

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 REPLY BRIEF

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GLOSSARY of GENERAL TERMS

ABQ Menaul	T-Mobile's Menaul facility in Albuquerque, New Mexico
ALJ or Judge	Administrative Law Judge
Arg. Sect.	Argument Section
BBrf.	Respondent's "Brief for the National Labor Relations Board."
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
EIP	Equipment Installment Plan
E.V.P.	Executive Vice President
FAQs	Frequently Asked Questions
GC	General Counsel of the National Labor Relations Board
JDA	Joint Deferred Appendix
NLRA	National Labor Relations Act (29 U.S.C. §§151, <i>et seq.</i>)
N.L.R.B., NLRB, or Board	National Labor Relations Board
OOW	Out of warranty
OpBrf.	Petitioner's Opening Brief

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."
TBrf.	Corrected Brief of T-Mobile USA, Inc.
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)

ARGUMENT SUMMARY

Regarding NLRA Section 8(a)(2), 29 U.S.C. §158(a)(2), factually, T-Mobile's communications – its admissions against interest – admit that T-Voice representatives presented working conditions proposals to management who considered them and granted some and rejected others, thus admitting “dealing with.” The NLRB concedes that T-Mobile's communications described “dealing with,” and concedes that the Board failed to give them the determinative effect as the admissions against interest which they are. Nothing more is needed for the Court to vacate and remand.

The NLRB seeks to excuse the Board's failure by arguing – despite conceding they show “dealing with” – that T-Mobile's communications lacked sufficient detail, but this argument is foreclosed by governing precedent, which provides that admissions against interest need no corroboration to establish the facts they set forth.

T-Mobile vaguely warns the Court against relying on “subjective” evidence, apparently an effort to persuade that, despite what it said in its contemporaneous communications, it really meant the opposite. Similarly, the NLRB's arguments amount to asking this Court to condone as consistent with protecting employees' statutory rights the Board's ratification of T-Mobile's purportedly deceiving employees – promising them effective advocacy through T-Voice representatives

who take their problems to management and bilaterally achieve real working conditions improvements. In essence, both parties ask the Court to condone T-Mobile's now-claimed deception. The Court should decline to do.

Legally, the NLRB and T-Mobile urge the Court to find that T-Voice fit a safe haven model. Although the NLRB admits that T-Voice was a single whole, neither the NLRB nor T-Mobile address T-Voice as a whole, nor cite authority that, as a whole, it constituted a safe haven. Rather, the NLRB cleaves T-Voice into two aspects – pain point collection and meetings/focus groups – and argues that, separately, each piece constituted a safe haven. Further, in aid of their safe haven arguments, both urge the Court to graft new requirements on to “labor organization’s” definition, i.e., “group” proposals and collective deliberation among employee members. But Section 2(5), 29 U.S.C. §152(5), forecloses this, as it explicitly provides that any organization of any kind suffices, and the Board consistently has found “dealing with” in the absence of such structural devices.

Regarding NLRA Section 8(a)(1), 29 U.S.C. §158(a)(1), solicitation, the NLRB and T-Mobile now concede that no pending representational petition is required for finding unlawful solicitation, and that CWA was actively organizing when T-Mobile implemented T-Voice. As neither denies that T-Voice solicited grievances with implied promises of remedy, nothing further is needed, and the Court should vacate the Board's dismissal and remand.

ARGUMENT

I. T-MOBILE'S ADMISSIONS AGAINST INTEREST AND THE NLRB'S ADMISSIONS ESTABLISH T-VOICE'S LABOR ORGANIZATION STATUS.

The NLRB's and T-Mobile's arguments are belied by T-Mobile's admissions against interest and the NLRB's admissions in its brief. In contemporaneous communications to employees and among managers, T-Mobile admitted every element of labor organization status. The NLRB's brief, too, admits these elements. All that is needed to establish T-Voice's labor organization status, here, is (1) that T-Voice representatives made proposals (or presented grievances) concerning working conditions through suggestions, questions, explanations of what was not working well, observations of unfairness, or similar communications;¹ and (2) T-Mobile responded in some way, for which managers' "real or apparent consideration,"² or acceptance or rejection by word or deed,³ sufficed.

¹ *Dillon Stores*, 319 N.L.R.B. 1245, 1251 (1995)(finding numerous communication forms to be proposals or grievances).

² *Electromation*, 309 N.L.R.B. 990, 995 fn.21 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994)(finding proposals "coupled with real or apparent consideration of those proposals" constitutes "dealing with"). *See also Dillon Stores*, 319 N.L.R.B. at 1251-52 (finding management's indication that the matters are under consideration suffices).

³ *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993)("dealing

In admissions against interest, T-Mobile described T-Voice as a “group” composed of employees and management that resolved employee pain points, and encouraged employees to raise issues with their T-Voice representatives. For example, in a February 1, 2016 email to all employees, E.V.P. Brueckman explained, in part:

It’s a new year and we have a new group of T -Voice Reps fired up to be your voice – the voice of the Frontline. T -Voice is made up of Frontline Representatives from each call center – that’s more than 50 Reps, plus Site Senior Managers and support team members. Their job is to raise Frontline and customer pain points to ensure they are resolved and results are communicated back to the Frontline. Last year, they resolved/answered more than 1100 issues. . . .

