

Nos. 17-1159, 17-1182

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**ROAD SPRINKLER FITTERS LOCAL UNION 669, U.A., AFL-CIO
Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner**

and

**COSCO FIRE PROTECTION, INC. AND
FIRETROL PROTECTION SYSTEMS, INC.
Intervenors**

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties, Intervenors, and Amici:

1. Road Sprinkler Fitters Local Union 669, U.A., AFL-CIO (“the Union”) was the respondent before the Board and is the petitioner/cross-respondent before the Court.

2. The Board is the respondent and cross-petitioner before the Court; the Board’s General Counsel was a party before the Board.

3. Firetrol Protection Systems, Inc. was the charging party before the Board. Firetrol and Cosco Fire Protection, Inc. are intervenors before the Court.

B. Rulings Under Review:

This case is before the Court on the Union’s petition for review and the Board’s cross-application for enforcement of a Decision and Order issued by the Board on May 23, 2017, and reported at 365 NLRB No. 83.

C. Related Cases:

This case has not previously been before the Court. The Union's lawsuit to compel arbitration (*Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO v. Cosco Fire Protection, Inc.*, No. SACV 12-1596-GHK (JPRx)) is currently stayed, pending resolution of this case, in the Central District of California.

/s/ Linda Dreeben

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Dated at Washington, D.C.
this 16th day of March, 2018

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¹ JA 164-74.

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GLOSSARY

The Parties Involved

CFP Fire Protection, Inc. Subsidiary of MX Holdings and a neutral in this dispute	CFP
Cosco Fire Protection Systems, Inc. Subsidiary of MX Holdings and a neutral in this dispute	Cosco
Firetrol Protection Systems, Inc. Subsidiary of MX Holdings and the primary in this dispute	Firetrol
MX Holdings US, Inc. Firetrol's parent company and a neutral in this dispute	MX Holdings
Road Sprinkler Fitters Local 669 Petitioner before the Court	the Union
National Labor Relations Board	the Board

Documents Referred to in the Board's Brief

National Labor Relations Act	the Act
Road Sprinkler Fitters' opening brief	Br.

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

INTRODUCTION

This case involves the application of Section 8(b)(4) of the National Labor Relations Act, which limits union pressure in a labor dispute to the “primary” employer involved, while shielding from pressure any “secondary” or “neutral”

employers with whom the union has no direct labor dispute.¹ The congressional purpose of Section 8(b)(4) is to ensure that “that the scope of industrial conflict and the economic effects of the primary dispute might be effectively limited,” and not unnecessarily affect commerce.²

Here, Road Sprinkler Fitters Local Union 669 (“the Union”) began exerting pressure over a labor dispute with Firetrol Protection Systems, Inc., after Firetrol closed its non-unionized Denver, Colorado facility where the Union had petitioned for a representation election among its employees. Specifically, the Union filed a grievance and a lawsuit to compel arbitration of the grievance against Firetrol’s parent company and two related, but independent companies, none of which is a party to the labor dispute or has any authority to remedy the Union’s grievance. The Board found that the Union’s attempts to enmesh those three neutral employers in its primary labor dispute with Firetrol constituted unlawful secondary activity in violation of Section 8(b)(4)(ii)(A) and (B) of the Act.³

¹ See *NLRB v. Pipefitters*, 429 U.S. 507, 519-20, 528 & n.16 (1977); *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951).

² *Local 1976, United Bhd. of Carpenters & Joiners v. NLRB*, 357 U.S. 93, 106 (U.S. 1958).

³ 29 U.S.C. §§ 151, et seq., 158(b)(4)(ii)(A) and (B).

STATEMENT OF JURISDICTION

This case is before the Court on the petition of the Union to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against the Union. The Board's Decision and Order issued on May 23, 2017, and is reported at 365 NLRB No. 83. (JA 11-17.)⁴ The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the Act,⁵ as amended, which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties.

The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement.⁶ The Union filed its petition for review on June 16, 2017. The Board filed its cross-application for enforcement on July 21, 2017. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

⁴ "JA" references are to the parties' joint appendix, and "SA" references are to the parties' supplemental appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

⁵ 29 U.S.C. § 160(a).

⁶ 29 U.S.C. § 160(e) and (f).

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Union violated Section 8(b)(4)(ii)(A) and (B) of the Act by filing a grievance and a lawsuit to compel arbitration against neutral employers Cosco, MX Holdings, and CFP for the unlawful secondary objective of furthering its labor dispute with Firetrol over closure of the Denver office.
2. Whether the Board properly exercised its discretion by declining to defer the unfair-labor-practice case to arbitration.
3. Whether the Board acted within its broad remedial discretion in ordering the Union to reimburse Firetrol, Cosco, MX Holdings, and CFP for all reasonable expenses and legal fees incurred in defending against the grievance and lawsuit.

RELEVANT STATUTORY AND REGULATORY ADDENDUM

The addendum attached to this brief contains all applicable statutory provisions and regulations.

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by Firetrol, the Board's General Counsel issued a complaint alleging that the Union violated Section 8(b)(4)(ii)(A) and (B) of the Act,⁷ by filing a grievance against Firetrol, Cosco Fire

⁷ 29 U.S.C. § 158(b)(4)(ii)(A) and (B).

Protection Systems, Inc., and MX Holdings US, Inc. (formerly known as Consolidated Fire Protection, LLC), and by filing a lawsuit to compel arbitration of that grievance against Cosco, MX Holdings, and CFP Fire Protection, Inc. (JA 85-95, 104-11, 130-31, 136-41.) After a hearing, an administrative law judge found that the Union violated the Act as alleged. (JA 15-16.) On May 23, 2017, the Board issued its Decision and Order adopting the judge's findings. (JA 11 & n.3.) Below are summaries of the Board's findings of fact and its conclusions and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Introduction to the Corporations Involved

The Union has a labor dispute with Firetrol Protection Systems, Inc., making it the primary employer in this case. (JA 14, 16.) The Union has a bargaining relationship—but no labor dispute—with Cosco Fire Protection Systems, Inc. (JA 45.) Both Firetrol and Cosco are wholly owned subsidiaries of MX Holdings US, Inc.,⁸ as is CFP Fire Protection, Inc. (JA 13; JA 67.)

Firetrol installs, repairs, and services fire suppression systems and alarms in Alabama, Arizona, Louisiana, Oklahoma, Texas, and Utah. (JA 14; JA 23-24.) Firetrol's managers report only to Firetrol's president, and those managers set

⁸ In both the grievance and the District Court lawsuit, the Union erroneously called MX Holdings by the name of its predecessor, Consolidated Fire Protection, LLC. (JA 104, 130, 136.) MX Holdings merged with Consolidated Fire Protection in 2010 and took over Consolidated's subsidiaries, including Firetrol, Cosco, and CFP. (JA 13, 14 n.9; JA 68, SA 38.)

employee wages with no input from MX Holdings or the other subsidiaries. (JA 13; JA 24-25, 31, JA 125.) Firetrol has no interchange of employees with other Cosco. (JA 31-32.) Firetrol is not, and never has been, unionized. (JA 29.) Firetrol and Cosco do not work on the same projects, do not subcontract work to each other, and are not involved in each other's business decisions. (JA 13; JA 31-32, 47-48.)

Cosco does the same type of work as Firetrol but in California, Oregon, Washington, and Nevada. (JA 14; JA 40.) Of the four companies involved in this case, Cosco is the only one with a bargaining relationship with the Union. (JA 14; JA 29, 44, 63, 73.) Cosco hires its field employees through the Union, and wages for those unionized employees are determined through the collective-bargaining process. (JA 14; JA 47-48, JA 143-44.) Cosco makes its own decisions, without input from Firetrol, to hire, discipline, or assign work to employees, and it does not share managers or supervisors with the other companies. (JA 13, 14; JA 42-43, 44, 47-48.)

CFP subcontracts fire protection work for nationwide clients to more than 700 subcontractors, including Cosco and Firetrol. (JA 14; JA 56-57.) CFP awards subcontracts through a bidding process, and subcontractors can decline any work offered. (JA 14; JA 60, 62.) In 2012, Cosco and Firetrol were each responsible for 15 to 20 percent of CFP's revenues, while subcontracts from CFP accounted for

about 5 percent of Cosco's revenues and 5.5 percent of Firetrol's revenues. (JA 14; JA 34, 49, 62.)

B. The Union, Which Has a Collective-Bargaining Agreement with Cosco, Seeks To Represent Firetrol's Employees

The Union has never represented employees at Firetrol, MX Holdings, or CFP. (JA 11 n.3; JA 29, 63, 73.) None of those companies was involved in negotiating Cosco's collective-bargaining agreement with the Union, and they did not agree to be bound by that agreement. (JA 11 n.3; JA 30, 63, 73.)

