

Dish Network Corporation and Communications Workers of America Local 6171. Cases 16–CA–027316, 16–CA–027331, 16–CA–027514, 16–CA–027700, 16–CA–027701, and 16–RC–010919

December 13, 2012

ORDER DENYING MOTION

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND BLOCK

On April 11, 2012, the National Labor Relations Board, by a three-member panel (Member Hayes and then-Member Flynn; Member Block, concurring in part), issued a Decision, Order, and Order Remanding in this proceeding, affirming the judge’s rulings, findings, and conclusions. 358 NLRB 174 (2012). The original panel unanimously agreed that the judge, relying on *Tri-Cast, Inc.*, 274 NLRB 377 (1985), and its progeny, correctly dismissed the allegation that the Respondent violated Section 8(a)(1) by informing employees that “they would be limited in bringing concerns to management if they selected the Union as their exclusive bargaining representative.” *Dish Network Corp.*, supra, slip op. at 1 fn. 1.

In her concurrence, Member Block stated her view “that the Board should reexamine the *Tri-Cast* doctrine in a case where the issue is squarely presented,” noting that the “Charging Party did not argue until its reply brief that *Tri-Cast* should be overruled” and that “[a]s a result, neither the Respondent nor the General Counsel has had the opportunity to brief the issue.” *Id.*, slip op. at 1 fn. 1 (concurring opinion). The original panel majority (Member Hayes and then-Member Flynn) took a different view on this specific issue, stating that “the merits of *Tri-Cast* are not before us” and citing two reasons for that conclusion: (1) that the Union’s argument that *Tri-Cast* be overruled was made too late under the Board’s Rules and Regulations Section 102.46(h), because it was first raised in the Union’s reply brief, as opposed to its exceptions brief; and (2) that the Union’s argument was foreclosed by the principle that the Acting General Counsel—who has not challenged *Tri-Cast*—controls the theory of the case. *Id.*, slip op. at 1 fn. 1 (majority opinion).

Following the Board’s April 11, 2012 decision, the Charging Party on May 9, 2012, filed a motion for reconsideration and suggestion for consideration by the full Board, and a supporting brief.¹ In its motion, the Charging Party requests that the Board withdraw its decision

¹ Sec. 102.48(d)(1) of the Board’s rules provides that “[a] party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.”

and call for supplemental briefing on the issue of whether *Tri-Cast* should be overruled.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which includes the remaining two members of the panel that participated in the Decision, Order, and Order Remanding.²

We believe that the original panel correctly affirmed the judge’s dismissal of the 8(a)(1) allegation under existing Board law, and we leave to another day the issue of whether the *Tri-Cast* doctrine should be revisited. That said, we believe that the original panel majority erred insofar as it appeared to hold that the Board lacks the *authority* here to overrule *Tri-Cast*. As a general matter, the original panel majority’s rationale would seem to foreclose the Board from overruling precedent sua sponte, but the Board (wisely or not) has done so in the past.³ (It is clear, too, that the Board may decline, in its discretion, to revisit precedent sua sponte, as recent decisions also illustrate.⁴) Our decision today has a narrower focus: the dubious reasons given by the original panel majority for holding that the “merits of *Tri-Cast* were not before” the Board. The original panel majority—in an error endorsed by our dissenting colleague today—fundamentally misunderstood the distinction between Board procedure and Board authority.

1. First, Section 102.46(h) of the Board’s Rules and Regulations, cited by the original panel majority, structures the briefing process, providing that a reply brief filed by the party excepting to the judge’s decision “shall be limited to matters raised in the brief to which it is replying.” But this limitation operates on the excepting party, not on the Board itself. With respect to the Board’s authority for deciding a case, the rules provide simply that:

² The Board has been polled at the request of one of the members of the original panel, and a majority has not voted in favor of rehearing or reconsideration by the full Board.

³ For a sampling of cases, see *Goya Foods of Florida*, 356 NLRB 1461 (2011); *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007); *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004); *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844 (2001); *Carpenters Local 1031*, 321 NLRB 30 (1996). There is no indication that the original panel majority contemplated the overruling of such prior decisions.

