

Consolidated Case Nos.

19-71501

19-71766

19-71804

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

INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 751,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

AIM AEROSPACE SUMNER, INC.,
Intervenor

AND RELATED ACTIONS

**REPLY IN SUPPORT OF PETITIONER INTERNATIONAL
ASSOCIATION OF MACHINISTS, DISTRICT 751'S MOTION TO
SUPPLEMENT AGENCY RECORD**

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I. The General Counsel’s Brief in Support of His Cross Exceptions to the Administrative Law Judge’s Decision is Evidence that the Issue of Whether the Board Erred in Applying the *Hearst* Exception was Raised Before the Board.

While the Board does not object to the Court reviewing and considering in this appeal General Counsel’s brief in support of his cross exceptions to the ALJ’s decision, the Board nevertheless argues that this Court is jurisdictionally barred from reaching the issue of whether the *Hearst* presumption applies because the *General Counsel* raised the argument, not the Union. Opp. at 4-6. According to the Board, for the Court to have jurisdiction to consider an issue on appeal, not only must an objection have been raised before the Board, it must *also* have been raised by the party who seeks to advance the argument on appeal. Section 10(e) contains no such requirement; the Board’s argument therefore fails.

HTH Corp. v. NLRB, the case the Board cites in support of its argument that “IAM is responsible for preserving its own arguments,” misses the mark. See Opp. at 5. In that case, the court held that the company could not overcome its failure to raise objections before the Board by relying on the fact that Board members discussed in a dissenting opinion the issues the company sought to raise on appeal. 823 F.3d 668, 673 (D.C. Cir. 2016). There, *no party* raised the issues the company sought to pursue on appeal. The court thus held that discussion by the Board—in and of itself—does not satisfy Section 10(e)’s requirement that an objection be “urged before the Board” before it may be considered on appeal. See *id.*

In contrast to *HTH Corp.*, the General Counsel here raised the issue of whether the *Hearst* presumption applies in his brief in support of his cross exceptions to the ALJ's decision. That the General Counsel raised the issue does not preclude the Union from advancing this argument on appeal; the lynchpin of Section 10(e) is that the issue be brought before the Board—it matters not which party brings it. *See Awrey Bakeries, Inc. v. N.L.R.B.*, 59 F. App'x. 690, 693 (6th Cir. 2003) (“[W]e have held that a party could seek judicial review on a matter it did not raise before the Board if another party to the enforcement proceedings adequately raised the issue.”); *Gardner Mechanical Servs., Inc. v. N.L.R.B.*, 115 F.3d 636, 641 (9th Cir. 1997) (court could consider company's argument on appeal although it did not file exceptions to the ALJ's rulings; the General Counsel and the union did file exceptions and therefore the issue was “clearly before the Board”); *Mourning v. N.L.R.B.*, 559 F.2d 768, 771 (D.C. Cir. 1997) (argument raised in General Counsel's brief to the Board was sufficient to allow charging party to pursue argument on appeal); *N.L.R.B. v USPS*, 833 F.2d 1195, 1202 (6th Cir. 1987) (considering arguments General Counsel raised in her brief in support of her exceptions as evidence that an issue of statutory interpretation was “urged before the Board” under Section 10(e), and rejecting General Counsel's argument that the court was barred from considering the issue on appeal because the issue was not raised in an exception or cross exception).

Accordingly, arguments raised by the General Counsel in his brief in support of his cross exceptions to the ALJ's decision are sufficient to raise the issue of whether the Board erred in failing to apply the *Hearst* presumption here. The Court should, therefore, grant the Union's motion to supplement the record on appeal.

II. CONCLUSION

Petitioner International Association of Machinists, District 751 hereby requests the Court grant its motion to supplement the record, and accept the brief attached to its Motion to Supplement Agency Record (Dkt. 72) as added to the record on review in this matter.

Respectfully submitted this 20th day of July, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32-1, I certify that the Reply Brief of Petitioner is proportionally spaced, has a typeface of 14 points or more and contains 636 words.

DATED this 20th day of July, 2020, in Seattle, Washington.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, in accordance with 28 U.S.C. § 1745, that the following is true and correct:

I, Carson Phillips-Spotts, filed the foregoing brief with the Ninth Circuit electronically via the CM/ECF System, which will automatically provide notice of such filing to all required parties via email..

DATED this 20th day of July, 2020, in Seattle, Washington.

s/Carson Phillips-Spotts
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