

ORAL ARGUMENT NOT YET SCHEDULED
No. 20-1044

**IN THE 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 for Respondent

**ON PETITION FOR REVIEW OF DECISION AND ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

PETITIONER'S FINAL OPENING BRIEF

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**PETITIONER CWA’s CERTIFICATE OF
PARTIES, RULINGS, and RELATED CASES**
and
CIRCUIT RULE 26.1 DISCLOSURE INFORMATION

Petitioner Communications Workers of America, AFL-CIO, (“CWA”) submits this certificate of parties, rulings and related cases under Circuit Rule 28(a)(1).

I. Parties and Amici.

The Petitioner in this Court is Communications Workers of America, AFL-CIO, who was the Charging Party in the proceeding before the National Labor Relations Board (NLRB). The Respondent in this Court is the NLRB. T-Mobile USA, Inc. was the Charged Party and Respondent before the NLRB and is an Intervenor on behalf of Respondent in this Court.

II. Ruling Under Review.

The ruling under review is the September 30, 2019 Decision and Order of the NLRB in *T-Mobile USA, Inc. and Communication [sic] Workers of America, AFL-CIO*, NLRB Case No. 14-CA-170229, published at 368 NLRB No. 81.

III. Related Cases.

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

IV. Circuit Rule 26.1 Disclosure Information.

Under Circuit Rules 26.1, CWA states that: (1) it is an unincorporated association that operates as a nonprofit, international labor union, headquartered in Washington, D.C.; (2) it is affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), also an unincorporated association; (3) CWA's members include workers in the telecommunications, airline, media, electronic, public sector, and other industries; and (4) no parent company or publicly-held company owns an interest in CWA.

Respectfully Submitted,

Dated: October 19, 2020

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GLOSSARY of GENERAL TERMS

| | |
|-------------------|---|
| ALJ or Judge | Administrative Law Judge |
| Arg. Sect. | Argument Section |
| Case Stmt. | Statement of the Case |
| CSR | Customer Service Representative |
| CWA | Communications Workers of America, AFL-CIO |
| EE&RT | Metrics and Employee Engagement and Retention Team |
| FAQs | Frequently Asked Questions |
| Fed.R.Evid. | Federal Rule of Evidence |
| GC | General Counsel of the National Labor Relations Board |
| JDA | Joint Deferred Appendix |
| LOB | Line(s) of business |
| N.L.R.B. or Board | National Labor Relations Board |
| OOW | Out of warranty |
| OSHA | Occupational Safety and Health Administration |
| SharePoint | T-Mobile's electronic pain point submission and management response system. It is cited as "JDA pain point entry page number/management response page number (which, in the original exhibit R 12, is 460 pages after the entry page number) – row number," as illustrated by "JDA1101/1364-1." |
| TPA | Third Party Activity |

UC or
UCX T-Mobile’s Un-Carrier X service

ULP Unfair Labor Practice

V.P. Vice President

GLOSSARY of T-MOBILE METRICS TERMS

CRT Call Resolution Time (Call length in seconds)

GRE or
Ops 2.0 A graded measure concerning a CSR’s call quality

iOCR Interval One Call Resolution (Concerns customer call backs)

myVOC, VOC
or
UP Score Voice of the Customer (Concerns customer survey responses)

STATEMENT OF JURISDICTION

National Labor Relations Act (NLRA) Section 10(a), 29 U.S.C. §160(a), provided jurisdiction for the Board's final order in *T-Mobile USA, Inc.*, 368 N.L.R.B. No. 81 (2019), which disposed of all parties' claims to CWA's detriment. This Court has jurisdiction under NLRA Section 10(f), 29 U.S.C. §160(f) (2018). CWA's February 21, 2020 petition for review of the Board's September 30, 2019 order was filed timely. *Id.*

ISSUES FOR REVIEW

1. Whether the Board erred in reversing the Administrative Law Judge's (ALJ's) decision that T-Voice "dealt with" T-Mobile, and consequently was a labor organization under NLRA Section 2(5), 29 U.S.C. §152(5).
2. Whether the Board erred in reversing the ALJ's decision that T-Mobile violated NLRA Section 8(a)(2), 29 U.S.C. §158(a)(2), by dominating, supporting and interfering with T-Voice.
3. Whether the Board erred in reversing the ALJ's decision that T-Mobile violated NLRA Section 8(a)(1), 29 U.S.C. §158(a)(1) by soliciting employee grievances with a promise of remedy.

STATUTES AND RULE

See Addendum for applicable provisions.

STATEMENT OF THE CASE

A. OVERVIEW.

T-Mobile USA, Inc. sells cellular telephone services and devices. It employs thousands of Customer Service Representatives (CSRs) in seventeen call centers nationwide. CSRs, with CWA's help, have been organizing. This case concerns T-Mobile's implementation of an unlawful company union, T-Voice, through which, during employee organizing, it unlawfully solicited grievances and promised remedies to thwart CSRs' efforts.

To be unlawful, a company union must be an NLRA-defined labor organization by meeting three primary criteria. The only disputed criterion is whether one purpose of T-Voice was to "deal with" T-Mobile. Regarding grievance solicitation with promised remedies, the only disputed issue is whether active organizing was ongoing.

B. T-MOBILE CREATED, IMPLEMENTED AND MAINTAINED T-VOICE.

1. T-Mobile Created T-Voice as a Bilateral Mechanism between Management and Employees, and Hand-picked and Trained Representatives.

T-Mobile implemented T-Voice as a pilot program in its East region in January of 2015.¹ It launched the program nationwide in June of 2015 during

¹ JDA0001, 0012; JDA0452-53.

CWA's ongoing organizing campaign.² T-Mobile held T-Voice out as a bilateral mechanism for communications between management and employees. It told employees that T-Voice was a "group" or "team" composed of both T-Mobile-selected employee representatives, and managers and corporate support personnel.³ T-Mobile's emails to employees described T-Voice's mission as "identifying, discussing, and communicating solutions for roadblocks for internal and external customers," and providing "a vehicle for Frontline feedback,"⁴ as well as creating "a closed loop communication with T-Mobile Sr. Leadership Team."⁵ And, it said

² JDA0012 ; JDA0415, 0452-453; JDA0557-558; Case Stmt. Sect. D.

³ JDA0006, 0026-27; JDA0586-587; and JDA0577-578. *See also*, JDA1006; JDA0486-487 (T-Voice Charter describing T-Voice as a "group" that supports customer care representatives).

⁴ "Frontline" or "internal customers" referred to employees, such as CSRs, who interacted directly with customers. JDA0011; *see also, for example*, JDA0053, 0410; JDA616-618 (using both terms); JDA0417 ("internal customer" means any customer service team employee, including CSRs).

⁵ JDA0002, 0030; JDA0564; JDA0573; JDA0586-587; JDA616-618; JDA0812-813; JDA0846, of JDA0839-851; JDA0966, 0975, of JDA0963-976; and JDA1043-44. *See also*, JDA1006 (T-Voice Charter); JDA0261-263; JDA0589-590.

T-Voice was “your voice”,⁶ encouraging employees to “raise issues by reaching out to your T-Voice representatives.”⁷

Each T-Mobile service center had several departments called lines of business (LOBs).⁸ T-Mobile hand-picked T-Voice representatives by LOB to serve for at least six months.⁹ T-Mobile described them as “representing” the views of their peers to management, the “voice” of their peers’, and “advocates” and “Frontline ambassadors”, as well as responsible for communicating management’s resolutions back to their peers.¹⁰

⁶ JDA0557-558, JDA0577-578, JDA0599-601; JDA0236-237, 270. *See also*, JDA0013 (“T-Voice was the voice of the employee”); JDA0018 (email: “T-Voice as a voice of the employee”) and JDA0584-585.

⁷ JDA0557-558, JDA0568-569, JDA0577-578 and JDA0599-601. *See also*, JDA0571, JDA0595; and JDA0068-72; 0110-113; 0129-133; 0146-148; 0237-241.

⁸ JDA0002, 0011. *See also*, JDA0046-49; 0089-93; 0127-128; 0135-138; 0184-185; 0202-204; 0222-224; 0233-235.

⁹ JDA0002, 0013. *See also*, JDA1081.

¹⁰ JDA0013-14. *See also*, JDA0589 (Charter: “3 frontline Reps per site representing primary LOBs”, providing “Frontline representation within site leadership meetings”)(JDA0486-87); JDA0577-78 (email: T-Voice reps are “your voice-the voice of the Frontline”)(JDA 0160-162); JDA0564 and JDA0085-86; JDA0570-71 (emails soliciting pain points)(JDA0149-153); JDA0573 and JDA0154-159; JDA0586-587 (email: “As a T-Voice member you will be responsible for gathering pain points from your peers in Springfield, representing those issues to local and national leadership teams, and tracking and communicating resolution back to the team”)(JDA0264-76); JDA0596 (soliciting applications to “Represent the voice of the frontline in leadership meetings”)(JDA0225-26); JDA0625 (post-national meeting notes: “T-Voice as advocates”)(JDA0458-469); JDA0812-13 (email: “T-Voice has been diligent in

T-Mobile encouraged T-Voice representatives to be passionate about getting pain points resolved and to be creative in coming up with solutions to them.¹¹ “Pain points” are perceived problems or complaints.¹² T-Mobile’s messaging emphasized that customer and employee pain points were subjects of the T-Voice program.¹³

T-Mobile trained T-voice representatives in the collection and submission of pain points.¹⁴ T-Mobile’s SharePoint training documents instructed T-Voice

being Frontline ambassadors” in “attacking” pain points)(JDA0528-530); JDA1054-55 (email welcoming new T-Voice Representatives as “advocate[s] for your Frontline peers!")(JDA0517-520).

¹¹ JDA0573 (email: T-Voice is responsible for “identifying, discussing, and communicating solutions to roadblocks for internal and external customers”); JDA0597-598 (email: “T-Voice team helps us enhance the customer and Frontline experience by identifying, discussing, creating and communicating solutions for roadblocks”); JDA0616-617 (email: T-Voice is “to identify, escalate and participate in resolution of pain points”, and desirable skills are “creativity”, “artistic”, “motivated”); JDA1043-44 (email: T-Voice representatives job- “identifying, discussing, creating and communicating solutions for roadblocks” and being “creative, articulate, energetic,” “passionate about resolving customer and employee pain points”, and “willing to think big and have fun creating solutions”) (*see also*, JDA0596); JDA0589 (T-Voice Charter describing mission as “identifying, discussing, and communicating solutions for roadblocks for internal and external customers”).

¹² JDA0012.

¹³ JDA0002, 0014, 0018; *see also, for example*, JDA0557-558; JDA0559; JDA0573; JDA0577-78; JDA0589; JDA0616-618.

