

No. 17-1159 (Consolidated with No. 17-1182)

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

ROAD SPRINKLER FITTERS LOCAL UNION No. 669, U.A. AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

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

Petition for Review of an Order of the National Labor Relations Board

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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GLOSSARY OF TERMS

Cosco	Cosco Fire Protection, Inc.
Firetrol	Firetrol Protection Systems, Inc.
Local 669	Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO
MX	MX Holdings U.S., Inc.
NLRB	National Labor Relations Board
NLRB Br.	Brief of Respondent National Labor Relations Board
NLRA	National Labor Relations Act
Op.	Panel Opinion
Pet. Br.	Brief of Petitioner Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO

RULE 35(b) STATEMENT

Petitioner Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (“Local 669”) respectfully submits that this case warrants rehearing or rehearing *en banc* on the following bases:

I. The case presents a fundamentally important question of law arising at the intersection of the U.S. Constitution, the Supreme Court’s decision in *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983), and federal labor law: when does the First Amendment protection of access to the courts allow the National Labor Relations Board (“NLRB” or “Board”) to intervene to block a suit to compel arbitration and preempt an arbitrator’s consideration of the merits of a grievance where, as here, the Board has already determined the contract clause sought to be enforced in arbitration to be primary, lawful and enforceable, *Road Sprinkler Fitters Local 669 (Cosco Fire Protection)*, 357 NLRB 2140 (2011), and where, as here, the Board and this Court’s panel have conceded that the NLRB has *no* basis for contending that the grievance is not “reasonably based” in fact. *See Bill Johnson’s Restaurants*, 461 U.S. at 738, n.5.

II. The panel’s affirmance of the NLRB’s decision prohibiting arbitration has also created lack of uniformity along two separate lines of this Court’s precedent:

A. It conflicts with the Court's precedent regarding proper interpretation of a contract clause at the *pre-arbitration stage*, which holds that where, as here, "the clause is not clearly unlawful on its face, the Board [should] interpret it to require no more than what is allowed by law." *Building Material & Const. Teamsters Union v. NLRB*, 520 F. 2d 172, 178 (D.C. Cir. 1974) (quoting *General Teamsters Local 982 (J.K. Barker)*, 191 NLRB 515, 517 (1970), *enf'd sub nom Joint Council of Teamsters Local 42 v. NLRB*, 450 F. 2d 1322 (D.C. Cir. 1971)); and

B. It deepens a preexisting lack of uniformity between the Court's precedents regarding the determinative test for protection under the First Amendment at the pre-arbitration stage. One line of Court precedent holds that the "contract provision sought to be enforced must *itself* have been illegal" for First Amendment protection to be denied to a grievance and arbitration, *Truck Drivers Local 705 v. NLRB*, 820 F.2d 448, 453 (D.C. Cir. 1987) (emphasis in original), while another line holds that First Amendment protection may be denied to a grievance, and arbitration precluded, *even under a clause the NLRB has specifically affirmed to be lawful and enforceable and reasonably based in fact and therefore not "itself" illegal*, where the NLRB has projected that the Union's interpretation of the contract clause "would *necessarily* result in an illegal hot cargo agreement" prohibited by NLRA Section 8(e), 29 U.S.C. § 158(e). *Local*

32B-32J Service Employees Int'l Union v. NLRB, 68 F.3d 490, 495 (D.C. Cir. 1995) (emphasis supplied).

BACKGROUND

The Union's grievance and suit to compel arbitration sought to enforce a neutrality clause in the Union's national collective bargaining agreement that applies, by its terms, to the signatory employer Cosco Fire Protection, Inc. ("Cosco") and also to "related" business entities, MX Holdings and Firetrol Protection Systems, Inc. ("MX" and "Firetrol"). MX is the parent company and Cosco and Firetrol are its wholly-owned and controlled subsidiaries.

Among other things, the neutrality clause prohibits the parties from "coerc[ing] or otherwise interfer[ing] with employees in their decision whether or not to sign an authorization card" for union representation.¹

¹ So-called "neutrality" clauses, such as the clause at issue here, were described by the Fourth Circuit in *Adcock v. Freightliner, LLC*, 550 F.3d 369, 371 n.1 (4th Cir. 2007):