What does this mean for you? You can raise issues by reaching out to your T -Voice representatives. Be vocal, let us know what you think. T-Voice was created to drive real change in our business and improve the customer experience by elevating the issues you experience every day.⁴

T-Mobile admitted in its recruitment communications that T-Voice existed, in part, so employee and management members could meet and think creatively to reach solutions with management concerning employee pain points gathered from co-workers and presented by T-Voice representatives. One flyer said, in part:

with” exists where, over time, management responds to proposals of an employee group “by acceptance or rejection by word or deed”).

⁴ JDA0577-578 (underlining added).

T-VOICE WANTS YOU! . . .

What is T-Voice?

Our T-Voice team helps us enhance the customer and Frontline experience by identifying, discussing, creating and communicating solutions for roadblocks. Our team members provide a vehicle for Frontline feedback and create a closed communication loop with the T-Mobile Sr. Leadership Team. . . .

What does it take?

Bring your best to the team!

- Live our guiding principles every day
- Be creative, articulate, energetic, and have strong business acumen
- Be passionate about resolving customer and employee pain points
- Strong skills: organizational, time management & attention to detail are critical
- Be flexible and adaptable. Remember, you'll be working with groups from all over the company
- Be willing to think big and have fun creating solutions!

What will I have to do?

- Interact with reps across the site weekly to gather and escalate top internal and external pain points and roadblocks
- Plan and execute focus groups, table days, and leverage other communication vehicles to gather feedback from the frontline
- Represent the voice of the frontline in leadership meetings
- Support the planning and rollout of key T-Mobile initiatives by helping to create frontline training and communication
- Communicate resolved pain points and status of escalated issues back to the frontline
- Infrequently travel for meetings, team summits and other events

What are the perks?

- You'll learn more about T-Mobile and how teams partner to improve the customer and frontline experience
- You'll have lots of exposure to the Senior Leadership Team⁵

And, T-Mobile's communications admitted that the T-Voice team achieved improvements to employees' working conditions. For example, in an October 22, 2015 email, V.P. Woods said, in part:

I am very pleased to announce that because of your feedback and the efforts of the T-Voice team, we are introducing a new Loyalty Recognition program starting January 1, 2016.

We appreciate your years of loyalty as a T-Mobile employee and want to recognize you! While every anniversary is cause to celebrate, we will officially recognize every five years of service starting with the first anniversary (1, 5, 10, 15 years, etc.) All Customer Care employees are eligible (including Care support team members within Brian's organization) and will receive exciting, branded T-Mobile gifts on anniversaries.⁶

Shortly afterward, the Menaul Site Manager reiterated the message, emailing:

To: ABQ Menaul Operations Everyone
Subject: FW: T -Voice is working for you: Introducing Loyalty Recognition

Team 505:

I wanted to make sure you all saw this awesome program rolling out Jan 1. Thank you all for all of your phenomenal feedback-keep it coming!⁷

⁵ JDA0596 (underlining added). *See also* JDA1043-44.

⁶ JDA0572 (underlining added).

⁷ JDA0560-62 (underlining added).

On August 21, 2015, Woods emailed her management peers, saying:

Since its National launch in June, T-Voice has been a machine in listening to our Frontline teams and ensuring their voices are heard. They have captured internal and external customer pain points and continue to bring the Un-Carrier attitude to our call center culture.

While the T-Voice team is busy addressing pain points, we want to ensure we keep everyone in the know about what is happening. Check out the first edition of The VOICE, a new monthly T-Voice Newsletter. This tool is a great way for our T-Voice team to showcase to the Frontline team that their voices are making changes.

T-Voice has worked with NCSQ to help improve the MyVOC SMS Survey experience, provided feedback to make sure customers received their MCSA discounts on the latest rate plans, helped update a number of documents to improve the frontline process, and partnered with site leadership to enhance the culture in each of the call centers.

Thank you T-Voice for a great couple of months and watch out for next month's edition.⁸

These and other contemporaneous communications demonstrate that T-Voice was a bilateral employee/management mechanism in which T-Voice representatives brought employee pain points and suggested solutions to management who considered them and responded, granting some of them.⁹

T-Mobile does not dispute that it made these communications. Instead, it asserts, vaguely, that the Court should not consider speculative or subjective

⁸ JDA0619-620 (underlining added).

⁹ OpBrf.30 fn.85 (listing other admissions against interest).

evidence. TBrf.2-3, 6-7. But, neither CWA nor the Court is speculating by relying upon T-Mobile's contemporaneous representations to its employees and among managers regarding T-Voice representatives' roles, and T-Voice's purpose and results, as opposed to T-Mobile's and the NLRB's revisionist, after-the-fact claims that T-Mobile did not mean what it said.

T-Mobile acknowledges that an employer's written attributions of success to a committee, even if not admissions against interest, are potent evidence of what the committee actually did, in its failed attempt to distinguish *Reno Hilton Resorts*, 319 N.L.R.B. 1154, 1174 (1995). TBrf.12-13.

