

Nos. 17-1065 and 17-1111

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

T-MOBILE USA, INC.,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties, Intervenors, and Amici:

1. T-Mobile USA, Inc. was the respondent before the Board and is the petitioner/cross-respondent before the Court.
2. The Board is the Respondent and Cross-Petitioner before the Court; the Board's General Counsel was a party before the Board.
3. Communication Workers of America, AFL-CIO, and its Local 1298 were the charging parties before the Board. Communication Workers of America, AFL-CIO, is the Intervenor before the Court.

B. Rulings Under Review:

This case is before the Court on T-Mobile's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board on February 2, 2017, and reported at 365 NLRB No. 23.

C. Related Cases:

This case has not previously been before the Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

/s/ Linda Dreeben

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Dated at Washington, D.C.
this 13th day of July 2017

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the petition of T-Mobile USA, Inc., to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against T-Mobile. In this unfair-labor-practice case, the Board found that T-Mobile violated the National Labor Relations Act by refusing to bargain with the Communication Workers of America, Local 1298, over a successor bargaining agreement.

The Board's Decision and Order issued on February 2, 2017, and is reported at 365 NLRB No. 23. (JA 93-102.)¹ The Board had subject-matter jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties.

The Court has jurisdiction over this proceeding under Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement. *See* 29 U.S.C. § 160(e) and (f). T-Mobile filed its petition for review on February 24, 2017. The Board filed its cross-application for

¹ "JA" references are to the joint appendix, and "Br." refers to T-Mobile's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

enforcement on April 5, 2017. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

STATEMENT OF THE ISSUE

Whether the Board reasonably found that T-Mobile violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union over a successor agreement.

RELEVANT STATUTORY AND REGULATORY ADDENDUM

The addendum attached to this brief contains all applicable statutes and regulations.

STATEMENT OF THE CASE

Acting on unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that T-Mobile violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by issuing and maintaining its employee handbook, which included "at will" and "attendance" policies, and by refusing to bargain with the Union over a successor collective-bargaining agreement. (JA 234-40.) After a hearing, an administrative law judge recommended dismissal of all allegations. The following subsections summarize the undisputed facts and the Board's Conclusions and Order, which overturned the judge's recommended dismissal of the refusal-to-bargain complaint allegation.

I. THE BOARD'S FINDINGS OF FACT

A. T-Mobile and the Union Negotiate an Initial Contract; T-Mobile Makes Changes to its Employee Handbook and Notice Requirements for Taking Leave Without First Notifying the Union; the Union Files Unfair-Labor-Practice Charges; the Employees File a Decertification Petition

T-Mobile is a nationwide cell phone service provider. (JA 93; JA 361.)

Since winning a secret-ballot election in 2011, the Union has represented a unit of field technicians, switch technicians, and material handlers employed by T-Mobile in Connecticut. About 20 employees are in the collective-bargaining unit. (JA 99; JA 362.)

In 2012, the parties entered into a collective-bargaining agreement, which was effective from July 31, 2012, through May 31, 2014. (JA 99; JA 363.) The agreement gave management the right “to suspend, discipline, discharge, demote or take any other disciplinary action for just cause.” (JA 99; JA 250.) It also gave management the right “to alter or eliminate entirely the[] benefits currently offered,” and provided that T-Mobile would “give notice to the Union of any such changes.” (JA 99; JA 261.)

In August 2013 and again in January 2014, T-Mobile posted changes to its employee handbook; the changes included language that employment was on an “at will” basis. (JA 100; JA 363-64.) In February, the Union filed an unfair-labor-practice charge, later amended, alleging that the “at will” language “discourages

employees from engaging in protected concerted activity and informs employees that forming and supporting a union is futile.” (JA 204-06.)

On March 28, 2014, an employee filed with the Board a decertification petition supported by a showing of interest that at least 30 percent of the bargaining unit employees no longer wished to be represented by the Union. (JA 100.) Sometime later, employees also gave T-Mobile a separate petition signed by 13 of the 20 bargaining-unit employees. (JA 93, 99; JA 197-98.) Their petition stated that they did “not want to be represented” by the Union. (JA 93; JA 359-60.) Pursuant to the Board’s blocking charge rule,² the Board’s Regional Director held the decertification petition in abeyance while the unfair-labor-practice charge was processed. (JA 93.)

In May 2014, two days before the contract expired, T-Mobile notified the unit employees that they were now required to provide two weeks’ notice before taking four or more days off, a change from the prior policy that required between one and three days’ notice. (JA 100; JA 289-90, 364, 589.) T-Mobile made this change without giving the Union the notice required by the contract. (JA 100; JA

² See NLRB Casehandling Manual Part One: Unfair Labor Practice Proceedings, Section 11730, “Blocking Charge Policy—Generally,” available at <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM-February%202017.pdf> (last visited July 7, 2017) (reproduced in the addendum to this brief). See also *Dayton Typographical Union No. 57 v. NLRB*, 326 F.2d 634, 648 (D.C. Cir. 1963).

261.) Accordingly, the Union filed an unfair-labor-practice charge alleging that T-Mobile's unilateral action violated Section 8(a)(5) and (1) of the Act. (JA 207-08.)

B. T-Mobile and the Union Begin Negotiating a Successor Contract; T-Mobile Then Refuses To Bargain—but only over the Contract

In April, with the collective-bargaining agreement set to expire in May, the Union requested bargaining. (JA 93; JA 364, 594.) The parties scheduled bargaining sessions for June and August. The Union cancelled the June session, but the parties rescheduled for August 19, 20, and 21. (JA 93; JA 365.)

In June, the Union requested information about the analysis T-Mobile used to determine wages. T-Mobile agreed to provide the information if the Union agreed to keep it confidential. (JA 155-56, 301-04.)

