

**ORAL ARGUMENT NOT YET SCHEDULED**

**Nos. 20-1112, 20-1186**

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

**COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO.**

**Petitioner**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent**

**and**

**T-MOBILE USA, INC.**

**Intervenor**

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**ON PETITIONS FOR REVIEW OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD**

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**BRIEF OF T-MOBILE USA, INC.**

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v.

NATIONAL LABOR RELATIONS BOARD

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Intervenor

Nos. 20-20-1112  
and 20-1186

Board Case Nos.  
14-CA-155249  
14-CA-158446  
14-CA-166164  
14-CA-162644

**CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

**And**

**CIRCUIT RULE 26.1 DISCLOSURE INFORMATION**

As required by Circuit Rule 28(a)(1) of this Court, counsel for Intervenor T-Mobile USA, Inc. certify the following:

**A. Parties, Intervenors and Amici:** Communications Workers of America

(“Union”) is petitioner/appellant before this Court and was Charging Party

before the Board. The National Labor Relations Board (“the Board” is

respondent/appellee before the Court; its General Counsel was a party before

the Board. T-Mobile USA, Inc. (“T-Mobile”) is an intervenor before the

Court on behalf of the Board, and was the Respondent/Charged Party before the Board. There are no amici.

**B. Rulings Under Review:** This case is before the Court on the Union's petitions for review of a Decision and Order issued by the Board on April 2, 2020, reported at 369 NLRB No. 50 and a Supplemental Decision and Order issued by the Board on May 27, 2020, reported at 369 NLRB No. 90.

**C. Related Cases:** This case has not been before this Court or any other court previously, and no related case is pending in this or any other Court.

**D. Circuit Rule 26.1 Disclosure Information:** T-Mobile is a wholly-owned subsidiary of T-Mobile US, Inc. a Delaware corporation ("TMUS"). Deutsche Telekom Holding B.V., a limited liability company organized and existing under the laws of the Netherlands ("DT B.V.") owns more than 10% of the shares of TMUS. DT B.V. is a wholly-owned subsidiary of T-Mobile Global Holding GmbH ("Holding"), a German entity which, in turn, is a wholly owned subsidiary of T-Mobile Global Zwischenholding GmbH ("Global"), a German entity. Global is a wholly-owned subsidiary of Deutsche Telekom AG, a German entity.

Deutsche Telekom AG's American Depository Shares ("ADSs"), each representing one ordinary share, trade on the Over-the-Counter market in the United States.

September 2, 2020

Respectfully Submitted,

/s/ Mark Theodore

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## GLOSSARY OF TERMS

Act	National Labor Relations Act (29 U.S.C §§ 151 <i>et seq.</i> )
Board	National Labor Relations Board
Br.	Opening brief of CWA to this Court
CSR	Customer Service Representative
CWA	Communications Workers of America, AFL-CIO
Decision	The Board's Decision and Order (369 NLRB No. 50)
GC	General Counsel of the National Labor Relations Board
GC-X	General Counsel exhibits in Board hearing
R-X	Employer (T-Mobile) exhibits in Board hearing
Supp. Dec.	The Board's Supplemental Decision and Order (369 NLRB No. 90)
T-Mobile	T-Mobile USA, Inc.
Tr.	Transcript of Board hearing

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**I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

**RELEVANT STATUTORY AND REGULATORY PROVISIONS**

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

**STATEMENT OF THE CASE**

Intervenor incorporates, by reference, the statements of subject matter and appellate jurisdiction, relevant statutory and regulatory provisions, issues presented for review, the case, and the facts, and argument as contained in the brief of the National Labor Relations Board.

**STANDING**

T-Mobile has standing as the successful Charged Party in the underlying Board proceeding. *Automobile Workers v. Scofield*, 382 U.S. 205, 208 (1965).