Similarly, the NLRB concedes that T-Voice addressed employee pain points concerning working conditions, such as "paid time off, maternity leave, and metrics . . . which can impact bonuses, awards, discipline and schedules." BBrf.7. And, its attempts to minimize T-Mobile's written attributions to T-Voice are undercut by its own admissions.

For example, the NLRB claims that T-Mobile's definition of T-Voice as a team of T-Voice representatives and managers "accords" with the Board's finding that T-Voice representatives' actual roles were minimal, and that solutions they proposed were personal opinions which management did not regularly accept or reject. Yet, the NLRB admits that Senior T-Voice Program Manager Tolman required T-Voice representatives to come to monthly national meetings prepared to

discuss focus group questions, which she provided in advance, after soliciting co-workers' views (BBrf.9), so T-Voice representatives cannot have provided only their personal opinions. For instance, before the October 2015 summit, Tolman gave T-Voice representatives focus group topics in advance to get and give feedback, and then they met in several groups comprised of 10-15 T-Voice representatives and a V.P. BBrf.10-11. T-Mobile's post-summit article praised the T-Voice representatives for working as a group to meet objectives of resolving employee roadblocks by successfully generating solutions as a team. BBrf.11; JDA1040. Further, T-Mobile's descriptions of T-Voice as "your voice", and T-Voice representatives as "your 'advocates'" responsible for presenting pain points and solutions, belie depersonalization of T-Voice and contentions that employees were "self-advocating".¹⁰ BBrf.38-39.

And, T-Voice representatives' roles were not minimal. The NLRB admits that, in meetings with management at every level, T-Voice representatives had "substantive, focus-group discussions of certain pain points at the national meetings and summits, and during some local or regional meetings." BBrf.31-2. It

¹⁰ T-Mobile asserts that T-Voice representatives had no representative capacity, yet its discussion of a purported continuous rotation of committee members and its citation of *General Foods Corp.*, 231 N.L.R.B. 1232 (1977) miss the mark. TBrf.15, 19. There is no evidence of continuous rotation of T-Voice representatives; rather T-Mobile extended their terms (JDA0002, 0013), and they acted as employee advocates (JDA0014, 0018; OpBrf.4 fn.10).

confirms they made “proposals that T-Mobile took under advisement”¹¹ (BBrf.33 fn.10), and, at monthly national meetings, management detailed what pain points from previous months were resolved and “what changes are still under consideration” (BBrf.9), with T-Voice representatives asking clarifying questions and making suggestions. BBrf.9-11.¹² Notably, it is paradoxical for the NLRB to confirm T-Voice representatives discussed and sought creative solutions for *customer* pain points, but to insist they did not do so regarding *employee* pain points (BBrf.9-10), as customer pain points affected employee metrics.¹³

These admissions undercut claims that T-Voice representatives and management did not discuss or attempt to resolve pain points in any meetings, and that the meetings instead constituted permissible brainstorming or information sharing sessions. BBrf.8, 32-36. To the contrary, not only were there substantive discussions that produced proposals, but, as instructed by Tolman, T-Voice representatives came to them with ideas already formulated after discussions with co-workers, rather than generating ideas anew at the meetings. Notably, CWA agrees with T-Mobile who, citing *Ona Corp.*, 285 N.L.R.B. 400 (1987) and

¹¹ The NLRB admits that management responses to SharePoint entries “either give a response or often, promise further management review.” BBrf.7.

¹² This activity demonstrates a group dynamic involved in seeking solutions.

¹³ OpBrf. 18; JDA0208-14, 0217-20.

Predicasts, Inc., 270 N.L.R.B. 1117 (1984), contends that “dealing with” exists where an employer and a group of employees engage in consultations with an eye toward resolving working conditions grievances. TBrf. 8-9. This is exactly what T-Voice representatives did. Indeed, *Predicasts* particularly supports a conclusion of “dealing with” here, as the Board found that “[e]ven if the Committee did no more than transmit employee views to Respondent and make recommendations, it would be considered as ‘dealing with’ Respondent so as to constitute a labor organization within the definition of the Act.” 270 N.L.R.B. at 1122 (citation omitted).

The NLRB dismisses the rest of T-Mobile’s contemporaneous statements by claiming they did not provide details about T-Voice representatives’ roles. BBrf.17, 38-41. But, it admits that T-Mobile’s communications characterizing T-Voice or crediting it with policy changes are probative. BBrf.37-38. And, although the NLRB claims that CWA overstates the communications’ importance, it concedes that they “may be interpreted to encompass dealing”. BBrf.41-42. In essence, it admits that the facts are as stated in the communications, and by effectively admitting that the Board did not consider them as admissions, the NLRB is agreeing that, when treated as admissions against interest, the

communications establish that the T-Voice representatives dealt with management.¹⁴

The NLRB asserts that the communications are not dispositive in light of the whole record. BBrf.38. But this is, in essence, an argument that admissions against interest must be supported by corroborating evidence, a proposition rejected by governing precedent holding that admissions against interest alone establish the facts set forth in them. OpBrf.29-34.

