

Initial Brief

Oral Argument Not Yet Scheduled

Nos. 20-1112, 20-1186

**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.

On Petitions for Review of Decisions and Orders of
the National Labor Relations Board

**REPLY BRIEF OF PETITIONER
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO**

Glenda L. Pittman
Glenda Pittman & Associates, P.C.
4807 Spicewood Springs Road
Building 1, Suite 1245
Austin, TX 78759

Matthew J. Ginsburg
James B. Coppess
815 Sixteenth Street NW
Washington, DC 20006
(202) 637-5397

TABLE OF CONTENTS

Table of Authorities	ii
Glossary	iv
Summary of Argument	1
Argument.....	5
I. The Board Ignored Clear Evidence of Discrimination, Instead Basing Its Decision on a Rationale that Has No Grounding in the Factual Record of This Case.....	5
II. The Board’s Claim that Its Decision Rests on a Special Discrimination Standard that Applies Only to Email Has No Basis in the Board’s Decision in This or Any Other Case.....	12
III. T-Mobile’s Claim that It Reprimanded Befort Because of How She Sent Her Message, Rather Than Because of Its Content, Is Contrary to the Board’s Rationale for Its Decision and Contrary to the Evidence	18
IV. T-Mobile’s Enactment of New Restrictions on Employees’ Rights to Communicate with Each Other at Work Constituted Additional Violations of the Act.....	21
Conclusion.....	26

TABLE OF AUTHORITIES

Cases

	Page(s):
<i>AdvancePierre Foods, Inc.</i> , 366 NLRB No. 133 (2018).....	22
* <i>Boeing Co.</i> , 365 NLRB No. 154 (2017).....	23
<i>Caesars Entertainment</i> , 368 NLRB No. 143 (2019).....	13
<i>ConAgra Foods, Inc. v. NLRB</i> , 813 F.3d 1079 (8th Cir. 2016).....	9
<i>Erie Brush & Mfg. Corp. v. NLRB</i> , 700 F.3d 17 (D.C. Cir. 2012)	11
* <i>Guard Publishing Co. v. NLRB</i> , 571 F.3d 53 (D.C. Cir. 2009)	3, 9, 10, 11, 14, 15, 16, 17
* <i>Guardian Industries Corp. v. NLRB</i> , 49 F.3d 317 (7th Cir. 1995).....	18
<i>ITT Indus., Inc. v. NLRB</i> , 251 F.3d 995 (D.C. Cir. 2001)	15
<i>Jensen Enterprises, Inc.</i> , 339 NLRB 877 (2003)	16
<i>Lucile Salter Packard Children’s Hospital at Stanford v. NLRB</i> , 97 F.3d 583 (D.C. Cir. 1996)	14
<i>Oberthur Techs. of Am.</i> , 362 NLRB 1820 (2015)	16

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES (CONTINUED)

Cases

	Page(s):
<i>Register-Guard</i> , 351 NLRB 110 (2007)	3, 13, 14, 15, 16, 17, 21
<i>Rest. Corp. of Am. v. NLRB</i> , 827 F.2d 799 (D.C. Cir. 1987)	15
<i>Ruisi v. NLRB</i> , 856 F.3d 1031 (D.C. Cir. 2017)	11
<i>St. Margaret Mercy Healthcare Ctrs. v. NLRB</i> , 519 F.3d 373 (7th Cir. 2008).....	9, 17
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	12
<i>W.W. Grainger, Inc.</i> , 229 NLRB 161 (1977)	9

Statutes

National Labor Relations Act, 29 U.S.C. § 151 <i>et seq.</i>	
Section 7 (29 U.S.C. § 157)	2, 4, 10, 11, 14, 22, 23, 25, 26
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	10, 16, 21, 22

GLOSSARY

“ALJ”.....Administrative Law Judge

“CWA”.....Communications Workers of America, AFL-CIO

“NLRA” or “the Act”.....National Labor Relations Act

“NLRB” or “the Board”.....National Labor Relations Board

SUMMARY OF ARGUMENT

In our opening brief on behalf of Petitioner Communications Workers of America, AFL-CIO (CWA), we explained why, applying established principles of discrimination, T-Mobile USA, Inc. (T-Mobile) violated the National Labor Relations Act (NLRA) by singling out for condemnation Chelsea Befort’s emails inviting her co-workers to a union-related weekend social event at a nearby bowling alley, even though the company liberally permitted employees to send and receive personal emails on nonwork topics, including facility-wide messages, that were similar to Befort’s in every respect except their union content. T-Mobile’s subsequent attempts to justify its actions, especially the company’s explanation for its claim that Befort’s emails constituted prohibited “junk mail” under the company’s Acceptable Use Policy – *i.e.*, emails about social events were permitted if they concerned “the T-Mobile family,” but not if they concerned “a third party” like the union, D&O15 n.29¹ – only highlighted the discriminatory basis for the