**II. SUMMARY OF ARGUMENT**

The Board correctly dismissed the allegation that T-Mobile unlawfully admonished employee Chelsea Befort not to send mass emails because the record does not support that other employee emails “of a similar character” were permitted. Decades of Board and court case law balance employees’ right to engage in protected activity on an employer’s property against the employer’s right to maintain order and discipline in the workplace. Although the Board has

changed positions on whether an employee has a statutory right to use an employer's email system for union organizing, it has adhered to the same definition on discrimination: that in order to establish disparate treatment, there must be similar activity that is permitted. The CWA does not address or challenge this established law, and is unable to meet this test. The CWA wrongly maintains that Befort's email was "singled out" based on its "content," but there is no evidence in support of this claim. The CWA focuses on content rather than disparate treatment, because it cannot show disparate treatment. The cases cited by the CWA mischaracterize the holdings or completely ignore the case's discussion of discrimination. This focus on content to the exclusion of all else deflects from the real standard: whether T-Mobile disparately treated the union-related emails; as the Board found, the record shows T-Mobile did no such thing, a finding that is supported by substantial evidence.

The CWA's attempts to shoehorn this case into *Guard Publishing*, are misplaced. The factual circumstances and holding in that decision are simply not comparable to what occurred here. The CWA glosses over the fact Befort did not have access or authority to do what she did, sending emails in clear violation of T-Mobile's lawful policies.

With respect to the allegations that T-Mobile promulgated new rules in response to union activity, the Board properly dismissed them stating, the “lawfulness of {T-Mobile’s] conduct is dependent on whether Befort had a Section 7 right under *Caesars Entertainment* to use her work email to send her message to her coworkers about joining the Union.” Supp. Dec., Sip op. p. 1. Under the holding in *Caesars Entertainment*, Befort did not have a statutory right to use T-Mobile’s email system and therefore a violation on these allegations could be proved only if Befort and other employees and no other avenues of communication. The record shows Befort and others admitting they routinely communicated with fellow employees about the Union openly and without any issue and email communication was unnecessary. The CWA does not dispute these facts nor does it cite *Caesars Entertainment*, choosing instead to rely exclusively on its incorrect “content based” argument.

The Court should dismiss these Petitions for Review.

### III. ARGUMENT

#### A. THE BOARD CORRECTLY CONCLUDED T-MOBILE DID NOT VIOLATE THE ACT BY ADMONISHING BEFORT.

##### 1. Despite the Board's Changing Standards Regarding Employee Use of Employer Email, Disparate Treatment Can Only Be Established By Comparing The Section 7 Activity To "Similar" Activity

The Board and courts have long balanced the rights of employees under the Act against the property rights of employers to maintain order and discipline in the business environment. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (ability of employer to make and enforce non-solicitation rules so long as purpose is not discriminatory) and *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956) (ability of employer to restrict access of non-employee organizers to property if other avenues of communication with employees are available).

Application of this balancing test has resulted in widely varying results as the means of communication have changed. In the modern technological era, in the last 13 years alone, the Board has issued decisions on the limitations of use of an employer email system by employees to engage in Section 7 activities that come to polar opposite conclusions. *Register Guard*, 351 NLRB 1110 (2007), *enfd. in part and remanded sub nom, Guard Publ' v. NLRB*, 571 NLRB F.3d 53 (D.C. Cir.

2009) held employees have no statutory right to use an employer's email system. The Board in *Purple Communications, Inc.*, 361 NLRB 1050 (2014) reversed *Register Guard* holding that employees do have a statutory right to use employer email systems. *Purple Communications* was controlling at the time the ALJ issued her decision in this case. The Board again reversed course, and reversed *Purple Communications*, in *Caesars Entertainment d/b/a Rio All Suites Hotel & Casino*, 368 NLRB No. 143 (2019). The holding in *Caesars Entertainment* was made retroactive which included the events of this case. *Id.*, Slip op. at 9.

While the balancing test has changed, the standard at issue here, whether a policy was applied in a discriminatory fashion, has not. *Register Guard*, *Purple Communications* and *Caesars Entertainment* all reiterate the basic principle of Board law that “unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status.” *Register Guard*, 351 NLRB at 1118; *Purple Communications*, 361 NLRB at 1054, n. 13 (“We do not reach *Register Guard*'s definition of discrimination, because no party has asked us to reconsider it here, and doing so is not necessary to our decision.”); *Caesars Entertainment*, 368 NLRB, Slip op. at 8, n. 68 (acknowledging that *Register Guard*'s definition of discrimination was not at issue in the case).

