

**No. 20-1044**

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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 PETITION FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	)	
	)	
Petitioner	)	No. 20-1044
	)	
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	14-CA-170229
	)	
Respondent	)	
	)	
and	)	
	)	
T-MOBILE USA, INC.	)	
	)	
Intervenor	)	
	)	

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

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

**A. *Parties and Amici:*** Communications Workers of America, AFL-CIO was the charging party before the Board, and is the Petitioner in this Court proceeding. T-Mobile USA, Inc. was the respondent before the Board, and has intervened in support of the Board this Court proceeding. The Board’s General Counsel was a party before the Board.

**B. *Rulings Under Review:*** The ruling under review is a Decision and Order of the Board, *T-Mobile USA, Inc.*, 368 NLRB No. 81 (September 30, 2019).

**C. *Related Cases:*** This case has not previously been before this Court. The Board is not aware of any related cases pending or about to be presented to this Court or any other court.

/s/ David Habenstreit

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Dated at Washington, DC  
this 7th day of October 2020

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## GLOSSARY

A.	Joint Appendix
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
T-Mobile	T-Mobile USA, Inc.

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

The Communications Workers of America, AFL-CIO (“CWA”) petitions for review of an Order the National Labor Relations Board issued on September 30, 2019 (368 NLRB No. 81), dismissing an unfair-labor-practice complaint that had issued against T-Mobile USA, Inc. (“T-Mobile”) on the basis of charges filed by

CWA. (A. 1-33.)<sup>1</sup> The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 160(a). This Court has jurisdiction over this appeal pursuant to Section 10(e) and (f), 29 U.S.C. § 160(e) and (f). The petition was timely as the Act places no time limit on such filings. T-Mobile has intervened on behalf of the Board.

### **ISSUES PRESENTED**

1. Whether the Board properly dismissed the complaint allegation that T-Mobile violated Section 8(a)(2) of the Act by maintaining, dominating, and supporting T-Voice, because substantial evidence supports the Board’s finding that T-Voice was not a labor organization under Section (2)(5) of the Act.

2. Whether the Board properly dismissed the complaint allegation that T-Mobile, through T-Voice, violated Section 8(a)(1) by soliciting and promising to remedy employee grievances during a union campaign, because substantial evidence supports the Board’s finding that T-Voice was not initiated, and did not have a reasonable tendency, to erode employee union support.

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<sup>1</sup> “A.” references are to the Joint Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to CWA’s opening brief.

## **RELEVANT STATUTORY PROVISIONS**

Relevant statutory provisions are contained in the attached Addendum.

## **STATEMENT OF THE CASE**

This case concerns a program called T-Voice that T-Mobile established to streamline its processes for obtaining feedback from its employees. CWA filed charges, and the General Counsel issued a complaint, alleging that T-Voice was a labor organization under Section 2(5) of the Act, 29 U.S.C. §152(5), and that T-Mobile had dominated, supported, and interfered with T-Voice in violation of Section 8(a)(2) of the Act, 29 U.S.C. §158(a)(2). The complaint further alleged that T-Mobile's operation of T-Voice violated Section 8(a)(1) of the Act, 29 U.S.C. §158(a)(1), by soliciting employee grievances with the promise of a remedy during an ongoing union campaign. After a hearing, an administrative law judge found merit to those allegations. Upon exceptions, the Board reversed the judge's conclusions and dismissed the complaint. The Board dismissed the Section 8(a)(2) allegation because it found that T-Voice was not a statutory labor organization. The Board dismissed the Section 8(a)(1) allegation because it found that the timing of T-Voice's national implementation did not support an inference that T-Voice was intended, or reasonably likely, to erode employee support for CWA.

## I. THE BOARD'S FINDINGS OF FACT

### A. T-Mobile's Initiation of the T-Voice Program

T-Mobile is a national wireless telecommunications carrier that operates 17 call centers across the country. (A. 1, 11; A. 1624-25.) It employs customer-service representatives (“CSRs”) who handle customer calls at those centers. (A. 1, 11.) Since 2009, CWA has attempted to organize T-Mobile’s CSRs and has, in other Board cases, filed several unfair-labor-practice charges against T-Mobile. As of the hearing in this case, CWA had not filed a petition for a representation election among the CSRs. (A. 1, 11-12.)

For many years, T-Mobile had solicited CSRs’ feedback through various avenues, including employee surveys, focus groups, an open-door policy, and a program called “Front-Line Certified,” through which front-line employees like CSRs provided pre-launch feedback on planned customer initiatives. (A. 1; A. 350-51, 411-14, 538.) In January 2015, T-Mobile set up T-Voice, a nationwide program, to replace those various avenues and address CSR feedback in a more streamlined fashion. (A. 12; A. 414, 452-53.) The T-Voice charter states that its mission is to “[e]nhance Customer[] and Frontline [employee] experience by identifying, discussing, and communicating solutions for roadblocks for internal and external customers,” and to “[p]rovide a vehicle for Frontline feedback and

create a closed loop communication with [the] T-Mobile Sr. Leadership team.” (A. 1-2; A. 1006, 416-17, 486.) T-Mobile is the sole source of financial support for T-Voice. (A. 2, 12, 14; A. 44.)

Initially, T-Mobile started T-Voice as a pilot program at a few call centers in its East Region, then expanded the program to all call centers. (A. 1, 12; A. 452-53.) In announcing the national roll-out in a June 2015 email to CSRs, Executive Vice President Brian Brueckman stated that T-Voice is comprised of “Frontline Representatives from each call center” and “Site Senior Managers and support team members.” (A. 2, 13; A. 469, 557, 599.) He explained that, collectively, “[t]heir job is to raise Frontline and customer pain points to ensure they are resolved and then results are communicated back to the Frontline.” And he advised CSRs, “You can raise issues by reaching out to your T-Voice representatives.” (A. 2, 13; A. 416-17, 486, 557, 599.)

T-Mobile selected three to five CSRs from each center to work as T-Voice representatives for 4 hours a week. Their term of service was initially 6 months, later extended to 9. (A. 2, 13-14; A. 423, 557.) The primary duties of T-Voice representatives are: to collect “pain points”—complaints, concerns, or suggestions—from CSRs, submit them to management through a database called SharePoint, inform the CSRs how management had resolved the pain points, and

share information about new equipment and marketing programs with CSRs. (A.2, 13-14; A. 293-94, 353, 358-59, 381-82, 410, 417.)

**B. T-Voice Representatives Collect and Submit CSRs' Pain Points and Communicate Management Responses to CSRs**

T-Voice representatives collect feedback from their fellow CSRs in various ways, including when they perform their informational duties by hosting “table days” and “knowledge checks.” During table days, T-Voice representatives set up a table at call centers and speak to CSRs about new devices or promotions. At those times, employees can drop pain points into a small collection box on the table. (A. 2; A. 307.) During knowledge checks, T-Voice representatives meet briefly with small groups of CSRs to check the CSRs’ awareness of new company developments. (A. 2; A. 300-01, 310-11, 424.) At the end of the checks, T-Voice representatives usually ask if anyone has a pain point to submit.

(A. 2; A. 310-11.) T-Voice representatives also gather pain points that CSRs have placed in suggestion boxes in each call center or emailed to a dedicated email account. (A. 2; A. 68, 307-08, 355, 378.) In some cases, T-Voice representatives submit their own pain points. (A. 2; A. 1098.)

T-Voice representatives enter each pain point that they collect into SharePoint, unless it is duplicative of one already submitted, noting the identity of the submitting CSR unless the pain point was anonymous. They enter them almost

verbatim with only grammatical errors corrected, and without discussing the pain points amongst themselves or screening the issues raised. (A. 2; A. 296-97, 361-64, 381, 426-29.) If two pain points propose different solutions to the same problem, both are entered into the database. (A. 2; A. 426-28, 514-16.) On a few occasions, an individual T-Voice representative sent a pain point directly to a manager, outside the SharePoint system, with a proposed solution. (A. 2 n.8, 3 n.11.)