Typically, a "card check" or "neutrality" agreement between the employer and the union "in which they agree that (a) the employer will not speak for or against the union (neutrality) and/or (b) the employer will recognize the union if it can get signed authorization cards from a majority of the unit members (card-check)." ... "Neutrality agreements have been upheld by this and other courts," citing *Amalgamated Clothing & Textile Workers Unions, AFL-CIO v. Facetglas, Inc.*, 845 F.2d 1250, 1253 (4th Cir. 1988); *AK Steel Corp. v. United Steelworkers*, 163 F.3d 403, 406 (6th Cir. 1988); *Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 563 (2nd Cir. 1993); and James J. Brudney, *Neutrality Agreement and Card*

The grievance in this case was filed to enforce the neutrality clause when one of Cosco's commonly owned, non-signatory corporate affiliates (Firetrol) closed its Denver office and terminated all of its employees after they signed union authorization cards on the eve of, and to prevent an NLRB election. The NLRB had recently affirmed the legality of the neutrality clause, rejecting a legal challenge to the clause (ironically by the same affiliated corporate entities that are parties here) and ruling that the neutrality clause was primary, lawful and enforceable in arbitration against non-signatory corporate entities that could be proven in arbitration to be commonly controlled. *Road Sprinkler Fitters Local 669 (Cosco Fire Protection)*, 357 NLRB 2140, 2143-44 (2011).

Yet in this case the NLRB prohibited the Union from arbitrating the grievance, ruling that, notwithstanding its recent ruling that the clause was primary, lawful and enforceable in arbitration, the Union's grievance was secondary and unlawful and not protected by the First Amendment under the Supreme Court's ruling in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). *Road Sprinkler Fitters Local 669 (Firetrol Protection)*, 365 NLRB No. 83 (2017). Although the neutrality clause is undisputedly lawful and enforceable and,

Check Recognition: Prospects for Changing Paradigms, 90 Iowa L. Rev. 819, 826 (2005).

See also *Georgetown Hotel v. NLRB*, 835 F.2d 1467, 1470-71 (D.C. Cir. 1987) (recognizing validity of union recognition based on union authorization cards).

as the NLRB conceded to the panel, the NLRB made *no* finding below that the Union's grievance was not reasonably based in fact, the panel affirmed the NLRB's ruling *per curiam*.

ARGUMENT

While petitions for rehearing and rehearing *en banc* are "not favored," and indeed are undoubtedly rare when the panel has denied oral argument and ruled *per curiam*, they are appropriate where "consideration by the full court is necessary to secure or maintain uniformity of its decisions" and/or where the case "involves a question of exceptional importance." FRAP 35(a), (b). Both conditions are presented here.

I. This Case Presents First Amendment Issues of Exceptional Importance

The panel decision warrants rehearing under FRAP 35(b)(1)(B) because it presents a fundamentally important question of law with regard to the First Amendment and the Supreme Court's decision in *Bill Johnson's Restaurants*: when does the First Amendment protection of access to the courts allow the NLRB to intervene to prohibit a suit to compel arbitration and preclude an arbitrator's consideration of the merits of a grievance where, as here, the Board has already determined the contract clause sought to be enforced in arbitration to be primary, lawful and enforceable, *Road Sprinkler Fitters Local 669 (Cosco Fire Protection)*, 357 NLRB at 2141-44, and where, as here, the Board and the panel have conceded

that there can be no basis for contending that the grievance is not “reasonably based” in fact. See *Bill Johnson’s Restaurants*, 461 U.S. at 738 n.5.²

Given the undisputed fact that the Board “made no findings regarding whether the grievance and lawsuit were reasonably based,” the NLRB could not possibly have satisfied the legal standard that it has acknowledged to be the Board’s First Amendment burden of proof at the pre-arbitration stage under *Bill Johnson’s Restaurants*: that the Union “did not have and could not reasonably have believed it could acquire through discovery or other means evidence needed to prove essential elements of its [claims].” *Milum Textile Servs. Co.*, 357 NLRB 2047, 2053 (2011) (cited as the governing standard by the NLRB below and to the

² The NLRB has admitted that the Board erred by misplacing the burden of proof upon the Union to *disprove* the General Counsel’s claim that the grievance was not reasonably based in fact (365 NLRB No. 83, slip op. at 1, n. 3). Before the panel it tried to rationalize that admitted error by asserting that “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.” (NLRB Br. 35). A misplacement of the burden of proof by the NLRB is itself an independent basis for reversal, *Consolidated Communications, Inc. v. NLRB*, 837 F. 3d 1, 18 (D.C. Cir. 2016), and the panel’s decision affirming the NLRB’s error is therefore a marked departure from the Court’s precedent in this regard as well. Out of an abundance of caution the Union demonstrated in its briefs that the NLRB could not carry its burden of proof because there is a rational basis in this record for concluding that, due to its control over Cosco, MX and Firetrol *are* bound by the non-interference provision, though neither is a signatory to the contract. See Pet. Brief at 36-41.

panel (Pet. Br. 34-35)).³ Yet the panel affirmed the NLRB's decision, stating that it was deferring to the "substantial evidence" before the Board. Op. at 7.⁴

The Court should grant rehearing in order to clarify and restore the First Amendment protection of the arbitration process under *Bill Johnson's Restaurants*.