Our colleague points out that two of the cited cases involved the reversal of precedent on remedial issues and two of the cases involved inconsistent case law that warranted clarification. The fact remains that the Board has overruled precedent sua sponte when it believed such a step was warranted and has never suggested that it lacked authority to do so. We certainly agree that the Board’s decision to reconsider precedent sua sponte should not be made lightly, and that the cases in which the Board does so should continue to be the exception.

⁴ See, e.g., *Hargrove Electric Co.*, 358 NLRB 1395, 1395 fn. 1 (2012); *Nott Co.*, 345 NLRB 396 (2005).

Upon the filing of timely and proper exceptions, and any cross-exceptions or answering briefs, as provided in section 102.46, *the Board may decide the matter forthwith upon the record*, or after oral argument, or may reopen the record and receive further evidence before a Member of the Board or other Board agent or agency, or may make other disposition of the case.

Section 102.48(b) (emphasis added).

Consistent with Section 102.46(h), the Board could choose to disregard a new (nonjurisdictional) argument in a reply brief, not least because the other party has had no opportunity to respond to that argument. Nothing in that rule, however, suggests that the Board would somehow lack the authority to “decide the matter” based on an argument made for the first time in a reply brief, or on a rationale that did not appear in the briefs at all, so long as the decision was made “upon the record.”⁵ When it decides cases, the Board functions in certain respects like an appellate court. The Supreme Court, in turn, has rejected the view that a party’s failure to make an argument until its reply brief to the appellate court limits the court’s authority:

When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.

Kamen v. Kemper Financial Services, 500 U.S. 90, 99 (1991).

2. Nor, contrary to the original panel majority, would the Board be precluded from reconsidering *Tri-Cast* because the “General Counsel controls the theory of the case, not the Charging Party.” 358 NLRB 174, 174 fn. 1 (majority opinion). This familiar axiom is based on Section 3(d) of the Act, which gives the General Counsel “final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . , and in respect of the prosecution of such complaints before the Board.” 29 U.S.C. § 153(d). E.g., *Moore Dry Dock Co.*, 92 NLRB 547, 547 fn. 1 (1950) (charging party not entitled to amend complaint without agreement of the General Counsel). There are limits, of course, to what respect for the exclusive prosecutorial authority of the General Counsel is required when the issue is the

⁵ Here, where the Charging Party did not squarely argue that *Tri-Cast* should be overruled until its reply brief, the Board—if it wished to entertain that argument—could properly give the Respondent an opportunity to respond, a point the Charging Party effectively acknowledges by requesting the Board to call for supplemental briefing.

scope of the Board’s own adjudicatory authority. As the Board explained soon after Section 3(d) was enacted:

[O]nce the complaint has issued and the case has been submitted to the Board for decision, the “final authority” of the General Counsel is exhausted. Any action which the Board may take thereafter does not constitute a review of the independent portion of the General Counsel’s authority.

....

Both the Board and the General Counsel are supreme within their respective statutory spheres: that of the General Counsel lies in investigating and prosecuting complaint cases; that of the Board in deciding such cases according to law and policy.

Haleston Drug Stores, Inc., 86 NLRB 1166, 1170 (1949) (rejecting the General Counsel’s view that the Board could not dismiss the complaint based on decision not to exercise discretionary jurisdiction), *affd.* 187 F.2d 418 (9th Cir. 1951), *cert. denied* 342 U.S. 815 (1951).

This case, however, poses no difficult issues under Section 3(d). The General Counsel issued a complaint alleging that the Respondent’s statement violated Section 8(a)(1). As we have observed, *Tri-Cast* stands in the way of the General Counsel’s allegation. The Charging Party’s argument that *Tri-Cast* should be overruled does not amount to adding a new allegation to the complaint.⁶ Nor is it—in any sense that implicates Section 3(d)—a new theory of liability that conflicts with the General Counsel’s decision to prosecute the allegation. Cf. *Independent Metal Workers Local 1*, 147 NLRB 1573, 1576 (1964) (full Board) (finding that “pleaded and litigated facts” violated Sec. 8(b)(2) and (3), although complaint alleged violation only of Sec. 8(b)(1)).⁷ Finally, the original panel majority’s observation that the General Counsel did not except to the judge’s decision is particularly misplaced. Under Section 102.46(a) of the Board’s rules, any party (not just the General Counsel) may file exceptions and so trigger the Board’s authority.