Of the thousands of pain points T-Voice representatives have received and entered into SharePoint since the beginning of the program, the vast majority involved customer issues (“customer pain points”) like billing, fraud procedures, and access to computer programs. (A. 2 & n.9; A. 433, 604, 1098.) A small percentage related to employees’ terms and conditions of employment (“employee pain points”), like paid time off, maternity leave, and metrics for employee performance and efficiency, which can impact bonuses, awards, discipline, and schedules. (A. 2 & n.10; A. 434.)

Once a T-Voice representative enters a pain point into SharePoint, a T-Voice program manager assigns it to a customer-experience manager. (A. 2; A. 359-61, 429-32.) The customer-experience managers then independently evaluate each pain point and enter responses into SharePoint. (A. 2; A. 429-32; *see* A. 73-74, 87,

297-98, 313, 323, 365-66.) For both customer and employee pain points, those SharePoint responses generally thank the submitting CSR for raising the issue and either give a response or, often, promise further management review. (A. 3; A. 1098.) CSRs do not have access to SharePoint so T-Voice representatives relay each management response to the CSR who submitted the pain point at issue or, for anonymous submissions, to everyone at the relevant call center. (A.2; A. 297, 433.)

### **C. T-Mobile Gathers Input from T-Voice Representatives**

T-Voice representatives in each call center also meet weekly with their local managers in charge of T-Voice to plan activities like table days and knowledge checks. (A. 3; A. 300, 307-09, 314-15, 387-88, 393, 439, 450-51.) During those T-Voice meetings, representatives and managers sometimes discuss the number of pain points recently submitted and identify any major or repetitive pain points. They do not discuss or attempt to resolve the substance of the pain points. (A. 3; A. 323, 325, 387-91, 394, 439-40.) T-Voice representatives also drop in at the beginning or end of managers' general meetings at their respective call centers to

present similar data. (A. 3, 15; A. 387-91.) Some T-Voice representatives also participate in local focus groups. (A. 3; A. 412, 420.)

T-Voice representatives also participate in monthly regional and national conference calls with senior T-Voice managers and support staff. Each call center takes turns leading the meeting for its region, which includes sharing best practices for gathering pain points and plans for T-Voice activities. (A. 3; A. 367, 369-71, 387, 391-92, 396.) During one such regional call, managers made a presentation concerning business projects in the pre-launch stage and, during another, they made a presentation about open positions at T-Mobile. (A. 3-4; A. 368, 451.)

For national meetings, Senior T-Voice Program Manager Kimberly Tolman prepares the agenda. She sometimes asks T-Voice representatives to review specific brainstorming questions and get feedback from employees at their sites in advance of the meetings. (A. 4; A. 448-49.) The meetings themselves follow a pattern of managers updating T-voice representatives on recent T-Voice developments before a limited focus-group discussion. Specifically, during the meetings, managers first detail which pain points have been resolved and what changes are still under consideration, so that T-Voice representatives can relay those updates to CSRs. Then T-Voice representatives have an opportunity to share

their personal opinions on certain pain points. No pain points are resolved during the national meetings. (A. 4, 15; A. 369, 391-92, 448.)

For example, during the August 2015 national meeting, managers informed T-Voice representatives of changes regarding a top pain point from July— involving customer surveys, known as “myVOC”—and asked them to convey those changes to CSRs at their respective call centers. (A. 4; A. 478-79, 718-26.) Managers also informed T-Voice representatives of the top three pain points for August (all customer points) and initiated a brainstorming session by asking the representatives to “discuss” the issues and “[s]eek solutions and creative ideas to overcome” them. (*Id.*) Similarly, at the September national meeting, the month’s top three pain points (all customer points) were discussed for 10 minutes and, over the next 15 minutes, managers informed T-Voice representatives of the status of August’s top pain points, and asked them to share that update with their teams. Several T-Voice representatives asked clarifying questions during the updates and individually made suggestions. For the last 30 minutes, the meeting was a focus group on customer impacts. (A. 4 & n.17; A. 806-07.) The January and February 2016 meetings had similar formats. (A. 4 & n.17.)

Finally, T-Voice representatives attended national T-Voice summits along with T-Mobile’s CEO and several senior managers. (A. 4, 14; A. 439, 504.) The

first national summit took place in October 2015, in Charleston, South Carolina.

T-Mobile Vice President of Customer Service and Sales, Kathy Woods, introduced the summit in opening remarks as an opportunity to gain knowledge of T-Mobile's business strategies and share feedback based on the frontline teams' customer experiences. (A. 4; A. 441.) Several managers then presented business issues, and Tolman led a "T-Voice Strategy" session with T-Voice representatives that focused on what worked well and what they thought of the program. (A. 4; A. 441-45.) Several different vice presidents hosted 45-minute focus groups of 10-15 T-Voice representatives. Tolman had provided the representatives with focus-group topics in advance so that they could provide feedback. (A. 4 & n.19; A. 798.) For example, Vice President of Financial Care Sid Bothra conducted a focus group on employee metrics, and some participating T-Voice representatives suggested changes. The minutes of that meeting were later forwarded to some managers who did not take any follow-up action. (A. 4-5; A. 472, 659.)

T-Mobile posted an article on its intranet about the Charleston summit, stating: "65 T-Voice Reps rolled into Charleston . . . to obliterate customer and employee pain points . . . . The T-Voice Summit offered the opportunity to discuss, strategize and resolve top pain points and learn how issues get resolved 'behind the scenes.'" (A. 5; A. 1040.) The article did not specify any pain points resolved, or

detail any deliberation among T-Voice representatives regarding pain points, during the summit. (A. 5; *see* A. 447.)

#### **D. T-Mobile Gives T-Voice Program Credit for Some Policy Changes**

T-Mobile announced that it had implemented some suggestions made by employees through the T-Voice employee-feedback program. For example, T-Mobile credited the program for giving rise to the employee “Loyalty Recognition program.” CSRs had submitted pain points suggesting implementation of a loyalty program, which T-Voice representatives entered into SharePoint. (A. 3, 18-19; A. 1098.) Management then addressed those suggestions without discussing them with T-Voice representatives. (A. 3; A. 435-48.) On October 22, 2015, Vice President Woods stated that a new loyalty program would start the following January because of the Customer Care Team’s “feedback and the efforts of the T-Voice team.” (A. 3; A. 560, 572.)

Local call centers also noted when T-Mobile had implemented suggestions made by employees through the T-Voice pain-point process. On November 12, 2015, for example, T-Mobile sent CSRs in Albuquerque, New Mexico an email that stated: “You asked and T-Voice listened!,” announcing “we have Wi-Fi available” throughout the call center. (A. 3; A. 563.) On December 21, a T-Voice representative informed CSRs in Springfield, Missouri by email that, as a result of

employee pain-point suggestions submitted through T-Voice, T-Mobile had installed three device-charging stations at that center. (A. 3; A. 260, 588.)

**E. T-Mobile Limits T-Voice to Customer Pain Points after CWA Files Unfair-Labor-Practice Charges**

In February 2016, CWA filed its unfair-labor-practice charges alleging that: (1) T-Voice is an unlawful employer-dominated labor organization that deals with T-Mobile regarding employees' terms and conditions of employment; and (2) through T-Voice, T-Mobile unlawfully solicited employee grievances with the promise of a remedy. (A. 3, 25; A. 539.) Subsequently, T-Mobile instructed employees to submit employee (as opposed to customer) pain points directly to local management, not through T-Voice. T-Mobile removed already-submitted employee pain points from SharePoint, directing them to local management, and made other changes to enforce T-Voice's new exclusive focus on customer pain points. (A. 3; A. 463-64.)