³ The panel misstated the terms of the neutrality clause and the Union's burden of proof to the arbitrator by ruling that the grievance was unlawful because the Union "seek[s] to bind to a CBA non-signatory companies that share a corporate parent" but failed to prove below that the affiliated corporations "... jointly qualify as one employer." Op. at 5. The Board previously held that the neutrality clause can lawfully bind non-signatory companies owned by a single corporate parent where the Union can prove to the arbitrator the "effective control" by the parent corporation "over the operation performing bargaining unit work." 357 NLRB at 2143. In doing so, the NLRB distinguished another clause in the same collective bargaining agreement that, in contrast to the neutrality clause, *does* impose a "single employer" standard. 357 NLRB at 2143. There is not one single word in either the language of the neutrality clause or in the NLRB's decision validating that clause suggesting that there is an additional "one employer" burden of proof prerequisite to its lawful enforcement.

⁴ The panel decision "deferring" to the "substantial evidence" allegedly supporting the NLRB's rulings below (Op. at 4) demonstrates a fundamental and determinative misunderstanding of the posture of the case. Because the Board conceded that the NLRB "made no findings regarding whether the grievance and lawsuit were reasonably based...." (NLRB Br. 35), no deference is possible to any purported factual findings by the NLRB regarding the basis for the grievance; as the NLRB has conceded, there were none. Furthermore, in First Amendment cases, the NLRB's determinations are not entitled to any deference on appeal. *NLRB v. Allied Mech. Services, Inc.*, 734 F. 3d 486, 492 (6th Cir. 2013) (citing *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 531-32 (2002)).

II. Rehearing is Necessary to Ensure Uniformity of the Court's Labor Law and First Amendment Precedents

In addition to this fundamentally important First Amendment/federal labor law issue, the panel decision conflicts with two different lines of precedent in this Court relating to labor contract interpretation and to the First Amendment protection of the grievance/arbitration process. The full court needs to address these conflicts to “secure or maintain uniformity among the court’s decisions” under FRAP 35(b)(1)(A).

A. In cases where, as here, the contract clause to be enforced in arbitration is subject to an employer’s *pre-arbitration* challenge alleging illegality, this Court has repeatedly held that “where the clause is not clearly unlawful on its face, the Board [should] interpret it to require no more than what is allowed by law.” *Building Material & Const. Teamsters Union v. NLRB*, 520 F. 2d 172, 178 (D.C. Cir. 1974) (quoting *General Teamsters Local 982 (J.K. Barker)*, 181 NLRB 515, 517 (1970), *enf’d sub nom Joint Council of Teamsters Local 42 v. NLRB*, 450 F. 2d 1322 (D.C. Cir. 1971)). Indeed, the NLRB’s previous decision affirming the primary, lawful and enforceable nature of the neutrality clause was premised on that same precedent, *Road Sprinkler Fitters Local 669 (Cosco Fire)*, 357 NLRB at 2143 (citing *J.K. Barker*), and the Union collective bargaining agreement likewise

stipulates that its terms are to “be applied [in arbitration] in a manner which is consistent with all applicable Federal and state laws.”⁵

Yet, while recognizing the NLRB’s prior affirmance of the neutrality clause’s facial legality and further acknowledging both that the NLRB misplaced the burden of proof below and that there was *no* basis in the record upon which to conclude that the grievance was not reasonably based in fact, the panel nevertheless concluded, at the pre-arbitration stage of this case, that the grievance was illegal and that the arbitration should be prohibited, and the Union’s First Amendment right of access to the federal courts enjoined, *prior* to the Union having an opportunity to demonstrate the merits of its case in its suit to compel arbitration or in arbitration itself. If left to stand, the panel’s decision to not simply read the contract clause at the pre-arbitration stage “to require no more than what is allowed by law” will constitute an important departure from the Court’s precedent

