

ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1044

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

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

T-MOBILE USA, INC.

Intervenor

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

FINAL BRIEF OF T-MOBILE USA, INC.

Mark Theodore
Proskauer Rose LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067-3010
Telephone.: (310) 557-2900
Facsimile: (310) 557-2193
mtheodore@proskauer.com
Counsel for Intervenor

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Board Case No.
14-CA-170229

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

And

CIRCUIT RULE 26.1 DISCLOSURE INFORMATION

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

A. Parties, Intervenors and Amici: Communications Workers of America (“Union”) is petitioner/appellant before this Court and was Charging Party before the Board. The National Labor Relations Board (“the Board”) is respondent/appellee before the Court; its General Counsel was a party before the Board. T-Mobile USA, Inc. (“T-Mobile”) is an intervenor before the

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

B. Rulings Under Review: This case is before the Court on the Union's petition for review of a Decision and Order issued by the Board on September 30, 2019, and reported at 368 NLRB No. 81.

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

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

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

October 19, 2020

Respectfully Submitted,

/s/ Mark Theodore

Mark Theodore
Proskauer Rose LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067-3010
mtheodore@proskauer.com

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GLOSSARY OF TERMS

Act	National Labor Relations Act (29 U.S.C §§ 151 <i>et seq.</i>)
Board	National Labor Relations Board
Br.	Opening brief of CWA to this Court
CWA	Communications Workers of America, AFL-CIO
Decision	The Board's Decision and Order (368 NLRB No. 81)
GC	General Counsel of the National Labor Relations Board
T-Mobile	T-Mobile USA, Inc.

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I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

RELEVANT STATUTORY AND REGULATORY PROVISIONS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

STATEMENT OF THE CASE

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

STANDING

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

II. SUMMARY OF ARGUMENT

The Board correctly concluded T-Voice was not a labor organization and that T-Mobile did not unlawfully solicit grievances, conclusions which are well supported by the record.

The record in this case is voluminous, with over a thousand pages of transcript and thousands more pages of exhibits. Despite the large record, the CWA focuses narrowly on only a few items, almost completely disregarding the witnesses of the GC. The CWA incorrectly asserts that speculation about how an

employee committee might work is enough to overturn the Board's decision. However, decades of consistent Board case law defining the term "deal with" in Section 2(5) focuses only on how the employee group actually operates. "Dealing with" an employer is determined by proof of group action by the employee entity to develop proposals or to submit grievances concerning employee terms and conditions of employment. The Board steadfastly rejects subjective interpretation of group action, whether it be by the testimony of non-participating employees, promotional materials or other insights not based on actual proof of the committee's operation. Despite this clear rejection of subjective evidence as acceptable evidence to establish labor organization status, the CWA continues to assert here that such speculative issues somehow render the Board's decision inappropriate. The Board addressed these assertions and rejected them outright; this Court should not consider such speculative evidence.

The CWA also asserts, contrary to case law, that the Board "overemphasized" the need for the employee committee to act on a group level concerning employee terms and conditions of employment. The Board correctly concluded T-Voice representatives simply do not "deal with" T-Mobile because T-Voice does not act as a group to present any kind of proposal to management. The Board also correctly concluded that, save for a minor number of employee related issues erroneously submitted to the SharePoint system, T-Voice's purpose is

customer pain point oriented. Group level activity by the employee committee is a fundamental requirement for “dealing with” to be established, and no case cited by the CWA concluded that an employee committee was a labor organization without some kind of group activity by the organization to fashion proposals and work in a bilateral fashion with management. T-Voice does not have the internal cohesiveness necessary to operate on a group level, and the record contains not a single reference to T-Voice representatives acting in a group capacity to fashion proposals; rather, the evidence shows only that T-Voice solicits individual suggestions on how to improve the customer experience from all customer service representatives in the call centers, and those suggestions are passed on to management without alteration. T-Mobile is free to do whatever it wants with these suggestions and does not work with T-Voice representatives toward a consensus or compromise. This kind of “suggestion box” format has been endorsed by the Board as a completely lawful form of employee engagement.

