

No. 19-70585

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

**INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS
AND ALLIED WORKERS, LOCAL 5**
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

KIRA DELLINGER VOL
Supervisory Attorney

JOEL HELLER
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-0656
(202) 273-1042

PETER B. ROBB
General Counsel

ALICE B. STOCK
Deputy General Counsel

DAVID HABENSTREIT
Acting Deputy Associate General Counsel

National Labor Relations Board

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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the petition of International Association of Heat & Frost Insulators and Allied Workers, Local 5 for review of a National Labor Relations Board order dismissing an unfair-labor-practice complaint against Coastal Marine Services, Inc. 367 NLRB No. 58 (2019). The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“NLRA” or “the Act”), 29 U.S.C. § 160(a), and the Court has jurisdiction pursuant to Section 10(f), 29 U.S.C. § 160(f). The petition is timely, as the Act provides no time limits for such filings.

STATEMENT OF THE ISSUE

Did the Board act reasonably and within its discretion in dismissing the complaint and declining to consider arguments it found were beyond the scope of the General Counsel's theory of the case?

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions appear in the addendum to this brief.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Coastal Marine performs insulation work on ships in San Diego, California. As a condition of employment, Coastal Marine's employees must sign a document entitled "Employee Acknowledgment and Agreement." (ER 3; ER 75.)¹ By signing that document, an employee "agree[s] to utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related in any way to my employment." (ER 3; ER 97.) The document further provides that:

All claims brought under this binding arbitration agreement shall be brought in the individual capacity of myself or the Company. This binding arbitration agreement shall not be construed to allow or permit the consolidation or joinder of other claims or controversies involving any other employees, or permit such claims or controversies to proceed as a class action, collective action, private attorney general action or

¹ "ER" citations are to Local 5's Excerpts of Record. Cites preceding a semicolon are to the Board's findings and cites following a semicolon are to supporting evidence in the record. "Br." cites are to Local 5's opening brief to the Court.

any similar representative action. No arbitrator shall have the authority under this agreement to order any such class or representative action. By signing this agreement, I am agreeing to waive any substantive or procedural rights that I may have to bring an action on a class, collective, private attorney general, representative or other similar basis.

(ER 3; ER 97-98.)

II. PROCEDURAL HISTORY

Following charges filed by Local 5, the Board's General Counsel issued an unfair-labor-practice complaint against Coastal Marine. The complaint alleged as follows:

Respondent has maintained as a condition of employment for all of its employees at the San Diego facility an agreement titled "Employee Acknowledgement and Agreement" ... that contains provisions requiring employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any rights they have to resolve disputes through collective or class action.

[E]mployees would reasonably conclude that the provisions of the Employee Acknowledgement and Agreement ... preclude employees from engaging in conduct protected by Section 7 of the Act.

(ER 84-85.)

The parties submitted the case on a stipulated record and without a hearing. In arguing that Coastal Marine's policy was unlawful, the General Counsel cited Board cases holding that "an employer violates Section 8(a)(1) of the Act by requiring employees ... to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working

conditions against the employer in any forum.” (ER 62.) Specifically, the General Counsel relied on *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *affirmed sub nom. Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013)—an earlier case establishing the same principle. (ER 61-63.) The administrative law judge found a violation based on those cases. (ER 3-4.)

Coastal Marine and Local 5 both filed exceptions to the judge’s decision. While the case was pending before the Board, the Supreme Court decided *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), which reversed the Board’s decision in *Murphy Oil*.² Local 5 filed a supplemental brief addressing the Supreme Court’s decision.

III. THE BOARD’S CONCLUSIONS AND ORDER

In a Decision and Order issued on January 10, 2019, the Board (Chairman Ring and Members Kaplan and Emanuel) dismissed the complaint. It held that “[i]n light of the Supreme Court’s decision in *Epic Systems*, which overrules the Board’s holding in *Murphy Oil USA, Inc.*, ... the complaint allegation that the mandatory arbitration agreement is unlawful based on *Murphy Oil* must be

² *Epic Systems* involved three consolidated cases: *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), and *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016).

dismissed.” (ER 2.) In addition, it declined to address alternative arguments raised by Local 5 for finding the policy unlawful, concluding that they were “wholly outside the scope of the General Counsel’s complaint.” (ER 2 n.2.) Local 5 filed a motion for reconsideration, which the Board denied. (ER 1.)