The CWA does not challenge or address the definition of discrimination in Board case law. Instead, the CWA incorrectly asserts (Br. 22) that Befort's emails were singled out because the topic involved a union. The CWA asserts T-Mobile's actions in addressing Befort's email were "content based" but still cites to law concerning the "discriminatory" application of otherwise lawful policies. The Board reached its conclusion because the comparator emails cited to by the GC and CWA did not establish T-Mobile allowed emails similar to Befort's to be sent unchallenged.

The cases relied upon by the CWA in support of its content based assertion do not apply. For example, the CWA's reliance on *St. Margaret Mercy Healthcare Centers v. NLRB*, 519 F.3d 373 (7th Cir. 2008) is misplaced. In *St. Margaret Mercy Healthcare Centers*, the employer maintained a rule prohibiting all solicitation in patient areas. The employer disciplined a nurse who solicited for the union at a nurse's station. The record showed the employer allowed other solicitations by employees including the sale of girl scout cookies and a balm created by a nurse to lessen bikini irritation. Management was aware of these solicitations and even participated in some. *Id.* at 375. The Seventh Circuit had little issue upholding the Board's finding that the prohibition of the union message constituted illegal discrimination, pointing out the rule in question forbade "any" solicitation yet only union related solicitation was prohibited. *Id.*

This case is not analogous. T-Mobile does not maintain a blanket rule prohibiting all non-business use of its email system so the proper inquiry is exactly what the Board did in this case: evaluate whether there was discrimination on the basis of similar actions; there was no such discrimination. T-Mobile admonished Befort to not send mass unsolicited emails. Indeed, the record shows that Befort did not have access to use the facility-wide distribution list to send her emails, something only mentioned in glancing fashion by the CWA. (Br. 10, n.2.) Instead she sent several emails to dozens of people at a time to circumvent the limitation on sending mass emails. (Tr. 45-87; R-X 1-18.) While the CWA makes much of the fact the Acceptable Use Policy (GC-X 11) and the Enterprise User Standard (GC-X 18) had not been enforced to prevent employees from sending mass emails (Br. 9), this begs the most important question: has any other employee ever been permitted to send a mass email on behalf of, or in support of, any outside organization? The answer to this question, as the Board correctly found, is no. There is no evidence in the record in this case showing a T-Mobile employee was allowed to send a mass unsolicited email to all 600 employees for any purpose. The collection of emails in the record mostly came from management and concerned business-related initiatives.

It is undisputed that the Company chose to not authorize Befort to send facility-wide emails. Testimony from both the GC's and T-Mobile's witnesses confirms

that access to facility-wide distribution lists is granted on a limited basis and only to employee who hold the title of “Senior Representative” or above. (Tr. at 259:19-260:7; 320:11-19; 379:17-380:14.) Befort found a way to “go around the policy” in her repeated attempts to send the emails (Tr. 380:9-10.); the fact that Befort successfully defeated the restrictions does not equate to authorization. Befort accomplished the mass emailing only after defeating the controls put in place.

The CWA similarly avoids altogether the crucial discussion of the definition of discrimination in its citation to *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 321 (7th Cir. 1995). The CWA cites *Guardian Industries Corps.* for the proposition that an employer’s failure to police a bulletin board for anything “except for the removal of the union’s meeting notices” is “anti-union discrimination by anyone’s definition.” *Id.* at 321 (quoting *Union Carbide Corp.*, 259 NLRB 974, 976 (1981)). This citation is to a discrete portion of the case where the Seventh Circuit was pointing out an example of employer conduct that would constitute unlawful discrimination. *Guardian Industries’* actual holding rejected a notion that “discrimination” can occur for purposes of establishing a violation of Section 8(a)(1) without the Charging Party and GC establishing a comparable situation was permitted to occur. The court in *Guardian Industries* stated, “Discrimination is a form of inequality, which poses the question: ‘equal with respect to what?’ A person making a claim of discrimination must identify another

case that has been treated differently and explain why that case is ‘the same’ in respects the law deems relevant or permissible as grounds of action.” 49 F.3d at 319. While the CWA points to the fact some emails were sent, it has never pointed to the “same” situation that was allowed to occur at T-Mobile because none exists.