Since at least 2004, Cosco's collective-bargaining agreement with the Union has included a work-preservation clause in Article 3. The clause, which states that it "protect[s] and preserve[s] for the employees covered by this Agreement all work historically and traditionally performed by them," requires that the terms of the agreement be applied to all work done by Cosco as a single or joint employer. (JA 145-46.) In 2004, the Union filed a grievance against Cosco "and its affiliates." (JA 147.) The grievance alleged that the economic terms and conditions of the collective-bargaining agreement between the Union and Cosco applied to Firetrol under the work-preservation clause. (JA 147, 165-66 (*Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO v. Cosco Fire Protection, Inc.*, No. SACV 12-1596-GHK (JPRx) (C.D. Cal. Apr. 24, 2013)).)

After the Union filed its grievance, Cosco petitioned the Board for a unit-clarification proceeding to determine whether Firetrol's employees were part of

Cosco's unit. As part of that proceeding, the Union and Cosco stipulated that Firetrol's employees were not an accretion to the unit and were not otherwise part of the bargaining unit to which Cosco's employees belonged. (JA 122.) The Board's regional director therefore clarified the bargaining unit to exclude Firetrol's employees. (JA 124.) Meanwhile, the Union's grievance proceeded through arbitration. In 2005, the arbitrator found that Cosco and Firetrol were not single or joint employers within the meaning of Article 3 of Cosco's collective-bargaining agreement with the Union. (JA 167.)

In 2007, the parties moved the work-preservation clause from Article 3 to Addendum C and added an "anti-dual shop" clause. (JA 13; JA 107, 167.) The anti-dual shop clause provides that if Cosco, through another business entity, "establish[es] or maintain[s] operations" doing work of the type covered by the agreement, the work would be covered by the agreement once a majority of the new entity's employees designated the Union as collective-bargaining representative through authorization cards or a secret-ballot election. (JA 145-46.) In 2011, the Board found the anti-dual shop clause in the second part of Addendum C to be facially valid and further noted that the work-preservation clause in the first part of Addendum C was conceded by the parties to be lawful. (JA 13 & n.1,

citing *Road Sprinkler Fitters Local 669 (Cosco Fire Protection, Inc.)*, 357 NLRB 2140, 2141, 2147 (2011).⁹

In May 2012, the Union filed a petition with the Board, seeking an election in a unit of fire suppression employees at Firetrol's Denver, Colorado facility. (JA 126, 187.) Before the election took place, Firetrol closed the facility, discharged its employees, and ceased serving customers in the Colorado market. (JA 14; JA 27, 187.) In response, the Union filed an unfair-labor-practice charge against Firetrol, alleging that Firetrol's closure of the Denver facility was based on discrimination against employees for their union activity. (JA 127, 187.) The Board's regional director declined to issue a complaint. (JA 100.) The Union subsequently withdrew its charge. (JA 128, 187.)

Firetrol President John White made the decision to close Firetrol's Denver office in consultation with Firetrol's financial controller and human resources manager. This decision did not involve anyone from Cosco, MX Holdings, or CFP, nor did it require their approval. (JA 27, 60, 64, 71-72.) Firetrol subcontracted the Denver office's outstanding work to unaffiliated companies. None of the subcontracts went to Cosco or CFP. (JA 28.) Firetrol notified MX Holdings of the closure, so that the two companies could coordinate regarding

⁹ In its brief, the Union refers to the anti-dual shop clause in the second part of Addendum C as a "neutrality clause." (Br. 52.)

closure-related technology issues and asset protection. (JA 27-28, 74-75, 184.) It also notified CFP so that CFP could divert work assigned to Firetrol to other subcontractors. (JA 28, 65, 186.)

C. The Union Files a Grievance and a Lawsuit To Compel Arbitration Against Cosco, MX Holdings, and CFP Over Firetrol's Closure of Its Denver Facility

On July 18, 2012, the Union filed a grievance against Firetrol, Cosco, and Consolidated (now MX Holdings), protesting Firetrol's closure of its Denver facility. The Union's grievance contended that the closure was a "Violation of Addendum C" of the collective-bargaining agreement with Cosco, which included a work-preservation clause and an anti-dual shop clause. (JA 14; JA 130-31.) The Union sought restoration of the *status quo* prior to closure, and asked that employees of Firetrol's Denver office be made "economically whole" through arbitration of the dispute. (JA 14; JA 130, 187.) Cosco agreed to submit to arbitration under its agreement with the Union, but MX Holdings refused because it was not a party to the agreement. (JA 75-76, SA 6-7.)

On September 21, 2012, the Union filed a lawsuit to compel arbitration against Cosco and MX Holdings (which it named as an alias of Consolidated, LLC). (JA 136-41.) The Union subsequently amended the lawsuit to add CFP as a defendant. (SA 8-36.) Firetrol is not party to the lawsuit, which alleges that Firetrol, Cosco, and MX Holdings are single or joint employers, and that MX

Holdings exercises authority over Cosco and Firetrol through CFP. (SA 11-13.)

The court dismissed, with leave to amend, the lawsuit against MX Holdings and

CFP based on the Union's failure to allege facts supporting its allegation that MX

Holdings and CFP are single or joint employers with Cosco and Firetrol. (JA 164-

73.) The court also stayed the lawsuit, which remains pending. (JA 11 n.2, citing

Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO v. Cosco Fire

Protection, Inc., No. SA CV 12-1596-GHK (JPRx) (C.D. Cal. Aug. 8, 2013)

(unpublished order granting motion to stay the Union's lawsuit to compel

arbitration).)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (then-Chairman Miscimarra and Members

Pearce and McFerran) concluded, in agreement with the administrative law judge,

that the Union threatened, coerced, or restrained Cosco, MX Holdings, and CFP

(the three neutral employers) in violation of Section 8(b)(4)(ii)(A) and (B) of the

Act by filing a grievance and a lawsuit to compel arbitration of that grievance

against them for the unlawful secondary objective of furthering its labor dispute

with Firetrol over closure of the Denver office. (JA 11, 16.) In so finding, the

Board held that the neutral employers did not exercise control over Firetrol's

decision to close its Denver office, and that the Union sought to apply the anti-dual

shop provision of its collective-bargaining agreement with Cosco in a manner that

would convert that provision into an agreement prohibited by Section 8(e) of the Act,¹⁰ to force the neutral employers to cease doing business with Firetrol, and to force Firetrol to recognize and bargain with the Union. (JA 16.)¹¹

The Board's Order requires the Union to cease and desist from the unfair labor practices found. (JA 12.) Affirmatively, the Board's Order directs the Union to withdraw the grievance and arbitration demand; seek dismissal of its lawsuit; reimburse Firetrol, Cosco, MX Holdings, and CFP for all reasonable expenses and legal fees; and post a remedial notice. (JA 12.)

SUMMARY OF THE ARGUMENT

The Board, applying well-settled law to the record evidence, reasonably found that the Union's exertion of pressure on the three neutral employers by filing the grievance and the lawsuit to compel arbitration against them had an illegal secondary objective and, therefore, violated Section 8(b)(4)(ii)(A) and (B) of the Act. The Board found that the three neutral employers have no control over primary employer Firetrol because, although Firetrol and the neutral employers share common ownership, the companies operate

¹⁰ 29 U.S.C. § 158(e).

¹¹ The administrative law judge determined that the neutral employers do not constitute a single or joint employer with Firetrol, a conclusion the Union does not challenge in its opening brief. (Br. 18, 52.) *See Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (issues not raised in opening brief are waived).

independently and make their own decisions regarding employees, wages, benefits, and labor policies. Further, the un rebutted evidence shows that Firetrol made the decision to close its Denver office on its own, with no input from the neutrals. The Board also found that the Union's grievance and lawsuit had an unlawful cease-doing-business objective in violation of Section 8(b)(4)(ii)(A) and (B) because those filings were not intended to preserve existing bargaining unit work. It is undisputed that the Union has a bargaining relationship only with neutral employer Cosco, and Cosco's employees have never performed the work that is the subject of the grievance.

The Union waived any challenge to the Board's additional finding that its grievance and lawsuit had an unlawful recognitional objective in violation of Section 8(b)(4)(ii)(B) by not raising the issue in its opening brief. In any event, it is undisputed that the Board has not certified the Union as the bargaining representative of Firetrol's employees and that the Union's grievance seeks to bind Firetrol to the collective-bargaining agreement with Cosco, an agreement to which Firetrol is not a party. In these circumstances, the Court should uphold the Board's finding that the Union's conduct had an unlawful recognitional objective.