¹ Citations to the NLRB’s decisions, the record, and the briefs before this Court are as follows: “D&O” refers to the NLRB’s Decision, Order, and Notice to Show Cause in *T-Mobile USA, Inc. and Communications Workers of America, AFL-CIO*, 369 NLRB No. 50 (April 2, 2020); “Supp.D&O” refers to the NLRB’s Supplemental Decision and Order in *T-Mobile USA, Inc. and Communications Workers of America, AFL-CIO*, 369 NLRB No. 90 (May 27, 2020); “GC Ex.” refers to the NLRB General Counsel’s exhibits at the hearing in this case; “Resp. Ex.” refers to T-Mobile’s exhibits; “Tr.” refers to the transcript of the hearing; “Pet. Br.” refers to Petitioner CWA’s opening brief; “NLRB Br.” refers to Respondent National Labor Relations Board’s brief; and “T-Mobile Br.” refers to Intervenor T-Mobile’s brief.

company's actions. It is thus clear that T-Mobile reprimanded Befort because it disagreed with her union message, not because the emails violated any policy.

We also explained why the rationale on which the National Labor Relations Board (NLRB or the Board) based its dismissal of the discrimination charge was plainly erroneous. The Board's conclusion that Befort's emails were not similar in character to the many facility-wide personal emails on nonwork topics that T-Mobile permitted – such as invitations to baby showers and birthday parties, or even an invitation to a bowling party as long as the company approved – rested on a factual mistake. The Board proceeded on the understanding that T-Mobile prohibited employees from sending “mass emails” that were “for [employees'] personal benefit” or “to further any organizational purpose,” D&O3, when the actual policies invoked by the company did not prohibit emails of either sort. As a result, the Board's determination that “the General Counsel failed to satisfy his burden of proving that [T-Mobile] discriminatorily enforced its [policies] against Section 7 activity” because “[t]here is no evidence that [T-Mobile] permitted employees to send mass emails for their personal benefit, much less to further any organizational purpose,” *ibid.*, was fundamentally flawed. The Board's conclusion that there was “no evidence” of discrimination rested on a distinction between permissible and prohibited messages without any basis in the record of this case.

In their responses, the Board and T-Mobile do not seriously engage with CWA's argument that, other than its union content, Befort's invitation to a weekend social event at a bowling alley was similar in all relevant respects to the facility-wide personal emails on nonwork topics that T-Mobile routinely permitted, and was certainly far less disruptive than the emails the company itself routinely sent encouraging employees to leave their workstations during work time to get popcorn or slushies or to claim free hockey tickets on a "first come, first serve" basis.

Instead, the Board defends its decision based on the entirely new argument that there is "a specific standard for assessing discrimination in this context," *i.e.*, in cases involving email use, that justified the Board's decision in this case. NLRB Br. 12. That claim is groundless. There is not a word in the Board's decision itself, in *Register-Guard*, 351 NLRB 1110 (2007), on which the Board relied for the discrimination standard it applied in this case, or in this Court's decision in *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), stating or suggesting that the discrimination standard for email is different than in any other context. To the contrary, this Court's decision in *Guard Publishing* made clear that there is a single discrimination standard that applies in all contexts. This Court should reject the Board's entirely unsupported claim that its decision is justified by a special discrimination standard.

For its part, T-Mobile does not defend the Board's decision at all, but instead seeks to revive a defense to its actions that it unsuccessfully asserted before the Board – that the company reprimanded Befort because of the manner in which she sent her emails, rather than the content of her message. Besides the fact that the Board did not so hold, T-Mobile's argument fails because it is simply contrary to the evidence. T-Mobile's own witness testified that the method by which Befort sent her emails did not violate the company's policies. That concession is not surprising, as the record shows that T-Mobile routinely permitted employees to send personal emails on nonwork topics on a facility-wide basis, as well as "reply all" responses, that were similar in form to Befort's emails. T-Mobile's argument thus demonstrates once again that, in applying its policies, the company singled out Befort's union-related message for disparate treatment.

Finally, the Board agrees with CWA that, if this Court finds that T-Mobile engaged in disparate treatment of Befort's emails based on their union content, the new policies the company promulgated in response to Befort's emails were unlawful as well. Those new policies, which restricted employees' rights to communicate with each other at work through social media and email, were also unlawfully overbroad in so far as reasonable employees would understand them to prohibit union and other Section 7-protected communications. And, the Board failed altogether to address the allegation that a manager's blanket statement to

Befort that union-related emails could not be sent to employees' work email addresses at all – which was contrary to T-Mobile's actual policies – was an unfair labor practice, providing yet another reason this Court should grant the petitions for review.

ARGUMENT

I. The Board Ignored Clear Evidence of Discrimination, Instead Basing Its Decision on a Rationale that Has No Grounding in the Factual Record of This Case

The Board and T-Mobile, in their briefs, do not dispute the basic facts of this case, facts which make clear T-Mobile's antiunion motivation for its actions.