¹⁴ JDA0013, 0014; JDA0498-499; JDA0754 , and JDA0839-0851 at JDA0846; JDA1086 and JDA0415-416.

representatives in exercising judgment. They were told to determine whether it was: a “one-off” issue; one already submitted; and similar to ones resolved.¹⁵ T-Voice representatives were required to: engage in review and research for pre-submission winnowing; personally observe the problem or provide an example¹⁶; and, provide enough detail for management.¹⁷

T-Mobile also trained T-Voice representatives to effectively discuss pain points in focus groups, leadership meetings, and summits.¹⁸

T-Voice Representatives performed paid T-Voice duties at least four hours weekly, and received paid travel expenses, and free shirts and other items.¹⁹

2. T-Voice Representatives Solicited Pain Points.

T-Mobile required T-Voice representatives to solicit pain points in face-to-face interactions with peers. They talked with co-workers on table and knowledge days, in focus groups and team huddles and hallway conversations, and during

¹⁵ JDA1086, and JDA0415-416.

¹⁶ JDA1086.

¹⁷ JDA1086; JDA0381, 0428, 0424-25.

¹⁸ JDA0499; JDA0754.

¹⁹ JDA0012, 0014; *see also*, JDA0608-615; JDA0967 of JDA0963-0976, JDA0991-1002, and JDA1007.

brown bag sessions.²⁰ T-Voice representatives assured their peers that management would review their pain points, that there would be resolution, and that they would update them on status.²¹

C. T-VOICE REPRESENTATIVES “DEALT WITH” T-MOBILE.

1. In Meetings.

T-Mobile required T-Voice representatives to regularly attend national, regional and local meetings to deal with management concerning working conditions.²²

For example, T-Voice representatives from each call center and management attended monthly national meetings, where Senior T-Voice Program Manager Kimberly Tolman prepared and circulated the agendas, ran the meetings, and circulated post-meeting summaries.²³ National meetings were “virtual”, electronically displaying the agenda and meeting documents, and enabling a chat

²⁰ JDA0002, 0006, 0014, 0027; JDA0082, 0094-97, 0105-109, 0143-148, 0236-238, 0242-243, 0353-354, 0356-357, 0424-425 ; and JDA0584-585, JDA0586-587, JDA0589, JDA0596, JDA0616-618, JDA0623-624.

²¹ JDA0002, 0017, 0018; *see also, for example*, JDA0557-58, JDA0574-575, JDA0570, JDA0584-585, JDA0603.

²² JDA0015-16; JDA0439; JDA0625-626; JDA0676; JDA0718-727; JDA0735-45; JDA0752-755; JDA0764-765; JDA0776; JDA0804-809; JDA0856-60 ; JDA0963-976.

²³ JDA0015, 0016; JDA0391, 0397-399, 0448-450.

forum.²⁴ Tolman included a T-Voice representative focus group in agendas, and described T-Voice as the “Frontline voice during monthly focus groups with leadership teams.”²⁵ T-Voice representatives received focus group questions in advance, discussed them with each other and co-workers, and prepared proposals to submit.²⁶

Management used the meetings to elicit T-Voice representatives’ proposals and advise T-Voice representatives of its responses to pain points involving working conditions raised through T-Voice for broader dissemination. More specifically, in the January 2016 meeting, management elicited proposals concerning employee training regarding new handset insurance, and agreed to T-Voice representatives’ proposal saying that documents would contain “more realistic verbiage.”²⁷ And, during that session, T-Voice representatives identified a disconnect between customer expectations and actual coverage, and proposed employee training and “network-specific talking points to help address customer questions/concerns.”²⁸

²⁴ JDA0016; JDA0419-421, 0476-477, 0522-528; JDA0804-809.

²⁵ JDA0812-813; JDA0528-530; *see also*, JDA0448-49.

²⁶ JDA0400-405; JDA0737, 0764-765.

²⁷ JDA0004 at n. 17; JDA0497-500; JDA0754.

²⁸ JDA0004 at n. 17; JDA0500-501; JDA0755.

An important metric was a subject of the August 2015 national meeting. Metrics are work performance measurements applied to CSRs varying by LOB but affecting CSRs' continued employment, bonuses, awards, shift placement, promotion, and other employment terms. Commonly-applied metrics are iOCR (Interval One Call Resolution), which tracks customer call backs; CRT (Call Resolution Time), which measures call length; VOC or myVOC (Voice of the Customer), also known as an "UP Score", based on customer survey responses; GRE or "Ops 2.0", a quality score after listening to calls; and sales metrics.²⁹ At the August meeting, management advised the T-Voice representatives of myVOC improvements as its response to this top July, 2015 pain point³⁰ which was "a hot topic of discussion".³¹ Two days later, V.P. Woods attributed the myVOC improvements to T-Voice's work with management.³²

For the September 2015 national meeting's focus group, T-Mobile sought and received T-Voice representatives' ideas regarding system and process improvements concerning out of warranty (OOW) fees.³³ A suggested script was

²⁹ JDA0011-12; JDA1021-39; JDA1057-74 ; JDA0054-67, 0093-105, 0125, 0162-182, 0188, 0227-228, 0239-240, 0249-256, 0331-349, 0372-374, 0375-376.

³⁰ JDA0016; JDA0476-78; JDA0718-726.

³¹ JDA0023; JDA1125/1388-1.

³² JDA0016; JDA0619-620.

³³ JDA0004; JDA0814-815; JDA0764-765; JDA0804-809.

proposed to which management responded “Will ensure I add this to the list of things to relook at.”³⁴ Another T-Voice proposal was that the employees have access to the same OOW explanation that T-Mobile provided to the customer.³⁵ Yet another proposal was that a report be created to identify customer family plans.³⁶ A week later, V.P. Woods emailed T-Voice representatives and others saying “we can expect resolution with Out of Warranty fees,” noting that the September T-Voice newsletter set out the resolution timeline.³⁷ T-Mobile sought T-Voice representatives’ suggestions in other national meetings.³⁸

Regional bi-weekly meetings were telephonic. Senior managers and T-Voice representatives attended and discussed the top pain points, and T-Voice representative Boydo testified that T-Voice representatives made recommendations

³⁴ JDA0806; JDA0528.

³⁵ JDA0808; JDA0527-528.

³⁶ JDA0809.

³⁷ JDA0789. *See also*, Tr. 1004-05 (identifying V.P. Woods’ email).

³⁸ *See, for example*, JDA0738-740 and JDA0492-495 (focus group questions for T-Voice representatives asked about new “internal customer” pain points, and the employee training-related inquiries “[w]hat do your peers still not understand about Binge On [video streaming service]” and “[w]hat is the most difficult thing to explain or address regarding our new data match plans or promos?”); JDA0625-626 and JDA0458-469 (focus group yielded T-Voice representatives’ proposals impacting metrics); JDA0735-736 and JDA0488-491 (focus group questions for T-Voice representatives asked about tools they used: “[w]hat limitations, policy or system, prevent you from completing resolution” of customer calls).

for solutions.³⁹ These pain points concerned career pathing, system problems, metrics, and employee tenure recognition.⁴⁰

T-Voice local meetings were held weekly between T-Voice representatives and managers, including Human Resources, wherein T-Voice representatives reported on current pain points, discussing “big ones” and those raised by multiple CSRs.⁴¹

2. In On-Demand Focus Groups.

T-Mobile conducted on-demand focus groups with T-Voice representatives to elicit their suggestions on working conditions and implemented them. For example, on October 29, 2015, T-Mobile conducted a focus group to review training preparing employees for the launch of the new Un-Carrier X (UCX) service.⁴² T-Mobile asked “how we could better prep with relevant FAQs and how-tos,” and how to make clear to employees that the new service could affect

³⁹ JDA0323-324; JDA0015-16; JDA302-305, 0318-324, and 0396-399. JDA0968.

⁴⁰ *See, for example*, JDA302-305, 0323-324 (T-Voice representatives discussed system pain points with management, and recommended solutions); JDA0676 and JDA0474-475 (pre-meeting solicitation for proposed changes to CRT metric); JDA0741-742, item 11 (solicitation for tenure recognition suggestions); *Id.* at item 15 (T-Voice representatives asked to actively participate and discuss current pain points).

⁴¹ JDA0300-01, 0314-17, 0387; JDA0015-16.

⁴² JDA0833-36; JDA0534-537.

metrics.⁴³ T-Mobile said it “was a very productive discussion,” and that managers “came away with valuable insights that we’ll be applying.”⁴⁴ Specifically, the T-Voice representatives engaged in “a valuable discussion about UC learning in general, starting with previously shared pain points about reps needing more time and more than a desk drop to prepare for UC Launch support,” and “really opened up and shared frank, honest feedback” about “what works and doesn’t work,” regarding employee training programs.⁴⁵ Other examples are in evidence.⁴⁶

3. Through Stand-alone Written Proposals.

T-Mobile’s encouragement to T-Voice representatives to identify employee pain points, and develop and present suggested solutions, yielded multiple submissions. For example, an April 20, 2016 email confirms Senior T-Voice Program Manager Tolman’s admission that T-Voice representative Wright shared ideas to reduce certain retail store calls to his department that negatively affected

⁴³ JDA0835, 0834.

⁴⁴ JDA0833.

⁴⁵ *Id.*

⁴⁶ JDA0796-797; JDA0522-523, 0407-408 (focus group solicitation regarding training on “tools and resources” for new handset tiered pricing launch); JDA0774-775 and JDA0513-514 (focus group solicitation on trouble ticket improvements training); JDA0854-855 and JDA0480-83 (focus group solicitation about employee web-based training on new accessory return tool and related orders).

metrics.⁴⁷ And, in an April 30, 2016 email, T-Voice representative Davis gave a detailed explanation to Tolman and a local manager concerning adverse impacts to bonuses and metrics resulting from T-Mobile's planned change about international data, and, Tolman admitted, he "did share ideas of how they could resolve this."⁴⁸ Similarly, T-Voice representative McLaughlin's September 2015 proposal to V.P. Woods concerned ways to improve his department's iOCR metric through revised policies and practices, which Woods forwarded to Tolman and others. Tolman responded that the problems he raised were common, thanked him for providing detail, and said she would forward his ideas to the appropriate managers.⁴⁹ The record contains other examples, as well.⁵⁰

⁴⁷ JDA0776; JDA0514-516.

⁴⁸ JDA0759-760; JDA0509-512. Employee pain points still were addressed after this ULP charge's filing.

⁴⁹ JDA0015; JDA0816-817; JDA0531-533.

⁵⁰ *See, for example*, JDA0761-762 (T-Voice representative Jarvis's August 2016 email proposing creation of a new metric with management response); JDA0777-779 and JDA0520-521 (Following a summit, T-Voice representative Pedraza and Tolman exchanged emails regarding Pedraza's proposal that T-Voice representatives regularly meet by department, with Tolman's response that "I love the idea and think I will be able to start putting this into play.")

4. In Summits.

a. The Charleston Summit.