STANDARD OF REVIEW

The Court will “uphold an NLRB decision when substantial evidence supports its findings of fact and when the agency applies the law correctly.” *Sever v. NLRB*, 231 F.3d 1156, 1164 (9th Cir. 2000). The Board’s determination of “whether a violation of the statute has occurred is accorded considerable deference as long as it is rational and consistent with the statute.” *IBEW, Local 21 v. NLRB*, 563 F.3d 418, 422 (9th Cir. 2009) (internal quotations omitted). The Board’s decision not to consider arguments outside the scope of the General Counsel’s theory of the case is reviewed for abuse of discretion. *Winn-Dixie Stores, Inc. v. NLRB*, 567 F.2d 1343, 1350 (5th Cir. 1978).

SUMMARY OF ARGUMENT

The Board’s General Counsel pleaded and litigated this case based solely on the rationale set forth in *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014). He argued that, as in *Murphy Oil*, Coastal Marine violated the NLRA by maintaining a policy requiring employees to bring any employment-related dispute to individual

arbitration. After the Supreme Court reversed *Murphy Oil in Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the Board reasonably dismissed the complaint.

Rather than accept that straightforward result, Local 5 contends that the Board should have considered a variety of alternative theories for why Coastal Marine's policy was unlawful. The Board did not abuse its discretion in declining to consider those arguments, applying the well-settled principle that the General Counsel, rather than the charging party, controls the theory of the case.

Local 5's argument that *Epic Systems* does not dispose of this case because Coastal Marine's policy prohibits other types of concerted legal activity besides class or collective actions does not withstand scrutiny, as Coastal Marine's policy is not materially different from the policies the Supreme Court addressed in that case.

ARGUMENT

The Board Reasonably Dismissed the Complaint and Declined To Consider Local 5's Alternative Arguments

The Board's General Counsel pleaded and litigated this case based entirely on *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), which the Supreme Court reversed in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). The Board reasonably dismissed the complaint in light of that adverse precedent. Local 5 resists that conclusion, but its challenge to the Board's dismissal consists of a series of arguments that either were outside the scope of the General Counsel's theory of the case or are not grounds to distinguish *Epic Systems*.

A. The Board Reasonably Dismissed a Complaint That the General Counsel Pleaded and Litigated Based on *Murphy Oil*

In dismissing the complaint in light of *Epic Systems*, the Board correctly noted that this case was pleaded and litigated "based on *Murphy Oil*." (ER 2 & n.2.) In *Murphy Oil*, the Board held that an employer violates Section 8(a)(1) of the NLRA when it "requires employees ... to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum." 361 NLRB 774, 774 (2015) (quoting *D.R. Horton, Inc.*, 357 NLRB 2277, 2277 (2012)).³ It held further

³ Section 8(a)(1) prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of" their rights under the NLRA, 29 U.S.C. § 158(a)(1), which include the right "to engage in ... concerted activities for the

that the Federal Arbitration Act (“FAA”) did not mandate enforcement of such policies, because they violate the NLRA and “the savings clause in Section 2 of the FAA affirmatively provides that such a conflict with federal law is grounds for invalidating the agreement.” *Id.* at 779, 782.⁴

The complaint in this case alleged that Coastal Marine’s policy requiring employees to resolve employment disputes through individual arbitration violated Section 8(a)(1). (ER 84-85.) In his brief to the Board, the General Counsel argued that the case was “controlled by the Board’s decisions in *D.R. Horton* ... and *Murphy Oil*” and that Coastal Marine’s policy was “a clear violation of the principles set forth in *D.R. Horton* and *Murphy Oil*.” (ER 40, 50.) The General Counsel likewise responded to Coastal Marine’s contention that its policy must be enforced under the FAA with “reasoning ... upheld by the Board in *Murphy Oil*,” arguing that “the FAA provides that arbitration agreements may be invalidated ... for the same reasons any contract can be invalidated, including if they are unlawful,” and “[i]nasmuch as the Agreement is unlawful ... it should not be enforceable under the FAA.” (ER 46.)

purpose of collective bargaining or other mutual aid or protection,” 29 U.S.C. § 157.