⁵ Other circuit courts have followed *J.K. Barker* in this context. *NLRB v. Local 32B-32J SEIU*, 353 F. 3d 197, 202 (2nd Cir. 2003); *George Ryan Co. v. NLRB*, 609 F.2d 1249, 1254 (7th Cir. 1979). And there is broad consensus among the circuit courts that arbitration is to be compelled unless the party seeking to avoid arbitration can show that the contract clause is itself illegal *on its face*. *Local 210 Laborers, v. Labor Relations Div. Assoc. Gen. Contractors*, 844 F.2d 69, 75 (2nd Cir. 1988); *Communications Workers of America v. Michigan Bell Telephone Co.*, 820 F.2d 189, 193 (6th Cir. 1987); *Virginia Sprinkler v. Road Sprinkler Fitters Local Union No. 669, U.A.*, 868 F.2d 116, 118-120 (4th Cir. 1989); *R.B. Electric, Inc. v. Local 569, International Brotherhood of Electrical Workers*, 781 F.2d 1440, 1442 (9th Cir. 1986).

and a prior restraint on First Amendment speech -- all without even the benefit of an oral argument.

In this respect, the panel's decision contradicts hallmark Supreme Court principles. Although a court cannot compel arbitration under a *facially* illegal contract clause, *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77, 83-84 (1982), a conflict between an arbitrator's decision and federal labor law "is necessarily speculative when the arbitrator has yet to rule." *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964). Such potential conflicts "can be resolved when they become manifest in an action to enforce the award. The mere possibility of conflict, however, is no barrier to arbitration." *Id.*

Thus, the Supreme Court has emphasized that:

whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts. It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as nonarbitrable because it can be seen in advance that *no award* to the Union could receive judicial sanction.

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 555 (1964) (emphasis added) (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). Indeed, the NLRB has recognized and applied this same principle. *E.g.*, *Ray Angellini, Inc.*, 351 NLRB 206, 209 (2007) (the NLRB's policy is "to stay its

hand” unless the Union’s lawsuit is “plainly foreclosed as a matter of law or is otherwise frivolous...,” quoting *Bill Johnson’s Restaurants*, 461 U.S. at 747).

We respectfully submit that the Court should address this case *en banc* to resolve the conflict between the panel decision and the Court’s existing precedents and the corollary contradiction between the panel’s decision and decisions of the Supreme Court. *En banc* review is necessary to examine and clarify why a contract clause that is *not clearly unlawful on its face* should not be subject to the previous decisions of this Court and the Supreme Court and, at the *pre-arbitration* stage of this matter, “... interpret[ed] ... to require no more than what is allowed by law.” *Building Material & Const. Teamsters Union*, 520 F. 2d at 178; *General Teamsters Local 982*, 181 NLRB at 517; *Road Sprinkler Fitters Local 669 (Cosco Fire)*, 357 NLRB at 2143.

B. On the *Bill Johnson’s Restaurants* question of First Amendment/labor law, this Court’s prior decisions recite two markedly different and, we submit, inconsistent standards for allowing the NLRB to intervene at the pre-arbitration stage of the grievance/arbitration process. One standard states that, in order to deny First Amendment protection under *Bill Johnson’s Restaurants*, the “contract provision sought to be enforced must *itself* have been illegal,” *Truck Drivers Local 705 v. NLRB*, 820 F.2d at 453 (emphasis in original); the other states that First Amendment protection can be denied where the Union’s interpretation of the

lawful and enforceable contract clause “would *necessarily* result in an illegal hot cargo agreement” prohibited by NLRA Section 8(e), 29 U.S.C. § 158(e). *Local 32B-32J Service Employees Int’l Union v. NLRB*, 68 F.3d at 495 (emphasis supplied).

That these are two separate and conflicting tests for First Amendment protection of the grievance/arbitration process is underscored by the panel’s decision in this case holding the Union grievance and suit to compel arbitration to be unprotected and illegal even though the panel did not -- and could not -- conclude that the Union’s grievance failed to satisfy the *Truck Drivers Local 705* test for First Amendment protection (the clause “must *itself* have been illegal”), since the NLRB has already determined that the contract provision the Union is enforcing is a primary, lawful and enforceable clause. *Road Sprinkler Fitters Local 669 (Cosco Fire Protection)*, 357 NLRB at 2143-44.⁶

Although the clause was lawful and enforceable on its face and even though there can be no argument that the grievance is not reasonably based in fact and therefore protected by the First Amendment under *Truck Drivers Local 705* and

⁶ *Truck Drivers Local 705* has been cited by other Courts and by the NLRB as the First Amendment standard for pre-arbitration challenges to the legality of a grievance. *E.g., Nelson v. IBEW Local 46*, 899 F. 2d 1557, 1562-63 (9th Cir. 1990); *United Health Group, Inc.*, 363 NLRB No. 134 (2016), slip op. at 10.