T-Mobile staged a nationwide, October 2015 T-Voice summit in Charleston, South Carolina.⁵¹ Vice Presidents conducted six focus groups, four of which concerned solely employment terms and conditions.⁵² Before the summit, Tolman instructed T-Voice representatives that the list of focus groups she provided was “for you to prep.”⁵³ Tolman and Joslin, of T-Mobile’s Metrics and Employee Engagement and Retention Team (EE&RT), also arranged for analyst Irvin to attend the summit, listen to T-Voice representatives’ metrics conversations, and bring back to Joslin those discussions.⁵⁴ At the summit’s metrics focus group, conducted by V.P. Bothra, T-Voice representatives made proposals for improvements to metrics, by department and metric.⁵⁵ T-Mobile’s post-summit

⁵¹ JDA0004, 0014; JDA1625-26.

⁵² JDA0004 n. 19, 0014; JDA0672-775; JDA0733-734; JDA1625-26; JDA0439-448, 0474 . The four topics were “Metrics”, “Employee Engagement/T-Mobile Culture”, “Systems/Tools”, and “Frontline Readiness”. Other sessions also concerned employee issues, including the myVOC metric and T-Voice’s effectiveness. JDA0444-445; JDA1625-26.

⁵³ JDA0672; *see also*, JDA0004 n.19.

⁵⁴ JDA0014; JDA0621-622; JDA0455-457. Analyst Irvin remarked “a fantastic presentation on myVOC.” Irvin responded to metrics proposals in SharePoint. JDA0677; JDA1625-26; JDA0022, 0024, 0026; JDA1165/1428-1. *See also*, n. 56.

SharePoint entries indicate that T-Mobile considered some of the metrics improvement concepts discussed at the summit.⁵⁶ In addition to senior managers' summit tweets lauding summit attendees for reaching solutions,⁵⁷ T-Mobile published a news article on its intranet which quoted V.P. Woods' praise for T-Voice working as a group at the summit to meet the T-Voice objective of resolving employee roadblocks by successfully generating ideas, as a team, to take back to workplaces.⁵⁸ And, a poster displayed drawings of T-Voice representatives at the summit, and touted "Representing ABQ Menaul and rubbing shoulders with T-MOBILE VIPS!"⁵⁹

⁵⁵ JDA0022, 0004-5; JDA0659-661; JDA0471-473. *See also*, JDA0591 (Bodkin's [JDA0673] tweeted photograph, captioned "One of our awesome VP's Sid Bothra engaged with our front line T-Voice rep's about company metrics #TVoice Summit 2015").

⁵⁶ *See, for example*, JDA1244/1507-2, and JDA0660 (Analyst's 1/4/2016 response to proposal to drop the high and low myVOC score, and his note that "we have received this request in the past, as well"); JDA1165/1428-1, and JDA0660 (12/17/15 response concerning the proposal that myVOC be disregarded for the months in which an employee received too few customer surveys).

⁵⁷ *See, for example*, JDA0591; JDA0592 (Appleton tweet: "T-Mobile VPs hanging with the frontline, getting feedback, and solving pain points!"); JDA0593 (Atlanta site manager Dunn: "T-Voice ... giving their feedback to the Customer Care Vice Presidents!").

⁵⁸ JDA1040.

⁵⁹ JDA0567; JDA0119-123.

b. The Tampa Summit.

T-Mobile staged a second nationwide T-Voice Summit in Tampa, Florida in May 2016. The summit resulted in T-Mobile adopting a T-Voice idea to eliminate the “help desk tickets” process to reduce employee time in resolving a customer’s inability to access their website account,⁶⁰ an important improvement given the metrics penalties for calls exceeding maximum time.⁶¹

5. Through SharePoint.

T-Voice representatives’ SharePoint entries reflect implementation of the training T-Mobile gave them. For example, many entries explain a pain point, providing context and detail to help management grasp the problem.⁶² With many

⁶⁰ JDA0005; JDA0767 (“if account is locked, it takes longer than it should to get resolved” as employee cannot remedy it directly at times, so must submit “help desk ticket”); JDA0763 (V.P. Field’s announcement of adoption of summit proposal to eliminate “Help Desk ticket when customers can’t access their account online,” an “immediate response to one of the great ideas T-Voice submitted and we’re working on many more”).

⁶¹ JDA0165-170 (lengthy calls can make achieving call time and quality metrics impossible, creating CSR anxiety).

⁶² *See, for example*, JDA1338/1601-3 (noted by the Board at JDA0007 n. 24)(explaining relevance to his department’s metrics of a problem with a system setting); JDA1100/1363-2 (explaining handset exchange form information is insufficient, suggesting frequent updates); JDA1104/1367-3 (explaining “various representatives have approached me” about problems getting time off, and one solution would be automatic birthdays off). Other examples are found at JDA1169/1432-4, -5, -7; JDA1170/1433-1, -2, -3; and nearly every pain point from JDA1205/1468-1 to JDA1211/1474-2; JDA1236/1499-1, -2; JDA1238/1501-3; JDA1243/1506-1; JDA1244/1507-2; JDA1257/1520-1; JDA 1272/1535-1;

others, the T-Voice representatives avoided duplicates by framing pain points as being experienced by multiple employees.⁶³

In nine of her decision's 22 pages, the ALJ described numerous proposals entered into SharePoint concerning working conditions and management's responses.⁶⁴ These topics included: scheduling, rewards, career advancement, paid time off, holiday work, unpaid sick time for emergencies, grandparents' leave, day care, attendance recognition, birthdays off, Appreciation Zone⁶⁵ awards,

JDA1283/1546-4; JDA1290/1553-2; JDA1294/1557-1; and JDA1301/1564-4. In addition, many entries show T-Voice representatives initiated pain points, with explanation. *See, for example*, JDA1110/1373-2; JDA1229/1492-1; JDA1232/1495-3; JDA1234/1497-5; JDA1251/1514-1; JDA1277/1540-3; JDA1283/1546-1; JDA1331/1594-1; and others.

⁶³ JDA0027 (ALJ observed that some entries "identify concerns either from a number of representatives or a number of call centers"). The Board said there were few such entries. JDA0007 n. 24. Twelve specific examples were cited in CWA's Answering Brief in Response to Respondent's Exceptions at 9 n. 9-12, and a search of SharePoint reveals numerous instances of phrases such as "reps are requesting", "reps feel", "reps would like", "reps ask", "reps are concerned". *See* JDA1099/1362-2; JDA1101/1364-1, -2, -3; JDA1120/1383-1; JDA1130/1393-1; JDA1164/1427-5; JDA1167/1430-2, -3, -4; JDA1168/1431-2; JDA1169/1432-1, -3, -7; JDA1173/1436-5; JDA1175/1438-1 to -5; JDA1176/1439-1, -2, -5, -6; JDA1205/1468-all; JDA1206/1469-all; JDA1207/1470-all; JDA1208/1471-all; JDA1209/1472-all; JDA1210/1473-all; JDA1211/1474-1; JDA1221/1484-2, -4; JDA1235/1498-10; JDA1263/1526-5; JDA1264/1527-3; JDA1270/1533-2; JDA1271/1534-2, -7; JDA1272/1535-1, -2; JDA1273/1536-1; JDA1276/1539-4; JDA1280/1543-2; JDA1296/1559-3; JDA1317/1580-4; JDA1347/1610-4; JDA1348/1611-1.

⁶⁴ JDA0017-24; JDA1098-1623.

⁶⁵ JDA0215.

longevity recognition, lack of WiFi, employee telephone program, education and training, cash-out of unused benefits, and others.⁶⁶

The ALJ found that metrics pain points also were employee pain points to which the Board agreed.⁶⁷ Many issues that, at first glance, might be seen as customer-only, nevertheless directly affected employees' ability to achieve metrics objectives, thus affecting their compensation, schedule, bonuses and other working conditions. For example, a customer's difficulty in trading in a leased phone, determining their data usage, incurring an OOW fee for a malfunctioning phone improperly exchanged, or not seeing an expected credit, all caused calls to extend long past the maximum allowable seconds and often generated repeat return calls from the customer, negatively affecting metrics and creating intense CSR anxiety.⁶⁸

6. In Giving Credit for Improvements to Employment Terms and Conditions.

T-Mobile emails credited "the T-Voice team" with improvements in employment terms and conditions or otherwise praised T-Voice for getting results.

⁶⁶ JDA0017-25, 0026, 0027, and the ALJ's citations to R 12 therein (contained within JDA1098-1623).

⁶⁷ JDA0002, 0006, 0012, 0017, 0022, 0026, 0027; JDA0093-105; JDA0162-181 and JDA0579, JDA0581; JDA0186-195, JDA0198-200, and JDA0582-83.

⁶⁸ JDA0093-105, 0162-181 and JDA0579, JDA0581; JDA0186-195, JDA0198-200, and JDA0582-583.

On June 12, 2015, V.P. Woods told employees that T-Voice resolved a pain point regarding paid time off, and a few days later, a Menaul manager sent a follow-up email.⁶⁹ An August 21, 2015 Woods' email to management reported that T-Voice was responsible for improvements in the myVOC metric.⁷⁰ On September 6, 2015, T-Voice representative Kapperman emailed that T-Voice was working on improvements to the exercise room equipment, and shortly afterward, improvements were made.⁷¹ V.P. Wood's October 22, 2015 email announcing a new employee longevity reward program (Loyalty Program) credited "the efforts of the T-Voice team."⁷² So too did Menaul site manager Viola's email of the same date.⁷³ A November 12, 2015 email credited T-Voice with resolving employees'

⁶⁹ JDA0013; JDA0559, JDA0565. The ALJ discredited Tolman's testimony that Woods' email was not authorized. JDA0013 n. 10.

⁷⁰ JDA0016; JDA0619-620.

⁷¹ JDA0016; JDA0584-585; JDA0260.

⁷² JDA0003, 0008, 0018; JDA0572. The ALJ discredited Tolman's testimony that T-Voice had no role in the Loyalty Program, saying that her "explanation rings hollow," and noting that T-Mobile's documents credited T-Voice, and its SharePoint response to a Salem pain point demonstrated T-Mobile's intent to work with human resources regarding a longevity program. JDA0018-19; *see also*, JDA1202/1465-4.

⁷³ JDA0018; JDA0560-562; JDA0572; JDA0076. The ALJ discredited Kozlowski's testimony that Viola's email was not a result of any T-Voice submission. JDA0018 n. 19.

inability to use wireless access during breaks.⁷⁴ And, a December 21, 2015 Springfield email credited T-Voice with installation of device charging stations in the break room.⁷⁵ T-Mobile touted T-Voice's role regarding improvements in working conditions in documents other than emails, as well.⁷⁶

D. T-MOBILE ACKNOWLEDGED STARTING T-VOICE WHILE ORGANIZING WAS ONGOING.

CWA has helped T-Mobile employees organize since 2009.⁷⁷ T-Mobile acknowledged that, when it started T-Voice, CWA had “spent a great deal of time and money” in the previous few years helping with the organizing.⁷⁸ Nationwide, with its Third Party Activity (TPA) Reports, T-Mobile monitored and reported on employees' organizing,⁷⁹ and held employee meetings to counter the organizing.⁸⁰

⁷⁴ JDA0021; JDA0563. The ALJ discredited Kozlowski's testimony denying knowledge that wireless access was a T-Voice initiative. JDA0021 at n. 26.