When Chelsea Befort sent an invitation to her coworkers about a union-related weekend social event at a nearby bowling alley, T-Mobile's immediate response was to generate a "Third Party Activity" report alerting corporate headquarters to union activity at the facility. Resp. Ex. 24; Tr. 351-52. Befort's Team Manager, Lillian Maron, then called Befort into a conference room and reprimanded her, telling her, contrary to T-Mobile's actual policies, that "anything union-related could not be done by email." D&O9; Tr. 52-54. Finally, Call Center Director Jeff Elliott sent an email to the entire facility publicly censuring Befort for having "sent . . . emails about the union," which Elliott disparaged as a "disruptive and unwanted communication." D&O9 (quoting GC Ex. 7). Elliott then proceeded to

discuss the union himself, making clear the company's opposition to unionization.

*Ibid.*²

It was only later, after CWA filed an unfair labor practice charge on Befort's behalf, that T-Mobile claimed that Befort's emails violated the company's Acceptable Use Policy, which permitted "incidental and infrequent personal use" of email, including "to discuss work-life balance," but prohibited the use of email to distribute pornography, to communicate threats, to distribute material containing derogatory content related to any legally-protected class, and, as relevant here, "[t]o distribute or store junk mail and chain letters." D&O14-15; GC Ex. 11 ¶ 3. As the ALJ correctly concluded, T-Mobile's application of the "junk mail" prohibition to Befort's message is obviously inapt as, "Befort's email, based upon . . . commonly accepted definitions [of the term], was not junk mail." D&O15.

² Remarkably, the Board claims without *any* evidentiary support that Elliott and Maron "specifically referenced the 'union' content of Befort's emails" because T-Mobile "deemed the type of emails Befort was sending to be inconsistent with its written policies," citing a company policy that barred "emails that 'advocate[] or solicit[] for . . . non-company related outside organizations'" in a manner "'not related to [company] business.'" NLRB Br. 25 n.9 (quoting GC Ex. 11). *See also id.* at 5 (citing same policy). T-Mobile *never* relied on this policy as a basis for reprimanding Befort, *never* cited this policy during the proceedings before the Board, and, perhaps most tellingly, does *not* mention this policy in its brief to this Court. As the ALJ explained in her decision, the Board found that policy unlawful in an earlier case between these same parties, a finding T-Mobile did not challenge. D&O 8 n.11. To put it mildly, there is no basis for the Board's argument dismissing the clear evidence of T-Mobile's antiunion motivation for reprimanding Befort on the basis of this concededly unlawful policy.

T-Mobile acknowledged that it never applied the “junk mail” prohibition to any other personal email on a nonwork topic sent or received by employees, including emails sent to the entire facility. D&O8. Indeed, other than Befort’s union-related message, T-Mobile claimed that it “d[id] not monitor for other non-business uses [of company email] by employees” at all. *Ibid.* See Tr. 408-09 (Call Center Director Elliott’s testimony that the company has no knowledge of the content of large group emails sent by employees). Despite T-Mobile’s claims of ignorance on this count, the record makes clear that employees *did* send and receive numerous facility-wide emails comparable to Befort’s bowling invitation in all respects other than its union content, including:

- Emails sent by employees to provide “notification of birthday plans for another employee throughout the facility,” for “[b]aby showers . . . in which the staff holds a potluck dinner and people voluntarily purchased joint gifts,” or emails sent to the entire facility by “[a]n employee who could not find a telephone charger,” D&O3, 7; GC 8; Tr. 55-56, 116, 142-43, 177, 475-76;
- Emails sent by T-Mobile managers and supervisors “when fresh popcorn or slushies are available . . . in the cafeteria,” to “ask employees to participate in a salsa contest or a lip sync contest, or offer free hockey tickets,” or when a birthday or condolence “card is available for signing”

for a coworker or even for the company's Chief Executive Officer,
D&O3, 7; GC Ex. 8; Tr. 389-94; and

- Emails sent by employees *in response* to other group emails, using the email system's "reply all" function, such as "ten emails of people . . . saying, 'Congratulations on the baby'" after a birth announcement was sent to the entire facility. D&O7; Tr. 178-79, 398-99.

Far from providing a neutral justification for its actions, therefore, T-Mobile's characterization of Befort's message as "junk mail" *confirmed* that the company was holding union communications to a different standard than personal messages on every other nonwork topic. Indeed, in seeking to justify treating Befort's message as prohibited "junk mail," Call Center Director Elliott explicitly distinguished emails about nonwork topics such as baby showers or bowling parties sponsored by the company from union-related communications on the basis that the former are "business related" because the company "is like a family" and so such messages concern "our people." Tr. 408. As the ALJ explained, "Elliott's statement impliedly shows disparate treatment of employees engaged in union activities." D&O15 n.29. "Birth announcements are about the T-Mobile family, but employees communicating about the union to each other are not part of our family, just a third party." *Ibid.*