⁴ The FAA provides that arbitration agreements are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

Because the complaint was based on *Murphy Oil*, it follows that the Supreme Court’s reversal of *Murphy Oil* controls the disposition of this case. In light of that adverse precedent, the Board reasonably dismissed the complaint.

B. The Board Did Not Abuse Its Discretion In Declining To Consider Local 5’s Arguments That Were Outside the General Counsel’s Theory of the Case

On appeal, Local 5 repeats to the Court a series of arguments that it contends the Board should have considered before dismissing the complaint. The Board reasonably determined that Local 5’s self-described “alternative theories” (Br. 18) for finding a violation were outside the scope of the General Counsel’s theory of the case, however, and did not abuse its discretion in declining to address them.

1. The General Counsel, Not the Charging Party, Controls the Theory of the Case

Under Section 3(d) of the Act, the Board’s General Counsel “shall have final authority” over “issuance of complaints ... and the prosecution of such complaints before the Board.” 29 U.S.C. § 153(d). As the Court has explained, “section 3(d) ... vests in the General Counsel exclusive prosecutorial authority over unfair labor practices.” *International Association of Machinists v. Lubbers*, 681 F.2d 598, 602 (9th Cir. 1982). The General Counsel’s power to issue complaints carries with it the power to determine the content of those complaints. *See, e.g., Frito Co. v. NLRB*, 330 F.2d 458, 464 (9th Cir. 1964) (“The authority to issue complaints is authority to determine what they shall contain.”); *IUOE, Local 150 v. NLRB*, 325

F.3d 818, 830 (7th Cir. 2003) (“The General Counsel ... exercise[s] exclusive control over the issues contained in any complaint that he issues.”). That power also bestows on the General Counsel the authority to decide how to proceed in prosecuting complaints, such that “the General Counsel determines the legal theory in unfair labor practice cases.” *White Cap, Inc.*, 325 NLRB 1166, 1174 n.2 (1998); *see also Containair Systems Corp. v. NLRB*, 521 F.2d 1166, 1170 (2d Cir. 1975) (“[T]he Board’s General Counsel determines whether to issue a complaint and the theory on which it should proceed”); *Zurn/N.E.P.C.O.*, 329 NLRB 484, 484 (1999) (“[T]he General Counsel’s theory of the case is controlling.”).

In addition, the General Counsel prosecutes unfair-labor-practice complaints on behalf of the public interest, not only the particular party who filed the charge. Unfair-labor-practice litigation “does not exist for the adjudication of private rights,” but to “give effect to the declared public policy of the Act.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941) (quoting *National Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940)); *see also Casino Pauma v. NLRB*, 888 F.3d 1066, 1078 & n.4 (9th Cir. 2018) (“The NLRB General Counsel seeks enforcement [of the NLRA] as a public agent, not on behalf of any private party or private right.” (internal quotations omitted)). Accordingly, “cases before the Board are not private litigation subject to the control of interested parties.” *Frito Co.*, 330 F.2d at 462.

Based on those principles, the Board long has held that “a charging party cannot enlarge upon or change the General Counsel’s theory.” *Kimtruss Corp.*, 305 NLRB 710, 711 (1991); *see also Atlantic Queens Bus Corp.*, 362 NLRB 604, 605 n.5 (2015) (same); *Zurn/N.E.P.C.O.*, 329 NLRB at 484 (same); *Rogers Cleaning Contractors, Inc.*, 277 NLRB 482, 490 n.58 (1985). Although the charging party initiates the process, “[t]he General Counsel, not the Charging Party, ... exclusively controls the issues contained in the complaint,” *Weigand v. NLRB*, 783 F.3d 889, 895 (D.C. Cir. 2015), and “the General Counsel, not the Charging Party, determines the theory of the case,” *Teamsters Local 282*, 335 NLRB 1253, 1254 (2001) (internal quotations omitted). Because “the General Counsel under Section 3(d) of the Act has broad power over the initiation and prosecution of complaints,” the Board has declined to weigh in “where the Charging Parties’ arguments go clearly beyond the reach of the complaint as issued and prosecuted by the General Counsel.” *California Saw & Knife Works*, 320 NLRB 224, 276 (1995). Taking up such arguments would allow “the management of the cause [to] be taken from the General Counsel and entrusted to a private party, which is contrary to the scheme of the statute and the specific provision of Section 3(d).” *Sailors’ Union of the Pacific*, 92 NLRB 547, 547 n.1 (1950). As the Court has explained, a charging party’s pursuit of a claim that the General Counsel did not advance would “in effect convert the proceeding into a