Bill Johnson's Restaurants, the panel nevertheless sustained the NLRB's ruling that the grievance was illegal and unprotected by the First Amendment by application of the alternative and conflicting standard stated in the Court's *Local 32B-32J* decision because, by the NLRB's pre-arbitration forecast, the interpretation asserted by the Union's grievance was "necessarily" secondary and illegal under the NLRA.⁷

⁷ Although admittedly not a proper basis for rehearing *en banc*, we feel obliged to note that, contrary to the panel's decision, the Union does not forfeit the First Amendment protection of its grievance and suit to compel arbitration even under the *Local 32B-32J* standard. In *32B-32J*, the grievance, on its face, required the signatory employer to cease doing business with a non-union company and therefore had an object that "necessarily" resulted in an unlawful secondary effect. 68 F.3d at 495. Here the parties *stipulated* that the Union's grievance sought no such remedy, and the Union also formally *disclaimed* such a remedy. Pet. Br. 51-52. The Union's suit to compel arbitration before the district court as well as its briefs before this Court all plainly and unequivocally confirm that the interpretation of the contract it seeks in arbitration -- that MX, the parent of Firetrol, controls its subsidiary Firetrol and is therefore *a primary employer* in this case (along with Firetrol) -- is precisely the *same* interpretation of the neutrality clause previously articulated by the NLRB in ruling that the cause is lawful, primary and enforceable in arbitration. 357 NLRB at 2143-44. And the Board has already expressly *rejected* the claim that the neutrality clause has an unlawful secondary object, concluding that such an object "would not be possible" by its reading. 357 NLRB at 2148-49. Accordingly, seeking to enforce the neutrality clause against MX and Firetrol is in full accord with the NLRB's prior decision, and cannot represent an interpretation of the neutrality clause that "necessarily" has any unlawful secondary effects.

CONCLUSION

Because there can be no basis for disputing that the neutrality clause at issue is primary, lawful and enforceable or that the grievance is reasonably based in fact, the panel's decision represents a serious and substantial departure from existing precedent under the First Amendment and the Supreme Court's *Bill Johnson's Restaurants* decision.

And, because the neutrality clause is not unlawful on its face, the panel decision not to simply read the clause, at the pre-arbitration stage, "to require no more than what is allowed by law" is in conflict with both the Court's prior precedent and well-settled Supreme Court principles. The panel decision likewise deepens an unexplained disparity between the standards for First Amendment protection of the grievance/arbitration process as set forth in the Court's *Truck Drivers Local 705* and *Local 32B-32J* decisions, respectively

Rehearing *en banc* should therefore be granted.

Respectfully submitted,

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Dated: July 16, 2018

CERTIFICATE OF COMPLIANCE

This Petition complies with the limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,543 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14pt font.

/s/ William W. Osborne, Jr.
William W. Osborne, Jr.

Counsel for Petitioner
July 16, 2018

ADDENDUM

PANEL OPINION..... Addendum-1

CERTIFICATE AS TO PARTIES AND *AMICI CURIAE*..... Addendum-8

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No. 17-1159

September Term, 2017

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ROAD SPRINKLER FITTERS LOCAL UNION No. 669, U.A., AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

COSCO FIRE PROTECTION, INC. AND FIRETROL PROTECTION SYSTEMS, INC.,
INTERVENORS

Consolidated with 17-1182

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: GRIFFITH, MILLETT and PILLARD, *Circuit Judges*.

J U D G M E N T

The court considered this petition for review and cross-application for enforcement on the record from the National Labor Relations Board (NLRB or Board) and on the briefs filed by the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). We accorded the issues full consideration and determined they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the petition for review be denied and the cross-application for enforcement be granted.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely

petition for rehearing or petition for rehearing *en banc*. See Fed. R. App. P. 41(b); D.C. Cir. R. 41.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY:

/s/
Ken Meadows
Deputy Clerk

Road Sprinkler Fitters Local Union No. 669 v. NLRB, Nos. 17-1159, 17-1182

MEMORANDUM

The Road Sprinkler Fitters Local Union No. 669 (Union) appeals the Board's determination that it violated Section 8(b)(4)(ii) of the National Labor Relations Act (NLRA) by filing a lawsuit and grievance against neutral employers Cosco Fire Protection, Inc. (Cosco), MX Holdings US, Inc. (MX), and CFP Fire Protection, Inc. (CFP) for alleged labor violations committed by a different employer, Firetrol Protection Systems, Inc. (Firetrol). The grievance was against Cosco, Firetrol, and MX. The lawsuit was against Cosco, CFP, and MX. Given the well-established law in this area and the considerable deference we owe the Board's judgment, we deny the Union's petition for review and grant the Board's and intervenors' cross-application for enforcement.