Like Call Center Director Elliott’s statement that Befort’s “emails about the union” constituted an “unwanted communication,” D&O9 – which Elliott explained by reference to the company’s own opposing views about the union – T-Mobile’s invocation of the Acceptable Use Policy’s “junk mail” prohibition demonstrated that the company reprimanded Befort *not* because she violated any company policy, but because it disagreed with her union message.³ This is thus a clear case of an employer “singling out . . . the union-supporting [employee] for rebuke” in a manner that constituted “discrimination against union activities.” *Guard Publishing Co. v. NLRB*, 571 F.3d at 53, 60-61 (2009) (quoting *St. Margaret Mercy Healthcare Ctrs. v. NLRB*, 519 F.3d 373, 375-76 (7th Cir. 2008)). As in *Guard Publishing* itself, T-Mobile “admonished [Befort] for using the company’s e-mail system *expressly* for the purpose of [a union communication].”

³ T-Mobile also claimed that Befort’s email violated the company’s Enterprise User Standard and No Solicitation and No Distribution policy. We address T-Mobile’s arguments relating to the Enterprise User Standard in Section III below. As we noted in our opening brief, the ALJ, in a finding the Board did not disturb, flatly rejected T-Mobile’s argument that Befort’s email violated the No Solicitation policy on the ground that the email was not a solicitation at all. Pet. Br. 22 (citing D&O16). *See generally ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079, 1089 (8th Cir. 2016) (“It should be clear that ‘solicitation’ for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad. ‘Solicitation’ for a union usually means asking someone to join the union by signing his name to an authorization card in the same way that solicitation for a charity would mean asking an employee to contribute to a charitable organization.” Quoting *W.W. Grainger, Inc.*, 229 NLRB 161 (1977), *enforced*, 582 F.2d 1118 (7th Cir.1978)).

Id. at 59 (emphasis added; citation and quotation marks omitted). And, as was the case in *Guard Publishing*, “[t]he only difference between [Befort]’s [] e-mail and the e-mails permitted by [T-Mobile] is that [Befort]’s e-mail was union-related.” *Ibid.* (citation and quotation marks omitted). For these reasons, “[T-Mobile]’s enforcement of [its policies] with respect to [Befort]’s e-mail discriminated along Section 7 lines and therefore violated Section 8(a)(1).” *Ibid.* (citation and quotation marks omitted).

The Board nevertheless dismissed the clear record evidence of unlawful discrimination in a single paragraph on the basis of a puzzling *non sequitur*: that because “[t]here is no evidence that [T-Mobile] permitted employees to send mass emails for their personal benefit, much less to further any organizational purpose,” “the type of emails that [T-Mobile] sent, or permitted employees to send, . . . were not similar in character to Befort’s email.” D&O3. As in *Guard Publishing*, however, “neither [T-Mobile]’s written policy nor its express enforcement rationales relied on an organizational justification,” 571 F.3d at 60, nor any justification relating to employees seeking a “personal benefit,” but rather, as we have explained, on T-Mobile’s characterization of Befort’s union-related bowling invitation as “junk mail.”

This error goes to the heart of the discrimination analysis – *i.e.*, by focusing on “personal benefit” and “organizational purpose,” D&O3, rather than T-Mobile’s

actual “written polic[ies]” and “express enforcement rationales,” *Guard Publishing*, 571 F.3d at 60, the Board’s conclusion that Befort’s message was “not similar in character” to the emails permitted by T-Mobile, D&O3, used the wrong baseline for comparison. Certainly, the Board’s conclusion that “the General Counsel failed to satisfy his burden of proving that [T-Mobile] discriminatorily enforced its [policies] against Section 7 activity” because “[t]here is no evidence that [T-Mobile] permitted employees to send mass emails for their personal benefit, much less to further any organizational purpose,” *ibid.*, rested squarely on this error.

The Board nevertheless contends that “substantial evidence supports the Board’s conclusion that [T-Mobile] had only previously permitted emails that ‘were not similar in character to Befort’s emails’” such that “[t]he Union has failed to establish that ‘no reasonable factfinder’ could find as the Board did, or that there is any basis for reversing the Board’s decision.” NLRB Br. 24-25 (first quote from D&O3; latter from *Ruisi v. NLRB*, 856 F.3d 1031, 1035 (D.C. Cir. 2017)). That is incorrect. The Board’s fundamental misapprehension of the nature of the company policy at issue renders its discrimination analysis, and thus its decision, unenforceable. *See Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 23 (D.C. Cir. 2012) (“[A]n agency’s discretionary order [may] be upheld, if at all, on the same basis articulated in the order by the agency itself.” (Quoting *Burlington Truck*

Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962)). While the substantial evidence standard is forgiving, a conclusion of this sort, that lacks *any* factual basis in the record, cannot be sustained. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (“Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial.”).