In July, T-Mobile discharged a bargaining unit employee. The Union filed a grievance, which T-Mobile processed, and a request for information about the discharge, to which T-Mobile responded. Ultimately, the Union did not pursue the grievance or seek arbitration. (JA 93; JA 186-87, 306-08, 365.)

As scheduled, the parties met and bargained over the successor contract for the Connecticut bargaining unit employees on August 19 and 20. The parties then agreed to use the scheduled session on August 21 to discuss the contract for a unit of employees in New York who were also represented by the Union. (JA 158-60.) During this time, T-Mobile never told the Union that it was unwilling to bargain

over a successor agreement because of the Connecticut employees' decertification petition. (JA 159.)

In addition to bargaining for the New York unit on August 21, the parties also addressed an issue related to the Connecticut unit. Under the expired collective-bargaining agreement, wages for the Connecticut unit employees were capped. (JA 365.) The parties negotiated an interim agreement allowing bargaining unit employees to participate in a compensation review and receive wage increases. (JA 158, 171-72, 336-37, 365, 597.) In addition, the parties agreed that the interim agreement was "made without prejudice to bargaining for a successor collective bargaining agreement." (JA 597.) The parties did not schedule new dates for bargaining after August. (JA 365.)

On October 8, about six months after it received the decertification petition that was filed with the Board, T-Mobile notified the Union that it had also received directly from the unit employees a petition that gave it "objective evidence of a loss of majority support." (JA 599.) T-Mobile told the Union that although Board law permitted it to withdraw recognition entirely, it believed that an election was "the best course of action." (JA 599.) T-Mobile added that it was suspending bargaining over the successor contract "while the question concerning representation is sorted out," and that it would continue to "abide by the terms of

the expired collective bargaining agreement, as well as any other interim bargaining obligations that may arise.” (JA 100; JA 365-66, 599.)

The Union responded by letter, noting that the pending decertification election was blocked, and that T-Mobile remained obligated to bargain over a new contract. (JA 601-02.) In addition, the Union asked whether T-Mobile was willing to abide by the “just cause” provisions of the contract, and whether it would arbitrate any disputes involving employee discipline. (JA 601-02.) Finally, the Union noted that it did not agree to the suspension of bargaining for a successor contract and asked T-Mobile to provide available dates for bargaining in October and November. (JA 101; JA 601-02.)

In reply, T-Mobile asserted that it had committed no unfair labor practices, and that none of the violations alleged by the Union in its unfair-labor-practice charges involved the loss of majority support. (JA 604.) T-Mobile also declined to answer the Union’s question about arbitration of disputes and instead responded that “certain provisions of the parties’ expired contract will remain unchanged by force of law; other provisions do not survive contract expiration.” (JA 101; JA 604.)

Following T-Mobile’s refusal to bargain for a successor contract, it requested bargaining over specific items. (JA 93; JA 366.) In October, T-Mobile proposed changes to its fleet policy, which involved changes to the employees’ use

of a required Global Positioning Satellite device in company vehicles and their personal use of company vehicles. (JA 313-15.) At the same time, T-Mobile notified the Union of a new stock grant program to begin in November. (JA 313, 316-23.) The Union agreed to the stock grant program but asked for time to discuss the fleet policy changes with unit employees. (JA 325.) The Union also asked that the changes not be implemented “until we have had an opportunity to negotiate these as part of contract negotiations, unless we get back to you and notify you that the Union accepts the[] proposal.” (JA 325.) The Union did not want its “willingness to consider the possibility of accepting these changes [to] be construed as a willingness to engage in separate negotiations over any changes to [the] Fleet Policy.” (JA 325.) T-Mobile responded that the Union was not free to accept the stock grant program without also accepting the fleet policy changes, stating that “[t]o be clear, the changes are being offered as a package” (JA 168, 324.)

In November, T-Mobile asked the Union to agree to changes in mileage reporting for personal use of company vehicles. (JA 169-70, 327-33, 366.) Because the proposed changes benefited the unit employees, the Union agreed to those changes. (JA 327, 334-35.)

In addition, T-Mobile maintained routine contact with the Union’s representative regarding matters affecting unit employees and continued to provide

the Union with information it requested to carry out its collective-bargaining responsibilities. (JA 93; JA 366.) For example, in January 2015, T-Mobile responded to the Union's request for information about changes to the employees' wages based on the interim agreement signed by the parties in August 2014. (JA 171-72, 336-38.) T-Mobile, however, continued to refuse to negotiate a successor agreement.

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Pearce and McFerran, Chairman Miscimarra dissenting in part) issued a Decision and Order against T-Mobile, reported at 365 NLRB No. 23 (2017). The Board adopted the administrative law judge's recommended dismissal of the complaint allegations that T-Mobile violated Section 8(a)(5) and (1) of the Act by issuing and maintaining a revised employee handbook containing "at will" and "attendance" policies, and by failing to notify the Union that it made changes to the paid-time-off policy. But the Board found, contrary to the judge, that T-Mobile violated Section 8(a)(5) and (1) by refusing to bargain with the Union over a successor collective-bargaining agreement. (JA 93 & n.2.)

The Board's Order requires T-Mobile to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by

Section 7 of the Act. Affirmatively, the Order directs T-Mobile to bargain with the Union, unless and until the Union is decertified or T-Mobile lawfully withdraws recognition from the Union, and to post a remedial notice. (JA 95.)

SUMMARY OF ARGUMENT

When an employer receives objective evidence of a union's loss of majority support and employees file a decertification petition, the employer has two options: it can withdraw recognition from the union entirely, or it can continue to bargain with the union while the Board processes the election petition. But no authority, no Board or court decision, allows an employer to continue to recognize and bargain with the union on a selective basis, bargaining only over topics of its own choosing while refusing to honor its duty to negotiate a successor agreement. As the Board explained here, as a policy matter, such a pick-and-choose approach would destabilize the bargaining process, create an unbalanced playing field, and deny unions a fair opportunity to demonstrate their effectiveness while awaiting the election. The Board reasonably concluded that these effects would be wholly inconsistent with the Act's policy of fostering stable bargaining relationships.

