

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

INTERNATIONAL ASSOCIATION OF) MACHINISTS AND AEROSPACE WORKERS,) AFL-CIO, EAST BAY AUTOMOTIVE) MACHINISTS LODGE No. 1546, DISTRICT) LODGE 190))	Case Nos. 16-74025 17-71337
Petitioner))	
SJK, INC. d/b/a FREMONT FORD))	
Intervenor))	
v.))	
NATIONAL LABOR RELATIONS BOARD))	Board Case No. 32-CA-151443
Respondent))	
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SJK, INC. d/b/a FREMONT FORD))	
Petitioner))	
v.))	Case No. 17-71210
NATIONAL LABOR RELATIONS BOARD))	
Respondent))	

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO
REMOVE THIS CASE FROM ABEYANCE, SUMMARILY GRANT THE
COMPANY’S PETITION FOR REVIEW, AND SUMMARILY DENY THE
UNION’S PETITION FOR REVIEW AND THE BOARD’S CROSS-
APPLICATION FOR ENFORCEMENT**

To the Honorable, the Judges of the United States Court
of Appeals for the Ninth Circuit:

The National Labor Relations Board, by its Deputy Associate General Counsel, respectfully moves the Court to remove this case from abeyance, summarily grant the Company's petition for review, and summarily deny the Union's petition for review and the Board's cross-application for enforcement. In support of this motion, the Board shows:

1. In the Decision and Order under review, the Board found that SJK, Inc. d/b/a Fremont Ford ("the Company") had violated the National Labor Relations Act by maintaining an arbitration agreement barring employees from concertedly pursuing work-related claims in any forum, arbitral or judicial. 364 NLRB No. 29 (June 16, 2016). In doing so, the Board applied the rule set forth in *Murphy Oil, USA, Inc.*, 361 NLRB 774 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, No. 16-307 (Jan. 13, 2017).

2. The Company petitioned for review of the Board's Order, challenging the unfair-labor-practice filing. The charging party before the Board, the International Association of Machinists and Aerospace Workers, AFL-CIO, East Bay Automotive Machinists Lodge No. 1546, District Lodge 190 ("the Union"), also petitioned for review of the Order, claiming aggrievement (and standing) based on the Board's failure to order certain additional remedies for the violation found.

3. On February 13, 2018, the Court placed this case in abeyance pending the Supreme Court's decision in *Murphy Oil*.

4. On May 21, 2018, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018), holding that employers may lawfully maintain arbitration agreements that bar employees from concertedly pursuing work-related legal claims.¹ The Board acknowledges that under that decision, the Decision and Order in this case is no longer enforceable. The Board therefore consents to the summary grant of the Company's petition for review, and the summary denial of the Board's cross-application for enforcement, of the Board's Order. Because the Union's petition for review requests additional remedies for the violation found, which does not survive *Epic Systems*, the Board further moves the Court to deny the Union's petition.

5. In its May 25, 2018 Status Report, the Union argues that this Court must still consider, and may enforce the Board's order based on, alternative theories not resolved by *Epic Systems*. However, the Board based its unfair-labor-practice finding exclusively on the rationale the Supreme Court rejected in *Epic Systems*, and specifically found that the Union's alternative theories were "wholly

¹ The Court issued *Epic Systems* together with *Murphy Oil*, No. 16-307, and *Ernst & Young LLP v. Morris*, No. 16-300.

outside the scope of the General Counsel’s amended complaint.” 364 NLRB No. 29, slip op. 1 n.1. As the Board explained, “[i]t is well settled that a charging party cannot enlarge upon or change the General Counsel’s theory of a case.” *Id.* (citing *Kimtruss Corp.*, 305 NLRB 710 (1991)).

6. Counsel for the Company has represented that the Company does not oppose the Board’s motion. Counsel for the Union has represented that it will oppose the motion.

WHEREFORE, the Board respectfully moves this Court to remove this case from abeyance, summarily grant the Company’s petition for review, and summarily deny the Union’s petition for review and the Board’s cross-application for enforcement.

Respectfully submitted,

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, S.E.
Washington, D.C. 20570

Dated at Washington, D.C.
This 4th day of June 2018

INTERNATIONAL ASSOCIATION OF)	
MACHINISTS AND AEROSPACE WORKERS,)	
AFL-CIO, EAST BAY AUTOMOTIVE)	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 528 words of proportionally spaced, 14-point

type, and that the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben
Linda Dreeben
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CERTIFICATE OF SERVICE

I certify that on June 4, 2018, the foregoing motion was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using

the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

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