II. The Board’s Claim that Its Decision Rests on a Special Discrimination Standard that Applies Only to Email Has No Basis in the Board’s Decision in This or Any Other Case

In an effort to make sense of the Board’s explanation for its decision, counsel claims that the Board “applies a specific standard for assessing discrimination in th[e] context” of “the use of [an employer’s] proprietary equipment, including its email system.” NLRB Br. 12. Although counsel never clearly explains the content of this alleged “specific standard,” the implication of the argument is that a fixed standard – untethered from the terms of the employer’s actual policies – applies whenever a discrimination claim involves employee email use, as compared to the discrimination standard used in other contexts, such as union property access or the enforcement of no-solicitation policies. *See generally* NLRB Br. 15-16 (discussing the purported standard). That argument fails because the alleged special discrimination standard for email has no basis in the Board’s decision in this case, nor in the Board’s case law generally.

In its decision in this case, the Board acknowledged that the relevant “discriminatory-enforcement standard” is set forth in *Register Guard*. See D&O3 & n.9. Nowhere in its decision here did the Board state that the *Register Guard* standard applies only to discrimination claims involving email, nor did the Board suggest that the fact that this case involves email use affected its discrimination analysis in any manner whatsoever.

The Board also did not adopt an email-specific discrimination standard in *Caesars Entertainment*, 368 NLRB No. 143 (2019), a recent case cited repeatedly by the Board in its brief as if it were somehow relevant to the discrimination analysis here. See NLRB Br. 15-17. As T-Mobile correctly notes, “[a]lthough the Board has changed positions [in *Caesars Entertainment*] on whether an employee has a statutory right to use an employer’s email system for union organizing, *it has adhered to the same standard on discrimination: that in order to establish disparate treatment, there must be similar activity that is permitted.*” T-Mobile Br. 1-2 (emphasis added). See *Caesars Entertainment*, 368 NLRB No. 143, slip op. 8-9 n.68 (citing the *Register Guard* discrimination standard as extant law and noting that “there is no contention that the Respondent discriminatorily applied its policy in this case”).

Register Guard itself confirms that, in that case, the Board did *not* purport to announce “a specific standard for assessing discrimination in th[e] [email]

context,” as the Board claims, NLRB Br. 12, but rather *generally* “modif[ied] Board law concerning discriminatory enforcement,” *Register Guard*, 351 NLRB at 1116. As *Register Guard* makes clear, such modification was necessary because of several circuit court decisions expressing varying degrees of dissatisfaction with the Board’s then-current approach to analyzing discrimination claims. *See id.* at 1117-18 (discussing those cases).

Notably, in modifying its discrimination standard, the Board in *Register Guard* prominently cited *Lucile Salter Packard Children’s Hospital at Stanford v. NLRB*, 97 F.3d 583 (D.C. Cir. 1996), a case concerning discrimination in the context of union property access, as support for its articulation of its general discrimination rule. *Register Guard*, 351 NLRB at 1118 (citing *Lucile Salter Packard Children’s Hospital*, 97 F.3d at 587). That is the same discrimination rule quoted by the Board in this case, 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.”” D&O3 (quoting *Register Guard*, 351 NLRB at 1118).⁴

⁴ In going on to state that “an employer *may* draw a line . . . between invitations for an organization and invitations of a personal nature,” among several other hypothetical employer rules, the Board in *Register Guard* made clear that it was merely providing “examples” of employer rules it believed would be permissible under its announced discrimination standard. 351 NLRB at 1118 (emphasis added). Because the Register-Guard, like T-Mobile, did not have such a rule, this Court reserved judgment as to the lawfulness of that hypothetical. *See*

Not surprisingly then, in its review of *Register Guard*, this Court made clear that it understood the Board to be setting forth a *general* discrimination standard, rather than one specific to employee email use. For example, in considering “whether the Register-Guard selectively enforced its e-mail policy against the union,” this Court, like the Board, relied on cases involving in-person conduct, rather than the use of proprietary equipment, for the foundational proposition that “[t]he law is clear that a valid no-solicitation rule applied in a discriminatory manner or maintained for discriminatory reasons may not be enforced against union solicitation.” *Guard Publishing*, 571 F.3d at 58 (quoting *Rest. Corp. of Am. v. NLRB*, 827 F.2d 799, 804-05 (D.C. Cir. 1987), and citing *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1006 (D.C. Cir. 2001), both in-person solicitation cases). The Board’s argument that “[i]n light of the Board’s controlling *Register Guard* standard, the Union does not advance its position by citing cases involving analytically distinct standards for finding discrimination in other [*i.e.*, non-email] contexts,” NLRB Br. 18 (citing *Restaurant Corporation of America* and *ITT Industries* as examples of cases supposedly involving “analytically distinct standards”), is thus directly contrary to this Court’s precedent. The cases cited by

Guard Publishing, 571 F.3d at 60 (not reaching “the propriety of drawing a line barring access based on organizational status” because “neither the company’s written policy nor its express enforcement rationales relied on an organizational justification”).

the Board as “involving analytically distinct standards for finding discrimination,” *ibid.*, are *the exact same cases* this Court relied upon in reviewing the Board’s *Register Guard* decision.⁵