Finally, the NLRB contends that the Board correctly ignored the ALJ's evidentiary finding that T-Mobile's communications were admissions against interest because they would not change the outcome. This contention, in addition to contravening precedent regarding admissions against interest, raises a disturbing question: why would the Board, a federal law enforcement agency charged with protecting employees' rights to engage in protected concerted activities, countenance an employer, for its own gain, lying to its employees by repeatedly telling them, in writing and in person, that they have advocates who are working on their behalf, making proposals, discussing their pain points in group meetings at every corporate level, and attempting to find solutions for them? Such deception was a factor in the Board's finding of labor organization status in *Polaroid Corp.*,

¹⁴ Yet T-Mobile still maintains that it did not work with T-Voice representatives toward consensus or compromise. TBrf.4.

329 N.L.R.B. 424, 432 (1999), for it said, citing *Electromation*, 309 N.L.R.B. at 998, that the employer operated the entity involved to create the impression that employee disagreements with management had been resolved bilaterally. It should have been no less troubling to the Board here.

The illogic of the NLRB's arguments is illustrated by an analogy: I can admit to you that I robbed a bank, but if I do not specify the details of how I robbed it, the admission may be disregarded. This is not, and cannot be, the standard for the Court's determination. Instead, the NLRB's acknowledgement that T-Mobile's communications can be seen as establishing "dealing with," coupled with its failure to deny the applicability of governing precedent, fully supports the Court declining to defer to the Board's findings.

The NLRB urges the Court to give the Board great deference, arguing that its interpretation of the statute governs if reasonable and consistent with precedent, and that its findings are conclusive when supported by substantial evidence. BBrf.18. But, the Board's decision is not consistent with precedent regarding admissions against interest, and its findings are not supported by substantial evidence. Indeed, in determining whether there is substantial evidence, the Court is not bound by the Board's rejection of the ALJ's findings, and her decision is as

much a part of the record as the complaint and evidence.¹⁵ *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 492-93 (1951); *International Brotherhood of Teamsters v. N.L.R.B.*, 587 F.2d 1176, 1180-1 (D.C. Cir. 1978).

II. T-VOICE IS NEITHER A SUGGESTION BOX NOR A BRAINSTORMING/INFORMATION-GATHERING SAFE HAVEN.

A. The NLRB and T-Mobile Cite No Precedent to Support that T-Voice, as a Whole, Fits any Safe Haven Framework.

The NLRB and T-Mobile argue that T-Voice fits “safe haven” frameworks. BBrf.4-6, 25, 27; TBrf.13-14. It does not. Attempting to shoehorn T-Voice into some “safe haven,” the NLRB portrays T-Voice as bifurcated, with one “aspect” for pain point collection and one for meetings/focus groups.¹⁶ It attempts to show that, separately, each aspect achieved safe haven status. BBrf.3, 16, 24-36. But, T-Voice was a single, whole organization. The NLRB essentially admits this when acknowledging that T-Voice representatives – who collected the pain points – had

¹⁵ The NLRB contends that CWA wrongly asserted that the standard of review differs where the Board reverses the ALJ. BBrf.18 fn.3. But, CWA focused on what weight should be given the evidence upon which the Board relies (OpBrf.26-27), noting that where the Board and ALJ differ, the evidence upon which the Board relies may be given less weight. *Universal Camera* at 496.

¹⁶ The NLRB claims that T-Voice’s purpose was to streamline employee feedback. BBrf.3-4. But, its record citations do not support this contention: the ALJ found T-Voice was established to address pain points in an organized fashion (JDA0012), and the charter neither states nor suggests streamlining of any practice (JDA0589).

substantial discussions with management regarding certain of those pain points in focus groups, at national meetings and summits, and during some local or regional meetings. BBrf.9, 31-32. Thus, the NLRB implicitly endorses the ALJ's treatment of T-Voice as a single, whole structure. JDA0027. And, T-Mobile's training of T-Voice representatives in both SharePoint usage and effective pain points discussions with management (OpBrf.5-6) demonstrates T-Voice was one body, with the same T-Voice representatives participating in all of its functions, which belies T-Mobile's contention of the training's irrelevance (TBrf.7).

Although the NLRB argues that T-Voice's "pain point process" fits the suggestion box framework described in *EFCO Corporation*, 327 N.L.R.B. 372 (1998), *enforced*, 215 F.3d 1318 (4th Cir. 2000) (BBrf.25-29), and its "meeting/focus-group aspect" fits an information-gathering/brainstorming framework described in *E.I. du Pont*, 311 N.L.R.B. at 894, and *Polaroid*, 329 N.L.R.B. at 425 (BBrf.22-24, 32), no precedent is cited to support the notion that there is no "dealing with" where, as here, a group's employee members both collect and present employee issues to management, and then engage with management about them.

