# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 17-1159** **September Term, 2017**

FILED JUNE 1, 2018

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

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Consolidated with 17-1182

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

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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Pursuant to D.C. Circuit Rule 36, this disposition will not be published.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

**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.

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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.