For example, Tolman cancelled a focus group on employee metrics scheduled for the February 2016 national meeting. (A. 4; A. 484-85.) At the subsequent March national meeting, Tolman reviewed the T-Voice mission statement with T-Voice representatives and directed them to focus exclusively on customer pain points. (A. 4; A. 463-64.)

That April, before the second national T-Voice summit, Springfield Call Center Senior Manager Drew Williams asked the Center's T-Voice representatives for a volunteer to present high-impact customer pain points at the summit. In a follow-up e-mail, Williams identified customer difficulties with their "myT-mobile.com" login as one high-impact pain point. At the second summit, which took place in Tampa, Florida, in May, T-Mobile shared company news and updates with the T-Voice representatives, informing them, for example, of a new internal search engine. Unlike in Charleston, no focus groups were held in Tampa. (A. 5; A. 507-08.) Several T-Voice representatives presented five high-impact customer pain points, including the login issue Williams had identified, and ideas to resolve them. (A. 5; A. 479, 495, 749, 767.) After the summit, T-Mobile e-mailed CSRs, announcing an upcoming change to the process for handling customers with login issues, crediting the pain-point presentation at the summit for raising the issue. (A. 5.)

## **II. PROCEDURAL HISTORY**

### **A. The Complaint and the Administrative Law Judge's Decision**

Acting on CWA's unfair-labor-practice charges, the Board's General Counsel issued a complaint alleging, in relevant part, that T-Mobile's implementation and maintenance of T-Voice violated the Act. Specifically, the

complaint alleged that T-Voice is a labor organization under Section 2(5) of the Act, which T-Mobile dominated, supported, and interfered with in violation of Section 8(a)(2) and (1) of the Act, 29 U.S.C. §158(a)(2) & (1). (A. 1, 10; A. 541.) And the complaint further alleged that, through T-Voice, T-Mobile violated Section 8(a)(1) by soliciting employee grievances with the promise of a remedy during a union campaign. (A. 1, 10; A. 541.) On April 3, 2017, after a hearing, an administrative law judge issued a decision and recommended order finding that T-Mobile had violated the Act as alleged. (A. 31.) T-Mobile excepted to the judge's decision before the Board. (A. 1.)

#### **B. The Board's Conclusions and Order**

On September 30, 2019, the Board (Chairman Ring and Members Kaplan and Emanuel), reversed the judge's findings and dismissed the unfair-labor-practice complaint against T-Mobile in its entirety.<sup>2</sup> (A. 1 & nn.1-5.) The Board dismissed the Section 8(a)(2) allegation because it found that T-Voice was not a statutory labor organization. (A. 6-9.) The Board dismissed the Section 8(a)(1) allegation because it found that the timing of T-Voice's national implementation

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<sup>2</sup> No exceptions were filed to the judge's dismissal of additional complaint allegations that T-Mobile violated Section 8(a)(3) of the Act, 29 U.S.C. §158(a)(3), by granting benefits because of ongoing unionization efforts, and Section 8(a)(1) by interrogating employees about home visits by a union representative. (A. 1 n.1.) Moreover, CWA withdrew its remaining allegation that T-Mobile had violated Section 8(a)(1) by maintaining a particular rule. (A. 1 n.6.)

did not support an inference that T-Voice was intended, or reasonably likely, to erode employee support for CWA. (A. 9.)

### **SUMMARY OF ARGUMENT**

1. The Board properly dismissed the complaint allegation that T-Mobile violated Section 8(a)(2) of the Act by maintaining, dominating, and supporting T-Voice—an employee feedback program. Substantial evidence supports the Board’s finding that T-Voice is not a statutory labor organization (as would be required to find a violation) because it does not meet the necessary element of “dealing with” T-Mobile through a bilateral practice of employees making group proposals to management, which management accepts or rejects.

Specifically, the record evidence shows that T-Voice falls within certain established “safe havens” that permit some cooperation between employees and management without rising to the level of statutory “dealing.” As the Board found, T-Voice primarily functions as a unilateral “suggestion box” mechanism that affords individual employees the opportunity to share their individual concerns (pain points) with management; CWA does not point to evidence that T-Voice representatives as a group regularly, or ever, screened pain points or otherwise substantively changed them before passing them along to management, which would be characteristics of “dealing.” The pain-point aspect of T-Voice is thus not

a labor organization under settled law, which provides a safe haven for employer-employee cooperation where programs act as conduits of information. It is distinguishable from statutory labor organizations that CWA identifies, which consist of employee committees that screen employee concerns and develop solutions in bilateral exchanges with management.

The record further shows that the aspect of T-Voice that entails participation in meetings and focus groups serves information-gathering or brainstorming roles—also safe havens under settled law. The evidence cited by CWA, which refers to individual employees sharing their personal ideas with management (a hallmark of brainstorming), is fully consistent with that finding; that T-Mobile occasionally acted on ideas gleaned from the discussions does not demonstrate bilateral dealing, much less the required pattern of dealing.

Finally, T-Mobile's communications about T-Voice's purpose and results were consistent with the Board's interpretation of the facts of T-Voice's actual operation as fulfilling lawful suggestion-box and information-sharing functions. Those communications refer to T-Voice as a "team" and credit T-Voice for some policy changes. But they do not provide details showing that T-Voice representatives' role extended beyond largely ministerial suggestion-box functions and brainstorming or information-sharing in their individual capacities. CWA is

thus incorrect when it characterizes those communications as dispositive proof of T-Voice's labor-organization status.

2. The Board properly dismissed the complaint allegation that T-Mobile, through T-Voice, violated Section 8(a)(1) of the Act by soliciting and promising to remedy employee grievances during a union campaign. Substantial evidence supports the Board's finding that the years-long length of the campaign, and the absence of an election petition or other significant contemporaneous organizing activity, negated any reasonable inference that T-Mobile initiated T-Voice to erode employee union support.

### **STANDARD OF REVIEW**

The Court accords adjudications by the Board “a very high degree of deference.” *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). It will “abide [the Board's] interpretation of the Act if it is reasonable and consistent with controlling precedent.” *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002); accord *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996). And the Board's findings of fact are “conclusive” when supported by substantial evidence. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*,

340 U.S. 474, 477 (1951). Thus, the “Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.”

*Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 772 (D.C. Cir. 2012) (quoting *Bally’s*, 646 F.3d at 935).<sup>3</sup>

## ARGUMENT

### I. **BECAUSE SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT T-VOICE WAS NOT A LABOR ORGANIZATION, THE BOARD PROPERLY DISMISSED THE COMPLAINT ALLEGATION THAT T-MOBILE VIOLATED SECTION 8(a)(2) BY DOMINATING, ASSISTING, OR INTERFERING WITH T-VOICE**

Section 8(a)(2) of the Act, 29 U.S.C § 158(a)(2), makes it an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”<sup>4</sup> In determining whether an employer has violated Section 8(a)(2), the Board

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<sup>3</sup> Contrary to CWA’s assertion (Br. 26), the same standard of review applies whether the Board upholds, or reaches a different conclusion from, the administrative law judge. *Bally’s*, 646 F.3d at 935 n.4 (D.C. Cir. 2011) (“[W]here the Board has disagreed with the ALJ, as occurred here, the standard of review with respect to the substantiality of the evidence does not change.”).