two-party private litigation,” which would be “inconsistent with Congress’s clear intent to create an essentially prosecutorial system of litigation in which ... the General Counsel enjoys prosecutorial authority.” *Boilermakers Union Local 6 v. NLRB*, 872 F.2d 331, 334 (9th Cir. 1989).⁵

Accordingly, the Board has declined to consider arguments raised by a charging party regarding violations not pleaded or litigated by the General Counsel, even if they target the same underlying conduct that the General Counsel alleged was unlawful. *See, e.g., Kimtruss*, 305 NLRB at 711 (not addressing argument that employer statement violated the Act as a unilateral change when General Counsel litigated it as a threat). It also has applied that principle in instances where the charging party presents a different theory for the same violation. In *Grane Healthcare Co.*, for example, the General Counsel and charging party both argued that, after purchasing a company, the successor employer unlawfully refused to bargain with the union that had represented the

⁵ Other courts have noted that proposition approvingly. *See, e.g., Williams v. NLRB*, 105 F.3d 787, 790 n.3 (2d Cir. 1996) (“[T]o permit the Charging Party to introduce ... theories of violations [other] than the theory relied upon by the General Counsel, is ... in derogation of the authority of the General Counsel” (internal quotations omitted)); *Winn-Dixie Stores, Inc. v. NLRB*, 567 F.2d 1343, 1350 (5th Cir. 1978) (affirming Board refusal to find a violation where “the general counsel ... did not include this charge in the complaint or attempt to litigate the issue”); *West Point Manufacturing Co. v. NLRB*, 330 F.2d 579, 590-91 (4th Cir. 1964) (charging party “could not put in issue before the Board ... a matter as to which the General Counsel had declined to allege illegality”).

predecessor's employees. 357 NLRB 1412, 1412 n.3 (2011). In dismissing the allegation, the Board rejected the General Counsel's argument that the union retained a presumption of majority support after the company changed hands but did not pass on the charging party's argument that its contract with the predecessor obligated any successor to recognize the union, because that argument would "expand the General Counsel's theory of the alleged violation." *Id.* And in *Atlantic Queens Bus*, the Board considered only the General Counsel's, not the charging party's, theory as to why the employer's unilateral implementation of its final bargaining offer violated the Act. 362 NLRB at 604-05 & n.5. Those cases show that, contrary to Local 5's suggestion (Br. 16), the outside-the-scope principle is not limited to charging-party arguments directly inconsistent with the General Counsel's theory but also applies to alternative, rather than divergent, theories of the case.

2. Local 5's Arguments Were Outside the General Counsel's Theory of the Case

As detailed above, the General Counsel pleaded and litigated this case on the singular basis that Coastal Marine's arbitration policy was unlawful and unenforceable for the reasons set forth in *Murphy Oil*. The Board was not required to address Local 5's alternative arguments that, as the Board found, were "wholly outside the scope of the General Counsel's complaint." (ER 2.) Nothing Local 5 argues on appeal renders that well-established principle inapplicable here.