B. The Safe Haven Arguments are Legally and Factually Unsupportable.

1. The Safe Haven Arguments are Contrary to Section 2(5)'s Language, and Legally Unsupportable.

The NLRB contends that T-Voice's "pain points process" was a suggestion box procedure on the grounds that T-Voice representatives did not collectively develop proposals for SharePoint or solutions, or otherwise engage in group feedback.¹⁷ BBrf.27-30, 32-34. Similarly, T-Mobile asserts that T-Voice representatives did not act collectively or engage in group level activity which T-Mobile claims is a "fundamental requirement" (TBrf.3-5, 9-12), and T-Voice lacked "the internal cohesiveness necessary to operate on a group level" (TBrf.4). And, both argue that focus groups and meetings constituted information-gathering and brainstorming processes, contending that T-Voice representatives made no collective proposals nor "developed solutions together with each other" (BBrf.32),¹⁸ but merely were individual employees sharing personal ideas with management (*Id.* at 16-17, 31-32; TBrf.13-14).

¹⁷ As discussed herein, despite no legal requirement, the evidence shows that T-Voice representatives did engage in group proposal-making.

¹⁸ Despite its arguments, the NLRB effectively admits T-Voice's collective nature. It describes an E.V.P. Brueckman email (JDA0557-558) as explaining "that, collectively, '[employee and management members]' job is to raise Frontline and customer pain points to ensure they are resolved." BBrf.5(emphasis added).

These arguments are contrary to Section 2(5) and to precedent. The assertions that T-Voice must have, but did not, operate on some group level and lacked the internal structure to do so represent an effort to create a structural test an entity must pass to achieve statutory labor organization status. But, Section 2(5) requires only that there be an organization, and it may be “any organization of any kind.” 29 U.S.C. §152(5)(emphasis added). In *Electromation*, the Board applied this definition and explicitly held that an entity’s internal characteristics and activities were immaterial to whether it was a labor organization. 309 N.L.R.B. at 994. It explained that any type of organization would suffice regardless of its internal processes, “even if it lacks a formal structure . . . [and] does not meet regularly.” *Id.* In no subsequent decision has the Board found otherwise.

Further, the assertion that T-Voice representatives must have, but did not, formulate proposals collectively or as a group is equally contrary to Section 2(5) and precedent. Section 2(5) is silent concerning communications between an organization’s employee participants. And, the Board repeatedly has found “dealing with” without evidence regarding communications among employee committee members. Indeed, in none of the cases cited by the NLRB or T-Mobile did the Board, as a basis for finding “dealing with”, focus on whether or what internal processes or structures produced proposals or grievances, or on whether or how employee members interacted with one another.

The NLRB principally relies upon three cases. BBrf.22, 27. First, it cites *E.I. du Pont*, 311 N.L.R.B. 893 (1993), to support the assertions that only group proposals avoid a suggestion box safe haven (BBrf.22), and that only collective deliberation among employee committee members avoids the brainstorming/information-sharing safe haven (BBrf.27). But, this misconstrues the decision. While the Board distinguished the seven committees involved from a permissible suggestion box process, noting that a suggestion box concerns individual, not group, proposals (311 N.L.R.B. at 894), individual proposals are those for which, unlike here, there is no group to which the individual's proposal may be referred for discussion. Indeed, the factual context, which parallels the instant case, was that individual employee committee members made proposals – often originating with individual employees – which then were discussed between “management members” and “unit employee members” in the committee meetings, with management having rejection power. *Id.* at 895, 914-17. As the NLRB admits, T-Voice representatives collected individual employees' suggestions, presented them to management through SharePoint and in meetings, and discussed them with management members in meetings at every organizational level, and management responded. *See* Section I. Notably, the Board in that case described no facts regarding communications or interactions among employee

committee members, and made no finding concerning them. 311 N.L.R.B. at 895, 914-17.

Second, the NLRB relies upon *EFCO Corporation*. In *EFCO*, management instructed employee members to solicit and bring co-workers' ideas to the committees, which the Board described as "developing," "recommending," or "presenting" proposals, with management accepting some and rejecting others. 327 N.L.R.B. at 350-3. But, the Board described no internal process regarding whether or how employee members communicated among themselves or with co-workers. Indeed, in finding the screening committee was not a labor organization, the Board hypothesized that, if an employer puts an entity "in the position of making proposals to management based on the suggestions of other employees," it constitutes "dealing with." *Id.* at 354. Here, T-Mobile put T-Voice representatives in the position of making proposals to management based on co-workers' suggestions, thus fitting this hypothetical. The NLRB admits this when confirming that pain points T-Voice representatives input into SharePoint became topics of discussion in meetings with management. *See* Section I.¹⁹

¹⁹ The NLRB maintains that multiple employees raising identical issues do not transform their suggestions into collective proposals. BBrf.28 fn.8. But, the essence of protected, concerted activity is employees raising the same issues with the aim of getting resolution, and here, they were raised through T-Voice representatives.

Third, the NLRB cites *Polaroid*, but there, although the Board considered and rejected a defense that there were only individual, not group, proposals, the Board did not examine whether, nor hold that, only group proposals can show “dealing with.” 329 N.L.R.B. at 429-31. And, in post-*Polaroid* decisions where “dealing with” was found, individual committee members, not the whole committee, made proposals. See *Ead Motors Eastern Air Devices, Inc.*, 346 N.L.R.B. 1060, 1076 (2006)(finding “dealing with” where management asked employee committee members to “feel the pulse” of coworkers and meet with management members about coworker requests, without considering whether committee members conferred with each other, or engaged in any internal process);²⁰ *UPMC*, 366 N.L.R.B. No. 185, slip op. 25 (2018)(finding “dealing with” where “employee members of the ESS Employee Council made proposals and a management representative . . . responded,” with no inquiry regarding how employee members arrived at the proposals)(emphasis added).