<sup>4</sup> Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their statutory rights. 29 U.S.C. §158(a)(1). A violation of Section 8(a)(2) of the Act produces a “derivative” violation of Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 250 (D.C. Cir. 1991).

conducts a two-pronged inquiry. First, the Board determines whether the employee group is a “labor organization” as defined in Section 2(5) of the Act, 29 U.S.C § 152(5). *See EFCO Corp. v. NLRB*, 215 F.3d 1318 (4th Cir. 2000). Only if it finds a labor organization, does the Board proceed to inquire whether the employer’s conduct constitutes domination or interference with the organization, or unlawful support. *See Electromation, Inc.*, 309 NLRB 990, 996 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

Section 2(5) of the Act defines a “labor organization” as “any organization of any kind . . . in which employees participate and which exists” at least in part “for the purpose of dealing with employers concerning grievances, labor disputes, wages . . . hours of employment or conditions of work.” 29 U.S.C § 152(5). *See Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1383 (D.C. Cir. 1999). Thus, an employee group is a labor organization under Section 2(5) if: (1) employees participate; (2) the organization exists, at least in part, for the purpose of “dealing with” the employer; and (3) those dealings concern statutory subjects such as wages or conditions of employment. *Electromation*, 309 NLRB at 994.

Here, there is no dispute that employees participate in T-Voice and the Board assumed, for purposes of its analysis, that T-Voice covers some qualifying statutory subjects. (A. 6 n.21.) However, the Board found (A. 6-9) that T-Voice

did not “deal with” T-Mobile within the meaning of Section 2(5) and that T-Voice was thus not a statutory labor organization—a dispositive issue. Because substantial evidence supports that finding of no “dealing,” the Board properly dismissed the Section 8(a)(2) allegation.<sup>5</sup>

**A. Statutory “Dealing” Requires a Pattern of Collective Employee Participation in a Bilateral Process with Management; Isolated Instances, Individual Suggestions, Brainstorming, and Information Sharing Do Not Qualify**

The Section 2(5) labor-organization element of “dealing with” an employer requires a “bilateral process involving employees and management in order to reach bilateral solutions on the basis of employee-initiated proposals.”

*Electromation*, 309 NLRB at 997. Such a “bilateral process” ordinarily entails a “pattern or practice” of a group of employees making proposals to management over time, and management responding by accepting or rejecting those proposals.

*E.I. du Pont*, 311 NLRB 893, 894 (1993); *accord NLRB v. Webcor Pkg. Inc.*, 118 F.3d 1115, 1121 (6th Cir. 1997); *NLRB v. Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d 1262, 1271-72 (4th Cir. 1994); *Polaroid Corp.*, 329 NLRB 424, 425 (1999). Thus,

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<sup>5</sup> Because it found that T-Voice did not satisfy the element of “dealing,” the Board found it unnecessary to pass on whether the issues addressed by T-Voice representatives concerned statutory subjects. (A. 6 n.21.) For the same reason, the Board did not reach the issue, which CWA repeatedly invokes, of whether T-Voice acted in a representative capacity or whether representation is required to establish a labor organization within the meaning of Section 2(5). (A. 5 n.20, 6 n.21.)

“isolated instances” of an employee group making ad hoc demands or proposals to management are insufficient to constitute “dealing,” even when followed by management’s acceptance or rejection. *E.I. du Pont*, 311 NLRB at 894; *accord Webcor*, 118 F.3d at 1121; *Peninsula*, 36 F.3d at 1271-72; *Polaroid Corp.*, 329 NLRB at 425.

While the term “dealing with” is broader than “collective bargaining,” *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211 (1959), the bilateral-mechanism requirement leaves ample room for lawful employer-employee cooperation consistent with the statutory purpose of Section 8(a)(2)—to “ensure that employee-dominated groups do not rob employees of their right to select a representative of their own choosing.” *Polaroid Corp.*, 329 NLRB at 424-25 (citing *Electromation*, 309 NLRB at 993-94); *see Peninsula*, 36 F.3d at 1265, 1272. And the Board has defined certain “safe havens” of cooperation. *Polaroid*, 329 NLRB at 425; *see also NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288, 292 (6th Cir. 1982) (“[N]ot all management efforts to communicate with employees concerning company personnel policy are forbidden on pain of violating the Act.”).

For example, the Board has made clear that Section 8(a)(2) is not violated by a “suggestion box” procedure whereby employees make specific proposals to management. *Polaroid*, 329 NLRB at 425. Such a mechanism does not satisfy the

statutory “dealing” requirement because it is unilateral, *Electromation*, 309 NLRB at 995 n.21, and because the proposals are made individually and not as a group, *E.I. du Pont*, 311 NLRB at 894. *See also Polaroid Corp.*, 329 NLRB at 425 (“Employee free choice cannot be infringed under such a procedure because any individual employee may participate.”); *EFCO Corp.*, 327 NLRB 372, 376 (1998) (“dealing” not shown by “suggestion box” program in which employee committee played ministerial role that facilitated employer’s consideration of individual employees’ suggestions), *enforced*, 215 F.3d 1318 (4th Cir. 2000).

The requisite element of “dealing” is similarly missing from an employee committee that is essentially a conduit for “sharing information with the employer,” and from which the employer “simply gathers the information and does what it wishes with such information.” *Polaroid Corp.*, 329 NLRB at 425 (quoting *E.I. du Pont*, 311 NLRB at 894). Likewise, a “brainstorming” employee group, the purpose of which is to develop ideas, is not ordinarily engaged in “dealing,” even if the employer “may glean some ideas from this process, and indeed may adopt some of them.” *Id. Accord Peninsula*, 36 F.3d at 1271.

Importantly, whether a group exists to “deal with” the employer turns on what it “actually does,” not just how its purpose is described by the employer or employees. *Electromation, Inc.*, 309 NLRB at 996. *Accord Polaroid Corp.*, 329

NLRB at 425; *EFCO*, 327 NLRB at 376 n.15; see *Reno Hilton Resorts Corp.*, 319 NLRB 1154, 1173-74 (1995) (determining labor-organization status based on what “exactly” the group does). Moreover, the “determination of whether an employee group is a ‘labor organization’ is a matter within the Board’s expertise and, therefore, lies in the first instance with the Board.” *Peninsula*, 36 F.3d at 1269; accord *Webcor*, 118 F.3d at 1119 (“the Board should be accorded great latitude” in defining “labor organizations”). Thus, the Board’s determination whether “an organization is a ‘labor organization,’” or not, should be affirmed “whenever the Board has made a ‘reasonably arguable’ case to that effect.” *Peninsula*, 36 F.3d at 1269.

**B. T-Voice Falls within the Safe Havens of Permissible Employee-Employer Cooperation Because T-Voice Representatives Do Not Make Group Proposals or Otherwise Engage in a Bilateral Exchange with Management**

Under the foregoing principles, substantial evidence supports the Board’s finding that T-Voice is not a “labor organization” within the meaning of Section 2(5) because it did not “deal with” T-Mobile. The record evidence shows that T-Voice was conceived, and primarily functions, as a unilateral mechanism that affords individual employees the opportunity to share with management their personal concerns—most of which involve customer-service issues—and for management to address those concerns at its discretion. As demonstrated below,

the pain-point aspect of T-Voice is analogous to a lawful suggestion box, the program's meetings and focus groups served permissible information-gathering or brainstorming roles, and T-Mobile's communications about T-Voice's purpose and results were consistent with that interpretation of the facts on the ground.

**1. T-Voice's Pain-Point Process Is a Permissible "Suggestion Box" Procedure for Gathering Individual Employee's Feedback**

As described (see above, pp. 6-8), the Board found that the core function of T-Voice representatives is to receive pain points from individual employees and transmit them to management by inputting them into the SharePoint database. In doing so, the only alterations a T-Voice representative might make are either grammatical corrections or omission of pain points identical to ones already submitted. T-Voice representatives do not discuss pain points among themselves or screen them before inputting them. T-Mobile then assigns each pain point to an appropriate manager, who develops a response without consulting T-Voice representatives. T-Voice representatives are not responsible for devising or proposing solutions to the pain points they enter. And their only follow-up duty is to relay any management response eventually entered into SharePoint to the submitting employee.