The General Counsel’s only theory for finding Coastal Marine’s arbitration policy unlawful was that it violated the NLRA. The Board thus reasonably declined to address Local 5’s arguments, repeated here, that Coastal Marine’s policy is unlawful because it “interfere[s] with other federal statutory schemes” involving “various federal agencies” (Br. 32-36) or “denie[s] access to the multitude of anti-retaliation provisions of many other federal statutes” besides the NLRA (Br. 31). It was likewise justified in not addressing Local 5’s arguments, also repeated on appeal, that Coastal Marine’s policy “would effectively deprive [employees] of substantive rights guaranteed by state law” under “numerous ... provisions in the California Labor Code” (Br. 36-37) or is unconscionable under California law (Br. 39-41). Indeed, an NLRA violation is the only theory the General Counsel *could have* pleaded or litigated, given that the Board does not have jurisdiction to decide whether an employer policy violates any other federal statute or state law.⁶

Even Local 5’s NLRA-related arguments would have expanded the General Counsel’s theory of the violation. Unlike Local 5 (Br. 38-39), the General Counsel

⁶ To the extent Local 5’s argument was that Coastal Marine’s policy violated the NLRA by prohibiting concerted activity that uses procedures provided for in other statutes, that argument is consistent with the General Counsel’s *Murphy Oil* theory but does not distinguish this case from *Epic Systems*. The arbitration policies the Supreme Court addressed in that case had been used by the employers to prevent collective-action suits under the Fair Labor Standards Act—one of the “other federal statutes” Local 5 lists. *See Epic Systems*, 138 S. Ct. at 1619-20.

never argued that Coastal Marine’s policy was unlawful because it restricted any other form of protected activity (such as strikes or leafleting) besides employees’ “rights to engage in collective legal action” (ER 46). Moreover, Local 5 cannot shoehorn its arguments into the General Counsel’s theory of the case simply by stating (Br. 3, 5) that both the complaint and Local 5 contend that Coastal Marine’s policy interferes with Section 7 rights. Even though the complaint is broadly worded, the General Counsel’s briefing made clear that he was proceeding only on the theory set forth in *Murphy Oil*. Cf. *Sierra Bullets, LLC*, 340 NLRB 242, 243 (2003) (declining to find violation not argued by General Counsel where, “although the complaint allegation was broad, the General Counsel made clear at the hearing that he was proceeding on a narrow theory of violation”).

Local 5’s arguments regarding the FAA were similarly outside of the General Counsel’s theory of the case. The General Counsel’s only argument was that Coastal Marine’s policy fell within the FAA’s saving clause because it violated the NLRA. (ER 46-47.) Local 5 took a different route. It argued to the Board, as it does here (Br. 18-29), that the FAA simply did not apply because Coastal Marine’s policy is not a “contract evidencing a transaction involving commerce.” 9 U.S.C. § 2. Local 5 posits that the policy is thus outside of Congress’s powers under the Commerce Clause to enforce. Those factual, statutory, and constitutional arguments went beyond anything the General Counsel

advanced or litigated; they appear nowhere in the General Counsel's filings in this case or the decisions he relied upon for his theory of the violation. Local 5's argument that Coastal Marine's policy falls within the FAA's saving clause as unconscionable under California law (Br. 39-41) is similarly absent from the General Counsel's case.⁷

Many of Local 5's arguments on appeal take an overly narrow view of the outside-the-scope principle. For example, the fact that the issue of whether the FAA mandates enforcement is a response to a defense, and therefore does not appear in the complaint (Br. 16), is of no moment. As described above, p.10, the principle that the General Counsel controls the theory of the case covers how the case is litigated as well as how it is pleaded. It applies to arguments that are "beyond the reach of the complaint" both "as issued" and "as ... prosecuted by the General Counsel." *California Saw*, 320 NLRB at 276. Responding to defenses is part of the prosecution of a case. For example, the employer in *Nott Co.* defended against an allegation that it unlawfully withdrew recognition from a union by arguing that the union lacked majority support. 345 NLRB 396, 397-99 (2005). In

⁷ Local 5 is wrong to suggest (Br. 12) that the administrative law judge's general comment that *D.R. Horton* and *Murphy Oil* "treated the issue" of the FAA was an acknowledgment that Local 5's FAA arguments were within the General Counsel's theory of the case. Neither *D.R. Horton* nor *Murphy Oil* said anything about interstate commerce or state-law unconscionability, so the General Counsel's reliance on those cases could not have constituted an adoption of those arguments.

dismissing the complaint, the Board did not pass on the charging party's rebuttal that it actually did maintain such support because the General Counsel had argued only that majority status was not necessary under the circumstances. *Id.* at 398 & n.10; *cf. Frito Co.*, 330 F.2d at 464 (defenses "which seek to inject issues which the General Counsel has refused to present ... may be ignored").