The Board in its Decision also correctly dismissed the solicitation of grievance allegation, noting the record does not support evidence of union organizing sufficient to draw an inference T-Voice was initiated in response to any union activity. On this issue, the CWA mischaracterizes the evidence of organizing and assigns too much importance to prior NLRB litigation involving T-Mobile. The vast majority of allegations in the prior T-Mobile NLRB litigation

did not concern any union activity; the few allegations that related to organizing occurred over two years prior to the establishment of T-Voice. The record contains very scant direct evidence of union organizing at the Wichita call center. There is no evidence in the record proving active organizing was taking place on local or a national level. The Board correctly concluded T-Voice, which is one of many employee-engagement programs instituted by T-Mobile in the last several years, was somehow in this case directly related to organizing.

III. ARGUMENT

A. THE BOARD CORRECTLY CONCLUDED T-VOICE IS NOT A STATUTORY LABOR ORGANIZATION.

The CWA faults the Board's analysis of whether a function of T-Voice is to "deal with" T-Mobile with respect to terms and conditions of employment. The CWA's assertions misconstrue the types of evidence the Board considers in making an evaluation of whether an employee group "deals with" the employer. And the CWA misinterprets the law regarding whether the employee group at issue in a Section 8(a)(2) case must act on a group level.

1. To Establish "Dealing With" The Board Focuses On Objective Evidence of How The Employee Group Operates.

The purpose and function of any employee committee or group is determined by what it actually does, rather than what it was created or perceived to

do. *Electromation, Inc.*, 309 NLRB 990, 996 (1992) (“[p]urpose is a matter of what the organization is set up to do, and that may be shown by what the organization *actually does*”) (Emphasis added). The Board has expressly rejected efforts to establish the purpose of an organization through either guidelines that do not match the organization’s actual practice or through subjective perceptions about the organization’s functioning. In *Keeler Brass Co.*, 317 NLRB 1110, 1114 n.16 (1995), the Board held that actual practice, not the documented policy of the grievance committee in question, controlled its inquiry, and relied on that practice in finding that the committee “dealt with” the employer, although the practice contravened the guidelines set forth for the committee. In *E.I. du Pont de Nemours & Co.*, 311 NLRB 893 (1993), the Board rejected efforts to establish the purpose of an organization through credible testimony by non-participating employees, that “the totality of circumstances surrounding the composition and functioning of the [organization] led [nonparticipating employees] to believe that the employee members were there to represent the interests of non-participating employees.” *Id.* at 894, n.7. Finding such perception to be irrelevant, the Board held that the actual activities of the organization must determine its purpose in any §8(a)(2) analysis. *Id.*

Much of CWA’s criticism of the Board’s Decision falls into the category of subjective perception of what T-Voice does as opposed to what T-Voice actually

does, exactly the type of assertion rejected by the Board in *Electromation* as being insufficient to establish labor organization status. For example, the CWA claims the Board ignored the fact T-Mobile “trained” representatives to enter pain points into SharePoint. The CWA describes the training to help T-Voice representatives explain pain points and to avoid entering duplicates into SharePoint (Br. 38). Even if such evidence was relevant to the labor organization analysis, it still would not show how T-Voice actually operates. There is no discussion by the CWA of specifics of the training or citation to record evidence as to what the training entailed. The CWA also claims T-Voice representatives “synthesized” suggestions (Br. 39) but does not cite to a definition of the meaning of the term or how it was, if at all, actually employed in T-Voice’s operation to change even one suggestion entered into SharePoint. The Board considered these types of claims and rejected them. Decision, Slip op. 8, n. 14 (“[W]e do not find that T-Voice representatives’ occasional minor edits or revisions of pain points when entering them into SharePoint suggest they filtered other employees’ suggestions”)

These assertions are exactly the types of subjective claims by non-participants in T-Voice the Board rejected in *Electromation* and which the Board was obligated to disregard in this case. Contrast these claims with the testimony of Christian Boydo, the only T-Voice representative called to testify in the trial who testified, without contradiction, that he submitted all pain points given to him to

SharePoint, save for grammatical correction, and he did so without discussing the pain points with other T-Voice representatives. (Decision, Slip op. at 7-8, n. 26; JA296-97.) Boydo also testified that he was instructed to direct employees with non-customer related issues to HR and not to use T-Voice. (JA299.) This credited first-hand evidence demonstrates how T-Voice actually operates. Speculation about the significance or impact of training or how individual employee suggestions may have been “synthesize[d]” by a T-Voice representative in SharePoint is pure speculation. This type of argument is not acceptable evidence of labor organization status.