Notably, CWA fails to seriously challenge those key factual findings about the pain-point process. While CWA claims, for example, that T-Voice representatives are trained to “exercise judgment” concerning whether to submit a pain point, and to “be creative” in developing solutions (Br. 48), it cites no evidence of T-Voice representatives taking such actions while fulfilling their role in the pain-point process, much less with sufficient regularity to establish the requisite “pattern or practice” of dealing. (A. 7.) *E.I. du Pont*, 311 NLRB at 894.<sup>6</sup> Instead, CWA argues that T-Voice representatives determined whether pain points were “duplicates,” synthesized “similar” pain points into one, and “explained” unclear pain points. (Br. 39.) None of those vague assertions suggest that the representatives made substantive changes to any pain points, as the Board found (A. 7), much less that they did so as a group. In addition to that lack of evidence, and as the Board aptly observed (A. 8), the sheer volume (thousands) of pain points entered into SharePoint makes it unlikely that any group decision-making

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<sup>6</sup> To the extent CWA relies on T-Voice representatives’ participation in brainstorming or information-sharing sessions at meetings or in focus groups, those aspects of the program are discussed below (Part B.2) but also do not demonstrate bilateral dealing.

process preceded their entry.<sup>7</sup>

Accordingly, as the Board found (A. 6-7), the pain-point process—T-Voice’s main component—satisfies the safe haven carved out for employer-employee programs that function as “suggestion boxes.” In so finding, the Board emphasized (A. 7) that, “precisely” like the screening committee it found permissible in *EFCO Corp.*, T-Voice does not “deal with” management because the employee participants forward the vast majority of suggestions onto management without deciding which are “best.” 327 NLRB at 376 & n.15. *See generally Polaroid Corp.*, 329 NLRB at 425 (noting that such suggestion-box procedures are lawful); *E.I. du Pont*, 311 NLRB at 894 (same). T-Voice representatives do not screen pain points or collectively develop proposals for

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<sup>7</sup> CWA claims the Board minimized “bilateral communication” by acknowledging only one instance of deviation from the ministerial SharePoint process. (Br. 39.) On that occasion, a T-Voice representative sent a pain point directly to a manager. But as the Board explained (A. 7 & n.23), there was no evidence showing the representative did more than relay the pain point, albeit outside the normal channels. The scant handful of other instances cited by CWA (Br. 12, 39) are confined to individual T-Voice representatives submitting their own pain points with suggested solutions to management (some during the information-gathering meetings discussed below, Part B.2). For example, a T-Voice representative’s “iOCR metric suggestion” (Br. 39) was his personal suggestion for a customer pain point, which he submitted to Vice President Woods—Woods, in turn sent it to Tolman for a response, effectively reinserting it into the standard process. (A. 15; A. 816-17.) Other “stand alone” proposals (Br. 39) also involve representatives’ personal pain points. (Br. 12-13, A. 514-16, 776.)

addressing them before entering them in SharePoint. For that reason, even though T-Mobile acts on some of the pain points, this aspect of T-Voice does not satisfy the fundamental requirement that *T-Voice representatives*—as opposed to individual employees—engage in a bilateral exchange of proposals and responses with T-Mobile management.

In so finding, the Board explicitly rejected the proposition that the “relevant inquiry” is, as CWA suggests at one point (Br. 43), “whether *individual* [CSR]s relayed proposals to management and management responded to those proposals.” (A. 7.) Both the discussion of other committees in *EFCO* that qualified as labor organizations and CWA’s own cases on this point support the Board’s position that bilateral dealing must involve group proposals. *See EFCO*, 327 NLRB at 375-76 (finding employee committees that “dealt with” employer collectively formulated and made numerous proposals, as committees, for management’s consideration); *Dillon Stores*, 319 NLRB 1245, 1246, 1250-52 (1995) (Br. 42-43) (emphasizing that employee proposals were “advanced collectively” during committee meetings, and then management entertained those proposals); *Reno Hilton Resorts Corp.*, 319 NLRB 1154, 1156-57 (1995) (Br. 43) (committee was labor organization given the “more than isolated instances” where employee members made

collective proposals to management regarding wages and other employment matters).

Nor, the Board found (A. 7 n.22), is it significant that T-Voice representatives communicate any eventual management responses to submitting employees, whereas the managers themselves had communicated such decisions directly to employees in *EFCO*—that distinction does not transform T-Voice representatives from a conduit relaying information regarding employee concerns between management and individual employees to a group “dealing” bilaterally with management with respect to those concerns.<sup>8</sup> As was the case with the non-dealing committee in *EFCO*, 327 NLRB at 374, only management members of T-Voice, not employee representatives, are responsible for substantively following up on the suggestions. *See Peninsula*, 36 F.3d at 1274 (“We believe that [an employer’s] action [of reporting back to employees what, if anything, it had decided to do with the information it received from them] constitutes the type of communication which is not only not unlawful, but is actually quite logical. . . .”). And, as the Board explained (A. 7), to the extent T-Voice representatives’ collection of pain points involved interaction with the employees who submitted

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<sup>8</sup> By the same token, as the Board also found (A. 7), that T-Voice representatives from different call centers sometimes input pain points from local CSRs raising identical issues does not transform those individual pain points into collective pain points submitted by the representatives as a group.

them, those intra-employee interactions did not evidence an employee-*management* exchange as required to establish “dealing.”

That lack of a true bilateral employee-management mechanism or collaboration distinguishes the pain-point aspect of T-Voice (as well as the focus-group aspect discussed below, pp. 31-37) from the labor organizations in the cases cited by CWA. In each of those cases, “dealing with” was established by record evidence of the employee committee serving as far more than a passive conduit but instead working with management to reach solutions through back-and-forth exchanges or crafting a consensus through discussion. *See Webcor*, 319 NLRB 1203, 1203-05, 1209-10 (1995) (Br. 53) (finding council was labor organization where its actual practice showed “it was not a forum for suggestions” but “a formalized procedure” operating by consensus, whereby employee members regularly made specific group “recommendations to management,” which employee and management members then discussed and often implemented), *enforced*, 118 F.3d 1115 (6th Cir. 1997); *Keeler Brass Auto. Group*, 317 NLRB 1110, 1113-14 (1995) (Br. 44) (employer and employee grievance committee members bargained back and forth on issues, such as whether employee was properly discharged, until the group agreed on a mutually acceptable result); *Ryder Distr. Resources*, 311 NLRB 814, 817-18 (1993) (Br. 44) (employees on

committees bargained back and forth with management over wage increase, made counter-proposals, and polled employees as to what wages and benefits they would accept); *E.I. du Pont*, 311 NLRB at 894-95 (employee committee made collective proposals and discussed them with management to reach consensus solutions); *Electromation*, 309 NLRB at 997 (employees and management exchanged written proposals and presented them at meetings, with management often rejecting initial employee proposals then accepting ones modified to meet its concerns).

In sum, the T-Voice pain-point process does not entail either group suggestions by T-Voice representatives—who transmitted individual employee suggestions in one direction and management responses in another—or a pattern of substantive bilateral dealing between T-Voice and T-Mobile. CWA does not persuasively demonstrate that the record compels a different understanding of how the process works. Its contention, throughout its brief, that the Board erred by characterizing the multifaceted T-Voice program as merely a “suggestion box” is, moreover, misguided. The Board characterized only the pain-point/SharePoint aspect of T-Voice that way, and separately examined the T-Voice representatives’ other duties, as discussed below.