⁷⁵ JDA0016; JDA0588; JDA0260.

⁷⁶ JDA0018; JDA0566 (“slick-looking” poster touting loyalty program and 1,143 addressed pain points); JDA0018; JDA1040 (article regarding summit results); JDA0570, JDA0574-575, JDA0597-598, JDA0602, JDA0603.

⁷⁷ JDA0001, 0011, 0012. JDA0279. *See also, T-Mobile USA, Inc.*, JD-57-16, slip op. at 4-5 (June 28, 2016), *rev'd in part*, 369 N.L.R.B. No. 50 (2020), (petition for review pending in D.C. Circuit, Case No. 20-1112) (in 2015, T-Mobile unlawfully engaged in surveillance, interrogation, threats, isolation of union supporters, and promulgated rules prohibiting organizing activity).

⁷⁸ JDA1056; JDA0286-290.

⁷⁹ *T-Mobile USA, Inc.*, JD-57-16, slip op. at 4-5, 8, 14, and 29 (June 28, 2016).

In 2013 and 2014, CSRs engaged in organizing activities, such as wearing union paraphernalia, voicing union support, and obtaining signatures on cards.⁸¹ During this time, CWA filed meritorious ULP charges, with decisions against T-Mobile issuing in March, August and December 2015, involving, among other things, unlawful work rules and threats of discipline for protected activity.⁸²

E. PROCEDURAL HISTORY.

On February 23, 2016, CWA filed a ULP charge, amended on June 21, 2016, alleging that T-Mobile's maintenance of T-Voice violated National Labor Relations Act (NLRA) Section 8(a)(2), and its use of T-Voice to solicit grievances and promise remedies in the midst of organizing violated NLRA Section 8(a)(1), 29 U.S.C. §158(a)(2) and (a)(1), respectively. JDA0539-540. The General Counsel issued a complaint on these allegations on June 29, 2016 (JDA0541-548);

⁸⁰ JDA0288 (site director held three early-January 2016 meetings to counter CWA's "miscommunication" concerning holiday time off, performance metrics and working conditions).

⁸¹ *T-Mobile USA, Inc.*, 365 N.L.R.B. No. 15, slip op. at 4-5, 11 (2017)(affirming ALJ's December 10, 2015 finding that T-Mobile unlawfully promulgated and maintained discriminatory rule prohibiting employee communications regarding CWA).

⁸² *T-Mobile USA, Inc.*, 365 N.L.R.B. No. 15 (2017), described in n. 81; *T-Mobile USA, Inc.*, 363 N.L.R.B. No. 171, slip op. at 1, 10 n. 4 (2016), *enforced in part*, 865 F.3d 265 (5th Cir. 2017)(*enforcing* March 18, 2015 finding of maintenance of unlawful work rules); *T-Mobile USA, Inc.*, JD(NY)-34-15 (August 3, 2015)(unlawful maintenance of confidentiality rule and threat of discipline for engaging in protected activity), *adopted in absence of exceptions*, 2015 N.L.R.B. LEXIS 705 (2015). *See also*, ALJ's description of litigated cases at JDA0012.

the trial was on October 4, 6 and 7, and November 3 and 4, 2016; and the ALJ's decision issued on April 3, 2017, finding largely in favor of CWA.

The ALJ found that T-Mobile's maintenance of T-Voice violated NLRA Section 8(a)(2), as T-Voice is a Section 2(5) labor organization dominated, supported and influenced by T-Mobile. Slip op. at 28. The ALJ determined that T-Voice met each of the three required criteria. First, employees participate in T-Voice in a representative capacity. JDA0026, 0027-28.

Second, T-Voice exists, at least in part, for the purpose of "dealing with" T-Mobile. JDA0026-27. The ALJ concluded that T-Voice representatives' collection of employee pain points, attendance in focus groups with management, T-Mobile's pattern and practice of responses and of crediting T-Voice with raising employee issues and getting results support a "dealing with" finding. *Id.* She considered T-Mobile's emails about T-Voice and SharePoint responses to entries as admissions against interest. JDA0025 n. 32. Thus, the ALJ found that the pattern and practice of submitting pain points constituted making proposals for workplace changes and rejected the notion that gathering and submitting pain points was merely a suggestion box procedure. JDA0026-27. She also found that T-Voice representatives' participation in focus groups with management about workplace issues constituted more than a screening, brainstorming or information-

sharing function, and was, instead, a bilateral mechanism to address pain points. JDA0027.

Third, discrediting T-Mobile's witnesses' testimony that T-Voice was only supposed to collect customer pain points, the ALJ determined that the "dealing with" concerned diverse working conditions, such as paid time off, the loyalty program and rewards through metrics, and noted that T-Mobile credited T-Voice with achieving improvements regarding the first two. JDA0026-27.

The ALJ then found unlawful domination, as T-Mobile undisputedly created and financially supports T-Voice, determined its structure and function, and enables its continued administration and existence. JDA0028.

The ALJ also found that T-Mobile unlawfully solicited employee complaints and impliedly promised remedies through T-Voice during an ongoing organizing campaign. JDA0012, 0029.

T-Mobile filed exceptions to the ALJ's decision, and the Board, on September 30, 2019, reversed it. It disagreed that T-Mobile violated NLRA Section 8(a)(2), concluding that T Voice did not meet the "dealing with" criterion, and thus was not a statutory labor organization. JDA0006, 0009.

The Board confirmed that the first criterion of employee participation was met. Slip op. at 2. The Board quibbled with the finding that the third criterion – that issues concern working conditions – was met, characterizing employee pain

points versus customer pain points as few. JDA0006. But, sidestepping this, it said that, even if all pain points concerned working conditions, T-Voice still is not a labor organization, as it is not a bilateral process in which T-Voice representatives made proposals to which management responded with acceptance or rejection. JDA0006-07. It concluded that T-Voice functioned as merely a unilateral “suggestion box.” JDA0006. Further, it found T-Mobile’s own crediting of T-Voice with achieving working conditions’ improvements was uncorroborated; and when T-Voice representatives made metrics suggestions at a summit, management did nothing with them. JDA0008-09.

The Board also disagreed that T-Mobile violated NLRA Section 8(a)(1), finding that there was no active union campaigning or election imminent. JDA0009.

STANDING

Under 29 U.S.C. §160(f), CWA has standing as an aggrieved party to a final Board order.

ARGUMENT SUMMARY

The Board’s factual determination is built on distortions of the record. Indispensable to that picture concerning T-Voice’s statutory labor organization status is the omission of the ALJ’s evidentiary ruling that T-Mobile’s “emails discussing T-Voice, T-Voice results, the T-Voice representatives’ roles” and T-

Mobile's "SharePoint responses to entries" are its admissions against interest, admissions which, when given proper effect, establish every fact necessary to finding T-Voice a Section 2(5) labor organization. The Board neither acknowledged this ruling nor gave effect to the admissions. By ignoring these admissions, the Board, without explanation, deviated from its own precedent that considers such admissions to establish the facts they set forth. Further, indispensable to the Board's fact construction is its reliance upon testimony discredited by the ALJ, despite its assertion that it would not disturb her credibility determinations, and upon misrepresentations of other testimony and of T-Mobile documents. Armed with these distortions, it differentiated this case from the long line of Board decisions finding violations based upon facts similar to those actually here. However, when the full record, the ALJ's fact findings, and the relevant case law is considered, the conclusion is inescapable that T-Voice is a Section 2(5) labor organization, and, consequently, that T-Mobile violated Section 8(a)(2).

The Board's treatment of the record regarding whether T-Mobile's undisputed solicitation of grievances violated Section 8(a)(1) is no more sound. To conclude that there was no ongoing organizing when T-Mobile implemented T-Voice, the Board ignored T-Mobile's acknowledgement that organizing at the time was active and that it held anti-Union meetings to counter the organizing, as well as other evidence of organizing, such as that set forth in *T-Mobile USA, Inc.*, 365

N.L.R.B. No. 15, slip op. at 4-5, 11 (2017), and improperly discounted as evidence of organizing the ongoing litigation concerning the organizing. And, in regarding the absence of a pending representation petition as valid evidence that there was no ongoing organizing, the Board, without explanation, abandoned longstanding precedent that no such petition is necessary to finding unlawful grievance solicitation. When all is considered, no other conclusion can be reached but that T-Mobile violated Section 8(a)(1).

ARGUMENT

I. STANDARD OF REVIEW.

The Court should set aside the Board's findings when they are not supported by substantial evidence, or the Board acts arbitrarily or otherwise errs in applying law to facts. *General Teamsters Local Union No. 174 v. N.L.R.B.*, 723 F.2d 966, 970 (D.C. Cir. 1983)(citing 29 U.S.C. §160(e)). The substantial evidence test requires the Board "to take account of contradictory evidence," *Lakeland Bus Lines, Inc. v. N.L.R.B.*, 347 F.3d 955, 962 (D.C. Cir. 2003), and to explain why it rejected contrary evidence, *Int'l Union, UAW v. Pendergrass*, 878 F.2d 389, 392 (D.C. Cir. 1989). Evidence supporting the Board's conclusions may be given less weight where an impartial, experienced examiner, who has observed the witnesses

and lived with the case, has drawn conclusions different from the Board's.

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 496 (1951).

These principles are applicable to each of the issues under review.

II. THE BOARD'S CONCLUSION THAT T-VOICE IS NOT A SECTION 2(5) LABOR ORGANIZATION IS CONTRARY TO THE EVIDENCE AND THE ALJ'S EVIDENTIARY RULINGS.

A. The Sections 2(5) and 8(a)(2) Framework.

NLRA Section 8(a)(2) provides that it is unlawful for an employer:

[T]o dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

29 U.S.C. §158(a)(2)(2018). The definition for Section 8(a)(2)'s term of "labor organization" is set forth in NLRA Section 2(5) as:

[A]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. §152(5)(2018).

In its seminal Section 8(a)(2) decision, *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994), the Board observed that Congress abolished employer-dominated organizations as an essential means to achieving the Act's purpose of eliminating industrial strife by encouraging collective bargaining, and, accordingly, defined "labor organization" broadly. 309

N.L.R.B. at 992-95. The *Electromation* Board articulated the criteria for determining Section 2(5) labor organization status, stating:

The organization at issue is a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of “dealing with” employers, and (3) these dealings concern “conditions of work” or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay or hours of employment. Further if the organization has as a purpose the representation of employees, it meets the statutory definition of “employee representation committee or plan” under Section 2(5) and will constitute a labor organization if it also meets the criteria of employee participation and dealing with conditions of work or other statutory subjects.