Similarly, the cases which T-Mobile cites provide it no support. TBrf.9-11. In neither *Ona Corp.*, 285 N.L.R.B. 400 (1987), nor *Predicasts, Inc.*, 270 N.L.R.B. 1117 (1984), did the Board question whether or how committee members communicated with each other to formulate proposals. And, *Stoody Co.*, 320

²⁰ While not precedential, *Ead Motors* is persuasive.

N.L.R.B. 18 (1995) and *Vencare Ancillary Servs., Inc.*, 334 N.L.R.B. 965 (2001), *enforcement denied on other grounds*, 352 F. 3d 318 (6th Cir. 2003), are factually distinguishable and irrelevant. In *Stoody*, a committee that met once was not considered a labor organization as there was no pattern and practice. In *Vencare*, five medical professionals who engaged in a strike were not considered a labor organization. Finally, its cite to *Webcor Packaging*, 319 N.L.R.B. 1203 (1995), concerning the notion that employee members must all endorse and make a proposal falls short, as the quoted passage is from a witness, not the Board.

The NLRB (BBrf.27-28) and T-Mobile (TBrf.3-4) wrongly contend that cases CWA cites support their group-activity position. In *Electromation*, consistently with its holding that an organization's internal structure does not determine labor organization status, the Board did not differentiate between the function of an action committee as a whole versus that of individual members. It sometimes used the terms – “employees had developed” and “employees devised” – and sometimes used the term – “the Committee decided” – when discussing proposals. 309 N.L.R.B. at 991. The collective aspect the Board described focused upon the workforce, not the committee members, noting their objective was reaching solutions “that would satisfy the employees as a whole,” and found they were labor organizations without examining communication between individual employee members. *Id.* at 997.

Accord Yukon Mfg., 310 N.L.R.B. 324, 335 (1993)(making no inquiry concerning whether inter-employee-member communications preceded proposals employee committee members made, the determinative facts being that the proposals concerned working conditions and management changed policies in response to some); *Ryder Distribution Resources*, 311 N.L.R.B. 814, 815, 818 (1993)(describing wage increase requests that employee committee members presented after polling co-workers as proposals by “the employees” or “the drivers”, not the committee, with no discussion of what process employee members used in determining what requests to make, nor whether they were “group” requests); *Reno Hilton Resorts*, 319 N.L.R.B. 1154 (1995)(finding that “[Quality Action Teams] or their members made proposals or requests” (at 1156)(emphasis added), with no discussion concerning how employee members developed them, or whether they internally deliberated (at 1156, 1174)); *Dillon Stores*, 319 N.L.R.B. 1245, 1246-51 (1995)(describing questions or complaints seeking improved working conditions raised by individual employee committee members acting in a representative capacity as “questions and comments from the employee members” (emphasis added), with no discussion concerning whether they deliberated with each other);²¹ *Keeler Brass Co.*, 317 N.L.R.B. 1110, 1113-14

²¹ T-Mobile attempts to distinguish this decision by suggesting that the ALJ found the committee internally deliberated collectively. TBrf.11-12. But, he

(1995)(making no inquiry concerning the grievance committee’s internal workings, nor finding that recommendations must be of a “group” nature, instead, noting that recommendations were made to management, who responded in word or deed.)²²

2. The Safe Haven Arguments are Factually Unsupportable.

Even were some kind of group activity demonstrated by actual practice required, the safe haven arguments are factually unsupportable as there was group activity. For example, as the NLRB admits, in meetings with management, T-Voice representatives had “substantive, focus-group discussions of certain pain points at the national meetings and summits, and during some local or regional meetings” (BBrf.31-2), asked clarifying questions and made suggestions at the national meeting level (BBrf.9-11), and at the October 2015 summit, several T-Voice representative groups of 10-15 each met with V.P.s to discuss pain points solutions, with the metrics focus group minutes showing specific recommended

found that matters advanced on a representative basis were advanced “collectively”, which relates to the workforce’s collective interests, not the employee members’ communications with each other or the committee’s internal workings. *Id.* at 1252.

²² T-Mobile cites *Keeler* for support regarding instances where actual practices contravene a committee’s written policies. TBrf.6. But *Keeler* supports CWA, as here, there was no difference between T-Voice representatives’ actual practice and T-Mobile’s written descriptions concerning their role, as they did exactly what was described in writing.

changes. BBrf.10-11.²³ Although the NLRB seeks to minimize the group work at that summit with the assertion that management did not “follow-up” on the metrics focus-group’s recommendations (BBrf.11, 34), no more than management’s consideration is needed for finding “dealing with,” and it is clear from management’s SharePoint responses that T-Mobile considered metrics improvement concepts discussed at the summit. OpBrf.14-15 fn.56.²⁴ Indeed, T-Mobile’s post-summit article praised T-Voice representatives for working as a group to generate solutions to take back to workplaces. BBrf.11; JDA1040.