The Seventh Circuit noted that in finding a violation of the law, the Board held that “whenever the employer permits the slightest access to a bulletin board, it must permit the posting of union notices; anything else is forbidden ‘discrimination’ against the employees’ right to organize” *Id.* at 318. This of course is the same exact theory the CWA advances here but which was rejected by the Seventh Circuit as contrary to any legal definition. In *Guardian Industries*, the employer the employer forbade an employee from posting notices of union meetings on a bulletin board. The evidence showed the employer did allow employees some personal use of the bulletin board, to post “shop and swap” notices and, on a couple of occasions, wedding announcements. *Id.* at 319. The Court rejected this definition of discrimination advanced by the CWA here as contrary to the law:

Courts evaluating claims of discrimination search for disparate treatment and sometimes for disparate impact. A rule distinguishing pro-union organization from anti-union organization would be disparate treatment. A rule banning all organizational notices (those of the Red Cross along with meetings pro and con unions) is impossible to understand as disparate treatment of unions.

*Id.* at 320. The holding of *Guardian Industries* supports the Board’s application of a definition of unlawful discrimination definition “consist[ing] of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status.” Decision, Slip op, 3 (quoting *Register Guard*, 351 NLRB 1110, 1118 (2007)).

## **2. *Guard Publishing Co. Does Nothing To Undermine the Board’s Decision***

The CWA’s reliance on *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009) as “especially pertinent” (Br. 23-25) again obscures the definition of discrimination used by the Board and courts in favor of focusing on items from the decision that are not relevant here. The employer policy asserted as the basis to prevent certain employee emails in *Guard Publishing*, similar to the employer policy used in *St. Margaret Mercy Healthcare Centers, supra*, prohibited all solicitation. In *Guard Publishing* the policy prohibited solicitation and proselytizing on behalf of “commercial ventures, religious or political causes, outside organizations or other non-job related solicitations.” 571 F.3d at 59. This policy was used to discipline employee union official Prozanski on three separate occasions for emails sent to the bargaining unit employees on the employer’s email system. As to the first email sent by Prozanski, this Court determined that policy did not apply because Prozanski’s email did not constitute a solicitation or

proselytization as those terms are commonly defined. *Id.* at 58-59. The Court noted the problem with the employer's argument that the policy applied was that "the company did not even contend that the e-mail constituted solicitation or proselytization." *Id.* at 59. With respect to the second set of emails, the Court determined that although the emails were solicitations, the employer's rationale constituted a *post hoc* invention because the company had "never invoked it before the General Counsel filed his complaint." *Id.* at 60. The CWA seizes on this language as if the situation here is analogous (Br. 28); it is neither. As the Court in *Guard Publishing* went on to explain, the real issue was the employer's policy prohibited all non-job related solicitations and the employer clearly had permitted personal solicitations to occur. *Id.* This is not the case here. Finally, the Court noted that as with the first disciplinary action, the employer did not invoke the portion of the policy related to solicitation for organizations but said Prozanski used the email for "business/personal" reasons. *Id.* In other words, the employer violated its own policy.

The fact employees are allowed use of T-Mobile's email system for some personal use does not magically mean that all messages must be allowed. Likewise, addressing a mass email sent by an employee in contravention of access to T-Mobile's policy and email system is not "singling out" a message because of its content especially when, as here, there is no evidence employees had ever been

allowed to send unsolicited mass emails before the event. In this regard, unlike the employer in *Guard Publishing*, it is not a “*post hoc*” invention for T-Mobile to enforce an otherwise valid and lawful Acceptable Use Policy the first and only time it was breached.

Facility-wide emails sent by managers about initiatives of T-Mobile cannot be compared to Befort’s emails for purposes of discrimination. Only T-Mobile’s managers and Senior Representatives<sup>1</sup> were given access to the facility-wide distribution lists which permitted emails to be sent to the call center staff; Befort was not granted such access. Emails sent by managers and Senior Representatives were business-related and sent as a general informational purpose to all employees. Other than Befort, who circumvented her lack of access to the distribution list, there is no evidence an employee ever sent a mass email facility-wide for some personal reason, let alone activity similar in nature to Section 7 activity.