Contrary to Local 5's suggestion (Br. 13), the absence of express opposition by the General Counsel to Local 5's arguments as outside the scope of the complaint does not mean that the Board was required to consider them. The Board does not mandate such opposition to preserve the General Counsel's control over the case, especially when it is otherwise clear that an argument departs from the General Counsel's theory. *See California Saw*, 320 NLRB at 276 (declining to address charging-party arguments "[w]here the General Counsel has opposed the Charging Parties *or* where the Charging Parties' arguments go clearly beyond the reach of the complaint" (emphasis added)). For example, neither *Grane Healthcare* nor *Atlantic Queens Bus* mentioned any express opposition to the charging party's alternative theories by the General Counsel.⁸

⁸ Cases that do feature explicit opposition by the General Counsel sometimes involve objection to the charging party's attempt to introduce evidence at the hearing in support of its theory. *See, e.g., Winn-Dixie*, 567 F.2d at 1350. Unlike in those cases, there was no hearing in this case, which proceeded on a stipulated record, and thus no opportunity for that kind of objection.

Here, the General Counsel’s briefing made clear that he was not advancing Local 5’s arguments or any theory beyond *Murphy Oil*. And the General Counsel did not adopt those arguments post-*Epic Systems*, after his own theory of the case was no longer viable. It was already clear at that point that the Board considered Local 5’s arguments beyond the scope of the General Counsel’s theory of the case, because the Board had declined to address materially similar arguments on that ground in prior cases litigated under *Murphy Oil*. See *Fremont Ford*, 364 NLRB No. 29, 2016 WL 3361190, at *2 n.1 (2016); *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195, 2016 WL 3213012, at *1 n.2 (2016). In light of that precedent, the General Counsel’s failure affirmatively to adopt those arguments confirmed that he was not advancing them as part of his prosecution of the complaint. For the same reason, the General Counsel did not need to argue in response to Local 5’s motion for reconsideration that those arguments went beyond his theory of the case (Br. 13)—the Board already had so held.

Finally, the Board’s decision is not inconsistent with the proposition Local 5 cites (Br. 15, 17) that under certain circumstances the Board can rule on theories or violations not argued by the General Counsel. See, e.g., *Desert Aggregates*, 340 NLRB 289, 292-93 (2003) (explaining that Board may rule on such issues if they are “closely related to the subject matter of the complaint and ha[ve] been fully and fairly litigated”). Cases stating that proposition address questions of the Board’s

authority and a charged party's due-process rights, not a charging party's ability to redirect the litigation.⁹ Moreover, they hold that the Board *can* rule on issues or theories outside of the complaint, not that it *must* do so anytime such issues are raised. The Board has discretion to decline to consider those arguments. *See, e.g., Winn-Dixie*, 567 F.2d at 1350 (affirming as "within its discretion" Board's decision not to find a violation that the General Counsel "did not include ... in the complaint or attempt to litigate"); *cf. Roundy's Inc. v. NLRB*, 674 F.3d 638, 646-47 (7th Cir. 2012) (explaining that "the Board had *discretion*" whether to consider a "theory ... not raised in the complaint or during the hearing before the ALJ").

The Board exercised that discretion here. Contrary to Local 5's characterization of the decision, the Board did not hold that it "cannot consider" Local 5's arguments. (Br. 15.) Instead, the Board found "no need to address" them. (ER 2 n.2.) That approach distinguishes the Second Circuit decision Local 5 cites (Br. 15) where the court rejected the claim that the Board "lacked the authority" to consider an argument advanced only by the charging party and that "due process concerns *necessarily* barred it from reaching this issue." *SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 446-48 (2d Cir. 2011); *see also Frito Co.*, 330 F.2d

⁹ Indeed, the case that Local 5 quotes (Br. 15) did not involve arguments made by a charging party, but a theory raised by the administrative law judge *sua sponte*. *DirectSat USA, LLC*, 366 NLRB No. 40, at *1 (2018), *enforced*, 925 F.3d 1272 (D.C. Cir. 2019).

at 461-62 (affirming General Counsel’s control over a case’s prosecution while rejecting argument that “the Board [is] precluded from considering” an unpleaded issue or “is powerless to exercise its own discretion” to do so).