Although T-Mobile could have withdrawn recognition, it decided that an election was "the best course of action." (JA 599.) Having made that choice, T-Mobile was obligated to continue bargaining for a successor agreement and fulfill all of its bargaining obligations until the election results were certified. Instead, T-

Mobile took it upon itself to bargain selectively, refusing to negotiate a new agreement while continuing to bargain about various issues on which it wanted the Union's agreement, including changes to its fleet policy and a new stock program. T-Mobile's selective approach to bargaining violated Section 8(a)(5) and (1) of the Act.

T-Mobile attempts to justify its selective refusal to bargain by claiming that it balanced the competing policy interests and chose the less destabilizing path. But policy decisions are for the Board to make. Here, the Board exercised its responsibility to administer the Act and reasonably determined, consistent with established law, that where an employer decides to avail itself of the safe harbor of Board election proceedings, it must continue to honor all of its bargaining obligations in the interim.

STANDARD OF REVIEW

This Court's review of Board decisions "is quite narrow."³ The Court "applies the familiar substantial evidence test to the Board's findings of fact and application of law to the facts."⁴ Under that standard, a reviewing court may not "displace the Board's choice between two fairly conflicting views of the facts, even though the court would justifiably have made a different choice had the

³ *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

⁴ *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998).

matter been before it de novo.”⁵ When reviewing the Board’s order, the Court grants deference to the Board’s findings and the “reasonable inferences that the Board draws from the evidence.”⁶ The Court will uphold the Board’s legal conclusions if they are “reasonable and consistent with controlling precedent.”⁷

When the Board engages in “the ‘difficult and delicate responsibility’ of reconciling conflicting interests of labor and management . . . , the balance struck by the Board is ‘subject to limited judicial review.’”⁸ In particular, it is the role of the Board, not the Court, “to promulgate new rules, or exceptions to existing rules, in order to effectuate one statutory purpose (employee choice) at the expense of another (stability).”⁹ Once the Court concludes that the Board’s decision is “reasonably calculated to reconcile those potentially conflicting objectives, [its] job is at an end.”¹⁰

The Board’s interpretation of the Act is subject to the principles enunciated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense*

⁵ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

⁶ *U.S. Testing*, 160 F.3d at 19.

⁷ *Cintas Corp. v. NLRB*, 482 F.3d 463, 468 (D.C. Cir. 2007).

⁸ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (quoting *NLRB v. Teamsters Local 449*, 353 U.S. 87, 96 (1957)).

⁹ *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 228 (D.C. Cir. 1996).

¹⁰ *Id.*

*Council, Inc.*¹¹ Under *Chevron*, where the plain terms of the Act do not specifically address the precise issue, the courts must defer to the Board's reasonable interpretation of the Act. The Court will "abide [the Board's] interpretation of the Act if it is reasonable and consistent with controlling precedent."¹² Moreover, the Court must "give deference to [an agency's] interpretations of its own precedents."¹³ It is uniquely within the Board's expertise and discretion to determine how a withdrawal of recognition or refusal to bargain can be accomplished.¹⁴ As the Court recently recognized in another case involving an employee petition, "policy arguments are for the Board—not this Court—to resolve."¹⁵

¹¹ 467 U.S. 837, 843 (1984). See *NLRB v. UFCW, Local 23*, 484 U.S. 112, 123-24 (1987).

¹² *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002) (citing *Local 702, Int'l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000)); see also *Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321, 333 (D.C. Cir. 2015) (the Court defers to the requirements imposed by the Board if they are "rational and consistent with the Act").

¹³ *Pacific Coast Supply*, 801 F.3d at 333.

¹⁴ See *Brooks v. NLRB*, 348 U.S. 96, 104 (1954) (noting that matters "appropriately determined" by the Board include when employers can ask for an election or the grounds upon which they can refuse to bargain).

¹⁵ *Pacific Coast Supply*, 801 F.3d at 333 (citing *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 364-66 (1998)).

ARGUMENT

THE BOARD REASONABLY FOUND THAT T-MOBILE'S REFUSAL TO BARGAIN OVER A SUCCESSOR CONTRACT VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

An employer violates Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with a labor organization representing its employees.¹⁶ Here, it is undisputed that T-Mobile refused to bargain with the Union over a successor collective-bargaining agreement while bargaining over interim matters and continuing to abide by the terms of the expired agreement. T-Mobile claims (Br. 14) that this selective approach to bargaining was lawful because it “balanced all the parties’ interests in the hopes of maintaining industrial stability.” But it is the responsibility of the Board, not T-Mobile, to interpret ambiguous statutory terms and strike an appropriate balance between the statutory objective of achieving “industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes,” and the right of employees to choose for themselves whether or not to be represented by a union.¹⁷ Exercising that responsibility here, the Board reasonably found that T-Mobile’s selective refusal to negotiate a successor agreement was “wholly inconsistent with

¹⁶ 29 U.S.C. § 158(a)(5) and (1).

¹⁷ *Auciello Iron Works Inc. v. NLRB*, 517 U.S. 781, 785, 790 (1996) (citing 29 U.S.C. § 141(b) and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987)).

the Act’s policy to foster stable collective bargaining relationships.” (JA 94.)

Given the absence of a legitimate justification for T-Mobile’s admitted refusal to bargain, the Court should enforce the Board’s Order.