The Board properly rejected the Union's claim that its grievance and lawsuit to compel arbitration were protected by the First Amendment. Under the Supreme

Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, the Board has authority to enjoin state court lawsuits that have an illegal objective.¹² Here, the Union admits the purpose of its grievance was to pressure the neutral employers (Cosco, MX Holdings, and CFP) to require Firetrol to reopen its Denver office—classic unlawful secondary activity.

Rejecting another defensive claim, the Board properly exercised its discretion by declining to defer the unfair-labor-practice case to arbitration for several reasons. First, Firetrol, MX Holdings, and CFP have no bargaining relationship and no collective-bargaining agreement requiring them to arbitrate any matter with the Union. Second, while Cosco does have a bargaining relationship with the Union, the labor dispute here involves Firetrol's Denver employees, not Cosco's employees. Third, the case involves secondary pressure under the Act, which is a matter the Board and this Court have recognized as not well suited for arbitration.

Finally, the Board acted well within its broad remedial discretion in awarding reasonable expenses and legal fees to compensate the neutral employers for having to defend against the Union's unlawful grievance and lawsuit to compel arbitration. The Board, with court approval, has consistently found it appropriate to order a union to reimburse neutral employers for expenses and legal fees

¹² 461 U.S. 731 (1983).

incurred in defending against grievances filed with an unlawful secondary objective. Moreover, the reimbursement remedy here was a conventional make-whole remedy; but for the Union's unlawful grievance and lawsuit to compel arbitration, the neutral employers would not have incurred the legal expenses involved in defending against those actions. Accordingly, the remedy chosen by the Board here is designed to effectuate the policies of the Act through conventional means.

STANDARD OF REVIEW

This Court's review of Board decisions "is quite narrow."¹³ The Court "applies the familiar substantial evidence test to the Board's findings of fact and application of law to the facts."¹⁴ Under that standard, a reviewing court may not "displace the Board's choice between two fairly conflicting views of the facts, even though the court would justifiably have made a different choice had the matter been before it de novo."¹⁵ When reviewing the Board's order, the Court grants deference to the Board's findings and the "reasonable inferences that the Board draws from the evidence."¹⁶ The Court will uphold the Board's legal

¹³ *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

¹⁴ *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998).

¹⁵ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

¹⁶ *U.S. Testing*, 160 F.3d at 19.

conclusions if they are “reasonable and consistent with controlling precedent.”¹⁷

Moreover, because Section 8(b)(4) of the Act is “neither obvious nor intuitive” as to how to identify unlawful secondary boycotts,¹⁸ the question before the Court is whether the Board’s findings are “based on a permissible construction of the [Act].”¹⁹ The Court will “defer to the Board’s determinations so long as they are reasonable . . . and are supported by substantial evidence.”²⁰

Further, as the Supreme Court has stated, “[t]he Board’s reading and application of [Section 8(b)(4)(ii)(B)] are long established, have remained undisturbed by Congress, and fall well within that category of situations in which courts should defer to the agency’s understanding of the statute which it administers.”²¹ Accordingly, the Board’s finding of secondary activity in violation of Section 8(b)(4) warrants enforcement so long as it is supported by substantial

¹⁷ *Cintas Corp. v. NLRB*, 482 F.3d 463, 468 (D.C. Cir. 2007).

¹⁸ *Soft Drink Workers Union Local 812 v. NLRB*, 657 F.2d 1252, 1261 (D.C. Cir. 1980).

¹⁹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

²⁰ *Sheet Metal Workers No. 91 v. NLRB*, 905 F.2d 417, 421 (D.C. Cir. 1990) (citations omitted).

²¹ *NLRB v. Enter. Ass’n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. & Gen. Pipefitters of New York & Vicinity, Local Union No. 638*, 429 U.S. 507, 528 (1977). *Accord Local 80, Sheet Metal Workers Union v. NLRB*, 989 F.2d 515, 521 (D.C. Cir. 1993).

evidence and has a reasonable basis in law.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(4)(ii)(A) AND (B) OF THE ACT BY FILING THE GRIEVANCE AND LAWSUIT AGAINST THE THREE NEUTRAL EMPLOYERS FOR THE UNLAWFUL SECONDARY OBJECTIVE OF FURTHERING ITS LABOR DISPUTE WITH FIRETROL OVER CLOSURE OF THE DENVER OFFICE

Of the four companies targeted by the Union in its grievance and lawsuit to compel arbitration, the Union has a collective-bargaining relationship with only one: Cosco. The Union also has a dispute with only one: Firetrol. But Firetrol has never signed a collective-bargaining agreement with the Union, and none of its employees are represented by the Union. The purpose of the Union's grievance and arbitration lawsuit, as it admits, was to pressure Cosco, MX Holdings, and CFP—all neutral employers, as the Board found—to require Firetrol to reopen its Denver office and rehire its employees. (Br. 53.) As we now show, under the applicable right-of-control test, the companies, while having the same corporate ownership, are separate and operate independently, and none has the authority to require Firetrol to reopen its Denver office. Thus, the Board's determination that the Union violated Section 8(b)(4)(ii)(A) and (B) by filing a grievance and a lawsuit to compel arbitration against the three neutral employers is supported by substantial evidence and consistent with law.

A. The Act Bars a Union From Coercing Neutral (or Secondary) Employers To Further Its Dispute With the Primary Employer

Section 8(b)(4), the so-called “secondary boycott” provision of the Act, makes it an unfair labor practice for a labor organization “to threaten, coerce, or restrain” a person not party to a labor dispute “where . . . an object thereof is . . . forcing or requiring [him] to . . . cease doing business with any other person or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees. . . .”²² As the Supreme Court has explained, the provision implements “the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.”²³ If that pressure “is addressed to the labor relations of the contracting employer vis-a-vis his own employees,” then it is directed at primary activity and lawful.²⁴ But if a union is pressuring “a neutral employer . . . to induce or coerce him to cease doing business

²² 29 U.S.C. § 158(b)(4)(ii)(A) and (B). See *NLRB v. Retail Clerks Local 1001 (Safeco Title Ins. Co.)*, 447 U.S. 607, 611 (1980); *Local 80, Sheet Metal Workers Union v. NLRB*, 989 F.2d 515, 519 (D.C. Cir. 1993).

²³ *NLRB v. Denver Bldg. & Trades Council*, 341 U.S. 675, 692 (1951). Accord *Local 812, Soft Drink Workers Union v. NLRB*, 657 F.2d 1252, 1260 (D.C. Cir. 1980.)

²⁴ *Nat’l Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 645 (1967).

with an employer with whom the union was engaged in a labor dispute,” then the union is engaging in unlawful secondary activity.²⁵ In determining whether a union has a proscribed secondary object, the Board may draw reasonable inferences from the foreseeable consequences of the union’s conduct, the nature of the acts themselves, and the totality of the circumstances.²⁶

The term “cease doing business” is liberally construed by the Supreme Court and appellate courts, including this one.²⁷ Thus, a cease-doing-business objective extends to situations where the union’s pressure is “calculated to cause a significant change or disruption of the neutral employer’s mode of business.”²⁸ Significantly, actions such as filing a grievance or a lawsuit to compel arbitration of a grievance can constitute prohibited secondary activity.²⁹

A violation of Section 8(b)(4)(ii)(A) is established where a union “coerces” an employer with the objective of forcing it to enter into an agreement prohibited

²⁵ *Id.* at 622.

²⁶ *ILA v. Allied Int’l, Inc.*, 456 U.S. 212, 224 & n.21 (1982); *Soft Drink Workers*, 657 F.2d at 1261.

²⁷ *NLRB v. Local 825, Int’l Union of Operating Engineers (Burns & Roe)*, 400 U.S. 297, 304 (1971). *Accord Sheet Metal Workers No. 91*, 905 F.2d at 421; *Local Union No. 25, a/w Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. NLRB*, 831 F.2d 1149, 1154 (1st Cir. 1987).

²⁸ *Sheet Metal Workers No. 91*, 905 F.2d at 421.

²⁹ *Local 32B-32J, SEIU, AFL-CIO v. NLRB*, 68 F.3d 490, 495 (D.C. Cir. 1995). *Accord Local Union No. 25*, 831 F.2d at 1154.

by Section 8(e).³⁰ Section 8(e) bars an employer and union from entering into an agreement requiring the employer to refrain from dealing in the product of another employer or to cease doing business with any other person.³¹

Nevertheless, clauses that fall within the literal proscription of Section 8(e) are lawful if their primary objective is “the preservation of work traditionally performed by employees represented by the union.”³²

A violation of Section 8(b)(4)(ii)(B) is established where a union “threaten[s], coerce[s] or restrain[s] any person” with the objective of forcing one person to cease doing business with another person or forcing any other employer to recognize or bargain with a union that has not been certified as the collective-bargaining representative of its employees.³³ As with a Section 8(b)(4)(ii)(A) allegation, a union may defend against a Section 8(b)(4)(ii)(B) allegation by showing that its objective was the preservation of unit work.³⁴

³⁰ *Sheet Metal Workers No. 91*, 905 F.2d at 421-22.