## **2. T-Voice Meetings and Focus Groups Serve Lawful Brainstorming and Information-Sharing Functions**

Another aspect of T-Voice involves the attendance of representatives at

various local, regional, and national meetings and summits with management, and their participation in focus groups at some of those meetings. As described (see pp. 8-11), the Board found that at the local, regional, and national meetings, T-Voice representatives plan informational events with local managers or fulfill their suggestion-box role by reporting data on pain points, and receiving updates from management on previously submitted pain points.<sup>9</sup> There are also more substantive, focus-group discussions of certain pain points at the national meetings and summits, and during some local or regional meetings. T-Voice representatives participate in those focus groups by expressing their personal opinions.

Based on those facts, the Board reasonably found that the meeting/focus-group aspect of T-Voice fit within the safe haven for brainstorming or information-sharing groups. (A. 8-9). *See E.I. du Pont*, 311 NLRB at 897 (the Act does not “prevent[] employers from encouraging its employees to express their ideas and to become more aware of . . . problems in their work”), and cases cited at pp. 22-23. Critically, as the Board found, the record evidence does not establish that T-Voice representatives collectively made proposals or gave feedback as a group—as

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<sup>9</sup> CWA does not seriously contend that T-Voice representatives’ informational duties, such as hosting table days and knowledge checks, constituted “dealing.” *See Polaroid*, 329 NLRB at 429 (finding “dealing” where record evidence made clear alleged labor organization was not “simply a mechanism by which the [employer] communicated information to its employees, or equipped selected employees to answer questions regarding existing policies or programs”).

opposed to expressing their personal opinions—during meetings or focus groups. Nor does it show that they developed solutions together with each other or in exchanges with management, or that management directly—much less regularly—responded to such. Indeed, no pain points were ever resolved at the meetings or in the focus groups. The Board thus reasonably found no “dealing.” See *Airstream, Inc. v. NLRB*, 877 F.2d 1291, 1294, 1296 (6th Cir. 1989) (“dealing” not shown by “rap sessions” or committee meetings where employer listened to employee complaints, because the “basic function continued to be a means of communication between management and employees”); *Streamway Div. of Scott & Fetzer Co*, 691 F.2d at 292-95 (observing that “not all management efforts to communicate with employees concerning company [] policy are forbidden,” and concluding that employee committee intended to identify “problem areas” and solicit “ideas for improving operations” was not a “labor organization”).

Thus, contrary to CWA (Br. 44-45, 48), this case is factually unlike *Polaroid*, which serves instead to bolster the Board’s determination with its contrasting facts. In *Polaroid*, the Board based a finding of “dealing” on evidence that management and employee committee members reached consensus on policies through “extensive” group discussion, polling to determine majority sentiment, and whittling down employee members’ numerous individual suggestions to a small

number of group proposals to be presented to management. 329 NLRB at 427-28, 429-31. *See also* cases cited at pp. 29-30 (detailing similar substantive collaboration by other “labor organizations”).<sup>10</sup>

CWA also fails to undercut the Board’s factual findings regarding specific events, much less demonstrate a pattern of bilateral dealing during T-Voice meetings or focus groups. For example, the evidence CWA cites does not support its characterization of the metrics focus group at the October 2015 national summit in Charleston as an instance of “dealing.” (Br. 36-37.) As the Board explained (A. 8-9), the minutes of that focus group merely summarize the ideas covered and suggestions raised; they do not specify that any were T-Voice representatives’ collective proposals, developed as a group.

In any event, as the Board further found (A. 9 n.28), T-Mobile did not follow up on any of the proposals raised in that focus group, as required to

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<sup>10</sup> CWA errs (Br. 52) in citing *Ead Motors*, 346 NLRB 1060, 1060 n.1 (2006), where the Board noted that *there were no exceptions* to the administrative law judge’s finding that a committee was a labor organization. A judge’s decision on an unexcepted-to matter does not constitute Board precedent. *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003); *Colgate-Palmolive Co.*, 323 NLRB 515, 515 n.1 (1997). In any event, the case is off point. Unlike the T-Voice representatives, who offered personal proposals that T-Mobile took under advisement, the employee members of the group in *Ead Motors* made collective proposals that the employer accepted or rejected. *Ead Motors*, 346 NLRB at 1076-77.

establish a bilateral mechanism. In so finding, the Board did not, as CWA claims (Br. 37, 51-52), misstate Tolman's testimony. Tolman explicitly asserted that she and other managers did not follow up (A. 471-73), and the evidence CWA cites contains no details illustrating that they did (Br. 37; *see* Br. 14 nn.54-58). Nor, contrary to CWA, is it significant that the Board did not explicitly address the judge's skeptical treatment (A. 14) of Tolman's separate testimony that no solutions were discussed or consensus reached at the summit generally. The Board had no occasion to do so because it found, as just described (and in agreement with the judge), that solutions *were* discussed.<sup>11</sup>

Likewise, CWA overstates (Br. 38) the significance of a purported bilateral exchange at the January 2016 national meeting. As the Board found (A. 4 n.17), management updated T-Voice representatives on T-Mobile's new device-insurance plans at that meeting, then held a focus group during which the representatives provided individual feedback on approaches to training CSRs on those new plans. The evidence cited by CWA is consistent with T-Voice representatives engaging in permissible brainstorming through an exchange of personal opinions and does not

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<sup>11</sup> While the Board did not comment on the specific testimony regarding "consensus," CWA does not cite any evidence of one. And the judge did not find that any consensus was reached; she questioned Tolman's overall characterization of the summit as devoid of any discussion of solutions despite evidence to the contrary. (A. 14.)

detail any group proposals, consensus, or back-and-forth exchanges. (A. 497-500, 754.) Neither does the evidence prove CWA's claim that T-Mobile acted as a result of the focus group, much less based on the group's resolution of the issue, rather than simply taking into consideration individual ideas expressed during the group's discussion. And even if CWA could show a bilateral exchange at this one national meeting, that would be insufficient to establish the requisite pattern of dealing.

Finally, the Board did not base its finding of no "dealing" during T-Voice meetings (or in general) on Tolman's discredited testimony, as CWA wrongly and repeatedly claims. According to CWA, that purported error is "exemplified" by the Board's discussion of the August 2015 "myVOC metric," to the effect that T-Mobile merely asked T-Voice representatives to "share" improvements made by management in response to SharePoint pain points. (Br. 35, citing A. 4.) However, the Board does not mention Tolman's testimony in describing the August meeting at the cited part of its decision. More importantly, the judge and the Board both found that the myVOC issue at the meeting was a follow-up to a July pain point that T-Mobile wanted T-Voice representatives to bring back to CSRs—the judge discredited Tolman's effort to portray the myVOC change as unrelated to the T-Voice pain-point process (A. 16) and the Board did not disturb

that ruling. For the reasons discussed above, the pain-point process does not constitute “dealing,” as CWA contends, but a permissible suggestion-box procedure.<sup>12</sup>

In the same passage of her decision, the judge also discredited Tolman’s effort to characterize the myVOC metric as affecting only customer issues, not employee issues (A. 16 n.15; *see also* A. 26, discrediting all T-Mobile witnesses on this point), a theme that repeats across several arguments that CWA highlights. But that issue regarding the content (employee-vs-customer) of pain points, which the Board found unnecessary to resolve (A. 6 n.21), does not affect the Board’s finding that T-Voice did not address the pain points through a process qualifying as a bilateral mechanism or statutory “dealing.”<sup>13</sup>

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<sup>12</sup> Nor (Br. 36) did the Board’s assessment of the August meeting overlook other evidence, like T-Mobile communications crediting T-Voice with improvements, which the Board separately addressed (A. 8), as discussed below (Part B.3).

<sup>13</sup> For similar reasons, CWA does not advance its position by citing to two instances when Tolman cut short or cancelled focus-group discussions of *employee* pain points as proof that “both T-Voice representatives and managers believed they were to address employee pain points together.” (Br. 51.) Those instances suggest that some pain points involved employee issues and reflect Tolman’s effort to focus on *customer* pain points, particularly after CWA’s unfair-labor-practice charges. Neither sheds any light on the material issue of the character of the discussions, much less indicates that they entailed group proposals, consensus-building, or other possible indicators of bilateral dealing.