⁶ Under the Board’s Rules, the complaint is not required to plead a legal theory, so long as it contains “a clear and concise statement of the facts” on which Board jurisdiction is predicated and a “clear and concise description of the acts which are claimed to constitute unfair labor practices.” Sec. 102.15. E.g., *Mammoth Coal Co.*, 358 NLRB 1643, 1651 (2012).

⁷ The *Independent Metal Workers* Board observed that “once the decision has been made to issue a complaint and to prosecute it, the General Counsel has embarked on the judicial process which is reserved to the Board.” 147 NLRB at 1577, quoting *Frito Co., Western Division v. NLRB*, 330 F.2d 458, 463–464 (9th Cir. 1964).

3. In his partial dissent, Member Hayes adheres to his view as a member of the original panel majority. His hyperbolic opinion—which ascribes hidden bad motives to the present majority and which proclaims the end of *stare decisis* and due process at the Board—is oddly out of proportion to our unremarkable observations here, themselves necessary to avoid reaffirming the original panel majority’s errors. For the reasons already explained, we believe that our colleague misunderstands the effect of the Board’s rules and the General Counsel’s authority in this case.

Our colleague, adding a new rationale for the original panel’s majority’s holding, invokes Section 102.46(b)(2) of the Board’s rules, which provides that

any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

In his view, for the Board to have the authority to reconsider *Tri-Cast*, the Charging Party was required not merely to except to the judge’s dismissal of the relevant 8(a)(1) allegation (as it did), but to specifically except to the judge’s application of *Tri-Cast*—a decision that the judge was, in fact, required to apply unless and until the Board overruled it.⁸

But the Charging Party’s failure (if any) under Section 102.46(b)(2) would not itself deprive the Board of the authority to reconsider *Tri-Cast*. The rule provides that a defective exception “may be disregarded,” not that it *must* be disregarded. Put differently, the provision operates against the parties, not the Board.⁹ Indeed, the Fifth Circuit has explicitly rejected the argument that the Board is barred by Section 102.46 from considering an issue not raised by a party in exceptions to the judge’s decision. The court held that “[e]ven absent an exception, the Board is not compelled to act as a mere rubber stamp for its Examiner” (now administrative law judge), but rather is “free to use its own reasoning.” *NLRB v. WTVJ, Inc.*, 268 F.2d 346, 348 (1959) (enforcing Board decision that found violation on different theory from trial examiner, despite failure of the General Counsel or Charging Party to except to examiner’s decision). A contrary rule, the court stated, would “unduly cripple the Board in its administration of the Act.” *Id.* See also *NLRB v. Duncan Foundry & Machine Works, Inc.*, 435 F.2d 612 (7th Cir. 1970). If the Board has the authority

⁸ E.g., *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004).

⁹ Similarly, Sec. 102.46(g) of the Board’s rules provides that “[n]o matter not included in exceptions . . . may thereafter be urged before the Board.” It does not prohibit the Board from considering a matter *sua sponte*, where due process permits.

to adopt its own legal rationale even in the absence of any underlying exception, it follows that the Board may do so when an exception was filed in accordance with the rules.¹⁰

While the Charging Party might have been well advised to raise the *Tri-Cast* issue specifically in its exceptions, the Board has not required a party to explicitly request the Board to reconsider precedent, if such a request may be fairly inferred from its exceptions and briefs, as is the case here. See *Toering Electric Co.*, 351 NLRB 225, 228 fn. 20 (2007).¹¹

Our colleague also invokes the axiom that the General Counsel controls the theory of the case to suggest that the Charging Party cannot make legal arguments that have not been made by the General Counsel or cite cases that the General Counsel has not cited. Our colleague cites *Raley’s*, 337 NLRB 719 (2002), in support of his argument, but that case (and cases like it) illustrate the distinction between this case and those that truly implicate Section 3(d) of the Act. In *Raley’s*, the Board refused to allow the Charging Party to assert a theory of violation that was specifically disavowed by the General Counsel. 337 NLRB at 719. In this case, the General Counsel alleged that the Respondent’s statement was unlawful under Section 8(a)(1). As we have demonstrated, in arguing for reversal of *Tri-Cast*, the Charging Party was not attempting to expand that allegation or otherwise alter the General Counsel’s theory of the case, which is not limited to the case law cited in its support or to its interpretation of particular decisions.