³¹ 29 U.S.C. § 160(e). *See also Sheet Metal Workers No. 91*, 905 F.2d at 421-22.

³² *NLRB v. Int’l Longshoremen’s Ass’n*, 447 U.S. 490, 504-05 (1980).

³³ 29 U.S.C. § 158(b)(4)(ii)(B).

³⁴ *See Local 32B-32J*, 68 F.3d at 494 (affirming the Board’s finding that the union’s “work preservation defense lacked merit” because the work had not previously been performed by bargaining unit employees).

The principal characteristic distinguishing lawful primary activity from unlawful secondary activity is whether the union's activity targets the employees of the contracting employer or instead is "calculated to satisfy union objectives elsewhere."³⁵ If the union's actions "have as their principal objective the regulation of the labor policies of other employers and not the protection of the unit," then they constitute unlawful secondary activity.³⁶

To identify whether a union's activity is aimed at the primary or at a neutral employer, the Board relies on its judicially approved "right-of-control" test. Under that test, an employer is a primary if it has "the power to give the employees the work in question."³⁷ By contrast, an employer is a neutral if "when faced with a coercive demand from [a] union, [it] is powerless to accede to [the] demand except by bringing some form of pressure on an independent third party."³⁸

Thus, when a union pressures an employer that lacks the right to control the disputed work, the Board may reasonably infer that the union has a secondary

³⁵ *Nat'l Woodwork Mfrs.*, 386 U.S. at 644-45.

³⁶ *Retail Clerks Local 1288*, 163 NLRB 817, 819 (1967), *enf'd in rel. part*, 390 F.2d 858, 861-62 (D.C. Cir. 1968).

³⁷ *Int'l Longshoremen Ass'n*, 447 U.S. at 504. *See also Enter. Ass'n*, 429 U.S. at 521.

³⁸ *Int'l Brotherhood of Elec. Workers, Local 501 (Atlas Co.)*, 216 NLRB 417, 417 (1975). *Accord Enter. Ass'n*, 429 U.S. at 521-27; *Nat'l Woodwork Mfrs.*, 386 U.S. at 644-45.

objective—namely, to influence the employer that possesses the right to control.³⁹

As the Board has explained, the secondary nature of the union’s conduct is revealed in such situations precisely because “the pressured employer cannot himself accede to the union’s wishes,” so that the union’s pressure is by definition “undertaken for its effect elsewhere.”⁴⁰

B. Substantial Evidence Supports the Board’s Finding that the Union Violated Section 8(b)(4)(ii)(A) and (B) of the Act by Filing a Grievance and Lawsuit To Compel Arbitration Against Neutral Employers Over Firetrol’s Decision To Close Its Denver Office

1. Cosco, MX Holdings, and CFP are neutrals because they had no control over Firetrol’s decision to close its Denver office

The Board found that the Union violated Section 8(b)(4)(ii)(A) and (B) by seeking to enforce the anti-dual shop provision in Addendum C of its collective-bargaining agreement with Cosco against neutral employers that have no control over Firetrol, the primary employer. (JA 13, 16.) As we now show, the undisputed record evidence demonstrates that the neutral employers (Cosco, MX Holdings, and CFP) operate independently of Firetrol and had no control over Firetrol’s decision to close its Denver office.

³⁹ *Int’l Longshoremen Ass’n*, 447 U.S. at 504-05.

⁴⁰ *Local Union No. 438, United Pipe Fitters (George Koch Sons, Inc.)*, 201 NLRB 59, 63, *enforced*, 490 F.2d 323, 326-27 (4th Cir. 1973).

As the Board correctly found, although Firetrol, Cosco, and CFP are wholly owned subsidiaries of MX Holdings, common ownership is not enough to establish that those entities have the right to control Firetrol's decision to close its Denver office. (JA 15.) Companies "bound *only* by common ownership are generally found to be neutrals with respect to each other's labor relations."⁴¹ Further, potential control is not enough: there must be "actual or active common control" denoting "an appreciable integration of operations and management policies."⁴²

The evidence shows that Cosco, MX Holdings, and CFP lacked active or actual common control over Firetrol. The companies operate independently, setting their own wages and labor policies, and do not share managers or supervisors. (JA 13.) While MX Holdings negotiates employee benefits for its subsidiaries through a broker, each company makes final decisions regarding its own employees' benefits, and each has its own human resources department. And although MX Holdings provides some administrative services to its subsidiaries, such as information technology, each subsidiary pays its pro rata share of those services. (JA 13.) In short, the unrebutted evidence shows that MX Holdings has

⁴¹ *District Council of NY & Vicinity, United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 326 NLRB 321, 325 (1998).

⁴² *Am. Fed'n of Television & Radio Artists, Washington-Baltimore Local, AFL-CIO v. NLRB*, 462 F.2d 887, 892 (D.C. Cir. 1972) (quoting *Drivers, Chauffeurs and Helpers Local No. 639 (Poole's Warehousing, Inc.)*, 158 NLRB 1281, 1286 (1966)).

no control over the day-to-day operations of Firetrol or the other subsidiaries. (JA 13; JA 69-72, 78.)

Moreover, Cosco, the signatory employer, has little to no interaction with Firetrol. (JA 14.) Each company is licensed to operate in different states. (JA 14; JA 23-24, 40.) They do not share managers or employees, subcontract work to each other, or share employees. Neither company hires, fires, disciplines, assigns, or directs the work of the other company's employees. (JA 14; JA 31-32, 47-48.)

Similarly, ample record evidence supports the Board's finding that there is an "arm's length" relationship between Firetrol, Cosco, and CFP. (JA 14.) Firetrol and Cosco are only two of CFP's approximately 700 vendors; each is responsible for between 15 and 20 percent of CFP's revenues. (JA 14; JA 61-62.) Firetrol and Cosco compete for subcontracts from CFP and have absolute discretion to accept or decline any work offered by CFP. (JA 14; JA 62.) CFP does not direct its subcontractors' work or tell them which employees to assign to that work. (JA 14; JA 59, 62.) And the work Cosco and Firetrol do accept is minimal, accounting for less than 6 percent of either company's overall revenues. (JA 14; JA 34, 49, 62.)

What the unrebutted evidence does show, however, is that Firetrol's president, controller, and human resources manager made the decision to close the Denver office on their own, without input from the other companies. (JA 27, 71-72.) They were not required to first seek approval for the decision from MX

Holdings, and they did not notify MX Holdings until after the decision had been made. (JA 27-28, JA 184.) Firetrol's president also notified CFP, so that company could reassign work it had subcontracted to Firetrol's Denver office. Firetrol subcontracted other outstanding work in Colorado to two contractors not owned by MX Holdings. Because Firetrol and Cosco have little to no interaction, Firetrol did not even notify Cosco of its decision to close the office. There was no reason to. (JA 27-28.)

Ignoring the weight of the record evidence, the Union misrepresents the Board's decision by claiming that the Board's "conclusion was based solely on the fact of 'no overlap of managers and supervisors.'" (Br. 41.) In fact, the Board found that the companies "do not possess common management[,] have no interrelationship of operations, and do not possess any centralized control of labor relations." (JA 15.) Further, the Union's reliance on an overlap of "corporate officers" (Br. 41) to counter the Board's findings ignores the Court's teaching that "common ownership is necessarily a feature of any conglomerate organization."⁴³ Common ownership, then, "is not determinative where common control is not shown."⁴⁴

⁴³ *United Tel. Workers, AFL-CIO v. NLRB*, 571 F.2d 665, 667 (D.C. Cir. 1978).

⁴⁴ *Id.*

Given the overwhelming evidence demonstrating that Cosco, MX Holdings, and CFP do not have the right to control Firetrol's labor relations, it is unsurprising that the Union fails to point to any evidence to the contrary. Instead, the Union unavailingly objects to the Board's evaluation of the evidence, complaining that it is "one-sided" and disputing the unrebutted testimony presented at the hearing. (Br. 46.) The Union's affirmative defense to the unfair-labor-practice allegation that its conduct had an unlawful secondary objective included its claim that Cosco, MX Holdings, and CFP had the right to control Firetrol's labor relations. As such, it was the Union's burden to come forward with evidence to support its contention that the grievance and lawsuit to compel arbitration had a lawful, primary objective to preserve work.⁴⁵ Nevertheless, the Union merely presented a single witness—its business agent—who testified only that he had been investigating the closure of the Denver office. (JA 82-84.) In these circumstances, the Board reasonably concluded that the Union's grievance and lawsuit were not intended to preserve work for bargaining unit members employed by Cosco but were "calculated to satisfy union objectives elsewhere."⁴⁶

⁴⁵ See *Local 32B-32J*, 68 F.3d at 494 (affirming the Board's finding that the union's "work preservation defense lacked merit" because the work had not previously been performed by bargaining unit employees).