In sum, Local 5 has not shown that its arguments fell within the General Counsel’s theory of the case or that the Board otherwise had to consider them. The Board’s decision not to do so thus does not undermine the reasonableness of its dismissal of the complaint.

C. Coastal Marine’s Policy Is No Broader Than the Policies at Issue in *Epic Systems*

Even when advancing arguments that do fit within the General Counsel’s theory, Local 5 has not shown that dismissal of the complaint was improper. Local 5 asserts that the Board “refused to consider” whether *Epic Systems* applies to a policy like Coastal Marine’s that prohibits other types of concerted legal action besides class actions or Fair Labor Standards Act collective actions, and that *Epic Systems* does not address such policies. (Br. 1, 37-38, 41-42.) Neither proposition is accurate. Although Local 5 is correct that the General Counsel’s theory of why Coastal Marine’s policy violated the Act was not limited to the policy’s prohibitions on class or collective actions (Br. 9-15), that fact does not support its position.

The Board answered the question that Local 5 now poses in the course of rejecting the General Counsel’s *Murphy Oil* argument. It correctly explained that

the question before the Supreme Court in *Epic Systems* was the enforceability of employer policies “that contain class- and collective-action waivers *and* stipulate that employment disputes are to be resolved by individualized arbitration.” (ER 2 (emphasis added).) None of the arbitration policies before the Supreme Court were limited to class or collective actions, but swept broadly to prohibit “any group, class or collective action claim,” *Murphy Oil*, 361 NLRB at 776, or “any class, collective, or representative proceeding,” *Lewis v. Epic Systems Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), *reversed*, 138 S. Ct. 1612 (2018). The policies provided that employee claims would proceed “only on an individual basis,” *Lewis*, 823 F.3d at 1154, “in separate proceedings,” *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 979 (9th Cir. 2016), *reversed*, 138 S. Ct. 1612 (2018), and “without consolidation ... with any other person or entity’s claim,” *Murphy Oil*, 361 NLRB at 776. The Seventh Circuit made clear that “the contract here purports to address *all* collective or representative procedures and remedies, not just class actions” and provided that “the plaintiff may not take advantage of any collective procedures.” *Lewis*, 823 F.3d at 1154-55.

The scope of the policies before the Supreme Court was thus commensurate with the scope of Coastal Marine’s policy. And as the Board explained, the Supreme Court’s ultimate holding was that those policies “must be enforced as written.” (ER 2.) Although, as Local 5 notes (Br. 38, 41), the Court discussed

class actions and statutory collective actions, the scope of a Supreme Court decision is measured “by holdings, not language.” *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). This case does not present a different issue than *Epic Systems*, and the Board reasonably relied on that case in dismissing the complaint.

CONCLUSION

The Board respectfully requests that the Court deny Local 5's petition for review.

s/ Kira Dellinger Vol
KIRA DELLINGER VOL
Supervisory Attorney

s/ Joel A. Heller
JOEL A. HELLER
Attorney
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-0656
(202) 273-1042

PETER B. ROBB
General Counsel

ALICE B. STOCK
Deputy General Counsel

DAVID HABENSTREIT
Acting Deputy Associate General Counsel

National Labor Relations Board
October 2019

STATEMENT OF RELATED CASES

Counsel for the Board is not aware of any related cases pending before this Court.

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

INTERNATIONAL ASSOCIATION OF HEAT &) FROST INSULATORS AND ALLIED WORKERS,)) LOCAL 5)		
Petitioner)		No. 19-70585
)	
v.)		
)	
NATIONAL LABOR RELATIONS BOARD)		Board Case No.
)	21-CA-139031
Respondent)		

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 5,106 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2016.

s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 28th day of October 2019

**UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 28th day of October 2019

STATUTORY ADDENDUM

29 U.S.C. § 158(a)(1):

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

29 U.S.C. § 153(d):

(d) General Counsel; appointment and tenure; powers and duties; vacancy

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

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

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