I.

The Union's petition invokes a host of employers: Cosco, a fire protection company, is the only one of those employers in a bargaining relationship with the Union. The Union's labor dispute is not, however, with Cosco—it is with Firetrol, a separate fire protection company servicing a different region of the United States. Both companies are wholly owned subsidiaries of MX Holdings, as is fire protection systems subcontractor CFP.

In May of 2012, the Union filed a petition with the Board seeking to represent Firetrol's Denver employees; before any election could take place, Firetrol closed its Denver office. The Union in July filed a charge against Firetrol, alleging the closure was retaliatory. *See* Deferred Joint App'x (J.A.) 127. The Union simultaneously filed a grievance against Firetrol, Cosco, and MX, alleging that the closure violated conditions of the Union's Collective Bargaining Agreement (CBA) with Cosco. *See Road Sprinkler Fitters Local Union 669*, 365 NLRB No. 83, at 4 (2017) (*Road Sprinkler Fitters*). Having found that the closure was not motivated by anti-union animus, the Regional Director declined to issue a complaint to press the Union's retaliation charge against Firetrol. *See* J.A. 100-02. The Union then withdrew its charge on September 7. J.A. 127-28. The Board's treatment of that charge is not before us.

The Union on September 21, 2012 filed a lawsuit in federal court to compel arbitration of its grievance against Cosco, MX, and CFP—but not Firetrol—alleging that those entities constituted a “single employer” thereby bound to the Cosco-Union CBA. *See Road Sprinkler Fitters*, 365 NLRB No. 83, at 5; Supplemental Deferred Joint App'x (S.A.) 11-12. The Union contended, and still maintains, that all of the companies are subject to the CBA under Addendum C of that agreement, which stipulates that it applies to the Employer (Cosco) “as a single or joint Employer (which shall be interpreted pursuant to applicable NLRB and judicial principles).” J.A. 145.

In response to the Union's grievance and suit to compel arbitration, Firetrol brought an unfair labor practice charge against the Union, which Cosco, MX, and CFP joined. *See Road Sprinkler Fitters*, 365 NLRB No. 83, at 1. They claimed the grievance and suit were themselves

unlawful under Section 8(b)(4)(ii)(A) and (B) of the NLRA, 29 U.S.C. §§ 158(b)(4)(ii)(A)-(B), because the Union's charges improperly embroiled them in proceedings to which they were in fact neutral nonparties. *Id.* at 3. Under Section 8(b)(4)(ii)(A)—which incorporates Section 8(e)—and Section 8(b)(4)(ii)(B), a union may not “exert[] any pressure calculated to cause a significant change or disruption of the neutral employer's mode of business.” *Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 421 (D.C. Cir. 1990) (*Sheet Metal Workers*). A union's actions that pressure not only its members' employer but also neutral employers thereby have unlawful, “cease doing business” objectives in violation of Section 8(b)(4)(ii). *Id.* The companies object to the Union's actions to enforce the Cosco-Union CBA against not only Cosco, but also MX and CFP—employers not parties to the CBA. They also contend the suit against all three employers is an illegal effort to have them exert pressure against Firetrol—a separate, nonunionized employer—to reopen its Denver office.

II.

Our review of the Board's unfair labor practice determinations is limited. *See Enter. Leasing Co. v. NLRB*, 831 F.3d 534, 542-43 (D.C. Cir. 2016). “Because a determination that a particular agreement violates section 8(e)” and section 8(b)(4)(ii) more broadly “involves ‘the Board's . . . special function of applying the general provisions of the [NLRA] to the complexities of industrial life,’ we defer to the Board's determinations so long as they are reasonable” and supported by substantial evidence. *Sheet Metal Workers*, 905 F.2d at 421 (quoting *Local Union 1395, Int'l Bhd. of Elec. Workers v. NLRB*, 797 F.2d 1027, 1030 (D.C. Cir. 1986)) (alterations in original) (citations omitted).

The ALJ, declining to refer the case to arbitration, first held that Firetrol, Cosco, MX, and CFP were not, under applicable law, a single employer bound by the Union's CBA with Cosco. *Road Sprinkler Fitters*, 365 NLRB No. 83, at 5. The Board unanimously affirmed. *Id.* at 1.