A. An Employer with Objective Evidence that an Incumbent Union Lacks Majority Support Has Two Options: Withdraw Recognition, or Await the Outcome of a Secret-Ballot Election while Continuing To Honor Its Bargaining Obligation

Section 7 of the Act gives employees the right to choose an exclusive collective-bargaining representative that bargains with the employer on their behalf.¹⁸ Employers have the corresponding duty to bargain with their employees’ chosen representative. By failing to do so, an employer violates Section 8(a)(5) and, derivatively, Section 8(a)(1) of the Act.¹⁹

In order to give effect to employees’ free choice, the collective-bargaining relationship between an employer and a union “must be given a chance to bear fruit and so must not be subjected to constant challenges.”²⁰ To that end, the Board—seeking to further the statutory goal of fostering industrial peace and

¹⁸ 29 U.S.C. § 157.

¹⁹ 29 U.S.C. § 158(a)(5) and (1). A violation of Section 8(a)(5) of the Act produces a “derivative” violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

²⁰ *Levitz Furniture Co.*, 333 NLRB 717, 720 (2001).

stability in collective-bargaining relationships—has adopted certain judicially-approved presumptions about the existence of union support.²¹

Specifically, a union that has been recognized as the collective-bargaining representative of a unit of employees is entitled to a presumption that it enjoys the support of a majority of those employees.²² This presumption “enable[s] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying about the immediate risk of decertification and by removing any temptation on the part of the employer to avoid good-faith bargaining in an effort to undermine union support.”²³ The presumption of majority status is irrebuttable during the term of a collective-bargaining agreement (up to three years); upon expiration of the agreement, the presumption continues but becomes rebuttable.²⁴

In *Levitz Furniture Company*, the Board held that an employer seeking to rebut the presumption of majority status must show with objective evidence that the union in fact no longer has the support of a majority of the unit.²⁵ In that event,

²¹ See *Fall River*, 482 U.S. at 38-39.

²² *Auciello*, 517 U.S. at 785-87.

²³ *Id.* at 786 (quoting *Fall River*, 482 U.S. at 38 (internal quotation marks omitted)).

²⁴ *Id.* at 785-87.

²⁵ *Levitz*, 333 NLRB at 725.

Levitz permits the employer to unilaterally withdraw recognition from the union.²⁶

Alternatively, employers or employees can—as the employees did here—challenge a union’s majority status by petitioning the Board to hold a secret-ballot election.²⁷

It has long been the Board’s view that “[s]ecret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.”²⁸ If the union fails to garner a majority of votes in the ensuing election, the employer is relieved of its obligation to bargain once the Board certifies the election results.²⁹

Here, instead of either withdrawing recognition or continuing to bargain with the Union while the Board processed the decertification petition, T-Mobile “unilaterally chose which parts of the bargaining relationship it would honor, thereby refusing to fulfill all of its normal bargaining obligations.” (JA 94.) As we now show, the Board reasonably determined that T-Mobile’s “selective approach” to bargaining violated the Act. (JA 94.)

²⁶ *Id.* at 725. See also *Parkwood Dev. Ctr. v. NLRB*, 521 F.3d 404, 408 (D.C. Cir. 2008).

²⁷ See 29 U.S.C. § 159(c)(1)(A)-(B)); 29 C.F.R. § 102.60(a).

²⁸ *NLRB v. Gissel Packing Co.*, 395 U.S. 575,602 (1969); see also *Transp. Maint. Serv., LLC v. NLRB*, 275 F.3d 112, 115 (D.C. Cir. 2002) (“formal elections with secret ballots best express employees’ free choice”).

²⁹ See *W.A. Krueger Co.*, 299 NLRB 914, 915 (1990).

B. The Board Reasonably Determined that T-Mobile Violated the Act by Selectively Bargaining with the Union

As noted above, under *Levitz* an employer with objective evidence of a union's loss of majority support must choose between withdrawing recognition entirely or waiting for the Board to hold an election and certify the results. If that employer decides to proceed with an election, its "bargaining obligation continues, while the [Board's] election proceedings are underway."³⁰ The Board's view in *Levitz* comports with this Court's view in the representation-case context. As this Court has explained, in that situation, an employer can avoid unfair-labor-practice charges either "by agreeing unconditionally to bargain . . . or [by] challeng[ing] the certification of, the Union," but "it may not do both at once."³¹

Withdrawal of recognition, even when an employer has objective evidence of a union's loss of majority support, is a grave decision that an employer makes "at its peril."³² The stakes are high because if the employer is wrong—if, for example, the union in fact maintained majority support, or concurrent unfair labor practices tainted any loss of support—then the employer has committed an unfair labor practice and is liable for any unilateral changes it made after withdrawing

³⁰ *Levitz*, 333 NLRB at 727.

³¹ *Terrace Gardens*, 91 F.3d at 225.

³² *Levitz*, 333 NLRB at 725.

recognition.³³ As an alternative to that high-stakes gamble, the Board gives employers the option of allowing decertification petitions to run their course through an election proceeding. To encourage employers to utilize the election procedure, the Board in *Levitz* relaxed the standard for employers to petition the Board for a decertification election. Under the lower standard, an employer can obtain an election by demonstrating good-faith uncertainty of the union's loss of majority support rather than the previous higher standard of good-faith belief.³⁴ The Board intended the lower standard to "reduc[e] the temptation to act unilaterally" and "provide a more attractive alternative to unilateral action."³⁵

Thus, under established principles, T-Mobile had the choice to withdraw recognition or continue to bargain while the Board processed the employees' decertification petition. As the Court has recognized, those processes are different: an employee decertification petition "pose[s] no obstacle to the employer's continuing to bargain with the union in good faith; it was not the employer that was disputing the union's legitimacy as the bargaining representative."³⁶ Similarly, under *Levitz*, T-Mobile could have filed its own (or relied on the employees')

³³ *W.A. Krueger*, 299 NLRB at 915.

³⁴ *Levitz*, 333 NLRB at 727.

³⁵ *Id.* at 726, 727.