⁴⁶ *Nat'l Woodwork Mfrs.*, 386 U.S. at 644-45.

2. The Union's grievance and lawsuit to compel arbitration have an unlawful cease-doing-business objective

A grievance and lawsuit to compel arbitration brought to pressure a neutral employer “to change its labor policies” constitute a “classic secondary boycott . . . potentially causing substantial disruption” to the neutral’s relationship with the primary employer.⁴⁷ Accordingly, the filing of a grievance can establish an unlawful cease-doing-business objective under Section 8(b)(4).⁴⁸ The Board’s finding that the Union’s grievance and lawsuit to compel arbitration “were intended to enmesh neutral corporations Cosco, CFP, and MX [Holdings] in a dispute between the Union and Firetrol” is amply supported by the record evidence. (JA 16.) As detailed above, none of the neutral employers had any control over Firetrol’s operations, labor relations, and more specifically, its decision to close the Denver office.

Moreover, Firetrol was not a signatory to a collective-bargaining agreement with the Union, and it employed no union-represented employees. The Board previously determined that Firetrol’s employees were not part of the Cosco bargaining unit. (JA 120-24.) Thus, the “work that is the subject of the grievance”

⁴⁷ *Local 32B-32J*, 68 F.3d at 495.

⁴⁸ *Id.*

has never been done by Cosco's employees.⁴⁹ Yet the Union's grievance claimed that "Firetrol's Denver facility became bound to the terms and conditions" of its collective-bargaining agreement with Cosco through the anti-dual shop clause codified in Addendum C to that agreement. (JA 130.) The grievance further demanded "an arbitration award restoring the *status quo* and making affected employees economically whole." (JA 130.)

Under these circumstances, the Union's grievance "cannot be intended to preserve existing bargaining unit jobs" but was instead an attempt to force Cosco, MX Holdings, and CFP to cease doing business with Firetrol.⁵⁰ Because the grievance and lawsuit to compel arbitration are an attempt to apply the collective-bargaining agreement to a non-signatory employer and non-bargaining unit employees, the Board reasonably concluded that the Union's grievance and lawsuit to compel arbitration violated Section 8(b)(4)(ii)(A) and (B) of the Act.⁵¹ (JA 11 n.3.)

⁴⁹ *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1303, 1304 (1986), *remanded sub nom., Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union Local 705 v. NLRB*, 820 F.2d 448 (D.C. Cir. 1987), *enforced*, 835 F.2d 367 (D.C. Cir. 1987) (table).

⁵⁰ *Id.* at 1305.

⁵¹ *See Sheet Metal Workers' Int'l Assn.*, 322 NLRB 877, 878 (1997) (union's referral of grievance to arbitration violated Act because it constituted an application of the collective-bargaining agreement to non-bargaining unit employees).

The Union does not seriously dispute this finding and instead admits in its opening brief that the purpose of its grievance and lawsuit to compel arbitration are to “require Consolidated (MX) to cause Firetrol to restore the *status quo* – to reinstate to employment the Firetrol employees at its Denver office.” (Br. 53.) Under the Union’s interpretation of its contract with Cosco, while MX Holdings would “continue to coexist with Firetrol,” it would “simply direct Firetrol to comply with whatever remedy the arbitrator may direct.” (Br. 51.) All the evidence shows, however, that MX Holdings, while the corporate parent of Firetrol, has no control over Firetrol’s labor policies, and no authority to order Firetrol to reopen the Denver office. By using the grievance and arbitration process to force MX Holdings to “direct Firetrol to comply” with an arbitrator’s remedy when neither entity is bound by the contract requiring arbitration, the Union is exerting secondary pressure on a neutral employer in violation of the Act.

Nor does the Union advance its cause by claiming that filing an “arguably meritorious” grievance and lawsuit to compel arbitration could not be coercive under Section 8(b)(4)(ii)(B) because the Board previously found the anti-dual shop provision codified in Addendum C of the collective-bargaining agreement with Cosco to be valid. (Br. 50-51 n.8.) As *Local 32B-32J* teaches, “the facial validity of the . . . clause does not excuse the [Union’s] conduct where its application, as in this instance, would illegally extend the contract to reach outside the contractual

bargaining unit.”⁵² While the Supreme Court held in *Bill Johnson’s Restaurants, Inc. v. NLRB*, that the Board cannot issue a cease-and-desist order against a state lawsuit unless the plaintiff has a retaliatory motive for the lawsuit and the lawsuit lacks a reasonable basis in fact or law, the Court also recognized that the Board can enjoin lawsuits that have “an objective that is illegal under federal law.”⁵³

Here, of course, despite the facial validity of Addendum C, the Union’s grievance and lawsuit to compel arbitration had an illegal objective—to enmesh neutrals in its dispute with Firetrol.⁵⁴ *Pilgrim’s Pride*, cited by the Union (Br. 50-51 n.8), is inapposite.⁵⁵ In that case, unlike here, the Board explicitly found that the union’s “invocation of the grievance arbitration process did not have an illegal objective within the meaning of [footnote] 5 of the Supreme Court’s decision in *Bill Johnson’s*.”⁵⁶ In contrast, the Union in this case converted an otherwise facially valid clause into an agreement to force neutral employers to cease doing business with Firetrol and to require Firetrol to recognize and bargain with the

⁵² *Local 32B-32J*, 68 F.3d at 495.

⁵³ 461 U.S. 731, 738 n.5 & 748-49 (1983). *Accord Local 32B-32J*, 68 F.3d at 495.

⁵⁴ *Local 32B-32J*, 68 F.3d at 495 (finding that under *Bill Johnson’s*, the Board can enjoin demands for arbitration that have an illegal objective).

⁵⁵ *UFCW Local Union 540 (Pilgrim’s Pride)*, 334 NLRB 852 (2001).

⁵⁶ *Id.* at 856 n.28.

Union. (JA 16.) Thus, the Board reasonably found Addendum C's facial validity to be irrelevant to the Union's secondary application of that clause. (JA 16.)

In sum, substantial evidence, including unrebutted, credited testimony, amply supports the Board's conclusion that the Union's grievance and lawsuit to compel arbitration had an unlawful secondary objective. Where, as here, primary employer Firetrol has "complete discretion in the areas of management policy, labor relations, production, purchasing, and all other aspects of planning and operation which might touch on labor's interests in this dispute," the neutral employers (Cosco, MX Holdings, and CFP) have no right of control over Firetrol's decision to close its Denver office.⁵⁷ The Board, therefore, reasonably determined that the Union violated the Act by seeking to enmesh the neutral employers in its primary dispute with Firetrol.

C. The Union Waived any Challenge to the Board's Finding that the Union's Grievance and Lawsuit to Compel Arbitration Have an Unlawful Recognitional Objective in Violation of Section 8(b)(4)(ii)(B)

Section 8(b)(4)(ii)(B) of the Act prohibits a union from engaging in coercive conduct against a neutral, secondary employer with the objective of forcing the primary employer to recognize or bargain with it, where the union is not certified

⁵⁷ *Am. Fed'n of Television & Radio Artists, Washington-Baltimore Local, AFL-CIO v. NLRB*, 462 F.2d 887, 892 (D.C. Cir. 1972).

as the collective-bargaining representative of the primary employer's employees.⁵⁸

In its brief, the Union fails to contest the Board's finding that its grievance and lawsuit have an unlawful recognitional objective under Section 8(b)(4)(ii)(B) of the Act. (JA 16.) The Union has, therefore, waived any challenge to this finding.⁵⁹

In any event, the Board's conclusion is supported by substantial evidence, which overwhelmingly demonstrates that the admitted and stated objective of the Union's grievance and lawsuit was to force Firetrol to recognize and bargain with the Union as the representative of Firetrol's Denver employees. It is undisputed that the Union is not and never has been certified by the Board as the exclusive bargaining representative of those employees. Further, in its grievance, the Union specifically seeks to bind Firetrol to the collective-bargaining agreement with Cosco. (JA 130.) In addition, in its position statement to the Board's regional office during the initial investigation, the Union confirmed that the "object of the pending grievance is to *preserve* the Firetrol bargaining unit in Denver" (emphasis in original). (JA 117.) Accordingly, substantial evidence supports the Board's finding that by prosecuting its grievance and lawsuit against the three neutral

⁵⁸ 29 U.S.C. §158(b)(4)(ii)(B). See *NLRB v. Local 825, Int'l Union of Operating Engineers, AFL-CIO*, 315 F.2d 695, 699 (3d Cir. 1963).