2. “Dealing With” Requires Group Activity By the Employee Group

The CWA incorrectly asserts group activity is “overemphasized” or unnecessary to a finding of labor organization status. These assertions are contrary to Board case law.

“Dealing with” exists where the employer and a group of its employees engage in consultations looking toward the resolution of grievances or the improvement of terms and conditions of employment. *See, e.g., Ona Corp.*, 285 NLRB 400, 405 (1987) (employee action committee dealt with the employer where it made committee-level proposals to the employer regarding vacations and

floating holiday schedules and engaged in back and forth discussions with the employer about the optimal resolution to these requests); *Predicasts, Inc.*, 270 NLRB 1117, 1121-22 (1984) (personnel committee dealt with the employer where it made committee-level recommendations to the employer on working conditions and grievances and engaged in a similar exchange with the employer). Stated differently, the concept of “dealing with” involves a “back and forth” or “bilateral mechanism” involving proposals from the employee organization, coupled with management responses to these proposals as either accepted or rejected. *See Electromation, Inc.*, 309 NLRB at 995 n. 21; *E.I. du Pont*, 311 NLRB at 894; *see also Crown Cork & Seal Co.*, 334 N.L.R.B. 699, 700 (2001) (noting that “dealing with” might require a process whereby the employer and the employees “went back and forth explaining themselves”); *Keeler Brass Co.*, 317 NLRB at 1114 (concluding that pattern of “dealing with” was evidenced by “bilateral mechanism in which the [employer]” and the employee “[c]ommittee went back and forth explaining themselves until an acceptable result was achieved.”).

For an employee organization to “deal with” the employer, it must, necessarily, take action as a group in making proposals for consideration. That is, the organization must engage in group discussion of identifiable issues, evaluate the strengths and weaknesses of potential resolutions to or proposals regarding those issues, and reach some type of group opinion, whether by majority or

consensus, as to the resolutions or proposals presented to management. *See, e.g., Webcor Packaging, Inc.*, 319 NLRB 1203, 1203 (1995) (“a consensus building type of recommendation . . . would come . . . from th[e] *entire* committee to [m]anagement about a proposed change”) (Emphasis added); *Ryder Distribution Resources*, 311 NLRB 814, 818 (1993) (employee committee met to discuss the topic of wage increases and presented to management a concrete, group suggestion as to the level of wage increases desired—from \$10.60 per hour to \$12.00 per hour with overtime); *Ona Corp.*, 285 NLRB at 401-03, 405 (employee committee met as a group on a weekly basis, made “consensus” decisions and, according to the Board, “deal[t] with” the employer “by . . . ma[king] [proposals] to the [employer],” discussing “those proposals . . . in terms of profitability, feasibility, and possibility” and reconsidering the proposals when asked to do so by management). *Compare E.I. du Pont*, 311 NLRB at 896 (safety conferences wherein employees met in groups with management facilitators and expressed ideas and suggestions as to how to improve plant safety did not constitute “dealing with” because ideas and suggestions were developed by individual employees and conferences did not “decide on” proposals for improved safety conditions); *AP Green Indus.*, Case 14-CA-22476, 1993 WL 321784 (Div. of Advice July 30, 1993) (employees attending periodic meetings did not “deal with” the employer within the meaning of §8(a)(2) where employees made individual suggestions

regarding terms and conditions of employment, there was “little group discussion” of particular suggestions, employees did not meet to discuss or generate suggestions before they were advanced, and no efforts were made to ascertain the group’s view as to a particular suggestion). Further, as in the cases cited above, there generally needs to be more than a one-time communication with an employer over a discrete issue. *Stoody Co.*, 320 NLRB 18 (1995); *Vencare Ancillary Servs., Inc.*, 334 NLRB 965, 969-970 (2001), *enf. denied on other grounds*, 352 F.3d 318 (6th Cir. 2013).

Despite this body of law, the CWA mistakenly claims Board cases hold that group activity by the employee committee is unnecessary to establish labor organization status. The CWA’s reliance on *Dillon Stores*, 310 NLRB 1245 (1995) is misplaced. The CWA asserts the Board in that case found a bilateral mechanism existed where an employer used an employee committee to receive and consider suggestions or complaints on behalf of absent coworkers (Br. 42-43). The Associates’ Committee in *Dillon* was far different than T-Voice. Its representatives were elected by their peers on the store level to sit on a committee with store management. There was no restriction on the topics that could be raised at the committee meetings. *Id.* at 1246. The vast majority of items the committee addressed concerned terms and conditions of employment, matters falling squarely within Section 2(5) status. *Id.* The ALJ found that the Associates’ Committee did

much more than present suggestions from absent employees, summing up his findings, “most, if not all, of the employee representatives’ proposals and grievances concerned the employees’ terms and conditions of employment; those proposals and grievances had been advanced *collectively*, on a representative basis.” *Id.* at 1252 (Emphasis supplied). There is no evidence T-Voice acted collectively at any level to fashion proposals or grievances on terms or conditions of employment.