309 N.L.R.B. at 994.

Here, the Board identified the second criterion, “dealing with”, as its primary focus.⁸³ In keeping with Congress’s definition of “labor organization,” the Board and courts have interpreted the “dealing with” element broadly to encompass and prohibit varied employer-dominated organizational forms even where those entities do not “bargain with” the employer in the usual sense. *See, e.g., N.L.R.B. v. Cabot Carbon Co.*, 360 U.S. 203, 211-214 (1959)(employee-committee system “dealt with” the employer where employee representatives regularly met with management to discuss matters of mutual interest, including working conditions, regardless of whether the recommendations were ever approved); *Thompson Ramo Wooldridge, Inc.*, 132 N.L.R.B. 993 (1961), *modified*

⁸³ JDA0006.

and enforced, 305 F.2d 807 (7th Cir. 1962)(presentation to management of employee views through an employee association, even without specific recommendations, constitutes “dealing with”). And, in *Electromation*, “action committees” composed of management and employees – who, unlike here, were volunteers not even selected by the employer – were considered Section 2(5) labor organizations as they sought resolution of matters causing employee disaffection, and, like here, the expectation was they would solicit co-workers’ views. 309 NLRB at 997.

Indeed, a bilateral mechanism suffices to establish “dealing with,” which ordinarily “entails a pattern or practice in which a group of employees, over time, makes proposals to management, and management responds to those proposals by acceptance or rejection by word or deed.” *Polaroid Corp.*, 329 N.L.R.B. 424, 425 (1999), citing *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993).

B. The Board Ignored the ALJ’s Evidentiary Determinations and Mischaracterized Evidence.

1. The Board Failed to Acknowledge and Give Effect to the ALJ’s Rulings Concerning T-Mobile’s Admissions Against Interest.

The Board concluded that T-Voice was not a labor organization on the ground that there was insufficient evidence that T-Voice representatives “dealt

with” management.⁸⁴ But, to conclude this, the Board ignored T-Mobile’s admissions against interest, which established every fact needed to find labor organization status, including “dealing with.”

Citing *Ferguson Enterprises, Inc.*, 355 N.L.R.B. 1121 n. 2 (2010), the ALJ determined that, excluded from the definition of hearsay under Federal Rule of Evidence (Fed.R.Evid.) 801(d)(2), was a body of T-Mobile documents created by its supervisors and agents that constituted T-Mobile’s admissions against interest, comprised of T-Mobile’s “emails discussing T-Voice, T-Voice results, the T-Voice representatives’ roles,” and T-Mobile’s “SharePoint responses to entries.”⁸⁵

⁸⁴ JDA0007, 0009.

⁸⁵ JDA0025 n. 32; *see also*, at JDA0021, n. 26. These admissions against interest included, among others, JDA0557-558; JDA0559; JDA0560-562; JDA0563; JDA0564; JDA0565; JDA0568-569; JDA0570; JDA0572; JDA0573; JDA0574-575; JDA0576; JDA0577-578; JDA0580; JDA0584-585; JDA0586-587; JDA0588; JDA0597-598; JDA0599-601; JDA0602; and JDA0604-605; JDA0606-622; JDA0625-667; JDA0669-730; JDA0731-37; JDA0741-758; JDA0761-775; JDA0777-853; JDA0856-60; JDA0861-962; JDA0963-1020; JDA1041-42; JDA1043-44; JDA1045-52; JDA1053; JDA1054-55; JDA1075-1076; JDA1089-97; and JDA1361-1623.

The Board did not address the ALJ's hearsay rulings. Instead, it wrongly asserted that, even if admitted, none of the evidence would change the outcome.⁸⁶ Had the Board followed its existing precedent, which gives this body of documents, as admissions against interest, dispositive evidentiary effect, the outcome necessarily would have been a finding that T-Voice dealt with management concerning employment terms and conditions.

In *Ferguson*, the Board held that a supervisor's uncorroborated statement admitting an unlawful reason for layoffs was, standing alone, substantial evidence and not hearsay under Fed.R.Evid. 801(d)(2). 355 N.L.R.B. at 1121 n. 2. Four years later, the Board applied Fed.R.Evid. 801(d)(2) to find that a party-opponent's written admission against interest establishes the facts asserted even if there is no corroboration. *Alternative Energy Applications, Inc.*, 361 N.L.R.B. 1203, 1206 (2014). In *Alternative Energy*, OSHA investigated possible retaliation after an employee filed an OSHA complaint and was fired. *Id.* at 1204. In its defense, the employer said the employee was fired because he "had disclosed his rate of pay to other employees." *Id.* The employee filed a meritorious ULP charge with the N.L.R.B. The ALJ, stating that the employer's letter was the only evidence that the employee talked with co-workers about wages, found it insufficient to satisfy the General Counsel's burden of proof. *Id.* at 1215. The Board reversed.

⁸⁶ JDA0001 n. 2.

Observing that the employer's defense letter statement constituted an admission against interest, the Board held the statement alone sufficient to establish the employer's unlawful motive, rejecting the ALJ's view that an admission against interest requires corroboration to establish a fact. *Id.* at 1215-16. *See also, United Technologies Corp.*, 310 N.L.R.B. 1126, 1127 n. 1 (1993), *enforced sub nom.*, *N.L.R.B. v. Pratt & Whitney*, 29 F.3d 621 (2d Cir. 1994) ("An admission against interest may be used as evidence as well as to impeach"); *Carpenters & Millwrights, Local Union 2471*, 481 F.3d 804, 812-13 (D.C. Cir. 2007) (A party's admission against interest established the fact on which the corporate veil could be pierced and liability imposed).

Here, the Board acknowledged that T-Mobile's emails attributing favorable working conditions changes to T-Voice were "probative" regarding "dealing with." But, despite the case law cited above, it found T-Mobile's attributions insufficient to demonstrate "dealing with" on the sole ground that they were unsupported by other evidence.⁸⁷ However, under *Ferguson* and *Alternative Energy*, when properly treated as admissions, the body of documents established that T-Voice

⁸⁷ JDA0008. Discussing just T-Mobile's attribution emails, the Board appears to have ignored the admission-against-interest nature of the three other document groups referenced by the ALJ – T-Mobile's emails describing T-Voice, its emails about T-Voice representatives' roles, and its SharePoint responses. Notably, there is no documentary evidence which contradicts T-Mobile's admissions against interest, nor which supports T-Mobile witnesses' testimony that T-Voice representatives acted merely as automaton suggestion boxes.

“dealt with” T-Mobile and met the other criteria for labor organization status under NLRA Section 2(5).⁸⁸

First, T-Mobile’s body of emails that discussed T-Voice described it as an entity – a “group” or “team” composed of T-Voice representatives on one hand, and T-Mobile managers and corporate support personnel on the other – whose purpose, in part, was to identify, discuss and communicate solutions to employee pain points.⁸⁹ Second, T-Mobile’s emails that discussed T-Voice representatives’ roles identified them as T-Mobile-selected employees responsible for gathering employee pain points, creatively developing solutions to them, presenting those pain points and solutions to management, and advising coworkers of management’s responses.⁹⁰ Thus, these admissions against interest established the first two of the Board’s three criteria for determining labor organization status – one, that employees participate in the T-Voice entity, and two, that its purpose, at least in part, be to deal with management.⁹¹

Third, T-Mobile’s emails that discussed T-Voice’s results credited “the T-Voice team” – which included employee T-Voice representatives – with

⁸⁸ *Electromation*, 309 N.L.R.B. at 994.

⁸⁹ Case Stmt. Sect. B.1.

⁹⁰ *Id.*

⁹¹ *See* Arg. Sect. II.A.

improvements in employment terms and conditions such as leave time, the Loyalty Program, metrics, and others.⁹² Finally, T-Mobile's SharePoint responses, which the ALJ addressed in comprehensive detail, demonstrate that T-Mobile considered T-Voice representatives' proposals regarding these same employment terms and conditions and accepted some and rejected others.⁹³ Thus, these admissions against interest established the final criterion – that T-Voice's dealing with management concerned working conditions.⁹⁴

In sum, given proper treatment under *Ferguson* and *Alternative Energy* as dispositive evidence, T-Mobile's admissions against interest establish T-Voice's status as a Section 2(5) labor organization.

2. The Board Relied Upon Discredited Testimony, Mischaracterized Testimonial and Documentary Evidence, and Ignored Other Evidence.

The Board rejected T-Mobile's challenges to the ALJ's credibility determinations, noting that the Board does not disturb such determinations unless "the clear preponderance of all the relevant evidence" persuades the Board that they are erroneous, and said "[w]e have carefully examined the record and find no

⁹² Case Stmt. Sect. C.6.

⁹³ JDA0018-24; Case Stmt. Sect. C.5.

⁹⁴ *Electromation*, 309 N.L.R.B. at 994.

basis for reversing the findings.”⁹⁵ Yet, to reach its no “dealing with” result, the Board heavily relied upon testimony discredited by the ALJ, despite indicating that it was not disturbing the ALJ’s credibility determinations.

For example, parallel to ignoring the ALJ’s ruling that T-Mobile’s emails attributing the Loyalty Program to T-Voice constituted admissions against interest, the Board cited to discredited testimony to support its views that the emails were uncorroborated and there was no “dealing with.” It twice favorably cited Tolman’s discredited testimony about T-Voice’s role in the Loyalty Program.⁹⁶

As another example, in aid of its unilateral “suggestion box” conclusion, the Board sought to portray T-Voice representatives’ roles in meetings as passive, and communications as one-sided. But, it built this picture on Tolman’s discredited testimony, as well as distortions of other evidence. The myVOC metric improvements discussion involving T-Voice representatives and T-Mobile at the August 2015 national meeting exemplifies this. The Board said T-Mobile was doing no more with this discussion than asking T-Voice representatives to “share” the improvements with coworkers.⁹⁷ But, the ALJ discredited Tolman’s testimony

⁹⁵ JDA0001 n. 3.

⁹⁶ JDA0003, 0008, 0018-19.

⁹⁷ JDA0004.

in this regard, noting contradictions to it in Respondent's SharePoint program."⁹⁸ The Board's "merely sharing" characterization also overlooked three other evidentiary items: (1) in the meeting, management was advising T-Voice representatives of the improvements in response to the top July T-Voice pain point⁹⁹, which had been "a hot topic of discussion"¹⁰⁰; (2) two days after the meeting, V.P. Woods credited T-Voice with the myVOC improvements¹⁰¹; and (3) V.P. Woods' attribution email was among those which the ALJ determined were T-Mobile's admissions against interest,¹⁰² not addressed by the Board¹⁰³.