⁵⁹ See *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000).

employers, the Union had an unlawful recognitional objective in violation of Section 8(b)(4)(ii)(B) of the Act.⁶⁰

D. The Union’s Grievance and Lawsuit to Compel Arbitration Are Not Protected Petitioning under the First Amendment

Citing *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Union asserts that its conduct was lawful because it was “not ‘baseless’” and was “therefore protected by the First Amendment.” (Br. 33.) But in what is now commonly referred to as simply “footnote 5,” the Supreme Court in *Bill Johnson’s* cautioned that its decision did not affect the Board’s authority to enjoin a lawsuit with an illegal objective.⁶¹ Thus, lawsuits having an illegal objective are an exception to the general rule requiring proof of motive and a lack of reasonable basis.

It cannot seriously be doubted that the Union’s grievance and lawsuit to compel arbitration had an illegal objective. In addition to the Union’s admission (Br. 53) that it filed the grievance and lawsuit to pressure neutral employers in its primary dispute with Firetrol, the overwhelming weight of the evidence shows that

⁶⁰ See *Local 27, Sheet Metal Workers Int’l Ass’n*, 321 NLRB 540, 541 n.2 & 547 (1996) (finding both an unlawful cease doing business object and unlawful recognition object in violation of Section 8(b)(4)(ii)(B)).

⁶¹ *Bill Johnson’s*, 461 U.S. at 737 n.5. See also *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (holding that, in the absence of an illegal objective, the Board may find a lawsuit unlawful only if it is both objectively baseless and subjectively motivated by an unlawful purpose).

the neutrals had “no power” to force Firetrol to rehire its employees.⁶² The Board therefore reasonably determined that the Union’s conduct had a secondary objective, “that is, to influence whoever does have such power over the work.”⁶³ Because the Union’s conduct had an illegal objective, it falls outside the protection of the First Amendment, as *Bill Johnson’s* recognizes.

In defending against this finding, the Union primarily argues that its grievance and lawsuit to compel arbitration were reasonably based. (Br. 6, 26, 33, 44.) To the contrary, any arguably laudable motive or reasonable basis for the Union’s grievance and lawsuit to compel is simply “irrelevant” here because the lawsuit “has an objective that is illegal under federal law.”⁶⁴ Indeed, it cannot “be successfully argued otherwise”⁶⁵ because even if Firetrol were a signatory to the Union’s collective-bargaining agreement, it could not be forced to reverse the decision to close its Denver facility.⁶⁶ Further, the Union’s truncated assertion that the Board committed reversible error by misplacing the burden of proof is

⁶² *NLRB v. Int’l Longshoremen’s Ass’n*, 447 U.S. 490, 504 (1980).

⁶³ *Id.* at 504-05.

⁶⁴ *Int’l Longshoremen’s & Warehousemen’s Union v. NLRB*, 884 F.2d 1407, 1414 (D.C. Cir. 1989).

⁶⁵ *Bill Johnson’s*, 461 U.S. at 737 n.5.

⁶⁶ *See Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 273-74 (1965), and discussion at pp. 43-44.

unavailing. (Br. 35-36.) While the administrative law judge “suggest[ed] that the [Union] bore the burden of demonstrating that its grievance and lawsuit were reasonably based,” the Board correctly noted that this suggestion was irrelevant because the Union’s conduct had an illegal objective. (JA 11 n.3.) The Board made no findings regarding whether the grievance and lawsuit were reasonably based, and thus, the burden of proof did not come into play in the Board’s decision.

The Union next claims that the Board’s decision conflicts with a district court ruling, which it characterizes as holding that “the Union’s access to the courts in this case is protected by the First Amendment.” (Br. 23.) As an initial matter, the district court held no such thing.⁶⁷ In that case, the Board’s regional director sought an injunction against the Union under Section 10(l) of the Act.⁶⁸ The district court denied the injunction. In its decision, the court noted that where “there is at least some risk that constitutionally protected speech will be enjoined,” the regional director must make a “particularly strong” showing of irreparable harm.⁶⁹ The court found that the regional director failed to meet the heightened standard.⁷⁰ But the district court did not hold, as the Union claims, that “an

⁶⁷ *Jones v. Rd. Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO*, No. CV13-3015-GHK JPRX, 2013 WL 5539291 (C.D. Cal. July 24, 2013) (unpublished).

⁶⁸ 29 U.S.C. §160(l).

⁶⁹ *Jones*, 2013 WL 5539291, at *2 (quotation omitted).

⁷⁰ *Id.* at *3.

injunction would be an unconstitutional ‘prior restraint’ upon the Union’s First Amendment protected right to petition the courts.” (Br. 16.)

In *Can-Am Plumbing, Inc. v. NLRB*, the Court put to bed the Union’s repeated suggestion (Br. 27 & n.6, 40, 55) that pre-*BE & K* cases are irrelevant.⁷¹ The Union, like the employer in *Can-Am Plumbing*, claims its grievance and arbitration are protected under *BE & K* they have a “reasonable basis.” (Br. 34-44.) But the Court explained that in *BE & K*, while the Supreme Court held that a completed, unsuccessful lawsuit cannot be an unfair labor practice if it is objectively reasonable, it “did not disturb” *Bill Johnson’s* footnote 5.⁷² In other words, “*Bill Johnson’s* and *BE & K* are not relevant here” because “the Supreme Court carved out an exception” for lawsuits with an illegal objective.⁷³ Further, since *BE & K*, the Board and courts have found that conduct with an illegal objective, like the Union’s, violates the Act.⁷⁴

⁷¹ 321 F.3d 145, 151 (D.C. Cir. 2003). *See also BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002).

⁷² *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003). *Accord Small v. Operative Plasterers’ & Cement Masons’ Int’l Ass’n Local 200, AFL-CIO*, 611 F.3d 483, 492 (9th Cir. 2010) (finding that *BE & K* left *Bill Johnson’s* exception for lawsuits with an illegal objective “undisturbed”).

⁷³ *Can-Am Plumbing*, 321 F.3d at 151.

⁷⁴ *See United Nurses Ass’ns of Cal. v. NLRB*, 871 F.3d 767, 787 (9th Cir. 2017) (employer’s subpoena demands for confidential Section 7 information had illegal objective and violated Section 8(a)(1)); *Dilling Mech. Contractors, Inc.*, 357

II. THE BOARD DID NOT ABUSE ITS DISCRETION BY DECLINING TO DEFER THE CASE TO ARBITRATION

Although arbitration is a preferred means of settling labor disputes, the Board “need not refrain from exercising its authority to enforce the Act merely because arbitration procedures are available.”⁷⁵ Indeed, Section 10(a) of the Act expressly provides that the Board’s authority to decide unfair labor practice cases is exclusive and is not “affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.”⁷⁶ The Court reviews the Board’s determination whether to defer to arbitration under an abuse of discretion standard.⁷⁷

Generally, the Board will decline to exercise its jurisdiction over an issue and instead defer to arbitration where “it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act.”⁷⁸ As

NLRB 544, 546 (2011) (employer’s discovery requests had illegal objective in violation of the Act.

⁷⁵ *Newspaper Guild Local 10 v. NLRB*, 636 F.2d 550, 558-59 (D.C. Cir. 1980).

⁷⁶ 29 U.S.C. § 160(a). *See also Office & Prof’l Emp. Intern. Union, Local 425, AFL-CIO v. NLRB*, 419 F.2d 314, 317-18 (D.C. Cir. 1969).

⁷⁷ *Util. Workers Union of Am., Local 246, AFL-CIO v. NLRB*, 39 F.3d 1210, 1213 (D.C. Cir. 1994).