Communications sent by T-Mobile management to employees are not at all comparable to employee communications legally or practically. The Board and courts have long recognized the employer has greater rights in communicating with its own workforce. A facility-wide email sent by a manager would not be evidence

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<sup>1</sup> Although the statutory status of Senior Representatives was not addressed in the Consolidated Complaint, or at trial, it is clear this position is different than CSRs. Indeed, Befort excluded Senior Representatives in her emails. (Tr. 45; GC-X 1-T; R-X 1-8.)

of disparate treatment. *NLRB v. Steelworkers (Nutone)*, 357 U.S. 357, 364 (1958) (“[T]he Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it.”)

**B. T-Mobile Did Not Unlawfully Promulgate Rules Prohibiting Use of Its Email System Because Employees Have Ample Opportunity to Communicate With Each Other**

The Board in *Caesars Entertainment* held that “an employer does not violate the Act by restricting the nonbusiness use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination.” 368 NLRB No. 143, Slip op. at 8. With respect to the allegations concerning unlawful promulgation of rules the Board held the “lawfulness of [T-Mobile’s] conduct is dependent on whether Befort had a Section 7 right under *Caesars Entertainment* to use her work email to send her message to her coworkers about joining the Union.” Supp. Dec., Slip op. at 1. The CWA appears to concede (Br. 38) if T-Mobile’s admonishment of Befort for sending her emails was lawful, then so was the establishment the rules regarding the use of T-Mobile email systems.

Specifically, *Caesars Entertainment* identified three avenues of effective means of communications: the fact employees work at the same location and have the opportunity to orally solicit each other on nonwork time, the ability to distribute literature in nonwork areas of the facility on nonwork time, and the presence and use of personal cell phones for texting, calling and using social media. *Id.*, Slip op at 7-8. The Board had severed and remanded these allegations for the narrow purpose for determining whether the “limited exception” applies. The record shows that employees can and do communicate using all three avenues identified by the Board:

- *Onsite presence of employees for oral solicitation.* All employees at the Wichita call center work at the same location where in the course of a work day they take breaks and meal periods and can solicit each other about the union or anything else. There are approximately 600 CSRs onsite at the Wichita Call Center, staffing the operation from 6:00 a.m. to midnight. (Tr. 375-376.) There is more than ample time for face to face communication. Befort testified she would solicit employees by “word of mouth” among other avenues of communication. (Tr. 45.) CSR Alyssa Jones testified about congregating with other employees at the smoking area outside the call center to discuss the union and plan union activities. (Tr. 112-113.)

- *Ability to distribute union literature in nonwork areas on nonwork time.*

The record shows that pro-union employees regularly distribute literature in nonwork areas during nonwork times: Befort testified: “I also did quite a bit of what we call leafletting on my time off work where we would stand at the entrances of the call center to hand out flyers and just work toward educating other people who work there” about the union. (Tr. 44.) CSR Abigail Parrish often distributed flyers on T-Mobile premises and sometimes brought treats such as donuts for her fellow employees. (Tr. 187.)

- *Access to smartphones, social media and personal email accounts.* There is consistent use of personal cell phones at the call center. Employees testified they used personal technology to advocate for the union while at work. Befort: “To communicate with my co-workers I would use, word-of-mouth, social media, leafletting of course, texting, calling.” (Tr. 45.) Befort also acknowledged that she “didn’t hide” her support and often wore union t-shirts and pins to work. (Tr. 74.) CSR Alyssa Jones acknowledged she used a personal email address for union activity. (Tr. 107); ones also testified, “Everyone is on their phone using it for social media, texting, Snapchatting, all types of things.”

The CWA does not cite or otherwise address *Caesars Entertainment* and does not dispute in any way the fact that employees routinely communicate with each other in many different forms, making the use of T-Mobile's email system irrelevant.

#### IV. CONCLUSION

T-Mobile respectfully requests the Court deny CWA's Petitions for Review.

Dated: September 2, 2020

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*/s/ Mark Theodore*

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14-CA-162163  
14-CA-166164

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), Intervenor certifies that this brief contains 3,369 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

September 2, 2020

Respectfully Submitted,

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14-CA-166164

**CERTIFICATE OF SERVICE**

I certify that on September 2, 2020, I filed the foregoing document(s) with the Clerk of the Court for the United States Court of Appeals for District of Columbia Circuit, and served all parties, through the court’s CM/ECF system.

September 2, 2020

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