³⁶ *Terrace Gardens*, 91 F.3d at 226.

decertification petition and continued to bargain while the Board processed the petition.³⁷

But T-Mobile chose neither option. Instead, it decided forge its own path and refused to bargain for a successor contract while continuing to bargain selectively over issues of its own choosing as they arose. T-Mobile's action made this case more like those in which a decertification petition has been filed without evidence of loss of majority support. In that situation, the incumbent union continues to enjoy a presumption of majority status until the election proves otherwise. For its part, the employer must maintain its neutrality by continuing to bargain with the union and cannot withdraw from bargaining or refuse to execute a contract.³⁸

By taking it upon itself to choose which aspects of its bargaining obligation it would honor, T-Mobile did not maintain neutrality during the pending election procedure, as required by Board and court law.³⁹ Instead, as the Board explained, as a matter of policy, T-Mobile's "selective approach" to bargaining would

³⁷ *Levitz*, 333 NLRB at 727.

³⁸ *Dresser Indus., Inc.*, 264 NLRB 1088, 1089 (1982). *Accord St. Agnes Med. Ctr. v. NLRB*, 871 F.2d 137, 146 (D.C. Cir. 1989). *Cf. RCA Del Caribe, Inc.*, 262 NLRB 963 (1982) (applying same principle to situations involving a representation petition filed by a rival union).

³⁹ *St. Agnes*, 871 F.2d at 146. *Accord RCA Del Caribe*, 262 NLRB at 965; *Dresser Indus.*, 264 NLRB at 1089.

destabilize bargaining relationships in two ways. (JA 94.) First, “an employer that unilaterally removes certain bargaining subjects from negotiation can gain an advantage by excluding those subjects on which it may be more likely to give concessions to the union, reducing the likelihood that the parties will find common ground.” (JA 94, citing *Endo Labs, Inc.*, 239 NLRB 1074, 1075 (1978).) By unilaterally choosing to honor only its preferred aspects of the collective-bargaining relationship, T-Mobile could gain an advantage by restricting bargaining to those subjects on which it held an advantage, “thus reducing the possibility of compromise and the ability of the relationship to function effectively.” (JA 94.) Second, “allowing an employer to unilaterally dictate which subjects the parties can bargain undermines the union, making it appear ineffective and weak to the employees,” and depriving it of “a fair opportunity to demonstrate its continued effectiveness, a matter of particular concern” when a decertification petition has been filed. (JA 94.)

With these considerations in mind, the Board reasonably determined that “so long as [T-Mobile] continued to recognize the Union, it was obligated to fulfill all aspects of its bargaining obligations.” (JA 94.) Moreover, the Board’s decision “is consistent with [its] longstanding policy disfavoring the practice of ‘piecemeal bargaining’ during contract negotiations,” because “allowing employers to cherry-pick the subjects of bargaining gives them an unfair advantage in negotiations and

destabilizes the bargaining process.” (JA 95 n.4.) As the Supreme Court has recognized, “it is difficult to bargain, if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of negotiations.”⁴⁰

Here, T-Mobile did “cherry-pick” the issues over which it would bargain, as the Board warned. (JA 95 n.4.) Such piecemeal bargaining seriously undermines the normal “give and take [] between parties carried on in good faith with the intention of reaching agreement through compromise.”⁴¹ The duty to bargain “[c]learly. . . requires more than going through the motions of proffering a specific bargaining proposal as to one item while others are undecided. . . .”⁴² In the instant case, T-Mobile could gain a tactical advantage by presenting the Union with select bargaining topics it wanted to change while refusing to bargain for a new agreement. Specifically, T-Mobile presented the Union with changes to the fleet vehicle policy and a new stock grant program. While the Union initially assumed it could bargain separately about these items, T-Mobile quickly disabused it of that notion. If the Union wanted the stock grants for unit members—which were being offered to every other employee below the director level—it would have to accept the changes to the fleet policy. (JA 93; JA 165-68, 324-25.) Unsurprisingly, the

⁴⁰ *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

⁴¹ *Winn-Dixie Stores, Inc.*, 243 NLRB 972, 974 (1979).

⁴² *Id.* at 974-75 (quoting Archibald Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1433 (1958)).

Union ultimately agreed to the combined deal. (JA 325, 366.) Similarly, T-Mobile presented the Union with proposed changes to mileage reporting for personal use of company vehicles. (JA 169-70, 327-35, 366.) Again, the Union agreed to the proposed changes. (JA 170, 334-35.) Thus, contrary to T-Mobile's claim (Br. 25, 28), the Board provided concrete examples of T-Mobile's piecemeal approach to bargaining in this case.

Simply put, given T-Mobile's decision to continue recognizing the Union instead of withdrawing recognition, it was not free to participate in some, but not all, of its bargaining obligations. The Board's rules regarding withdrawal of recognition are designed to "remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees."⁴³ The Union, therefore, "has the right to insist on negotiating an entire contract rather than engaging in piecemeal negotiation over particular issues [because] the statutory purpose of requiring good-faith bargaining would be frustrated if parties were permitted, or indeed required, to engage in piecemeal bargaining."⁴⁴

⁴³ *Fall River*, 482 U.S. at 38.

⁴⁴ *E.I. Du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310, 1317 (D.C. Cir. 2007) (quoting *E.I. Dupont de Nemours & Co. (Spruance)*, 304 NLRB 792, 792 n.1 (1991)).

The Board's determination is also consistent with, and indeed flows from, the Act's structure and the policies it was designed to promote. When Congress passed the Act, it recognized the importance of "restoring equality of bargaining power between employers and employees" to promote the free and unobstructed flow of commerce.⁴⁵ The Act effectuates that purpose by giving rights and benefits to employers and employees alike, and balancing them with corresponding responsibilities and obligations. The resulting mutuality of obligations is embedded in the Act's very structure, notably in the twin provisions of Sections 8(a)(5) and 8(b)(3), which separately prohibit employers and unions from refusing to bargain in good faith.⁴⁶ Thus, the duty to bargain—and the associated duties to maintain the status quo after contract expiration and to provide relevant information on request—further the federal policy of achieving balance within the collective-bargaining relationship.