Given the record evidence, the Board reasonably found, consistent with settled law, that the meeting/focus-group aspect of T-Voice is lawful brainstorming or information sharing. Accordingly, that aspect of the program, like the pain-point process, does not constitute “dealing” that would qualify T-Voice as a labor organization under Section 2(5) of the Act. While CWA relies on various T-Mobile communications about T-Voice to contest the Board’s analysis of the program, those communications are consistent with the Board’s factual findings and legal analysis, as shown in the next section.

### **3. T-Mobile’s Communications Characterizing and Crediting T-Voice Do Not Establish Bilateral “Dealing”**

In addition to analyzing evidence detailing the actual functioning of T-Voice in assessing whether the program is a “labor organization,” the Board acknowledged T-Mobile’s many communications either characterizing the program or crediting it with certain policy changes. Substantial evidence supports the Board’s finding that, while “probative,” those communications are not dispositive in light of the record as a whole. (A. 8.) *See Polaroid*, 329 NLRB at 425 (focus of “labor organization” inquiry is on what the group “actually does”), and cases cited at p. 23. Contrary to CWA (*e.g.*, Br. 33-34), a finding of “dealing” is not compelled by those T-Mobile communications, particularly because they are consistent with the Board’s factual findings regarding the nature of T-Voice.

With respect to T-Mobile's characterizations of T-Voice, for example, CWA cites (Br. 3, 33-34) emails describing T-Voice as a "group" or "team" comprised of T-Voice representatives and managers whose purpose, in part, is to identify, discuss, and communicate solutions to pain points submitted by employees. That description of the team's overall function, however, accords with the Board's findings that, in practice, the roles of the different players are distinct and T-Voice representatives play a ministerial or information-sharing role in the team's pain point (suggestion box) and focus-group (brainstorming) processes.

Likewise, CWA cites (Br. 33) emails describing T-Voice representatives as responsible for presenting pain points and solutions to management. In practice, as shown, that responsibility is limited: the representatives act as a conduit to relay, verbatim, individual employees' submissions to management and management's responses back to the particular employees.<sup>14</sup> Thus, while T-Mobile told employees that T-Voice was "your voice" and your "advocates" (Br. 4), the record showed that, in practice, employees expressed their own voice, self-advocating by submitting personal pain points through T-Voice to management. *See Airstream, Inc.*, 877 F.2d at 1294, 1296-98 (employer's reference to committee as "your

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<sup>14</sup> Consistent with that process, the documents cited by CWA (e.g., Br. 3, 34, A. 577) state that individual employees can "raise issues" by reaching out to T-Voice representatives.

voice” in letters to employees did not make committee a labor organization); *Georgia Pwr. Co.*, 342 NLRB 192, 192, 196, 200 (2004) (absent actual evidence of bilateral dealing, committee was not labor organization despite employer’s reference to committee members as “employee advocates” and committee as “resolving employee concerns”), *enforced*, 427 F.3d 1354 (11th Cir. 2005).

In other words, while T-Mobile told employees that T-Voice was a team or group of representatives and managers (Br. 3, 34), the division of labor was that T-Voice representatives gathered pain points submitted by individual employees, passed them on to management for resolution, and then passed management’s response back to the submitting employees. To the extent T-Voice representatives proposed solutions to pain points, they were personal opinions conveyed in meetings and focus groups, which managers solicited for brainstorming or information-gathering purposes but did not regularly accept or reject during or after the meetings.

Nor, contrary to CWA (Br. 32, 34, 36), is the requisite bilateral “dealing” mechanism shown by T-Mobile’s various communications crediting “the T-Voice team” with certain changes in employees’ work conditions. Given the actual division of labor between the employee and management members of the “team,” those conclusory statements crediting the program are insufficient to prove that the

vaunted changes resulted from bilateral dealing. As the Board explained, the communications in question lacked any details disproving the Board's fundamental finding that T-Voice representatives in fact primarily acted as conduits of information to gather and pass on employee concerns through a suggestion-box procedure. (A. 8.)

For example, CWA places great weight (Br. 19, 34) on an October 22, 2015 email by Vice President Woods that partly attributed T-Mobile's adoption of an employee loyalty program to "the efforts of the T-Voice team." As the Board explained, however, the email did not detail what those "efforts" were, or suggest that T-Voice representatives did more than perform their usual function of entering individual employee suggestions into SharePoint, much less that they advanced the program as their own proposal. (A. 3, 8; *see pp.* 11-12.)<sup>15</sup> The same is true of the other T-Mobile emails CWA cites (Br. 34, 36) as crediting the whole "T-Voice

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<sup>15</sup> As the Board noted, the *only* evidence in the record describing the mechanics of the loyalty program's development is Tolman's assertion that she handled it without any discussion with T-Voice representatives. To be sure, as CWA points out (Br. 35), the judge looked askance at Tolman's overall attempt to distance the loyalty program from T-Voice, albeit without specifically discrediting Tolman's account of the representatives' role (A. 18-19). But the Board did not find that T-Voice had no role in the loyalty program's development, only that there is no evidence in Woods' email—or elsewhere in the record—that the development entailed bilateral "dealing." And CWA fails to identify any such evidence. In other words, CWA misses the mark in claiming that the Board thus grounded its no-dealing finding on Tolman's "discredited" testimony.

team,” and the newsletter article about the Charleston summit describing T-Voice as a “group” of representatives “making real change” in the workplace. *See above*, pp. 10-11 (describing lack of evidence of bilateral dealing at the summit).

Finally, CWA misreads the Board’s decision and overstates the import of T-Mobile’s communications describing and crediting T-Voice in asserting (Br. 29-32) that the Board erred by “ignor[ing]” (Br. 29) the judge’s ruling (A. 25 n.32) that those communications were not hearsay but were admissible as statements against interest. CWA’s mistake is in insisting (Br. 30-31) that, to the extent specific *facts* stated in those communications may be admitted, they require a *legal* conclusion that T-Voice is a labor organization engaged in bilateral “dealing” with T-Mobile—as just demonstrated, they do not. The communications contain vague statements characterizing and crediting T-Voice that may be interpreted to encompass dealing; they are also consistent with the Board’s assessment of the record evidence as failing to demonstrate dealing.

Accordingly, the Board did not disregard, but rather found it unnecessary to pass on, the judge’s evidentiary ruling because the contested communications, if admitted, would not change the outcome of this case. (A. 1 n.2.) As such, this case is unlike those cited by CWA (Br. 34) where the employer admitted a fact that was itself sufficient to establish a legal element—e.g., an unlawful motive for a

discharge. *See Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1204-06 (2014) (employer's admission in letter stating it discharged employee for discussing wages was "persuasive evidence" that employer discharged employee for that reason, particularly given other, corroborating evidence of that motive); *Ferguson Enter., Inc.*, 355 NLRB 1121 n.2 (2010) (supervisor's statement admitting that employer laid off employees because of their prevailing-wage claims was itself substantial evidence of that unlawful motive).

In sum, the Board reasonably found the record evidence describing the functioning of T-Voice insufficient to establish that T-Voice representatives "dealt with" management within the meaning of Section 2(5), or that T-Mobile established T-Voice for the purpose of enabling the representatives to deal with management. Consequently, T-Voice is not a statutory labor organization, and it necessarily follows that T-Mobile did not violate Section 8(a)(2), and the Board properly dismissed that complaint allegation. (A. 9.)