The CWA also wrongly asserts that the establishment of labor organization status merely requires that T-Mobile employees relayed proposals to management and that management responded (Br. 43) The law concerning labor organization status is not so simplistic. In support of this notion, the CWA cites *Reno Hilton Resorts*, 319 NLRB 1154 (1995) for the proposition that the employer’s Quality Action Teams (QATs) were labor organizations because members made proposals or requests on terms and conditions of employment and the employer responded. The Board’s summary cited by the ALJ (and then the CWA in its brief) does not contain any specifics on the operation of the QATs. The ALJ’s decision, however, contains details showing the QATs clearly acted in bilateral fashion with the employer and it did not just involve passing on employee complaints: the QAT and high level management discussed working conditions and resolutions. The employer’s written minutes of the meetings which were shared with the employees

directly tied the success of the committee in resolving issues to the employer's recent victory in a union election, stating it was "a victory for our employees who have determined that working directly with management to iron out difficulties is preferable to outside representation." *Id.* at 1174. The reference to the union election was repeated in at least one other set of QAT meeting minutes. *Id.* There is no such evidence here tying T-Voice to anything union related. The vast majority of SharePoint entries concern customer issues. T-Voice representatives did not advance as a group proposals to management concerning any topic, let alone employee issues, and there was no resolution of any "grievance" as a result of a meeting.

3. T-Voice Is Essentially A Centralized Suggestion Box Procedure For Customer Issues

Consistent with these requirements for the type of process and interaction that must be present in order for "dealing with" to exist, "[n]othing in the Act prevents an employer from encouraging its employees to express their ideas." *E.I. du Pont*, 311 NLRB at 897 (Emphasis added). As such, the proscriptions embodied in §8(a)(2) are not infringed upon by a "suggestion box" procedure where any employee may make a proposal or recommendation to management, by a committee that exists for purposes of sharing information with the employer, or by a "brainstorming" mechanism. *Id.* at 894-97. As to the "suggestion box"

procedure, the Board has explained that it cannot constitute “dealing with” by a specific organization because an avenue that is open to any employee to submit a suggestion is, in essence, a *unilateral* mechanism and because the suggestions, even if they may be characterized as proposals, are made individually and not as a group. *Electromation, Inc., supra*, 309 NLRB at 995 fn. 21; *E. I. du Pont, supra*, 311 NLRB at 894. The threat of infringement on employee free choice, which §8(a)(2) aims to guard against, does not exist under such a procedure because any individual employee may take part in it. *Id.*

As to a committee that “exists for the purpose of sharing information with the employer,” the Board explained in *E. I. du Pont* that the element of “dealing” is missing from such a committee because it makes no proposals to the employer, and the employer simply gathers the information and does what it wishes with it. *Id.* Similarly, a “brainstorming” group also is not ordinarily engaged in “dealing,” as the purpose of such a group is simply to develop a whole host of ideas. *Id.* at 894-97. Management may glean some ideas from this process, and indeed may adopt some of them; but participation in the brainstorming session is not “dealing.” *Id.* See also *Sears, Roebuck & Co.*, 274 NLRB 230 (1985), *rev’d in part on other grounds*, 289 NLRB 627 (1988); *John Ascuaga’s Nugget*, 230 NLRB 275 (1977); *Mercy-Memorial Hosp.*, 231 NLRB 1108 (1977); *General Foods Corp.*, 231 NLRB 1232 (1977).

In addition, “dealing with” is not present if there are only isolated incidents of proposals to management, as such isolated incidents are insufficient to establish the requisite “pattern or practice” of “dealing with” the employer within the meaning of the Act. *Vons Grocery Co.*, 320 NLRB 53, 54 (1995) (one incident of making proposals on conditions of work does not constitute a pattern or practice of dealing with the employer); *Stoody Co.*, 320 NLRB at 20 (same).