The Board's portrayal of evidence concerning the October 2015, Charleston summit similarly exemplifies its effort to paint T-Voice representatives as passive, despite the contrary evidence. The Board discounted the proposals made by T-Voice representatives in the summit's metrics focus group as evidence of "dealing with", twice asserting that Tolman testified that nothing was done in response to

⁹⁸ JDA0016.

⁹⁹ JDA0016; JDA0476-478; JDA0718-25.

¹⁰⁰ JDA0023; JDA1125/1388-1.

¹⁰¹ JDA0016; JDA0619-620.

¹⁰² JDA0619-620; JDA0025 n. 32, and JDA0021 n. 26; *see also*, Arg. Sect. II.B.1., n.85.

¹⁰³ JDA0004 n. 16; *see also* Arg. Sect. II.B.1..

them.¹⁰⁴ But, this misstated her testimony. She testified only that she did not participate in the metrics focus group, and that she herself did nothing after receiving minutes of the session; she did not testify that no other manager responded to the proposals.¹⁰⁵ Indeed, the evidence is that management did consider some of the suggested concepts.¹⁰⁶ And, the Board failed to address the ALJ's discrediting of Tolman's claim that no pain point consensus was reached or solutions discussed during the summit, as she noted that Tolman's summit planning emails conflicted with this assertion and that T-Mobile's internal news article touted T-Voice representatives' pain points' resolutions.¹⁰⁷ Instead, it mischaracterized the news article.¹⁰⁸ The Board discounted the article as "dealing with" evidence, saying it "made no mention of any deliberation among T-Voice representatives as a group."¹⁰⁹ No such deliberation requirement regarding a group's internal processes exists in Section 8(a)(2) Board jurisprudence.¹¹⁰ But,

¹⁰⁴ JDA0005, JDA0009 n. 28.

¹⁰⁵ JDA0022; JDA0471-72.

¹⁰⁶ See description of management's consideration in Case Stmt. Sect. C.4., n.54-8.

¹⁰⁷ JDA0014. See also, discussion of management tweets bragging of pain points resolutions at Case Stmt. Sect. C.4., n.55, 57.

¹⁰⁸ JDA0018; JDA1040; see also, Case Stmt. Sect. C.4., n.58.

¹⁰⁹ JDA0005.

¹¹⁰ Argument Section (Arg. Sect.) III. Cf., *Electromation*, 309 N.L.R.B. at 994.

even if it did, the Board avoided citing or addressing the very parts of the article which evidenced group T-Voice deliberation: the article's description of T-Voice as a "group" of representatives, and the quoted praise by V.P. Woods for T-Voice's success in "making real change" and for the summit's production of shared ideas to "take back" to workplaces.¹¹¹

The Board's mischaracterization of evidence regarding the January 2016 national meeting provides another example of misuse of evidence to paint T-Voice representatives as passive. The Board labeled their proposals for changes in employee training language as mere "feedback."¹¹² But, this ignored that management itself first elicited the T-Voice representatives' proposals and then, once received, agreed to them,¹¹³ the essence of bilateral dealing.

The Board's evidentiary mischaracterizations aimed at minimizing T-Voice representatives' bilateral communications with management extended to SharePoint. To support its picture, the Board asserted that T-Voice representatives recorded in SharePoint nearly every pain point that came to them "verbatim", that there is no evidence that they modified more than an "occasional" one, that there was only one SharePoint entry in which a T-Voice representative explained the

¹¹¹ Compare JDA1040 with Board's description at JDA0005.

¹¹² JDA0004 n. 17.

¹¹³ JDA0497-0500; JDA0754; *see also*, Case Stmt. Sect. C.1., n.27.

pain point.¹¹⁴ To create this picture, the Board ignored (1) T-Mobile's training for T-Voice representatives, in which they were trained to explain pain points (2) the numerous SharePoint entries in which they did so;¹¹⁵ (3) their training to avoid duplicates; and (4) the numerous SharePoint entries in which they synthesized similar pain points received from multiple sources into one entry.¹¹⁶

As a final example regarding the Board erroneously depicting minimal bilateral communication, the Board asserted that the record revealed just one "instance where a T-Voice representative did more than enter a pain point into SharePoint," citing a T-Voice representative's email to Senior V.P. Field proposing dual monitors.¹¹⁷ But, the record contains numerous other instances, among them an Oakland T-Voice representative's iOCR metric suggestion,¹¹⁸ stand-alone written proposals;¹¹⁹ and multiple other proposals T-Voice representatives made in focus groups, other meetings with management, and summits.¹²⁰

¹¹⁴ JDA0002, 0006, 0007 n. 24.

¹¹⁵ Case Stmt. Sects. B.1., n. 14-18; C.5., n.62-66.

¹¹⁶ Case Stmt. Sect. C.5., n.62.

¹¹⁷ JDA0003 n. 11; JDA0665-666.

¹¹⁸ JDA0015; JDA0816-817.

¹¹⁹ Case Stmt. Sect. C.3.

¹²⁰ Case Stmt. Sects. C.1, C.2, C.4.

Although the Board conceded that T-Voice addressed statutory subjects, it distorted the record even regarding this, depicting employee pain points as insignificant in asserting that, compared with customer issues, they were few.¹²¹ But, this overlooked that the number of employee pain points reflected in SharePoint was deflated due to the prohibition against duplicates, and that management responded to employee-only concerns and, in emails and internal newsletters, credited T-Voice with changes in working conditions, not customer-only matters, of great importance to employees – all of which the ALJ considered when rejecting T-Mobile’s assertion that employee pain points were *de minimus*.¹²² As to SharePoint entries, despite accepting metrics as employee-related,¹²³ the Board characterized employee pain points as a “small number,” even though a simple search for metrics-related terms reveals that there are hundreds of SharePoint entries directly referencing metrics. The ALJ said she identified over 30 metrics-related pain points in SharePoint, and indeed, many more are readily identifiable.¹²⁴ There are hundreds more that complain of slow or malfunctioning

¹²¹ JDA0002, 0006.

¹²² JDA0027.

¹²³ JDA0002, n. 10.

¹²⁴ JDA0022. Metrics-related terms usable in such a search include “metric”, “CRT”, “iOCR”, “myVOC” and “VOC”, “call back”, “quality score”, “GRE”, “Ops 2.0”, “sales goal”, “UP score” and “UP”, “credit”, “adjustment”, “cancel rate”, and words referencing length of call. See transcript citations in footnote 29.

system tools which impact metrics. The ALJ noted, generally, that underperforming computer systems affected metrics, described a couple instances, and cited one T-Voice representative's observation that "the system" would not allow certain "real time" actions, but there are many more SharePoint entries concerning problematic tools, such as "Samson" (170 responses), "Quikview" (100 responses), and "Grand Central" (250 responses).¹²⁵ And, T-Mobile understood underperforming systems impaired performance, holding an April 2016 national meeting focus group about it.¹²⁶

3. Under Established Precedent in this Circuit, the Court Should Vacate the Board's Decision.

In *Carpenters & Millwrights, Local Union 2471*, 481 F.3d 804 (D.C. Cir. 2007), the Court set aside the only contested portion of a Board order where it found that, in reversing the Judge's piercing of a corporate veil, the Board relied upon discredited testimony, and ignored significant record evidence contrary to its conclusion, including a company principle's admission against interest, all without explanation concerning why it disregarded significant contrary evidence. 481 F.3d at 811 and 811 n. 3, 812-13.

¹²⁵ JDA0012, 0017, 0022. JDA0633,638, 668 and JDA0753-755 (references to the Samson system CSRs use); JDA0406-407 (Quikview is a "tool that we use on top of the billing system."); JDA0668 and JDA0075-77 (referring to the Grand Central system CSRs use).

¹²⁶ JDA0735-736 and JDA0488-91.

Here, the Board provided no explanation for failing to treat as admissions against interest the body of documents the ALJ found to be such. Nor did it explain its reliance upon discredited testimony. Like in *Carpenters & Millwrights*, there is significant record evidence which the Board ignored or mischaracterized that is contrary to the Board's conclusion, and the Board gave no explanation for ignoring such evidence. Thus, like in *Carpenters & Millwrights*, the Board's decision that T-Voice is not a statutory labor organization should be set aside as both unsupported by substantial evidence and arbitrary.

III. ON THIS RECORD AND UNDER EXISTING PRECEDENT, T-VOICE IS A LABOR ORGANIZATION; THE COURT SHOULD VACATE THE BOARD'S DECISION FINDING OTHERWISE, AND REMAND.

The Board's evidence distortions are what enable it to distinguish this case from those on which the ALJ relied to find "dealing with" and statutory labor organization status, and from decades of other Section 8(a)(2) jurisprudence. Until the Board's decision here, numerous cases properly applied the *Electromation* Board's framework to find "dealing with", and thus statutory labor organization status, on facts much like those here. In *Dillon Stores*, 319 N.L.R.B. 1245 (1995), the Board found a sufficient bilateral mechanism where management communicated with employees through an Associates' Committee acting as employees' representative. The Board rejected the notion that the Committee's primary purpose was simply communication so no bilateral mechanism existed, as

at Committee meetings, management received and considered proposals and grievances presented by individual employee Committee members, in question, suggestion or complaint form, on behalf of absent coworkers. 319 N.L.R.B. at 1246, 1250-52. Like in *Dillon Stores*, individual T-Voice representatives, as members of the T-Voice team, soliciting coworkers' working conditions' pain points and bringing them to management's attention as questions, suggestions or complaints for discussion and resolution on behalf of absent workers, coupled with management's consideration, constitutes "dealing with."¹²⁷

Contrary to the Board, who disagreed with the ALJ, the evidence and law support the ALJ's position that the relevant inquiry is whether CSRs relayed proposals to management and management responded.¹²⁸ In *Reno Hilton Resorts*, 319 N.L.R.B. 1154, 1156-1157 (1995), the Board found Quality Action Teams (QATs) were statutory labor organizations. QAT meeting minutes revealed that, on more than an isolated or ad hoc basis, QAT members made proposals or requests, or raised employee concerns, regarding working conditions, and the employer responded. Here, the record is rich with examples, ignored by the Board, of T-Voice members regularly making requests and raising employee concerns over working conditions, and management apparently or actually considering and

¹²⁷ See, JDA0026-27.

¹²⁸ JDA0007, 0026.

responding to those, rendering T-Voice a Section 2(5) labor organization like for the QATs. *See also, e.g., Ryder Distribution Res*, 311 N.L.R.B. 814, 817-818 (1993)(wages and benefits committee was established to poll other employees and problem-solve with management, and was labor organization); *Keeler Brass Auto. Group Div.*, 317 N.L.R.B. 1110, 1113-1114 (1995)(Grievance Committee dealt with employer concerning grievances, including Committee recommendations on discharges, no call no show policy, and grievance procedure itself, to which employer considered and responded, and thus was labor organization); *Yukon Mfg. Co.*, 310 N.L.R.B. 324, 335-336 (1993)(employee committee presented problems to management affecting either all employees or those in specific departments and management made changes in response, rendering it a labor organization).