⁷⁸ *Collyer Insulated Wire*, 192 NLRB 837, 841-42 (1971).

this case aptly shows, however, deferral is not appropriate where the Board's special expertise in enforcing the Act is implicated. In particular, the Board will refuse to defer an issue to arbitration where, as here, "the very demand for arbitration . . . could, in and of itself, constitute a violation of the Act."⁷⁹ In addition, deferral is "unwarranted" in cases involving secondary conduct under Section 8(b)(4) because the "arbitrator ha[s] no authority to decide if the alleged conduct was secondary."⁸⁰

Applying these principles, the Board did not abuse its discretion in refusing to defer to arbitration here. As the Board explained, deferral here is inappropriate for three reasons. (JA 11 n.3.) First, three of the corporate entities the Union attempted to enmesh in grievance and arbitration proceedings—Firetrol, MX Holdings, and CFP—have no bargaining relationship with the Union and no collective-bargaining agreement that would require them to arbitrate with the Union. Second, while Cosco does have a bargaining relationship with the Union and a collective-bargaining agreement with a grievance and arbitration provision, the dispute does not involve Cosco's employees. Finally, as noted above,

⁷⁹ *Int'l Organization of Masters*, 220 NLRB 164, 168 (1975).

⁸⁰ *Int'l Longshore & Warehouse Union*, 363 NLRB No. 47, 2015 WL 7750748, at *1 n.13 (citation omitted), *enforced*, 705 F. App'x 1 (mem.) (per curiam) (unpublished) (D.C. Cir. 2017).

allegations that a union has exerted secondary pressure are not suited to arbitration because they involve issues beyond contract interpretation.⁸¹

The Union does not dispute the Board's reasoning. Instead, it makes broad statements that the Board should have deferred to arbitration because "[i]t is axiomatic that labor disputes are to be decided through private arbitral resolution," and that the Board defers unless the litigation is "plainly foreclosed as a matter of law or is otherwise frivolous." (Br. 44-45.) As discussed above (pp. 27-31), the Union's error lies in its failure to acknowledge the Board's finding that the Union's grievance and lawsuit themselves violate the Act. That Cosco and the Union agreed to arbitrate disputes involving Cosco's employees does not require the Board to refrain from exercising its jurisdiction to determine, in the first instance, whether the Union engaged in secondary activity in violation of the Act. Moreover, the Union's grievance and arbitration demand are indeed "plainly foreclosed as a matter of law" because the Board found that they had an illegal secondary objective, and the Union committed an unfair labor practice by pursuing them.⁸²

⁸¹ See *Iron Workers District Council of the Pac. Nw. (Hoffman Const.)*, 292 NLRB 562, 577-78 (1989), *enforced*, 913 F.3d 1470 (9th Cir. 1990); *Int'l Union of Elevator Constructors, AFL-CIO (Long Elevator)*, 289 NLRB 1095, 1097 (1988), *enforced*, 902 F.2d 1297 (8th Cir. 1990).

⁸² See *Local 32B-32J*, 68 F.3d at 495.

In addition, the Union suggests that the Board's conclusions concerning the entities' relationships are based on an "incomplete and one-sided" record that the Union could correct in arbitration. (Br. 46.) This argument is conveniently silent regarding the Union's participation in the unfair-labor-practice hearing. At the hearing, the Union cross-examined the General Counsel's witnesses and had ample opportunity to call its own witnesses and introduce documentary evidence. In addition, under the Board's Rules and Regulations, the Union could have subpoenaed witnesses and records from Firetrol, Cosco, MX Holdings, and CFP.⁸³ Instead, the Union called a single witness—its own business agent—and subpoenaed no records. Accordingly, the Union cannot complain about any lack of evidence in the record to support of its defense.

The Union further claims that, because the Board previously determined that the anti-dual shop provision of Addendum C, which it calls a neutrality clause, was facially valid, "circuit court precedent *requires* deferral of this case to arbitration." (Br. 45.) But the Union's argument is contrary to Board and court precedent.⁸⁴ Indeed, the Supreme Court resolved this question 40 years ago, explaining that

⁸³ 29 C.F.R. § 102.31(a) (the Board "will, on the written application of any party, issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, electronic data, or documents, in their possession or under their control").

⁸⁴ *Local 32B-32J*, 68 F.3d at 496; *Hoffman Const.*, 292 NLRB at 577-78; *Long Elevator*, 289 NLRB at 1097.

“regardless of whether an agreement is valid under §8(e), it may not be enforced by means that would violate §8(b)(4).”⁸⁵ Thus, this case is unlike *Michigan Bell Telephone* and *R.B. Electric*, cited by the Union.⁸⁶ (Br. 45.) In those cases, the issue was whether an employer and union had to arbitrate a grievance arising under the collective-bargaining agreement they had both signed, where the contract provision was not unlawful on its face.⁸⁷ Neither case involved secondary activity in violation of Section 8(b)(4)(ii)(A) and (B).

Furthermore, in finding the anti-dual shop clause to be facially lawful, the Board explicitly noted that “the operative provisions of the addendum reflect an assumption that it applies only to operations controlled by [Cosco].”⁸⁸ The Board explained that, under its terms, Addendum C would apply only where Cosco “possesses sufficient authority over the operation to guarantee union recognition

⁸⁵ See *NLRB v. Enter. Ass’n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & Gen. Pipefitters of NY & Vicinity, Local Union No. 638*, 429 U.S. 507, 521 (1977). *Accord Local 32B-32J*, 68 F.3d at 495 (“the facial validity of the . . . clause does not excuse the [Union’s] conduct where its application, as in this instance, would illegally extend the contract to reach outside the contractual bargaining unit”).

⁸⁶ *Comm’ns Workers of Am. v. Michigan Bell Telephone Co.*, 820 F.2d 189 (6th Cir. 1987); *R.B. Elec., Inc. v. Local 569, Int’l Bhd. of Electrical Workers, AFL-CIO*, 781 F.2d 1440 (9th Cir. 1986).

⁸⁷ *Michigan Bell*, 820 F.2d at 190, 193; *R.B. Electric*, 781 F.2d at 1441-42.

⁸⁸ *Road Sprinkler Fitters, Local 669*, 357 NLRB 2140, 2142 (2011).

. . . and the application of the collective-bargaining agreement.”⁸⁹ By its own terms, Addendum C is limited “to those entities controlled by signatory employers.”⁹⁰ Because Cosco has no control over Firetrol’s operations or employees, forcing it to arbitrate a grievance concerning Firetrol’s employees violates the Act.⁹¹

Further, contrary to the Union’s suggestion, the Board need not first find Addendum C to be “‘incompatible with’ a prior determination by the Board.” (Br. 34, quoting *Sheet Metal Workers Local 27 (E.P. Donnelly)*, 357 NLRB 1577, 1580 (2011).) While a prior, contrary determination by the Board can lead to a finding of illegal objective, it is not required, and the Court has affirmed Board decisions finding a lawsuit or grievance to have an illegal objective without a prior determination.⁹²

Moreover, the Union fails to identify any case involving violations of Section 8(b)(4)(ii)(A) or (B) where the Board has deferred to arbitration. The Union cites *New York Post*, arguing that a facially valid provision can only be found to have a secondary objective as applied “*after* ‘it is authoritatively

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Local 32B-32J*, 68 F.3d at 495.

⁹² *Id.* at 493.

construed by an arbitrator as having a meaning that is inconsistent with Section 8(e).” (Br. 31, quoting *Newspaper & Mail Deliverers’ Union of New York* (“*New York Post*”), 337 NLRB 608, 609 (2002).) But as the Board explained in *New York Post*, its statement refers specifically to violations of Section 8(e).⁹³ Unlike violations of Section 8(b)(4)(ii)(A) or (B), Section 8(e) does not require a finding of threat, coercion, or restraint.⁹⁴ Instead, Section 8(e) prohibits “any labor organization and any employer” from entering “contract or agreement” with a secondary cease-doing-business objective.⁹⁵ An arbitrator’s construction of a provision, then, “will provide the necessary ‘agreement’ for an 8(e) violation.”⁹⁶ In any event, the Board in *New York Post* also found that the union violated Section 8(b)(4)(ii)(A) and (B) by “resorting to arbitration” with illegal secondary objectives. The Board did not defer the issue to arbitration.⁹⁷

Finally, the Union’s claim that the grievance should proceed to arbitration because any arbitration award “would be subject to review by the [Board] or the courts,” represents a misunderstanding of the law. (Br. 47.) Under the Supreme

⁹³ *New York Post*, 337 NLRB at 609.

⁹⁴ *Shepard v. NLRB*, 459 U.S. 344, 350 (1983).

⁹⁵ 29 U.S.C. §158(e).

⁹⁶ *New York Post*, 337 NLRB at 609.

⁹⁷ *Id.*

Court's decision in *Darlington Manufacturing*, a company can close a facility for any reason—including anti-union animus.⁹⁸ (JA 100.) Even if the Union had represented Firetrol's employees at the time, it could not have prevented the closure of the Denver facility on these facts.⁹⁹ Thus, in this case, there is no scenario compatible with *Darlington Manufacturing* under which an arbitrator could force Firetrol to reopen the Denver office. Moreover, the Board has determined that the Union's grievance and lawsuit to compel arbitration have an illegal secondary objective. Should the arbitrator disagree, as the Supreme Court has explained, "the Board's ruling would, of course, take precedence."¹⁰⁰ In other words, there would be nothing for an arbitrator to decide.¹⁰¹

The Board, therefore, reasonably exercised its discretion in declining to defer to arbitration the question whether the Union, by pursuing grievance and arbitration against neutral employers, violated Section 8(b)(4)(ii)(A) and (B).

