

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
)	
v.)	No. 17-73210
)	
INTERNATIONAL ASSOCIATION OF)	
BRIDGE, STRUCTURAL, ORNAMENTAL,)	
AND REINFORCING IRON WORKERS,)	
LOCAL 229, AFL-CIO)	
)	
Respondent)	

**NATIONAL LABOR RELATIONS BOARD’S OPPOSITION
TO RESPONDENT’S REQUEST FOR JUDICIAL NOTICE**

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

The National Labor Relations Board opposes Respondent’s request for judicial notice. Respondent seeks judicial notice of two documents: (1) a Supplemental Memorandum, dated September 27, 1950, that the Board filed with the Supreme Court in *IBEW Local 501 v. NLRB*, 341 U.S. 694 (1951) (“*IBEW Local 501*”), and (2) the initial brief, dated February 21, 1951, that the Board filed in *IBEW Local 501*. The Court should reject Respondent’s request as an improper attempt to use judicial notice to present irrelevant documents, to make legal arguments that were not timely presented to the Board or this Court, and to expand the record.

1. This Court does not take judicial notice of documents that are “not relevant to the resolution of [the] appeal.” *Santa Monica Food Not Bombs v. Santa Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006). Resolution of the instant appeal turns on whether one of the secondary-boycott provisions of the National Labor Relations Act (“the Act”)—Section 8(b)(4)(i)(B)—may be constitutionally applied to prohibit union efforts, including through oral and written communication, to “induce or encourage” a work stoppage for a prohibited secondary purpose. As the Board observed in its decision in the instant case (*see* Excerpts of Record 5; Board brief pp. 20-27), the Supreme Court answered that question in the affirmative in *IBEW Local 501*. Respondent (brief pp. 13-15) disagrees, claiming that *IBEW Local 501* only addressed whether picketing, and not mere speech, to induce or encourage a work stoppage, warranted First Amendment protection. It thus seeks that the Court take judicial notice of these other documents, claiming they support its interpretation.

This Court should reject Respondent’s request for judicial notice of two nearly 70-year-old filings in *IBEW Local 501* because they are not relevant to resolution of the instant dispute. The Supreme Court’s decision speaks for itself, and its scope has been fully briefed by the parties. The *IBEW Local 501* filings, and certainly Respondent’s interpretation of them, have no bearing on the issue before this Court. Contrary to Respondent’s suggestion, this Court should interpret

Supreme Court precedent based on the decision, not party filings. *See* 18 *Moore's Federal Practice - Civil* § 134.03, n.3 (3d ed. 2018) (the principal evidence of what has been decided is the court's written opinion). Any other view would invite requests for judicial notice of every brief filed in every related case—a Pandora's Box that this Court should refuse to open.

2. Further, though couched as a motion for judicial notice, Respondent's motion is a thinly veiled and improper attempt to make a legal argument to the Court—and one that it never made to the Board. Under Federal Rules of Evidence 201, the Court can take judicial notice of a “fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.” A request for judicial notice is not, however, a proper vehicle for legal argument. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2009) (“judicial notice is generally not the appropriate means to establish the legal principles governing the case”) (citation omitted). Accordingly, the Court will not take judicial notice of pleadings filed in other cases for the purpose of noticing the truth of the facts alleged or arguments made therein. *See, e.g., Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001). This so because such alleged facts and arguments are subject to reasonable dispute, and, therefore, not a proper subject of judicial notice. *Id.* The Court should reject Respondent's request as an improper attempt to use

judicial notice to make a legal argument and because Respondent seeks judicial notice of disputed matters.

Having already briefed the contested scope of *IBEW Local 501*, Respondent now requests that the Court take judicial notice of two 70-year-old Board filings for the purpose of making an additional legal argument—an improper use of judicial notice. Respondent does not rely on those filings for the Court to take notice of the indisputable facts of either their existence or their filing dates. Rather, Respondent, selectively citing to various assertions and arguments made in the brief and memorandum (motion 2-4), uses them to advance its disputed position that “the only issue [in *IBEW Local 501*] was picketing.” Respondent further argues (motion at 3) that the filings demonstrate the relevance of another case that it brought to the Court’s attention through FRAP 28(j)—a claim that the Board disputed in its FRAP 28(j) reply. Respondent does not—and cannot—claim that its interpretation of the filings is an undisputed fact “whose accuracy cannot be reasonably questioned,” so as to be a proper subject of a request for judicial notice. In short, Respondent is asking the Court to take judicial notice of Respondent’s opinion regarding how the filings should be interpreted—a legal interpretation that the Board disputes. Because judicial notice is an inappropriate vehicle for making these legal arguments, the Court should reject Respondent’s request that it take judicial notice of the two filings. *Cf. Lee v. City of Los Angeles*, 250 F.3d at 689-

90 (granting judicial notice only as to the existence of filings and undisputed fact, and not for the purposes of noticing the truth of the facts or arguments made therein).

Moreover, by failing to provide these filings to the Board below—which were obviously available to Responding during the Board proceedings—Respondent has failed to preserve any such argument based on the filings for judicial review. Section 10(e) of the Act provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). Respondent offers no reason for its failure, and it offers no reason why the Court should disregard that oversight. This Court therefore lacks jurisdiction to consider any arguments based on those filings, irrespective of the fact that judicial notice is, as discussed above, an improper vehicle for legal argument. *See, e.g., NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1103 n.10 (9th Cir. 2008) (“Section 10(e) of the [Act] constitutes a jurisdictional bar to this court considering claims not raised before the [Board].”) Respondent also waived any such argument by failing to discuss these documents or raise any argument based on them in its opening court brief in this case. *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992); *see also* Fed. R. App. P. 28(a)(8)(A) (brief must contain party’s contentions with citation to authorities and record).

Finally, because the documents are not a proper subject of a request for judicial notice, and because Respondent failed to provide them to the Board, its motion is essentially an improper attempt to supplement the record. A party generally may not use judicial notice to enlarge the record on appeal to include material—such as the two filings at issue here—that was not part of the record before the Board. *See Yagman v. Republic Ins.*, 987 F.2d 622, 626 n.3 (9th Cir. 1993). “[P]arties may not supplement the record with evidence not presented to the agency in the first place.” *NLRB v. Fred Meyer Stores, Inc.*, 466 F. App’x 560, 562 (9th Cir. 2012); *accord Fisher v. INS*, 79 F. 3d 955, 963 (9th Cir. 1996) (declining to take judicial notice of a report because “we are limited to reviewing facts considered by the [INS]”). Here, Respondent failed to bring these 70-year-old filings to the Board’s attention, and it offers no explanation for its failure to do so. The Court should reject Respondent’s unsupported attempt to supplement the record at this late date.

In sum, Respondent cites no authority that allows it to use judicial notice to circumvent the established principles discussed above. Briefing is complete, and the time for submitting legal arguments to the Court has long passed, particularly those based on 70-year-old materials available to Respondent from the outset of the proceedings.

WHEREFORE, the Court should deny the request for judicial notice.

Respectfully submitted,

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street S.E.

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Dated at Washington, D.C.
this 7th day of February 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its document contains 1,460 words of proportionally spaced, 14-point type, and that the word processing system used was Microsoft Word 2016.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 7th day of February 2019

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2019, I filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for Ninth Circuit by using CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 7th day of February 2019