Finally, to the extent that due process concerns might be implicated here (or in a case where the Board *sua sponte* raised a potentially dispositive issue, argument, or legal theory), those concerns could be easily addressed by requesting supplemental briefing: i.e., providing the party or parties an opportunity to be heard on the specific point in question. Whether and when that step is constitutionally required is not a question that needs to be answered today, nor is a definitive answer readily ascertainable.¹² Our dissenting colleague invokes due process,

¹⁰ *Can-Am Plumbing, Inc.*, 350 NLRB 947 (2007), cited by our colleague, is easily distinguishable. There, the issue that the Board declined to consider—whether the Davis-Bacon Act precluded finding an unfair labor practice—had never been raised as a defense by the respondent employer before the Board, nor been discussed by any party to the Board proceeding. Rather, the issue was raised for the first time by the District of Columbia Circuit on review of the Board’s original order in the case.

¹¹ Interestingly, there is no indication in *Tri-Cast* itself that the respondent employer there had asked the Board to reverse existing precedent, as it did, enabling the employer to prevail.

¹² See Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 San Diego L. Rev. 1253 (2002).

but never explains precisely how the principle should operate in the class of cases we discuss, nor cites any relevant authority to support his criticism.

4. We conclude, then, that the Board would have the authority to revisit the *Tri-Cast* doctrine here. Nevertheless, in the exercise of our discretion, we decline to take up that issue today. To do so would further delay resolution of this case, not least because the Charging Party acknowledges that additional briefing would be appropriate. And even if the Board ultimately determined to overrule *Tri-Cast*, that step would alter the result for the parties only if the Board also decided to apply its new rule retroactively to find a violation (since we agree that the statement was lawful when made). If the *Tri-Cast* issue arises in connection with a future unfair labor practice charge, the General Counsel may then determine whether to issue a complaint and to ask the Board to reverse precedent. Such a case would be a better vehicle for reexamining what, rightly or wrongly, is now a well-established precedent more than 25 years old.

Accordingly, having duly considered this matter, we shall deny the Charging Party's motion.

IT IS ORDERED that the Charging Party's motion for reconsideration and suggestion for consideration by the full Board is denied.

MEMBER HAYES, concurring in part and dissenting in part.

I agree with my colleagues that the Charging Party has not shown that extraordinary circumstances exist warranting reconsideration of the Board's decision in this case. I dissent from their declaration that the Board possesses broad discretion to reconsider and overrule its precedent *sua sponte*.

The majority's extensive argument about the Board's "authority" to address issues not raised by the parties is a red herring, and I might note, unsullied by any due process concerns on their part. If my colleagues simply wanted to make the point that there is no statutory bar to *sua sponte* reconsideration of precedent, they could have done so in a footnote to the customary unpublished order denying the Respondent's motion. I fear something more is afoot here; that is, they are undercutting the validity of longstanding procedural precedent in order to set the stage for overruling substantive precedent, even when not relied on or challenged in a particular case.

That procedural precedent was accurately stated in the Board's original decision. First, pursuant to Section 102.46(b)(2) of the Board's Rules and Regulations, which complements the limitation on judicial review in Section 10(e) of the Act¹ "[a]ny exception to a ruling,

¹ In relevant part, Sec. 10(e) states: "No objection that has not been urged before the Board, its member, agent, or agency, shall be consid-

finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded." So while the Act may not bar the Board from exercising its discretion to reconsider precedent *sua sponte*, the Board's own Rules bar doing so when a party has not challenged that precedent in exceptions. The panel in the underlying decision unanimously and expressly agreed that the Union only argued that *Tri-Cast*² was distinguishable, not that it should be overruled.