Further, employer-employee interactions that occur between an employer and a single employee acting alone also cannot establish an organization’s “dealing with.” *See* 29 U.S.C. 152(5) (the term “labor organization” encompasses an agency, committee, organization, or plan but not individual employees); *Gen. Foods Corp.*, 231 NLRB 1232, 1235 (1977) (finding no “dealing with” where employees in a team meeting raised issues with management representatives because the employees acted as individuals). The Board and the courts have observed that continuous rotation of an employee organization’s members suggests that the members are acting as individuals rather than as representatives of the workforce. *In re The Globe Newspaper Co.*, No. 1-CA-30117, 1993 WL 853909, at *5 (Nov. 26, 1993) (adopting an ALJ’s conclusion that “an employees’ communication committee was not a labor organization [dealing with the employer] where all employees participated in committee meetings on a rotation basis and the committee served as a management tool to increase company

efficiency”); *Sears Roebuck and Co.*, 274 NLRB 230, 244 (1985) (same); *NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288, 290, 294-95 (6th Cir. 1982) (“The continuous rotation of Committee members . . . makes the Committee resemble more closely the employee groups speaking directly to management on an individual, rather than a representative, basis as in *General Foods*”).

Nor does an employer’s delegation of duties, such as planning of education programs, constitute dealing. *EFCO Corp.*, 327 NLRB 372, 376 (1998).

Pursuant to these standards, the Board and the courts have concluded that programs such as T-Voice, where participants are scattered throughout a wide area and who merely facilitate the employer’s consideration of suggestions made by all employees or serve an informational function through which management ascertains employees’ experiences with serving the Company’s customers are not labor organizations. In *EFCO Corp.*, 327 NLRB at 376, for example, the Board considered 4 committees. It concluded that 3 of the committees were formed by the employer for the purpose of making committee-based proposals to management which would be considered and accepted or rejected, and that, in fact, that was the practice. Therefore, the element of “dealing with” was present. As to the 4th committee, named the Employee Suggestions Screening Committee, it was charged with screening and forwarding to management suggestions placed by the

company's employees in suggestion boxes located in various parts of the company's facility. *Id.* at 374. Employees received \$5 each for any "valid" suggestion. *Id.* The committee simply reviewed suggestions made by individual employees, screened them to ensure that they were meritorious, and forwarded the vast majority of them to management without providing any recommendations of its own. *Id.* This function, the Board concluded, was similar to a screening portion of a lawful employee "suggestion box" program and not a labor organization. *Id.* at 376. T-Voice representatives "screen" suggestions only as to whether they are customer pain points which are then submitted to SharePoint. For employee related issues, the T-Voice representative directs the employee to Human Resources. (JA299.)

Further, although the employer's memorandum announcing the formation of the Suggestions Committee stated that the committee would recommend the best suggestions made to management, the Board looked to the committee's *actual performance*, rather than to the written policy, and concluded that because the committee did not actually "recommend" or provide an opinion about the adoption or modification of any of the suggestions, it did not "deal with" the employer. *Id.* at 376 n.15.

In *E. I. du Pont*, the Board considered the legality of 7 committees and the practice of conducting one-day safety conferences. The committees were composed of both managers and employees, each addressing different workplace issues. The Board found that each committee was “dealing with” the employer because each of them “*involve[d] group action and not individual communication*” and “made proposals [to which] management responded by word or deed.” 311 NLRB at 894. (Emphasis added). The Board observed that in all committees, there was “dealing” under §2(5) because there were discussions about proposals among committee members, representing both management and employees, and the committees followed “*consensus decision-making*” rules. *Id.* at 895. (Emphasis added). On the other hand, the safety conferences were lawful. There, employees were encouraged to talk about their personal experiences with safety issues and to develop ideas and suggestions about those issues. The Board concluded that the conferences were permissible brainstorming sessions and declared that “[n]othing in the Act prevents an employer from encouraging its employees to express their ideas and to become more aware of . . . problems in their work.” *Id.* at 897. There was no “dealing with” during the conferences because individual employees developed ideas and suggestions and those attending the conferences did not have the task of deciding on proposals for improved safety conditions. *Id.*