Moreover, there can be no mutuality of obligation once the employer claims the right to selectively ignore its bargaining duties. The destabilizing effect of that approach, undertaken before a decertification election where T-Mobile was

⁴⁵ 29 U.S.C. § 151; *see also* *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 835 (1984) ("[T]he Act's statement of purpose [reflects] a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements.").

⁴⁶ 29 U.S.C. §§ 158(a)(5), (b)(3).

required to maintain neutrality, is readily apparent. T-Mobile insulated itself from any potential unilateral-change allegations by first presenting the Union with the changes it wanted to impose on employees.⁴⁷ At the same time, T-Mobile held the Union at arms-length and demonstrated to employees that the Union had no power to bargain a new contract. By acting as it did, T-Mobile was able to extract all the benefits of the collective-bargaining relationship it wished, while shirking its duty to fulfill all of its bargaining obligations.

C. T-Mobile's Argument that It, Rather than the Board, Correctly Balanced Competing Policy Interests Is Unjustified and Contrary to the Act

T-Mobile defends its decision to suspend bargaining over the successor agreement by variously claiming that it, rather than the Board, balanced the competing policy interests and that it chose the bargaining obligations it wished to honor because it believed that path was less destabilizing than a complete withdrawal of recognition. The Court should reject T-Mobile's attempt to substitute its judgment for the Board's.

⁴⁷ See *Litton*, 501 U.S. at 198 (explaining that, once a collective-bargaining agreement expires, employers must maintain the status quo and may not make unilateral changes until the parties negotiate a new agreement or bargain in good faith to impasse). Accord *NLRB v. Cauthorne Trucking*, 691 F.2d 1023, 1025 (D.C. Cir. 1982).

1. The Act is administered by the Board, not individual employers

T-Mobile first takes the Board to task for not balancing the competing policy interests, and instead leaving this responsibility to T-Mobile. T-Mobile claims that it came to the rescue of not only its employees but “all the parties,” undertaking the difficult task of balancing the competing interests “in the hopes of maintaining industrial stability while allowing employees to exercise their free choice in a government-supervised election.” (Br. 14.)

Despite T-Mobile’s professed attempt at Solomonic decision-making, such policy determinations are for the Board, not employers, to make. Whether a union should be decertified or an employer violated the Act are, as the Supreme Court has stated, “matters for the Board; they do not justify employer self-help or judicial intervention To allow employers to rely on employees’ rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it.”⁴⁸ Thus, the Board is “entitled to suspicion when faced with an employer’s benevolence as its workers’ champion against their certified union. . . . There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees’ organizational freedom.”⁴⁹

⁴⁸ *Brooks v. NLRB*, 348 U.S. 96, 103 (1954).

⁴⁹ *Auciello Iron Works Inc. v. NLRB*, 517 U.S. 781, 790 (1996).

Those sentiments apply equally well here, where the employees took action by filing a decertification petition. T-Mobile’s refusal to bargain over a successor contract while the Board processed the petition “undermines the [U]nion, making it appear ineffective and weak to the employees.” (JA 94.) By agreeing to bargain only over selected issues of its own choosing, T-Mobile “den[ied] the [U]nion a fair opportunity to demonstrate its continued effectiveness, a matter of particular concern” where employees have filed a decertification petition. (JA 94.) Because T-Mobile’s refusal to bargain was “wholly inconsistent with the Act’s policy to foster stable collective bargaining relationships,” the Board reasonably determined that the refusal violated the Act. (JA 94.)

T-Mobile’s claim (Br. 23) that Board “did not balance the competing interests at all” ignores those explicit findings in the Board’s decision. Moreover, T-Mobile ignores the balancing of competing interests outlined in the Board’s *Levitz* decision, which provides two options for employers that receive objective evidence of a union’s loss of majority support. As noted above (p. 18), under *Levitz*, employers can withdraw recognition—an option T-Mobile declined to take.⁵⁰ Alternatively, employers can file an election petition, or rely on a decertification petition filed by employees, and continue to bargain pending the

⁵⁰ *Levitz*, at 725-26 & n.52.

outcome of any election.⁵¹ Thus, *Levitz* expressly contemplates that some employers will continue to bargain even after receiving objective evidence that the union has lost majority support. In addition, *Levitz* even provides a “safe harbor” for employers who bargain and reach a contract with the union, should the union lose the impending election.⁵²

T-Mobile is simply incorrect when it argues (Br. 16, 19-21), that the Board has—in *Lexus of Concord*,⁵³ *Abbey Medical*,⁵⁴ and *Show Industries*,⁵⁵—balanced the competing policy interests in favor of selective bargaining. None of the three cited cases is remotely similar to T-Mobile’s action here, and none would mandate a different result.

In *Lexus*, the issue was whether the employer’s decision to put bargaining “on hold” for three weeks tainted its subsequent withdrawal of recognition. On the unique facts of that case, the Board expressly found that the short bargaining hiatus

⁵¹ *Id.* at 726 & n.52. See also *Shaws Supermarkets, Inc.*, 350 NLRB 585, 588 (2007) (noting that employer with evidence of loss of support “could have awaited the outcome of the decertification election”).

⁵² *Levitz*, at 726 & n.52; *City Markets, Inc.*, 273 NLRB 469,469-70 (1984). *Accord Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321, 334 (D.C. Cir. 2015).

⁵³ *Lexus of Concord, Inc.*, 343 NLRB 851 (2004).