It bears repeating that, in applying this Court’s discrimination standard, “the company’s written policy” and “its express enforcement rationales,” *Guard Publishing*, 571 F.3d at 60, are the relevant yardsticks for measuring whether “communications [are] of a similar character,” *Register Guard*, 351 NLRB at 1118, in order to determine whether there has been disparate treatment of a union-related message. It was on that basis that this Court, in *Guard Publishing*, reversed the Board’s conclusion that “it was not discriminatory to discipline Prozanski for the August e-mails because they were solicitations on behalf of an organization rather than an individual.” 571 F.3d at 60. What mattered was not the abstract

⁵ Nor does the Board gain any ground by citing a case concerning “a rule restricting in-person conversations during working time” as supposedly applying a different discrimination standard than cases involving “rule[s] restricting the use of employer equipment” such as bulletin boards or email. NLRB Br. 18 (citing *Oberthur Techs. of Am.*, 362 NLRB 1820, 1820 n.4 (2015)). While the *employer rules* at issue may differ, the *discrimination standard* is the same – *i.e.*, ““an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work.”” *Oberthur Techs.*, 362 NLRB at 1820 n.4 (quoting *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003)). See also D&O1 (applying that same standard to reach the unchallenged determination that “[T-Mobile] violated Section 8(a)(1) by telling employees that they could not talk about the Union during worktime in working areas despite permitting discussions of other subjects ‘not associated or connected with their work tasks’ during worktime in working areas” (quoting *Jensen Enterprises*, 339 NLRB at 878)).

“propriety of drawing a line barring access based on organizational status,” but rather the Register-Guard’s *actual* email policy. *Ibid.* Because *that* policy “made no distinction between solicitations for groups and for individuals,” it was error for the Board to determine whether there had been disparate treatment by comparing Prozanski’s emails only to other emails involving “solicitations on behalf of an organization.” *Ibid.*⁶

As we explained in detail in our opening brief, Pet. Br. 26-27, *Guard Publishing* thus makes clear why the Board’s decision in this case rests on a fundamental legal error, and why late-in-the-day arguments about a “specific standard” for discrimination claims involving employee email use cannot resuscitate it. Whether “[T-Mobile] permitted employees to send mass emails for their personal benefit” or “to further any organizational purpose,” D&O3, is

⁶ The Seventh Circuit, in *St. Margaret Mercy Healthcare Centers*, colorfully made this same point, explaining:

It is true, as a Board member pointed out in dissent, that with the exception of the [beach] balm the solicitations were charitable or social rather than commercial. But what difference can that make? *The hospital’s rule forbids solicitations in patient care areas, period*, yet the only solicitations that have ever drawn a rebuke from management are, as the hospital’s lawyer acknowledged at argument, those in support of union activities. . . . The singling out of the union-supporting nurse for rebuke was discrimination against union activities.

519 F.3d at 375-76 (emphasis added).

irrelevant – the actual policies that T-Mobile invoked as a basis for reprimanding Befort did not address emails sent by employees “for their personal benefit” or “to further [an] organizational purpose” at all. Rather, T-Mobile justified its actions based on a prohibition on “junk mail,” even though the company acknowledged that the only emails it considered “junk” were Befort’s union-related messages. That, coupled with T-Mobile’s contemporaneous references to the union content of Befort’s emails at the time it reprimanded her, constituted “antiunion discrimination by anyone’s definition.” *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 321 (7th Cir. 1995).

III. T-Mobile’s Claim that It Reprimanded Befort Because of How She Sent Her Message, Rather Than Because of Its Content, Is Contrary to the Board’s Rationale for Its Decision and Contrary to the Evidence

T-Mobile’s attempt to defend the Board’s decision on the basis that Befort allegedly “circumvent[ed] the limitation on sending mass emails,” T-Mobile Br. 7-8, rather than based on the content of her email, is no more successful than Board counsel’s defense of the Board’s decision. As we have already explained, the Board did not base its decision on this “circumvention” rationale, but rather on the legally-irrelevant conclusion that only Befort’s email, among the many nonwork emails sent by employees and T-Mobile itself, was sent for a “personal benefit”

and for an “organizational purpose.” D&O3.⁷ Moreover, the record evidence strongly contradicts T-Mobile’s claim.

T-Mobile’s “circumvention” argument appears to rest on the proposition that Befort violated some company policy – T-Mobile does not explain which policy, but presumably has the Enterprise User Standard in mind – that allegedly prohibits employees from “sending mass emails.” T-Mobile Br. 7-8. There are several factual flaws with this argument, beyond the obvious legal flaw that the Board did not base its decision on *how* Befort sent her emails, but rather on her message’s content.