Also instructive is *General Foods Corp.*, in which the Board adopted the administrative law judge's findings that the committees established by the employer did not constitute labor organizations with the meaning of the Act. The employer there established teams divided according to job assignments. Each team, acting by consensus of its members, made job assignment to individual team members, assigned job rotations, and scheduled overtime among the team members. 231 NLRB at 1232-34. Each team also held team meetings during which different employees "voiced opinions . . . as to what they liked or disliked about their jobs," addressing issues such as overtime, attendance, promotions and performance. *Id.* At times, the employer "discontinued" certain "practices" after complaints were brought to its attention during these meetings. *Id.* at 1234. On occasion, certain employees from each of the teams were designated to act as a safety committee and to tour the premises to observe and report safety violations. *Id.* A committee of employees drawn from the various teams was also designated to prepare a list of new work procedures. *Id.* Another group collectively wrote up a job description. *Id.* The administrative law judge found the teams were not labor organizations, explaining:

[a]t these formalized meetings, certain employees have on occasion elected to voice their complaints individually to the management representatives who were present, but there is no evidence that the team as such ever acted as an agent on behalf of any irate employee to assist him on

pressing his case. Indeed, a team could not do so because it lacked sufficient internal functional cohesiveness to be regarded as a unit or an entity separate and apart from its membership. A team could not be a bargaining agent because it lacked the structure and capacity to be an organization or an agent of any kind. No team had a team spokesman. At every team meeting, those who spoke did so on their own behalf and in their own individual capacities. If such a set of circumstances should give rise to the existence of a labor organization, no employer could ever have a staff conference without bringing forth a labor organization in its midst.

Id. at 1235. The Board agreed. *Id.* See also *Streamway*, 691 F.2d at 294 (“As in *General Foods*, the Committee was a part of a company plan to determine employee attitudes regarding working conditions and other problems in an accurate and effective way, for the Company’s self-enlightenment, rather than a method by which to pursue a course of dealings”) The employee groups found lawful in *General Foods* and *EFCO* are very similar to T-Voice. There is no evidence T-Voice has any “internal cohesiveness” or structure to act as a true representative of anyone. Indeed, the GC’s belated attempt to assert T-Voice representatives were T-Mobile’s agents was rejected by the Board. Decision, Slip op. at 1, n. 1. The Board correctly concluded T-Voice representatives main task was to collect suggestions on customer issues and pass them on to management.

**B. THE BOARD CORRECTLY DISMISSED THE
SOLICITATION OF GRIEVANCE ALLEGATION**

The Board correctly concluded that a years-long union campaign, without more, is insufficient to establish an inference of solicitation of grievances. Decision, Slip op. at 9 (“Also, the record contains no evidence of the union organizational efforts among call centers at the time.”)

The Board’s dismissal of the solicitation of grievances allegation correctly followed Board precedent as unsustainable in light of the scant evidence of union organizing. In order for an allegation of solicitation of grievances to be sustained there must be sufficient evidence in the record to create an inference that the program was created to interfere with union organizing. The solicitation of employee grievances during a union organizing campaign is not unlawful unless accompanied by an express or implied promise to remedy the grievances or provide other benefits if the union is rejected; that is, if the solicitation is conducted for purposes of undermining organizing activities. *ITT Telecommunications*, 183 NLRB 1129 (1970) (explaining that the solicitation of employee grievances is not illegal unless accompanied by an express or implied promise of benefits specifically aimed at interfering with, restraining, and coercing employees in their organizational effort); *Leland Stanford Jr. Univ.*, 240 NLRB 1138, 1138 n.1, 1142-43 (1979) (relied upon by the Board in its Decision,

explaining that solicitation is unlawful only where conducted in response or opposition to union organizing efforts); *Clark Equipment Co.*, 278 NLRB 498, 500 (1986), *rev'd in part on other grounds*, 296 NLRB 927 (1989) (concluding that even in the context of an active union campaign, employer statements communicating good intentions and ongoing improvements were not unlawful where the statements could not be read to imply promises of benefits if employees rejected the union).

An employer's established past practice of employee engagement can defeat a solicitation of grievance allegation as long as the form of solicitation does not deviate substantially from prior programs. *Longview Fibre Paper and Packaging, Inc.*, 356 NLRB 796, 805 (2011) (lawful for the employer to continue brainstorming meetings, surveys and walking the plant floor to discuss employees issues during organizing because such employee engagement was a past practice).