T-Mobile’s admissions against interest also establish that T-Voice worked as a “group,” a “team” to achieve working conditions improvements. *See* Section I. And, as discussed in Section III, while bargaining-like exchanges are not even required, these admissions, and the NLRB’s admissions (BBrf.31-2), also undercut T-Mobile’s contention that it does not work toward consensus with T-Voice

²³ The NLRB claims no pain points were resolved during meetings or focus groups. BBrf.8, 32. But, this is belied by T-Mobile’s admissions against interest. *See* Section I. T-Mobile claims that T-Voice representatives’ activities were isolated. TBrf.15. But, this is belied by the record and the NLRB’s admissions that T-Voice representatives were expected to, and did, make proposals at every monthly national meeting’s focus group, and that at every meeting level – some as often as weekly and bi-monthly – they had substantive discussions with management. BBrf.9-11, 31-32.

²⁴ Despite the NLRB’s claim and inapt citation to *N.L.R.B. v. Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d 1262 (4th Cir. 1994), it matters not if management members are solely responsible for substantive follow up. BBrf. 29.

representatives (TBrf.4). In sum, T-Voice representatives' role was functionally equivalent to that of stewards of any labor organization: they gathered employee information concerning working conditions and pursued employees' collective interests with management.

III. BARGAINING IS NOT REQUIRED FOR LABOR ORGANIZATION STATUS.

The NLRB and T-Mobile essentially argue that “dealing with” requires bargaining, such as back-and-forth exchanges, to reach consensus. BBrf.9, 16, 29-30, 33-35, 37 fn.13; TBrf.8-9. T-Mobile cites *Crown, Cork & Seal Co.*, 334 N.L.R.B. 699 (2001), involving management delegating operational authority to a committee, to support this proposition; however, the Board made no such declaration in that case. And the NLRB relies heavily upon *EFCO Corporation* (BBrf.27-28), recounting testimony that the benefit committee did not engage in “negotiations” or “give and take.” But, the Board found that because the committee made recommendations to management concerning working conditions, which management considered, accepting some and rejecting others, there was “dealing with.” 327 N.L.R.B. at 351, 353.

No precedent supports that there must be, in essence, bargaining to find “dealing with”. Indeed, that contention is contrary to *N.L.R.B. v. Cabot Carbon Co.*, 360 U.S. 203, 210-12 (1959), *Electromation*, and other governing cases, which establish that “dealing with” is broader than bargaining, such that no

consensus need be reached, no deal struck, no back-and-forth of proposals, as it is enough that employee members make suggestions or raise complaints, which the employer considers, or accepts or rejects by word or deed.

Indeed, the NLRB admits that T-Voice representatives offered proposals to management who took them under advisement, and even responded to some. (BBrf.9-10, 31-32, 33 fn.10). For example, when comparing T-Voice representatives making proposals to the employee members in *Ead Motors*, the NLRB concedes that T-Voice representatives made “proposals that T-Mobile took under advisement.” BBrf.33 fn.10. That is all that is required – proposals presented by members of the employer-dominated entity which the employer considers.

To summarize, to find Section 2(5) “dealing with” here, (1) T-Voice representatives must have presented proposals or grievances through questions, suggestions, explanations of what was not working well, or similar statements (*Dillon Stores*, 319 N.L.R.B. at 1251), and (2) T-Mobile must have responded, either through its managers’ “real or apparent” consideration (*Electromation*, 309 N.L.R.B. at 995 fn.21) or through acceptance or rejection by word or deed (*E.I. du Pont*, 311 N.L.R.B. at 894), or by indicating that the matters were under consideration (*Dillon Stores* at 1251-52).

Based upon the above, the full record, and governing precedent, there can be no other conclusion but that T-Voice was a Section 2(5) labor organization; therefore, T-Mobile violated Section 8(a)(2).

IV. RECORD EVIDENCE ESTABLISHES T-MOBILE SOLICITED EMPLOYEE GRIEVANCES, VIOLATING SECTION 8(a)(1).

T-Mobile solicited employee grievances through T-Voice and implicitly promised to remedy them during its employees' ongoing union organizing campaign. OpBrf.54-58. This type of solicitation of grievances violates Section 8(a)(1) because it leads employees to believe unionization is unnecessary, and thereby interferes with employees' choice regarding union representation. *Manor Care of Easton*, 356 N.L.R.B. 202, 219 (2010).

Contrary to the NLRB's and T-Mobile's claims (BBrf.58; TBrf.22-23), the Board's purported reasons for dismissing the unlawful solicitation allegation were the absence of an outstanding petition to represent CSRs and of active organizing when T-Voice was implemented.²⁵ As to the former, the NLRB and T-Mobile now concede an outstanding representational petition is not required for a finding of an unlawful solicitation. BBrf.58; TBrf.22-23. As to the latter, although they challenge the scope and extent of the organizing, the NLRB and T-Mobile appear

²⁵ JDA0009.

to concede CWA had an active organizing campaign when T-Mobile implemented T-Voice. BBrf.45-46; TBrf.25.