First, the record shows that Befort was guided in her actions by email policies promulgated by T-Mobile itself. As the Board acknowledged, when Befort attempted to send an email to all of her coworkers inviting them to a union-related weekend social event at a nearby bowling alley, “she received an automated notice that the email was not sent to anyone because [T-Mobile]’s system limits emails from being sent to more than 100 recipients; *the notice instructed Befort to ‘try to resend with fewer recipients.’*” D&O2 (emphasis added). *See also* Resp. Ex. 1 (text of the notice). That is exactly what Befort did, “sen[ding] her email

⁷ T-Mobile’s argument is also contrary to the Board’s finding that the prohibition on mass emails on nonwork topics announced by Call Center Director Elliott in his facility-wide email censuring Befort constituted a “*new workplace rule*,” Supp.D&O1 and 1-2 n.1 (emphasis added), *i.e.*, at the time Befort sent her emails, there was no such prohibition.

eight separate times, each time to fewer than 100 recipients, to reach all of her coworkers.” D&O2. T-Mobile can hardly fault Befort for following the company’s own instructions.

In addition, at the hearing, T-Mobile Call Center Director Elliott acknowledged that the company did *not* prohibit customer service representatives like Befort from sending large group emails to their coworkers, as long as they did so without using the prepopulated distribution lists T-Mobile reserved for managers, supervisors, and senior employees. Tr. 400-403. As we explained in our opening brief, Pet. Br. 31, for this reason, Befort’s emails, which, as T-Mobile acknowledges, Befort sent not by means of a distribution list but by sending “several emails to dozens of people at a time,” T-Mobile Br. 7, were simply not covered by any of the company’s policies.

Finally, the evidence is clear that the only time T-Mobile ever applied its supposed prohibition on sending mass emails was in response to Befort’s union-related message, even though there were several other examples in the record of employees sending personal emails to large groups on nonwork topics. Thus, even assuming *arguendo* that T-Mobile maintained a “no mass email” policy, the company failed to apply that policy in a non-discriminatory manner. The fact that the company did not apply its alleged policy to reprimand the “employee [who] sent notification of birthday plans for another employee *throughout the facility*,”

D&O7 (emphasis added), the employee who “emailed *the entire facility* about a lost phone charger,” D&O3 (emphasis added), or the ten employees who sent “reply all” emails “saying ‘Congratulations on the baby’” in response to a facility-wide birth announcement, Tr. 178-79, but *did* apply its policy to Befort’s union-related bowling invitation demonstrates once again that the company engaged in “disparate treatment” of Befort’s emails “because of their union . . . status.” D&O3 (quoting *Register Guard*, 351 NLRB at 1118).

IV. T-Mobile’s Enactment of New Restrictions on Employees’ Rights to Communicate with Each Other at Work Constituted Additional Violations of the Act

As we explained in our opening brief, Call Center Director Elliott’s enactment of new restrictions on employees’ rights to communicate with each other at work and Team Manager Maron’s statement to Befort that she could not send union-related emails to other employees’ work email addresses constituted additional violations of Section 8(a)(1) of the NLRA for three reasons: (a) because the new restrictions were enacted in response to Befort’s union activity; (b) because the new restrictions on social media use and on employees sending “mass emails” on nonwork topics were unlawfully overbroad; and (c) because Maron’s statement that employees were not allowed to send union-related emails to work email addresses, which contradicted T-Mobile’s actual policy, was substantively unlawful. *See* Pet. Br. 36-42. In its brief, the Board acknowledges that if this

Court finds that T-Mobile's reprimand of Befort was unlawfully discriminatory, it should find that these new restrictions promulgated by Elliott in response to Befort's union activity were unlawful as well. The Board disputes that the new restrictions on social media use and "mass emails" were unlawfully overbroad, but that argument is not persuasive. Finally, the Board fails to address in its brief, just as it failed to address in its decision, the allegation that Maron's statement that employees could not send any union-related emails to work email addresses was substantively unlawful because it directly restricted employees' Section 7 rights.

The Board acknowledges that "an employer violates Section 8(a)(1) by promulgating otherwise lawful rules 'in response to union activity' or other statutorily protected conduct." NLRB Br. 26 (quoting *AdvancePierre Foods, Inc.*, 366 NLRB No. 133, slip op. 1 n.4 (2018), *enforced*, 966 F.3d 813 (D.C. Cir. 2020)). There is, therefore, no dispute that, if this Court finds that T-Mobile engaged in unlawful discrimination, the company's promulgation of new restrictions on employees' rights to communicate with each other at work in response to Befort's protected activity was unlawful as well. *See id.* at 27 (agreeing that "the allegations that the new workplace rules were promulgated 'in response to' protected union activity . . . turn on whether or not [T-Mobile] acted lawfully in reprimanding Befort for sending her union-related emails").