The CWA asserts the Board erred in concluding that because there was no outstanding petition to represent employees there was insufficient organizing. This misstates the Board's conclusion. The Board did note there was no outstanding petition, which obviously would have been evidence of organizing. The Board's rejection of the allegation went much further, however, noting, "Also, the record

contains no evidence of the Union's organizational efforts among customer service representatives at the time." Decision Slip op. 9.

The CWA's citation to *Amptech, Inc.*, 342 NLRB 1131 (2004), *Manor Care of Easton Penn*, 356 NLRB 202 (2010) and *Advancepierre Foods Inc.*, 366 NLRB No. 133 (2018) is misplaced as these cases all demonstrate a clear causal relationship between specific organizing activities and the employer's solicitation of grievances.

In *Amptech*, there existed specific evidence organizing was occurring including identification of the shift where it was occurring. 342 NLRB at 1132. The employer had no prior practice of soliciting feedback from its employees. Shortly after organizing began, the employer initiated an employee survey and employee advocacy group. The inference was clear of the causal relationship between the engagement and the obvious union organizing making it unlawful. *Id.* at 1136-37.

Similarly, *Manor Care of Easton, PA, LLC*, 356 NLRB 202 (2010) demonstrates how organizing must be proven to support a solicitation of grievances allegation. There, the evidence showed clear organizing very close in time to the solicitation in the form of union leafletting and employee discussions about the union. *Id.* at 207. Although the employer had no prior practice of

soliciting feedback in small group meetings, it initiated meetings to discuss the issues and complaints of employees. The written policy used to invoke the meetings stated that at least one purpose of the meetings was to “make third-party representation unnecessary,” an obvious reference to unions. *Id.* at 209. The Board adopted the ALJ finding that unlawful solicitation occurred because of the clear evidence of organizing, the lack of practice in holding such meetings, and the employer’s express admission it was seeking feedback to prevent unionization. *Id.* 219-220.

In *Advancepierre Foods, Inc.*, 366 NLRB No. 133 (2015), evidence of organizing was prevalent and manifested itself in documents showing the employer’s knowledge, the hiring of a management consulting firm to counter the union, and written solicitation of employees to revoke their authorization cards. *Id.*, Slip op. at 10-11. The institution of a direct solicitation of grievance program constituted a violation of Section 8(a)(1) because there was no prior practice of solicitation; indeed, a suggestion box in the plant contained suggestions that remained “unresponded to” for 8 years. *Id.*, Slip op. at 37.

Contrast these decisions with the record in this case and it is clear the Board’s decision was correct. *Amptech*, *Manor Care*, and *Advancepierre* all had very specific and substantial evidence of organizing coupled with a

contemporaneous, and oftentimes unlawful, employer response. In all the cases, the solicitation was either expressly related to organizing (*Manor Care*) or was established close in time to the organizing so as to give rise to an inference that it was created to stop organizing (*Amptech* and *Advancepierre*). There was little evidence of prior employee engagement by the employers. Here, there is little evidence in the record establishing union organizing at any call center, let alone that it was ongoing and a great deal of evidence showing constant employee engagement. The record contains wisps of organizing at Wichita, but employee Angela Melvin only testified about one meeting in which the union was discussed but no organizing efforts by her or others. There is no evidence organizing was occurring at Albuquerque, Meridian, Springfield or Jefferson call centers, even though the GC called witnesses from each of these locations which is why they remain unmentioned on appeal. None of the other former or current T-Mobile employees mentioned the CWA or organizing. CWA representative Choi was called to testify about her monitoring of T-Mobile social media by the CWA but there is no evidence that T-Mobile knew about this surveillance.

Unlike the employers in *Amptech*, *Manor Care*, and *Advancepierre*, T-Mobile has an established practice of soliciting feedback from its employees. T-Voice was merely a continuation and reiteration of these practices. As the Board acknowledged, noting that it was not mentioned by the ALJ, “it is undisputed that

the Respondent has solicited feedback from its employees for many years through employee surveys, focus groups, an open-door policy, and a program called ‘Frontline Certified,’ through which customer service representatives provided prelaunch feedback on planned customer initiatives. Decision, Slip op. 1. The CWA does not mention this past practice. Even if organizing was occurring at T-Mobile the prior practice of solicitation of feedback would counter any notion that the alleged solicitation of grievances was for purposes of eroding support for a union.

