T-Mobile, Inc. v. National Labor Relations Board: Why the Perilous Choice Is Best

By Elizabeth Torphy-Donzella

Introduction

The National Labor Relations Board, more than any other administrative agency, is given substantial deference in its interpretation of the law for which it is responsible: the National Labor Relations Act (Act). The Board's stated duty is to effectuate the fundamental purpose of the Act: the Section 7 right of employees to choose or reject collective bargaining. In *T-Mobile USA, Inc. v. NLRB*[1] the U.S. Court of Appeals for the D.C. Circuit upheld a Board determination that seems more aimed at preserving a union's unwanted status than in effectuating employee choice.

Facts

In 2011, a group of T-Mobile USA, Inc. ("T-Mobile" or "the Company") employees voted to be represented by a Union. T-Mobile and the Union negotiated a two-year collective bargaining agreement ("CBA") which extended from July 31, 2012 through May 31, 2014.[2]

Beginning in January 2014, the Union filed a series of unfair labor practice ("ULP") charges over certain handbook policies that had been adopted by T-Mobile.[3] In late March 2014, a bargaining unit employee filed a petition, supported by the requisite showing of interest, seeking an election to decertify the Union.[4] Based on the pending ULP charges, the petition was placed in abeyance pursuant to the Board's "blocking charge" policy pending the disposition of the ULP charges. Shortly thereafter, in April 2014, the employer was presented with a petition signed by 13 of the 20 bargaining unit employees stating that they no longer wanted to be represented by the Union.

With the CBA set to expire, in April 2014, representatives of T-Mobile and the Union began to discuss a schedule of negotiations for a successor CBA. T-Mobile and the Union held two bargaining sessions before the Company advised the Union in October 2014 that it was suspending bargaining over a successor contract. In the letter announcing this decision, the Company's attorney noted that T-Mobile had "objective evidence of a loss of majority support of bargaining unit employees, a majority of whom no longer want to be represented by the [Union]."[5] The letter continued, "As you are aware, employees in the bargaining unit filed a timely [de]certification petition several months ago. Unfortunately, their efforts to seek a simple election have been blocked."[6] Given these circumstances, the Company determined that it would suspend bargaining over a successor contract until the representation issue was resolved. The Company agreed, however, that it would continue to recognize the Union as the bargaining representative of unit employees, would abide by the existing CBA, and would bargain on interim matters (which the Company did, including stock grants, mileage reimbursement, and the tax implications for use of Company vehicles). The Company also continued to engage the Union over employee grievances and other matters affecting employees.[7]

Based on the refusal to bargain over a successor CBA, the Union filed additional ULP charges.

Decisions of the ALJ and the NLRB

The ALJ's Decision

The administrative law judge (ALJ) that heard the case in the first instance held that the Company's refusal to bargain over a successor contract did not violate the ActA. The ALJ explained that the Board, in *Levitz Furniture Co. of the Pacific,*[8] had established that an employer

[1] 2018 U.S. App. LEXIS 8054 (D.C. Cir. Mar. 27, 2018) (unpublished).

[2] *T-Mobile USA, Inc. and Communication Workers of America, AFL-CIO and Communication Workers of America Local 1298, AFL-CIO*, 365 NLRB No. 23, 2017 NLRB LEXIS 24 (2017) at *3.

[3] 2017 NLRB LEXIS at *23-24. The Union contended that the handbook's at-will employment policy caused employees to believe that the selection of a bargaining representative was futile and that the adoption of a new notice requirement for the use of paid time off unlawfully modified the CBA. These ULP charges were rejected by the ALJ, which decision was affirmed unanimously by the Board and the court.

[4] 2017 NLRB LEXIS at *4. A petition must be supported by 30% or more of the employees in the bargaining unit.

[5] 2017 NLRB LEXIS 24 at *34.

[6] 2017 NLRB LEXIS 24 at *34 (brackets added).

[7] 2017 NLRB LEXIS 24 at *4-5.

[8] 333 NLRB 717 (2001).

that has information calling into doubt the Union's continued majority status has the following options. If the employer has objective evidence that the union has lost majority support, it may withdraw recognition and refuse to bargain. *Levitz Furniture* emphasized, however, that the employer,

> withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).[9]

Alternatively, an employer that has a good-faith reasonable doubt as to a union's majority status may file petition for election (known as an "RM petition") to use the Board's election procedures rather than following, in the words of *Levitz Furniture*, "the more disruptive process of unilateral withdrawal of recognition."[10]

In this case, the ALJ observed, T-Mobile had demonstrated that the Union had lost majority support, and the loss was not tainted by any misconduct of the Company. Finding that it would have been permissible to have withdrawn recognition and refused to bargain at all, "it chose not to do so; instead merely suspending contract negotiations until an election could be held to determine majority status or lack thereof. If the employer could have legally withdrawn recognition, then surely it could have taken the lesser path of suspending negotiations on a temporary basis."[11] Accordingly, the ALJ ruled that the employer's conduct did not violate the Act.