The Board attempted to fit this case into fact patterns where the Board found no “dealing with.” But, each of the cases the Board relied upon, when applied to the actual evidence, here, requires finding “dealing with” and a labor organization dominated by T-Mobile.

The current Board ignored relevant aspects of *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993), *EFCO Corp.*, 327 N.L.R.B. 372 (1998), *enforced*, 215 F.3d 1318 (4th Cir. 2000), and *Polaroid Corp.*, 329 N.L.R.B. 424 (1999) concerning an employer’s creation of a system of worker representatives communicating on workers’ behalf with management about working conditions,

and management thereafter taking action. Consequently, the Board overemphasized the notion of group proposals, misapplying *E.I. du Pont* and *Polaroid* when contending that they stand for the proposition that the employee group must make “*group* proposals to management” to be a labor organization.¹²⁹ Rather, these decisions hold that “the bilateral mechanism entails a pattern or practice in which a group of employees, over time, makes proposals to management, and management responds to those proposals by acceptance or rejection by word or deed.” *Polaroid*, 329 N.L.R.B. at 425, citing *E.I. du Pont*, 311 N.L.R.B. at 894 (to establish dealing with, the evidence must show a pattern or practice or a purpose to have a pattern or practice of making proposals, not ad hoc proposals, and compromise is not a necessary element). But, neither decision requires that the group, as a collective, bring each proposal to management’s attention. Instead, members of the group must bring proposals to management, over time. As the *Dillon Stores* facts and holding demonstrate, for there to be “dealing with”, it matters not whether one member of the employee group who represents coworkers’ views brings,¹³⁰ or all members of the employee group

¹²⁹ JDA0008 n. 26 and 0009 (emphasis in original).

¹³⁰ The Board’s notion that T-Voice representatives only expressed their *personal* opinions (JDA0004, and JDA0008 n. 27) is not supported by the evidence, and is a nonsensical inference, as they were specifically tasked with soliciting co-workers’ pain points and were chosen for long terms to effectively voice those pain points. While the ALJ may have said their opinions were “personal” in national meetings

together agree to bring, working conditions concerns to management over time. Further, as found by the ALJ, that T-Voice representatives were chosen for six- and nine-month terms to effectively solicit, voice and address co-workers' pain points supports that theirs was not participation on an individual basis, a finding that the Board ignored.¹³¹

E.I. du Pont de Nemours & Co. was cited by the Board for the proposition that, if an employee committee's only purpose is sharing information with the employer, with which the employer does as it wishes, there is no "dealing with."¹³² But this comparison with T-Voice is inapposite. In *E.I. du Pont*, several employee committees operating in a unionized setting were found to be unlawful labor organizations because, as here, they exceeded the "safe havens" of existing simply to brainstorm, share information, or individually make suggestions. 311 N.L.R.B. at 894-95. The only lawful cooperative effort was a quarterly conference whose purpose was for employees to provide safety suggestions, where, unlike here, the structure was not designed to allow committee members and management to address working conditions. *Id.* at 896-97. Further, T-Mobile's admissions against

(JDA0015), she also found that T-Voice representatives acted in those same meetings in a representational capacity (JDA0027). The Board ignored this finding.

¹³¹ JDA0026, 0002, 0006.

¹³² JDA0006.

interest, improperly ignored by the Board,¹³³ demonstrated that T-Voice existed for the bilateral communication purpose of “rais[ing] Frontline and customer pain points to ensure that they are resolved an [sic] then results are communicated back to the Frontline.”¹³⁴

Second, the Board cited *EFCO Corp.* for support, on the asserted ground that T-Voice forwarded a majority of suggestions to management without providing recommendations.¹³⁵ But, as discussed above, this ground is contradicted by T-Voice representatives’ actual roles in meetings with management, SharePoint submissions, and stand-alone written proposals. Indeed, given the actual evidence, *EFCO* supports finding T-Voice a labor organization. In *EFCO*, the Board found that employee benefits, policy review, and safety committees were labor organizations because, as here, they operated in representational capacities and were an integral part of a bilateral process involving employees and management with the purpose of affecting those matters, unlike the employee suggestion screening committee, which performed clerical or ministerial functions by merely screening an “employee suggestion box.” The Board equated T-Voice representatives’ functions with the ministerial task the *EFCO* employee

¹³³ See Arg. Sect. II. B.1.

¹³⁴ JDA0002, 0013; JDA0557-558, JDA0577-578. See also, Case Stmt. Sect. C.1.

¹³⁵ JDA0007.

suggestion committee performed, asserting that T-Voice representatives did not “weed out” CSRs’ suggestions, merely entering them in SharePoint verbatim.¹³⁶ Yet, as discussed above, that contradicts the evidence that T-Voice representatives were trained to analyze each pain point, exercise judgment concerning whether to submit it, explain it, provide examples, and be creative when suggesting solutions.¹³⁷ Moreover, T-Mobile responded to their SharePoint suggestions.¹³⁸ But, even if the facts supported the Board’s contention that T-Voice representatives did no “weeding out”, such is not required to find “dealing with” here, as T-Voice clearly was intended to be, and operated as, a bilateral mechanism for T-Voice representatives, on behalf of their peers, to address employee pain points with management. Further, the Board conceded, as it must, that T-Voice representatives provided recommendations in some instances.¹³⁹

Third, the Board cited *Polaroid* in support of the proposition that T-Voice representatives as a group did not make group proposals, and therefore, it was not a

¹³⁶ JDA0006, 0007.

¹³⁷ Case Stmt. Sect. B.1., n.11-17.

¹³⁸ JDA0017-24.

¹³⁹ JDA0002 n. 8, and JDA0015 (emailed); JDA0004 (at Sept. national meeting) and JDA0004 at n. 17 (at other meetings and focus groups); JDA0005 (Charleston summit metrics focus group); JDA0007 n. 24 (in SharePoint); JDA0008 (national meeting focus groups).

labor organization.¹⁴⁰ This ground, too, is contrary to the evidence. T-Mobile’s admissions against interest¹⁴¹ repeatedly referred to T-Voice as a “group” when attributing to it improved working conditions and successful pain points’ resolutions at summits,¹⁴² admissions which the Board ignored in ascribing to T-Voice representatives a lack of group behavior. But, even without this evidence, “dealing with” must be found, for group proposals are not required. In *Polaroid*, the Board found the employer’s Employee-Owner’s Influence Council (EOIC) met the “dealing with” factors because it was not a unilateral mechanism akin to suggestion boxes, or to brainstorming groups whose purpose is merely to develop ideas. 329 N.L.R.B. at 429. Like for T-Voice here, the employer repeatedly emphasized the EOIC’s significant input and influence on management decisions, which, in *Polaroid*, underlay, the Board’s conclusion that EOIC was operated to create the impression that employee disagreements with management had been resolved bilaterally. *Id.* at 432. And, like T-Voice here, the EOIC acted in a representational capacity as evidenced by the employer encouraging EOIC members to communicate with co-workers about their issues and to report back, this back and forth conduct indicating a representational purpose. *Id.*

¹⁴⁰ JDA0008-9.

¹⁴¹ *See Arg.* Sect. II.B.1.

¹⁴² Case Stmt. Sects. C.4., n.58; C.6.

To conclude that T-Voice was merely a suggestion box device, and hence there was no “dealing with”, the Board ignored contrary evidence to regard T-Voice representatives’ roles as minimal, their duties as limited to mere brainstorming and verbatim transcription of pain points. But, as discussed above, the evidence establishes that T-Voice representatives did much more than this.¹⁴³ T-Mobile created a bilateral communication pattern and practice in which T-Voice representatives solicited CSR’s pain points, promised review of them, developed creative solutions, made suggestions to management for their resolution, and updated their peers on resulting changes after consideration by management, with some accepted and some rejected.¹⁴⁴ T-Voice representatives met weekly with senior managers admittedly to “discuss past successes and disappointments,”¹⁴⁵ regularly attending management meetings, and participating in monthly regional and national conference calls and focus groups with senior managers and T-Voice program managers, in each instance addressing, at least in part, employee “pain points” collected from CSRs.¹⁴⁶

¹⁴³The Board here did not even conclude that T-Voice representatives screened pain points, despite their training to do so. *See*, JDA0006 (“T-Voice did not screen pain points, develop, as a group, its own proposals for their resolution, or engage in any bilateral dealing with the Respondent over those matters.”)

¹⁴⁴ Case Stmt. Sects. B.1.; C.

¹⁴⁵ JDA0003.

¹⁴⁶ Case Stmt. Sects. C.1., C.2., C.4.

The Board referenced Senior T-Voice Program Manager Tolman’s self-serving testimony to support its conclusions, but her testimony does the opposite. For example, the Board cited Tolman’s testimony that, during one call center’s focus group, T-Voice representatives got “off track” when bringing up employee frustrations, prompting her to close the focus group and advise that managers focus on customer needs.¹⁴⁷ But, this demonstrates that both T-Voice representatives and managers believed they were to address employee pain points together. The Board also noted that Tolman scheduled a metrics focus group for the February 2016 national meeting, but cancelled it after the union filed its charge.¹⁴⁸ Again, this supports the conclusion that even she believed T-Voice representatives were to engage about employee pain points together – that is until the charge was filed – and belies the Board’s later assertion that national meeting focus groups concerned only customer- or business-related matters.¹⁴⁹ And, the Board asserted that, even assuming that T-Voice representatives made proposals to management at the Charleston summit, Tolman testified that no follow-up actions were taken.¹⁵⁰ However, as noted in this brief, the Board mischaracterized this testimony, and

¹⁴⁷ JDA0003 n. 12.

¹⁴⁸ JDA0004.

¹⁴⁹ JDA0008.

¹⁵⁰ JDA0005.

ignored that the ALJ discredited Tolman's testimony claiming no pain point solutions were discussed or consensus reached as contradicted by other evidence,¹⁵¹ and, even had the ALJ not, no final actions are required to find a bilateral mechanism supporting "dealing with."

Indeed, this case is remarkably similar to that of *Ead Motors Eastern Air Devices, Inc.*, 346 N.L.R.B. 1060 (2006), where an employer violated Section 8(a)(2) by setting up a "Have your say" committee. There, like here, the employer established the committee, chose employee committee members, encouraged employees to advise members of their concerns, held meetings to discuss these concerns that management and members attended during work time, and changed policies based thereon. 346 N.L.R.B. at 1076-77. The Board agreed with the ALJ, in the absence of exceptions, that the committee was a labor organization which the employer assisted and dominated in violation of the Act. *Id.* at 1060.