Absent such a finding, the Board claims that the new workplace rules were not unlawfully overbroad because, for purposes of the first step of the Board's *Boeing Co.*, 365 NLRB No. 154 (2017), standard, "reasonable employees would not interpret the rules as interfering with the exercise of their Section 7 rights." NLRB Br. 27-28. As we explained in our opening brief, before the Board, T-Mobile defended against this claim on the sole basis that its statements in response to Befort's union-related emails did not constitute new workplace rules at all. *See* Pet. Br. 39-40. The Board's conclusion that the statements *did* constitute "new workplace rules," but that reasonable employees would *not* interpret the new rules as restricting their rights to engage in Section 7-protected communications at the workplace flies in the face of common sense.

At the time T-Mobile announced its new workplace rule on social media use – stating that employees "can use social networks," but only "off the job, of course," D&O9 (quoting GC Ex. 7) – the company's existing Social Media Policy stated the opposite, that "occasional, personal Social Media use on your work computer or during work hours may be acceptable as long as it doesn't interfere with your job responsibilities," GC Ex. 19. Moreover, the testimony was voluminous and undisputed that T-Mobile both liberally permitted employees to use social networks during work time and that company supervisors frequently participated in this social network use. D&O7, 10; Tr. 117-19, 141-44, 180-81,

327-28, 385-86. T-Mobile’s complete reversal of its written Social Media Policy and of the company’s established practice under that policy – made suddenly in the context of the company’s condemnation of a union-related communication – could only be understood by reasonable employees as limiting their ability to use social networks to communicate with each other about all workplace issues, including the union.

The same is true with regard to T-Mobile’s new workplace rules relating to sending facility-wide or other group emails on nonwork topics – that T-Mobile “did not allow ‘mass communication[s] for any non-business purpose’” and that “employees were not allowed to send out ‘mass emails.’” NLRB Br. 26 (quoting D&O2, 9; GC Ex. 8; Tr. 53). The Board concluded that, because “[T-Mobile] announced its new rules ‘in response to Befort’s violation of several of its policies, . . . all of the employees reasonably knew that [T-Mobile] promulgated its rules – the language of which prohibited the very type of impermissible conduct Befort engaged in – because of Befort’s improper use of its email system and to prevent similar infractions in the future.’” NLRB Br. 28 (quoting Supp.D&O1 n.1). As we have explained in the preceding sections, the factual predicate for that conclusion is incorrect.⁸ Prior to Befort’s emails, T-Mobile liberally *permitted*

⁸ The Board’s reasoning also defies logic. Restrictions that constitute “*new* workplace rules” could not have “prohibited the very type of impermissible

“mass emails” for a wide variety of “non-business purpose[s].” *Id.* at 26 (citation and quotation marks omitted). Thus, while it is true that “employees reasonably knew that [T-Mobile] promulgated its rules . . . *because of* Befort’s . . . use of its email system and *to prevent* similar [use] in the future,” NLRB Br. 28 (quoting Supp.D&O1 n.1) (emphasis added), the correct conclusion to draw from those facts is that reasonable employees would view the company’s promulgation of new workplace restrictions on email use, like the new restrictions on social media use, as restricting *their* ability to send facility-wide emails on nonwork topics and thus interfering with *their* right to engage in Section 7-protected communications in the workplace.

Finally, as we explained in our opening brief, Team Manager Maron’s statement to Befort that she ““was prohibited from sending Union-related emails to employees’ work email addresses,”” was, as the General Counsel alleged, and as the ALJ found, unlawfully ““coercive”” for the straightforward reason that ““an employee would believe she did not have a right to use the email system to communicate about [the] Union or other protected activities,”” even though it was undisputed that this was not T-Mobile’s policy. Pet. Br. 13-14 (quoting Third Consolidated Complaint ¶ 7(c)), and *id.* at 41-42 (quoting D&O18 and citing Resp.

conduct Befort engaged in” *prior to* T-Mobile’s enactment of those rules. Supp.D&O1-2 n.1 (emphasis added).

Ex. 23). In its decision, the Board did not address the General Counsel's allegation that Maron's statement constituted a direct violation of employees' Section 7 rights, instead treating this violation as part of the overbreadth analysis. *See* Supp.D&O1-2 n.1. The Board repeats that error in its brief. *See* NLRB Br. 26-28. The Board's dismissal of this allegation without explanation thus constitutes an additional reason to grant these petitions for review.

CONCLUSION

The Court should grant the petitions for review and remand this case to the Board.

Glenda L. Pittman
Glenda Pittman & Associates, P.C.
4807 Spicewood Springs Road
Building 1, Suite 1245
Austin, TX 78759

Respectfully submitted,

/s/ Matthew J. Ginsburg
Matthew J. Ginsburg
James B. Coppess
815 Sixteenth Street NW
Washington, DC 20006
(202) 637-5397

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE-STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(b) because this brief contains 6,180 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in a 14-point type in a Times New Roman font style.

/s/ Matthew J. Ginsburg
Matthew J. Ginsburg

Date: September 23, 2020

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2020, the foregoing Initial Reply Brief of Petitioner Communications Workers of America, AFL-CIO was served on all parties or their counsel of record through the CM/ECF system.

/s/ Matthew J. Ginsburg

Matthew J. Ginsburg