“As explained approvingly by the Supreme Court in 1965, the Board weighs four factors in ascertaining whether several businesses are sufficiently integrated to be treated as one: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control.” *United Tel. Workers v. NLRB*, 571 F.2d 665, 667 (1978) (*United Tel.*) (discussing *Radio & Television Broad. Technicians Local 1264 v. Broad. Serv.*, 380 U.S. 255, 256 (1965)). The ALJ surveyed the evidence pertinent to those factors, *Road Sprinkler Fitters*, 365 NLRB No. 83 at 3-4, and concluded that the employers “do not possess common management,” “have no interrelationship of operations, and do not possess any centralized control of labor relations,” *id.* at 5. The record supports that conclusion; the companies do not share employees, have no control over one another's decision making, and share few officers. *See* J.A. 24, 25, 27, 31-32, 47, 49, 59, 63, 71, 78. The Union did not offer evidence to the contrary. While the Union emphasized that MX wholly owns its subsidiaries, “common ownership is not determinative where common control is not shown,” even for corporate subsidiaries. *United Tel.*, 571 F.2d at 667; *see also Dist. Council of N.Y.C. & Vicinity, United Bhd. of Carpenters & Joiners*, 326 NLRB 321, 325 (1998) (*Dist. Council of N.Y.C.*). We accordingly see no basis to disturb the Board's reasonable and supported conclusion that the four employers in this case do not constitute a “single employer.”

Next, the ALJ determined that the Union's suit and grievance violated Section 8(b)(4)(ii)(A) and (B). See *Road Sprinkler Fitters*, 365 NLRB No. 83, at 5-6. The elements of Section 8(b)(4)(ii) violations are "well established." *Sheet Metal Workers*, 905 F.2d at 421. When a Union exerts pressure on an employer through a proffered CBA term, or a suit or grievance to enforce that term, the lawfulness of its action under Section 8(b)(4)(ii) depends on its objective. To have a lawful work-preservation objective, it "must pass two tests":

First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the . . . employer must have the power to give the employees the work in question—the so-called 'right of control' test of [*NLRB v.*] *Pipefitters*, [429 U.S. 507, 517 (1977)]. The rationale of the second test is that, if the [targeted] . . . employer has no power to assign the work, it is reasonable to infer that the [union's conduct] has a[n] . . . objective . . . to influence whoever does not have such power over the work.

NLRB v. Int'l Longshoremen's Ass'n, 447 U.S. 490, 504-05 (1979) (*ILA*); see also *Pipefitters*, 429 U.S. at 517-18; *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 624-26, 644-45 (1966). Where union action seeks to influence neutral parties, it is an unfair labor practice under Section 8(b)(4)(ii) because it has an unlawful "cease doing business" objective. See *Local 32B-32J, Serv. Emps. Int'l Union v. NLRB*, 68 F.3d 490, 494 (D.C. Cir. 1995) (*Local 32B-32J*); *Sheet Metal Workers*, 905 F.2d at 421. Applying that law in the context of parent and subsidiary companies, the Board has long held that seeking to bind to a CBA non-signatory companies that share a corporate parent with the signatory but do not jointly qualify as one employer violates the Act. That is because doing so "seeks to regulate the labor practices of other, neutral employers" and reaches work those neutral employers have no right to control. *Int'l Ass'n of Bridge Structural & Ornamental Iron Workers*, 328 NLRB 934, 936 (1999) (*Iron Workers*); see also *id.* at 940-41.

Substantial evidence and well-established law support the Board's finding that the Union's grievance against Cosco, Firetrol, and MX and its lawsuit against Cosco, MX, and CFP had the unlawful objective of entangling Cosco, MX, and CFP—firms the Board permissibly found to be neutral third parties—in the Union's dispute with Firetrol.

First, the Board was on firm ground in affirming the ALJ's conclusion that the Union's grievance and lawsuit fail both *ILA* tests. The Union never represented Firetrol's employees. The work at issue in the grievance—work previously performed by Firetrol's Denver office—had never been performed by Cosco employees, who are the only employees covered by the CBA and represented by the Union. See *Road Sprinkler Fitters*, 365 NLRB No. 83, at 5. Consequently, the work at the center of the dispute was not "fairly claimable"; the Union's case was not "intended . . . to preserve work (that it had never done)," *Local 32B-32J*, 68 F.3d at 494-95, so the ALJ reasonably concluded that the Union lacked a lawful work-preservation objective.