⁵⁴ *Abbey Med./Abbey Rents, Inc.*, 264 NLRB 969 (1982), *enforced mem.*, 709 F.2d 1514 (9th Cir. 1983).

⁵⁵ *Show Indus., Inc.*, 326 NLRB 910 (1998).

was reasonable in light of the complexity of the situation. Specifically, the union had filed an unfair-labor-practice charge just two days after the employer suspended bargaining based on a letter signed by nearly all of the unit employees saying they no longer wished to be represented; the day after the union filed its charge, the Board issued its decision in *Levitz*; two and a half weeks later, the employees filed a decertification petition with the Board; and two days after that, the employer resumed bargaining.⁵⁶ Given this complex set of circumstances, the Board concluded that the employer's decision to briefly delay bargaining "was not a repudiation of its bargaining responsibilities."⁵⁷ At no point in its decision did the Board endorse an open-ended refusal to bargain over a successor agreement.

The situation here is vastly different. T-Mobile did not briefly delay bargaining in order to consider its options after receiving an employee petition at a time the Board issued a new controlling case. Rather, it acted at a time the law was settled and waited over six months before deciding to continue some aspects of its bargaining relationship with the Union—but not contract negotiation. As discussed above (pp. 21-26), an employer cannot unilaterally pick and choose the subjects on which it deigns to bargain, or the aspects of its bargaining relationship it wishes to honor. It must fulfill all of its bargaining obligations.

⁵⁶ *Lexus*, 343 NLRB at 853-54.

⁵⁷ *Id.* at 854.

Nor does *Abbey Medical* help T-Mobile's cause. *Abbey Medical* stands for the uncontroversial proposition that, during the term of a three-year or less collective-bargaining agreement, an employer with objective evidence of the union's loss of majority support can withdraw recognition only during the 30-day "open period" in which a timely election petition could be filed.⁵⁸ Should the employer choose to announce its withdrawal prior to the contract's end, it must continue to abide by the contract until expiration, but it is not obligated to begin bargaining for a successor contract—precisely because it has announced a withdrawal of recognition.⁵⁹ In *Parkwood Developmental Center, Inc. v. NLRB*, the Court distinguished between the anticipatory withdrawal in *Abbey Medical* and ordinary withdrawal, explaining that anticipatory withdrawal occurs prior to expiration "and does not obviate the employer's obligations under the existing agreement."⁶⁰ Garden-variety withdrawal, on the other hand, "occurs after expiration of a [contract], at which time the employer is free of contractual obligations."⁶¹ These well-established principles are simply inapplicable in this case because T-Mobile did not withdraw recognition—anticipatorily or otherwise.

⁵⁸ *Abbey Med.*, 264 NLRB at 969.

⁵⁹ *Id.*

⁶⁰ 521 F.3d 404, 409 (D.C. Cir. 2008).

⁶¹ *Id.*

Show Industries is similarly inapposite. There, after the union won an election, the employer refused to bargain in order to test the certification. While the refusal-to-bargain case was pending before the Board, the employer closed the facility at issue and bargained over the effects of the closure. The Board found this was not impermissible piecemeal bargaining because “given the closure, it may well be that such matters are moot or at least less critical.”⁶² In addition, as Member Brame explained, plant closure situations are simply different: closure “places unique time constraints on bargaining, and reduces the subjects of bargaining to the effects of the closing.”⁶³ In that situation, by bargaining with the union over effects, the employer “satisf[ied] its duty to bargain.”⁶⁴

None of the three cases cited by T-Mobile involves a situation where, like here, an employer with objective evidence of the union’s loss of support chose to proceed to a Board election rather than withdraw recognition, then selectively bargained over specific issues it presented to the union. T-Mobile has cited no case in which the Board has allowed an employer in T-Mobile’s position to bargain over some, but not all, issues.

⁶² *Show Indus.*, 326 NLRB at 913.

⁶³ *Id.* at 913 n.4.

⁶⁴ *Id.* See also *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 676-77 & n.15, 686 (1981) (holding that the decision to close a business is a core entrepreneurial decision about which employers do not have to bargain, though they retain the distinct “duty to bargain about the results or effects of [that] decision”).

While T-Mobile may not like the balance struck by the Board in this case, the balancing of competing statutory goals is for the Board. It is not the prerogative of individual employers. As Congress designed, courts must “respect the judgment of the agency empowered to apply the law ‘to varying fact patterns,’ even if the issue ‘with nearly equal reason [might] be resolved one way rather than another.’”⁶⁵ And a court “may not substitute its own construction” of the Act for the reasonable interpretation of the agency charged with its administration.⁶⁶ Accordingly, the Board’s determination that T-Mobile violated the Act by refusing to bargain over a successor contract should be upheld.

2. The Court should reject T-Mobile’s remaining claims

T-Mobile’s overwrought claim (Br. 24) that withdrawal of recognition would arguably be more destabilizing to the bargaining relationship than its personal choice to bargain selectively misses the mark. The Board intended to make withdrawal of recognition a high-stakes decision, explaining in *Levitz* that an employer withdraws recognition “at its peril.”⁶⁷ See pp. 19-20, above. T-Mobile weighed the risks and, instead of withdrawing recognition, chose to proceed

⁶⁵ *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996) (quoting *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 302, 304 (1977)).

⁶⁶ *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842-45 & n.11 (1984).

