legally withdraw recognition if it could prove by objective evidence that a union had lost its majority support. As to the legality of an employer’s withdrawal of recognition, the Board stated:

5 [W]e hold that an employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit. We overrule *Celanese* and its progeny insofar as they hold that an employer may lawfully withdraw recognition on the basis of a good-faith doubt (uncertainty or disbelief) as to the union's continued majority status.

10 We have also decided to allow employers to obtain RM elections by demonstrating good-faith reasonable uncertainty (rather than disbelief) as to unions' continuing majority status. We adopt this standard to enable employers who seek to test a union's majority status to use the Board's election procedures—in our view the most reliable measure of union support—rather than the more disruptive process of unilateral withdrawal of recognition.<sup>3</sup>

15 We emphasize that an employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).

25 Notwithstanding the presentation of objective evidence showing that a union has, in fact, lost its majority status, an employer's withdrawal of recognition may still be unlawful, if that withdrawal is tainted by other unfair labor practices. But in order to show a "taint" the Board has held that "there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." See *Lexus of Concord, Inc.*, 343 NLRB 851 (2004), and cases cited therein.

30 In the present case, the employer has presented evidence showing that the unions have lost their majority support. Further, as I have concluded that the Respondent has not engaged in the alleged unfair practices, there is no reason to find that the loss of majority status was caused by those alleged violations.

35 Based on the above, it would be permissible to conclude that the employer could have completely withdrawn recognition. Nevertheless, it chose not to do so; instead merely suspending contract negotiations until an election could be held to determine majority status or lack thereof. If the employer could have legally withdrawn recognition, then surely it could have taken the lesser path of suspending negotiations on a

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<sup>3</sup> While proof that a union lacks majority support will allow an employer to completely withdraw from its bargaining obligation, evidence showing only doubt as to majority status will only permit an employer to ask the Board to hold an election. In the latter instance, even where an election is scheduled, the employer is still required to negotiate in good faith; albeit any contract made will be deemed to be null and void if the Board thereafter certifies that the union failed to obtain a majority of the valid votes counted. In this case, since a decertification petition had already been filed, there was no need for the Employer to file its own election petition.

temporary basis. I therefore conclude that the Respondent has not violated the Act in this respect.

**Conclusion**

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For the reasons stated above, I conclude that the complaint should be dismissed.

Dated: Washington, D.C. August 3, 2015

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Raymond P. Green  
Administrative Law Judge