The NLRB's Decision

A divided panel of the NLRB reversed the ALJ.[12] The majority acknowledged that *Levitz Furniture* "does not specifically address whether an employer that continues to recognize the union may nevertheless unilaterally refuse to bargain over a successor contract."[13] However, the majority reasoned that permitting an employer to continue to recognize the union and choose which subjects it will bargain about (rather than withdraw recognition) constituted a "selective approach to a collective bargaining relationship" that the Board "cannot countenance."[14] The majority determined that the failure to fulfill the duty to bargain fully, including over a successor contract, destabilizes the bargaining process in two ways. First, by unilaterally removing certain subjects from bargaining and unilaterally recognizing certain aspects of a CBA an employer could gain an unfair advantage in negotiations and undermine the ability of the parties' relationship to function. Second, permitting the employer to dictate the subjects of bargaining "would deny the union a fair opportunity to demonstrate its continued effectiveness, a matter of particular concern if the employer eventually does file an RM petition."[15] Thus, the majority concluded, an employer must either withdraw recognition or continue to bargain and file an RM petition. The Board majority held that T-Mobile violated the ActA by failing to negotiate a successor CBA.

The dissenting member observed that in this case, the evidence of loss of majority support was sufficient to permit withdrawal of recognition entirely and, as such, the majority's concern that the Company's actions destabilized the "bargaining process" were misplaced. "This contention fails to recognize that the Union's representative status was rendered doubtful—and quite possibly negated—by what occurred here: the Respondent's receipt of objective evidence that the Union has lost majority support."[16] The dissent continued, "There is no resemblance between the Respondent's extremely restrained, principled actions and what my colleagues attempt to portray as an arbitrary picking-and-choosing among different obligations imposed by our statute."[17] Instead, the Company's actual conduct (as opposed to the hypothesized actions) in the dissent's view preserved the status quo during the period in which the petition was held in abeyance, while minimizing the perception that the Union was weak. "Respondent's actions advanced the goal of promoting stability in labor relations, which is the responsibility of the Board."[18]

---

[9] 2017 NLRB LEXIS 24 at * 43 quoting *Levitz Furniture*. The ALJ noted that if the loss of majority status is a result of employer unfair labor practices, then the withdrawal would violate the NLRA. Given that the ALJ determined that ULP charges based on the employee handbook were unfounded, that caveat did not apply in this case.

[10] 2017 NLRB LEXIS 24 at *42 (*quoting Levitz Furniture*).

[11] 2017 NLRB LEXIS 24 at * 44-45.

[12] Members Pearce and McFerran were in the majority. Member Miscimarra dissented.

[13] 2017 NLRB LEXIS 24 at *6.

[14] 2017 NLRB LEXIS 24 at *7.

[15] 2017 NLRB LEXIS 24 at *8-9.

[16] 2017 NLRB LEXIS 24 at * 19 (internal quotations and brackets omitted).

[17] 2017 NLRB LEXIS 24 at *19.

[18] 2017 NLRB LEXIS 24 at * 20.

A Divided D.C. Circuit Enforces the Board's Order

A divided U.S. Court of Appeals for the D.C. Circuit denied the Company's petition for review and enforced the Board's determination that T-Mobile unlawfully refused to bargain over a successor CBA.[19]

According to the court majority, the Board majority provided a "fulsome analysis" of why *Levitz Furniture* provided only two options: either withdraw recognition or continue to honor the full bargaining obligation until an election could be conducted. The Board's analysis, neither contrary to law nor unsupported by the record (the standard of review), was legitimately a function of "the Board's intent to make withdrawal of recognition a high-stakes option that an employer 'chooses at its peril.'"[20] The majority cited the core values of the Act that it found to be supported by this stark choice—the right of employees to choose or reject a collective bargaining representative and the promotion of stability in bargaining relationships. The majority agreed that "selective bargaining" frustrated these fundamental policies by enabling an employer to gain advantage in the manner cited by the Board majority. The majority asserted that the flexibility the Company sought was within the discretion of the Board as interpreter of labor law to reject.