⁶⁷ *Levitz*, 333 NLRB at 725.

through the Board's election machinery. Having made that choice, T-Mobile was obligated to bargain while awaiting the election outcome. Although T-Mobile complains (Br. 13, 23) about the delays inherent in that process because of the Union's ability to file blocking charges that can postpone the decertification election, the blocking charge procedure—and its attendant delays—have long been a part of the Board's processes.⁶⁸ The blocking charge rule is regarded by the Board and the courts as necessary to further the important statutory goal of employee choice free from the tainting effects of concurrent unfair labor practices.⁶⁹

T-Mobile's attempts to frame its refusal to bargain over a successor contract as the only reasonable response to the Union's behavior is a gloss on the facts with no basis in the record. Thus, T-Mobile repeatedly suggests (Br. 23, 27 & n.6, 28) that the Union was “uninterested in negotiating a successor agreement,” and attacks (Br. 10, 21, 23, 29) the Union's unfair-labor-practice charges as “frivolous.” Both claims misrepresent the record.

⁶⁸ See *id.* at 732 (Member Hurtgen, concurring); *Shaws Supermarkets*, 350 NLRB at 588 (discussing “the ready availability of blocking charges” and the “delays that can attend the processing of a [decertification] petition”).

⁶⁹ See *Dayton Typographical Union No. 57 v. NLRB*, 326 F.2d 634, 648 (D.C. Cir. 1963); *Albertson's, Inc. v. NLRB*, 161 F.3d 1231, 1239 n.8 (10th Cir. 1998) (citing *Bishop v. NLRB*, 502 F.2d 1024, 1028 (5th Cir. 1974)); *Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1290 (6th Cir. 1989); *Mark Burnett Prods.*, 349 NLRB 706, 707 (2007); *U.S. Coal & Coke*, 3 NLRB 398, 399 (1937).

To begin, T-Mobile's complaint (Br. 27-28) that the Union failed to make bargaining proposals and cancelled bargaining dates conveniently fails to mention that although the Union was unavailable to meet in June, the parties then met and bargained in August. Indeed, this bargaining bore fruit: the parties signed an interim agreement on compensation. In addition, the Union rejected suspension of negotiations and requested additional bargaining dates. (JA 601-02.) Neither the Board nor the administrative law judge found that T-Mobile was justified in its refusal to bargain because the Union was insufficiently interested in bargaining.

Next, T-Mobile's suggestion (Br. 21) that its only choices were to withdraw recognition and refuse to bargain or "drop[] its defense" to "frivolous" charges is disingenuous. T-Mobile bargained for months after the charges were filed, and it never claimed before the Board that the blocking charges were improper or "frivolous." (JA 58-90.) Although the Board ultimately adopted the judge's dismissal of the complaint allegations involving those charges, they were substantial enough to warrant issuance of a complaint.⁷⁰ To the extent that T-Mobile is attacking the Board's blocking-charge policy, it never raised that issue to

⁷⁰ See *Mark Burnett*, 349 NLRB at 706 (Regional Director did not abuse discretion by holding decertification petition in abeyance even where there was no allegation that the petition was tainted by the unfair labor practices).

the Board, as then-Member Miscimarra noted in his partial dissent. (JA 96 n.2.)

The Court, therefore, lacks jurisdiction to consider such a challenge.⁷¹

In sum, T-Mobile could have withdrawn recognition from the Union. It did not. Instead, it decided to wait for the Board to conduct a decertification election and certify the results. Having made that choice, T-Mobile cannot now be heard to complain that the Board required it to proceed according to the Board's well-established rules, which required it to honor all of its bargaining obligations pending the election—including bargaining for a successor contract.

⁷¹ See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216 (D.C. Cir. 2002).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny T-Mobile's petition for review and enforce the Board's Order in full.

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STATUTORY AND REGULATORY ADDENDUM

**STATUTORY AND REGULATORY ADDENDUM
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THE NATIONAL LABOR RELATIONS ACT

Section 1 of the Act (29 U.S.C. § 151):

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

Section 8(b) of the Act (29 U.S.C. § 158(b)) provides in relevant part:

(b) It shall be an unfair labor practice for a labor organization or its agents--

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

Section 9 of the Act (29 U.S.C. § 159) provides in relevant part:

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section];

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be

served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner

to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

THE BOARD'S RULES AND REGULATIONS

29 C.F.R. § 102.60. Petitions

(a) Petition for certification or decertification. A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of Section 9(c) of the Act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of Section 9(c) of the Act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalty of perjury, that its contents are true and correct (see 28 U.S.C. 1746). One original of the petition shall be filed, and a copy served on all parties named in the petition. A person filing a petition by facsimile pursuant to § 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. A person filing a petition electronically pursuant to § 102.114(i) need not file an original. Except as provided in § 102.72, such petitions shall be filed with the regional director for the Region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more Regions, with the regional director for any of such Regions. A certificate of service on all parties named in the petition shall also be filed with the regional director when the petition is filed. Along with the petition, the petitioner shall serve the Agency's description of procedures in representation cases and the Agency's Statement of Position form on all parties named in the petition. Prior to the transfer of the record to the Board, the petition may be withdrawn only with the consent of the regional director with whom such petition was filed. After the transfer of the record to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the regional director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

THE BOARD'S CASEHANDLING MANUAL, PART ONE UNFAIR LABOR PRACTICE PROCEEDINGS

11730 Blocking Charge Policy—Generally

The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted. However, there are significant exceptions to the general policy of having a charge “block” a petition. Accordingly, the filing of a charge does not automatically cause a petition to be held in abeyance.

The exceptions to the blocking charge policy are set forth in detail in Sec. 11731. Where the Regional Director is giving consideration to these exceptions while implementing the blocking charge policy, it should be recognized that the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition. Rather, the blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process.

LABOR MANAGEMENT RELATIONS ACT

29 U.S.C. § 141(b). Declaration of policy

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

T-MOBILE USA, INC.,)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	Nos. 17-1065 and 17-1111
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	Board Case Nos.
)	01-CA-123183
and)	01-CA-129976
)	01-CA-140752
COMMUNICATIONS WORKERS OF)	
AMERICA, AFL-CIO)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 7,948 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
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Dated at Washington, DC
this 13th day of July, 2017

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)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 13th day of July, 2017