Finally, the Board should not have ignored or discounted that the T-Voice team acted in a representational capacity and was integral to a bilateral process involving employees and management with the purpose of affecting workplace issues, nor that T-Mobile held out the T-Voice team, not any individual member,

¹⁵¹ JDA0014. *See also*, Arg. Sect. II.B.3., n.105-07. Similarly, the Board discounted Manager Appleton's plan to have T-Voice representatives discuss a metric. JDA0003 n. 13. His conduct demonstrates that T-Voice representatives were to address employee pain points. Yet, the Board asserted that the record was silent concerning what happened at and after the meeting. *Id.*

as a collective that could resolve employee pain points.¹⁵² Had it properly applied *E.I. du Pont de Nemours & Co., EFCO*, and *Polaroid*, to these facts, the Board would have had no choice but to find “dealing with” and T-Voice an unlawful labor organization.

IV. AS T-VOICE IS A STATUTORY LABOR ORGANIZATION, AND T-MOBILE ADMITS ITS DOMINATION OF T-VOICE, T-MOBILE VIOLATED SECTION 8(a)(2), AND THE BOARD ERRED IN FAILING TO SO FIND.

The issue here is whether T-Voice is a labor organization. Not before the Court is whether T-Mobile dominates, interferes with or supports T-Voice as contemplated under Section 8(a)(2), as T-Mobile has never disputed that it does. Instead, T-Mobile stipulated that “T-Voice is a T-Mobile USA, Incorporated program that is entirely funded by T-Mobile USA, Incorporated.”¹⁵³ This is sufficient to establish domination, support, and interference.

Yet, even without T-Mobile’s admission, the un rebutted evidence shows that T-Mobile created T-Voice, determined its purpose and structure, set the agendas

¹⁵² While the Board ignored many relevant facts and circumstances, it did reference some pain points for which the T-Voice team as a collective was held out by T-Mobile as resolving, including: a loyalty recognition program, Wi-Fi connectivity, device charging stations, available paid time off, and dual monitors. *See Webcor Packaging*, 319 N.L.R.B. 1203 (1995), *enforced*, 118 F.3d. 1115 (6th Cir. 1997), where the Board found that employer approval of suggestions in four instances met the dealing with requirement.

¹⁵³ JDA0014, 0028; JDA0044.

for all T-Voice meetings, determined the number of T-Voice representatives, selected which employees would serve as T-Voice representatives, determined the length of the T-Voice representatives' terms, and appointed management personnel to direct T-Voice at local, regional and national levels.¹⁵⁴ In addition, T-Mobile paid T-Voice Representatives for time spent on T-Voice duties, provided resources and office space for T-Voice functions, and fully funded all other T-Voice activities, including the annual T-Voice national summits.¹⁵⁵ In essence, as the ALJ found, the continued existence of T-Voice was fully dependent upon T-Mobile, and T-Mobile unlawfully dominated it.¹⁵⁶

V. THE BOARD'S CONCLUSION THAT T-MOBILE DID NOT UNLAWFULLY SOLICIT GRIEVANCES AND IMPLIEDLY PROMISE REMEDIES IS CONTRARY TO THE EVIDENCE AND TO PRECEDENT, AND SHOULD BE VACATED.

In the absence of a previous practice of doing so, an employer violates NLRA Section 8(a)(1), 29 U.S.C. §158(a)(1)(2018) by soliciting grievances with an explicit or implied promise of remedy in the midst of its employees' organizing efforts. *Amptech, Inc.*, 342 N.L.R.B. 1131, 1137 (2004), *enforced*, 165 Fed. Appx.

¹⁵⁴ JDA0028. *See also*, JDA0414-415, 0448-449, 0453-454; JDA0589; JDA0599-601; JDA1077-88; JDA1625-626.

¹⁵⁵ JDA0012, 0014, 0028. *See also*, JDA0423; JDA1077-88; JDA0672-675; JDA0731; Case Stmt. Sect. B.1., n.19.

¹⁵⁶ JDA0028, 0029. *See also*, *Polaroid*, 329 N.L.R.B. at 429 (finding employer domination, employer support and employer interference under circumstances similar to those here).

435 (6th Cir. 2006); *Center Service System Div.*, 345 N.L.R.B. 729, 730 (2005), *enforced in part sub nom.*, *Center Construction Co. v. N.L.R.B.*, 482 F.3d 425 (6th Cir. 2007).

The Board did not disturb the ALJ's finding that T-Mobile, through T-Voice, solicited employee grievances with implied promises of remedy.¹⁵⁷ Instead, relying on *Leland Stanford Jr. University*, 240 N.L.R.B. 1138 (1979), the Board concluded that T-Mobile did not engage in unlawful solicitation because the Union's campaign had existed for several years and that, in its view, there was no evidence of any organizational efforts when T-Mobile implemented T-Voice.¹⁵⁸ In reaching this conclusion the Board erred by ignoring unrebutted evidence of active organizing, including T-Mobile's contemporaneous conduct in response to the organizing, and by discounting active litigation of related charges.

In *Leland Stanford Jr. University*, objections to an election had been pending for two years. While the objections were pending, the employer distributed a survey to employees, part of which solicited grievances. The Board found that the solicitation did not violate the Act as, "both prior and subsequent to the distribution of the survey, there was no active campaigning on the part of either the Union or

¹⁵⁷ JDA0009.

¹⁵⁸ *Id.*

the Respondents.”¹⁵⁹ However, unlike in *Leland*, T-Mobile’s own acknowledgement and conduct, as well as unrebutted evidence and litigation concerning T-Mobile responses to organizing, shows active organizing ongoing at the time of T-Voice implementation.¹⁶⁰

In January 2016, T-Mobile held meetings with employees to respond to Union communications about holiday time off, performance metrics, and working conditions, and in advance, prepared a December 2015 document to guide management’s presentation entitled “Talking Points: Union Organizing and Authorization Cards,” with a subscript of “For Proactive Use.”¹⁶¹ T-Mobile wrote that CWA had “spent a great deal of time and money” on organizing in the previous few years, the same period when T-Mobile implemented a pilot T-Voice in January 2015 and expanded it nationwide in June 2015.¹⁶²

As the ALJ properly observed, the Union’s ongoing organizing drive and T-Mobile’s knowledge were further evidenced by the series of ULP charges pursued by the Union as part of the organizing drive.¹⁶³ The Board failed to properly

¹⁵⁹ 240 N.L.R.B. at 1138 n.1.

¹⁶⁰ Case Stmt. Sect. D.

¹⁶¹ Case Stmt. Sect. D., n.78, 80; JDA1056; JDA0286-291.

¹⁶² JDA1056; JDA0286-90.

¹⁶³ JDA0012; Case Stmt. Sect. D., n.77, 81, 82.

consider this related litigation. Although acknowledging other charges, the Board contended that they were unrelated to the organizing.¹⁶⁴ But, the Board was wrong. It ignored the 2013-14 organizing activity detailed in *T-Mobile USA, Inc.*, 365 N.L.R.B. No. 15, slip op. at 4-5, 11 (2017), which included displays of union paraphernalia, obtaining card signatures, and other expressions of union support, nor did it address the ALJ's citation of this case as evidence of ongoing organizing.¹⁶⁵ Moreover, the Board's myopic view of what constitutes organizing activity ignored the obvious: pursuing unfair labor practice charges for unrepresented workers to enforce their NLRA rights to organize is itself organizing activity. Among other things, it demonstrates that the union, as a representative, will help remedy unlawful working conditions.

Lastly, the Board apparently regarded the lack of an impending representational election as support for its view that T-Mobile's solicitation was not unlawful. But, this is contrary to the Board's well-established standard for unlawful solicitation. *See, e.g., Amptech, Inc.*, 342 N.L.R.B. 1131, 1137 (2004)(finding unlawful solicitation in the midst of employees' organizing efforts even where there was no representational petition filed); *Manor Care of Easton*,

¹⁶⁴ JDA0009 n.29.

¹⁶⁵ *See* JDA0011.

Pa., 356 N.L.R.B. 202, 219-221 (2010)(same); *Advancepierre Foods, Inc.*, 366 N.L.R.B. No. 133, slip op. at 35-37 (2018)(same).

There can be no serious doubt that CWA was engaged in an ongoing organizing effort before, during, and after T-Mobile's January 2015 T-Voice implementation. Accordingly, T-Mobile's solicitation of employee grievances through T-Voice, accompanied by implied promises of remedy, violated NLRA Section 8(a)(1), as the ALJ properly found, and the Board's determination is unsupported by substantial evidence, arbitrary, and contrary to precedent.

CONCLUSION

Congress's primary purpose in enacting Section 8(a)(2) was to eliminate employers' pervasive practice at the time of establishing and controlling in-house labor organizations to prevent autonomous ones from engaging at the workplace. The Supreme Court said that, when called upon to distinguish between a lawful employee participation process and an unlawfully dominated labor organization, the Board's fundamental statutory responsibility is to insure the fair and free choice of bargaining representatives by employees. *N.L.R.B. v. A.J. Tower Co.*, 329 U.S. 324 (1946); *N.L.R.B. v. Savair Mfg. Co.*, 414 U.S. 270 (1973). Yet, the Board ignored this Congressional mandate here. T-Mobile implemented T-Voice in 2015 when CWA was engaged with employees in organizing T-Mobile's call

centers, and filed and was litigating meritorious ULP charges against T-Mobile.¹⁶⁶ T-Mobile did so to control how CSRs' "pain points" got addressed. In pronouncing T-Mobile's conduct lawful, the Board subverted Congress's purpose, and failed to fulfill its fundamental statutory responsibility. The Board's decision should be reversed and remanded for further processing that is consistent with the Court's rulings.

¹⁶⁶ Case Stmt. Sect. D.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with Federal Rule of Appellate Procedure (Fed.R.App.P.) 32(a)(5) and (7) because, excluding the parts of the document exempted by Fed.R.App.P. 32(f) and Circuit Rule 32(e), this document contains 11,813 words, as determined by the word counting function of Microsoft Word, 2013 compatibility mode, in Microsoft 365 Business Office.

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2020, I electronically filed the foregoing Petitioner's Final Opening Brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I also hereby certify that the following participants in the case are registered CM/ECF users and will be served by the CM/ECF system:

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NLRA Section 2(5), 29 U.S.C. §152(5)

The term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

NLRA Section 8(a)(1) and (2), 29 U.S.C. §158(a)(1) and (2)

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C.S. § 157];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [29 U.S.C.S. § 156], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

NLRA Section 10(a), 29 U.S.C. §160(a)

- (a) **Powers of Board generally.** The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [29 U.S.C.S. § 158]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [29 U.S.C.S. §§ 151–158, 159–169] or has received a construction inconsistent therewith.

NLRA Section 10(a), 29 U.S.C. §160(f)

- (f) **Review of final order of Board on petition to court.** Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any court of appeals of the United States in the circuit wherein the unfair labor practice in

question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Federal Rule of Evidence 801(d)(2)

Rule 801. Definitions that Apply to This Article; Exclusions from Hearsay

* * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

* * *

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).