⁹⁸ *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965).

⁹⁹ *See Plaza Properties of Michigan, Inc.*, 340 NLRB 983, 987 (2003) (decision to close business entirely is not a violation of the Act; partial closure is a violation "only if motivated by a purpose of chilling unionism at the employer's remaining operations").

¹⁰⁰ *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964). *Accord Int'l Longshoremen's & Warehousemen's Union v. NLRB*, 884 F.2d 1407, 1413 (D.C. Cir. 1989).

¹⁰¹ *Jones*, 2013 WL 5539291, at *4 ("even if the arbitration goes forward and results in an award in favor of the Union, we can . . . vacate the award if the Board determines that the Suit constitutes an unfair labor practice").

III. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DIRECTING THE UNION TO REIMBURSE THE COMPANIES FOR REASONABLE EXPENSES AND LEGAL FEES INCURRED TO DEFEND THE GRIEVANCE AND LAWSUIT DESIGNED TO ENMESH NEUTRALS IN ITS DISPUTE WITH FIRETROL

A. Applicable Principles and Standard of Review

Section 10(c) of the Act authorizes the Board, upon finding an unfair labor practice, to order the violator not only to cease and desist from the unlawful conduct, but also “to take such affirmative action . . . as will effectuate the policies of th[e] Act.”¹⁰² The basic purpose of a Board remedial order is “to restore, so far as possible, the status quo that would have obtained but for the wrongful act.”¹⁰³

The Supreme Court and this Court recognize that the Board’s power to fashion remedies is “a broad discretionary one, subject to limited judicial review.”¹⁰⁴ Under long-standing Supreme Court precedent, the Board’s choice of remedy “should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of

¹⁰² 29 U.S.C. § 160(c).

¹⁰³ *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). *Accord Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995).

¹⁰⁴ *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *Accord St. Francis Fed. of Nurses and Health Professionals v. NLRB*, 729 F.2d 844, 849 (D.C. Cir. 1984).

the Act.”¹⁰⁵ In particular, “[b]ecause the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board’s discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.”¹⁰⁶ Thus, the Court reviews the Board’s choice of remedies under an abuse of discretion standard.¹⁰⁷

B. The Board’s Make-Whole Award of Reasonable Expenses and Legal Fees Reasonably Effectuates the Policies of the Act

Tested by the above-stated principles, the Board’s reimbursement order here is unassailable. The Supreme Court in *Bill Johnson’s* squarely held that “[i]f a violation is found, the Board may order [a party] to reimburse th[ose] whom he had wrongfully sued for their attorney’s fees and other expenses.”¹⁰⁸ Guided by the Supreme Court’s decision, the Board, with the Court’s approval, has consistently found it appropriate to order parties to reimburse their opponents for expenses and fees incurred in defending unlawful lawsuits.¹⁰⁹ The Union contends that the

¹⁰⁵ *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

¹⁰⁶ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

¹⁰⁷ *Local 32B-32J*, 68 F.3d at 496.

¹⁰⁸ 461 U.S. at 747.

¹⁰⁹ See *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 35 (D.C. Cir. 2001); *Local 32B-32J*, 68 F.3d at 496.

Board's remedy is in error because its grievance and lawsuit to compel arbitration are reasonably based, the remedy is punitive, and the Board has rejected this remedy in similar cases. (Br. 54-56.) Each of these claims fails.

As an initial matter, the Union's argument that its grievance and arbitration lawsuit are reasonably based and not "truly frivolous" elides the Board's finding. (Br. 33, 54-55.) As discussed above (pp. 34-35), the Board did not analyze the reasonableness or frivolity of the Union's conduct. Instead, the Board found, based on the exception for lawsuits with an illegal objective in *Bill Johnson's*, that the Union violated the Act by pursuing a grievance and arbitration lawsuit intended to, as the Union admits, "require Consolidated (MX) to cause Firetrol to restore the *status quo*." (Br. 53.) Thus, the Union's claim (Br. 33, 55) that the Board has no authority under *Bill Johnson's* to order reimbursement of the neutrals' expenses and legal fees because its grievance and arbitration lawsuit are not "truly frivolous" misses the point. Unlike the typical situation where a court is faced with the question of awarding fees, the Board, in the *Bill Johnson's* context, awards expenses and legal fees "not because the [Union] did not prevail in its district court litigation against the [neutral employers], but because it was the [Union's] lawsuit itself that was unlawful."¹¹⁰ The cases cited by the Union (Br. 55), which consider

¹¹⁰ *Petrochem Insulation, Inc.*, 330 NLRB 47, 52 (1999), *enforced*, 240 F.3d 26 (D.C. Cir. 2001). *See also Local 32B-32J*, 68 F.3d at 496; *Unbelievable, Inc. v.*

whether litigation is frivolous and a fee-reimbursement remedy appropriate, are simply inapplicable.

Nor is the Board's award of expenses and fees "punitive." (Br. 32.) The Board provided a conventional make-whole remedy here because the Union filed a grievance and lawsuit against neutral employers, which is itself a violation of the Act. There is, therefore, no basis for distinguishing this case from the Supreme Court's recognition in footnote 5 of *Bill Johnson's*, nor for concluding that the Board's remedy here was a patent attempt to do anything but effectuate the policies of the Act through conventional means.

The Union's further claim that "the Board has rejected attorneys' fees remedies in cases involving lawsuits to enforce unlawful secondary contract clauses" misrepresents the Board's precedent. (Br. 54.) *Glens Falls*, for example, concerned a violation of Section 8(e) of the Act. Here, the Board made a predicate Section 8(e) finding that the Union's grievance and lawsuit to compel arbitration had an illegal cease-doing-business objective. (JA 11 n.3, 16.) But the Board found that the Union's conduct violated Section 8(b)(4)(ii)(A) and (B), not Section 8(e).¹¹¹ (JA 11 n.3.) The crucial difference is that Section 8(e), unlike Section

NLRB, 118 F.3d 795, 806 n.*** (D.C. Cir. 1997) (recognizing that the Board may award legal fees where lawsuit itself has unlawful objective).

¹¹¹ *Glens Falls Bldg. & Constr. Trades Council, et al.*, 350 NLRB 417, 417 (2007).

8(b)(4), does not require a finding of threat, coercion, or restraint.¹¹² As the Supreme Court has explained, the Board's determination that reimbursement of attorneys' fees would not effectuate the purposes of the Act in cases involving violations of Section 8(e) is reasonable.¹¹³

¹¹² *Id.* at 422 n.14 (citing *Shepard v. NLRB*, 459 U.S. 344 (1983)).

¹¹³ *Shepard*, 459 U.S. at 349-50.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Union's petition for review and enforce the Board's Order in full.

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STATUTORY AND REGULATORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM
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THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)):

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 7.

Section 8(b)(4) of the Act (29 U.S.C. § 158(b)(4)) provides in relevant part:

It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is- -

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [subsection (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such

labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title]: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

Section 8(e) of the Act (29 U.S.C. § 158(e)):

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the

determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * *

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in

vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the

clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *

(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its

principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

THE BOARD'S RULES AND REGULATIONS

29 C.F.R. § 102.31(a):

(a) The Board or any Board Member will, on the written application of any party, issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, electronic data, or documents, in their possession or under their control. The Executive Secretary has the authority to sign and issue any such subpoenas on behalf of the Board or any Board Member. Applications for subpoenas, if filed before the hearing opens, must be filed with the Regional Director. Applications for subpoenas filed during the hearing must be filed with the Administrative Law Judge. Either the Regional Director or the Administrative Law Judge, as the case may be, will grant the application on behalf of the Board or any Member. Applications for subpoenas may be made ex parte. The subpoena must show on its face the name and address of the party at whose request the subpoena was issued.

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ROAD SPRINKLER FITTERS LOCAL)	
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)	
Petitioner/Cross-Respondent)	
)	Nos. 17-1159, 17-1182
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD,)	27-CC-091349
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
COSCO FIRE PROTECTION, INC. AND)	
FIRETROL PROTECTION SYSTEMS, INC.,)	
)	
Intervenors)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 11,150 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
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Dated at Washington, DC
this 16th day of March, 2018

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)	
Intervenors)	

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 16th day of March, 2018