The prior NLRB cases involving T-Mobile cited by the CWA (Br. 56, n. 163 citing to ALJD, Slip Op. 12) also do not support the assertion that organizing was occurring at the advent of T-Voice or its subsequent operation:

T-Mobile USA, Inc., 363 NLRB No. 171 (2016) *enforced in part* 865 F.3d 265 (5th Cir. 2017) involved allegations that the promulgation and maintenance of certain of T-Mobile’s written policies violated the Act. Other than the caption, the CWA is not mentioned in the case. No employee is mentioned in the decision nor are any organizing efforts. In dismissing the promulgation allegation, the Board noted, “there is no argument or evidence that any of the rules were promulgated in response to union or other protected concerted activity.” *Id.*, slip op. 1, n.4. These rules would have been found unlawful at the time regardless of the presence of a

union. The Board has since abandoned the standard under which these rules were found to be unlawful. *The Boeing Co.*, 365 NLRB No. 154 (2017).

T-Mobile USA, JD (NY-34-15), aff'd by the Board WL 5350227, involved a written rule requiring confidentiality in workplace investigations that was in place in T-Mobile's Maine and South Carolina call centers. There also was a single allegation that an employee at the T-Mobile call center in Maine was verbally instructed not to discuss an ongoing workplace investigation of alleged harassment. There is no mention at all of union organizing in the case. The rules at issue would have been found unlawful at the time regardless of the presence of a union. The rules in question would have been considered unfair labor practices regardless of union organizing or actual protected activity. The Board has since abandoned the case law used to support the 8(a)(1) violations. *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019).

T-Mobile USA, Inc., 365 NLRB No. 23 (2017) *enf.d* 717 Fed. App'x 1 (D.C. Cir. 2018), to which the ALJ cited to the ALJD in this case because the Board had not issued its decision, has nothing to do with organizing. This case involved a CWA represented bargaining unit of a small group of T-Mobile field engineers in Connecticut. A majority of those employees sought to end union representation. The CWA filed blocking charges which prevented a decertification election from

being held. Slip Op. at 4, n. 2. T-Mobile was presented with a petition signed by a majority of the bargaining unit employees which expressly asked T-Mobile directly to end CWA representation. Slip Op. at 1. T-Mobile was privileged to withdraw recognition but, believing that the employees should have an election, suspended bargaining with the CWA until an election could be held. Slip op. at 8. All Section 8(a)(1) and (5) allegations which allegedly concerned employee rights (although no specific employee was ever mentioned as part of the case) were dismissed by the ALJ, and that dismissal was upheld by the Board. Slip op. at 1. The only violation found was a Section 8(a)(5) allegation concerning the suspension of bargaining.

The CWA asserts (Br. 25) a failing of the Board was that it did not consider one litigation, *T-Mobile USA, Inc.*, 365 NLRB No. 15 (2017). This case did involve some organizing activity in the 2013-2014 timeframe in T-Mobile's Albuquerque facility. The ALJ dismissed the most serious allegations involving the termination of an asserted CWA supporter and the isolation of another. The Board upheld these dismissals. Slip op. at 1, n. 1. At the point T-Voice was created, the "union activity" cited in this case was more than two years old. The CWA cites no evidence of organizing occurring at the Albuquerque call center or any other call center.

In sum, the Board's conclusion that T-Mobile did not violate the law through solicitation of grievances is consistent with case law. There must be some specific, ongoing organizing sufficient in size and scope to create an inference that the employer's solicitation of grievances from employees; here, there was no such evidence put into the record.

IV. CONCLUSION

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

Dated: October 19, 2020

PROSKAUER ROSE LLP

/s/ Mark Theodore

MARK THEODORE

Attorneys for Intervenor
T-MOBILE USA, INC

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COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

T-MOBILE USA, INC.

Intervenor

No. 20-1044

Board Case No.
14-CA-170229

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), Intervenor certifies that this brief contains 6,152 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

October 19, 2020

Respectfully Submitted,

/s/ Mark Theodore

Mark Theodore
Proskauer Rose LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067-3010
mtheodore@proskauer.com

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CERTIFICATE OF SERVICE

I certify that on October 19, 2020, I filed the foregoing document(s) with the Clerk of the Court for the United States Court of Appeals for District of Columbia Circuit, and served all parties, through the court’s CM/ECF system.

October 19, 2020

Respectfully Submitted,

/s/ Mark Theodore

Mark Theodore
Proskauer Rose LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067-3010
mtheodore@proskauer.com