Second, the original decision correctly relied on the well-established procedural precedent that "the General Counsel's theory of the case is controlling, and that a charging party cannot enlarge upon or change that theory." See *Raley's*, 337 NLRB 719 (2002), citing *Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999). So even if the Charging Party Union had explicitly contended in exceptions that *Tri-Cast* should be overruled, the Board *is* foreclosed by longstanding precedent from exercising discretion to consider this argument because, as my colleagues acknowledge, the Acting General Counsel did not challenge that precedent.

As my colleagues well know, the cases they cite in support of their novel proposition that the Board has broad discretion to reconsider precedent *sua sponte* actually show that the Board's discretion is constrained within narrow limits.³ My colleagues' broad construction of those cases is of a piece, however, with several recent

ered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

² *Tri-Cast, Inc.*, 274 NLRB 377 (1985).

³ In *Goya Foods of Florida*, 356 NLRB 1461 (2011), and *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007), the Board overruled precedent on a remedial issue. It is well established that remedial issues are always within the Board's discretion to address in the absence of exceptions. *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996). In *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844 (2001), and *Carpenters Local 1031*, 321 NLRB 30 (1996), the Board was confronted with mutually inconsistent case law and found it appropriate to clarify the law "in the interest of consistency and coherence of Board precedent." *Kolkka Tables*, *supra* at 848 fn. 9. In *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), the Board did likewise after the Sixth Circuit pointed out the inconsistency of our precedent. Finally, in *Toering Electric Co.*, 351 NLRB 225 (2007), the Board majority found that the respondent's exceptions "squarely present[ed]" the issue of genuine-applicant status, adding that it "view[ed] the [r]espondent's specific exceptions and supporting argument on brief as a request to reconsider precedent." *Id.* at 228 fn. 20. Only the dissenters in *Toering* claimed that the issue was not raised.

The court's observation in *NLRB v. WTVJ, Inc.*, 268 F.2d 346, 348 (1959), upon which my colleagues rely, is not so broad as they would have it. It merely affirms the right of the Board in *de novo* review of a judge's decision to use a different rationale in affirming the *same result* reached by the judge, as long as the rationale is comprehended by the complaint and the relevant facts were fully litigated. See *W. E. Carlson Corp.*, 346 NLRB 431, 434 (2006).

decisions in which they have demonstrated a troubling willingness to decide cases on grounds neither alleged nor litigated.⁴

I suggest that this is not an innocent or innocuous opinion. Until recently, the principle that “the Board only decides issues that are presented and litigated by the parties” seemed intact, even to the point of refusing a judicial direction to address an issue. See *Can-Am Plumbing, Inc.*, 350 NLRB 947, 948, 949 (2007) (holding that an issue the D.C. Circuit instructed the Board to address on remand, “not having been raised by the [r]espondent before the Board, was waived and therefore *cannot* be considered” (emphasis added)). Now, my colleagues indicate that the “inconvenience” of needing litigant parties to raise an issue of precedent before us has been removed. They pave the way for the Board in any case, regardless of the scope of exceptions filed or issues litigated, to address and overrule precedent. To

the extent that any member of the public has any faith left that this Board holds even a semblance of allegiance to concepts of stare decisis and due process, that faith should evaporate with this opinion.⁵

⁵ In *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 San Diego L. Rev. 1253 (2002), cited by my colleagues, author Barry A. Miller relevantly observes that “[t]he absence of a consistent principle [for raising issues sua sponte] leaves courts open to the accusation that ignoring the adversary process is a political action, where a court reaches out to legislate instead of following judicial norms.” *Id.* at 1260. In my view, the observation applies with equal force to administrative agency sua sponte actions.

Should my colleagues seek relevant authority that sua sponte issue consideration may raise due process concerns, I refer them to the same article. *Id.* at 1288, et seq. As evidenced by the difference of opinion in *Mammoth Coal*, supra, I do not believe that predecisional notice and opportunity to address an issue raised sua sponte in supplemental briefs is in all instances sufficient to allay those concerns as to previously unpled and unlitigated matters.

⁴ See, e.g., *Mammoth Coal*, 358 NLRB 1643, 1651 (2012).