Moreover, there is no precedential support, nor is any cited, for the NLRB's argument that the Union's organizing must be commensurate with the scope of the employer's solicitation through T-Voice. BBrf.56. Regardless, the record shows CWA's organizing drive was extensive when T-Voice launched. For instance, CWA Senior Strategic Research Analyst Hae-Lin Choi's unrebutted testimony confirmed that CWA's organizing campaign spanned across various T-Mobile workplaces.²⁶ Further, several meritorious unfair labor practice charges filed in the two years preceding T-Voice's launch and shortly thereafter, involving different T-Mobile workplaces, illustrate the Union's widespread organizing campaign.²⁷

T-Mobile's argument that T-Voice was a mere "continuation and reiteration" of its past practice of soliciting feedback from its employees is also without merit. TBrf.25-26. An employer cannot rely on past practice as a defense if, during its employees' organizing campaign, it makes significant changes in its manner and

²⁶ JDA0279.

²⁷ See *T-Mobile USA, Inc.*, 365 N.L.R.B. No. 15 (2017)(New Mexico); *T-Mobile USA, Inc.*, JD(NY)-34-15 (August 3, 2015), *adopted in absence of exceptions*, 2015 N.L.R.B. LEXIS 705 (2015)(South Carolina and Maine); *T-Mobile USA, Inc.*, 369 N.L.R.B. No. 50 (2020), *reversing in part*, JD-57-16 (June 28, 2016)(petition for review pending, D.C. Circuit Case No. 20-1112)(Kansas); *T-*

methods of solicitation. *Center Service System Division*, 345 N.L.R.B. 729, 730 (2005), *enforced in relevant part sub nom., Center Construction Co. v. N.L.R.B.*, 482 F.3d 425 (6th Cir. 2007). T-Mobile's solicitation of grievances, through T-Voice, was a significant departure from anything it had done in the past.

Before T-Voice, the main avenue available to CSRs for airing grievances was an open-door policy, which involved employees talking directly with their immediate supervisor.²⁸ According to T-Mobile management witness Tolman, the company also had a practice of using surveys and focus groups for gathering employee feedback.²⁹ However, none of these pre-existing methods involved an organized, collective (BBrf.5), and representational structure like T-Voice. As the ALJ correctly noted, with T-Voice, the methodology changed, with implied promises to remedy employee complaints. JDA0029.

T-Mobile vigorously solicited employee grievances through T-Voice using a broad range of methods that it had not used before, including email accounts

Mobile USA, Inc., 363 N.L.R.B. No. 171 (2016), *enforced in part*, 865 F.3d 265, 268 (5th Cir. 2017)(nationwide).

²⁸ JDA0124, 0197.

²⁹ JDA0411-413. Tolman further testified T-Mobile used to have a program called "Frontline Certified," involving regular focus groups with CSRs to review the company's pre-launch project initiatives. JDA0413-415. However, during cross examination, Tolman clarified that Frontline Certified did not collect employee feedback on pain points, but rather, the program exclusively existed for gathering feedback on the company's planned business projects. JDA0538-539.

dedicated specifically to T-Voice; T-Voice suggestion boxes; T-Voice table days; focus groups run by T-Voice representatives; team meetings in which T-Voice representatives attended; and flyers and posters.³⁰ Moreover, unlike any of the company's prior methods, T-Voice was touted by the company as a way for CSRs to skip their immediate supervisor or even local management and have complaints heard by the highest level executives.³¹ And, a new electronic database system, SharePoint, was implemented to keep track of and address employee grievances.

T-Mobile's solicitation of grievances through T-Voice was accompanied by its implicit promise to remedy those grievances. Since implementing T-Voice, T-Mobile has expressly advised employees that T-Voice, by design and practice, was instituted and maintained for the purpose of getting employees' and customers' pain points resolved.³² This was affirmed by T-Mobile's frequent and numerous communications regarding the numbers of pain points resolved and specific changes made as a result of concerns brought to its attention through T-Voice.³³

³⁰ *See, for example*, JDA0083-84, 0111, 0147, 0239, 0243; JDA0567-571, JDA0574-575, JDA0579-580, JDA0590, JDA0595-598, JDA0603.

³¹ JDA0557-558 (emphasizing that, through T-Voice, employees could skip their local management and go directly to the highest company leadership).

³² *See, for example*, JDA0557-558, JDA0568-569, JDA0570, JDA0603.

³³ *See, for example*, JDA0559-563, JDA0566, JDA0572, JDA0574-575, JDA0577-578, JDA0588.

CONCLUSION

For these reasons and on this record, and for the reasons discussed in CWA's opening brief, the Court should reverse the Board's determination and affirm the ALJ's findings that T-Mobile violated Section 8(a)(2) by implementing T-Voice, and violated Section 8(a)(1) by soliciting grievances through T-Voice and impliedly promising to remedy them during an ongoing union campaign.

Respectfully Submitted,

Dated: October 19, 2020

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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 6,473 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 Reply 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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