## **II. THE BOARD PROPERLY DISMISSED THE COMPLAINT ALLEGATION THAT T-MOBILE SOLICITED EMPLOYEE GRIEVANCES IN VIOLATION OF SECTION 8(a)(1)**

The Board properly dismissed the allegation that T-Mobile, acting through T-Voice, unlawfully solicited employee grievances, and impliedly promised to

remedy them, during an ongoing union campaign in violation of Section 8(a)(1) of the Act. (A. 9.)

Section 7 of the Act guarantees employees “the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer’s conduct “has a reasonable tendency to coerce or interfere with” the free exercise of an employee’s Section 7 rights. *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006) (quoting *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001)).

Where an employer does not already have a practice of soliciting employee feedback and grievances, such solicitation during an active union campaign may raise an inference that the employer is implicitly promising a remedy with the intent to convey to employees that union representation is unnecessary. *Reliance Elec. Co.*, 191 NLRB 44, 46 (1971), *enforced* 457 F.2d 503 (6th Cir. 1972). Under those circumstances, the solicitation may have the requisite tendency to coerce in

violation of Section 8(a)(1). However, even where an employer's solicitation occurs during an ongoing union campaign, that fact alone does not necessarily suggest that the solicitation was designed to, or would have a reasonable tendency to, undermine the union. *Leland Stanford Jr. Univ.*, 240 NLRB 1138, 1138 n.1 (1979). For example, the Board has held that an employer lawfully solicited employee grievances during a union campaign that had already lasted several years, where there was no active campaigning by either the union or the employer for a considerable time before and after the solicitation. *Id.*

The Board reasonably found (A. 9) that the same rationale applies here. CWA's campaign had been going on for several years, since 2009, when T-Mobile implemented the T-Voice program nationally in June 2015. At that time, the campaign was not at a crucial juncture and nothing indicated a likely link between the long-term union organizing efforts and the immediate decision to implement T-Voice. Specifically, as the Board noted (A. 9, 12), there was no outstanding union petition to represent T-Mobile's CSRs (so no imminent election), and the record contains little evidence of CWA's organizational efforts among CSRs. (A. 9 & n.29.) As detailed below, moreover, the little record evidence of organizing efforts among CSRs is confined to one or two call centers—not commensurate with the

national scope of the T-Voice program—and mostly temporally distant from the T-Voice launch.

As the Board described (A. 9 & n.29), the record evidence shows that in January 2016, about seven months after T-Mobile implemented T-Voice nationwide, T-Mobile held meetings at its Wichita call center to respond to some recent CWA communications at that particular call center. And, at one meeting, a single employee asked whether CWA had contacted his coworkers at their homes. While CWA observes that T-Mobile’s talking points for the Wichita meetings stated “that CWA had ‘spent a great deal of time and money’ on organizing over the previous few years” (Br. 56), the document offers no relevant details, nor does the record substantiate that description. (Br. 20, 56; A. 286-90, 1056.)<sup>16</sup> Similarly, the “2013-14” organizing activities of two CSRs at the Menaul call center in New Mexico—the only organizing activity CWA describes in any detail (Br. 57)—took place at least six months before the national implementation of T-Voice (the end of 2014) at one location. *See T-Mobile USA, Inc.*, 365 NLRB No. 15, slip op. at 4-5, 11 (2017). There is no evidence of serious contemporaneous union organizing of CSRs at any of the other 14 call centers. That gap in scope between localized

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<sup>16</sup> CWA also cites (Br. 20) a case involving organizing activities by CSRs in Wichita closer in time to the T-Voice implementation. *T-Mobile USA, Inc.*, 369 NLRB 50 (2020), *petition for review pending*, D.C. Cir. No. 20-1112. Like the other evidence, it does not reveal organizing activities at any other call center.

union activity and the national T-Voice program, and the fact that the union had been campaigning since 2009, negate the inference that T-Mobile established the program to erode employee union support or that it would reasonably have that tendency.

While it is true (Br. 56-57) that CWA filed several unfair-labor-practice charges against T-Mobile, that fact does not undermine the Board's analysis. The charges were separated from the T-Voice implementation by several months. Moreover, as the Board found, they involved matters unrelated to CWA's campaign to organize a new unit of CSRs. (A. 9 n.29.) *See, e.g., T-Mobile USA, Inc.*, 365 NLRB No. 23 (2017) (T-Mobile refused to bargain regarding a unit of about 20 technicians and material handlers in one Connecticut call center), *enforced*, 717 F. App'x 1 (D.C. Cir. 2018); *T-Mobile USA, Inc.*, 363 NLRB No. 171 (2016) (T-Mobile violated Section 8(a)(1) by maintaining certain work rules regarding access to company information, workplace respect, and recordings in the workplace), *enforced in part*, 865 F.3d 265 (5th Cir. 2017). Accordingly, CWA's claim (Br. 57) that "pursuing unfair labor charges" is a type of "organizing" does not advance its argument that it was actively organizing the CSRs, much less doing so nationally, when T-Voice launched.

Finally, CWA cites (Br. 57) cases for the proposition that there can be unlawful solicitation without an election petition, but the Board did not suggest otherwise. Rather, the Board found that the lack of a petition along with the years-long campaign and lack of other significant, contemporaneous organizational activities in the time-frame surrounding the national implementation of the T-Voice program negated the inference that it implemented the program to deter union support. Those circumstances distinguish CWA's cases finding unlawful solicitation where the timing between the campaign and the solicitation was marked by more significant events—including, in some cases, the employer essentially admitting that it was acting to deter union support. *See Manor Care of Easton*, 356 NLRB 202, 219-21 (2010) (employer solicited grievances “in the midst” of active organizing campaign and “made clear that discouraging union representation was the reason,” with “explicit assurances that union representation was unnecessary”); *AdvancePierre Foods, Inc.*, 366 NLRB No. 133, slip op. at 35-37 (2018) (same; finding employer clearly implemented grievance-solicitation program “as an antidote to the union drive”), *enforced*, 966 F.3d 813 (D.C. Cir. 2020); *Amptech, Inc.*, 342 NLRB 1131, 1136-37 (2004) (employer implemented grievance-solicitation program shortly after learning of active union campaign), *enforced*, 165 F. App'x 435 (6th Cir. 2006). Here, by contrast, the context and

“timing of [T-Mobile’s] actions does not, by itself, suggest that [T-Voice] was designed to undermine the Union.” *Leland*, 240 NLRB at 1138 n.1.

In sum, the Board reasonably found the record evidence insufficient to establish that T-Mobile implemented T-Voice to erode union support or—given the years-long duration of the union campaign and the absence of evidence of organizing activity among CSRs at most call centers—that it would reasonably have that tendency. Accordingly, the Board reasonably dismissed the allegation that T-Mobile violated Section 8(a)(1) of the Act by soliciting employee grievances through T-Voice.

## CONCLUSION

The Board respectfully requests that the Court deny CWA's petition for review.

Respectfully submitted,

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National Labor Relations Board  
October 2020



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

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COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	)	
	)	
Petitioner	)	No. 20-1044
	)	
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	14-CA-170229
	)	
Respondent	)	
	)	
and	)	
	)	
T-MOBILE USA, INC.	)	
	)	
Intervenor	)	

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 7, 2020, I filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for District of Columbia Circuit by using CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit  
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Dated at Washington, DC  
this 7th day of October 2020

# **STATUTORY ADDENDUM**

## STATUTORY ADDENDUM

Except for the following, all pertinent statutes are contained in the statutory addendum to CWA's opening brief to the Court.

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#### **National Labor Relations Act, 29 U.S.C. § 151, et seq.**

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Section 10(e) (29 U.S.C. § 160(e)) .....	i

**Section 7.** [§ 157.] [RIGHTS OF EMPLOYEES] 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 of 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 158(a)(3) of this title].

**Section 10(e)** [§ 160(e).] [Petition to court for enforcement of order; proceedings; review of judgment] 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 [section 2112 of title 28]. 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.