Finally, the majority rejected T-Mobile's argument that the policy of allowing blocking charges to delay a decertification election indefinitely militates in favor of the Company's choice in this case. Having never raised the issue before the Board, the majority ruled that it lack jurisdiction to decide that issue. The majority noted, however, "Going forward, the Board may adopt a different policy when an employer has objective evidence a union has lost majority support, but petitioner has not shown that the Board's Decision and Order are inconsistent with the Act or arbitrary and capricious."[21]

The dissent maintained that nothing in *Levitz Furniture* limited an employer to the "all or nothing" approach espoused by the Board. The dissent also disputed the Board's justifications for its decision as unsupported by the facts of case. Agreeing with the dissenting Board member, the dissenting judge observed that the record was bereft of facts to suggest that T-Mobile's bargaining was aimed at gaining an unfair advantage. Furthermore, the dissent also remarked that the Union had already lost majority support, and thus the contention that selective bargaining would undermine the Union's standing was inapposite. "T-Mobile was entitled to withdraw recognition of the Union entirely. By taking the restrained approach it did, T-Mobile allowed the Union to continue to be involved in the day-to-day issues."[22]

The dissent ended by observing that the decertification petition was still pending four years after its filing due to the Board's blocking-charge rule "If there is unfair prejudice in this case, it is by the Board, not the employer."[23]

Analysis

The Board's standard in *Levitz Furniture*, of which *T-Mobile's* stark choice is the progeny, was developed after the Board was rebuked by the U.S. Supreme Court for using contorted interpretations of fact to require an employer to continue to recognize the union as bargaining agent even though the employer had a good-faith doubt as to the union's majority status (the then-applicable standard). In *Allentown Mack Sales and Serv. v. NLRB*,[24] the Supreme Court held that the Board acted improperly when it effectively imposed a higher burden of proof on the employer in assessing the facts supporting its doubt about the union's majority status such that evidence supporting doubt was irrationally discounted.

In a "twist" on *Allentown Mack,* in *T-Mobile,* both the Board and court majorities ignored the actual facts of the conduct of the employer in the case before them and focused, instead, on hypothetical conduct in which a bad actor, advantage-seeking employer might engage in some "what if" world. They espoused the importance of employee free choice in the selection of bargaining representatives as a "fundamental policy" of the NLRA, yet barely acknowledged the undisputed record evidence that *over half of the unit employees* had signed a petition stating that they *no longer wanted to be represented by the Union*. In advancing the need for stability in bargaining relationships, they offered two stark (and decidedly destabilizing) options: withdraw recognition without any election based on objective evidence of loss of majority support (and hope you can prove it "at your peril" employer) or file an RM petition and bargain with what may well be a union lacking majority support (during which time the union undoubtedly would file blocking-charges alleging that the employer was not bargaining in good faith).

---

[19] 2018 U.S. App. LEXIS 8054.

[20] 2018 U.S. App. LEXIS 8054 at *3 (quoting *Levitz Furniture*, 333 NLRB at 725).

[21] 2018 U.S. App. LEXIS at *7.

[22] 2018 U.S. App. LEXIS at * 10.

[23] 2018 U.S. App. LEXIS at *11. The dissent further criticized the Board for creating new rules through adjudication rather than the notice-and-comment process of rulemaking under the Administrative Procedures Act.

[24] 522 U.S. 359 (1988).

The impact of the blocking-charge on employee free choice cannot be discounted.[25] Although a ULP charge will not automatically block an election (a party must request it, provide an offer of proof concerning the basis for the request, and obtain the Regional Director's approval), according to critics, such requests frequently are granted in petitions challenging a union's majority status.[26] The Board's blocking-charge policy[27] permits parties who think they will not prevail in an election to achieve delay. This case (in which the validity of the blocking charge was not timely raised) demonstrates the problem. During four years of litigation, a petition with the requisite showing of interest—and a test of the union's support—was left unresolved due to blocking charges. Cognizant of the delay, T-Mobile decided to take a seemingly prudent approach and not act unilaterally by withdrawing recognition. Instead, T-Mobile worked to preserve the status quo pending the disposition of the dispute by continuing to recognize and engage with the Union, adhering to the expired contract and bargaining over subjects that benefitted employees. The result was a finding that its conduct violated the NLRA.

Given the options, the takeaway for employers that believe they have objective information that a union no longer has majority support is to withdraw recognition. An RM petition likely will be delayed until employee apathy dispels interest in change. Disruption is the better course.

Elizabeth Torphy-Donzella is a partner with Shawe Rosenthal, LLP, which specializes in management side labor and employment law.

[25] The Act does not provide for blocking charges. Indeed, Section 9(e) of the Act provides that upon the filing of a petition with the requisite showing of interest, "the Board *shall take a secret ballot election* of the employees in such unit." 29 U.S.C. § 159(e) (emphasis added). However, the practice has been endorsed by courts as within the Board's discretion. *See, e.g. Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 228 (5th Cir. 2016).

[26] *See* David A. Kadela and Robert S. Giolito, "To Block or Not to Block – Does the Board's Blocking Charge Policy Need to Be Fixed?" Paper from the ABA Committee on Practice and Procedure under the National Labor Relations Act Midwinter Meeting (March 2, 2088), available at https://www.americanbar.org/content/dam/aba/events/labor_law/2018/papers/2018%20PP%20Midwinter%20Meeting%20Blocking%20Charge%20Paper%20(final).authcheckdam.pdf.

[27] NLRB Representation Case Handling Manual §§ 11730-11731 describes the Board's practice with regard to blocking charges.