Second, substantial evidence supports the ALJ's conclusion that, as neutral employers, Cosco, MX, and CFP have no "right of control" over Firetrol's decision making. See, e.g., J.A. 24-25, 63, 78. Specifically, record evidence supports the conclusion that none of the companies other than Firetrol was involved in its decision to close the Denver office. See J.A. 27-28, 63, 71-

72. Nor did any of the companies named in the lawsuit have the ability to reopen Firetrol's Denver office or reemploy the affected employees. J.A. 16.

Third, the Board's decision is consistent with NLRB precedent. The Board has held that language similar to the work preservation clause of Addendum C "fails the 'right of control' test" when "it is not limited to work that [the subsidiary corporation in a bargaining relationship with the Union] has the power to assign. . . . [A]s the Board has previously noted, the fact that the signatory employer owns another business entity would not, without more, establish that the signatory employer had control over the assignment of the work performed by the other entity." *Iron Workers*, 328 NLRB at 936; see *Dist. Council of N.Y.C.*, 326 NLRB at 325. The Union in this case does not even have a bargaining relationship with Firetrol—the firm its suit alleges violated the Act by closing the Denver office. Further, the signatory employer, Cosco, is not the entity that owns Firetrol. MX is. Cosco and Firetrol merely share common ownership. The Board accordingly committed no legal error in finding a Section 8(b)(4)(ii) violation.

The Union's primary response—that its grievance and suit had reasonable bases and are therefore protected speech under the First Amendment—mistakes the law. The Board is correct that, under *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 737 n.5 (1983), "the Board may enjoin" a "suit that has an objective that is illegal under federal law" without running afoul of the First Amendment regardless of whether the suit also had an objectively reasonable basis or was filed in good faith. See *Road Sprinkler Fitters*, 365 NLRB No. 83, at 1 n.3. As we explained in *Local 32B-32J*, if the interpretation the Union seeks is "itself" illegal—such as by interjecting contract obligations into employment relations where they do not apply—the "argument that the merits of the claim had not previously been determined" does not preserve the suit. 68 F.3d at 495-96; see *Truck Drivers, Oil Drivers, Filling Station & Platform Workers' Union Local 705 v. NLRB*, 820 F.2d 448, 452 (D.C. Cir. 1987). Contrary to the Union's suggestion, "*BE & K [Constr. v. NLRB]*, 536 U.S. 516 (2002)] did not affect the footnote 5 exemption in *Bill Johnson's*." *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003). The Board aptly observed that whatever error the ALJ made by allocating the burden of proof in briefly discussing the reasonableness of the suit was therefore harmless. See *Road Sprinkler Fitters*, 365 NLRB No. 83 at 1 n.3.

III.

The Union's remaining arguments lack merit. *First*, the Union challenges the Board's fee determination. Not only are we "obliged to defer heavily to Board remedial decisions," but, as in *32B-32J*, "[t]he Local misconceives the reason for the award of attorney's fees. It is not because the Local's behavior is particularly egregious but rather because the litigation itself is the illegal act. Since, as the Board determined, the Local's [grievance and suit were] illegal *ab initio*, . . . costs . . . are therefore the logical measure of damages." 68 F.3d at 496.

Second, because the Union's attempt to arbitrate the dispute is itself prohibited under Section 8(b)(4)(ii), the ALJ did not abuse her discretion by declining to refer the case to arbitration. See *id.* at 495-96. Further, the arbitration agreement at issue comes from the Union's CBA with Cosco, which the Board found does not govern the Union's relationship with Firetrol, CFP, or

MX. *See Road Sprinkler Fitters*, 365 NLRB No. 83, at 1 n.3. The CBA covers only Cosco, whose employees are not involved in the pertinent labor dispute; for its part, Cosco agreed to arbitrate the dispute, *see* S.A. 6-7.

* * *

Because the order under review is supported by established precedent and substantial evidence, we deny the petition for review and grant the Board's and Intervenors' cross-application for enforcement.

CERTIFICATE AS TO PARTIES AND *AMICI CURIAE*

Petitioner is Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO ("Local 669"). The Respondent is the National Labor Relations Board ("NLRB"). Firetrol Protection Systems, Inc. ("Firetrol") and Cosco Fire Protection, Inc. ("Cosco") have been granted leave to intervene. See Docket No. 1687631.

There are no *amici curiae*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. and D.C. Circuit Rule 26.1, Petitioner Local 669 makes the following disclosures:

1. Local 669 is an unincorporated labor organization, not a publicly held entity or corporation, and does not have any affiliates which have issued stock to the public.
2. As a labor organization, Local 669 is not required to identify or list the identities of persons who have represented it.

CERTIFICATE OF SERVICE

I hereby certify that on July 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 CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ William W. Osborne, Jr.
William W. Osborne, Jr.